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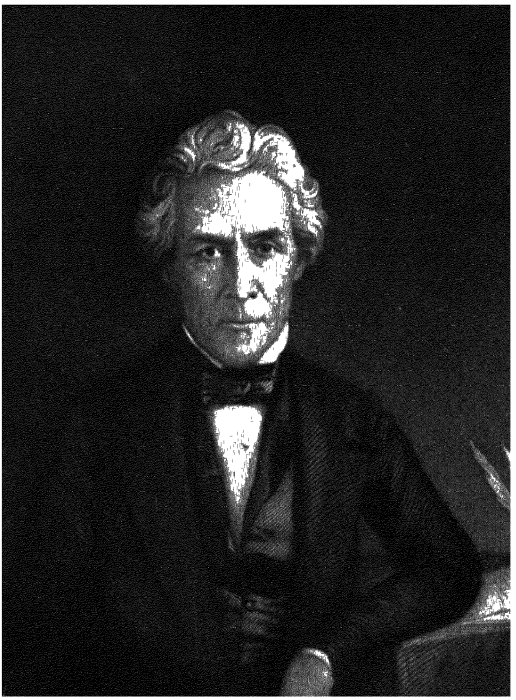
A CONCISE

ENCYCLOPEDIA OF THE LAW

RAWLE'S REVISION



JOHN BOUVIER

J. Bouvier

BOUVIER'S

LAW DICTIONARY

AND

CONCISE ENCYCLOPEDIA

BY JOHN BOUVIER

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

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

THIRD REVISION

(BEING THE EIGHTH EDITION)

BY FRANCIS RAWLE

OF THE PHILADELPHIA BAR

VOLUME I

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PREFACE

IT HAS been the purpose of the Editor in preparing this his Third Revision to treat much more fully all encyclopædic titles, except those in which there has been no development in recent years, while adding many dictionary and other minor titles not found in the last Revision. These objects and the great changes since 1898, the date of the last Revision, in the questions which have occupied the courts, have required the extension of the work to three volumes. The titles of both State and Federal cases have for the first time been inserted, as well as the volumes of the different series of reports other than those of the official series. Titles of a statutory and changing nature have been treated less fully, so as to avoid purely ephemeral matter.

Judge Baldwin (Modern Political Institutions 241) quotes Jeremiah Mason as saying that the development of an American Jurisprudence can only be looked for from the courts of the National Government. The Editor has been guided by that thought and sees in it a hope of increasing uniformity of law, towards which the profession, in its work on uniform legislation, is making real progress. He has therefore constantly cited the decisions of the Supreme Court of the United States and very frequently those of the lower Federal Courts. Of course, on many of the questions now being passed upon by the State Courts, the decisions of the Supreme Court are of binding authority.

The Editor is indebted to George H. Bates for many important titles, such as Constitutional Law, Constitution of the United States, Restraint of Trade and Equity; to R. C. Wildes for valuable assistance throughout; to Charles G. Fenwick, Ph. D. (Johns Hopkins), author of the "Neutrality Laws of the United States," for revising and in many cases rewriting the titles relating to International Law; and to Norman B. Gwyn, M. D., for revising the titles relating to Medical Jurisprudence.

FRANCIS RAWLE.

PHILADELPHIA, November 3, 1914.

PREFACE TO THE FIRST EDITION

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

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

The English law dictionaries would be very unsatisfactory guides, even in pointing out where the laws relating to the acquisition and transfer of real estate, or the laws of descent in the United States, are to be found. And the student who seeks to find in the Dictionaries of Cowel, Manly, Jacobs, Tomlins, Cunningham, Burn, Montefiore, Pott, Whishaw, Williams, the Termes de la Ley, or any similar compilation, any satisfactory account in relation to international law, to trade and commerce, to maritime law, to medical jurisprudence, or to natural

law, will probably not be fully gratified. He cannot, of course, expect to find in them any thing in relation to our government, our constitutions, or our political or civil institutions.

It occurred to the author that a law dictionary, written entirely anew, and calculated to remedy those defects, would be useful to the profession. Probably overrating his strength, he resolved to undertake the task; and, if he should not fully succeed, he will have the consolation to know that his effort may induce some more gifted individual, and better qualified by his learning, to undertake such a task, and to render the American bar an important service. Upon an examination of the constitution and laws of the United States, and of the several states of the American Union, he perceived many technical expressions and much valuable information which he would be able to incorporate in his work. Many of these laws, although local in their nature, will be found useful to every lawyer, particularly those engaged in mercantile practice. As instances of such laws the reader is referred to the articles *Acknowledgment*, *Descent*, *Divorce*, *Letters of Administration* and *Limitation*. It is within the plan of this work to explain such technical expressions as relate to the legislative, executive, or judicial departments of the government; the political and the civil rights and duties of the citizens; the rights and duties of persons, particularly such as are peculiar to our institutions, as, the rights of descent and administration; of the mode of acquiring and transferring property; to the criminal law, and its administration. It has also been an object with the author to embody in his work such decisions of the courts as appeared to him to be important, either because they differed from former judgments, or because they related to some point which was before either obscure or unsettled. He does not profess to have examined or even referred to all the American cases: it is a part of the plan, however, to refer to authorities, generally, which will lead the student to nearly all the cases.

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

In the execution of his plan, the author has, in the first place, defined and explained the various words and phrases, by giving their most enlarged meaning, and then all the shades of signification of which they are susceptible; secondly, he has divided the subject in the manner which to him appeared the most natural, and laid down such principles and rules as belong to it; in these cases he has generally been careful to give an illustration, by citing a case whenever the subject

seemed to require it, and referring to others supporting the same point; thirdly, whenever the article admitted of it, he has compared it with the laws of other countries within his reach, and pointed out their concord or disagreement; and, fourthly, he has referred to the authorities, the abridgments, digests, and the ancient and modern treatises, where the subject is to be found, in order to facilitate the researches of the student. He desires not to be understood as professing to cite cases always exactly in point; on the contrary, in many instances the authorities will probably be found to be but distantly connected with the subject under examination, but still connected with it, and they have been added in order to lead the student to matter of which he may possibly be in pursuit.

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

JOHN BOUVIER.

PHILADELPHIA, September, 1839.

REVIEW

OF BOUVIER'S LAW DICTIONARY AND "INSTITUTES OF AMERICAN LAW"

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

From the North American Review for July, 1861

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

It was while busily engaged as editor and publisher that Mr. Bouvier resolved to commence the study of the law. He attacked Coke and Blackstone with the determination and energy which he carried into every department of action or speculation, and in 1818 he was admitted to practice in the Court of Common Pleas of Fayette county, Pennsylvania. During the September term of 1822 he was admitted as an attorney of the Supreme Court of Pennsylvania, and in the following year he removed to Philadelphia, where he resided until his death. In 1836 he was appointed by Governor Ritner Recorder of the City of Philadelphia, and in 1838 was commissioned by the same chief magistrate as an Associate Judge of the Court of Criminal Sessions. But the heavy draughts upon time and strength to which he was continually subjected had not been permitted to divert his mind from the cherished design of bestowing upon his profession a manual of which it had long stood in urgent need. While laboring as a student of law, and even after his admission to the bar, he had found his efforts for advancement constantly obstructed, and often frustrated, by the want of a conveniently arranged digest of that legal information which every student should have, and which every practising lawyer must have, always ready for immediate use. The English Law Dictionaries—based upon the jurisprudence of another country, incorporating peculiarities of the feudal law, that are to a great extent obsolete even in England, only partially brought up to the revised code of Great Britain, and totally omitting the distinctive features of our own codes—were manifestly insufficient for the wants of the American lawyer. A Law Dictionary for the profession on this side of the Atlantic should present a faithful incorporation of the old with the new,—of the spirit and the principles of the earlier codes, and

the "newness of the letter" of modern statutes. The Mercantile Law, with the large body of exposition by which it has been recently illustrated; the Law of Real Property in the new shape which, especially in America, it has latterly assumed; the technical expressions scattered here and there throughout the Constitution of the United States, and the constitutions and laws of the several States of the American Union,—all these, and more than these, must be within the lawyer's easy reach if he would be spared embarrassment, mortification, and decadence.

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

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

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

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

He was persuaded—and here as elsewhere he has correctly interpreted the wants of the profession—that an occasional comparison of the civil, canon, and other systems of foreign law with our own would be eminently useful by way of illustration, as well as for other purposes too obvious to require recital. We will barely suggest the advantage to the student of civil law or canon law of having at hand a guide of this character. And we would express our hope that the student of civil or of canon law is not hereafter to be that *rara avis* in the United States which, little to our credit, he has long been. He who would be thoroughly fur-

nished for his high vocation will not be satisfied to slake his thirst for knowledge even at the streams (to which, alas! few aspire) of Bracton, Britton, or Fleta; he will ascend rather to the fountains from which these drew their fertilizing supplies.

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

In common with the profession on both sides of the water, Judge Bouvier had doubtless often experienced inconvenience from the absence of an Index to Matthew Bacon's New Abridgment of the Law. Not only was this defect an objection to that valuable compendium, but since the publication of the last edition there had been an accumulation of new matter which it was most desirable should be at the command of the law student, the practising lawyer, and the bench. In 1841 Judge Bouvier was solicited to prepare a new edition, and undertook the arduous task. The revised work was presented to the public in ten royal octavo volumes, dating from 1842 to 1846. With the exception of one volume, edited by Judge Randall, and a part of another, edited by Mr. Robert E. Peterson, Judge Bouvier's son-in-law, the whole of the labor, including the copious Index, fell upon the broad shoulders of Judge Bouvier. This, the second American, was based upon the seventh English edition, prepared by Sir Henry Gwillim and Messrs. C. E. Dodd and William Blanshard, and published in eight royal octavos in 1832. In the first three volumes Bouvier confines his annotations to late American decisions; but in the remaining volumes he refers to recent English as well as to American Reports.

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

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

PARTIAL LIST OF WRITERS

WHO ASSISTED IN EDITING THE EDITION OF 1867

Affidavit; Codes; Ex Post Facto; Falcidian Law; Feudal Law; Fiction; Foreign Law, &c.	AUSTIN ABBOTT, Esq., of the New York Bar. Author of a "Collection of Forms and Pleadings in Actions;" "Reports of Cases in Admiralty;" "Practice Reports;" "Digest of Reports," &c.
Bankrupt Laws; Damages; Indorsement; Receipt, &c.	BENJAMIN VAUGHAN ABBOTT, Esq., of the New York Bar. Author of a "Collection of Forms and Pleadings in Actions;" "Reports of Cases in Admiralty;" "Practice Reports;" "Digest of Reports," &c.
Corporations	Hon. SAMUEL AMES, LL.D., Chief Justice of Rhode Island. Author of "Treatise on the Law of Private Corporations," &c. Editor of Ames's "Reports."
Parties, &c.	Hon. OLIVER LORENZO BARBOUR, Vice-Chancellor of New York. Author of a "Treatise on Chancery Practice;" "Set-Off;" "Criminal Law;" &c. Editor of Barbour's "Reports."
Articles upon Maritime Law	E. C. BENEDICT, Esq., New York City.
Rescission of Contracts; Specific Performance, &c.	Hon. WILLIAM H. BATTLE, LL.D., of the Supreme Court of North Carolina; Professor of Law in the University of North Carolina.
Letters Testamentary; Probate of a Will, &c.	Hon. ALEX. W. BRADFORD, LL.D., Ex-Surrogate of New York. Editor of Bradford's "Surrogate Reports," &c.
Abbreviations; Construction; Costs, &c.	F. C. BRIGHTLY, Esq., of the Philadelphia Bar. Author of an "Analytical Digest of the Laws of the United States;" "Treatise on the Law of Costs;" "Equity Jurisdiction of the Courts of Pennsylvania," &c.
Statute of Frauds, &c.	CAUSTEN BROWNE, Esq., of the Boston Bar. Author of a "Treatise on the Construction of the Statute of Frauds."
Ejectment, &c.	Hon. T. W. CLERKE, LL.D., of the Supreme Court of New York. Author of a "Digest of Cases Determined in Supreme Court of New York." Editor of "Adams on Ejectment."

Slave; Slavery; Slave-Trade, &c. . .	Hon. T. R. R. Cobb, of Georgia. Author of the "Law of Negro Slavery, &c. in the United States." Editor of "Cobb's Reports," Digests, &c.
Abortion; Birth; Gestation; Infanticide; Medical Jurisprudence; Pregnancy, &c.	Amos Dean, LL.D., President of the Law Department of the Albany University. Author of Dean's "Medical Jurisprudence," &c.
Abatement; Attachment, &c.	Hon. Charles D. Drake, of the St. Louis Bar, United States Senator. Author of "Drake on Attachments."
Ancient Rights; Backwater; Bridge; Canal; Child; Chose in Action; Creek; Dam; Dedication; Father; Ferry; Fishery; Highway; Inundation; Master; River; Roads; Street; Thoroughfare; Tide; Tide-water; Turnpike; Water-way; Wharf; Wharfinger, &c.	Thomas Durfee, Esq., of Rhode Island. Author of a "Treatise on the Law of Highways," &c.
Crime; Deed; Deposition; Descent; Distribution; Husband; Marriage; Wife; Will, &c.	Hon. Henry Dutton, LL.D., of the Supreme Court of Connecticut, Kent Professor of Law in Yale College. Author of a "Digest of Connecticut Reports," &c.
Reports; Reporters, &c.	Hon. Theodore W. Dwight, LL.D., Professor of Law in Columbia College, New York.
Trusts; Trustees; Presumptive Trusts, &c.	Dorman B. Eaton, Esq., of the New York Bar.
Accessary; Bargain and Sale; Bidder; Conspiracy; Court-Martial; Escape; Fee; Foreign Laws; Gift; Habitual Drunkard; Hue and Cry; Labor; Letter of Attorney; Letters Rogatory; Misadventure; Misprision; Misrecital, Mistrial; Monument; Mute; Negative Pregnant; Nudum Pactum; Offer; Pamphlets; Party-Wall; Per Capita; Per Stirpes; Perpetuating Testimony; Poison; Provisions; Public Stores; Quack; Receiver.	Charles Edwards, Esq., of the New York Bar. Author of a "Treatise on Receivers in Equity," &c.
Bailee; Bailments, &c.	Isaac Edwards, Esq., of the Albany Bar. Author of a "Treatise on the Law of Bailments, Bills," &c.
Experts; Malpractice of Medical Men; Medical Evidence; Physicians; Surgeons, &c.	J. J. Elwell, M. D., of Cleveland, Ohio. Author of "Medico-Legal Treatise on Malpractice," and "Medical Evidence."
Computation; Fraction of a Day; Glossators; Jus; Negligence; Time, &c.	A. I. Fish, Esq., of the Philadelphia Bar. Editor of the "American Law Register;" "Williams on Executors;" "Digest of Exchequer Reports," &c.

Bar; Plea; Pleading, &c.	Hon. GEORGE GOULD, LL.D., of the Supreme Court of New York. Editor of "Gould on Pleading," &c.
Chancellor; Chancery, &c.	Hon. HENRY W. GREEN, LL.D., Chancellor of New Jersey.
Bottomry; Captain; Collision; Freight; Master; Mate; Respondentia; and many other articles relating to Admiralty and Maritime Law	Hon. NATHAN K. HALL, LL.D., Judge of the United States District Court for the Northern District of New York.
Articles relating to Criminal Law . .	F. F. HEARD, Esq., of the Middlesex Bar. Author of a "Treatise on Slander and Libel;" Editor of "Leading Criminal Cases;" "Precedents of Indictments," &c.
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Conflict of Laws, &c.	Hon. MURRAY HOFFMAN, LL.D., Judge of the Superior Court of New York City and County. Author of a "Treatise on the Practice of the Court of Chancery," &c.
Extradition; Fugitive from Justice; Fugitive Slave; Habeas Corpus .	Hon. R. C. HURD, of Ohio. Author of a "Treatise on the Right of Personal Liberty," and on the "Writ of Habeas Corpus," &c.
Bondage; Freedom, &c.	J. C. HURD, Esq., of the New York Bar. Author of the "Law of Freedom and Bondage in the United States."
Actio; Actio Personalis; Advocati; Advocatus; Curia; Execution; Forum; Obligatio, &c.	W. A. INGHAM, Esq., of the Philadelphia Bar.
Alimony; Condonation; Divorce; Nullity of Marriage; Promise of Marriage; Separation a Mensa et Thoro	C. C. LANGDELL, Esq., of the New York Bar.
Absolutism; Aristocracy; Civil Liberty; Constitution; Construction; Democracy; Guerrilla Party; Hermeneutics; Interpretation; Liberty; Right; Self-Government; Sovereignty; and many other articles . . .	FRANCIS LIEBER, LL.D., Professor in Columbia College, New York. Author of "Civil Liberty," &c.
Executors, &c.	Hon. J. TAYLOE LOMAX, late Professor in the Law School of the University of Virginia. Author of a "Treatise on the Law of Executors," &c.

Prize; Salvage; Wreck; and other articles relating to Admiralty . .	Hon. WILLIAM MARVIN, Judge of the United States District Court for the Southern District of Florida. **Author of a "Treatise on the Law of Wrecks and Salvage."**
Limitations	J. WILDER MAY, Esq., of the Boston Bar. **Editor of Angell on "Limitations."**
Ancient Lights; Charities; Easements; Eminent Domain; Torture, &c. . .	Hon. WILLIAM CURTIS NOYES, LL.D., of the New York Bar.
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Agency; Bailment; Equity; Evidence, &c.	Hon. JOEL PARKER, LL.D., Royal Professor of Law in Harvard University.
Firm; Partners; Partnership; Profits; &c.	Hon. J. C. PERKINS, LL.D., Chief Justice of the Court of Common Pleas of Massachusetts. **Editor of Collyer on "Partnership;" Jarman on "Wills,"** &c.
Guaranty; Suretyship	C. A. PHILIPS, Esq., of the Boston Bar.
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[DEDICATION OF THE FIRST EDITION]

TO THE HONORABLE

JOSEPH STORY, LL.D.

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

THIS WORK IS, WITH HIS PERMISSION, MOST RESPECTFULLY DEDICATED, AS A TOKEN OF THE GREAT REGARD ENTERTAINED FOR HIS TALENTS, LEARNING, AND CHARACTER, BY THE AUTHOR

A

LAW DICTIONARY

AND

CONCISE ENCYCLOPEDIA

A TABLE OF ABBREVIATIONS WILL BE FOUND UNDER THE TITLE **ABBREVIATION**

A

A. The first letter of the alphabet.

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

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

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

The article "a" is not necessarily a singular term, it is often used in the sense of "any," and is then applied to more than one individual object; National Union Bank v. Copeland, 141 Mass. 266, 4 N. E. 794; Snowden v. Guion, 101 N. Y. 458, 5 N. E. 322; Thompson v. Stewart, 60 Ia. 225, 14 N. W. 247; sometimes as *the;* 23 Ch. Div. 595.

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

The letter A (i. e. *antiquo*, "for the old law") was inscribed upon Roman ballots under the *Lex Tabellaria*, to indicate a negative vote; Tayl. Civ Law, 191, 192.

An abbreviation of *adversus* used for *versus*, indicating the parties to an action.

An adulteress among the Puritans was condemned to wear the initial letter "A" in red cloth on her dress.

A CONSILIIS. A counsellor. Spelm. Gloss.

A FORTIORI (Lat.). With stronger reason; much more.

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

From, on, or at the side; collaterally. *Hæredes a latere venientes*, heirs succeeding collaterally. *A latere ascendit (jus).* The right ascends collaterally.

In Civil Law and by Bracton, a synonym for *e transverso*, across; Bract. fol. 67*a*.

Applied also to a process or proceeding; Keilw. 159.

Out of the regular or lawful course; incidentally or casually. Applied to the acts of strangers, or persons having no legal interest; Bract. fol. 42*b;* Fleta, lib. 3, c. 15, § 13. *Confirmatio a latere facta*, a confirmation made by one having no legal interest (a non domino); Bract. fol. 58*a*.

At the side of a person; referring to or denoting intimacy of connexion. Justices of the *Curia Regis* are described as *a latere regis residentes*, sitting at the side of the King; Bract. fol. 108*a;* 2 Reeves Hist. Eng. L. 250.

From the side of; denoting closeness of intimacy or connexion; as a court held before auditors *specialiter a latere regis destinatis;* Fleta, lib. 2, c. 2, § 4.

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

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

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

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

A MENSA ET THORO (Lat. from table and bed, but more commonly translated, from bed and board). A kind of divorce, which is rather a separation of the parties by law, than a dissolution of the marriage. See DIVORCE.

A NATIVITATE. From birth. 3 Bla. Com. 332; Reg. Orig. 266*b*.

A POSTERIORI (Lat.). From the effect to the cause; from what comes after.

A PRENDRE (Fr. to take, to seize). Rightfully taken from the soil. 5 Ad. & E. 764; 1 N. & P. 172; Waters v. Lilley, 4 Pick. (Mass.) 145, 16 Am. Dec. 333.

Used in the phrase *profit à prendre* (q. v.) which differs from a right of way or other easement which confers no interest in the land itself. 5 B & C. 221; 2 Washb R. P. 25

A PRIORI (Lat.). From the cause to the effect; from what goes before.

A QUO (Lat.). From which. A court *a quo* is a court from which a cause has been removed. The judge *a quo* is the judge in such court. Clegg v. Alexander, 6 La. 339. Its correlative is *ad quem*.

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

A RETRO (Lat.). In arrear. Fleta, lib. 2, c. 55, § 2; *id.* c. 62, § 14.

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

A. U. C. Lat. *ab urbe condita*. From the foundation of the city, Rome. The era from which Romans computed time, being assumed to be 753 years before the Christian Era.

A VINCULO MATRIMONII (Lat. from the bond of matrimony). A kind of divorce which is a dissolution of the marriage contract or relation. See DIVORCE.

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

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

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

A legislature cannot agree *ab ante* to any modification or amendment to a law which a third person may make; Allen v. McKean, 1 Sumn. 308, Fed. Cas. No. 229.

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

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

AB INCONVENIENTI (Lat. *inconveniens*). From hardship; from what is inconvenient. An argument *ab inconvenienti* is an argument drawn from the hardship of the case.

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

An estate may be said to be good, an agreement to be void, an act to be unlawful, a trespass to have existed, *ab initio;* Plowd. 6*a;* 11 East 395; Backrider v. M'Donald, 10 Johns. (N. Y.) 253; Hopkins v. Hopkins, *id.* 369; 1 Bla. Com. 440. See Ad, Eq. 186. Webb's Poll. Torts Wald's ed. 477. See TRESPASS; TRESPASSER.

Before. Contrasted in this sense with *ex post facto*, 2 Shars. Bla. Com. 308; or with *postea*, Calvinus, Lex., *initium*.

AB INTESTAT. Intestate. 2 Low. Can. 219. Merlin, Repert.

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

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

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

AB URBE CONDITA. See **A. U. C.**

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

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

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

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

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

ABANDON. To relinquish; forsake; give up. The word includes the intention. And the external act by which it is carried into effect. See ABANDONMENT.

An *abandonee* is the person in whose favor the property or right is abandoned. 5 M. & S. 79.

ABANDONED AND CAPTURED PROPERTY ACT. The act of Congress of March 12, 1863, relating to certain property in the Confederate States. It expressly excludes from its operation property which had been used to carry on war against the United States. August 20, 1866, is, as to the operation of the act, the date of the end of the war.

Congress constituted the government trustee for so much of such property as belonged to the faithful Southern people; it was directed to be sold and the proceeds paid into the treasury, claimants having two years to bring suit in the Court of Claims; U. S. v. Anderson, 9 Wall. (U. S.) 56, 19 L. Ed. 615. It was the property which had been seized or taken from the enemy's possession by the United States forces; Bigelow v. Forrest, 9 Wall. (U. S.) 351, 19 L. Ed. 696.

ABANDONMENT. Relinquishment; renunciation; surrender.

Relinquishment of a right or of property with the intention of not reclaiming it or resuming its ownership or enjoyment. The relinquishment or surrender of rights or property by one person to another. This last definition was adopted in Hickman v. Link, 116 Mo. 123, 22 S. W. 472, and therefore it is deemed proper to leave it undisturbed, although it is not technically accurate as to all the sub-titles of Abandonment. This definition first appeared in the edition of 1867, in which the author of the title was Mr. Phillips, author of "Insurance," etc. Abandonment of rights or property generally cannot legally be made to a specified person. As used in Insurance Law, however, it does involve the relinquishment of the property insured to a specified person—the insurer. As Mr. Phillips was not only an able writer on Insurance Law but also president of an insurance company, he doubtless had the particular form of abandonment known in that branch of the law, most prominent in his mind, and it is not improbable that the definition was not intended as a general one, but only of those forms of abandonment to which it applied. This seems manifest from the fact that the term is correctly defined in the sub-titles with reference to their respective subject matters.

It is a matter of intention and consists in giving up a thing without reference to a particular person or purpose; there can be none to a definite person; Norman v. Corbley, 32 Mont. 195, 79 Pac. 1059; or for a consideration; Watts v. Spencer, 51 Or. 262, 94 Pac. 39. As applied to property rights it consists of nonuser and intention; Alamosa Creek Canal Co. v. Nelson, 42 Colo. 140, 93 Pac. 1112. A transaction which fails as a sale cannot be converted into an abandonment; Watts v. Spencer, 51 Or. 262, 94 Pac. 39. Abandonment implies a relinquishment to the public generally, or to the next comer —a surrender to a particular person not being an abandonment; Stephens v. Mansfield, 11 Cal. 363. Of two persons both interested in a water right, neither party can *abandon* to the other; Norman v. Corbley, 32 Mont. 195, 79 Pac. 1059.

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

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

The effect of such abandonment is to release the owner from any further responsibility. The privilege in case of contracts is limited to those of a maritime nature; Pothier, Chart. Part. sec. 2, art. 2, § 51; Code de Commerce, lib. 2, tit. 2, art. 216. Similar provisions exist in England and the United States to some extent; 1 Par. Mar. Law, 395; Pope v. Nickerson, 3 Sto. 465, Fed. Cas. No. 11,274; American Transp. Co. v. Moore, 5 Mich. 368. Under the Act of Congress of 1851, March 3 (Rev. Stat. U. S. § 4285), the liability of the shipowners for a collision may be discharged by surrendering and assigning the vessel and freight to a trustee for the benefit of the parties injured, though these have been diminished in value by the collision; when they are totally destroyed, it would seem that the owners are discharged; Norwich Co. v. Wright, 13 Wall. (U. S.) 104, 20 L. Ed. 585; Wright v. Transp. Co., 8 Blatchf. 14, Fed. Cas. No. 18,087; overruling Walker v. Ins. Co., 14 Gray (Mass.) 288; Barnes v. Steamship Co., 6 Phila. 479, Fed. Cas. No. 1,021. This is not the case under the English statutes. 2 My. & Cr. 489; 15 M. & W. 391; 2 B. & Ad. 2.

Insurers notified that vessel is abandoned to them, after which owner and master take no steps to save vessel, does not relieve the insurers of liability on policy of insurance; The Natchez, 42 Fed. 169. A schooner was stranded and crew taken off by life-saving crew, the master expecting to return on board, and with no intention of abandoning her; a tug took schooner in tow to New York, and it was held that salvage service should be allowed; The S. A. Rudolph, 39 Fed. 331. A vessel is not abandoned unless its possession is voluntarily forsaken by its owner or master; The Mary, 2 Wheat. (U. S.) 123, 4 L. Ed. 200.

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

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

"An abandonment is an act on the part of the assured, by which he relinquishes and transfers to the underwriters his insurable interest, or the proceeds of it, or the claims arising from it, so far as it is insured by the policy." 2 Phil. Ins. § 1490.

The term is used only in reference to risks in navigation; but the principle is applica-

e in fire insurance, where there are rem-
nts, and sometimes also under stipulations
life policies in favor of creditors; 2 Phil.
s. §§ 1490, 1514, 1515; 3 Kent 265; Cincin-
ti Ins. Co. v. Duffield, 6 Ohio St. 200, 67
n. Dec. 339; 6 East 72.

The doctrines which have obtained in ma-
ne insurance of constructive total loss and
andonment, salvage and general average,
e not applicable in fire insurance; May,
s. § 421 a; Hicks v. McGehee, 39 Ark. 264.

The object of abandonment being to recov-
the whole value of the subject of the in-
rance, it can occur only where the subject
self, or remains of it, or claims on account
it, survive the peril which is the occasion
the loss; 2 Phil. Ins. §§ 1507, 1516; 2 Pars.
ar. Ins. 120; 36 Eng. L. & Eq. 198; 3 Kent
1; 3 Bing. N. C. 266. In such case the as-
red must elect, immediately on receiving
telligence of a loss, whether to abandon,
id not delay for the purpose of speculating
the state of the markets; 2 Phil. Ins. §
67. He may have a reasonable time to in-
ect the cargo, but for no other purpose; 3
ent 320. He must give notice promptly to
e insurer of his intention; five days held
o late; 5 M. & S. 47; see L. R. 5 C. P. 341.

otice of the abandonment of a vessel need
t be given to insurers or reinsurers where
ere is a constructive total loss; 15 Q. B.
11; and delay in giving notice, if it does
t prejudice the insurer, will not affect the
ghts of the insured; Young v. Ins. Co., 24
d. 279. In cases of actual total loss, no-
e of abandonment is unnecessary; Tyser,
ar. Ins. § 33.

In America, it appears that the right of
andonment is to be judged by the facts
each particular case as they existed at
e time of abandonment; Peele v. Ins. Co.,
Mas. 27, Fed. Cas. No. 10,905; 2 Phil. Ins.
1536; Bradlie v. Ins. Co., 12 Pet. (U. S.)
8, 9 L. Ed. 1123. In England, the aban-
nment may be effected by subsequent occur-
nces, and the facts at the time of action
ought determine the right to recover; 4
& S. 394; 2 Burr. 1198. But this rule
s been doubted in England; 2 Dow 474;
Kent 324.

By the doctrine of constructive total loss,
loss of over one-half of the property in-
red, or damage to the extent of over one-
lf its value, by a peril insured against,
ay be turned into a total loss by abandon-
ent; 2 Beach, Ins. § 948; Dwpuy v. Ins.
., 3 Johns. Cas. (N. Y.) 182; Allen v. Ins.
., 1 Gray (Mass.) 154. This does not ap-
ar to be the English rule; 9 C. B. 94; 1
of L. 513. See Forbes v. Ins. Co., 1 Gray
lass.) 371.

The right is waived by commencing re-
irs; 2 Pars. Mar. Ins. 140; Humphreys v.
s. Co., 3 Mas. 429, Fed. Cas. No. 6,871;
ckey v. Ins. Co., 3 Wend. (N. Y.) 658, 20
n. Dec. 763; Depau v. Ins. Co., 5 Cow. (N.
Y.) 63, 15 Am. Dec. 431; 4 App. Cas. 755; but not by temporary repairs; 2 Phil. Ins. § 1540; but is not lost by reason of the enhancement of the loss through the mere negligence or mistakes of the master or crew. It is too late to abandon after the arrival *in specie* at the port of destination; 2 Pars. Mar. Ins. 128; 4 H. of L. 24; Pezant v. Ins. Co., 15 Wend. (N. Y.) 453. See Peters v. Ins. Co., 3 S. & R. (Pa.) 25. An inexpedient or unnecessary sale of the subject by the master does not strengthen the right; 2 Phil. Ins. §§ 1547, 1555, 1570. But the fact that the master only takes steps for the safety or recovery of the thing insured, will not deprive the owners of the right to abandon; Tyser, Mar. Ins. § 28. See SALVAGE; TOTAL LOSS.

No notice of abandonment is necessary where owner loses his rights in a vessel by sale under decree of court of competent jurisdiction, in consequence of peril insured against; 13 App. Cas. 160.

Abandonment may be made upon information entitled to credit, but if made speculatively upon conjecture, it is null.

In the absence of any stipulation on the subject, no particular form of abandonment is required; it may be in writing or oral, in express terms or by obvious implication (but see 1 Campb. 541); but it must be absolute and unconditional, and the ground for it must be stated; 2 Phil. Ins. §§ 1678, 1679 *et seq.*; Bullard v. Ins. Co., 1 Curt. C. C. 148, Fed. Cas. No. 2,122; Bell v. Beveridge, 4 Dall. (U. S.) 272, 1 L. Ed. 830; Peirce v. Ins. Co., 18 Pick. (Mass.) 83, 29 Am. Dec. 567; see Macy v. Ins. Co., 9 Metc. (Mass.) 354; Citizens Ins. Co. v. Glasgow, 9 Mo. 416. Acceptance may cure a defect in abandonment, but is not necessary to its validity; 2 Phil. Ins. § 1689. Nor is the underwriter obliged to accept or decline. He may, however, waive it; 2 Phil. Ins. § 1698. But it is not subject to be defeated by subsequent events; 2 Phil. Ins. § 1704; Peele v. Ins. Co., 3 Mas. 27, 61, Fed. Cas. No. 10,905; Humphreys v. Ins. Co., 3 Mas. 429, Fed. Cas. No. 6,871; Rhinelander v. Ins. Co., 4 Cran. (U. S.) 29, 2 L. Ed. 540; Schieffelin v. Ins. Co., 9 Johns. (N. Y.) 21. See *supra*. And the subject must be transferred free of incumbrance except expense for salvage; Allen v. Ins. Co., 1 Gray (Mass.) 154; Depau v. Ins. Co., 5 Cow. (N. Y.) 63, 15 Am. Dec. 431. The right to abandon being absolute under proper circumstances, no acceptance is necessary. It is only when the circumstances do not warrant abandonment that the question of the validity of acceptance arises. If there is an acceptance it must be by some distinct and unequivocal act; 29 N. B. 510; but the insurer is not bound to signify acceptance and his silence justifies the conclusion of non-acceptance; Peele v. Ins. Co., 3 Mas. 27, Fed. Cas. No. 10,905, per Story, J.,

whose ruling was followed in L. R. 6 P. C. 224, in preference to 3 Brod. & B. 97, where it was held that the insurer must elect within a reasonable time whether to accept. But if the insurer does not accept, either expressly or by some act amounting to it, he cannot hold the assured to the abandonment; Child v. Ins. Co., 2 Sandf. (N. Y.) 76; whether the insurer accepts is a matter of construction of his words and conduct; Richelieu & O. Nav. Co. v. Ins. Co., 136 U. S. 408, 10 Sup. Ct 934, 34 L. Ed. 398; Badger v. Ins. Co., 23 Pick. (Mass.) 347; Singleton v. Ins. Co., 132 N. Y. 298, 30 N. E. 839. See note, 45 L. Ed. 1, where the subject is examined. There may be an acceptance though there was not strictly a right of abandonment; Copelin v. Ins. Co., 9 Wall. (U. S.) 461, 19 L. Ed. 739. It may be constructive and is implied from taking possession to raise and repair; Peele v. Ins. Co., 3 Mas. 27, Fed. Cas. No. 10,905; Gloucester Ins. Co v. Younger, 2 Curt. 322, Fed. Cas. No. 5,487; but not from partial repairs and restoration of the property; Marmaud v. Melledge, 123 Mass. 173; Peele v. Ins. Co., 7 Pick. (Mass.) 254, 19 Am. Dec. 286; though in such case the return must be made in a reasonable time; *id.;* Reynolds v. Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727; Copelin v. Ins. Co., 46 Mo. 211, 2 Am. Rep. 504; Norton v. Ins. Co., 16 Ill. 235; Copelin v. Ins. Co., 9 Wall. (U. S.) 461, 19 L. Ed. 739; Young v. Ins. Co., 24 Fed. 279. The effect of a valid abandonment is to put the insurer in the place of the insured with no greater right but entitled to all that can be saved; Insurance Co. v. Gossler, 96 U. S. 645, 24 L. Ed 863; and the owner becomes the agent of the underwriter and is bound to protect his interest; Columbian Ins. Co. v. Ashby, 4 Pet. (U. S.) 139, 7 L. Ed. 809; Richelieu & O. Nav. Co. v. Ins. Co., 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398. See TOTAL LOSS.

Of Public Highway. Non-user of public alley for over 40 years in connection with affirmative acts of abandonment, justifies a finding that it cease to be a public highway; Woodruff v. Paddock, 130 N. Y. 618, 29 N. E. 1021, *id.*, 56 Hun 288, 9 N. Y. Supp. 381. Encroachment on public highway outside of traveled track and use thereof by a private party for 10 years did not necessarily show abandonment of the highway; Village of Grandville v. Jenison, 84 Mich. 54, 47 N. W. 600.

Of Public Lands. Title from the state, under a patent, is not affected by the doctrine of abandonment, unless, in consequence, title is acquired by adverse possession; Kreamer v. Voneida, 213 Pa. 74, 62 Atl. 518. The title once passed is never revested by abandonment; *id.*, 24 Pa. Super. 347.

It has been held that the use of property for public purposes may be abandoned for so long a time as to prevent the assertion of a private proprietary interest as against an improving possessor; Collett v. Board of Com'rs, 119 Ind. 27, 21 N. E. 329, 4 L. R. A. 321. Failure to pay interest on school lands for 15 years with no assertion of ownership will prevent assertion of title as against subsequent purchaser from the state who has been in possession of property for 10 years; Richardson v. Doty, 25 Neb. 420, 41 N. W. 282.

Of Rights. The relinquishment of a right. It implies some act of relinquishment done by the owner without regard to any future possession by himself, or by any other person, but with an intention to abandon; 14 M. & W. 789; Dyer v. Sanford, 9 Metc. (Mass.) 395, 43 Am. Dec. 399; Dawson v. Daniel, 2 Flip. 309, Fed. Cas. No. 3,669. Mere non-user does not necessarily or usually constitute an abandonment; Emerson v. Wiley, 10 Pick. (Mass.) 310; Parkins v. Dunham, 3 Strobh. (S. C.) 224; Elliott v. Rhett, 5 Rich. (S. C.) 405, 57 Am. Dec. 750; Jewett v. Jewett, 16 Barb. (N. Y.) 150; see Tud. Lead. Cas. 130; 2 Washb. R. P. 83. There must be actual relinquishment and intention to abandon; Log-Owners' Booming Co. v. Hubbell, 135 Mich. 65, 97 N. W. 157, 4 L. R. A. (N. S.) 573; Fugate v. Pierce, 49 Mo. 441; Eisele v. Oddie, 128 Fed. 941; Foster v. Hobson, 131 Ia. 58, 107 N. W. 1101; Carroll County Academy v. Academy Co., 104 Ky. 621, 47 S. W. 617; Watts v. Spencer, 51 Or. 262, 94 Pac. 39. Intention may be shown by inferential proof; Enno-Sander Mineral Water Co. v. Fishman, 127 Mo. App. 207, 104 S. W. 1156; United Shoe Mach. Co. v. Mach. Co., 197 Mass. 206, 83 N. E. 412. It cannot be inferred from *non-user* alone; Doty v. Gillett, 43 Mich. 203, 5 N. W. 89. Nor does it result from failure to take possession of land for a period less than would give title by adverse possession; Kreamer v. Voneida, 24 Pa. Super. 347; from failure to pay taxes; *id.;* or from mere temporary absence; Hurt v. Hollingsworth, 100 U. S. 104, 25 L. Ed. 569. But failure to pay taxes or exercise rights of ownership for over 20 years, coupled with possession of and improvement by another under color of title is evidence of abandonment; Timber v. Desparois, 18 S. D. 587, 101 N. W. 879; or coupled with other acts showing intention not to repossess himself; Alamosa Creek Canal Co. v. Nelson, 42 Colo. 140, 93 Pac. 1112. For older cases see 5 L. R. A. 259, note.

Abandonment is properly confined to incorporeal hereditaments, as legal rights once vested must be divested according to law, though equitable rights may be abandoned; Great Falls Co. v. Worster, 15 N. H. 412; see Cringan v. Nicolson's Ex'rs, 1 Hen. & M. (Va.) 429; and an abandonment combined with sufficiently long possession by another party destroys the right of the original owner; Gregg v. Blackmore, 10 Watts (Pa.) 192;

Barker v. Salmon, 2 Metc. (Mass.) 32; Inhabitants of School Dist. No. 4 v. Benson, 31 Me. 381, 52 Am. Dec. 618. Fee simple title to real estate cannot be lost by abandonment; Barrett v. Coal Co., 70 Kan. 649, 70 Pac. 150; nor transferred by it; Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219, 7 L. R. A. (N. S.) 791. But under Spanish Law it may be divested, although the question of fact is for the jury; Fine v. Public Schools, 30 Mo. 166.

There may be an abandonment of an easement; Pope v. Devereux, 5 Gray (Mass.) 409; Shelby v. State, 10 Humphr. (Tenn.) 165; Corning v. Gould, 16 Wend. (N. Y.) 531; Crain v. Fox, 16 Barb. (N. Y.) 184; 3 B. & C. 332; of a mill site; French v. Mfg. Co., 23 Pick. (Mass.) 216; Farrar v. Cooper, 34 Me. 394; Taylor v. Hampton, 4 McCord (S. C.) 96, 17 Am. Dec. 710; 7 Bingh. 682; an application for land; Com. v. Rahm, 2 S. & R. (Pa) 378; of an improvement; Fisher v. Larick, 3 S. & R. (Pa.) 319; of a trust fund; Breedlove v. Stump, 3 Yerg. (Tenn.) 258; of an invention or discovery; Wyeth v. Stone, 1 Sto. 280, Fed. Cas. No. 18,107; Mellus v. Silsbee, 4 Mas. 111, Fed. Cas. No. 9,404; property sunk in a steamboat and unclaimed; Creevy v. Breedlove, 12 La. An. 745; a mining claim; Davis v. Butler, 6 Cal. 510; Paine v. Griffiths, 86 Fed. 452, 30 C. C. A. 182; a right under a land warrant; Emery v. Spencer, 23 Pa. 271. An easement acquired by grant is not lost by non-user; Butterfield v. Reed, 160 Mass. 361, 35 N. E. 1128.

The burden of proof rests on the party claiming abandonment of an easement; Hennessy v. Murdock, 137 N. Y. 317, 33 N. E. 330.

The question of abandonment is one of fact for the jury; 2 Washb. R. P. 82; Wiggins v. McCleary, 49 N. Y. 346; Banks v. Banks, 77 N. C. 186; Sample v. Robb, 16 Pa. 320.

The effect of abandonment when acted upon by another party is to divest all the owner's rights; Davis v. Butler, 6 Cal. 510; McGoon v. Ankeny, 11 Ill. 558.

It was the ancient law that the owner could, by abandoning a slave or animal which was a cause of damage, relieve himself of liability, and there is a trace of the application of this principle to inanimate things; the new owner became liable, under the doctrine *noxa caput sequitur*. The cause of offense was the slave, animal, or thing, and only as a means of getting at that was the liability of the owner considered; Dig. 9, 1, 1, sec. 12; Inst. 4, 8, sec. 5; Holmes, Com. L. 8.

Abandonment is to be distinguished from Dedication, Surrender, Waiver. See FINDER.

Consult 2 Washb. R. P. 56, 82, 85, 253. See also Curtis, Pat. § 381; Walk. Patents § 87; Ewell, Fixt.; Thomp. Homest.; Dicey, Dom. 90. As to Abandonment of Patents, see PATENTS.

ABANDONMENT FOR TORTS. In Civil Law. The relinquishment of a slave or animal who had committed a trespass to the person injured, in discharge of the owner's liability for such trespass or injury. If this were done, the owner could not be held to any further responsibility. Just. Inst. 4, 8, 9. A similar right exists in Louisiana; Fitzgerald v. Ferguson, 11 La. An. 396.

ABANDUM or ABANDONUM. Anything sequestered, proscribed or abandoned. Cunningham.

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

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

ABATARE. To abate. Yelv. 151.

ABATE (Fr. *abattre*, L. Fr. *abater*). To throw down, to beat down, destroy, quash. 3 Shars. Bla. Com. 168; Case v. Humphrey, 6 Conn. 140. See ABATEMENT AND REVIVAL.

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

It differs from an abatement at law in this; that in the latter the action is entirely dead and cannot be revived; but in the former the right to proceed is merely suspended, and may be revived by a supplemental bill in the nature of a bill of revivor; 3 Bla. Com. 301; Boynton v. Boynton, 21 N. H. 246, Sto Eq. Pl. § 20 n. § 354; Ad. Eq. 403; Mitf. Eq. Pl., by Jeremy 57; Brooks v. Jones, 5 Lea (Tenn.) 244, Clarke v. Mathewson, 12 Pet. (U. S.) 161, 9 L. Ed. 1041; Kronenberger v. Heinemann, 104 Ill. App. 156; Zoellner v. Zoellner, 46 Mich. 511, 9 N. W. 831; where interest is transmitted by act of law, as to personal representative or heir a simple bill of revivor may be used; Story, Eq. Pl. § 364; Feemster v. Markham, 2 J. J. Marsh. (Ky.) 303, 19 Am. Dec. 131; Putnam v. Putnam, 4 Pick. (Mass.) 139, but where by virtue of act of party, as to devisee, an original bill in the nature of a bill of revivor must be used, Russell v Craig, 3 Bibb (Ky.) 377; Wood v. Dummer, 3 Mas. 308, Fed. Cas. No. 17,944.

Generally speaking, if any property or right in litigation is transmitted to another, he is entitled to continue the suit, or at least have the benefit of it, if he be plaintiff; Talmage v. Pell, 9 Paige, Ch. (N. Y.) 410; or it may be continued against him, or at least perfected, if he be defendant; Story, Eq. Pl. §§ 332, 442; Sedgwick v. Cleveland, 7 Paige, Ch. (N. Y.) 290; Sinclair v. Realty Co., 99 Md. 223, 57 Atl. 664. See PARTIES.

Death of a trustee does not abate a suit, but it must be suspended till a new one is appointed; Shaw v. R. Co., 5 Gray (Mass.) 162; and the further proceedings must be by supplemental bill in the nature of a bill of revivor, setting forth the proceedings and requiring an answer by the new trustee; Greenleaf v. Queen, 1 Pet. (U. S.) 138, 7 L.

Ed. 85. And where there was a failure to perform duties of a fiduciary nature, carrying compensation, the remedy therefor survived; Warren v. Shoe Co., 166 Mass. 97, 44 N. E. 112.

The death of the owner of the equity of redemption abates a foreclosure suit; Wright v. Phipps, 58 Fed. 552; but the executor of complainant in a bill to redeem was held not entitled to prosecute it; Smith v. Manning, 9 Mass. 422; though now the right of an administrator to redeem is given by statute to an administrator; and in a late case it was held that the right to redeem under a deed absolute on its face, but in fact a mortgage, is based on failure to perform a duty of a fiduciary character and the right of action survives; Clark v. Seagraves, 186 Mass. 430, 71 N. E. 813.

There are some cases, however, in which a court of equity will entertain application notwithstanding the suit is suspended: thus, proceedings may be had to preserve property in dispute; Washington Ins. Co. v. Slee, 2 Paige, Ch. (N. Y.) 368; to pay money out of court where the right is clear; 6 Ves. 250; or upon consent of parties; 2 Ves. 399; to punish a party for breach of an injunction; Hawley v. Bennett, 4 Paige, Ch. (N. Y.) 163; to enroll a decree; 2 Dick. 612; or to make an order for the delivery of deeds and writings; 1 Ves. 185. On a bill to set aside a deed, the heirs at law or devisees of a deceased complainant, and not the executor (unless title is vested in him under the will), should file the bill of revivor; Webb v. Janney, 9 App. D. C. 41. The death of the complainant in a bill of discovery after answer abates it and the suit cannot be revived; its purpose is accomplished; Horsburg v. Baker, 1 Pet. (U. S.) 232, 7 L. Ed. 125.

Although abatement in chancery suspends proceedings, it does not put an end to them; a party, therefore, imprisoned for contempt is not discharged, but must move that the complaint be revived in a specified time or the bill be dismissed and himself discharged; Dan. Ch. Pr. (6th Am. ed.) *1543. Nor will a receiver be discharged without special order of court; McCosker v. Brady, 1 Barb. Ch. (N. Y.) 329. A suit in equity for relief against infringement of a patent does not abate by the death of the plaintiff; Illinois Cent. R. Co. v. Turrill, 110 U. S. 301, 4 Sup. Ct. 5, 28 L. Ed. 154; nor does a suit in Admiralty for prize money; Penhallow v. Doane, 3 Dall. (U. S.) 54, 1 L. Ed. 507. The assignee of the rights of a complainant may proceed by bill of revivor in the old suit or begin a new one; Botts v. Cozine, 1 Hoffm. Ch. (N. Y.) 79.

In order to recover damages caused by injunction, it is unnecessary to revive a cause in which a preliminary injunction was issued, bond given, and judgment on demurrer for defendant who died; the remedy is by action on the bond; Grissler v. Stuyvesant, 1 Hun (N. Y.) 116, 3 Thomp. & C. 756.

All declinatory and dilatory pleas in equity are said to be pleas in abatement, or in the nature thereof; see Story, Eq. Pl. § 708; Bea. Eq. 55; Coop. Eq. Pl. 236. And such pleas must be pleaded before a plea in bar, if at all; Story, Eq. Pl. § 708; see Saltus v. Tobias, 7 Johns. Ch. (N. Y.) 214; Kendrick v. Whitfield, 20 Ga. 379. See PLEA.

Of Freehold. The unlawful entry upon and keeping possession of an estate by a stranger, after the death of the ancestor and before the heir or devisee takes possession. It is a species of ouster by intervention between the ancestor or devisor and the heir or devisee, thus defeating the rightful possession of the latter; 3 Bla. Com. 167; Co. Litt. 277*a*.; Cruise, Dig. B. 1, 60.

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

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

When the estate of a testator is insufficient to pay both debts and legacies, it is the rule that the general legacies must abate proportionally to an amount sufficient to pay the debts; Towle v. Swasey, 106 Mass. 100; Appeal of Trustees of University of Pennsylvania, 97 Pa. 187. If the general legacies are exhausted before the debts are paid, then, and not till then, the specific legacies abate, and proportionally; 2 Bla. Com. 513 and note; Bacon, Abr. Leg. H; 2 P. Wms. 383; 1 Ves. Sen 564; Brant v. Brant, 40 Mo. 280; Armstrong's Appeal, 63 Pa. 312. See LEGACY.

In Revenue Law. The deduction from, or the refunding of, duties sometimes made at the custom house, on account of damages received by goods during importation or while in store. See R. S. § 2894.

Of Nuisances. The removal of a nuisance. 3 Bla. Com. 5; Poll. Torts 210. See NUISANCE.

Of Actions at Law. The overthrow of an action caused by the defendant pleading some matter of fact tending to impeach the correctness of the writ or declaration, which defeats the action for the present, but does not debar the plaintiff from recommencing it in a better way. Stephen, Pl. 47; Pepper, Pl. 15; Webb, Poll. Torts; 3 Bla. Com. 301; 1 Chit. Pl. (6th Lond. ed.) 446; Gould, Pl. ch. 5, § 65.

It has been applied rather inappropriately as a generic term to all pleas of a dilatory nature, whereas the word dilatory would seem to be the more proper generic term, and the word abatement applicable to a certain portion of dilatory pleas;

Com. Dig. Abt B; 1 Chit. Pl. 440 (6th Lond. ed.); Gould, Pl. ch. 5, § 65. In this general sense it has been used to include pleas to the jurisdiction of the court. This usage, being technically inaccurate, results in some confusion in the use of the word by courts with respect to such pleas; Frohlich v. Glass Co, 144 Mich 278, 107 N. W. 889; Bank of Valley v. Gettinger, 3 W. Va. 309; and by some approved digests and text writers. The distinction is however not lost sight of, Bishop v. Camp, 39 Fla. 517, 22 South 735; Lewis v. Schwinn, 71 Ill. App. 265. See JURISDICTION; PLEA.

Matter in abatement *dehors* the record is properly presented by plea in abatement; Schofield v. Palmer, 134 Fed. 753.

AS TO THE PERSON OF THE PLAINTIFF AND DEFENDANT. It may be pleaded, as to the plaintiff, that there never was such a person *in rerum natura;* 1 Chit. Pl. (6th Lond. ed.) 448; Guild v. Richardson, 6 Pick. (Mass.) 370; Campbell v. Galbreath, 5 Watts (Pa.) 423; Doe v. Penfield, 19 Johns. (N. Y.) 308; Bolinger v. Fowler, 14 Ark. 27; Boston Type & Stereotype Foundry v. Spooner, 5 Vt. 93 (except in ejectment; Doe v. Penfield, 19 Johns. [N. Y.] 308); and by one of two or more defendants as to one or more of his co-defendants; Archb. C. P. 312. That one of the plaintiffs is a fictitious person, to defeat the action as to all; Com. Dig. Abt. E, 16; 1 Chit. Pl. 448; Archb. C. P. 304. This would also be a good plea in bar; 1 B. & P. 44. That the nominal plaintiff in the action of ejectment is fictitious, is not pleadable in any manner; 4 M. & S. 301; Jones v. Gardner, 10 Johns. (N. Y.) 269. A defendant cannot plead matter which affects his co-defendant alone; Bonzey v. Redman, 40 Me. 336; Harker v. Brink, 24 N. J. Law, 333; Ingraham v. Olcock, 14 N. H. 243; Shannon v. Comstock, 21 Wend. (N. Y.) 457, 34 Am. Dec. 262.

An action on contract by a copartnership, the avails of which have been assigned during its pendency to a third person, does not abate by death of one partner, but may be prosecuted to judgment without change on the record; Pennsylvania Fire Ins. Co. v. Carnahan, 19 Ohio Cir. Ct. R. 97. But when the suit involves an adjustment of equities between former partners and new ones, it should be revived as against the representatives of a new partner who died *pendente lite;* Hausling v. Rheinfrank, 103 App. Div. 517, 93 N. Y. Supp. 121.

Certain legal disabilities are pleadable in abatement, such as *outlawry;* Bac. Abr. Abt. B; Co. Litt. 128 *a; attainder* of treason or felony; 3 Bla. Com. 301; Com. Dig. Abt. E. 3; also *præmunire* and *excommunication;* 3 Bla. Com. 301; Com. Dig. Abt. E. 5. The law in reference to these disabilities can be of no practical importance in the United States; Gould, Pl. ch. 5, § 32.

Alienage. That the plaintiff is an alien friend is pleadable only in some cases, where, for instance, he sues for property which he is incapacitated from holding or acquiring; Co. Litt. 129 *b;* Stramburg v. Heckman, 44 N. C. 250. By the common law, although he could not inherit, yet he might acquire by purchase, and hold as against all but the sovereign. Accordingly he has been allowed in this country to sue upon a title by grant or devise; Sheaffe v. O'Neil, 1 Mass. 256; Fairfax v. Hunter, 7 Cranch (U. S.) 603, 3 L. Ed. 453; but see Siemssen v. Bofer, 6 Cal. 250; Wacker v. Wacker, 26 Mo. 426. The early English authority upon this point was otherwise; Bac. Abr. Abt. B, 3, Aliens D; Co. Litt. 129 *b.* He is in general able to maintain all actions relating to personal chattels or personal injuries; 3 Bla. Com. 384; Cowp. 161; Bac. Abr. Aliens D; 2 Kent 34; Co. Litt. 129 *b.* But an alien enemy can maintain no action except by license or permission of the government; Bac. Abr. Abt. B, 3, Aliens D; 46; 1 Ld. Raym. 282; 6 Term 53, 49; Russel v. Skipwith, 6 Binn (Pa.) 241; Sewall v. Lee, 9 Mass. 363; 3 M. & S. 533; Hamersley v. Lambert, 2 Johns. Ch. (N. Y.) 508; Russel v. Skipwith, 1 S. & R. (Pa.) 310. This will be implied from the alien being suffered to remain, or to come to the country, after the commencement of hostilities without being ordered away by the executive; Clarke v. Morey, 10 Johns. (N. Y.) 69. See 28 Eng. L. & Eq. 319. But the disability occurring after suit brought simply suspends the right of action; Hutchinson v. Brock, 11 Mass. 119. The better opinion seems to be that an alien enemy cannot sue as administrator; Gould, Pl. ch. 5, § 44. That both parties were aliens is no ground for abatement of a suit on a contract made in a foreign country; Rea v. Hayden, 3 Mass. 24. See also Barrell v. Benjamin, 15 Mass 354; Roberts v. Knights, 89 Mass. (7 Allen) 449.

Corporations. A plea in abatement is the proper manner of contesting the existence of an alleged corporation plaintiff; Methodist E. Church v. Wood, Wright (Ohio) 12; Proprietors of Kennebeck Purchase v. Call, 1 Mass. 485; President, etc., Hanover Sav. Fund Soc. v. Suter, 1 Md. 502; Rheem v. Wheel Co., 33 Pa. 356; Pitman v. Perkins, 28 N. H. 93; Yeaton v. Lynn, 5 Pet. (U. S.) 231, 8 L. Ed. 105. To a suit brought in the name of the "Judges of the County Court," after such court has been abolished, the defendant may plead in abatement that there are no such judges; Judges of Fairfield County v. Phillips, 2 Bay (S. C.) 519.

Where a general incorporation law provides for winding up the affairs of corporations by trustees, after dissolution, pending suits do not thereupon abate; Scott v. Oil Co., 142 Fed. 287; Gordon v. Pub. Co., 66 N. Y. Supp. 828; Platt v. Ashman, 32 Hun (N. Y.) 230; until the expiration of the period allowed for winding up; Dundee Mortg. & Trust Inv. Co. v. Hughes, 77 Fed. 855; or, if abated, they may be revived against the trustees; Shayne v. Pub. Co., 168 N. Y. 70, 61 N. E. 115, 55 L. R. A. 777, 85 Am. St. Rep. 654. The annulment of a charter for non-

payment of taxes will not abate a suit properly brought and previously prosecuted to judgment before a referee; Pyro-Gravure Co. v. Staber, 30 Misc. 658, 64 N. Y. Supp. 520.

Public Officers. Where a commission created by state law is abolished during the pendency of a suit against it, the officers who are by law authorized to wind up its business are proper parties against whom there may be proceedings for revival; Hemingway v. Stansell, 106 U. S. 399, 1 Sup. Ct. 473, 27 L. Ed. 245. A suit against a public officer in his official capacity does not as a general rule abate by reason of a change in the incumbent of the office; Murphy v. Utter, 186 U. S. 95, 22 Sup. Ct. 776, 46 L. Ed. 1070; Sheehan v. Osborn, 138 Cal. 512, 71 Pac. 622; Nance v. People, 25 Colo. 252, 54 Pac. 631; People v. Coleman, 99 App. Div. 88, 91 N. Y. Supp. 432; nor does a suit by a sheriff for conversion of goods levied by him; Dickinson v. Oliver, 112 App. Div. 806, 99 N. Y. Supp. 432; but a suit against the Secretary of the Interior to compel the issue of patents for public lands, does abate on his resignation; Warner Valley Stock Co. v. Smith, 165 U. S. 28, 17 Sup. Ct. 225, 41 L. Ed. 621; and so does a suit against a town treasurer if his successor is not made a party in due time; Saunders v. Pendleton, 19 R. I. 659, 36 Atl. 425.

A suit against a receiver does not abate by reason of his discharge; Baer v. McCullough, 176 N. Y. 97, 68 N. E. 129; Dougherty v. King, 165 N. Y. 657, 59 N. E. 1121; or his death; Pickett v. Fidelity & Casualty Co., 60 S. C. 477, 38 S. E. 160; nor of an order to return the property to the corporation owner; Cowen v. Merriman, 17 App. D. C. 186.

When, pending suit by a guardian, the heir comes of age, there is no abatement and no need of revival; the guardian may be discharged; Shattuck v. Wolf, 72 Kan. 366, 83 Pac. 1093.

Coverture of the plaintiff is pleadable in abatement; Com. Dig. Abt. E, 6; Bac. Abr. Abt. G; Co. Litt. 132; 3 Term 631; 1 Chit. Pl. 439; Hayden v. Attleborough, 7 Gray (Mass.) 338; though occurring after suit brought; 3 Bla. Com. 316; Bac. Abr. Abt. 9; Wilson v. Hamilton, 4 S. & R. (Pa.) 238; Newell v. Marcy, 17 Mass. 342; 6 Term 265; Gerard v. Pierce, 5 N. C. 161; Guphill v. Isbell, 1 Bailey (S. C.) 369; and see Hastings v. McKinley, 1 E. D. Sm. (N. Y.) 273; but not after plea in bar, unless the marriage arose after the plea in bar; Northum v. Kellogg, 15 Conn. 569; but in that case the defendant must not suffer a continuance to intervene between the happening of this new matter, or its coming to his knowledge, and his pleading it; McCoul v. Lekamp, 2 Wheat. (U. S.) 111, 4 L. Ed. 197; Swan v. Wilkinson, 14 Mass. 295; Templeton v. Clary, 1 Blackf. (Ind.) 288; Perry v. Boileau, 10 S. & R. (Pa.) 208; Lyman v. Albee, 7 Vt. 508; Gatewood v. Tunk, 3 Bibb (Ky.) 246. And it cannot be otherwise objected to if she sues for a cause of action that would survive to her on the death of her husband; 12 M. & W. 97; Perry v. Boileau, 10 S. & R. (Pa.) 208. An action for damages for assault by a female plaintiff does not abate on her marriage; Stevens v. Friedman, 58 W. Va. 78, 51 S. E. 132. Where she sues, not having any interest, the defence is one of substance, and may be pleaded in bar, by demurrer, or on the general issue; 4 Term 361; 1 H. Bla. 108; Cro. Jac. 644, whether she sues jointly or alone. So also where coverture avoids the contract or instrument, it is matter in bar; Steer v. Steer, 14 S. & R. (Pa.) 379.

Where a *feme covert* is sued without her husband for a cause of action that would survive against her, as upon a contract made before, or a tort committed after, marriage, the coverture is pleadable in abatement; 3 Term 626; and not otherwise; 9 M. & W. 299; Com. Dig. Abt. F, 2. If the marriage takes place pending the action, it cannot be pleaded; 2 Ld. Raym. 1525; Crockett v. Ross, 5 Greenl. (Me.) 445; City Council v. Van Roven, 2 McCord (S. C.) 469. It must be pleaded by the *feme* in person; 2 Saund. 209 *b*. Any thing which suspends the coverture suspends also the right to plead it; Com. Dig. Abt. F, 2, § 3; Co. Litt. 132 *b;* 1 B. & P. 358; Gregory v. Paul, 15 Mass. 31. Marriage of a female defendant in error after writ has been duly served, will not abate suit, but it will proceed as if she were still unmarried; United States Mut. Acc. Ass'n v. Weller, 30 Fla. 210, 11 South. 786.

Death of the plaintiff before purchase of the writ may be pleaded in abatement; 1 Archb. C. P. 304; Com. Dig. Abt. E, 17; Camden v. Robertson, 2 Scam. (Ill.) 507; Hurst v. Fisher, 1 W. & S. (Pa.) 438; Humphreys v. Irvine, 6 Smedes & M. (Miss.) 205. Alexander v. Davidson, 2 McMul. (S. C.) 49 So may the death of a sole plaintiff who dies pending his suit at common law; Bac. Abr. Abt. F; Archer v. Colly, 4 Hen. & M. (Va.) 410; Livingston v. Abel, 2 Root (Conn.) 57; Smith v. Manning, 9 Mass. 422; Drago v. Stead, 2 Rand. (Va.) 454; Ryder v. Robinson, 2 Greenl. (Me.) 127. Otherwise now by statute, in most cases, in most if not all the states, and in England since 1852. Under some statutes the right to revive depends upon the exercise of a sound discretion by the court; Hayden v. Huff, 62 Neb. 375, 87 N. W. 184; Beach v. Reynolds, 64 Barb. (N. Y.) 506.

The right to revive an action is solely a statutory right; Ashby v. Harrison's Committee, 1 Pat. & H. (Va.) 1. It is a question of right, not of procedure, and is governed by the *lex fori;* Martin's Adm'r v. R. Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311; Baltimore & O. R. Co. v. Joy, 173 U. S. 226,

19 Sup. Ct. 387, 43 L. Ed. 677; Martin v. R. Co., 142 Fed. 650, 73 C. C. A. 646, 6 Ann. Cas. 582; Sanders' Adm'x v. R. Co., 111 Fed. 708, 49 C. C. A. 565; Richardson v. R. Co., 98 Mass. 85; Mexican Cent. Ry. Co. v. Goodman, 20 Tex. Civ. App. 109, 48 S. W. 778; Austin's Adm'r v. Ry. Co., 122 Ky. 304, 91 S. W. 742, 5 L. R. A. (N. S.) 756; Stratton's Independence v. Dines, 126 Fed. 968; Whitten v. Bennett, 77 Fed. 271.

It was held that the death of the sole complainant did not abate the suit if the cause of action survives; Keep v. Crawford, 92 Ill. App. 587; but, even where there is a statutory provision for revival all proceedings are suspended until it is complied with; King v. Mitchell, 83 Ill. App. 632, judgment affirmed 187 Ill. 452, 58 N. E. 310; Street v. Smith, 75 Neb. 434, 106 N. W. 472. Death of either party abates a divorce case; Bell v. Bell, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. Ed. 804; McCurley v. McCurley, 60 Md. 189, 45 Am. Rep. 717; In re Crandall, 196 N. Y. 127, 89 N. E. 578, 134 Am. St. Rep. 830, 17 Ann. Cas. 874; L. R. 11 P. Div. 103. The personal representatives are usually authorized to act in such cases. The personal representatives of a deceased plaintiff are the proper parties to revive in replevin; Rexroad v. Johnson, 4 Kan. App. 333, 45 Pac. 1008; a suit to redeem property from a tax sale; Clark v. Lancy, 178 Mass. 460, 59 N. E. 1034, foreclosure of mortgage; Van Brocklin v. Van Brocklin, 17 App. Div. 226, 45 N. Y. Supp. 541 (but see Stancill v. Spain, 133 N. C. 76, 45 S. E. 466, where heirs at law or devisees were held necessary parties); on a delivery bond by a deputy sheriff (he having no official successor in office); Tucker v. Potter, 22 R. I. 4, 45 Atl. 741; ejectment, when the land was devised to the executor in trust to sell and dispose of the proceeds; Bell's Adm'r v. Humphrey, 8 W. Va. 1; an action on a sick benefit policy; Columbian Relief Fund Ass'n v. Walker, 26 Ind. App. 25, 59 N. E. 36; an action for personal injuries, commenced by the deceased, though assigned by him; McCafferty v. R. Co., 193 Pa. 339, 44 Atl. 435, 74 Am. St. Rep. 690; suit under contract for service stipulating payment for passage back to France; Bethmont v. Davis, 11 Mart. O. S. (La.) 195; a suit by a married man against a railroad company for damages to homestead; Southern Ry. Co. v. Cowan, 129 Ala. 577, 29 South. 985; trespass by two, where one dies; Rowe v. Lumber Co., 133 N. C. 433, 45 S. E. 830; an action for damages to land, if permitted to survive at all (but see *infra*); Mast v. Sapp, 140 N. C. 533, 53 S. E. 350, 5 L. R. A. (N. S.) 379, 111 Am. St. Rep. 864, 6 Ann. Cas. 384; an action for rescission of contract to cut and remove timber; Isham v. Stave Co., 25 Oh. Cir. Ct. 167.

The heir at law or devisee is the proper party to revive in an action for injury to real estate; Texas & N. O. R. Co. v. Smith, 35 Tex. Civ. App. 351, 80 S. W. 247.

If the cause of action is such that the right dies with the person, the suit still abates. By statute 8 & 9 Wm. IV. ch. 2, sect. 7, which is understood to enact the common-law rule, where the form of action is such that the death of one of several plaintiffs will not change the plea, the action does not abate by the death of any of the plaintiffs pending the suit.

The death of both parties does not abate an action under a statute providing that no action shall abate if the cause of action survives; McNulta v. Huntington, 62 App. Div. 257, 70 N. Y. Supp. 897; or under one providing that actions for injury to property shall survive; Northern Trust Co. v. Palmer, 171 Ill. 383, 49 N. E. 553, in cases meeting those conditions respectively.

A Code provision forbidding dismissal of a cause by plaintiff without consent of defendant, does not affect the right of revival by personal representatives of plaintiff after his death; Kinzie v. Riely's Ex'r, 100 Va. 709, 42 S. E. 872.

In some cases where an action is saved by statute from abatement on death of plaintiff, the court may permit the continuance of the action by his successor in interest; Overall v. Traction Co., 112 Mo. App. 224, 90 S. W. 402.

The death of the lessor in ejectment never abates the suit; Frier v. Jackson, 8 Johns. (N. Y.) 495; Ex parte Swan, 23 Ala. 193; Thomas v. Kelly, 35 N. C. 43; Hatfield v. Bushnell, 1 Blatchf. 393, Fed. Cas. No. 6,211; his heirs are properly substituted on defendant's petition; Ballantine v. Negley, 158 Pa. 475, 27 Atl. 1051.

In Wasserman v. United States, 161 Fed. 722, 88 C. C. A. 582, it was held that the fine of one found guilty of contempt, who had sued out a writ of error, but died before the submission of the case to the higher court, should be considered as a charge against the estate, and that the action did not abate by death.

On death of administrator bringing suit it may be revived by his administrator or by administrator *de bonis non;* Wood v. Tomlin, 92 Tenn. 514, 22 S. W. 206. In Missouri an action for personal injuries cannot be revived by the administrator after plaintiff's death; Davis v. Morgan, 97 Mo. 79, 10 S. W. 881; nor is such action impliedly saved in West Virginia by the statute giving a right of action after death to the personal representatives; Martin v. R. Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311. In New York a statutory cause of action for death by negligence abates by the death of the wrongdoer; Hegerich v. Keddie, 99 N. Y. 258, 1 N. E. 787, 52 Am. Rep. 25. In Maryland an action by husband to recover damages for the killing of his wife, abates on his death; Harvey v. R. Co., 70 Md. 319, 17 Atl. 88; but in Texas a suit by a husband for personal injury to his wife may be continued by her after

his death; Mexican Cent. Ry. Co. v. Goodman, 20 Tex. Civ. App. 109, 48 S. W. 778; and the remedy of a son for his own suffering caused by mutilation of his father's body, is by new action, and not by substitution of himself as plaintiff after the death of his mother in a suit begun by her for her own suffering; Jones v. Miller, 35 Wash. 499, 77 Pac. 811. On the death of a father suing for an injury causing the death of his daughter, her administratrix may revive; Meekin v. R. Co., 164 N. Y. 145, 58 N. E. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635.

The death of a party pending an audit causes a mistrial and new parties must be brought in and the case tried *de novo*, Carroll v. Barber, 119 Ga. 856, 47 S. E. 181.

The death of plaintiff after judgment and pending motion for a new trial, does not abate the suit; Fowden v. S. S. Co., 149 Cal. 151, 86 Pac. 178; and a decree in equity in favor of husband and wife, after the death of the husband survives to the wife, though she was not a necessary party; Edgerton v. Muse, Dud. Eq. (S. C.) 179. Where a judgment on a cause of action which does not survive was recovered against a decedent and another, it abates as to the former; Hammond v. Hoffman, 2 Redf. (N. Y.) 92.

On the death of one of three partners plaintiff the remaining two may prosecute to final judgment in their own names; Davis v. Davis, 93 Ala. 173, 9 South. 736.

An action by two tenants in common, after the death of one who bequeathed to the survivor his interest in a pending action and made him executor, may be continued by him for damages sustained by both; McPhillips v. Fitzgerald, 177 N. Y. 543, 69 N. E. 1126. Under U. S. Rev. Stat. § 956, providing that an action may be continued by a surviving plaintiff against a surviving defendant without abatement, where the cause of action survives to the surviving plaintiff or against the surviving defendant, an administrator can neither continue nor defend the action; Fox v. Mackay, 1 Alaska 329.

The death of sole defendant pending an action abates it; Bac. Abr. Abt. F; anonymous, 2 N. C. 500; McKee v. Straub, 2 Binn. (Pa.) 1; Carter v. Carr, 1 Gilm. (Va.) 145; Farmer v. Frey, 4 McCord (S. C.) 160; Macker v. Thomas, 7 Wheat. (U. S.) 530, 5 L. Ed. 515; Nutz v. Reutter, 1 Watts (Pa.) 229; Mellen v. Baldwin, 4 Mass. 480; Merritt v. Lumbert, 8 Greenl. (Me.) 129; Petts v. Ison, 11 Ga. 151, 56 Am. Dec. 419; but not after a finding for the plaintiff; Wilkins v. Wainwright, 173 Mass. 212, 53 N. E. 397; or because of the death of a party after verdict; Laidley v. Jasper, 49 W. Va. 526, 39 S. E. 169; but the death of defendant after decision, but before judgment, abates the suit; Fox v. Hopkinson, 19 R. I. 704, 36 Atl. 824. After abatement by reason of the death of defendant, the duty of instituting proceedings for revival rests upon the plaintiff and not on the other defendants; Wilkinson v. Vordermark, 32 Ind. App. 633, 70 N. E. 538; Jameson v. Bartlett, 63 Neb. 638, 88 N. W. 860. When the defendant dies before service, no jurisdiction has attached and the executor cannot be made a party; Connaway v. Overton, 98 Fed. 574; Crowdus' Adm'r v. Harrison, 9 Ky. L. Rep. 58.

An action against a surgeon for malpractice abates with the death of the defendant, whatever the form of the action; Boor v. Lowrey, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519.

But where one of several co-defendants dies pending the action, his death is in general no cause of abatement, even by common law; Cro. Car. 426; Bac. Abr. Abt. F; Gould, Pl. ch. 5, § 93; Tucker v. Utley, 168 Mass. 415, 47 N. E. 198. If the cause of action is such as would survive against the survivor or survivors, the plaintiff may proceed by suggesting the death upon the record; Torry v. Robertson, 24 Miss. 192; Gould, Pl. ch. 5, § 93. Where one of several plaintiffs or defendants in error dies, the suit does not abate or require a revival in the Supreme Court; Prior v. Kiso, 96 Mo. 316, 9 S. W. 898. The inconvenience of abatement by death of parties was remedied by 17 Car. II, ch. 8, and 8 & 9 Wm. III. ch. 2, ss. 6, 7. In the U. S., on the death of a sole defendant, his personal representatives may be substituted if the action could have been originally prosecuted against them; Gould, Pl. ch. 5, § 95. The common law rule is that the right of action against a tort-feasor dies with him; Jones v. Barmm, 217 Ill. 381, 75 N. E. 505; Hedekin v. Gillespie, 33 Ind. App. 650, 72 N. E. 143; Stratton's Independence v. Dines, 135 Fed. 449, 68 C. C. A. 161; and such death should be pleaded in abatement; O'Conner v. Corbitt, 3 Cal. 370. Many exceptions to this rule exists by statute. When a party has been so long dead as to require consent to revive, which is refused, it abates; New Hampshire Banking Co. v. Ball, 57 Kan. 812, 48 Pac. 137.

As to the effect of death of parties on suit, see 5 L. Ed. 256, note. And as to the survival of personal actions after the death of the plaintiff, see ACTIO PERSONALIS MORITUR CUM PERSONA. As to the effect of the death of a party in suits for divorce, see that title.

Infancy is pleadable in abatement to the person of the plaintiff, unless the infant appear by guardian or *prochein ami;* Co. Litt. 135 *b*; 2 Saund. 117; 3 Bla. Com. 301; Schemerhorn v. Jenkins, 7 Johns. (N. Y.) 373; Hinman v. Taylor, 2 Conn. 357; Blood v. Harrington, 8 Pick. (Mass.) 552. He cannot appear by attorney, since he cannot make a power of attorney; 3 Saund. 212; Young v. Young, 3 N. H. 345; Blood v. Harrington, 8 Pick. (Mass.) 552; Smith v. Van Houten, 9 N. J. L. 381; Schemerhorn v. Jenkins, 7 Johns. (N. Y.) 373. The death of the next friend bringing suit for minors does not

abate suit, nor does the attainment of majority by minors; Tucker v. Wilson, 68 Miss. 693, 9 South. 898. Where an infant sues as co-executor with an adult, both may appear by attorney, for, the suit being brought *in autre droit*, the personal rights of the infant are not affected, and therefore the adult is permitted to appoint an attorney for both; 3 Saund. 212; Cro. Eliz. 542. At common law, judgment obtained for or against an infant plaintiff who appears by attorney, no plea being interposed, may be reversed by writ of error; 1 Rolle, Abr. 287; Cro. Jac. 441. By statute, however, such judgment is valid, if for the infant; 3 Saund. 212 (n. 5). A suit by a guardian to compel an accounting by a guardian *ad litem* does not abate by reason of the death of the guardian or the majority of the ward; Smith v. Mingey, 72 App. Div. 103, 76 N. Y. Supp. 194, order affirmed 172 N. Y. 650, 65 N. E. 1122.

Imprisonment. A sentence to imprisonment in New York, either of plaintiff or defendant, abates the action by statute; Graham v. Adams, 2 Johns. Cas. (N. Y.) 408; O'Brien v. Hagan, 1 Duer (N. Y.) 664; but see Davis v. Duffie, 8 Bosw. (N. Y.) 617.

Lunacy. A lunatic may appear by attorney, and the court will on motion appoint an attorney for him; Faulkner v. McClure, 18 Johns. (N. Y.) 134. But a suit brought by a lunatic under guardianship shall abate; Collard v. Crane, Brayt. (Vt.) 18; but it is held that a suit brought by the committee of an insane person may be revived by the administrator of the latter after his death; Straight v. Ice, 56 W. Va. 60, 48 S. E. 837. *Quære* whether suit against committee of an insane person may be revived against the administrators of such person; Paradise's Adm'rs v. Cole, 6 Munf. (Va.) 218.

Mandamus, when brought against a public officer, is a personal action which abates at his death or retirement from office, and his successor cannot be substituted without statutory authority; U. S. v. Butterworth, 169 U. S. 600, 18 Sup. Ct. 441, 42 L. Ed. 873, citing the prior cases.

Misjoinder. The joinder of improper plaintiffs may be pleaded in abatement; Archb. C. Pl. 304; 1 Chit. Pl. 8. Advantage may also be taken, if the misjoinder appear on record, by demurrer in arrest of judgment, or by writ of error. If it does not appear in the pleadings, it would be ground of non-suit on the trial; 1 Chit. Pl. 66. Misjoinder of defendants in a personal action is not subject of a plea in abatement; Wooten & Co. v. Nall, 18 Ga. 609; Archb. C. Pl. 68, 310; Durgin v. Smith, 115 Mich. 239, 73 N. W. 361; otherwise where there is found to be no joint liability; Wright v. Reinelt, 118 Mich. 638, 77 N. W. 246. When an action is thus brought against two upon a contract made by one, it is a good ground of defence under the general issue; Clayt. 114; Anderson v. Henshaw, 2 Day (Conn.) 272; Diblee v. Best, 11 Johns. (N. Y.) 104; 1 Esp. 363; for in such case the proof disproves the declaration. If several are sued for a tort committed by one, such misjoinder is no ground of objection in any manner, as of co-defendants in actions *ex delicto*, some may be convicted and others acquitted; 1 Saund. 291. In a real action against several persons, they may plead several tenancy; that is, that they hold in severalty, not jointly; Com. Dig. Abt. F, 12; or one of them may take the entire tenancy on himself, and pray judgment of the writ; Com. Dig. Abt. F, 13. Misjoinder of action is waived unless taken before defence; Organ v. R. Co., 51 Ark. 235, 11 S. W. 96. Where a husband is improperly joined in an action concerning his wife's separate interest in land, the action should be abated; West v. Adams (Va.) 27 S. E. 496.

Misnomer of plaintiff, where the misnomer appears in the declaration, must be pleaded in abatement; Jewett v. Burroughs, 15 Mass. 469; Porter v. Cresson, 10 S. & R. (Pa.) 257; State v. Dines, 10 Humphr. (Tenn.) 512; Barnes v. Perine, 9 Barb. (N. Y.) 202; Proprietors of Sunapee v. Eastman, 32 N. H. 470; American Bank v. Doolittle, 14 Pick. (Mass.) 123; Trull v. Howland, 10 Cush. (Mass.) 109, 57 Am. Dec. 82; and he must disclose his true name and thereby enable the plaintiff to amend his writ; Com. v. Lewis, 1 Metc. (Mass.) 151; McCrory v. Anderson, 103 Ind. 12, 2 N. E. 211; and where parties were improperly joined in suit on covenants of indemnity and the only relief was in equity, under the statute, the action was abated as to them only; McIlvane v. Lumber Co., 105 Va. 613, 54 S. E. 473. It is a good plea in abatement that the party sues by his surname only; Chappell v. Proctor, Harp. (S. C.) 49; Labat v. Ellis, 1 N. C. 172; Seely v. Boon, 1 N. J. L. 138. A mistake in the Christian name is ground for abatement; Moss v. Flint, 13 Ill. 570; or where the initials merely are used; Smith v. Barrett, Morris (Ia.) 492; City of Menominee v. Lumber Co., 119 Mich. 196, 77 N. W. 704. In England the effect of pleas in abatement of misnomer has been diminished by statute 3 & 4 Wm. IV. ch. 42, s. 11, which allows an amendment at the cost of the plaintiff. The rule embodied in the English statute prevails in this country.

If the defendant is sued or declared against by a wrong name, he may plead the mistake in abatement; 3 Bla. Com. 302; 3 East 167; Bac. Abr. D; Louisville & N. R. Co. v. Hall, 12 Bush (Ky.) 131; and in abatement only, Thompson v. Elliott, 5 Mo. 118; Salisbury v. Gillett, 2 Scam. (Ill.) 290; Melvin v. Clark, 45 Ala. 285; Carpenter v. State, 8 Mo. 291; Com. v. Lewis, 1 Metc. (Mass.) 151; but one defendant cannot plead the misnomer of another, Com. Dig. Abt. F, 18; Archb. C. P. 312; 1 Nev. & P. 26. But if having been sued by the wrong name, he is served with process, and fails to plead the misnomer in

abatement, he will be bound by the judgment; Bloomfield R. Co. v. Burress, 82 Ind. 83. And a corporation setting up a misnomer in its answer, but failing to state its true name, will be bound by a judgment against it in the name by which it was sued; Louisville & N. R. Co. v. Hall, 12 Bush (Ky.) 131.

The omission of the initial letter between the Christian and surname of the party is not a misnomer or variance; Franklin v. Talmadge, 5 Johns. (N. Y.) 84. Since oyer of the writ has been prohibited, the misnomer must appear in the declaration; Williard v. Missani, 1 Cow. (N. Y.) 37. Misnomer of defendant was never pleadable in any other manner than in abatement; Thompson v. Elliott, 5 Mo. 118; Salisbury v. Gillett, 2 Scam. (Ill.) 290; Melvin v. Clark, 45 Ala. 285; Carpenter v. State, 8 Mo. 291; Com. v. Lewis, 1 Metc. (Mass.) 151. In England this plea has been abolished; 3 & 4 Wm. IV. ch. 42, s. 11. And in the states, generally, the plaintiff is allowed to amend a misnomer. The misnomer of one of two defendants, as to his Christian name, if material at all when sued as a firm, must be taken advantage of by plea in abatement; Whittier v. Gould, 8 Watts (Pa.) 485.

In criminal practice the usual pleas in abatement are for misnomer. If the indictment assigns to the defendant no Christian name, or a wrong one, no surname, or a wrong one, he can only object to this matter by a plea in abatement; 2 Gabb. Cr. L. 327. As to the evidence necessary in such case, see 1 M. & S. 453; 3 Greenl. Ev. § 221.

Non-joinder. If one of several joint tenants sue, Co. Litt. 180 *b*; Bacon, Abr. *Joint Tenants*, K; 1 B. & P. 73; one of several joint contractors, in an action *ex contractu*, Archb. C. P. 48, 53; one of several partners, Puschel v. Hoover, 16 Ill. 340; Bellas v. Fagely, 19 Pa. 273; one of several joint executors who have proved the will, or even if they have not proved the will; Newton v. Cocke, 10 Ark. 169; 1 Chit. Pl. 12, 13; one of several joint administrators; *id.* 13; the defendant may plead the non-joinder in abatement; Com. Dig. Abt. E; 1 Chit. Pl. 12. The omission of one or more of the owners of the property in an action *ex delicto* is pleaded in abatement; Chandler v. Spear, 22 Vt. 388; Weare v. Burge, 32 N. C. 169; Morley v. French, 2 Cush. (Mass.) 130; Reading R. R. v. Boyer, 13 Pa. 497; Edwards v. Hill, 11 Ill. 22. Dormant partners may be omitted in suits on contracts to which they are not privy; Clark v. Miller, 4 Wend. (N. Y.) 628; Wilson v. Wallace, 8 S. & R. (Pa.) 55; Lord v. Baldwin, 6 Pick. (Mass.) 352; Clarkson v. Carter, 3 Cow. (N. Y.) 85. A non-joinder may also be taken advantage of in actions *ex contractu*, at the trial, under the general issue, by demurrer, or in arrest of judgment, if it appears on the face of the pleadings; Armine v. Spencer, 4 Wend. (N. Y.) 409.

Non-joinder of a person as defendant who is jointly interested in the contract upon which the action is brought can only be taken advantage of by plea in abatement; 5 Term 651; 3 Campb. 50; Robertson v. Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227; Hine v. Houston, 2 G. Greene (Ia.) 161; Johnson v. Ransom, 24 Conn. 531; Potter v. McCoy, 26 Pa. 458; Gove v. Lawrence, 24 N. H. 128; Merrick v. Bank, 8 Gill (Md.) 59; Henderson v. Hammond, 19 Ala. 340; Mershon v. Hobensack, 22 N. J. L. 372; Com. v. Davis, 9 B. Monr. (Ky.) 129; Beasley v. Allan, 23 Ga. 600; Prunty v. Mitchell, 76 Va. 169; unless the mistake appear from the plaintiff's own pleadings, when it may be taken advantage of by demurrer or in arrest of judgment; 1 Saund. 271; Robertson v. Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227. Non-joinder of a co-tenant may be pleaded when the suit respects the land held in common; Southard v. Hill, 44 Me. 92, 69 Am. Dec. 85; State v. Townsend, 2 Harring. (Del.) 277. When the contract is several as well as joint, the plaintiff is at liberty to proceed against the parties separately or jointly; and where one member of a firm is sued separately on an endorsement, the liability being joint and several, he may have the other partners made parties but cannot abate the suit for their non-joinder; Jameson v. Smith, 19 Tex. Civ. App. 90, 46 S. W. 864. In actions of tort the plaintiff may join the parties concerned in the tort, or not, at his election; 1 Saund. 291; 3 B. & P. 54; Gould, Pl. ch. 2, § 118. The non-joinder of any of the wrongdoers is no defence in any form of action; Buddington v. Shearer, 22 Pick. (Mass.) 427.

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

Pendency of another action must be pleaded in abatement and not in bar; Mattel v. Conant, 156 Mass. 418, 31 N. E. 487; Central Railroad & Banking Co. v. Coleman, 88 Ga. 294, 14 S. E. 382; Danforth v. R. Co., 93 Ala. 614, 11 South. 60; and the judgment of the court below thereon is not subject to review; Stephens v. Bank, 111 U. S. 197, 4 Sup. Ct. 336, 28 L. Ed. 399. But where two or more tribunals have concurrent jurisdiction on the same subject-matter between the same parties, a suit commenced in any one of them is a bar to an action for the same cause in any other; Shelby v. Bacon, 10 How. (U. S.) 56, 13 L. Ed. 326. The rule in equity is analogous to the rule at law; Insurance Co. v. Brune, 96 U. S. 588, 24 L. Ed. 737; but it is

no ground for abatement of an action at law, that a suit in equity is pending between the same parties for the same money where the result of the action at law may be required to perfect the decree in equity; Kittredge v. Race, 92 U. S. 116, 23 L. Ed. 488. Prior pendency of an action unless both are in the same jurisdiction is not cause for abatement; O'Reilly v. R. Co., 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244, 5 L. R. A. 364, 6 L. R. A. 719; Stanton v. Embry, 93 U. S. 548, 23 L. Ed. 983. It must be the same cause, founded on the same facts, between the same parties, for the same rights and the same relief; Watson v. Jones, 13 Wall. (U. S.) 679, 20 L. Ed. 666; Marchand v. Frellsen, 105 U. S. 423, 26 L. Ed. 1057; Spencer v. Johnston, 58 Neb. 44, 78 N. W. 482; Kansas City S. Ry. Co. v. Railroad Commission, 106 La. 583, 31 South. 131; Richardson v. Opelt, 60 Neb. 180, 82 N. W. 377. Pendency of suit in a state court is no ground for a plea in abatement to a suit upon same cause in a Federal court; Wilcox & Gibbs Guano Co. v. Ins. Co., 61 Fed. 199; Piquignot v. R. Co., 16 How. (U. S.) 104, 14 L. Ed. 863; and see Gordon v. Gilfoil, 99 U. S. 168, 25 L. Ed. 383; but see Wallace v. McConnell, 13 Pet. (U. S.) 136, 10 L. Ed. 95; Hunt v. Cotton Exchange, 205 U. S. 322, 27 Sup. Ct. 529, 51 L. Ed. 821; Barnsdall v. Waltemeyer, 142 Fed. 415, 73 C. C. A. 515; Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 C. C. A. 288; Barber Asphalt Pav. Co. v. Morris, 132 Fed. 945, 66 C. C. A. 55, 67 L. R. A. 761; City of Mankato v. Paving Co., 142 Fed. 329, 73 C. C. A. 439; Gamble v. City of San Diego, 79 Fed. 487; but the latter court will stay proceedings until the other suit is determined; Zimmerman v. So Relle, 80 Fed. 417, 25 C. C. A. 518; Bunker Hill & S. Mining & C. Co. v. Mining Co., 109 Fed. 504, 47 C. C. A. 200; or compel an election; Insurance Co. v. Brune, 96 U. S. 588, 24 L. Ed. 737. Pendency of prior suit in one state cannot be pleaded in abatement of suit for same cause and between same parties in another state; Sandwich Mfg. Co. v. Earl, 56 Minn. 390, 57 N. W. 938; Renner v. Marshall, 1 Wheat. (U. S.) 215, 4 L. Ed. 74; nor is a libel of a vessel, under the Chinese Exclusion Act, for smuggling opium, barred by a prior libel for similar offenses in another Federal Court; The Haytian Republic, 154 U. S. 118, 14 Sup. Ct. 992, 38 L. Ed. 930. Pendency of a suit in a foreign country between the same parties and for same cause would not bar or abate an action; Insurance Co. v. Brune, 96 U. S. 588, 24 L. Ed. 737; Stanton v. Embry, 93 U. S. 548, 23 L. Ed. 983, 42 L. R. A. 449, note; Crossman v. Rubber Co., 60 N. Y. Super. Ct. 68, 16 N. Y. Supp. 609; Harvey v. R. Co., 50 Minn. 405, 52 N. W. 905, 17 L. R. A. 84; North British Mercantile Ins. Co. v. Bank, 3 Tex. Civ. App. 293, 22 S. W. 992. A good answer to plea in abatement of pendency of prior suit, is that such action has been dismissed since trial of second action began; Moore v. Hopkins, 83 Cal. 270, 23 Pac. 318, 17 Am. St. Rep. 248; Nichols v. Clark, 45 Minn. 102, 47 N. W. 462; Warder v. Henry, 117 Mo. 530, 23 S. W. 776; Clark v. Comford, 45 La. Ann. 502, 12 South. 763.

Privilege of defendant from being sued may be pleaded in abatement; Marr v. Johnson, 9 Yerg. (Tenn.) 1; Bac. Abr. Abt. C. See PRIVILEGE. A peer of England cannot, as formerly, plead his peerage in abatement of a writ of summons; 2 Wm. IV. ch. 39. It is a good cause of abatement that the defendant was arrested at a time when he was privileged from arrest; Hubbard v. Sanborn, 2 N. H. 468; Legrand v. Bedinger, 4 T. B. Monr. (Ky.) 539; or that he was served with process when privileged from suits; Van Alstyne v. Dearborn, 2 Wend. (N. Y.) 586; Halsey v. Stewart, 4 N. J. L. 366; Greening v. Sheffield, Minor (Ala.) 276; but a statute allowing such plea applies not to persons improvidently arrested, but only to the privileged classes; Bank of Vergennes v. Barker, 27 Vt. 243. The privilege of defendant as member of the legislature has been pleaded in abatement; King v. Colt, 4 Day (Conn.) 129; but the privilege of a non-resident witness cannot be; Wilkins' Adm'r v. Brock, 79 Vt. 57, 64 Atl. 232.

For cases where the defendant may plead non-tenure, see Archb. C. P. 310; Cro. Eliz. 559; Manning v. Laboree, 33 Me. 343.

Where he may plead a disclaimer, see Archb. C. P.; Com. Dig. Abt. F, 15; Mills v. Peirce, 2 N. H. 10.

PLEAS IN ABATEMENT TO THE COUNT required oyer of the original writ; and, as this cannot now be had, these pleas are, it seems, abolished; 1 Chit. Pl. 405 (6th Lond. ed.); Saund. Pl. *Abatement.*

PLEAS IN ABATEMENT OF THE WRIT.—In general, any irregularity, defect, or informality in the terms, form, or structure of the writ, or mode of issuing it, is a ground of abatement; Gould, Pl. ch. 5, s. 132. Among them may be enumerated want of date, or impossible date; want of venue, or, in local actions, a wrong venue; a defective return; Gould, Pl. ch. 5, s. 133. Oyer of the writ being prohibited, these errors cannot be objected to unless they appear in the declaration, which is presumed to correspond with the writ; Campbell v. Chaffee, 6 Fla. 724; 3 B. & P. 399; 14 M. & W. 161. The objection then is to the writ through the declaration; 1 B. & P. 648; there being no plea to the declaration alone, but in bar; 2 Saund. 209. A variance between writ and declaration may properly be pleaded in abatement; Weld v. Hubbard, 11 Ill. 573; Pierce v. Lacy, 23 Miss. 193.

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

Those of the first description were formerly either for matter apparent on the face of

the writ, or for matter *dehors;* Com. Dig. Abt. H, 17.

Pleas in abatement to the form of the writ were formerly allowed for very trifling errors apparent on the face of the writ; 2 B. & P. 395, but since oyer has been prohibited, have fallen into disuse; Tidd, Pr. 636.

Pleas in abatement of the form of the writ are now principally for matters *dehors;* Com. Dig. Abt. H, 17; existing at the time of suing out the writ, or arising afterwards; such as misnomer of the plaintiff's or defendant's name; Tidd, Pr. 637.

Pleas in Abatement to the Action of the Writ are that the action is misconceived, as if assumpsit is brought instead of *account*, or trespass when case is the proper action; 1 Show. 71; Tidd, Pr. 579; or that the right of action had not accrued at the commencement of the suit; Cro. Eliz. 325; Com. Dig. *Action*, E, 1. But these pleas are unusual, since advantage may be taken for the same reasons on demurrer or under the general issue; Gould, Pl. ch. 5, s. 137; 1 C. & M. 492, 768.

Variance. Where the count varies from the writ, or the writ varies from the record or instrument on which the action is brought, it is pleadable in abatement; Cro. Eliz. 722; 1 H. Bla. 249; McNeill v. Arnold, 17 Ark. 154; Carpenter v. Hoyt, 17 Ill. 529; Smith v. Butler, 25 N. H. 521; and not otherwise; Lovell v. Doble, Quincy (Mass.) 88. If the variance is only in matter of mere form, as in time or place, when that circumstance is immaterial, advantage can be taken only by plea in abatement; Riley v. Murray, 8 Ind. 354; Cruikshank v. Brown, 5 Gilman (Ill.) 75; Latch 173; Gould, Pl. ch. 5, s. 97. But if the variance is in matter of substance, as if the writ sounds in contract and the declaration in tort, advantage may also be taken by motion in arrest of judgment; Pitman v. Perkins, 28 N. H. 90; Cro. Eliz. 722. Pleas under this head have been virtually abolished by the rule refusing oyer of the writ; and the operation of this rule extends to all pleas in abatement that cannot be proved without examination of the writ; Gould, Pl. ch. 5, s. 101. It seems that oyer of the writ is allowed in some of the states which retain the old system of pleading, as well as in those which have adopted new systems. In such states these rules as to variance are of force; Pitman v. Perkins, 28 N. H. 90; Carpenter v. Hoyt, 17 Ill. 529; Chapman v. Spence, 22 Ala. 588; Pierce v. Lacy, 23 Miss. 193; Riley v. Murray, 8 Ind. 354; Lary v. Evans, 35 N. H. 172; McNeill v. Arnold, 17 Ark. 154; Giles v. Perryman, 1 Harr. & G. (Md.) 164; White v. Walker, 1 T. B. Monr. (Ky.) 35; Chirac v. Reinicker, 11 Wheat. (U. S.) 280, 6 L. Ed. 474; Garland v. Chattle, 12 Johns. (N. Y.) 430; President, etc., of Bank of New Brunswick v. Arrowsmith, 9 N. J. L. 284. See VARIANCE.

QUALITIES OF PLEAS IN ABATEMENT. The defendant may plead in abatement to part, and demur or plead in bar to the residue, of the declaration; 2 Saund. 210. The general rule is that whatever proves the writ false at the time of suing it out shall abate the writ entirely; 1 Saund. 286 (n. 7).

As this plea delays the ascertainment of the merits of the action, it is not favored by the courts; the greatest accuracy and precision are therefore required; and it cannot be amended; 2 Saund. 298; Co. Litt. 392; 13 M. & W. 474; Jenkins v. Pepoon, 2 Johns. Cas. (N. Y.) 312; 8 Bingh. 416; Getchell v. Boyd, 44 Me. 482; Mandel v. Peet, 18 Ark. 236; Anonymous, 1 Hemp. 215, Fed. Cas. No. 18,224; Roberts v. Heim, 27 Ala. 678. It must contain a direct, full, and positive averment of all the material facts; Morse v. Nash, 30 Vt. 76; Lary v. Evans, 35 N. H. 172; Ellis v. Ellis, 4 R. I. 110; Tweed v. Libbey, 37 Me. 49; Dinsmore v. Pendexter, 28 N. H. 18; Townsend v. Jeffries' Adm'r, 24 Ala. 329; Wales v. Jones, 1 Mich. 254. It must give enough so as to enable the plaintiff by amendment completely to supply the defect or avoid the mistake on which the plea is founded; 4 Term 224; 1 Saund. 274 (n. 4); Wadsworth v. Woodford, 1 Day (Conn.) 28; Rea v. Hayden, 3 Mass. 24; Burrow v. Sellers' Ex'rs, 2 N. C. 501; 2 Ld. Raym. 1178; 1 East 634.

It must not be double or repugnant; 3 M. & W. 607. It must have an apt and proper beginning and conclusion; 3 Term 186; Jenkins v. Pepoon, 2 Johns. Cas. (N. Y.) 312; Schoonmakers' Ex'rs v. Elmendorf, 10 Johns. (N. Y.) 49; 2 Saund. 209. The whole matter of complaint must be covered by the plea; 2 B. & P. 420. It cannot be pleaded after making full defence; 1 Chit. Pl. 441 (6th Lond. ed.).

A plea in abatement and a plea or answer in bar cannot be pleaded together; Southern Bldg. & Loan Ass'n v. Ins. Co., 23 Pa. Super. Ct. 88; Huntington Mfg. Co. v. Schofield, 28 Ind. App. 95, 62 N. E. 106; Trentman v. Fletcher, 100 Ind. 105; Carmien v. Cornell, 148 Ind. 83, 47 N. E. 216 (in Indiana there is a statute forbidding it; Field v. Malone, 102 Ind. 251, 1 N. E. 507); *contra*, Fisher v. Fraprie, 125 Mass. 472; O'Loughlin v. Bird, 128 Mass. 600; Parks v. Smith, 155 Mass. 26, 28 N. E. 1044; (where expressions otherwise in Pratt v. Sanger, 4 Gray [Mass.] 84 and Morton v. Sweetser, 12 Allen [Mass.] 134, are characterized as *obiter*); Hurlburt v. Palmer, 39 Neb. 158, 57 N. W. 1019; Templin v. Kimsey, 74 Neb. 614, 105 N. W. 89 (citing many intermediate cases and establishing the rule that a plea to the merits may be filed with one to the jurisdiction, when the latter sets up an objection *dehors* the record); and see Reynolds v. Cook, 83 Va. 817, 3 S. E. 710, 5 Am. St. Rep. 317. See also Duke v. Duke, 70 N. J. Eq. 135, 62 Atl. 466; and a plea to the merits filed simultaneously with

a plea in abatement waives the latter; Putnam Lumber Co. v. Ellis-Young Co., 50 Fla. 251, 39 South. 193; City of Covington v. Limerick, 40 S. W. 254, 19 Ky. L. Rep. 330; Lassas v. McCarty, 47 Or. 474, 84 Pac. 76; Maupin v. Ins. Co., 53 W. Va. 557, 45 S. E. 1003; Crowns v. Land Co., 99 Wis. 103, 74 N. W. 546.

In some states this rule is changed by statute; Moffitt v. Chronicle Co., 107 Ia. 407, 78 N. W. 45; Little Rock Trust Co. v. R. Co., 195 Mo. 669, 93 S. W. 944; Thach v. Mut. Acc. Ass'n, 114 Tenn. 271, 87 S. W. 255; Pyron & Davidson v. Graef, 31 Tex. Civ. App. 405, 72 S. W. 101; or rule of court; National Fraternity v. Circuit Judge, 127 Mich. 186, 86 N. W. 540.

But this rule was held not to apply to a special plea denying partnership of the plaintiffs, filed under a statute requiring denial of the character in which the plaintiff sues in order to control it; Robinson v. Parker, 11 App. D. C. 132.

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

As to the time of pleading matter in abatement, it must be pleaded before any plea to the merits, both in civil and criminal cases, except in cases where it arises or comes to the knowledge of the party subsequently; Turns v. Com., 6 Metc. (Mass.) 224; University of Vermont v. Joslyn, 21 Vt. 52; Inhabitants of Plantation No. 9 v. Bean, 40 Me. 218; Butts v. Grayson, 14 Ark. 445; Hart v. Turk, 15 Ala. 675; Hatry v. Shuman, 13 Mo. 547; Ricker v. Scofield, 28 Ill. App. 32; and the right is waived by a subsequent plea to the merits; Sheppard v. Graves, 14 How. (U. S.) 505, 14 L. Ed. 518; Hart v. Turk, 15 Ala. 675; Smith v. State, 19 Conn. 493; Saum v. Bd. of Com's, 1 G. Greene (Ia.) 165; Chapman v. Davis, 4 Gill (Md.) 166; Cook v. Burnley, 11 Wall. (U. S.) 659, 20 L. Ed. 29. See PLEA PUIS DARREIN CONTINUANCE.

Demurrer to complaint for insufficiency of facts, waives all matter in abatement; Marx v. Crpisan, 17 Or. 393, 21 Pac. 310.

Of the Affidavit of Truth. Every dilatory plea must be proven to be true, either by affidavit, by matter apparent upon the record, or probable matter shown to the court to induce them to believe it; 3 B. & P. 397; Holden v. Scanlin, 30 Vt. 177; White v. Whitman, 1 Curt. 494, Fed. Cas. No. 17,561; Humphrey v. Whitten, 17 Ala. 30; Knowlton v. Culver, 1 Chand. (Wis.) 16; Bank of Tennessee v. Jones, 1 Swan (Tenn.) 391; Saum v. Bd. of Com's, 1 G. Greene (Ia.) 165. It is not necessary that the affidavit should be made by the party himself; his attorney, or even a third person, will do; 1 Saund. Pl. & Ev. 3 (5th Am. ed.). The plaintiff may waive an affidavit; 5 Dowl. & L. 737; Richmond v. Tallmadge, 16 Johns. (N. Y.) 307. The affidavit must be coextensive with the plea; 3 Nev. & M. 260, and leave nothing to be collected by interence; Say. 293. It should state that the plea is true in substance and fact, and not merely that the plea is a true plea; 3 Stra. 705; Day v. Hamburgh, 1 Browne (Pa.) 77; Rapp v. Elliot, 2 Dall. (Pa.) 184, 1 L. Ed. 341.

Plea in abatement on account of non-joinder of joint promisors need not be verified by oath, National Niantic Bank v. Express Co., 16 R. I. 343, 15 Atl. 763.

JUDGMENT ON PLEAS IN ABATEMENT. If issue be joined on a plea in abatement, a judgment for the plaintiff upon a verdict is final; 1 Str. 532; Moore v. Morton, 1 Bibb (Ky.) 234; McCartee v. Chambers, 6 Wend. (N. Y.) 649, 22 Am. Dec. 556; Good v. Lehan, 8 Cush. (Mass.) 301; Dodge v. Morse, 3 N. H. 232; Haight v. Holley, 3 Wend. (N. Y.) 258; but judgment for plaintiff upon a demurrer to a plea in abatement is not final, but merely *respondeat ouster;* Ld. Raym. 699; Whitford v. Flanders, 14 N. H. 371; Lambert v. Lagow, 1 Blackf. (Ind.) 388. After judgment of *respondeat ouster*, the defendant has four days' time to plead, commencing after the judgment has been signed; 8 Bingh. 177. He may plead again in abatement, provided the subject-matter pleaded be not of the same degree, or of any preceding degree or class with that before pleaded; Com. Dig. Abt. I, 3; 1 Saund. Pl. & Ev. 4 (5th Am. ed.); Tidd, Pr. 641.

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

See JUDGMENT.

As to abatement and revival of actions, the power and practice of United States courts are governed by the law of the state in which action is pending at death; Wilhite v. Skeleton, 149 Fed. 67, 78 C. C. A. 635.

ABATOR. One who abates or destroys a nuisance. One who, having no right of entry, gets possession of the freehold to the prejudice of an heir or devisee, after the time when the ancestor died, and before the heir or devisee enters. Litt. § 397; Perk. Conv. § 383; 2 Prest. Abs. 296, 300. See Ad. Ej. 43; 1 Washb. R. P. 225.

ABATUDA. Anything diminished; as *moneta abatuda;* which is money clipped or diminished in value. Cowell.

ABAVIA. A great-great-grandmother.

ABAVITA. Used for *abamita*, which see.

ABAVUNCULUS. A great-great-grandmother's brother. Calvinus, Lex.

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

ABBACY. The office of an abbot. The dignity of the office.

ABBAT, ABBOT. A spiritual lord or gov-

ernor having the rule of a religious house. Cunningham.

ABBEY. A monastery or convent for the use of an association of religious persons, having an abbot or abbess to preside over them.

ABBOT. They were prelates in the 13th century who had had an immemorial right to sit in the national assembly. Taylor, Science of Jurispr. 287.

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

The abbreviations in common use in modern times consist of the initial letter or letters, syllable or syllables, of the word. Anciently, also, contracted forms of words, obtained by the omission of letters intermediate between the initial and final letters were much in use. These latter forms are now more commonly designated by the term *contraction*.

Abbreviations are of frequent use in referring to text-books, reports, etc., and in indicating dates, but should be very sparingly employed, if at all, in formal and important legal documents. See 4 C. & P. 51; 9 Co 48. No part of an indictment should contain any abbreviations except in cases where a *facsimile* of a written instrument is necessary to be set out 1 East 180, n. The variety and number of abbreviations are as nearly illimitable as the ingenuity of man can make them; and the advantages arising from their use are, to a great extent, counterbalanced by the ambiguity and uncertainty resulting from the usually inconsiderate selection which is made.

As to how far a judicial record may contain abbreviations of English words without invalidating it, see Stein v. Meyers, 253 Ill. 199, 97 N. E. 297.

The following list is believed to contain all abbreviations in common use. Where a shorter and a longer abbreviation are in common use, both are given.

A. Alabama;—American, see Am.;—Anonymous;—Arkansas,—Abbott (see Abb.);—Annuals (Louisiana);—Atlantic Reporter.

A, a, B, b. "A" front, "B" back of a leaf.

A. B. Anonymous Reports at end of Benloe's Reports, commonly called New Benloe.

A. B. R. American Bankruptcy Reports.

A'B R. J. N. S. W. A'Beckett's Reserved (Equity) Judgments, New South Wales.

A'B. R J. P. P. A'Beckett's Reserved Judgments, Port Philip.

A. C. Appellate Court;—Case on Appeal;—Appeal Cases, English Chancery; Law Reports Appeal Cases.

A. C

[1891] *A. C.* English Appeal Cases; Law Reports, 3d Series, 1891.

[1892] *A C.* Same for 1892, etc.

A. C C. American Corporation Cases (Withrow's).

A. C. R. American Criminal Reports.

A. D. American Decisions;—*Anno Domini;* in the year of our Lord,—Appellate Division, New York Supreme Court.

A. E. C. American Electrical Cases.

A. G. Attorney General.

A. G. Dec. Attorney General's Decisions.

A. G. Op. Attorney General's Opinions.

A. Ins. R. American Insolvency Reports.

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

A. L. C. American Leading Cases.

A. L. J. Albany Law Journal.

A. Moo. A. Moore's Reports, in vol. 1 Bosanquet & Puller.

A. M. & O. Armstrong, Macartney & Ogle's Irish Nisi Prius Reports.

A. N. C. Abbott's New Cases, New York;—American Negligence Cases.

A. N. R. American Negligence Reports, Current Series.

A. P. B. or *Ashurst MSS L. I. L.* Ashurst's Paper-books; the manuscript paper-books of Ashurst, J., Buller, J., Lawrence, J., and Dampier, J., in Lincoln's Inn Library.

A. R. American Reports;—*Anno Regni;* in the year of the reign,—Atlantic Reporter,—Appeal Reports, Ontario.

A. R. C. American Railway Cases.

A. R. R. American Railway Reports.

A. R. V. R. 22. Anno Regni Victoriæ Regina Vicesimo Secundo.

A Rep American Reports;—Atlantic Reporter (Commonly cited Atl. or A.).

A. S. Acts of Sederunt, Ordinances of the Court of Session, Scotland.

A. S. R. American State Reports.

A. & A. Corp. Angell & Ames on Corporations.

A. & E. Adolphus & Ellis's English King's Bench Reports;—Admiralty and Ecclesiastical.

A. & E. Corp Ca. American and English Corporation Cases.

A & E Encyc. American and English Encyclopædia of Law.

A. & E. N. S Adolphus & Ellis's Reports, New Series, English Queen's Bench, commonly cited *Q. B.*

A. & E. R. R. C. American & English Railroad Cases.

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

A. & H. Arnold & Hodges's English Queen's Bench Reports.

A. & N. Alcock & Napier's Irish King's Bench Reports.

Ab. Abridgment.

Ab. Adm. Abbott's Admiralty Reports.

Ab App. Dec. Abbott's New York Court of Appeals Decisions.

Ab. Ct. App. Abbott's New York Court of Appeals Decisions.

Ab Eq Cas. Equity Cases Abridged, English Chancery.

Ab N. Y. Ct. App. Abbott's New York Court of Appeals Decisions.

Ab N. Y. Dig. Abbott's New York Digest.

Ab. N. Y. Pr. Abbott's Practice Reports, New York.

Ab. N. Y. Pr. N. S. Abbott's Practice Reports, New Series, New York.

Ab Nat. Dig. Abbott's National Digest.

Ab New Cas. Abbott's New Cases, various New New York courts

Ab Pl. Abbott's Pleadings under the Code.

Ab Pr. Abbott's Practice Reports, New York.

Ab. Pr. N. S. Abbott's Practice Reports, New Series, New York.

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

Ab. U. S. Abbott's Reports, United States Circuit Court.

Ab U. S. Pr. Abbott's United States Courts Practice.

Abb. Abbott. See below

Abb. Ad. or *Abb. Adm* Abbott's Admiralty Reports.

Abb. App Dec Abbott's New York Court of Appeals Decisions.

Abb. Beech. Tr. Abbott's Report of the Beecher Trial.

Abb. C. C. Abbott's Reports, United States Circuit Court.

Abb. Ct. App. Abbott's New York Court of Appeals Decisions.

Abb. Dec. Abbott's New York Court of Appeals Decisions.

Abb. Dig. Abbott's New York Digest.

Abb. Dig. Corp. Abbott's Digest Law of Corporations.

Abb. Mo. Ind. Abbott's Monthly Index.

Abb. N. C. Abbott's New Cases, New York.
Abb. N. S. Abbott's Practice Reports, New Series.
Abb. N. Y. App. Abbott's New York Court of Appeals Decisions.
Abb. N. Y. Dig. Abbott's New York Digest.
Abb Nat. Dig. Abbott's National Digest.
Abb. Pr. or *Abb. Prac.* Abbott's New York Practice Reports.
Abb. Pr. N. S. Abbott's New York Practice Reports, New Series.
Abb. Ship. Abbott (Lord Tenterden) on Shipping.
Abb. Tr. Ev. Abbott's Trial Evidence.
Abb. U. S. Abbott's United States Circuit Court Reports.
Abb. Y. Bk. Abbott's Year Book of Jurisprudence.
Abbott. Abbott's Dictionary.
Abdy's R. C. P. Abdy's Roman Civil Procedure.
A'Beck. Judg. Vict. A'Beckett's Reserved Judgments of Victoria.
Abr. Abridgment;—Abridged.
Abr Case. Crawford & Dix's Abridged Cases, Ireland.
Abr. Case Eq. Equity Cases Abridged (English).
Abr Cas Eq or *Abr Eq Cas.* Equity Cases Abridged, English Chancery.
Abs. Absolute.
Acc. Accord or Agrees.
Act. Acton's Reports, Prize Causes, English Privy Council.
Act. Can. Monro's Acta Cancellariæ.
Act. Pr. C. Acton's Reports, Prize Causes, English Privy Council.
Act. Reg. Acta Regia.
Ad. Cas. Sales. Adams's Cases on the Law of Sales.
Ad. Con. Addison on Contracts.
Ad E. Adams on Ejectment.
Ad Eq. Adams's Equity.
Ad fin. Ad finem, at or near the end.
Ad. Jus. Adam's Justiciary Reports (Scotch).
Ad. Rom. Ant. Adams's Roman Antiquities.
Ad. Torts. Addison on Torts
Ad. & E. or *Ad. & Ell.* Adolphus & Ellis's English King's Bench Reports.
Ad. & Ell. N. S. Adolphus & Ellis's Reports, New Series,—English Queen's Bench (commonly cited *Q. B.*).
Adams. Adams's Reports, vols. 41, 42 Maine;—Adams's Reports, vol. 1 New Hampshire.
Adams, Eq. Adams's Equity.
Adams, Rom. Ant. Adams, Roman Antiquities.
Add. Addison's Reports, Pennsylvania;—Addams's English Ecclesiastical Reports.
Add. Abr. Addington's Abridgment of the Penal Statutes.
Add. Con. Addison on Contracts.
Add. Eccl. Addams's Ecclesiastical Reports, English.
Add. Pa. Addison's Reports, Pennsylvania.
Add. Torts. Addison on Torts.
Addams. Addams's Ecclesiastical Reports, English.
Addis. Addison's Pennsylvania Reports.
Adj. Adjudged, Adjourned.
Adjournal, Books of. The Records of the Court of Justiciary, Scotland.
Adm. Admiralty.
Adm. & Ecc. Admiralty and Ecclesiastical;—English Law Reports, Admiralty and Ecclesiastical.
Admr. Administrator.
Admx. Administratrix.
Adol. & El. Adolphus & Ellis's Reports, English King's Bench.
Adol. & El. (N. S.). Adolphus & Ellis's Reports, New Series, English Queen's Bench, commonly cited *Q. B.*
Adolph & E. Adolphus & Ellis's Reports, English King's Bench.
Adolph & E N. S. Adolphus & Ellis's Reports, New Series, English Queen's Bench, commonly cited *Q. B.*
Ads. Ad sectam, at suit of.
Adv. Advocate
Adye C. M. Adye on Courts-Martial.
Aelf. C. Canons of Aelfric.
Agn. Pat. Agnew on Patents.
Agn. St. of Fr. Agnew on the Statute of Frauds.
Agra H. C. Agra High Court Reports, India.
Aik. Aikens's Vermont Reports.
Aikens (Vt.). Aikens's Reports, Vermont.
Ainsw. or *Ainsworth.* Ainsworth's Lexicon.
Al. Aleyn's Select Cases, English King's Bench;—Alabama;—Allen.
Al. Tel. Cas. Allen's Telegraph Cases, American and English.
Al. & Nap. Alcock & Napier's Reports, Irish King's Bench and Exchequer.
Ala. Alabama;—Alabama Reports.
Ala. N. S. Alabama Reports, New Series.
Ala. Sel. Cas. Alabama Select Cases, by Shepherd, see Alabama Reports, vols. 37, 38 and 39.
Ala. St. Bar Assn. Alabama State Bar Association.
Alaska Co. Alaska Codes, Carter.
Alb. Arb. Albert Arbitration, Lord Cairns's Decisions.
Alb. L. J. or *Alb. Law Jour.* Albany Law Journal.
Alc. or *Alc Reg.* or *Alc. Reg. Cas.* Alcock's Irish Registry Cases.
Alc. & N. Alcock & Napier's Reports, Irish King's Bench and Exchequer.
Ald. Alden's Condensed Reports, Pennsylvania.
Ald. Hist. Aldridge's History of the Courts of Law.
Ald. Ind. Alden's Index of U. S. Reports.
Ald. & Van Hoes. Dig. Alden & Van Hoesen's Digest, Laws of Mississippi.
Aldr Cas. Cont. Aldred's Cases on Contracts.
Alex. Cas. Report of "Alexandra" case, by Dudley.
Alex. Ch. Pr. Alexander's Chancery Practice.
Alexander. Alexander's Reports, vols. 66-72 Mississippi.
Aleyn. Aleyn's Select Cases, English King's Bench.
Alis Prin. Scotch Law. Alison's Principles of the Criminal Law of Scotland.
All. Allen's Massachusetts Reports.
All. N. B. Allen's New Brunswick Reports.
All Ser. Allahabad Series, Indian Law Reports.
All Sher. Allen on Sheriffs.
All Tel. Cas. Allen's Telegraph Cases.
All. & Mor. Tr. Allen & Morris's Trial.
Allen. Allen's Massachusetts Reports;—Allen's Reports, New Brunswick;—Allen's Reports, Washington.
Allen (N. B.). Allen's Reports, New Brunswick Supreme Court.
Allen Tel. Cas. Allen's Telegraph Cases.
Alleyne L. D. of Mar. Alleyne's Legal Degrees of Marriage Considered.
Allin. Allinson, Pennsylvania Superior and District Court.
Alison Prac. Alison's Practice of the Criminal Law of Scotland.
Alison Princ. Alison's Principles of ditto.
Alln. Part. Allnat on Partition.
Am. America, American, or Americana.
Am. Bank. R. or *Am. B'kc'y Rep.* American Bankruptcy Reports.
Am. Bar Asso. American Bar Association.
Am. C. L. J. American Civil Law Journal, New York.
Am. Cent. Dig. American Digest (Century Edition).
Am. Ch Dig. American Chancery Digest.
Am. Corp Cas. Withrow's American Corporation Cases.
Am. Cr. Rep. American Criminal Reports.
Am. Crim. Rep. American Criminal Reports, by Hawley.
Am. Cr. Tr. American Criminal Trials. Chandler's.
Am. Dec. American Decisions.
Am. Dig. American Digest.
Am. Dig. Cent. Ed. American Digest (Century Edition).
Am Dig. Dec. Ed. or *Am. Dig. Decen. Ed.* American Digest (Decennial Edition).

Am. El. Ca. or *Am. Elec. Ca.* American Electrical Cases.
Am. Ins. Rep American Insolvency Reports.
Am Insolv. Rep. American Insolvency Reports.
Am. Jour. Pol. American Journal of Politics.
Am. Jour. Soc. American Journal of Sociology.
Am. Jur. American Jurist, Boston.
Am. L. C. R. P. Sharswood and Budd's Leading Cases on Real Property.
Am. L. Cas. American Leading Cases (Hare & Wallace's).
Am. L. Elect. American Law of Elections.
Am. L. J. American Law Journal (Hall's), Philadelphia.
Am. L. J. (O.). American Law Journal, Ohio.
Am. L J. N. S. American Law Journal, New Series, Philadelphia.
Am. L. M. American Law Magazine, Philadelphia.
Am. L R American Law Register, Philadelphia.
Am. L. Rec. American Law Record, Cincinnati.
Am. L. Reg. & Rev. American Law Register and Review, Philadelphia.
Am. L. Rep. American Law Reporter, Davenport, Iowa.
Am. L. Rev. American Law Review, St Louis.
Am. L. T. American Law Times, Washington, D. C.
Am. L. T. Bank. American Law Times Bankruptcy Reports.
Am. L. T. R. American Law Times Reports.
Am L. T. R. N. S. American Law Times Reports, New Series.
Am Law Jour. American Law Journal (Hall's) Philadelphia
Am. Law Jour N S. American Law Journal, New Series, Philadelphia.
Am. Law Mag. American Law Magazine, Philadelphia.
Am. Law Rec. American Law Record, Cincinnati.
Am. Law Reg. American Law Register, Philadelphia.
Am Law Rep. American Law Reporter, Davenport, Iowa.
Am. Law Rev. American Law Review, St Louis.
Am Law Times. American Law Times, Washington, D. C.
Am Lawy. American Lawyer, New York City.
Am. Lead. Cas. Hare & Wallace's American Leading Cases.
Am. Neg. Ca. or *Am. Neg. Cas.* American Negligence Cases.
Am Neg. Rep. American Negligence Reports.
Am. Pl. Ass. American Pleader's Assistant.
Am Pr Rep. American Practice Reports, Washington, D. C.
Am. Prob. or *Am. Prob. Rep.* American Probate Reports.
Am. R. American Reports.
Am. R R. Cas. American Railway Cases (Smith & Bates').
Am R. R. Rep. American Railway Reports, New York.
Am. R. R. & C. Rep. American Railroad and Corporation Reports.
Am. Rail. Cas. Smith and Bates's American Railway Cases.
Am. Rail. R. American Railway Reports.
Am. Rep. American Reports (Selected Cases).
Am. Ry. Ca. American Railway Cases.
Am. Ry. Rep. American Railway Reports.
Am. St P. American State Papers
Am. St. Rep. American State Reports.
Am. St. Ry. Dec. American Street Railway Decisions.
Am. Them. American Themis, New York.
Am. Tr. M. Cas. Cox's American Trade Mark Cases.
Am. & Eng Corp. Cas. American and English Corporation Cases.
Am. & Eng. Dec in Eq. American and English Decisions in Equity.
Am. & Eng. Encyc. Law. American and English Encyclopædia of Law.
Am. & Eng. Pat. Ca. American and English Patent Cases.
Am. & Eng. Pat. Cas. American and English Patent Cases.
Am & Eng. R. Cas. American and English Railroad Cases.
Am. & Eng. R. R. Ca. American and English Railroad Cases.
Am. & Eng. Ry. Ca. American and English Railway Cases
Amb. or *Ambl.* Ambler's English Chancery Reports.
Amer. American;—Amerman, vols. 111-115 Pennsylvania.
Amer. Jur. American Jurist.
Amer. Law. American Lawyer, New York.
Amer. Law Reg. (N. S.). American Law Register, New Series
Amer Law Reg. (O. S.). American Law Register, Old Series.
Amer. Law Rev. American Law Review.
Amer. & Eng. Enc. Law. American & English Encyclopædia of Law.
Ames. Ames's Reports, vol. 4-7 Rhode Island;—Ames's Reports, vol. 1 Minnesota.
Ames Cas. B. & N. Ames's Cases on Bills and Notes.
Ames Cas. Par. Ames's Cases on Partnership.
Ames Cas. Part. Ames's Cases on Partnership.
Ames Cas Pl. Ames's Cases on Pleading.
Ames Cas. Sur. Ames's Cases on Suretyship.
Ames Cas. Trusts. Ames's Cases on Trusts.
Ames, K. & B. Ames, Knowles & Bradley's Reports, vol. 8 Rhode Island.
Ames & Sm. Cas. Torts. Ames & Smith's Cases on Torts.
Amos Jur. Amos's Science of Jurisprudence.
Amos & F. or *Amos & F. Fixt.* Amos and Ferrard on Fixtures.
An Anonymous.
And. Anderson's Reports, English Common Pleas and Court of Wards;—Andrews's Reports, vols. 63-72 Connecticut;—Andrews's English King's Bench Reports.
And Ch Ward. Anderson on Church Wardens.
And Com Anderson's History of Commerce.
Anders. or *Anderson.* Anderson's Reports, English Common Pleas and Court of Wards
Andr. Andrews's Reports, English King's Bench. See also And.
Andr. Pr. Andrews's Precedents of Leases.
Ang. Angell's Reports, Rhode Island Reports.
Ang. Adv. Enj. Angell on Adverse Enjoyment.
Ang. Ass. Angell on Assignments.
Ang. B. T. Angell on Bank Tax.
Ang Carr. Angell on Carriers.
Ang Corp. Angell and Ames on Corporations.
Ang High. Angell on Highways.
Ang. Ins. Angell on Insurance.
Ang Lim. Angell on Limitations.
Ang. Tide Wat. or *Ang. Tide Waters.* Angell on Tide Waters.
Ang. Water C. or *Ang. Water Courses.* Angell on Water Courses.
Ang. & A. Corp. Angell and Ames on Corporations
Ang. & D. High. Angell and Durfee on Highways.
Ang. & Dur. (R. I.) Angell & Durfee's Rhode Island Reports, vol. 1.
Ann. Queen Ann; as 1 Ann. c. 7.
Ann. C. Annals of Congress.
Ann. Cas. American & English Annotated Cases;—New York Annotated Cases.
Ann. de la Pro. Annales de la Propriété Industrielle.
Ann. de Leg. Annuaire de Legislation Estrangere, Paris.
Ann. Jud. Annuaire Judiciaire, Paris.
Ann Reg. Annual Register, London.
Ann. Reg. N. S. Annual Register, New Series, London.
Ann. St. Annotated Statutes.
Annaly. Annaly's Edition of Hardwicke's Reports, English. Sometimes cited *Cas. temp. Hardw, Lee's Cas. temp. Hard.*, or *Rep. temp. Hard.*
Anne. Queen Anne (thus "1 Anne," denotes the first year of the reign of Queen Anne).
Annes. Ins. Annesly on Insurance.

Anon. Anonymous.
Ans. Contr. or *Anson, Cont.* Anson on Contracts.
Anst. or *Anstr.* Anstruther's Reports, English Exchequer.
Anth. Anthon's New York Nisi Prius Reports;—Anthony's Illinois Digest
Anth Abr. Anthon's Abridgment of Blackstone's Commentaries.
Anth Ill Dig Anthony's Illinois Digest.
Anth. L. S. Anthon's Law Student.
Anth. N. P. Anthon's New York Nisi Prius Reports.
Anth. Prec Anthon's Precedents.
Anth Shep. Anthon's edition of Sheppard's Touch-tone.
Ap. Justin. Apud Justinianum, or Justinian's Institutes.
App. Appeal, — Apposition; — Appendix; — Appleton's Reports, vols 19, 20 Maine
App. Cas. Appeal Cases, English Law Reports;—Appeal Cases, United States,—Appeal Cases of the different States;—Appeal Cases, District of Columbia.
[1891] App. Cas. Law Reports, Appeal Cases, from 1891 onward.
App. Cas. (D. C.). Appeal Cases, District of Columbia.
App Cas. Beng. Sevestre and Marshall's Bengal Reports, India.
App Cas Rep. Bradwell's Illinois Appeal Court Reports
App Ct. Rep. Bradwell's Illinois Appeal Court Reports.
App D. C. Appeal Cases, District of Columbia.
App. Div. Appellate Division, New York.
App Ev. Appleton on Evidence.
App Jur. Act 1876. Appellate Jurisdiction Act, 1876, 39 & 40 Vict. c. 59.
App. N Z. Appeal Reports, New Zealand.
App. Rep Ont. Appeal Reports, Ontario
Appe. Bre. Appendix to Breese's Reports.
Appleton. Appleton's Reports, vols. 19, 20 Maine.
Appx Appendix.
Ar. Arrêté.
Ar Rep. Argus Reports, Victoria.
Arabin. Decisions of Seargeant Arabin.
Arbuth. Arbuthnot's Select Criminal Cases, Madras.
Arch. Court of Arches, England
Arch. P. L. Cas. Archbold's Abridgment of Poor Law Cases.
Arch. Sum. Archbold's Summary of Laws of England.
Archb B. L. Archbold's Bankrupt Law.
Archb. C. P. Archbold's Civil Pleading
Archb. Civil Pl. Archbold's Civil Pleading.
Archb. Cr. L. Archbold's Criminal Law
Archb. Cr. P. Archbold's Criminal Pleading.
Archb Cr. P by Pom. Archbold's Criminal Pleading, by Pomeroy.
Archb Crim Pl Archbold's Criminal Pleading.
Archb. F. Archbold's Forms.
Archb F I. Archbold's Forms of Indictment.
Archb. J. P. Archbold's Justice of the Peace.
Archb. L. & T. Archbold's Landlord and Tenant.
Archb Landl. & Ten. Archbold's Landlord and Tenant.
Archb. N P. Archbold's Nisi Prius Law.
Archb. New Pr. or *Archb. N. Prac.* Archbold's New Practice.
Archb Pr. Archbold's Practice.
Archb Pr. by Ch Archbold's Practice, by Chitty.
Archb. Pr. C. P. Archbold's Practice, Common Pleas
Archb. Pr. K. B. Archbold's Practice, King's Bench.
Archb Sum. Archbold's Summary of the Laws of England.
Archer. Archer's Reports, Florida Reports, vol. 2.
Arg. Arguendo, in arguing, in the course of reasoning.
Arg. Fr. Merc Law Argles (Napoleon), Treatise upon French Mercantile Law, etc.
Arg. Inst. Institution au Droit Français, par M. Argou.
Arg. Rep. Reports printed in Melbourne Argus, Australia.
Ariz. Arizona;—Arizona Reports.
Ark. Arkansas; — Arkansas Reports; — Arkley's Justiciary Reports, Scotland.
Ark. L. J. Arkansas Law Journal, Fort Smith.
Ark. Rev. Sts. Arkansas Revised Statutes.
Arkl. or *Arkley.* Arkley's Justiciary Reports, Scotland.
Arms. Br. P. Cas. Armstrong's Breach of Privilege Cases, New York.
Arms. Con. Elec. Armstrong's New York Contested Elections.
Arms. Elect Cas. Armstrong's Cases of Contested Elections, New York.
Arms. M. & O. or *Arms. Mac. & Og.* Armstrong, Macartney & Ogle's Irish Nisi Prius Reports.
Arms. Tr. Armstrong's Limerick Trials, Ireland.
Arn. Arnold's English Common Pleas Reports,—Arnot's Criminal Trials, Scotland.
Arn El. Cas Arnold's Election Cases, English.
Arn. Ins. Arnould on Marine Insurance.
Arn. & H. or *Arn. & Hod* Arnold & Hodges's English Queen's Bench Reports.
Arn & H B. C. Arnold and Hodges's English Bail Court Reports.
Arn & Hod. B. C. Arnold & Hodges's English Bail Court Reports.
Arn & Hod. Pr. Cas. Arnold & Hodges's Practice Cases, English.
Arnold. Arnold's Common Pleas Reports, English.
Arnot. Arnot's Criminal Cases, Scotland.
Arnot Cr. C. Arnot's Criminal Cases, Scotland.
Art. Article.
Artic Clerk. Articles of the clergy.
Articuli sup Chart. Articles upon the charters.
Ashe. Ashe's Tables to the Year Books (or to Coke's Reports,—or to Dyer's Reports).
Ashl. Cas Cont Ashley's Cases on Contracts
Ashm. Ashmead's Pennsylvania Reports.
Ashton Ashton's Reports, vols 9-12 Opinions of the United States Attorneys General.
Ashurst MS. Ashurst's Paper Books, Lincoln's Inn Library,—Ashurst's Manuscript Reports, printed in vol 2 Chitty.
Aso & Man. Inst Aso and Manuel's Institutes of the Laws of Spain.
Asp. Aspinall, English Admiralty.
Asp Cas. or *Asp Rep.* English Maritime Law Cases, new series by Aspinall.
Asp. M. C. Aspinall's Maritime Cases.
Asp Mar L. Cas. Aspinall's Maritime Law Cases.
Ass. Book of Assizes,—Liber Assissarium, Part 5 of the Year Books.
Ass de Jerus or *Ass Jerus.* Assizes of Jerusalem.
Ast. Ent. Aston's Entries.
Atch Atcheson's Reports, Navigation and Trade, English.
Ath Mar Set. or *Ath Mar. Sett.* Atherly on Marriage Settlements.
Atk Atkyn's English Chancery Reports.
Atk. Ch. Pr. Atkinson's Chancery Practice.
Atk. Con. Atkinson on Conveyancing.
Atk P. T. Atkyn's Parliamentary Tracts.
Atk Sher. Atkinson on Sheriffs.
Atk. Tit. or *Atk. M. T.* Atkinson on Marketable Titles.
Atl. Atlantic Reporter.
Atl Mo. Atlantic Monthly.
Atl R. or *Atl Rep.* Atlantic Reporter.
Ats. At suit of.
Atty. Attorney.
Atty. Gen. Attorney-General.
Atty. Gen. Op. Attorney-Generals' Opinions, United States.
Atty Gen. Op. N. Y. Attorney-Generals' Opinions, New York.
Atw. or *Atwater.* Atwater's Reports, vol. 1 Minnesota.
Auch. Auchinleck's Manuscript Cases, Scotch Court of Session.
Auct Reg. & L. Chron. Auction Register and Law Chronicle.
Aul. Gel. Noctes Atticæ. Aulus Gellius, Noctes Atticæ.

Aus. Jur. Australian Jurist, Melbourne.
Aust. Austin's English County Court Cases;—Australia.
Aust. Jur. or *Aust. Juris.* Austin's Province of Jurisprudence.
Aust Jur Abr. Austin's Lectures on Jurisprudence, abridged.
Aust L. T. Australian Law Times.
Austin (Ceylon). Austin's Ceylon Reports.
Austin C. C or *Austin C. C. R.* Austin's English County Court Reports.
Austr. Jur. Australian Jurist, Melbourne.
Austr. L T. Australian Law Times, Melbourne.
Auth. Authentica, in the authentic; that is, the Summary of some of the Novels in the Civil Law inserted in the Code under such a title.
Av. & H B. Law. Avery and Hobb's Bankrupt Law of the United States.
Ayck. Ch F. Ayckbourn's Chancery Forms.
Ayck Ch. Pr Ayckbourn's Chancery Practice.
Ayl Pan See Ayliffe.
Ayl. Pand. See Ayliffe.
Ayl Par. See Ayliffe.
Ayliffe Ayliffe's Pandects;—Ayliffe's *Parergon Juris Canonici Anglicani.*
Ayliffe Parerg. See Ayliffe.
Azuni Mar. Law. Azuni on Maritime Law.
B. Bancus, the Common Bench, the back of a leaf; Book
B. B. Bail Bond; Bayley on Bills.
B. Bar. Bench and Bar, Chicago
B C. Bail Court,—Bankruptcy Cases,—Bell's Commentaries on the Laws of Scotland
B C C Bail Court Reports (Saunders & Cole);—Bail Court Cases (Lowndes & Maxwell),—Brown's Chancery Cases.
B Ch Barbour's Chancery Reports, New York.
B. C. R. or *B C Rep.* Saunders & Cole's Bail Court Reports, English,—British Columbia Reports.
B D. & O. Blackham, Dundas & Osborne's Nisi Prius Reports, Ireland
B. Ecc. Law Burns's Ecclesiastical Law.
B. Just. Burns's Justice.
B L. R Bengal Law Reports
B L T. Baltimore Law Transcript.
B M Burrow's Reports *tempore* Mansfield;—Ben Monroe's Reports, Kentucky,—Moore's Reports, English
B Mon Ben Monroe's Reports, Kentucky.
B. Moore. Moore's Reports, English.
B N C. Bingham's New Cases, English Common Pleas,—Brooke's New Cases, English King's Bench —Busbee's North Carolina Law Reports
B N P. Buller's Nisi Prius.
B. P. B Buller's Paper Book, Lincoln's Inn Library. See *A. P B.*
B. P. C. Brown's Parliamentary Cases.
B. P. L Cas. Bott's Poor Law Cases.
B P N. R. Bosanquet & Puller's New Reports, English Common Pleas
B. P. R Brown's Parliamentary Reports.
B R American Law Times Bankruptcy Reports; —*Bancus Regis;* the King's Bench,—Bankruptcy Reports,—Bankruptcy Register, New York;—National Bankruptcy Register Reports.
B R Act. Booth's Real Action.
B Reg. Bankruptcy Register, New York.
B. R. H. Cases in King's Bench, *temp. Hardwicke.*
B S. Upper Bench.
B. Tr. Bishop's Trial.
B W C. C. Butterworth's Workmen's Compensation Cases (Br. & Col.).
B. & A. Barnewall & Adolphus's English King's Bench Reports,—Barnewall & Alderson's English King's Bench Reports,—Baron & Arnold's English Election Cases;—Baron & Austin's English Election Cases,—Banning & Arden's Patent Cases.
B. & Ad. or *Adol.* Barnewall & Adolphus's English King's Bench Reports.
B. & Ald. Barnewall & Alderson's English King's Bench Reports.
B. & Arn. Barron & Arnold's Election Cases.
B. & Aust. Barron and Austin's Election Cases, English.
B. & B. Broderip & Bingham's English Common Pleas Reports;—Ball & Beatty's Irish Chancery Reports;—Bowler & Bowers, vols. 2, 3 United States Comptroller's Decisions.
B. & Bar. The Bench and Bar, Chicago.
B. & C. Barnewall & Cresswell's English King's Bench Reports.
B & D. Benloe & Dalison, English.
B. & F. Broderip & Fremantle's English Ecclesiastical Reports.
B. & H. Blatchford & Howland's United States District Court Reports.
B & H. Dig. Bennett & Heard's Massachusetts Digest.
B & H. Lead. Cas. Bennett & Heard's Leading Cases on Criminal Law.
B & I. Bankruptcy and Insolvency Cases.
B. & L. Browning & Lushington's Reports, English Admiralty.
B & L Prec. Bullen & Leake's Precedents of Pleading.
B & M. or *B. & Macn.* Browne & Macnamara's Reports, English.
B & P. Bosanquet & Puller's English Common Pleas Reports.
B & P. N. R Bosanquet & Puller's New Reports, English.
B & S. Best & Smith's English Queen's Bench Reports.
B. & V. Beling & Vanderstraaten's Reports, Ceylon.
Ba & Be. Ball & Beatty's Irish Chancery Reports
Bab Auc. Babington on Auctions.
Bab Set-off Babington on Set-off.
Bac Abr. Bacon's Abridgment
Bac. Aph or *Bac. Aphorisms.* Bacon's (Sir Francis) Aphorisms.
Bac. Comp. Arb. Bacon's Complete Arbitration.
Bac Dig Bacon's Georgia Digest.
Bac El. Bacon's Elements of the Common Law.
Bac. Gov. Bacon on Government.
Bac. Ir. Bacon (Sir Francis), Law Tracts.
Bac. Law Tr. Bacon's Law Tracts.
Bac Lease. Bacon on Leases and Terms of Years
Bac. Lib Reg Bacon's *Liber Regis, vel Thesaurus Rerum Ecclesiasticarum.*
Bac. M. or *Bac Max* Bacon's Maxims.
Bac. Read. Uses. Bacon (Sir Francis), Reading upon the Statute of Uses.
Bac. St. Uses or *Bac. U.* Bacon (Sir Francis) Reading upon the Statute of Uses
Bac. Works. Bacon's (Sir Francis), Works.
Bach. Bach's Reports, vols. 19-21 Montana.
Bach. Man Bache's Manual of a Pennsylvania Justice of the Peace.
Bacon. Bacon's Abridgment;—Bacon's Aphorisms, —Bacon's Complete Arbitrator;—Bacon's Elements of the Common Law;—Bacon on Government,—Bacon's Law Tracts;—Bacon on Leases and Terms of Years,—Bacon's Maxims,—Bacon on Uses.
Bag. C. Pr. Bagley's Chamber Practice.
Bage. Const. Bagehot on the English Constitution.
Bagl. Bagley's Reports, vols. 16-19 California.
Bagl. & H. Bagley & Harmen's Reports, California.
Bail Bailey's Law Reports, South Carolina.
Bail Ct. Cas. Lowndes & Maxwell's English Bail Court Cases.
Bail Ct Rep. Saunders & Cole's English Bail Court Reports,—Lowndes & Maxwell's English Bail Court Cases.
Bail. Dig. Bailey's North Carolina Digest.
Bail. Eq. Bailey's Equity Reports, South Carolina.
Bailey. Bailey's Law Reports, South Carolina.
Bailey Ch. or *Bailey Eq.* Bailey's Equity Reports, South Carolina.
Baill. Dig. Baillie's Digest of Mohammedan Law.
Bain M. & M. or *Bainb. Mines.* Bainbridge on Mines and Minerals.
Bak. Bur. Baker's Law Relating to Burials.
Bak. Corp. Baker on Corporations.
Baker, Quar. Baker's Law of Quarantine.
Bald. Baldwin's United States Circuit Court Reports;—Baldus (Commentator on the Code);—Baldasseroni (on Maritime Law).

Bald. App. 11 Pet. Baldwin's Appendix to 11 Peters.
Bald C. C. Baldwin's United States Circuit Court Reports.
Bald. Con. or *Bald. C. V.* Baldwin on the Constitution.
Baldw Dig. Baldwin's Connecticut Digest.
Balf. Balfour's Practice of the Law of Scotland.
Ball Cas. Tort Ball's Cases on Torts.
Ball. Lim. Ballantine on Limitations.
Ball & B. Ball & Beatty's Reports, Irish Chancery.
Balt. L. Tr. Baltimore Law Transcript.
Banc. Sup. Bancus Superior, or Upper Bench.
Bank and Ins. R Bankruptcy and Insolvency Reports, English.
Bank Ct. Rep. Bankrupt Court Reports, New York,—The American Law Times Bankruptcy Reports are sometimes thus cited.
Bank. I. or *Bank Inst.* Bankter's Institutes of Scottish Law.
Bank. Reg. National Bankruptcy Register, New York
Bank. Rep. American Law Times Bankruptcy Reports.
Bank. & Ins. or *Bank & Ins. R.* Bankruptcy and Insolvency Reports, English.
Banker's Law J. Banker's Law Journal.
Banker's Mag. Banker's Magazine, New York.
Banker's Mag. (Lon.). Banker's Magazine, London.
Banks. Banks' Reports, vols. 1-5 Kansas.
Bann. Bannister's Reports, English Common Pleas.
Bann. Br. Bannister's edition of O. Bridgman's English Common Pleas Reports.
Bann Lim Banning on Limitation of Action.
Bann & A. or *Bann. & A. Pat Ca.* Banning and Arden's Patent Cases.
Bar. Barnardiston's English King's Bench Reports;—Barnardiston's Chancery,—Bar Reports in all the Courts, English;—Barbour's Supreme Court Reports, New York;—Barrows's Reports, vol. 18 Rhode Island.
Bar. Ch. or *Chy.* Barnardiston's English Chancery Reports.
Bar Ex Jour. Bar Examination Journal, London.
Bar Mag. Barrington's Magna Charta
Bar. N. Barnes's Notes, English Common Pleas Reports.
Bar Obs. St. Barrington's Observations upon the Statutes from Magna Charta to 21 James I.
Bar. & Ad. Barnewall & Adolphus's English King's Bench Reports.
Bar. & Al Barnewall & Alderson's English King's Bench Reports.
Bar. & Arn. Barron & Arnold's English Election Cases.
Bar. & Aust. or *Au.* Barron & Austin's English Election Cases.
Bar. & Cr. Barnewall & Cresswell's English King's Bench Reports
Barb. Barbour's Supreme Court Reports, New York;—Barber's Reports, vols 14-24 Arkansas.
Barb. Abs. Barbour's Abstracts of Chancellor's Decisions, New York.
Barb. App Dig. Barber's Digest, New York.
Barb. Ark. Barber's Reports, vols. 14-24 Arkansas.
Barb. Ch. Barbour's Chancery Reports, New York.
Barb. Ch. Pr. Barbour's Chancery Practice (Text Book).
Barb. Cr. P. Barbour's Criminal Pleadings.
Barb. Dig. Barber's Digest of Kentucky.
Barb. Grot. Grotius on War and Peace, Notes by Barbeyrac.
Barb. on Set-off. Barbour on Set-off.
Barb. Puff. Puffendorf's Law of Nature and Nations, Notes by Barbeyrac.
Barb. S C. Barbour's Supreme Court Reports, New York.
Barbe. or *Barber.* Barber's Reports, Arkansas. See Barb. Ark.
Barc. Dig Barclay's Missouri Digest.
Barl. Elect. Cas. Bartlett's Congressional Election Cases.
Barn. Barnardiston's English King's Bench Reports;—Barnes's English Common Pleas Reports;—Barnfield's Reports, vols. 19-20, Rhode Island.
Barn. Ch. Barnardiston's Chancery Reports, English.
Barn. No. Barnes's Note of Cases, English Common Pleas.
Barn. Sh. Barnes's Sheriff.
Barn. & A. Barnewall & Alderson's English King's Bench Reports.
Barn. & Ad. or *Barn. & Adol.* Barnewall & Adolphus' English King's Bench Reports.
Barn. & Ald. Barnewall & Alderson's English King's Bench Reports.
Barn. & C. or *Barn. & Cr.* or *Barn. & Cress.* Barnewall & Cresswell's English King's Bench Reports.
Barnard Ch. Barnardiston's Chancery Reports.
Barnard. K. B. Barnardiston's King's Bench Reports.
Barnes. Barnes's Practice Cases, English.
Barnes, N. C. Barnes's Notes of Cases in Common Pleas.
Barnet. Barnet's Reports, vols. 27-29 English Central Criminal Courts Reports.
Barnf & S. Barnfield and Stiness's Reports, vol. 20. Rhode Island.
Barnw. Dig. Barnwall's Digest of the Year Books
Barr. Barr's Reports, vols. 1-10 Pennsylvania State,—Barrows's Reports, vol. 18 Rhode Island,—Barr Reports, in all the courts, English.
Barr Ob St or *Barr. St* Barrington's Observations upon the Statutes from Magna Charta to 21 James I.
Barr. Ten. Barry on Tenures.
Barr & Arn. Barron & Arnold's Election Cases, English.
Barr. & Aus. Barron & Austin's Election Cases, English.
Barring Obs. St or *Barring St* Barrington's Observations upon the Statutes from Magna Charta to 21 James I.
Barron Mar. Barron's Mirror of Parliament.
Barrows Barrows's Reports, vol 18 Rhode Island
Barry Ch Jur. Barry's Chancery Jurisdiction.
Barry Conv. Barry on Conveyancing
Bart. Conv. Barton's Elements of Conveyancing.
Bart. El. Cas. Bartlett's Congressional Election Cases.
Bart. Eq. Barton's Suit in Equity.
Bart. Prec. Barton's Precedents of Conveyancing.
Bat. Dig. Battle's Digest, North Carolina.
Bat Sp. Per. Batten on Specific Performance.
Batem. Ag. Bateman on Agency.
Batem. Auct. Bateman on the Law of Auctions.
Batem. Comm. L. Bateman's Commercial Law.
Batem. Const. L. Bateman's Constitutional Law.
Batem. Ex. L. Bateman's Excise Laws.
Bates Ch. Bates's Chancery Reports, Delaware.
Bates Dig. Bates's Digest, Ohio
Batt. or *Batty.* Batty's Irish King's Bench Reports.
Baum. Baum on Rectors, Church Wardens, and Vestrymen.
Bax. or *Baxt.* Baxter's Reports, vols. 60-68 Tennessee.
Bay. Bay's South Carolina Reports;—Bay's Reports, vols. 1, 2, and 5-8 Missouri.
Bay (Mo.). Bay's Reports, Missouri.
Bayl. Bill. Bayley on Bills.
Bayl. Ch. Pr. Bayley's Chancery Practice.
Bea. C. E. Beame's Costs in Equity.
Bea. Eq Pl. Beame's Equity Pleading.
Bea. Ne Exeat. Beame on the Writ of *Ne Exeat.*
Bea. Ord. Beame's Orders in Chancery.
Bea. Pl. Eq. Beame's Pleas in Equity.
Beach. Rec. Beach on the Law of Receivers.
Beas. Beasley's Reports, New Jersey Equity.
Beat. or *Beatt.* or *Beatty.* Beatty's Irish Chancery Reports.
Beaum. B. of S. Beaumont on Bills of Sale.
Beaum. Ins. Beaumont on Insurance.
Beav. Beavan's Chancery Reports, English Rolls Court.
Beav. R. & C. Cas. English Railway and Canal Cases, by Beavan and others.

Beav. & Wal. Ry. Cas. Beavan & Walford's Railway and Canal Cases, England.

Beaw. or *Beaw. Lex Merc.* Beawes's Lex Mercatoria.

Beawes. Beawes's Lex Mercatoria.

Becc. Cr. Beccaria on Crimes and Punishments.

Beck. Beck's Reports, vols. 12-16 Colorado; also vol. 1 Colorado Court of Appeals.

Beck, Med. Jur. or *Beck's Med. Jur.* Beck's Medical Jurisprudence.

Bedell. Bedell's Reports, vols. 163-191 New York.

Bee. Bee's United States District Court Reports.

Bee Adm. Bee's Admiralty. An Appendix to Bee's District Court Reports.

Bee C. C. R. Bee's Crown Cases Reserved, English.

Beebe Cit. Beebe's Ohio Citations.

Bel. Bellewe's English King's Bench Reports *temp.* Richard II,—Bellasis's Bombay Reports;—Beling's Ceylon Reports,—Bellinger's Reports, vols. 4-8 Oregon.

Beling. Beling's Ceylon Reports.

Beling & Van. (Ceylon). Beling & Vander Straalen's Ceylon Reports.

Bell. Bell's Dictionary and Digest of the Laws of Scotland,—Bell's English Crown Cases Reserved;—Bell's Scotch Appeal Cases;—Bell's Scotch Session Cases;—Bell's Calcutta Reports, India;—Bellewe's English King's Bench Reports *temp.* Richard II;—Brooke's New Cases, by Bellewe,—Bellinger's Reports, vols. 4-8 Oregon;—Bellasis's Bombay Reports.

Bell Ap. Ca. or *Bell Ap. Cas.* or *Bell App. Cas.* Bell's Scotch Appeals.

Bell Cas. Bell's Cases, Scotch Court of Session.

Bell. Cas. t. H. VIII. Brooke's New Cases (collected by Bellewe).

Bell. Cas. t. R. II. Bellewe's English King's Bench Reports (time of Richard II).

Bell C. C. Bell's English Crown Cases Reserved;—Bellasis's Civil Cases, Bombay;—Bellasis's Criminal Cases, Bombay.

Bell. C. Cas. Bellasis's Civil Cases, Bombay; Bellasis's Criminal Cases, Bombay.

Bell C. H. C. Bell's Reports, Calcutta High Court.

Bell Com. or *Bell Comm.* Bell's Commentaries on the Laws of Scotland.

Bell Cr. C. Bell's English Crown Cases;—Beller's Criminal Cases, Bombay.

Bell C. T. Bell on Completing Titles.

Bell. Del. U. L. Beller's Delineation of Universal Law.

Bell, Dict. Bell's Dictionary and Digest of the Laws of Scotland.

Bell Dict. Dec. Bell's Dictionary of Decisions, Court of Session, Scotland.

Bell El L. Bell's Election Law of Scotland.

Bell fol. Bell's folio Reports, Scotch Court of Session.

Bell H. C. or *Bell H. C. Cal.* Bell's Reports, High Court of Calcutta.

Bell H. L. or *Bell, H. L. Sc.* Bell's House of Lord's Cases, Scotch Appeals.

Bell H. & W. Bell on Husband and Wife.

Bell Illus. Bell's Illustration of Principles.

Bell (In.). Bell's Reports, India.

Bell L. Bell on Leases.

Bell Med. L. J. Bell's Medico Legal Journal.

Bell Notes. Bell's Supplemental Notes to Hume on Crimes.

Bell Oct. or *8vo.* Bell's octavo Reports, Scotch Court of Session.

Bell. (Or.). Bellinger's Reports, Oregon.

Bell P. C. Bell's Cases in Parliament, Scotch Appeals.

Bell Prin. Bell's Principles of the Law of Scotland.

Bell Put. Mar. Bell's Putative Marriage Cases, Scotland.

Bell S. Bell on Sales.

Bell Sc. App. Bell's Appeals to House of Lords from Scotland.

Bell Sc. Dig. Bell's Scottish Digest.

Bell Ses. Cas. or *Bell Sess. Cas.* Bell's Cases in the Scotch Court of Session.

Bell Styles. Bell's System of the Forms of Deeds.

Bell T.D. Bell on the Testing of Deeds.

Bellas. Bellasis's Criminal (or Civil) Cases, Bombay.

Bellewe. Bellewe's English King's Bench Reports.

Bellewe Cas. Bellewe's Cases, *temp.* Henry VIII; Brooke's New Cases; Petit Brooke.

Bellewe t. H. VIII. Brooke's New Cases (collected by Bellewe).

Bellinger. Bellinger's Reports, vols. 4-8 Oregon.

Bellingh. Tr. Report of the Bellingham Trial.

Belt Bro. Belt's edition of Brown's Chancery Reports.

Belt Sup. or *Belt Sup. Ves.* Belt's Supplement to Vesey Senior's English Chancery Reports.

Belt Ves. Sen. Belt's edition of Vesey Senior's English Chancery Reports.

Ben. Benedict's United States District Court Reports.

Ben. Adm. Benedict's Admiralty Practice.

Ben. Av. Benecke on Average.

Ben. F. I. Cas. Bennett's Fire Insurance Cases.

Ben. Ins. Cas. Bennett's Insurance Cases.

Ben. Just. Benedict on Justices of the Peace.

Ben Mon. Ben Monroe's Reports, Kentucky.

Ben. & Dal Benloe & Dalison's English Common Pleas Reports.

Ben. & H. L. C. Bennett & Heard's Leading Criminal Cases.

Ben. & S. Dig. Benjamin & Slidell's Louisiana Digest.

Bench & B. Bench and Bar (periodical), Chicago.

Bendl. or *Bendloe.* Bendloe (see Benl.);—Bendloe's or New Benloe's Reports, English Common Pleas, Edition of 1661.

Bened. Benedict's United States District Court Reports.

Benet Ct. M. Benet on Military Law and Courts Martial.

Beng. L. R. Bengal Law Reports, India.

Beng. S.D. or *Beng. S. D. A.* Bengal Sudder Dewany Adawlut Reports, India.

Benj. Benjamin. New York Annotated Cases.

Benj. Chalm. Bills & N. Benjamin's Chalmer's Bills and Notes.

Benj. Sales. Benjamin on Sales.

Benl. Benloe's or Bendloe's English King's Bench Reports; Benloe's English Common Pleas Reports.

Benl. in Ashe. Benloe at the end of Ashe's Tables.

Benl. in Keil. Benloe or Bendloe in Keilway's Reports.

Benl. New. Benloe's Reports, English Common Pleas, Ed. of 1661;—Benloe's Reports, English King's Bench.

Benl. Old. Benloe's Reports, English Common Pleas, of Benloe & Dalison, Ed. of 1689.

Benl. & Dal. Benloe & Dalison's Common Pleas Reports.

Benn. Cal. Bennett's Reports, vol. 1 California.

Benn. (Dak.). Bennett's Dakota Reports.

Benn Diss. Bennett's Dissertation on the Proceedings in the Master's Office in the Court of Chancery of England, sometimes cited *Benn. Prac.*

Benn. F. I. Cas. or *Benn. Fire Ins. Cas.* Bennett's Fire Insurance Cases.

Benn. (Mo.). Bennett's Reports, Missouri.

Benn. Prac. See *Benn. Diss.*

Benn. & H. Cr. Cas. Bennett & Heard's Leading Criminal Cases.

Benn. & H. Dig. Bennett & Heard's Massachusetts Digest.

Benne. Reporter of vol. 7, Modern Reports.

Bennett. Bennett's Reports, vol. 1 California;—Bennett's Reports, vols. 16-21 Missouri.

Bennett M. See *Benn. Diss.*

Bent. Bentley's Reports, Irish Chancery.

Benth. Ev or *Benth. Jud. Ev.* Bentham on Rationale of Judicial Evidence.

Benth. Leg. Bentham on Theory of Legislation.

Bentl. Atty.-Gen. Bentley's Reports, vols. 13-19 Attorneys-General's Opinions.

Beor. Queensland Law Reports.

Ber. Berton's New Brunswick Reports.

Bern. Bernard's Church Cases, Ireland.

Berry. Berry's Reports, vols. 1-28 Missouri Court of Appeals.
Bert. Berton's Reports, New Brunswick.
Besson Prec. Besson's New Jersey Precedents.
Best Ev. Best on Evidence.
Best Prcs. Best on Presumptions.
Best & S. or *Best & Sm.* Best & Smith's English Queen's Bench Reports.
Betts Adm. Pr. Betts's Admiralty Practice
Bett's Dec. Blatchford and Howland's United States District Court Reports,—Olcott's United States District Court Reports
Bev. (Ceylon). Beven's Ceylon Reports.
Bev Hom. Bevill on Homicide.
Bev. Pat. Bevill's Patent Cases, English
Bev & M. Bevin & Mill's Reports, Ceylon.
Beven. Beven's Ceylon Reports.
Bibb. Bibb's Reports, Kentucky
Bick. or *Bick. & H.* or *Bick & Hawl.* Bicknell & Hawley's Reports, vols. 10-20 Nevada.
Bick. (In.). Bicknell's Reports, India.
Bick. & H. or *Bick. & Hawl. (Nev.).* Bicknell & Hawley's Nevada Reports.
Biddle Retro. Leg. Biddle on Retrospective Legislation.
Big. Bignell's Reports, India.
Big. Bills & N. Bigelow on Bills and Notes.
Big. Cas. Bigelow's Cases, William I. to Richard I.
Big. Eq. Bigelow on Equity
Big Estop. Bigelow on Estoppel.
Big. Frauds. Bigelow on Frauds
Big Jarm. Wills. Bigelow's Edition of Jarman on Wills.
Big Lead. Cas. Bigelow's Leading Cases on Torts.
Big. L. I. Cas or *Big L & A. Ins. Cas.* Bigelow's Life and Accident Insurance Cases.
Big Ov Cas or *Big. Over-ruled Cas.* Bigelow's Over-ruled Cases.
Big. Plac. or *Big. Placita.* Bigelow's Placita Anglo-Normannica.
Bigelow, Estop. Bigelow on Estoppel.
Bigg Cr. L. Bigg's Criminal Law.
Bign. Bignell's Indian Reports.
Bilb. Ord. Ordinances of Bilboa.
Bill. Aw. Billing on the Law of Awards.
Binn. Binney's Pennsylvania Reports
Binn. Dig Binmore's Digest, Michigan.
Bing. Bingham's Reports, English Common Pleas.
Bing Des. Bingham on Descent.
Bing. Inf. Bingham on Infancy
Bing. Judg. Bingham on Judgments and Executions.
Bing. L. & T. Bingham on Landlord and Tenant.
Bing. N. C. Bingham's New Cases, English Common Pleas.
Bing. & Colv. Rents. Bingham & Colvin on Rents, etc.
Binn. Binney's Pennsylvania Reports.
Binn Jus. Binn's Pennsylvania Justice.
Bird Conv. Bird on Conveyancing.
Bird L & T. Bird on Landlord and Tenant.
Bird Sol. Pr. Bird's Solution of Precedents of Settlements.
Birds St. Birdseye's Statutes, New York.
Biret de l'Abs. Traite de l'Absence et de ses effets, par M Biret.
Biret, Vocab. Biret, Vocabulaire des Cinq Codes, ou definitions simplifées des termes de droit et de jurisprudence exprimés dan ces codes.
Bis. Bissell's United States Circuit Court Reports.
Bish. Contr. Bishop on Contracts.
Bish Cr. L. or *Bish. Cr. Law.* Bishop on Criminal Law.
Bish. Crim. Proc. or *Bish. Cr. Proc.* Bishop on Criminal Procedure.
Bish. Mar. & D. or *Bish. Mar. & Div.* Bishop on Marriage and Divorce
Bish Mar. Wom. Bishop on Married Women.
Bish. St. Cr. or *Bish. St. Crimes.* Bishop on Statutory Crimes.
Bishop Dig. Bishop's Digest, Montana.
Bisp. Eq. or *Bisph. Eq.* Bispham's Equity.

Biss. or *Bis.* Bissell's United States Circuit Court Reports.
Biss. Est. or *Biss. Life Est.* Bissett on Estates for Life.
Biss. Part. Bissett on Partnership.
Bitt. or *Bitt. Chamb. Rep.* Bittleson's Chamber Reports, England.
Bitt. Pr. Cas. Bittleston's English Practice Cases.
Bitt. W. & P. Bittleson, Wise & Parnell's Reports, vols. 2, 3 New Practice Cases.
Bk. Black's United States Supreme Court Reports.
Bk. Judg. Book of Judgments by Townsend.
Bl. Black's United States Supreme Court Reports;—Blatchford's United States Circuit Court Reports;—Blackford's Indiana Reports;—Henry Blackstone's English Common Pleas Reports;—W. Blackstone's English King's Bench Reports;—Blackstone.
Bl. C. C. Blatchford's United States Circuit Court Reports.
Bl Com. or *Bl. Comm.* Blackstone's Commentaries.
Bl D. Blount's Law Dictionary.
Bl. Dict. Black's Dictionary.
Bl D. & O Blackham, Dundas & Osborne's Irish Nisi Prius Reports.
Bl. H. Henry Blackstone's English Common Pleas Reports.
Bl Judgm. Black on Judgments.
Bl Law Tracts. Blackstone's Law Tracts.
Bl. L. D. Blount's Law Dictionary.
Bl. L T. Blackstone's Law Tracts.
Bl. Pr. Ca. or *Bl. Prize* or *Bl. Pr. Cas.* Blatchford's Prize Cases.
Bl R. or *Bl W.* Sir William Blackstone's English King's Bench Reports.
Bl. & H. Blatchford & Howland's United States District Court Reports,—Blake & Hedges's Reports, vols. 2-3 Montana
Bl. & How. Blatchford & Howland's Admiralty Reports, U. S. Dist. Court, Southern Dist. of N Y.
Bl & W. Mines. Blanchard & Weeks's Leading Cases on Mines.
Bla Ch. Bland's Maryland Chancery Reports.
Bla Com. Blackstone's Commentaries.
Bla. H. Henry Blackstone's English Common Pleas Reports.
Bla R. or *Bla. W.* Sir William Blackstone's Reports English King's Bench.
Black. Black's United States Supreme Court Reports,—Black's Reports, vols. 30-53 Indiana,—H. Blackstone's English Common Pleas Reports,—W. Blackstone's English King's Bench Reports,—Blackford's Indiana Reports
Black. Cond. Rep. Blackwell's Condensed Illinois Reports.
Black, Const. Law. Black on Constitutional Law.
Black, Const. Prohib. Black's Constitutional Prohibitions.
Black. D. & O. Blackham, Dundas & Osborne's Irish Nisi Prius Reports.
Black. H. Henry Blackstone's English Common Pleas Reports.
Black (Ind.). Black's Reports, Indiana Reports, vols. 30-53.
Black, Interp. Laws. Black on Interpretation of Laws.
Black, Intox. Liq. Black on Intoxicating Liquors.
Black, Judgm Black on Judgments
Black. Jus. Blackerby's Justices' Cases.
Black. R. Black's United States Supreme Court Reports,—W. Blackstone's English King's Bench Reports. See Black.
Black. S. Blackburn on Sales.
Black Ship. Ca. Black's Decisions in Shipping Cases.
Black, Tax Titles or *Black T. T* Black on Tax Titles.
Black. W. W. Blackstone's English King's Bench Reports.
Blackf. Blackford's Reports, Indiana.
Blackst. Com. Blackstone's Commentaries.
Blackst. R. Wm. Blackstone's Reports, English.
Blackw. Cond. Blackwell's Condensed Reports, Illinois.

Blak. Ch. Pr. Blake's Chancery Practice, New York.
Blake. Blake's Reports, vol. 1 Montana.
Blake & H. Blake and Hedges's Reports, vols. 2-3 Montana.
Blan. Annu. Blaney on Life Annuities.
Blan. Lim. Blanshard on Limitations.
Blanc. & W. L. C. Blanchard & Week's Leading Cases on Mines, etc.
Bland or *Bland's Ch.* Bland's Maryland Chancery Reports.
Blatchf. Blatchford's United States Circuit Court Reports—United States Appeals.
Blatchf. Pr. Ca. or *Blatchf. Pr. Cas.* Blatchford's Prize Cases.
Blatchf. & H. Blatchford & Howland's United States District Court Reports.
Bleck. or *Bleckley.* Bleckley's Reports, vols. 34, 35 Georgia.
Bli or *Bligh.* Bligh's Reports, English House of Lords.
Bli. N. S. or *Bligh N. S.* Bligh's Reports, New Series, English House of Lords.
Bliss. Delaware County Reports, Pennsylvania.
Bliss L. Ins. Bliss on Life Insurance.
Bliss N. Y. Co. Bliss's New York Code.
Bloom. Man. or *Bloom. Neg. Cas* or *Bloomf. Manu. Cas.* or *Bloomf. N. Cas* Bloomfield's Manumission (or Negro) Cases, New Jersey.
Blount. Blount's Law Dictionary.
Blount Tr. Blount's Impeachment Trial.
Boh. Dec. Bohun's Declarations.
Boh. Eng. L. Bohun's English Lawyer.
Boh. Priv. Lon Bohun's Privilegia Lon dini.
Boil Code N. Boileux's Code Napoléon.
Bomb. H. Ct. or *Bomb. H. Ct. Rep.* Bombay High Court Reports.
Bomb. L R. Bombay Law Reporter.
Bomb. Sel. Cas. Bombay Select Cases.
Bomb. Scr. Bombay Series Indian Law Reports
Bond. Bond's United States Circuit Reports.
Bone Prec. Bone's Precedents on Conveyancing.
Bonney Ins Bonney on Insurance.
Books S. Books of Sederunt.
Boor. or *Booraem.* Booraem's Reports, California.
Boote Ch. Pr. Boote's Chancery Practice.
Boote S. or *Boote, Suit at Law.* Boote's Suit at Law.
Booth Act. or *Booth R. A.* or *Booth, Real Act.* Booth on Real Actions.
Boothley Ind. Off. Boothley on Indictable Offences.
Bo R Act. Booth on Real Actions.
Borr Borradaile's Reports, Bombay.
Borth Borthwick on Libel and Slander.
Bos. Bosworth's New York Superior Court Reports.
Bos. & P. or *Bos. & P. N. R.* or *Bos. & Pul.* or *Bos. & Pul. N. R.* Bosanquet & Puller's New Reports, English Common Pleas.
Bost. Law Rep. Boston Law Reporter.
Bost. Pol. Rep. Boston Police Court Reports.
Bosw. Boswell's Reports, Scotch Court of Session;—Bosworth's New York Superior Court Reports.
Bosw. (N. Y.). Bosworth's New York City Superior Court Reports, vols. 14-23.
Bott P. L. Bott's Poor Laws.
Bott P. L. Cas. Bott's Poor Law Cases.
Bott P. L. Const. Const's Edition of Bott's Poor Law Cases.
Bott Set Cas. or *Bott Sett. Cas.* Bott's Poor Law (Settlement) Cases, English.
Bouch. Ins. Dr. Mar. Boucher, Institutes ou Droit Maritime.
Boulay Paty Dr. Com. Cours de Droit Commercial Maritime, par P. S. Boulay Paty.
Bould. Bouldin's Reports, vol. 119 Alabama.
Bouln. or *Boulnois.* Boulnois's Reports, Bengal.
Bourke. Bourke's Reports, Calcutta High Court.
Bourke P. P. Bourke's Parliamentary Precedents.
Bousq. Dict. de Dr. Bousquet, Dictionnaire de Droit.
Bout. Man. Boutwell's Manuel of the Tax System of the U. S.
Bouv. or *Bouv. L. D.* Bouvier's Law Dictionary.
Bouv. Inst. Bouvier's Institutes of American Law.
Bouv. Inst. Th. Institutiones Theologicæ, auctore J. Bouvier.
Bouvier. Bouvier's Law Dictionary.
Bov. Pat. Ca. Bovill's Patent Cases.
Bow. Bowler & Bowers, vols. 2, 3, United States Comptroller's Decisions.
Bowen, Pol. Econ. Bowen's Political Economy.
Bowy. C. L. Bowyer's Modern Civil Law.
Bowy. Com. or *Bowy. P. L.* Bowyer's Commentaries on Universal Public Law.
Bowyer, Mod. Civil Law. Bowyer's Modern Civil Law.
Boyce Pr. Boyce's Practice in the U. S. Courts.
Boyd Adm. Boyd's Admiralty Law.
Boyd Sh. Boyd's Merchant Shipping Laws.
Boyle Char. Boyle on Charities.
Br. Bracton or *Bracton de Legibus et Consuetudinibus Angliæ;*—Bradford;—Bradwell;—Brayton,—Breese; — Brevard; — Brewster; — Bridgman; — Brightly; — British; — Britton; — Brockenbrough, — Brooke; — Broom; — Brown; — Brownlow; — Bruce. See below, especially under Bro.
Br. Abr. Brooke's Abridgment.
Br. Brev. Jud. Brownlow's Brevia Judicalia.
Br. C. C. British (or English) Crown Cases (American reprint);—Brown's Chancery Cases, England.
Br. Ch. C. Brown's Chancery Cases, English.
Br. Cr. Ca. British (or English Crown Cases).
Br. Fed. Dig. Brightly's Federal Digest.
Br N. C. Brooke's New Cases, English King's Bench.
Br. P. C. Brown's English Parliamentary Cases.
Br. Reg. Braithwaite's Register.
Br. Sup Brown's Supplement to Morrison's Dictionary, Sessions Cases, Scotland.
Br. Syn. Brown's Synopsis of Decisions, Scotch Court of Session.
Br. & B. Broderip & Bingham, English Common Pleas.
Br. & F. Ecc or *Br. & Fr.* Broderick & Freemantle's Ecclesiastical Cases, English.
Br. & Gold. Brownlow & Goldesborough's English Common Pleas Reports.
Br. & L. or *Br. & Lush* Brownlow & Lushington's English Admiralty Reports.
Br. & R. Brown & Rader's Missouri Reports.
Brac. or *Bract.* or *Bracton.* Bracton de Legibus et Consuetudinibus Angliæ.
Brack. L. Mis. Brackenbridge's Law Miscellany
Brack. Trust. Brackenbridge on Trusts.
Brad. Bradford's Surrogate Reports, New York;—Bradford's Iowa Reports;—Bradwell's Illinois Appeal Reports;—Bradley's Reports, Rhode Island,—Brady's History of the Succession of the Crown of England.
Bradby Dist. Bradby on Distresses.
Bradf. Bradford's New York Surrogate Reports;—Bradford's Reports, Iowa.
Bradf. (Iowa). Bradford's Reports, Iowa.
Bradf. Sur. or *Bradf. Surr.* Bradford's Surrogate Court Reports, New York.
Bradl (R. I.). Bradley's Rhode Island Reports.
Bradl. P. B. Bradley's Point Book.
Bradw. Bradwell's Reports, Illinois Appellate Courts.
Brady Ind. Brady's Index, Arkansas Reports.
Braithw. Pr. Braithwaite's Record and Writ Practice.
Brame. Brame's Reports, vols. 66-72 Mississippi.
Branch. Branch's Reports, Florida Reports, vol. I.
Branch Max. Branch's Maxims.
Branch Pr. or *Branch, Princ.* Branch's Principia Legis et Æquitatis.
Brand. Brandenburg's Reports, vol. 21, Opinions Attorneys-General.
Brand. F. Attachm. or *Brand. For. Attachm.* Brandon on Foreign Attachment.
Brande. Brande's Dictionary of Science.
Brandt Div. Brandt on Divorce Causes.
Brandt Sur. G. Brandt on Suretyship and Guaranty.
Brans. Dig. Branson's Digest of Bombay Reports.
Brant. Brantly's Reports, vols. 80-116 Maryland.
Brayt. Brayton's Reports, Vermont.
Breese. Breese's Reports, vol. 1 Illinois.
Brett Ca. Eq. Brett's Cases in Modern Equity.
Brev. Brevard's Reports, South Carolina.

Brev. Dig. Brevard's Digest.
Brev. Ju. Brevia Judicialia (Judicial Writs).
Brev. Sel. Brevia Selecta, or Choice Writs.
Brew. Brewer's Reports, vols. 19-26 Maryland.
Brew. or *Brews.* or *Brewst.* Brewster's Reports, Pennsylvania.
Brew. (Md.). Brewer's Reports, Maryland.
Brewst. Brewster's Pennsylvania Reports.
Brice Pub. Wor. Brice's Law Relating to Public Worship.
Brice U. V. Brice's Ultra Vires.
Brick. Dig. Brickell's Digest, Alabama.
Bridg. J. Bridgmore's Reports, English Common Pleas
Bridg. Conv. Bridgman on Conveyancing.
Bridg Dig Ind. Bridgman's Digested Index.
Bridg J. Sir J. Bridgman's English Common Pleas Reports.
Bridg. Leg. Bib. Bridgman's Legal Bibliography.
Bridg. O. Sir Orlando Bridgman's English Common Pleas Reports—(sometimes cited as Carter).
Bridg. Refl. Bridgman's Reflections on the Study of the Law.
Bridg. Thes. Jur. Bridgman Thesaurus Juridicus
Bright. Brightly's Nisi Prius Reports, Pennsylvania.
Bright. C. Brightly on Costs
Bright. Dig. Brightly's Digest, New York;—Brightly's Digest, Pennsylvania,—Brightly's Digest, United States.
Bright. Elec. Cas. or *Bright. Elect. Cas.* Brightly's Leading Election Cases.
Bright. Eq. Brightly's Equity Jurisprudence.
Bright. Fed. Dig. Brightly's Federal Digest.
Bright H. & W. Bright on Husband and Wife.
Bright. N. P. Brightly's Nisi Prius Reports, Pennsylvania.
Bright. (Pa.). Brightly's Nisi Prius Reports, Pennsylvania.
Bright. Purd. or *Brightly's Purd Dig.* Brightly's Edition of Purdon's Digest of Laws of Pennsylvania.
Bright. T. & H Pr. Brightly's Edition of Troubat & Haly's Practice.
Bright. U. S. Dig. Brightly's United States Digest.
Brisb. or *Brisbin (Minn.).* Brisbin's Minnesota Reports.
Brissonius De verborum quæ ad jus civile pertinent significatione.
Brit. Britton's Ancient Pleas of the Crown.
Brit. Col. S. C. British Columbia Supreme Court Reports.
Brit. Cr. Cas. British (or English) Crown Cases.
Brit. Quar. Rev. British Quarterly Review.
Britt. Britton on Ancient Pleading.
Bro. See, also, Brown and Browne. Browne's Pennsylvania Reports,—Brown's Michigan Nisi Prius Reports;—Brown's English Chancery Reports;—Brown's Parliamentary Cases,—Brown's Reports, vols. 53-65 Mississippi,—Brown's Reports, vols. 80-136 Missouri.
Bro. A. & C. L. Browne's Admiralty and Civil Law.
Bro. A. & R. Brown's United States District Court Reports (Admiralty and Revenue Cases).
Bro. Abr. Brooke's Abridgments.
Bro. Abr. in Eq. Browne's New Abridgment of Cases in Equity.
Bro. Adm. Brown's United States Admiralty Reports.
Bro. Car. Browne on Carriers.
Bro. C. C. Brown's English Chancery Cases, or Reports.
Bro. Ch. or *Bro. Ch. Cas.* or *Bro. Ch. R.* Brown's Chancery Cases, English.
Bro. Civ. Law. Browne's Civil Law.
Bro. Co. Act. Browne on the Companies Act.
Bro. Com. Brown's Commentaries.
Bro. Div. Pr. Browne's Divorce Court Practice.
Bro. Ecc. Brooke's Six Judgments in Ecclesiastical Cases (English).
Bro. Ent. Browne's Book of Entries.
Bro. Insan. Browne's Medical Jurisprudence of Insanity.
Bro. Leg. Max. or *Bro. Max.* Broom's Legal Maxims.
Bro. M. N. Brown's Methodus Novissima.
Bro. M. & D. Browning on Marriage and Divorce.
Bro. N. C. Brooke's New Cases, English King's Bench.
Bro. N. P. Brown's Michigan Nisi Prius Reports;—Brown's Nisi Prius Cases, English.
Bro. N. P. Cas. Browne's National Bank Cases.
Bro. N. P. (Mich.). Brown's Nisi Prius Cases, Michigan.
Bro. Of. Not. Brooke on the Office of a Notary in England.
Bro. P. C. Brown's English Parliamentary Cases.
Bro. (Pa). Browne's Pennsylvania Reports.
Bro. Read. Brooke's Reading on the Statute of Limitations.
Bro. R. P. L. Brown's Limitation as to Real Property.
Bro. Sales. Brown on Sales.
Bro. St. Fr. Browne on the Statute of Frauds.
Bro. Stair. Brodie's Notes and Supplement to Stair's Institutions of the Laws of Scotland.
Bro. Supp. Brown's Supplement to Morrison's Dictionary of the Court of Session, Scotland.
Bro. Syn. Brown's Synopsis of the Decisions of the Scotch Court of Session.
Bro. T. M. Browne on Trademarks.
Bro. V. M. Brown's Vade Mecum.
Bro. & F. or *Bro. & Fr.* Brodrick & Freemantle's Ecclesiastical Cases.
Bro. & G. Brownlow & Goldesborough's English Common Pleas Reports.
Bro. & Lush. Browning & Lushington's English Admiralty Reports.
Brock. or *Brock. C. C.* or *Brock Marsh.* Brockenbrough's Reports of Marshall's Decisions, United States Circuit Court.
Brock. Cas. Brockenbrough's Virginia Cases
Brock. & H. or *Brock. & Hol.* Brockenbrough & Holmes's Reports, Virginia Cases, vol 1.
Brod Stair. Brodie's Notes and Supplement to Stair's Institutes of the Laws of Scotland.
Brod. & B. or *Brod. & Bing.* Broderip & Bingham's English Common Pleas Reports.
Brod & F. or *Brod. & Fr.* Brodrick & Freemantle's Ecclesiastical Cases.
Brooke or *Brooke (Petit).* Brooke's New Cases, English King's Bench.
Brooke Abr. Brooke's Abridgment.
Brooke Ecc. Brooke's Ecclesiastical Reports, English.
Brooke Eccl. Judg. Brooke's Six Ecclesiastical Judgments.
Brooke Lim. Brooke's Reading on the Statute of Limitations.
Brooke N. C. Brooke's New Cases, English King's Bench (Bellewe's Cases, *temp.* Henry VIII).
Brooke Not. Brooke on the Office of a Notary in England.
Brooke Read. Brooke's Reading on the Statute of Limitations.
Brooke Six Judg. Six Ecclesiastical Judgments of the English Privy Council, by Brooke.
Brooks. Brooks's Reports, vols. 106-119 Michigan.
Broom C. L. or *Broom Com. Law* or *Broom Comm.* Broom's Commentaries on the Common Law.
Broom Const. L. Broom's Constitutional Law.
Broom Leg. Max. or *Broom Max.* Broom's Legal Maxims.
Broom Part. Broom's Parties to Actions.
Broom & H. Com. or *Broom & H. Comm.* Broom & Hadley's Commentaries on the Laws of England.
Broun or *Broun Just.* Broun's Reports, Scotch Justiciary Court.
Brown. Brown's Reports, vols. 53-65 Mississippi;—Brown's English Parliamentary Cases;—Brown's English Chancery Reports;—Brown's Law Dictionary;—Brown's Scotch Reports;—Brown's United States District Court Reports;—Brown's U. S. Admiralty Reports;—Brown's Michigan Nisi Prius Reports;—Brown's Reports, vols. 4-25 Nebraska;—Brownlow (& Goldesborough's) English Common Pleas Reports;—Brown's Reports, vols. 80-136 Missouri. See, also, Bro. and Browne.
Brown, Adm. Brown's United States Admiralty Reports.

Brown A. & R. Brown's United States District Court Reports (Admiralty and Revenue Cases).
Brown Car. Brown on Carriers.
Brown Ch. or *Brown Ch. C.* or *Brown Ch. Cas.* or *Brown Ch. R.* Brown's Chancery Cases, English.
Brown, Civ. & Adm. Law. Brown's Civil and Admiralty Law.
Brown Comm. Brown's Commentaries.
Brown Dict. Brown's Law Dictionary.
Brown Ecc. Brown's Ecclesiastical Reports, English.
Brown Ent. Brown's Entries.
Brown Fixt. Brown on Fixtures.
Brown Lim Brown's Law of Limitations.
Brown. M. & D. Browning on Marriage and Divorce.
Brown Novis. Brown's Method of Novissima.
Brown N. P. Brown's Michigan Nisi Prius Reports.
Brown N. P. Cas. Brown's Nisi Prius Cases, English.
Brown N. P. (Mich.). Brown's Nisi Prius Reports, Michigan.
Brown P. C. or *Brown, Parl Cas.* Brown's Parliamentary Cases, English House of Lords.
Brown R. P. L. Brown's Limitations as to Real Property.
Brown Sales. Brown on Sales.
Brown Sup. or *Brown Sup Dec.* Brown's Supplement to Morrison's Dictionary. Session Cases, Scotland.
Brown Syn. Brown's Synopsis of Decisions of the Scotch Court of Session.
Brown V. M. Brown's Vade Mecum.
Brown. & Gold. Brownlow & Goldesborough's English Common Pleas Reports.
Brown & H. (Miss). Brown & Hemingway's Reports, vols. 53-65 Mississippi.
Brown & L. or *Brown & Lush.* Brown's & Lushington's Reports, English Admiralty.
Browne. Browne's Pennsylvania Reports;—Browne's Reports, vols. 97-109 and 112-114 Massachusetts;—Browne, New York Civil Procedure. See also Bro. and Brown.
Browne Adm. C. L. Browne's Admiralty and Civil Law.
Browne Bank Cas. or *Browne Nat. B. C.* Browne's National Bank Cases.
Browne Car. Browne on the Law of Carriers.
Browne Civ. L. Browne on Civil Law.
Browne, Div. or *Browne Div. Pr.* Browne's Divorce Court Practice.
Browne Frauds. Browne on the Statute of Frauds.
Browne Insan. Browne's Medical Jurisprudence of Insanity.
Browne Mass Browne's Reports, Massachusetts, vols. 97-109 and 112-114.
Browne N. B C. Browne's National Bank Cases.
Browne, Prob. Pr. Browne's Probate Practice.
Browne T. M. Browne on Trademarks.
Browne Usages. Browne on Usages and Customs.
Browne & G or *Browne & Gray* Browne & Gray's Reports, Massachusetts, vols. 110-111.
Browne & Macn. Browne & Macnamara's English Railway and Canal Cases.
Browning Mar. & D. Browning on Marriage and Divorce.
Browning & L. Browning & Lushington's Reports, English Admiralty.
Brownl. or *Brownl. & G.* or *Brownl. & Gold.* Brownlow & Goldesborough's English Common Pleas Reports.
Brownl. Brev. Jud. Brownlow's Brevia Judiciala.
Brownl. Ent. or *Brownl. Rediv.* Brownlow's Redivivus or Entries.
Bru. or *Bruce* Bruce's Reports, Scotch Court of Session.
Bruce M. L. Bruce's Military Law, Scotland.
Brun. Brunner's Collective Cases, United States.
Brunk. Ir. Dig. Brunker's Irish Common Law Digest.
Brunner Sel. Cas. Brunner's Selected Cases United States Circuit Courts.
Bt. Benedict's United States District Court Reports.
Buch. Buchanan's (Eben J. or James) Reports, Cape of Good Hope.
Buch. Cas. or *Tr.* Buchanan's Remarkable Criminal Cases, Scotland.
Buch. Ct. Ap. Cape G. H. Buchanan's Court of Appeals Reports, Cape of Good Hope.
Buch E. Cape G. H. E. Buchanan's Reports, Cape of Good Hope.
Buch. E. D. Cape G. H. Buchanan's Eastern District Reports, Cape of Good Hope.
Buch. J. Cape G. H. J. Buchanan's Reports, Cape of Good Hope.
Buch. Rep. Buchanan's Reports, Cape of Good Hope.
Buck. Buck's English Cases in Bankruptcy;—Buck's Reports, vols. 7-8 Montana.
Buck Cas. Buck's Bankrupt Cases, English.
Buck. Co. Act. Buckley's Law and Practice under Companies Act.
Buck. Cooke. Bucknill's Cooke's Cases of Practice, Common Pleas.
Buck. Dec. Buckner's Decisions (in Freeman's Mississippi Chancery Reports).
Buff. Super. Ct. (N. Y.). Sheldon's Superior Court Reports, Buffalo, New York.
Bull N. P. Buller's Law of Nisi Prius, English.
Bull. & C. Dig or *Bull. & Cur. Dig.* Bullard & Curry's Louisiana Digest.
Bull & L. Pr. Bullen & Leake's Precedents of Pleading.
Buller MSS. J. Buller's Paper Books, Lincoln's Inn Library.
Bulling. Eccl. Bullingbrooke's Ecclesiastical Law.
Bulst. Bulstrode's Reports, English King's Bench.
Bump Bkcy. Bump's Bankruptcy Practice.
Bump Fed. Proc. Bump's Federal Procedure.
Bump Fr. Conv. or *Bump Fraud Conv.* Bump on Fraudulent Conveyances.
Bump Inter. Rev. L. Bump's Internal Revenue Laws.
Bump N. C. or *Bump Notes.* Bump's Notes on Constitutional Decisions.
Bump Pat. Bump's Law of Patents, Trademarks, etc.
Bunb. Bunbury's Reports, English Exchequer.
Buny. L. A. Bunyon on Life Insurance.
Bur. Burnett's Reports, Wisconsin;—Burrow's Reports, English King's Bench.
Bur. M. Burrow's Reports *tempore* Mansfield.
Burd. Cas. Torts. Burdick's Cases on Torts.
Burf. Burford's Reports, vols. 6-18 Oklahoma.
Burg. Dig. Burgwyn's Digest Maryland Reports.
Burge Col. Law. Burge on Colonial Law.
Burge Confl. Law. Burge on the Conflict of Laws.
Burge For. Law. Burge on Foreign Law.
Burge Mar. Int. L. Burge on Maritime International Law.
Burge Sur. Burge on Suretyship.
Burgess. Burgess's Reports, vols. 46-51 Ohio State.
Burke Tr. Burke's Celebrated Trials.
Burks. Burks's Reports, vols 91-98 Virginia.
Burlam. Nat. Law or *Burlamaqui.* Burlamaqui's Natural and Politic Law.
Burlesque Reps. Skillman's New York Police Reports.
Burm. L. R. Burmah Law Reports.
Burn Burnett's Reports, Wisconsin.
Burn. Cr. L. Burnett on the Criminal Law of Scotland
Burn Dict. Burn's Law Dictionary.
Burn, Ecc. Law or *Burn Ec. L.* Burn's Ecclesiastical Law.
Burn Jus. Burn's Justice of the Peace.
Burnet. Burnet's Manuscript Decisions, Scotch Court of Session.
Burnett. Burnett's Wisconsin Reports;—Burnett's Reports, vols. 20-22 Oregon.
Burr. Burrow's Reports, English King's Bench *temp.* Mansfield.
Burr. Ass. Burrill on Assignments.
Burr. Circ. Ev. Burrill on Circumstantial Evidence.
Burr. Dict. Burrill's Law Dictionary.

Burr. Prac. Burrill's Practice.
Burr. S C. or *Sett. Cas.* Burrows's English Settlement Cases.
Burr. Taxation. Burroughs on Taxation.
Burr Tr. Burr's Trial
Burr Tr. Rob. Burr's Trial, reported by Robertson.
Burrill. Burrill's Law Dictionary.
Burrill, Circ. Ev. Burrill on Circumstantial Evidence.
Burrill, Pr. Burrill's Practice
Burrow. Burrow's Reports, English King's Bench.
Burrow, Sett. Cas. Burrow's English Settlement Cases.
Burt. Bankr. Burton on Bankruptcy.
Burt. Cas. Burton's Collection of Cases and Opinions
Burt. Parl. Burton's Parliamentary Diary.
Burt. R. P. or *Burt. Real Prop.* Burton on Real Property.
Burt Sc. Tr. Burton's Scotch Trials.
Busb. Busbee's Law Reports, North Carolina Reports, vol. 44.
Busb. Cr. Dig. Busbee's Criminal Digest, North Carolina.
Busb. Eq. Busbee's Equity Reports, North Carolina.
Bush. Bush's Reports, Kentucky.
Busw. & Wal. Pr. Buswell & Walcott's Practice, Massachusetts.
Butl. Co. Litt. Butler's Notes to Coke on Littleton.
Butl. Hor. Jur. Butler Horæ Juridicæ Subsecivæ.
Butt's Sh. Butt's Edition of Shower's English King's Bench Reports
Buxton. Buxton's Reports, vols. 123-129 North Carolina
Byles, Bills. Byles on Bills.
Bynk. Bynkershoek on the Law of War.
Bynk Jur. Pub. Bynkershoek Quæstiones Juris Publici.
Bynk Obs Jur. Rom. Bynkershoek, Observationum Juris Romani Libri.
Bynk War. Bynkershoek on the Law of War.
Byth. Conv. Bythewood's Conveyancing.
Byth Prec. Bythewood's Precedents
C. Cowen's Reports, New York,—Connecticut;—California,—Colorado,—Canada (Province),—Codex Juris Civilis. Code. Chancellor. Chancery. Chapter. Case.
C. of S. Ca. 1st Series. Court of Session Cases, First Series. By Shaw, Dunlop & Bell. Ct. Sess. (Sc.).
C. of S. Ca. 2d Series. Court of Session Cases, Second Series. By Dunlop, Bell & Murray. Ct. Sess. (Sc.).
C. of S. Ca. 3d Series. Court of Session Cases, Third Series. By Macpherson, Lee & Bell. Ct. Sess. (Sc.).
C. of S. Ca. 4th Series. Court of Session Cases, Fourth Series. By Rettie, Crawford & Melville. Ct. Sess. (Sc.).
C. A. Court of Appeal; Court of Arches; Chancery Appeals.
C. B. Chief Baron of the Exchequer, Common Bench; English Common Bench Reports, by Manning, Granger & Scott.
C. B. N. S English Common Bench Reports, New Series, by Manning, Granger & Scott.
C. B. R. Cour de Blanc de la Reine, Quebec.
C. C. Circuit Court; Chancery Cases; Crown Cases; County Court; City Court; Cases in Chancery, English; Civil Code; Civil Code Francais, or Code Napoleon; Cepi Corpus.
C. C A. U. S. Circuit Court of Appeals Reports; —Circuit Court of Appeals, United States;—County Court Appeals, English.
C. C. C. Choice Cases in Chancery, English;—Crown Circuit Companion.
C. C. Chr. or *C. C. Chron.* Chancery Cases Chronicle, Ontario.
C. C. E. Caines's Cases in Error, New York;—Cases of Contested Elections.
C. C. L. C. Civil Code, Quebec.
C. Com. Code de Commerce.
C. C. P. Code of Civil Procedure.
C. C. R. City Courts Reports, New York City;—County Court Reports, Pa.;—Crown Cases Reserved.
C. Cr. P. Code of Criminal Procedure.
C. C. Supp. City Court Reports, Supplement, New York.
C. C. & B. B. Cepi Corpus and Bail Bond.
C. C. & C. Cepi Corpus et Committitur.
C. D. Commissioner's Decisions, United States Patent Office;—Century Digest;—Comyn's Digest.
C. d'Et. Conseil d'Etat.
C. E. Gr. C. E. Greene's New Jersey Equity Reports.
C. F. Code Forestier.
C. H. Rec. City Hall Recorder (Rogers), New York City.
C. H. Rep. City Hall Reporter (Lomas), New York City.
C. H & A. Carrow, Hamerton & Allen's New Sessions Cases, English.
C. I. Constitutiones Imperiales.
C. Instr. Cr. Code Instruction Criminelle.
C. J. Chief Justice.
C. J. C. Couper's Justiciary Cases, Scotland.
C. J. Can. Corpus Juris Canonici.
C. J. Civ. Corpus Juris Civilis.
C. J. C. P. Chief Justice of the Common Pleas.
C. J. K. B. Chief Justice of the King's Bench.
C. J. Q. B. Chief Justice of the Queen's Bench.
C. J. U. B. Chief Justice of the Upper Bench.
C. L. Common Law. Civil Law
C. L. Ch. Common Law Chamber Reports, Ontario.
C. L. J. Central Law Journal, St. Louis, Mo.;—Canada Law Journal, Toronto.
C L J. N. S. Canada Law Journal, New Series, Toronto
C. L. N. Chicago Legal News.
C. L. P. Act. English Common Law Procedure Act.
C. L. R. Common Law Reports, printed by Spottiswoode,—English Common Law Reports.
C. M R. Crompton, Meeson & Roscoe's Reports, English Exchequer.
C. N Code Napoleon.
C N. Conf Cameron & Norwood's North Carolina Conference Reports.
C. N. P. Cases at Nisi Prius.
C. N. P. C. Campbell's Nisi Prius Cases, English.
C. O. Commons' Orders.
C of C. E. Cases of Contested Elections, United States.
C. P. Code of Procedure;—Common Pleas;—Code Penal.
C. P. C. Code of Civil Procedure, Quebec;—Code de Procédure Civile;—Cooper's Practice Cases, English.
C. P. Coop. C. P. Cooper's Reports, English.
C. P. C. t. Br. C. P. Cooper's English Chancery Reports *tempore* Brougham.
C. P. C. t. Cott. C. P. Cooper's English Chancery Reports *tempore* Cottenham.
C. P. D. or *C. P. Div.* Common Pleas Division, English Law Reports (1875-1880).
C. P. Q. Code of Civil Procedure, Quebec.
C. P. Rcp. or *C. P. Rcpt.* Common Pleas Reporter, Scranton, Pennsylvania.
C. P. U. C. Common Pleas Reports, Upper Canada.
C. Pr. Code of Procedure;—Code de Procédure Civile.
C. R. Chancery Reports;—Code Reporter, New York.
C. R. N. S. Code Reports, New Series, New York.
C. Rob. or *C. Rob. Adm.* Christopher Robinson's Reports on English Admiralty.
C. S. Court of Session, Scotland.
C. S. B. C. Consolidated Statutes, British Columbia.
C. S. C. Consolidated Statutes of Canada, 1859.
C. S. L. C. Consolidated Statutes, Lower Canada.
C. S. M. Consolidated Statutes of Manitoba.
C. S. N. B. Consolidated Statutes of New Brunswick.
C. S. U. C. Consolidated Statutes of Upper Canada, 1859.
C. S. & J. Cushing, Storey & Josselyn's Election

Cases. See vol. 1 Cushing's Election Cases, Massachusetts.

C. S & P. (Craigie, Stewart &) Paton's Scotch Appeal Cases.

C. T Constitutiones Tiberii.

C Theod. Codex Theodosiani.

C. t K. Cases *tempore* King (Macnaghten's Select Chancery Cases, English).

C. t. N Cases *tempore* Northington (Eden's English Chancery Reports).

C t T. or *C. t. Talb.* Cases *tempore* Talbot, English Chancery.

C. W. Dud C W Dudley's Law or Equity Reports, South Carolina.

C. W. Dudl Eq. C. W. Dudley's Equity Reports, South Carolina

C. & A. Cooke & Alcock's Reports, Irish King's Bench and Exchequer.

C. & C. Coleman and Caine's Cases, New York

C. & D Corbett & Daniel's English Election Cases,—Crawford & Dix's Abridged Cases, Irish.

C & D. A. C. Crawford & Dix's Abridged Cases, Irish.

C & D C. C. Crawford & Dix's Irish Circuit Cases,—Crawford & Dix's Criminal Cases, Irish.

C. & E. Cababé & Ellis, English.

C. & F. Clark & Finnelly's Reports, English House of Lords

C. & H. Dig. Coventry & Hughes's Digest.

C. & J. Crompton & Jervis's English Exchequer Reports.

C. & K. Carrington & Kirwan's Reports, English Nisi Prius.

C. & L. Connor & Lawson's Irish Chancery Reports.

C. & L. C. C. Cane & Leigh's Crown Cases.

C. & L. Dig Cohen & Lee's Maryland Digest.

C. & M. Crompton & Meeson's English Exchequer Reports,—Carrington & Marshman's English Nisi Prius Reports

C. & Marsh Carrington & Marshman's Reports, English Nisi Prius.

C & N. Cameron & Norwood's North Carolina Conference Reports.

C. & O R Cas or *C. & O. R. R. C. Cas.* Carrow & Oliver's English Railway and Canal Cases.

C. & P. Carrington & Payne's English Nisi Prius Reports;—Craig & Phillips's Chancery Reports.

C. & R Cockburn & Rowe's Reports, English Election Cases.

C. & S. Dig. Connor & Simonton's South Carolina Digest.

Ca. Case;—Placita;—Placitum;—Cases (see Cas.).

Ca resp. Capias ad respondendum.

Ca sa. Capias ad satisfaciendum.

Ca t. Hard. Cases *tempore* Hardwicke.

Ca t K. Cases *tempore* King,—Cases *tempore* King, Chancery.

Ca t Talb. Cases *tempore* Talbot, Chancery.

Ca temp. F. Cases *tempore* Finch.

Ca. temp. H. Cases *tempore* Hardwicke, King's Bench

Ca temp. Holt. Cases *tempore* Holt, King's Bench.

Cab. Lawy. The Cabinet Lawyer.

Cab & E. or *Cab. & El.* Cababé & Ellis, English.

Cadw Dig. Cadwalader's Digest of Attorney-Generals' Opinions.

Cadw Gr Rents. Cadwalader on Ground Rents.

Cai. Caines's Reports, Supreme Court, N. Y.;—Caines's Term Reports, New York Supreme Court.

Cai. Cas. or *Cai. Cas. Err.* Caines's New York Cases in Error.

Cai. Inst. Cail or Gail Institutiones.

Cai. Lex. Mer. Caines's *Lex Mercatoria.*

Cai. Pr. Caines's Practice.

Cai. T. R. Caines's Term Reports, New York Supreme Court.

Cai. Visig. Caines's *Visigothicum.*

Cain. or *Caines.* Caines, New York;—Caines's Reports, New York Supreme Court.

Caines Cas. Caines's Cases, Court of Errors, New York.

Cairn's Dec. Cairn's Decisions in the Albert Arbitration.

Cairns Dec. Cairns's Decisions, Reilly, English.

Cal. California;—California Reports;—Calthrop's English King's Bench Reports;—Caldecott's English Settlement Cases.

Cal. L. J. California Law Journal, San Francisco.

Cal. Leg. Adv. Calcutta Legal Advertiser, India.

Cal Leg. Obs. Calcutta Legal Observer.

Cal. Leg. Rec. California Legal Record, San Francisco.

Cal. Prac. Hart's California Practice.

Cal. Rep. California Reports;—Calthrop's English King's Bench Reports.

Cal. S. D. A. Calcutta Sudder dewanny Adawlut Reports.

Cal. Ser. Calcutta Series Indian Law Reports.

Cal. Sew. Callis on Sewers.

Cal. W. R. Calcutta Weekly Reporter, India.

Calc L O Calcutta Legal Observer

Cald. Caldwell's Reports, vols 25-36 West Virginia

Cald or *Cald. J. P.* or *Cald. M. Cas.* or *Cald. S. C.* Caldecott's English Magistrate's (Justice of the Peace) and Settlement Cases.

Cald. Arb. Caldwell on Arbitration.

Cald. Sett. Cas. Caldecott's Settlement Cases.

Call Call's Reports, Virginia

Call Mil. L. Callan's Military Laws.

Call. Sew. Callis on Sewers.

Calth. Calthorpe's Reports, English King's Bench.

Calth Copyh. Calthorpe on Copyholds.

Calvin or *Calv. Lex.* or *Calvin. Lex. Jurid.* Calvinus Lexicon Juridicum.

Calv. Par. Calvert on Parties to Suits in Equity

Cam. Cameron's Reports, Upper Canada Queen's Bench.

Cam. Crit. Camden's Britannia.

Cam Duc. Camera Ducata, Duchy Chamber.

Cam. Op. Cameron's Legal Opinions, Toronto.

Cam Scac. or *Cam. Scacc.* Camera Scaccaria (Exchequer Chamber).

Cam Stell. Camera Stellata, Star Chamber.

Cam. & N. or *Cam & Nor.* Cameron & Norwood's Reports, North Carolina Conference Reports, vol. 3

Camd Brit. or *Camden.* Camden's Britannia.

Camp Camp's Reports, vol. 1 North Dakota,—Campbell's English Nisi Prius Reports;—Campbell's Reports, vols. 27-58 Nebraska. See also Campbell.

Camp Dec or *Campt. Dec.* Campbell's Reports of Taney's Decisions, U. S. Circuit Court;—Campbell's Decisions.

Camp. Ld. Ch. or *Camp. Lives Ld. Ch.* Campbell's Lives of the Lord Chancellors.

Camp. N. P. Campbell's Reports, English Nisi Prius.

Campbell. Campbell's English Nisi Prius Reports;—Campbell's Reports of Taney's United States Circuit Court Decisions;—Campbell's Legal Gazette Reports, Pennsylvania;—Campbell's Reports, vols. 27-58 Nebraska.

Camp Neg. Campbell on Negligence.

Can. Canon. Canada.

Can Exch. Canada Exchequer Reports.

Can. L. J. Canada Law Journal, Toronto.

Can. L. J. (L. C.). Lower Canada Law Journal Montreal.

Can. L. T. Canadian Law Times, Toronto, Canada.

Can. Mun. J. Canadian Municipal Journal.

Can. S C. Rep. Canada Supreme Court Reports

Canad. Mo. Canadian Monthly.

Cane & L. Cane & Leigh's Crown Cases Reserved.

Cap. Capitulum. Chapter.

Cape Law J. Cape Law Journal, Grahamstown, Cape of Good Hope.

Car. Carolina;—Carolus; thus 13 Car. II., signifies the thirteenth year of the reign of King Charles II.

Car. Cr. L. Carrington's Criminal Law.

Car., H. & A. Carrow, Hamerton & Allen's New Sessions Cases, English.

Car. L. Jour. Carolina Law Journal, Charleston, S. C.

Car. L. Rep. Carolina Law Repository, Raleigh, N. C.

Car. O. & B. Carrow, Oliver & Bevan's English Railway and Canal Cases.

Car. & K. or *Car. & Kir.* Carrington & Kirwan's English Nisi Prius Reports.

Car. & M or *Car & Mar.* Carrington & Marshman's English Nisi Prius Reports.

Car. & O. or *Car. & Ol.* Carrow & Oliver's Railway and Canal Cases

Car. & P. Carrington & Payne's Reports, English Nisi Prius.

Carl. Carleton, New Brunswick.

Carp. Carpenter's Reports, California.

Carp. P. C. Carpmael's English Patent Cases.

Carpenter. Carpenter's Reports, vols. 52-53 California.

Carr. Cas Carran's Summary Cases, India.

Carr, Ham. & Al. Carrow, Hamerton & Allen's New Sessions Cases, English

Carr. & K. Carrington & Kirwan.

Carrau. Carrau's Edition of "Summary Cases," Bengal.

Cart. Cartwright's Cases, Canada;—Carter's Reports, English Common Pleas.

Cart. (Ind.). Carter's Reports, Indiana.

Carta de For. Carta de Foresta.

Carter. Carter's English Common Pleas Reports, same as Orlando Bridgman;—Carter's Reports, vols. 1, 2, Indiana.

Carth. Carthew's Reports, English King's Bench

Cartm. Trade M. Cas. Cartmell's Trademark Cases

Cartw. Const. Cas. Cartwright's Constitutional Cases.

Cary. Cary's Reports, English Chancery.

Cary Part. Cary on Partnership.

Cas. Casey's Reports, vols. 25-36 Pennsylvania State.

Cas. App. Cases on Appeal to the House of Lords

Cas. Arg. & Dec Ch. Cases Argued and Decreed in Chancery, English.

Cas B. R Cases Banco Regis *tempore* William III. (12 Modern Reports)

Cas. B. R Holt. Cases and Resolutions (of settlements; not Holt's King's Bench Reports).

Cas. Ch Cases in Chancery, English,—Select Cases in Chancery;—Cases in Chancery (9 Modern Reports).

Cas. C. L. Cases in Crown Law.

Cas Ch. 1, 2, 3. Cases in Chancery *temp* Car. II.

Cas. Eq. Cases in equity, Gilbert's Reports;—Cases and Opinions in Law, Equity, and Conveyancing.

Cas. Eq. Abr. Cases in Equity Abridged, English.

Cas. F. T. Cases *tempore* Talbot, by Forrester, English Chancery.

Cas. H. L. or *Cas. H. of L.* Cases in the English House of Lords.

Cas. in C. Cases in Chancery;—Select Cases in Chancery.

Cas. in P. or *Cas. Parl.* Cases in Parliament.

Cas K. B. Cases in King's Bench (8 Modern Reports).

Cas. K. B. t. H. or *Cas. K. B. t. Hardw.* Cases *temp.* Hardwicke, W. Kelynge's Reports, English King's Bench.

Cas L. & Eq. Cases in Law and Equity (10 Modern Reports);—Gilbert's Cases in Law and Equity, English.

Cas. P. or *Cas. Parl.* Cases in Parliament.

Cas. Pr. Cases of Practice in the Court of the King's Bench, from Eliz. to 14 Geo. III.

Cas. Pr. or *Cas Pr. C. P. (Cooke).* Cooke's Practice Cases, English Common Pleas.

Cas. Pr. K. B. Cases of Practice, English King's Bench.

Cas. R. Casey's Reports, Pennsylvania State Reports, vols. 25-36.

Cas. S. C. (Cape of G. H.). Cases in the Supreme Court, Cape of Good Hope.

Cas. Self Def. Cases on Self Defence, Horrigan & Thompson's.

Cas. Sett. Cases of Settlement, King's Bench.

Cas. Six Cir. Cases in the Six Circuits, Ireland.

Cas. t. Ch II Cases *temp.* Charles II., in vol. 3 of Reports in Chancery.

Cas. t. F. Cases *tempore* Finch, English Chancery.

Cas. t. Geo I. Cases *tempore* George I., English Chancery, Modern Reports, vols. 8 and 9.

Cas. t. H. or *Cas. t. Hardwicke.* Cases *tempore* Hardwicke, English King's Bench (Ridgway, Lee, or Annaly);—West's Chancery Reports, *tempore* Hardwicke.

Cas. t. Holt or *Cas. t. H.* Cases *tempore* Holt English King's Bench;—Holt's Reports.

Cas. t. K. Select Cases *tempore* King, English Chancery (edited by Macnaghten);—Moseley's Chancery Reports, *tempore* King.

Cas. t. Lee (Phillimore's). Cases *temp.* Lee, English Ecclesiastical.

Cas. t. Mac. Cases *tempore* Macclesfield, Modern Reports, vol. 10, Lucas's Reports.

Cas. t Nap. Cases *tempore* Napier, by Drury, Irish Chancery.

Cas t. North Cases *temp.* Northington (Eden's English Chancery Reports).

Cas. t Plunk Cases *tempore* Plunkett, by Lloyd & Gould, Irish Chancery.

Cas. t. Q. A. Cases *tempore* Queen Anne, Modern Reports, vol. 11.

Cas. t. Sugd. Cases *tempore* Sugden, Irish Chancery.

Cas t. Tal. Cases *tempore* Talbot, English Chancery, Forrester's Reports.

Cas t. Wm. III. Cases *tempore* William III., Modern Reports, vol. 12.

Cas Tak & Adj. Cases Taken and Adjudged (first edition of Reports in Chancery).

Cas Wm. I. Bigelow's Cases, William I. to Richard I.

Cas. w. Op. or *Cas. & Op.* Cases with Opinions of Eminent Counsel.

Casey. Casey's Reports, Pennsylvania State Reports, vols. 25-36.

Cass. Dig. Cassel's Digest, Canada.

Cass. Sup C Prac. Cassel's Supreme Court Practice, 2d edition by Masters.

Castle Com. Castle on Law of Commerce

Cav Money Secs. Cavanaugh's Law of Money Securities.

Cav Deb. Cavendish's Debates, House of Commons

Cawl. Cawley's Laws against Recusants.

Cay Abr. Cay's Abridgment of the Statutes.

Cel. Tr. Burke's Celebrated Trials.

Cent. Dict. Century Dictionary.

Cent. Dig. Century Digest.

Centr. Cr. C. R. Central Criminal Court Reports, English.

Centr. L. J. Central Law Journals, St. Louis, Mo.

Ceyl. Leg. Misc. Ceylon Legal Miscellany.

Ch.

[1891] *Ch.* English Chancery Cases; Law Reports, 1st Series, 1891.

[1892] *Ch.* Same for 1892, etc.

Ch. App. Cas. Chancery Appeal Cases, English Law Reports.

Ch. Burn J. Chitty Burn's Justice.

Ch Cal. Chancery Calendar.

Ch. Cas. Cases in Chancery.

Ch. Cas. Ch. Choice Cases in Chancery.

Ch. Ch. or *Ch. Cham. (Ont.).* Chancery Chambers's Reports, Ontario.

Ch. Col. Op. Chalmers's Colonial Opinions.

Ch. D. Chancery Division English Law Reports.

Ch. Dig. Chaney's Digest, Michigan Reports.

Ch. Div. Chancery Division, English Law Reports.

Ch. J. Chief Justice. Chief Judge.

Ch. Pr. Chancery Practice.

Ch. Pre. or *Ch. Prec.* Precedents in Chancery.

Ch. R. or *Ch. Repts.* Reports in Chancery.

Ch. R. M. R. M. Charlton's Georgia Reports.

Ch. Rep. Reports in Chancery;—Irish Chancery Reports.

Ch. Sent. Chancery Sentinel, Saratoga, New York.

Ch. T. U. P. T. U. P. Charlton's Georgia Reports.

Ch. & Cl. Cas. Cripp's Church and Clergy Cases.

Chal. Op. Chalmer's Colonial Opinions.

Cham. or *Chamb.* Chamber Reports, Upper Canada.

Chamb. Ch. Jur. Chambers's Chancery Jurisdiction.

Chamb. Dig. P. H. C. Chambers's Digest of Public Health Cases.

Chamb. L. & T. Chambers on Landlord and Tenant.

Chamb. Rep. Chancery Chamber Reports, Ontario.
Chamber. Chamber Reports, Upper Canada.
Chan. Chaney's Reports, vols. 37-58 Michigan;—Chancellor;—Chancery (see Ch.).
Chanc. Chancery (see Ch.).
Chance. Chance on Powers.
Chand. Chandler's Reports, Wisconsin;—Chandler's Reports, vols. 20, 38-44 New Hampshire.
Chand Cr Tr. or *Chand. Crim. Tr.* Chandler's American Criminal Trials.
Chand. N. H. Chandler's Reports, New Hampshire, vols. 20 and 38-44.
Chaney. Chaney's Reports, vols. 37-58 Michigan.
Chapl. Cas. Crim. L. Chaplin's Cases on Criminal Law.
Char. Merc. Charta Mercatoria.
Charl. Pr. Cas. Charley's English Practice Cases (Judicature Act).
Charl. R. P. Stat. Charley's Real Property Statutes.
Charlt. R. M. R. M. Charlton's Georgia Reports.
Charlt. T. U. P. Charlton's Reports, Georgia.
Chase. Chase's Decisions by Johnson, U. S. 4th Circuit.
Chase Tr. Chase's Trial by the U. S. Senate.
Cher. Cas. Cherokee Case.
Chest. Cas. Case of the City of Chester, on Quo Warranto.
Chev. Cheves's Law Reports, South Carolina.
Chev. Ch. or *Chev. Eq.* or *Cheves.* Cheves's Chancery or Equity Reports, South Carolina
Chic. L. B. Chicago Law Bulletin, Illinois.
Chic. L. J. Chicago Law Journal.
Chic. L. Rec. Chicago Law Record.
Chic. L. T. Chicago Law Times.
Chic. Leg. News. Chicago Legal News.
Chip. Chipman's Reports, New Brunswick.
Chip. Contr. Chipman on Contracts.
Chip. D. D. Chipman's Reports, Vermont.
Chip. MS. Reports printed from Chipman's Manuscript, New Brunswick.
Chip. N. N. Chipman's Reports, Vermont.
Chip. W. Chipman's New Brunswick Reports.
Chit. or *Chitt.* Chitty's English Bail Court Reports.
Chit. App. Chitty on Apprentices and Journeymen.
Chit. Arch. Pr. Chitty's Archbold's Practice.
Chit. B. C. Chitty's Bail Court Reports, English.
Chit. Bills. Chitty on Bills.
Chit. Bl. Comm. or *Chit. Bla. Com.* Chitty's Blackstone's Commentaries.
Chit. Burn's J. Chitty Burn's Justice.
Chit. Car. Chitty on Carriers.
Chit. Com. L. or *Chit. Com. Law.* Chitty on Commercial Law.
Chit. Cont. or *Chit. Contr.* Chitty on Contracts.
Chit. Cr. L. or *Chit. Crim. Law.* Chitty on Criminal Law.
Chit. Des. Chitty on the Law of Descent.
Chit. Eq. Dig. Chitty's Equity Digest.
Chit. F. Chitty's Forms.
Chit. G. P. or *Chit. Gen. Pr.* Chitty's General Practice.
Chit. Jr. Bills. Chitty, Junior, on Bills.
Chit. L. of N. Chitty's Law of Nations.
Chit. Med. Jur. Chitty on Medical Jurisprudence.
Chit. Pl. Chitty on Pleading.
Chit. Pr. or *Chit. Prac.* Chitty's General Practice.
Chit. Prec. Chitty's Precedents in Pleading.
Chit. Prer. Chitty's Prerogatives of the Crown.
Chit. Rep. Chitty's Reports, English Bail Court.
Chit. St. or *Chit. Stat.* Chitty's Statutes of Practical Utility.
Chitt. Chitty's Reports, English Bail Court.
Cho. Cas. Ch. Choice Cases in Chancery.
Chr. Pr. W. Christie's Precedents of Wills.
Chr. Rep. Chamber Reports, Upper Canada.
Chr. Rob. Christopher Robinson's English Admiralty Reports.
Christ. B. L. Christian's Bankrupt Laws.
Churchill & Br. Sh. Churchill and Bruck on Sheriffs.
Chute, Eq. Chute's Equity under the Judicature Act.
Cic. Frag. de Repub. Cicero, Fragmenta de Republica.
Cin. Law Bul. Cincinnati Law Bulletin, Cincinnati, Ohio.
Cin. Mun. Dec. Cincinnati Municipal Decisions.
Cin. Rep. or *Cinc. (Ohio).* Cincinnati Superior Court Reports.
Circ. Ct. in Eq. Circuit Court in Equity.
City C. Rep. or *City Ct. R.* City Court Reports, New York City.
City Hall Rec. Rogers's City Hall Recorder, New York.
City Hall Rep. Lumas's City Hall Reporter, New York.
City Rec. City Record, New York.
Civ. Code. Civil Code.
Civ. Code Prac. Civil Code of Practice.
Civ. Pro. or *Civ. Proc. R.* or *Civ. Proc. Rep. (N. Y.).* Civil Procedure Reports, New York.
Cl. App. Clark's Appeal Cases, English House of Lords.
Cl. Ass. Clerk's Assistant.
Cl. Ch. Clarke's Chancery Reports, N. Y.
Cl. Col. Clark's Colonial Law.
Cl. Cr. L. Clarke, Criminal Law.
Cl. Elec. Clark on Elections.
Cl. Extr. Clarke on Extradition.
Cl. Home. Clerk Home, Scotch Session Cases.
Cl. Home R. Clerk Home Scotch Reports.
Cl. Ins. Clarke on Insurance
Cl. R. L. Clarke's Early Roman Law.
Cl. & F. or *Cl. & Fin.* Clark & Finnelly's Reports, English House of Lords.
Cl. & Fin. N. S. Clark & Finnelly's Reports, New Series, English House of Lords.
Clan. H. & W. Clancy on Husband and Wife.
Cl. & H. Clarke & Hall's Congressional Election Cases.
Clan. Mar. Wom. Clancy on Married Women
Clar. Parl. Chr. Clarendon's Parliamentary Chronicle.
Clark. Clark's Appeal Cases, English House of Lords.
Clark (Ala.). Clark's Reports, Alabama Reports, vol. 58.
Clark Dig. Clark's Digest, House of Lords Reports.
Clark Lease. Clark's Inquiry into the Nature of Leases.
Clark (Pa.). Clark's Pennsylvania Law Journal Reports.
Clark & F. or *Clark & Fin.* Clark & Finnelly's Reports, English House of Lords.
Clark & Fin. N. S. Clark & Finnelly's Reports, New Series, English House of Lords
Clarke. Clarke's New York Chancery Reports;—Clarke's edition of vols. 1-8 Iowa;—Clarke's Reports, vols. 19-22 Michigan;—Clarke's Notes of Cases, Bengal. See, also, Clark.
Clarke (Iowa). Clarke's Reports, vols. 1-8 Iowa.
Clarke (Mich.). Clarke's Reports, vols. 19-22 Michigan.
Clarke (N. Y.). Clarke's New York Chancery Reports.
Clarke Adm. Pr. Clarke's Admiralty Practice.
Clarke Bills. Clarke on Bills, Notes, and Checks.
Clarke Ch. or *Clarke Ch. R.* Clarke's New York Chancery Reports.
Clarke Cr. L. Clarke on Criminal Law, Canada.
Clarke Ins. Clarke on Insurance, Canada.
Clarke Not., or *Clarke Not. R. & O.* Clarke's Notes of Cases, in his Rules and Orders, Bengal.
Clarke Prax. Clarke's Praxis.
Clarke & H. Elec. Cas. Clarke & Hall's Cases of Contested Elections in Congress.
Clay. Conv. Clayton's Conveyancing.
Clayt. Clayton's Reports, English York Assize.
Cleir. Us et Cout. Cleirac, *Us et Coutumes de la Mer.*
Clem. Clemens's Reports, vols. 57-59 Kansas.
Clem. Corp. Sec. Clemens on Corporate Securities.
Clerk Home. Clerk Home's Decisions, Scotch Court of Session.

Clerke Dig. Clerke's Digest, New York.
Clerke Pr. Clerke's Praxis Admiralitatis.
Clerke Rud. Clerke's Rudiments of American Law and Practice.
Clev. Bank. Cleveland on the Banking System.
Clev. L. Rec. Cleveland (Ohio) Law Record.
Clev. L. Rep'r. Cleveland Law Reporter.
Clif. Clifford's United States Circuit Court Reports.
Clif. (South.) El. Cas. Clifford's Southwick Election Cases.
Clif. & R. Clifford & Richard's English Locus Standi Reports.
Clif. & Rick Clifford & Rickard's English Locus Standi Reports
Clif. & St. Clifford & Stephens's English Locus Standi Reports
Cliff. Clifford's Reports, U. S. 1st Circuit.
Cliff El Cas. Clifford's Election Cases.
Clift Ent. Clift's Entries
Clin Dig. Clinton's Digest, New York Reports.
Clin. & Sp. Dig. Clinton & Spencer's Digest
Clk. Mag. Clerk's Magazine, London ,—Rhode Island Clerk's Magazine
Clode. Clode's Martial Law.
Clow L. C. on Torts. Clow's Leading Cases on Torts.
Clusk. P T. Cluskey's Political Text Book.
Co. County ;—Company ,—Coke's Reports, English King's Bench.
Co. B. L. Cooke's Bankrupt Law.
Co. Cop Coke's Copyholder
Co. Ct. Cas. County Court Cases, English
Co. Ct. Ch. County Court Chronicle, English.
Co. Ct Rep. County Court Reports, Pa.
Co. Cts. Coke on Courts (4th Inst).
Co. Ent Coke's Entries.
Co. G. Reports and Cases of Practice in Common Pleas *tempore* Anne, Geo I., and Geo II., by Sir G. Coke (Same as Cooke's Practice Reports.)
Co. Inst. Coke's Institutes.
Co. Litt. The First Part of the Institutes of the Laws of England, or a Commentary on Littleton, by Sir Edward Coke.
Co. M. C. Coke's Magna Charta (2d Inst).
Co. P. C. Coke's Pleas of the Crown (3d Inst) ;—Coke's Reports, English King's Bench.
Co. Pal. County Palatine.
Co. Pl. Coke's Pleadings (sometimes published separately).
Co. R. (N. Y.). Code Reporter, New York.
Co. Rep. Coke's Reports, English King's Bench.
Co. R. N. S. Code Reporter, New Series.
Cobb. Cobb's Reports, vols. 4-20 Georgia ;—Cobb's Reports, vol. 121 Alabama.
Cobb. Cas. Int. L. Cobbett's Cases on International Law
Cobb. Parl. Hist. Cobbett's Parliamentary History.
Cobb. Pol. Reg. Cobbett's Political Register.
Cobb. Slav. Cobb on Slavery.
Cobb. St. Tr. Cobbett's (afterwards Howell's) State Trials.
Cochr. Cochran's Nova Scotia Reports ;—Cochrane's Reports, vols. 3-10 North Dakota.
Cock Nat. Cockburn on Nationality.
Cock. Tich. Ca. Cockburn's Charge in the Tichborne Case.
Cock. & Rowe. Cockburn and Rowe's English Election Cases.
Cocke. Cocke's Reports, vols. 16-18 Alabama;—Cocke's Reports, vols. 14, 15 Florida.
Cocke (Fla.). Cocke's Reports, Florida Reports, vols. 14, 15.
Cocke Const. His. Cocke's Constitutional History.
Cocke Pr. Cocke's Practice in the U. S. Courts.
Cod. Codex Justiniani.
Cod. Jur. Civ. Codex Juris Civilis;—Justinian's Code.
Cod. Theodos Codex Theodorianus.
Code. Criminal Code of Canada, 1892.
Code Civ. Code Civil, or Civil Code of France.
Code Civ. Pro. or *Code Civ. Proc.* Code of Civil Procedure.
Code Civil. Code Civil or Civil Code of France.
Code Comm. Code de Commerce.
Code Cr. Pro. or *Code Cr. Proc.* Code of Criminal Procedure.
Code de Com. Code de Commerce.
Code d'Instr. Crim. Code d'Instruction Criminelle.
Code F. Code Forestier.
Code I. Code d'Instruction Criminelle.
Code La. Civil Code of Louisiana.
Code N. or *Code Nap.* Code Napoléon, French Civil Code.
Code P. Code Pénal.
Code Pro. Code de Procédure Civile;—Code of Procedure.
Code Rep. Code Reporter, New York.
Code Rep. N. S. or *Code R. N. S.* Code Reports, New Series.
Cof. Dig. Cofer's Digest, Kentucky.
Coffey Prov. Dec. Coffey's Probate Decisions.
Cogh Epit. Coghlan's Epitome of Hindu Law Cases.
Coke. Coke's English King's Bench Reports (cited by parts and not by volume).
Coke Inst. Coke's Institutes.
Coke Lit Coke on Littleton.
Col Colorado ;—Colorado Reports;—Coldwell's Reports, Tennessee;—Coleman's Reports, vols. 99, 101-106, 110-142, Alabama ;—Column.
Col App. Colorado Appeals.
Col Cas. Coleman's Cases (of Practice), New York.
Col C. C. Collyer's English Chancery Cases
Col. L. J. Colonial Law Journal, New Zealand.
Col. L. Rep. Colorado Law Reporter.
Col Law Review Columbia Law Review.
Col. & Cai. or *Col. & Cai. Cas.* Coleman & Caines's Cases, New York.
Colb. Pr. Colby's Practice.
Cold or *Coldw* Coldwell's Tennessee Reports.
Cole. Cole's edition of Iowa Reports ;—Coleman's Reports, vols. 99, 101-106, 110-142 Alabama.
Cole Cas Pr. Coleman's Cases, New York.
Cole Dig. Colebrooke's Digest of Hindoo Law.
Cole Eject Cole's Law and Practice in Ejectment.
Cole Inf. Cole on Criminal Information
Cole. & C. Coleman & Caines's Cases, New York.
Coll. Colles's Parliamentary Cases.
Coll. or *Coll. C. C.* Collyer's English Chancery Cases.
Coll. Caus. Cel. Collection des Causes Célèbres, Paris.
Coll Contrib. Collier's Law of Contributories.
Coll Id. Collinson on the Law Concerning Idiots.
Coll Jur. Collectanea Juridica.
Coll Min. Collier on Mines.
Coll. Part. Collyer on Partnership.
Coll. P. C. or *Coll. Parl. Cas.* Colles's English Parliamentary (House of Lords) Cases.
Coll Pat. Collier on the Law of Patents.
Coll. & E. Bank. Collier and Eaton's American Bankruptcy Reports.
Colles Colles's English Parliamentary Cases.
Collin. Lun. Collinson on Lunacy.
Colly. Collyer's English Vice Chancellors's Reports.
Colly. Partn. Collyer on Partnerships.
Colo. Colorado Reports.
Colq. Colquit's Reports (1 Modern Reports).
Colq C. L Colquhoun's Civil Law.
Colq. R. Colquit's Reports (1 Modern).
Colq. Rom. Civil Law. Colquhoun's Roman Civil Law.
Colt Coltman, Reg. App. Cas.
Colt Reg. Ca. or *Colt. Reg. Cas.* Coltman's Registration Cases.
Colum. Law T. Columbia Law Times.
Colvil. Colvil's Manuscript Decisions, Scotch Court of Session.
Com Comyn's Reports, English King's Bench;—Comberbach's English King's Bench Reports ;—Comstock's Reports, vols. 1-4 New York Court of Appeals;—Communes, or Extravagantes Communes;—Commissioner;—Commentary ;—Blackstone's Commentaries.
Com. B. English Common Bench Reports, by Manning, Granger & Scott.
Com. B. N. S. English Common Bench Reports, New Series, by Manning, Granger & Scott.

Com. Cas. Commercial Cases, England.
Com. Cont. Comyn on Contracts.
Com Dig. Comyn's Digest.
Com. Jour. Journals of the House of Commons.
Com. Law. Commercial Law;—Common Law.
Com L R. or *Com. Law R.* or *Com. Law Rep.* English Common Law Reports;—Common Law Reports, published by Spottiswoode.
Com. L. & T. Comyn on Landlord and Tenant.
Com. P. Div. Common Pleas Division, English Law Reports.
Com. Pl. Common Pleas, English Law Reports
Com Pl. Div. Common Pleas Division, English Law Reports.
Com. P Reptr. Common Pleas Reporter, Scranton, Penna.
Com U. Comyn on Usury.
Com & Leg. Rep. Commercial and Legal Reporter, Nashville, Tenn.
Comb Comberbach's Reports, English King's Bench.
Comp Dec Comptroller's Decisions.
Comp Laws Compiled Laws.
Comp. St. Compiled Statutes.
Coms Comstock's Reports, New York Ct. of Appeals Reports, vols. 1-4.
Coms. Ex. Comstock on Executors.
Comst. Comstock's Reports, New York Court of Appeals, vols 1-4.
Comyn. Comyn's Reports, English King's Bench and Common Pleas.
Comyns's Dig. Comyns's Digest, English
Con. Conover's Reports, Wisconsin,—Continuation of Rolle's Reports (2 Rolle);—Connoly, New York Criminal.
Con Cus Conroy's Custodian Reports.
Con. Dig. Connor's Digest
Con. Par. Connell on Parishes.
Con. & Law. Connor & Lawson's Reports, Irish Chancery.
Com & Sim. Connor & Simonton's Equity Digest.
Cond. Condensed
Cond Ch R or *Cond. Eng. Ch.* Condensed English Chancery Reports
Cond Eccl. or *Cond Ecc. R.* Condensed Ecclesiastical Reports.
Cond Eng. Ch. Condensed English Chancery Reports.
Cond Exch. R or *Cond Ex R.* Condensed Exchequer Reports.
Cond. Rep. U. S. Peter's Condensed United States Reports.
Condy Mar. Marshall's Insurance, by Condy.
Conf Cameron & Norwood's Conference Reports, North Carolina.
Conf. Chart. Confirmatio Chartarum.
Cong. El Cas. or *Cong. Elect. Cas.* Congressional Election Cases.
Cong Rec Congressional Record, Washington.
Congr. Globe. Congressional Globe, Washington
Congr. Rec. Congressional Record, Washington.
Conk Adm. Conkling's Admiralty.
Conk Jur. & Pr. or *Conk Pr.* Conkling's Jurisdiction and Practice, U S Courts.
Conn. Connecticut;—Connecticut Reports;—Connoly, New York, Surrogate.
Connolly. Connolly, New York Surrogate.
Conover. Conover's Reports, vols. 16-153 Wisconsin.
Conr. Conroy's Custodian Reports, Irish.
Cons. del Mare. Consolato del Mare.
Cons. Ord. in Ch. Consolidated General Orders in Chancery.
Consist. or *Consist. Rep.* English Consistorial Reports, by Haggard.
Consold. Ord. Consolidated General Orders in Chancery.
Const. Constitution;—Constitutional Reports, South Carolina, by Mill;—Constitutional Reports, South Carolina, by Treadway,—Constitutional Reports, vol. 1 South Carolina, by Harper.
Const. Hist. Hallam's Constitutional History of England.
Const. N. S. Constitutional Reports (Mill), South Carolina, New Series.
Const. Oth. Constitutiones Othoni (found at the end of Lyndewood's Provinciale).
Const. S. C. Treadway's Constitutional Reports, South Carolina.
Const. (N. S.) S. C. Mill's Constitutional Reports, New Series, South Carolina.
Const U. S. Constitution of the United States.
Consuct. Feud. Consuetudines Feudorum, or the Book of Forms.
Cont. Contra.
Coo. & Al. Cooke & Alcock's Irish King's Bench Reports.
Cook V. Adm. Cook's Vice-Admiralty Reports, Nova Scotia.
Cooke. Cooke's Cases of Practice, English Common Pleas,—Cooke's Reports, Tennessee.
Cooke (Tenn.). Cooke's Reports, Tennessee.
Cooke Agr. T. Cooke on Agricultural Tenancies.
Cooke B. L. Cooke's Bankrupt Law
Cooke Cop. Cooke's Law of Copyhold Enfranchisements.
Cooke Def. Cooke's Law of Defamation.
Cooke I. A. or *Cooke, Incl. Acts.* Cooke's Inclosure Acts.
Cooke Pr. Cas. Cooke's Practice Reports, English Common Pleas.
Cooke Pr Reg. Cooke's Practical Register of the Common Pleas.
Cooke & Al or *Cooke & Alc.* Cooke & Alcock's Reports, Irish King's Bench.
Cooke & H. Cooke & Harwood's Charitable Trust Acts
Cooley. Cooley's Reports, vols. 5-12 Michigan.
Cooley Const. L. Cooley on Constitutional Law.
Cooley Const. Lim. Cooley on Constitutional Limitations
Cooley Tax. Cooley on Taxation.
Cooley Torts. Cooley on Torts.
Coop. Cooper's Tennessee Chancery Reports;—Cooper's Reports, vols. 21-24 Florida,—Cooper's English Chancery Reports *tempore* Eldon;—Cooper's English Chancery Reports *tempore* Cottenham,—Cooper's English Chancery Reports *tempore* Broughham,—Cooper's English Practice Cases, Chancery.
Coop. (Tenn.). Cooper's Reports, Tennessee.
Coop C. C. or *Coop. Cas.* Cooper's Chancery Cases *temp.* Cottenham.
Coop C & P R Cooper's Chancery and Practice Reporter, Upper Canada.
Coop Ch. Cooper's Tennessee Chancery Reports.
Co-op Dig. Co-operative Digest, United States Reports
Coop. Eq Pl. Cooper's Equity Pleading
Coop. Inst. or *Coop. Jus.* Cooper's Institutes of Justinian.
Coop. Med. Jur. Cooper's Medical Jurisprudence
Coop Pr. Cas. Cooper's Practice Cases, English Chancery.
Coop Sel Cas. Cooper's Select Cases *tempore* Eldon, English Chancery.
Coop. t. Br. or *Coop. t. Brough.* Cooper's Reports *temp.* Brougham, English Chancery.
Coop. t. Cott. or *Coop t Cotten.* Cooper's Cases *tempore* Cottenham, English Chancery.
Coop t Eld. Cooper's Reports *temp.* Eldon, English Chancery.
Coop. Tenn. Ch. Cooper's Tennessee Chancery Reports.
Cooper. Cooper's Reports, English Chancery *temp* Eldon.
Coote Adm. Coote's Admiralty Practice.
Coote Ecc. Pr. Coote's Ecclesiastical Practice.
Coote L. & T. Coote's Landlord and Tenant.
Coote Mort. Coote on Mortgages.
Coote Pro. Pr. or *Coote, Prob. Pr.* Coote's Probate Practice.
Coote & Tr. Coote & Tristram's Probate Court Practice.
Cop. Cop. Copinger on Copyright.
Cop. Ind. Pr. Copinger's Index to Precedents.
Cope. Cope's Reports, vols. 63-72 California.
Copp L. L. Copp's Public Land Laws.
Copp Land. Copp's Land Office Decisions.
Copp Land Off. Bull. Copp's Land Office Bulletin.
Copp Min. Dec. or *Copp U. S. Min. Dec.* Copp's United States Mining Decisions.

Copp U. S. Min. L. Copp's U. S. Mineral Land Laws.
Cor. Coram;—Coryton's Bengal Reports.
Corb & Dan. Corbett & Daniel's Parliamentary Election Cases.
Cord Mar. Wom. Cord on Married Women.
Corn. D. Cornish on Purchase Deeds.
Corn. Dig. Cornwell's Digest.
Corn Uses. Cornish on Uses.
Corn. Rem. Cornish on Remainders.
Cornw Tab. Cornwall's Table of Precedents.
Corp. Jur Can. Corpus Juris Canonici.
Corp. Jur Civ Corpus Juris Civilis.
Corry. Corryton's Reports, Calcutta.
Corvin. Corvinus's Elementa Juris Civilis.
Cory. Coryton's Reports, Calcutta.
Cory. Cop. Coryton on Copyright.
Cory. Pat. Coryton on Patents.
Cot. Abr. Cotton's Abridgment of the Records.
Cou. Couper's Justiciary Reports, Scotland.
Coul. & F. Waters. Coulston & Forbes on Waters.
Counsellor. The Counsellor, New York City.
County Ct Rep. County Court Reports, English
County Ct Rep. N. S. County Court Reports, New Series, English.
County Cts. Ch. County Courts Chronicle, London.
County Cts & Bankr. Cas. County Courts and Bankruptcy Cases.
Coup. or *Coup. Just.* Couper's Justiciary Reports, Scotland.
Court Cl. U. S. Court of Claim Reports.
Court J & Dist Ct. Rec. Court Journal and District Court Record.
Court Sess Ca or *Court Sess. Cas.* Court of Sessions Cases, Scotch.
Court. & Macl. Courteney and Maclean's Scotch Appeals (6-7 Wilson and Shaw).
Cout Dig. Coutlée's Digest, Canada Supreme Court.
Cov. Ev. Coventry on Evidence
Cow. Cowen's New York Reports;—Cowper's English King's Bench Reports.
Cow. Cr. Dig Cowen's Criminal Digest.
Cow. Cr. or *Cow. Cr. Rep.* Cowen's Criminal Reports, New York.
Cow Dic. Cowell's Law Dictionary.
Cow. Dig. Cowell's East India Digest.
Cow Inst. Cowell's Institutes of Law.
Cow Int Cowell's Interpreter.
Cow N. Y. Cowen's New York Reports.
Cowell. Cowell's Law Dictionary,—Cowell's Interpreter.
Cowp. Cowper's Reports, English King's Bench.
Cowp. Cas. Cowper's Cases (in the third volume of Reports in Chancery).
Cox Cox's English Chancery Reports;—Cox's English Criminal Cases,—Cox's Reports, vols. 25-27 Arkansas.
Cox Am. Tr. M. Cas. Cox's American Trademark Cases.
Cox (Ark.). Cox's Reports vols. 25-27 Arkansas.
Cox C. C. Cox's English Criminal Cases;—Cox's Crown Cases,—Cox's County Court Cases.
Cox Ch. Cox's English Chancery Cases.
Cox Cr Cas. Cox's English Criminal Cases.
Cox Cr. Dig. Cox's Criminal Law Digest.
Cox Elect. Cox on Ancient Parliamentary Elections
Cox Eq. Cox's Reports, English Chancery.
Cox Gov. Cox's Institutions of the English Government.
Cox Inst. Cox's Institutions of the English Government.
Cox J. S. Cox on Joint Stock Companies.
Cox J. S. Cas. Cox's Joint Stock Cases.
Cox M C. Cox's Magistrate Cases.
Cox, McC. & H. Cox, McCrae and Hertslett's County Court Reports, English.
Cox Mag Ca. Cox's Magistrate Cases.
Cox Man. Tr. M. or *Cox Tr. M* Cox's Manual of Trade-Mark Cases.
Cox Tr. M. Cas. Cox's American Trade-Mark Cases.
Cox & Atk. Cox & Atkinson, English Registration Appeal Reports.
Coxe. Coxe's Reports, New Jersey.
Coxe & Melm. Coxe & Melmoth MSS. Cases on Fraud, in May on Fraudulent Conveyances.
Cr. Cranch's Reports, United States Supreme Court,—Cranch's United States Circuit Court Reports;—Craig's Jus Feudale, Scotland.
Cr. or *Cr. C. C.* or *Cra.* or *Cra. C. C.* Cranch's Reports U. S. Circuit Court, Dist. of Columbia.
Cr. Cas. Res. Crown Cases Reserved, Law Reports.
Cr. Code. Criminal Code.
Cr. Code Prac. Criminal Code of Practice.
Cr. M. & R Crompton, Meeson & Roscoe's English Exchequer Reports.
Cr. Pat. Dec. Cranch's Decisions on Patent Appeals.
Cr. S. & P. Craigie, Stewart & Paton's Scotch Appeal Cases (same as Paton).
Cr. & Dix. Crawford & Dix's Irish Circuit Court Cases.
Cr & Dix Ab. Cas. Crawford & Dix's (Irish) Abridged Notes of Cases.
Cr & Dix C. C. Crawford & Dix's Irish Circuit Court Cases.
Cr. & J. Crompton & Jervis.
Cr. & M. Crompton & Meeson's English Exchequer Reports.
Cr. & Ph. Craig & Phillips's English Chancery Reports.
Cr. & St. Craigie and Stewart, House of Lords (Sc.) Reports.
Cra. Cranch's Reports, U. S. Supreme Court.
Cra. C. C. Cranch's Reports, U. S Circ. Court, Dist. of Col.
Crab. Crabbe's United States District Court Reports.
Crabb Com. L. or *Crabb Com. Law.* Crabb on the Common Law.
Crabb Conv. Crabb's Conveyancing.
Crabb. Dig. Crabb's Digest of Statutes from Magna Charta to 9 & 10 Victoria.
Crabb, Eng. Law. Crabb's History of the English Law.
Crabb Hist or *Crabb Hist. Eng. Law.* Crabb's History of the English Law.
Crabb R. P or *Crabb Real Prop.* Crabb on the Law of Real Property.
Crabb, Technol. Dict. Crabb's Technological Dictionary.
Crabbe. Crabbe's United States District Court Reports;—Crabbe's Reports, District Court of U. S., Eastern District of Penna.
Craig Pr Craig's Practice.
Craig & P. or *Craig & Ph.* Craig and Phillip's English Chancery.
Craig & St. Craigie, Stewart and Paton's English House of Lords, Appeals from Scotland
Craigius, Jus Feud. Craigius Jus Feudale.
Craik or *Craik C. C.* Craik's English Causes Célèbres.
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Cranch C. C. or *Cranch D C.* Cranch's Reports, U. S. Circuit Ct., District of Columbia
Cranch Pat. Dec. Cranch's Patent Decisions.
Crane. Crane's Reports, vols. 22-29 Montana.
Craw. Crawford's Reports, vols. 53-69, 72-101 Arkansas.
Craw & D. Crawford and Dix's Reports, Irish Circuit Cases.
Craw. & D. Abr. C. Crawford and Dix's Abridged Cases, Ireland.
Creasy (Ceylon). Creasy's Ceylon Reports.
Creasy Col. C. Creasy's Colonial Constitutions.
Creasy Int. L. Creasy on International Law.
Cress. Ins. Cas. or *Cressw. Ins. Cas.* Cresswell's English Insolvency Cases
Crim. Con. Criminal Conversation, Adultery.
Crim. L. Mag or *Crim. Law Mag.* Criminal Law Magazine, Jersey City, New Jersey.
Crim. L. Rec. Criminal Law Recorder.
Crim. L. Rep. Criminal Law Reporter.
Crim. Rec. Criminal Recorder, Philadelphia,—Criminal Recorder, London;—Criminal Recorder, vol. 1 Wheeler's New York Criminal Reports.
Cripp Ch. Cas. or *Cripp's Ch. Cas.* Cripp's Church Cases.
Cripp Ecc. L. Cripp's Ecclesiastical Law.
Critch. Critchfield's Reports, vols. 5-21 Ohio State.

Cro. Croke's English King's Bench Reports;—Keilway's English King's Bench Reports by Serj. Croke.

Cro. Car. Croke's Reports *temp.* Charles I. (3 Cro.).

Cro. Eliz. Croke's Reports *temp.* Elizabeth (1 Cro.).

Cro. Jac. Croke's English King's Bench Reports *tempore* James (Jacobus) I. (2 Cro.).

Crock Notes. Crocker's Notes on Common Forms.

Crock. Sher. Crocker on Sheriffs.

Crockford. English Maritime Law Reports, published by Crockford.

Cromp. Star Chamber Cases by Crompton.

Cromp. Cts. Crompton on Courts.

Cromp. Exch. R. Crompton's Exchequer Reports, English.

Cromp. J. C. or *Cromp. Jur.* Crompton's Jurisdiction of Courts.

Cromp. M & R. Crompton, Meeson and Roscoe's Reports, English Exchequer.

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Cromp. & J. or *Cromp. & Jerv.* Crompton and Jervis's Reports, English Exchequer.

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Croswe Pat Ca Croswell's Patent Cases.

Cross Lien. Cross on Liens.

Crounse. Crounse's Reports, vol. 3 Nebraska.

Crown C. C. Crown Circuit Companion.

Crowth. or *Crowther (Ceylon).* Crowther's Ceylon Reports.

Cruise Dig. or *Cruise R. P.* Cruise's Digest of the Law of Real Property.

Cruise Titles Cruise on Titles of Honor.

Cruise Uses Cruise on Uses.

Crump Ins. or *Crump Mar. Ins.* Crump on Marine Insurance.

Crumrine. Crumrine's Reports, vols. 116-146 Pennsylvania.

Ct App. N. Z. Court of Appeals Reports, New Zealand.

Ct Cl or *Ct. of Cl.* Court of Claims, United States.

Ct. of App. Court of Appeals.

Ct. of Err. Court of Error.

Ct of Gen Sess Court of General Sessions.

Ct. of Sess. Court of Session

Ct of Spec. Sess. Court of Special Sessions.

Cujacius. Cujacius, Opera, quæ de Jure fecit, etc.

Cul. Culpabilis, Guilty.

Cull. B. L. Cullen's Bankrupt Law.

Cum. C. L. Cumin's Civil Law.

Cum. & Dun. Rem. Tr. Cummins & Dunphy's Remarkable Trials

Cummins. Cummins's Reports, Idaho

Cun or *Cunn.* Cunningham's Reports, English King's Bench.

Cun. Bills of Ex. Cunningham on Bills of Exchange.

Cun. Dict. Cunningham's Dictionary.

Cunn. or *Cunningham.* Cunningham's English Bench Reports.

Cur. Curtis' United States Circuit Court Reports;—Curia.

Cur. Adv. Vult. Curia Advisare Vult.

Cur. Can. Cursus Cancellariæ.

Cur. Com. Current Comment and Legal Miscellany.

Cur. Dec. Curtis's Decisions, United States Supreme Court.

Cur. Ov. Ca. Curwen's Overruled Cases, Ohio.

Cur. Phil. Curia Philippica

Cur. Scacc. Currus Scaccarii.

Current Com. Current Comment and Legal Miscellany.

Curry. Curry's Reports, Louisiana Reports, vols. 6-19.

Curt. Curtis' United States Circuit Court Reports;—Curteis' English Ecclesiastical Reports.

Curt. Adm. Dig. Curtis' Admiralty Digest.

Curt. C. C. Curtis' United States Circuit Court Decisions.

Curt. Com. Curtis' Commentaries.

Curt. Cond. Curtis' (Condensed) Decisions, United States Supreme Court.

Curt. Cop. Curtis on Copyrights.

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Curt. Dig. Curtis' Digest, United States.

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Curw. Abs. Tit. Curwen on Abstracts of Title.

Curw. L O. Curwen's Laws of Ohio 1854, 1 vol.

Curw. R S. Curwen's Revised Statutes of Ohio.

Cush. Cushing's Massachusetts Reports;—Cushman's Mississippi Reports.

Cush Elec. Cas. Cushing's Election Cases in Massachusetts.

Cush. Man. Cushing's Manual.

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

Cush Trust. Pr. Cushing on Trustee Process, or Foreign Attachment.

Cushing. Cushing's Massachusetts Reports.

Cushm or *Cushman.* Cushman's Reports, Mississippi Reports, vols 23-29.

Cust de Norm. Custome de Normandie.

Cust Rep. Custer's Ecclesiastical Reports.

Cutl. Cutler on Naturalization.

Cutl. Ins. L. Cutler's Insolvent Laws of Massachusetts.

Cut. Pat. Cas. Cutler's Trademark and Patent Cases, 11 vols.

Cyc Cyclopædia of Law and Procedure.

D Decree Décret. Dictum,—Digest, particularly the Digest of Justinian;—Dictionary, particularly Morison's Dictionary of the Law of Scotland,—Delaware,—Dallas's United States and Pennsylvania Reports,—Denio's Reports, New York,—Dunlop, Bell & Murray's Reports, Scotch Session Cases (Second Series),—Digest of Justinian, 50 books, never been translated into English,—Disney, Ohio;—Divisional Court;—Dowling, English;—Dominion of Canada.

D B. Domesday Book.

D. C. District Court. District of Columbia.

D. C L. Doctor of the Civil Law.

D. Chip. D. Chipman's Reports, Vermont.

D. Dec. Dix's School Decisions, New York.

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D. P. Domus Procerum, House of Lords.

D. P. B. Dampier Paper Book. See *A. P. B.*

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D. S. B. Debit sans breve.

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D. & Sw. Deane and Swabey, English Ecclesiastical Reports.

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D & War. Drury and Warren's Reports, Irish Chancery.

Dag Cr L. Dagge's Criminal Law.

Dak. Dakota,—Dakota Territory Reports.

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Dal Coop Dallas's Report of Cooper's Opinion on the Sentence of a Foreign Court of Admiralty.

Dale Dale's Reports, vols 2-4 Oklahoma

Dale Ecc Dale's Ecclesiastical Reports, English.

Dale Leg Rit. Dale's Legal Ritual (Ecclesiastical) Reports.

Dalison. Dalison's English Common Pleas Reports (bound with Benloe).

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Dall Dec or *Dall Dig.* Dallam's Texas Decisions, printed originally in Dallam's Digest

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Dall S. C. Dallas's United States Supreme Court Reports.

Dall Sty. Dallas's Styles, Scotland.

Dall (Tex). Dallam's Texas Reports.

Dall Tex Dig. Dallam's Texas Digest

Dallam. Dallam's Decisions, Texas Supreme Court

Dallas. Dallas's Pennsylvania and United States Reports.

Dalloz. Dictionnaire général et raisonné de législation, de doctrine, et de jurisprudence, en matière civile, commerciale, criminelle, administrative, et de droit public.

Dalr. Dalrymple's Decisions, Scotch Court of Session;—(Dalrymple of) Stair's Decisions, Scotch Court of Session,—(Dalrymple of) Hailes's Scotch Session Cases.

Dalr Ent. Dalrymple on the Polity of Entails.

Dalr. F. L. or *Dalr. Feud Pr.* or *Dalr. Feud. Prop.* Dalrymple on Feudal Property.

Dalr. Ten. Dalrymple on Tenures.

Dalrymple. (Sir Hew) Dalrymple's Scotch Session Cases;—(Sir David Dalrymple of) Hailes's Scotch Session Cases,—(Sir James Dalrymple of) Stair's Scotch Session Cases. See, also, Dal. and Dalr.

Dalt. Just. Dalton's Justice.

Dalt Sh. Dalton's Sheriff.

Daly. Daly's Reports, New York Common Pleas.

Dampier MSS Dampier's Paper Book, Lincoln's Inn Library.

D'An. D'Anvers's Abridgment.

Dan. Daniell's Exchequer and Equity Reports;—Dana's Kentucky Reports;—Danner's Reports, vol. 42 Alabama.

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

Dan. Neg. Inst. Daniel's Negotiable Instruments.

Dan. Ord. Danish Ordinance.

Dan. T. M. Daniels on Trademarks.

Dan. & Ll. or *Dan. & Lld.* Danson & Lloyd's Mercantile Cases.

Dana. Dana's Reports, Kentucky.

Dane Abr. Dane's Abridgment.

Daniel, Neg. Inst. Daniel's Negotiable Instruments.

Daniell, Ch Pr. Daniell's Chancery Practice.

Dann Dann's Arizona Reports,—Danner's Reports, vol. 42 Alabama;—Dann's California Reports.

Danner. Danner's Reports, Alabama Reports, vol. 42.

Dans. & L. or *Dans. & Lld.* Danson & Lloyd's English Mercantile Cases.

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

Darb & B. Darby & Bosanquet on Limitations.

Darl Pr. Ct Sess. Darling, Practice of the Court of Session (Scotch).

Dart Col Cas. Report of Dartmouth College Case.

Dart Vend Dart on Vendors and Purchasers.

Das. Dasent's Bankruptcy and Insolvency Reports,—Common Law Reports, vol. 3

Dass. Dig. Dassler's Digest Kansas Reports.

Dauph. Co. Rep. Dauphin County Reporter, Pennsylvania.

Dav. Davels's United States District Court Reports (now republished as 2 Ware),—Davy's or Davies's Irish King's Bench and Exchequer Reports,—Davies's English Patent Cases,—Davis's Reports (Abridgment of Sir Edward Coke's Reports);—Davis's Reports, vol 2 Hawaii;—Davis's United States Supreme Court Reports

Dav Coke. Davis's Abridgment of Coke's Reports.

Dav Con. or *Dav Conv* Davidson's Conveyancing.

Dav Dig. Davis's Indiana Digest.

Dav. Eng. Ch. Can. Davis's English Church Canon.

Dav Ir or *Dav. Ir K. B.* Davies's Reports, Irish King's Bench.

Dav. Jus Davis's Justice of the Peace.

Dav. Pat. Cas. Davies's Patent Cases, English Courts.

Dav Prec. or *Dav Prec. Conv.* Davidson's Precedents in Conveyancing.

Dav. Rep Davies's (Sir John) Reports, King's Bench, Ireland.

Dav. (U. S.) Davels's Reports, U. S. Dist. of Maine (2d Ware)

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Davies Davies's (or Davis's or Davys's) Irish King's Bench Reports.

Davis Davis's Hawaiian Reports;—Davies's (or Davys's) Irish King's Bench Reports,—Davis's Reports, vols 103-176 United States Supreme Court

Davis (J C B.). Davis's United States Supreme Court Reports.

Davis Bldg. Soc. or *Davis Build.* Davis's Law of Building Societies.

Davis Rep Davis's Reports, Sandwich Island

Daw. Arr. Dawe on the Law of Arrest in Civil Cases.

Daw. Land. Pr. Dawe's Epitome of the Law of Landed Property.

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

Day. Day's Connecticut Reports;—Connecticut Reports, proper, reported by Day.

Day Elect. Cas. Day's Election Cases.

Day Pr. Day's Common Law Practice.

Dayt. Surr. Dayton on Surrogates.

Dayt. Term Rep. Dayton Term Reports, Dayton, Ohio.

De Bois. Halluc. De Boismont on Hallucinations.

De Burgh Mar. Int. L. De Burgh on Maritime International Law.

De Colyar's Quar. De Colyar's Law of Quarantine.

D'Ewes. D'Ewes's Journal and Parliamentary Collection.
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De G. F. & J. De Gex, Fisher, & Jones' Reports, English Chancery.
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Deb Jud Debates on the Judiciary.
Dec Com. Pat. Decisions of the Commissioner of Patents.
Dec. Dig. American Digest, Decennial Edition.
Dec Joint Com. Decisions of the Joint Commission.
Dec. O. Ohio Decisions.
Dec. t. H. & M. Decisions in Admiralty *tempore* Hay & Marriott.
Decen. Dig. American Digest, Decennial Edition.
Deft. Defendant.
Degge. Degge's Parson's Companion.
Del. Delaware; — Delaware Reports; — Delane's English Revision Cases.
Del. Ch. Delaware Chancery Reports, by Bates.
Del. Co. Delaware County Reports, Pennsylvania.
Del. Cr. Cas. Delaware Criminal Cases, by Houston.
Del. El. Cas. Delane's English Election (Revision) Cases.
Deleg. Court of Delegates.
Delehanty. Delehanty's New York Miscellaneous Reports.
De Lolme, Eng. Const. De Lolme on the English Constitution.
Dem. or *Dem. Surr.* Demarest's New York Surrogate Reports.
Demol. or *Demol. C. N.* Demolombe's Code Napoléon.
Den. Denio's New York Reports;—Denis's Reports, vols. 32-46 Louisiana Annual;—Denied.
Den. or *Denio.* Denio's Reports, New York.
Den. C. C. Denison's English Crown Cases.
Den. & P. Denison & Pearce's English Crown Cases, vol. 2 Denison.
Denio. Denio's New York Reports.
Denis. Denis's Reports, vols 32-46 Louisiana.
Dens. Denslow's Notes to second edition, vols. 1-3 Michigan Reports.
Denver L. J. Denver Law Journal.
Denver L. N. Denver Legal News.
De Orat. Cicero, De Oratore.
Des., Dess., or *Dessaus.* or *Desaus. Eq.* Dessaussure's Reports, South Carolina.
Dest. Cal. Dig. Desty's California Digest.
Desty Com. & Nav. Desty on Commerce and Navigation.
Desty Fed. Const. Desty on the Federal Constitution.
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Dev. Devereux's North Carolina Law Reports;—Devereux's Reports, United States Court of Claims.
Dev. C. C. or *Dev. Ct. Cl.* Devereux's Reports, United States Court of Claims.
Dev Eq Devereux's Equity Reports, North Carolina, vols. 16-17.
Dev. L. or *Dev. (N. C.).* Devereux's Law Reports, North Carolina, vols. 12-15.
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Dev & B L or *Dev & Bat* Devereux & Battle's Law Reports, North Carolina.
Dew. Dewey's Reports, vols. 60-70 Kansas;—Dewey's Kansas Court of Appeals Reports.
De Witt. De Witt's Reports, vols. 24-42 Ohio State
Dy or *Dy.* Dyer's English Reports, King's Bench.
Dial. de Scac. Dialogus de Scaccario
Dibb F. Dibb's Forms of Memorials.
Dice (Ind.) Dice's Reports, vols. 71-99 Indiana.
Dicey, Const. Dicey, Lectures Introductory to the Study of the Law of the English Constitution.
Dicey Dom. Dicey on Domicil.
Dicey Part. Dicey on Parties to Actions.
Dick. Dickens's English Chancery Reports,—Dickinson's Reports, vols 46-59 New Jersey Equity.
Dick. Ch. Prec. Dickinson's Chancery Precedents.
Dick. Pr. or *Dick Qr. Sess.* Dickinson's Practice of the Quarter and other Sessions.
Dickson Ev Dickson's Law of Evidence.
Dict. Dictionary.
Dig. Digest;—Digest of Justinian;—Digest of Writs.
Dig. Proem. Digest of Justinian, Proem.
Digby R. P. Digby on Real Property.
Dil. or *Dill.* Dillon's United States Circuit Court Reports.
Dill. Mun. Corp. Dillon on Municipal Corporations.
Dirl. Dirleton's Decisions, Scotch Court of Session.
Dis. or *Disn.* Disney's Superior Court Reports. Cincinnati, Ohio.
Disn. Gam. Disney's Law of Gaming.
Dist. Rep. District Reports
Div. Division, Courts of the High Court of Justice.
Div. & Matr. C. Divorce and Matrimonial Causes Court.
Doct. Pl. Doctrina Placitanda.
Doct. & Stud. Doctor and Student.
Dod. or *Dods.* Dodson's English Admiralty Reports.
Dod Adm. Dodson's Reports, English Admiralty Courts.
Dods. Dodson's Reports, English Admiralty Courts.
Dom. or *Domat.* Domat on Civil Law.
Dom. Book. Domesday Book.

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

Domat. **Domat on Civil Law.**

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Drone Copyr. **Drone on Copyrights.**

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Du C. **or** *Du Cange.* **Du Cange's Glossarium.**

Duane Road L. **Duane on Road Laws.**

Dub. **Dubitatur. Dubitante.**

Dub. Rev. **Dublin Review, Dublin, Ireland.**

Dud **or** *Dud. Ga.* **Dudley's Reports, Georgia.**

Dud Ch **or** *Dud. Eq. (S. C.).* **Dudley's Equity Reports, South Carolina.**

Dud L. **or** *Dud. S. C.* **Dudley's Law Reports, South Carolina.**

Duer. **Duer's Reports, New York Superior Court, vols. 8-13.**

Duer Const. **Duer's Constitutional Jurisprudence.**

Duer Ins. **Duer on Insurance**

Duer Mar. Ins. **Duer on Marine Insurance.**

Duer Repr. **Duer on Representation**

Dufresne. **Dufresno's [Law] Glossary**

Dugd. Orig. **Dugdale's Originales Juridiciales.**

Dugd. Sum. **Dugdale's Summons.**

Duke **or** *Duke Uses.* **Duke on Charitable Uses.**

Dun. **Duncan (see Dunc.);—Dunlap (see Dunl).**

Dun. & Cum. **Dunphy & Cummins's Remarkable Trials**

Dunc. Ent. Cas. **Duncan's Scotch Entail Cases.**

Dunc. N. P. **Duncombe's Nisi Prius.**

Duncan's Man. **Duncan's Manual of Entail Procedure.**

Dungl Med Dict. **Dunglison, Dictionary of Medical Science and Literature**

Dunl **Dunlop, Bell, & Murray's Reports, Scotch Court of Session (Second Series, 1838-62)**

Dunl. Abr. **Dunlap's Abridgment of Coke's Reports**

Dunl Adm. Pr. **Dunlop's Admiralty Practice.**

Dunl. B. & M **Dunlop, Bell, & Murray's Reports, Scotch Court of Session (Second Series, 1838-62).**

Dunl. F. **Dunlop's Forms**

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

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

Dunl. Paley Ag **Dunlop's Paley on Agency.**

Dunl. Pr. **Dunlop's Practice.**

Dunlop **or** *Dunl B. & M.* **Dunlop, Bell & Murray's Reports, Second Series, Scotch Session Cases**

Dunn. **Dunning's English King's Bench Reports.**

Duponc. Const. **Duponceau on the Constitution.**

Duponc. Jur. **Duponceau on Jurisdiction.**

Dur Dr. Fr. **Duranton's Droit Français.**

Durf. (R. I.). **Durfee's Reports, vol. 2 Rhode Island.**

Durie **or** *Durie Sc.* **Durie's Scottish Court of Session Cases.**

Durn & E. **or** *Durnf. & E.* **Durnford & East's English King's Bench Reports (Term Reports)**

Dutch. **Dutcher's Reports, New Jersey Law.**

Duv. **Duvall's Kentucky Reports;—Duval's Reports, Canada Supreme Court.**

Duv. (Can.). **Duvall's Canada Supreme Court Reports.**

Duval. **Duval's Reports, Canada Supreme Court.**

Dwar. **Dwarris on Statutes.**

Dwar. St. **Dwarris on Statutes.**

Dwight. **Dwight's Charity Cases, English.**

Dy. **or** *Dyer.* **Dyer's English King's Bench Reports.**

E. **Easter Term. King Edward;—East's Reports, English King's Bench.**

E. B. **Ecclesiastical Compensations or "Bots."**

E. B. & E. **Ellis, Blackburn, and Ellis's Reports, English Queen's Bench.**

E. B. & S. **(Ellis) Best & Smith's English Queen's Bench Reports.**

E C. **English Cases;—English Chancery;—English Chancery Reports,—Election Cases, Ontario.**

E. C. L. **English Common Law Reports.**

E. D. C. **Eastern District Court, South Africa.**

E. D. S. **or** *E D. Smith (N. Y.).* **E. D. Smith's Reports, New York Common Pleas.**

E. E. **English Exchequer Reports.**

E. E. R. English Ecclesiastical Reports.
E. I. Ecclesiastical Institutes.
E. I. C. East India Company.
E. L. & Eq. English Law and Equity Reports.
E. of Cov. Earl of Coventry's Case.
E. P. C. East's Pleas of the Crown.
E. R. East's King's Bench Reports;—Election Reports.
E. R. C. English Ruling Cases.
E. T. Easter Term.
E. & A. Ecclesiastical and Admiralty;—Error and Appeal;—Spink's Ecclesiastical and Admiralty Reports;—Upper Canada Error and Appeal Reports.
E. & A. R. Error and Appeal Reports, Ontario.
E. & A. W. C. Grant's Error and Appeal Reports, Ontario.
E. & B. Ellis & Blackburn's . Reports, English Queen's Bench.
E. & E. Ellis & Ellis's Reports, English Queen's Bench.
E & I. English and Irish Appeals, House of Lords.
E. & Y. Eaglé & Younge's English Tithe Cases.
Ea. East's English King's Bench Reports.
Eag. T. Eagle's Commutation of Tithes.
Eag. & Yo. Eagle & Younge's English Tithe Cases.
East. East's King's Bench Reports,—East's Notes of Cases in Morley's Indian Digest;—Eastern Reporter.
East N. of C. East's Notes of Cases (in Morley's East Indian Digest).
East, P. C. or *East, Pl. Cr.* East's Pleas of the Crown.
East. Rep. Eastern Reporter.
East's N. of C. East's Notes of Cases, India.
Ebersole. Ebersole's Reports, vols. 59-80 Iowa.
Ec. & Ad. Spink's Ecclesiastical and Admiralty Reports.
Eccl. Ecclesiastical.
Eccl. Law. Ecclesiastical Law.
Eccl R. or *Eccl. Rep.* English Ecclesiastical Reports.
Eccl Stat. Ecclesiastical Statutes.
Eccl & Ad Ecclesiastical and Admiralty;—Spink's Ecclesiastical and Admiralty Reports.
Ed. Edition Edited. King Edward,—Eden's English Chancery Reports.
Ed. Bro. Eden's edition of Brown's English Chancery Reports.
Ed Cr. Edwards's New York Chancery Reports.
Ed. et Ord. Edits et Ordonnances (Lower Canada).
Eden. Eden's Reports, High Court of Chancery, England.
Eden B. L. or *Eden, Bankr.* Eden's Bankrupt Law.
Eden Inj. Eden on Injunctions.
Eden Pen. L. Eden's Penal Law.
Edg. Edgar's Reports, Scotch Court of Session.
Edg. C. Canons enacted under King Edgar.
Edict. Edicts of Justinian.
Edin. L. J. or *Edinb. L. J.* Edinburgh Law Journal.
Edm. Exch. Pr. Edmund's Exchequer Practice.
Edm. Sel. Cas. Edmonds's Select Cases, New York.
Edw. Edwards's New York Chancery Reports;—Edwards's English Admiralty Reports;—Edwards's Reports, vols. 2, 3 Missouri;—King Edward; thus 1 Edw. I. signifies the first year of the reign of King Edward I.
Edw. Abr. Edwards's Abridgment of Cases in Privy Council;—Edwards's Abridgment of Prerogative Court Cases.
Edw. Adm. Edwards's Admiralty Reports, English.
Edw. Bail. Edwards on Bailments.
Edw. Bill. Edwards on Bills.
Edw. Ch. Edwards's Chancery Reports, New York.
Edw. Jur. Edwards's Juryman's Guide.
Edw. Lead. Dec. Edwards's Leading Decisions in Admiralty; Edwards's Admiralty Reports.
Edw. (Mo.). Edwards's Reports, Missouri.
Edw. Part. Edwards on Parties to Bills in Chancery.
Edw. Pr. Cas. Edwards's Prize Cases (English Admiralty Reports).
Edw. Pr. Ct. Cas. Edwards's Abridgment of Prerogative Court Cases.
Edw. Rec. Edwards on Receivers in Chancery.
Edw. St. Act. Edwards on the Stamp Act.
Edw. (Tho.). Edwards's English Admiralty Reports.
Efird. Efird's Reports, vols. 45-61 South Carolina
Eir. Lambert's Eirenarcha.
El. Queen Elizabeth,—Elchies's Decisions, Scotch Court of Session.
El. B. & E. Ellis, Blackburn, & Ellis's Reports, English Queen's Bench.
El. B. & S. Ellis, Best, & Smith's Reports, English Queen's Bench.
El. Cas. Election Cases.
El. Dict. Elchies's Dictionary of Decisions, Court of Session, Scotland.
El. & B. or *El. & Bl.* Ellis & Blackburn's Reports, English Queen's Bench.
El & El. Ellis & Ellis's Reports, English Queen's Bench.
Elchie or *Elchies's Dict.* Elchies's Dictionary of Decisions, Scotch Court of Session.
Elec Cas. N. Y. New York Election Cases (Armstrong's).
Eliz. Queen Elizabeth.
Ell. Bl. & Ell. Ellis, Blackburn, & Ellis's English Queen's Bench Reports.
Ell Deb. Ellis's Debates.
Ell. Dig. Minn. Eller's Digest, Minnesota Reports.
Ell. D. & Cr. Ellis on Debtor and Creditor.
Ell Ins. Ellis on Insurance.
Ell. & Bl. Ellis & Blackburn's English Queen's Bench Reports
Ell & Ell. Ellis & Ellis's English Queen's Bench Reports.
Ellesm Post N. Ellesmere's Post Natl.
Elliott, App. Proc. Elliott's Appellate Procedure
Elm Dig Elmer's Digest, New Jersey.
Elm. Dilap. Elmes on Ecclesiastical and Civil Dilapidation.
Elmer, Lun Elmer's Practice in Lunacy.
Els W. Bl. Elsley's Edition of Wm. Blackstone's English King's Bench Reports.
Elsyn. Parl. Elsynge on Parliaments.
Elt Ten of Kent. Elton's Tenures of Kent.
Elton, Com. Elton on Commons and Waste Lands
Elton, Copyh. Elton on Copyholds.
Elw. Med Jur. Elwell's Medical Jurisprudence.
Emer. Ins. Emerigon on Insurance.
Emer. Mar. Loans or *Emerig. Mar. Loans.* Emerigon on Maritime Loans.
Emerig. Tr. des Ass. or *Emerig. Traite des Assur.* Emerigon, Traite des Assurances.
Encyc Encyclopædia.
Enc. Brit. Encyclopædia Britannica.
Enc. Forms. Encyclopædia of Forms.
Enc. Pl. & Pr. or *Encyc. Pl. & Pr.* Encyclopædia of Pleading and Practice.
Ency. Law. American and English Encyclopædia of Law.
Encyc. Encyclopædia.
Encyc. Pl. & Pr. Encyclopædia of Pleading & Practice.
Encycl. Encyclopædia
Eng. English,—English's Reports, vols. 6-13 Arkansas;—English Reports by N. C. Moak.
Eng. Ad. English Admiralty;—English Admiralty Reports.
Eng Adm. R. English Admiralty Reports.
Eng. C. C., or *Eng. Cr. Cas.* English Crown Cases (American reprint).
Eng Ch. English Chancery;—English Chancery Reports;—Condensed English Chancery Reports
Eng. C. L. or *Eng. Com. L. R.* English Common-Law Reports.
Eng. Ecc. R. English Ecclesiastical Reports.
Eng. Eccl. English Ecclesiastical Reports.
Eng. Exch. English Exchequer Reports.
Eng. Ir. App. English Law Reports, English and Irish Appeal Cases.
Eng. Jud. or *Eng. Judg.* Scotch Court of Session Cases, decided by the English Judges.
Eng. L. & Eq. or *Eng. L. & Eq. R.* English Law and Equity Reports.
Eng. Plead. English Pleader.
Eng. R. & C. Cas. English Railroad and Canal Cases.

Eng. Re. English Reports, Full Reprint.
Eng. Rep. Moak's English Reports;—English's Reports, vols. 6-13 Arkansas;—English Reports.
Eng Rep. R. English Reports, Full Reprint.
Eng. Ru. Ca. English Ruling Cases.
Eng. Ry. & C. Cas English Railway and Canal Cases.
Eng. Sc. Ecc. English and Scotch Ecclesiastical Reports.
Eng & Ir. App. Law Reports, English and Irish Appeal Cases
English. English's Reports, vols. 6-13 Arkansas.
Ent. Coke's Entries;—Rastell's Entries.
Entries, Ancient. Rastell's Entries (cited in Rolle's Abridgment).
Entries, New Book of. Sometimes refers to Rastell's Entries, and sometimes to Coke's Entries.
Entries, Old Book of. Liber Intrationum.
Eod. Eodem
Eq. Equity
Eq Ab. or *Eq Ca. Abr.* Equity Cases Abridged.
Eq Cas. Equity Cases, vol 9, Modern Reports.
Eq. Cas Abr. Equity Cases Abridged (English).
Eq. Draft. Equity Draftsman (Hughes's).
Eq Judg. Equity Judgments (by A'Beckett) New South Wales.
Eq Rep. Equity Reports;—Gilbert's Equity Reports,—Harper's South Carolina Equity Reports,—Equity Reports, English Chancery and Appeals from Colonial Courts, printed by Spottiswoode
Err. & App. Error and Appeals Reports, Upper Canada.
Ersk. Erskine's Institutes of the Law of Scotland,—Erskine's Principles of the Law of Scotland
Ersk Dec. Erskine's United States Circuit Court, etc, Decisions, in vol 35 Georgia.
Ersk Inst. Erskine's Institutes of the Law of Scotland.
Erskine, Inst. Erskine's Institutes of the Law of Scotland.
Ersk Prin. Erskine's Principles of the Law of Scotland
Escriche or *Escriche, Dic. Leg.* Escriche, Diccionario Razonado de Legislacion y Jurisprudencia.
Esp or *Esp. N. P.* Espinasse's English Nisi Prius Reports
Esp Ev. Espinasse on Evidence.
Esp N. P. Espinasse's Nisi Prius Law.
Esp. Pen. Ev Espinasse on Penal Evidence.
Esprit des Lois. Montesquieu, Esprit des Lois.
Esq Esquire.
Et al Et alii, and others.
Eth. Nic. Aristotle, Nicomachean Ethics.
Euer Euer's Doctrina Placitandi.
Eunom. Wynne's Eunomus.
Europ Arb European Arbitration, Lord Westbury's Decisions.
Ev Evidence.
Ev. Tr. Evans's Trial.
Evans. Evans's Reports, Washington Territory.
Evans Ag. Evans on Agency.
Evans Pl Evans on Pleading.
Evans Pothier Evans's Pothier on Obligations.
Evans R. L. Evans's Road Laws of South Carolina.
Evans Stat. Evans's Collection of Statutes.
Evans Tr Evans's Trial.
Ewell Fixt. Ewell on Fixtures.
Ewell Lead. Cas. Ewell's Leading Cases on Infancy, etc.
Ewell's Evans Ag. Ewell's Evans on Agency.
Ew & H Dig (Minn.). Ewell and Hamilton's Digest, Minnesota Reports.
Ex. Exchequer Reports, English.
Ex. or *Exr.* Executor.
Ex. C. R. Exchequer Court of Canada Reports.
Ex. Com. Extravagantes Communes.
Ex. D. or *Ex. Div.* Exchequer Division, English Law Reports.
Exam. The Examiner.
Exch. Exchequer,—Exchequer Reports (Welsby, Hurlstone, & Gordon),—English Law Reports, Exchequer;—English Exchequer Reports.
Exch. Can. Exchequer Reports, Canada.
Exch. Cas. Exchequer Cases (Legacy Duties, etc.), Scotland.
Exch. Chamb. Exchequer Chamber.
Exch. Div. Exchequer Division, English Law Reports.
Exch. Rep. Exchequer Reports.
Exec. Execution. Executor.
Exp. Ex parte. Expired.
Expl. Explained.
Ex rel Ex relatione.
Ext Extended.
Exton Mar. Dicael. Exton's Maritime Dicaelogie.
Eyre. Eyre's Reports, English King's Bench, *temp.* William III.
F. Federal Reporter;—Fitzherbert's Abridgment;—Finalis,—Consuetudines Feudorum;—Fitzherbert's Abridgment.
F. Abr. Fitzherbert's Abridgment is commonly referred to by the other law writers by the title and number of the placita only, e g. "coron, 30."
F. B. C. Fonblanque's Bankruptcy Cases.
F. B. R Full Bench Rulings, Bengal.
F. B. R. N. W. P. Full Bench Rulings, Northwest Provinces, India.
F. C. Faculty of Advocates Collection, Scotch Court of Session Cases;—Federal Cases
F. C. R. Fearne on Contingent Remainders.
F Dict Kames and Woodhouselee's Dictionary, Scotch Court of Session Cases
F N. B. Fitzherbert's Natura Brevium.
F. R Forum Romanorum;—Federal Reporter
F. & F Foster and Finlason's Reports, English Nisi Prius.
F & Fitz Falconer and Fitzherbert's English Election Cases
F. & J Bank. De Gex. Fisher & Jones' English Bankruptcy Reports.
F. & S. Fox and Smith's Reports, Irish King's Bench
F & W. Pr. Freud and Ward's Precedents.
Fac. Col. Faculty of Advocates Collection, Scotch Court of Session Cases.
Fairf or *Fairfield.* Fairfield's Reports, vols. 10-12 Maine.
Falc. Falconer's Reports, Scotch Court of Session.
Falc. & Fitz. Falconer and Fitzherbert's English Election Cases.
Fam. Cas Cir. Ev. Famous Cases of Circumstantial Evidence, by Phillips
Far Farresley's Reports, English King's Bench, Modern Reports, vol 7
Far or *Farr.* Farresley (see Farresley).
Farr Med. Jur. Farr's Elements of Medical Jurisprudence.
Farresley. Farresley's Reports, vol 7 Modern Reports;—Farresley's Cases in Holt's King's Bench Reports.
Farw Pow. Farwell on Powers.
Faw. L. & T. Fawcett's Landlord and Tenant.
Fearne Rem Fearne on Contingent Remainders.
Fed. The Federalist,—Federal Reporter.
Fed. Ca. or *Fed Cas.* Federal Cases.
Fed. Cas No. Federal Case Number.
Fed. R. or *Fed. Rep.* The Federal Reporter, all U. S. C. C. & D. C. and C. C. A. Cases, St. Paul, Minn. District, Circuit and Circuit Court of Appeals Reports.
Fell Guar. Fell on Mercantile Guarantees.
Fent. (New Zealand). Fenton's New Zealand Reports
Fent. Imp. Judg. Fenton's Important Judgments, New Zealand.
Fent. N. Z. Fenton's New Zealand Reports.
Fer. Fixt. or *Ferard, Fixt.* Amos and Ferard on Fixtures.
Ferg. or *Ferg. Cons.* Fergusson's Reports, Scotch Consistorial Court.
Ferg. M. & D. Fergusson on Marriage and Divorce.
Ferg. Proc. Ferguson's Common Law Procedure Acts, Ireland.
Ferg. Ry. Cas. Ferguson's Five Years' Railway Cases
Fergusson. (Fergusson of) Kilgerran's Scotch Session Cases.

Fern. Dec. Decretos del Fernando, Mexico.
Ferr. Hist. Civ. L. Ferriere's History of the Civil Law.
Ferr. Mod. Ferriere's Dictionnaire de Droit et de Pratique.
Ferriere. Ferriere's Dictionnaire de Droit et de Pratique.
Fess. Pat. or *Fessen, Pat.* Fessenden on Patents.
Feud. Lib. The Book of Feuds. See this dictionary, *s. v.* "Liber Feudorum."
Ff. Pandectæ (Juris Civilis);—Pandects of Justinian.
Fi. fa. Fieri facias.
Field Com. Law. Field on the Common Law of England.
Field Corp. Field on Corporations.
Field Ev. Field's Law of Evidence, India.
Field Int. Code. Field's International Code.
Field Pen. L. Field's Penal Law.
Fil. Filigor's Writs.
Fin. Finch's English Chancery Reports;—Finlason (see Finl).
Fin. Law. Finch's Law.
Fin. Pr. Finch's Precedents in Chancery.
Fin. Ren. Finlay on Renewals.
Finch. English Chancery Reports *tempore* Finch.
Finch Cas. Cont. Finch's Cases on Contract.
Finch Ins. Dig. Finch's Insurance Digest.
Finch L. C. Finch's Land Cases.
Finl. Dig. Finlay's Digest and Cases, Ireland.
Finl. L. C. Finlason's Leading Cases on Pleading, etc
Finl. Mart. L. Finlason on Martial Law.
Finl Rep. Finlason's Report of the Gurney Case.
Finl. Ten. Finlason on Land Tenures.
First pt. Edw. III. Part II of the Year Books.
First pt H VI. Part VII of the Year Books
Fish Fisher's United States Patent Cases;—Fisher's United States Prize Cases.
Fish. Cas. Fisher's Cases, United States District Courts.
Fish Cop. Fisher on Copyrights.
Fish. Dig. Fisher's Digest, English Reports.
Fish. Mort. or *Fish. Morty.* Fisher on Mortgages.
Fish Pat. or *Fish. Pat. Cas.* Fisher's United States Patent Cases.
Fish. Pat Rep. Fisher's Patent Reports, U. S. Supreme and Circuit Courts.
Fish. Pr Cas or *Fish. Prize.* Fisher's Prize Cases, U. S Courts, Penna.
Fitz or *Fitz. Abr.* Fitzherbert's Abridgment (see F. & Fitz).
Fitz. N B Fitzherbert's Natura Brevium.
Fitzg. Fitzgibbon's English King's Bench Reports.
Fitzh. Abr Fitzherbert's Abridgment.
Fitzh. N B or *Fitzh. Nat. Brev.* Fitzherbert's New Natura Brevium
Fl. Flcta,—Flanders (see Fland.);—*Commentarius Juris Anglicani.*
Fl. & K. or *Fl. & Kel.* Flanagan & Kelly's Irish Rolls Court Reports.
Fla. Florida;—Florida Reports.
Flan. & K or *Flan. & Kel.* Flanagan and Kelly's Reports, Irish Rolls Court.
Fland. Ch J. Flanders's Lives of the Chief Justices.
Fland. Const. Flanders on the Constitution.
Fland. Fire Ins. Flanders on Fire Insurance.
Fland. Mar. L. Flanders on Maritime Law.
Fland. Ship. Flanders on Shipping
Fleta Flcta, Commentarius Juris Anglicani.
Flip. or *Flipp.* Flippin's United States Circuit Court Reports.
Flor. Florida;—Florida Reports.
Foelix Dr. Int. Foelix's Droit International Privé.
Fogg. Fogg's Reports, vols. 32-37 New Hampshire.
Fol. Folio;—Foley's Poor Laws and Decisions, English.
Fol. Dict. Kames and Woodhouslee's Dictionary, Scotch Court of Session Cases.
Foley Poor L. Foley's Poor Laws and Decisions, English.
Folw. Laws. Folwell's Laws of the United States.
Fonb. Eq. Fonblanque's Equity.
Fonb. Med. Jur. Fonblanque on Medical Jurisprudence.
Fonb. N. R. Fonblanque's New Reports, English Bankruptcy.
Fonbl. Fonblanque's Equity;—Fonblanque on Medical Jurisprudence;—Fonblanque's New Reports, English Bankruptcy
Fonbl. Eq. Fonblanque's Equity.
Fonbl. R. Fonblanque's English Cases (or New Reports) in Bankruptcy.
Foote Int. Jur. Foote on Private International Jurisprudence.
For. Forrest's Exchequer Reports;—Forrester's Chancery Reports (Cases *tempore* Talbot).
For. Cas. & Op. Forsyth's Cases and Opinions.
For. de Laud. Fortescue's de Laudibus Legum Angliæ.
For. Pla. Brown's Formulæ Placitandi.
Foran C. C. P. Q. Foran's Code of Civil Procedure, Quebec.
Forb. Forbes's Decisions, Scotch Court of Session.
Forb. Inst. Forbes's Institutes of the Law of Scotland.
Form. Forman's Reports, Illinois.
Forman. Forman's Reports, Illinois
Form. Pla. Brown's Formulæ Placitandi.
Forr. or *Forrest.* Forrest's English Exchequer Reports;—Forrester's English Chancery Cases (commonly cited, Cases *tempore* Talbot).
For. Cas & Op or *Fors. Cas. & Op* Forsyth's Cases and Opinions on Constitutional Law.
Fors. Comp. Forsyth's Composition with Creditors.
Fors. His Forsyth's History of Trial by Jury
Fors. Trial by Jury. Forsyth's History of Trial by Jury.
Fort. or *Fortes.* Fortescue's English King's Bench Reports.
Fortes. de Laud. Fortescue de Laudibus Legum Angliæ.
Forum The Forum, by David Paul Brown;—Forum (periodical). Baltimore and New York.
Forum L. R. Forum Law Review, Baltimore.
Foss, Judg. Foss's Judges of England.
Fost Foster's English Crown Law or Crown Cases;—Foster's New Hampshire Reports, vols. 19, and 21-31,—Foster's Legal Chronicle Reports, Pennsylvania,—Foster's Reports, vols 5, 6 and 8 Hawaii.
Fost. (N. H.). Foster's Reports, New Hampshire, vols. 19 and 21-31.
Fost. Cr. Law. Foster, Crown Law.
Fost Elem. or *Fost. Jur.* Foster's Elements of Jurisprudence.
Fost. S F. or *Fost. on Sci. Fa.* Foster on the Writ of *Scire Facias*
Fost. & Fin Foster and Finlason's Reports, English Nisi Prius Cases
Foster. Foster's English Crown Law,—Legal Chronicle Reports (Pennsylvania), edited by Foster;—Foster's New Hampshire Reports.
Fount. Fountainhall's Reports, Scotch Court of Session.
Fowl. L. Cas. Fowler's Leading Cases on Collieries.
Fox. Fox's Decisions, Circuit and District Court, Maine (Haskell's Reports);—Fox's Reports, English.
Fox Reg. Ca. or *Fox Reg. Cas.* Fox's Registration Cases.
Fox & Sm. Fox & Smith's Reports, Irish King's Bench.
Fr. Fragment, or Excerpt, or Laws in Titles of Pandects;—Freeman's English King's Bench and Chancery Reports,—Fragment.
Fr. Ch. Freeman's English Chancery Reports; Freeman's Mississippi Chancery Reports.
Fr. E. C. Fraser's Election Cases.
Fr. Ord. French Ordinances.
Fra. Max. Francis's Maxims of Equity.
Fran. Char. Francis's Law of Charities.
Fran. Max. Francis's Maxims of Equity.
Franc. or *Franc. Judg.* Francillon's Judgments, County Courts.
France. France's Reports, vols. 3-11 Colorado.
Fras. Dom. Rel. Fraser on Personal and Domestic Relations.

Fras. El. Cas. or *Fras. Elec. Cas.* or *Fraser.* Fraser's English Cases of Controverted Elections.
Fraz. or *Fraz. Adm.* Frazer's Admiralty Cases, Scotland.
Frcd. Code. Frederician Code, Prussia.
Free. Freeman's English King's Bench Reports, vol. 1 Freeman's King's Bench Reports and vol. 2 Freeman's Chancery Reports. See also Freem.
Free. Ch. Freeman's English Chancery Reports;—Freeman's Mississippi Chancery Reports.
Freem. (Ill.). Freeman's Reports, Illinois
Freem. C. C. or *Freem Ch.* Freeman's Reports, English Chancery. (2d Freeman.)
Freem. Compar. Politics. Freeman, Comparative Politics.
Freem. Coten. & Par. Freeman on Cotenancy and Partition.
Freem. Ex. Freeman on Executions.
Freem. (Ill.). Freeman's Reports, Illinois.
Freem. Judg. Freeman on Judgments.
Freem. K. B. Freeman's Reports, English King's Bench. (1st Freeman.)
Freem. (Miss). Freeman's Chancery Reports, Mississippi.
French. French's Reports, New Hampshire.
Fries Tr. Trial of John Fries (Treason).
Frith. Opinions Attorneys-General, pt. 2, vol. 21.
Fry Cont. Fry on the Specific Performance of Contracts.
Full B. R. Full Bench Rulings, Bengal (or Northwest Provinces).
Fuller. Fuller's Reports, vols. 59-105 Michigan.
Fult. or *Fulton.* Fulton's Reports, Bengal.
G. Gale's Reports, English Exchequer,—King George, thus 1 G I. signifies the first year of the reign of King George I.
G. B. Great Britain.
G. Coop. or *Cooper.* G. Cooper's English Chancery.
G. Gr. George Greene's Reports, Iowa
G. M. Dudl. G. M Dudley's Reports, Georgia.
G. O. General Orders, Court of Chancery, Ontario.
G. S. General Statutes.
G & D. Gale & Davison's Reports, English Exchequer,—Gale & Davison's English Queen's Bench Reports.
G. & G. Goldsmith & Guthrie, Missouri.
G. & J. Gill & Johnson's Maryland Reports;—Glyn & Jameson's English Bankruptcy Reports.
G. & T. Gould & Tucker's Notes on Revised Statutes of United States
Ga. Georgia,—Georgia Reports.
Ga. Dec. Georgia Decisions, Superior Courts.
Ga. L. J. Georgia Law Journal
Ga. L. Rep Georgia Law Reporter.
Ga. Supp. Lester's Supplement, vol. 33 Georgia.
Gab Cr. L. Gabbett's Criminal Law.
Gai. Gai Institutionum Commentarii.
Gaius. Gaius's Institutes.
Gal. Gallison's Reports, United States Circuit Courts.
Galb. Galbraith's Reports, Florida Reports, vols. 9-12.
Galb. & M. Galbraith & Meek's Reports, Florida Reports, vol. 12.
Galbraith. Galbraith's Reports, vols. 9-12 Florida.
Gale. Gale's Reports, English Exchequer.
Gale E. or *Gale, Easem.* Gale on Easements.
Gale Stat. Gale's Statutes of Illinois.
Gale & Dav. Gale & Davison's Queen's Bench Reports.
Gale & W. Gale and Whatley on Easements.
Gall. or *Gallis.* Gallison's Reports, United States Circuit Courts.
Gall Cr. Cas. Gallick's Reports of French Criminal Cases.
Gall Hist Col. Gallick's Historical Collection of French Criminal Cases.
Gall. Int. L. Gallaudet on International Law.
Gamb. & Barl. Gamble & Barlow's Digest, Irish.
Gantt Dig. Gantt's Digest Statutes, Arkansas.
Gard. N. Y. Rept Gardenier's New York Reporter.
Garden. or *Gardenhire.* Gardenhire's Reports, Missouri.
Gardn. P. C. or *Gardn. P. Cas.* Gardner Peerage Case, reported by Le Marchant.
Gaspar. Gaspar's Small Cause Court Reports, Bengal.
Gay. (La.). Gayarré's Louisiana Reports.
Gayarré. Gayarré's Reports, vols. 25-28 Louisiana Annual.
Gaz. B. or *Gaz. Bank.* Gazette of Bankruptcy, London.
Gaz. Dig. Gazzam's Digest of Bankruptcy Decisions.
Gaz. & B. C. Rep. or *Gaz. & Bank. Ct. Rep.* Gazette & Bankrupt Court Reporter, New York.
Gazz. Bank. Gazzam on Bankruptcy.
Geld & M. Geldart & Maddock's English Chancery Reports, vol. 6 Maddock's Reports.
Geld. & O. or *Geld. & Ox. (Nova Scotia).* Geldert and Oxley's Decisions, Nova Scotia.
Geld. & R. Geldert & Russell, Nova Scotia.
Geldart. Geldart & Maddock's English Chancery Reports, vol. 6 Maddock's Reports.
Gen. Arb. Geneva Arbitration.
Gen. Abr. Cas. Eq. General Abridgment of Cases in Equity (Equity Cases Abridged)
Gen Dig. General Digest American and English Reports
Gen. Laws. General Laws.
Gen. Ord. General Orders, Ontario Court of Chancery.
Gen. Ord. Ch. or *Gen. Ord. in Ch.* General Orders of the English High Court of Chancery.
Gen. Sess. General Sessions.
Gen. St. General Statutes.
Gen. Term. General Term.
Geo. Georgia;—Georgia Reports;—King George (as 13 Geo. II.).
Geo. Coop. George Cooper's English Chancery Cases, *temp.* Eldon.
Geo. Dec. Georgia Decisions.
Geo. Dig. George's Mississippi Digest.
Geo. Dig. George's Digest, Mississippi.
Geo. Lib. George on Libel
George. George's Reports, Mississippi.
Ger. Real Est. Gerard on Titles to Real Estate
Gib Cod. Gibson's *Codex Juris Ecclesiastici Anglicani*
Gib. Dec. Gibson's Scottish Decisions.
Gibb D. & N. Gibbons on Dilapidations and Nuisances.
Gibbon, Rom. Emp. Gibbon, History of the Decline and Fall of the Roman Empire.
Gibbs Gibbs's Reports, Michigan.
Gibbs Jud Chr Gibbs's Judicial Chronicle.
Gibs Gibson's Decisions, Scotland
Gibs Camd Gibson's [edition of] Camden's Britannia
Gibson. (Gibson of) Durie's Decisions, Scotch Court of Session.
Gif. or *Giff.* Giffard's English Vice-Chancellors's Reports.
Gif & Fal. Gilmour & Falconer's Scotch Session Cases.
Giff. Giffard's Reports, English Chancery.
Giff & H. Giffard and Hemming's Reports, English Chancery.
Gil. Gilfillan's Edition, vols. 1-20 Minnesota,—Gilman's Reports, vols 6-10 Illinois,—Gilmer's Virginia Reports,—Gilbert's English Chancery Reports,—Gilbert's English Cases in Law and Equity
Gilb. Gilbert's Reports, English Chancery.
Gilb Cas. Gilbert's Cases in Law and Equity, English Chancery and Exchequer.
Gilb Ch. Gilbert's Reports, English Chancery.
Gilb Ch. Pr. Gilbert's Chancery Practice.
Gilb. C. P. Gilbert's Common Pleas.
Gilb Com Pl Gilbert's Common Pleas.
Gilb. Dev. Gilbert on Devices.
Gilb Dist. Gilbert on Distress.
Gilb. Eq. Gilbert's English Equity or Chancery Reports.
Gilb Ev. Gilbert's Evidence.
Gilb. Ex. Gilbert on Executions.
Gilb. Exch. Gilbert's Exchequer,
Gilb. For. Rom. Gilbert's Forum Romanum.
Gilb K. B. Gilbert's King's Bench
Gilb Lex Præ. Gilbert's Lex Prætoria.
Gilb. Railw. L. Gilbert's Railway Law.
Gilb. Rem. Gilbert on Remainders.

Gilb. Rents. Gilbert on Rents.
Gilb. Rep. Gilbert's Reports, English Chancery.
Gilb. Repl. Gilbert on Replevin.
Gilb. Ten. Gilbert on Tenures.
Gilb U. or *Gilb Uses.* Gilbert on Uses and Trusts.
Gild (N. M.). Gildersleeve's New Mexico Reports.
Gilfillan Gilfillan's Edition of Minnesota Reports.
Gill. Gill's Reports, Maryland.
Gill Pol. Rep Gill's Police Court Reports, Boston, Mass.
Gill & J. or *Gill & Johns. (Md.).* Gill & Johnson's Reports, Maryland.
Gilm Gilman's Reports, vols. 6-10 Illinois;—Gilmer's Reports, Virginia,—Gilmour's Reports, Scotch Court of Session.
Gilm. Dig Gilman's Digest, Illinois and Indiana.
Gilm (Ill.). Gilman's Reports, Illinois.
Gilm. (Va). Gilmer's Reports, Virginia.
Gilm. & Fal or *Gilm & Falc.* Gilmour and Falconer's Reports, Scotch Court of Session
Gilp. Gilpin's United States District Court Reports.
Gilp Opin. Gilpin's Opinions of the United States Attorneys-General.
Gir. W C. Girard Will Case.
Gl. Glossa, a gloss or interpretation.
Gl & J. Glyn & Jameson's English Bankruptcy Reports.
Glan lib. Glanville, De Legibus et Consuetudinibus Angliæ.
Glanv. or *Glanvil* Glanville, De Legibus et Consuetudinibus Angliæ.
Glanv. El. Ca. or *Glanv. El. Cas.* Glanville's Election Cases.
Glas or *Glasc.* Clascock's Reports in all the Courts of Ireland.
Glassf. Glassford on Evidence.
Glenn. Glenn's Reports, Louisiana Annual.
Glov. Mun. Corp. Glover on Municipal Corporations.
Glyn & Jam Glyn and Jameson's Bankruptcy Cases, English.
Go. Goebel's Probate Court Cases.
Godb Godbolt's Reports, English King's Bench.
Godd Eas Goddard on Easements.
Godef & S Godefroi and Shortt on Law of Railway Companies
Godo. Godolphin's Abridgment of Ecclesiastical Law;—Godolphin on Admiralty Jurisdiction;—Godolphin's Orphan's Legacy,—Godolphin's Repertorium Canonicum.
Godol Ecc Law or *Godolph.* Godolphin's Abridgment of Ecclesiastical Law.
Godolph. Adm. Jur. Godolphin on Admiralty Jurisdiction.
Godolph Leg. Godolphin's Orphan's Legacy.
Godolph. Rep. Can. Godolphin's Repertorium Canonicum.
Gods Pat. Godson on Patents.
Goeb. or *Goeb. Prob. Ct. Cas.* Goebel's Probate Court Cases.
Gog. Or. Goguet's Origin of Laws.
Goirand. Goirand's French Code of Commerce.
Gold. or *Goldes* Goldesborough's or Gouldsborough's English King's Bench Reports.
Gold & G. Goldsmith & Guthrie's Reports, vols. 36-67 Missouri Appeals.
Goldes. Goldesborough's Reports, English King's Bench.
Golds. Eq. Goldsmith's Equity Practice.
Good. Pat Goodeve's Abstract of Patent Cases.
Good. & Wood. Full Bench Rulings, Bengal, edited by Goodeve & Woodman.
Gord. Dig. Gordon's Digest of the Laws of the U. S.
Gord Tr. Gordon's Treason Trials.
Gordon. Gordon's Reports, vols. 24-26 Colorado and vols. 10-13 Colorado Appeals.
Gosf. Gosford's Manuscript Reports, Scotch Court of Session.
Goud R. L. Goudsmit's Roman Law.
Gould. Gouldsborough's English King's Bench Reports.
Gould, Pl. Gould on Pleading.
Gould & T. Gould & Tucker's Notes on Revised Statutes of United States.

Gouldsb. Gouldsborough's Reports, English King's Bench.
Gour. Wash. Dig. Gourick's Washington Digest
Gow or *Gow N. P.* Gow's Nisi Prius Cases, English.
Gow Part. Gow on Partnership.
Gr. Grant's Cases, Pennsylvania;—Green's New Jersey Reports; — Greenleaf's Maine Reports; — Grant's Cases, Canada;—Grant's Chancery Reports, Ontario.
Gr. Ca. or *Gr. Cas.* Grant's Cases, Pennsylvania.
Gr. Ch. or *Gr. Eq.* (H. W.) Green's New Jersey Equity Reports,—Gresley's Equity Evidence.
Gra. Grant (see Grant);—Graham's Reports, vols. 98-139 Georgia.
Grah. Pr. Graham's Practice.
Grah. & Wat. N. T. Graham & Waterman on New Trials.
Grain Hip. Grain's Ley Hipotecaria, of Spain.
Grand Cou. or *Grand Cout.* Grand *Coutumier de Normandie.*
Grang or *Granger.* Granger's Reports, vols. 22-23 Ohio State.
Grant. Grant's Upper Canada Chancery Reports Ontario,—Grant's Pennsylvania Cases,—(Grant of) Elchies's Scotch Session Cases,—Grant's Jamaica Reports.
Grant Bank. Grant on Banking
Grant Cas. Grant's Cases, Pennsylvania Supreme Court.
Grant Ch. Grant's Upper Canada Chancery Reports.
Grant Ch. Pr. Grant's Chancery Practice.
Grant Corp. Grant on Corporations.
Grant E. & A. Grant's Error and Appeal Reports, Ontario.
Grant (Jamaica). Grant's Jamaica Reports.
Grant Pa. Grant's Cases, Pennsylvania Supreme Court.
Grant U. C. Grant's Upper Canada Chancery Reports.
Grat or *Gratt.* Grattan's Virginia Reports.
Grav de Jur Nat Gent. Gravina, de Jure Naturale Gentium, etc.
Gravin Gravina, Originum Juris Civilis.
Gray. Gray's Massachusetts Reports;—Gray's Reports, vols. 112-122 North Carolina.
Gray Cas. Prop. Gray's Cases on Property.
Gray Perp. Gray on Perpetuities.
Gray's Inn J. Gray's Inn Journal.
Grayd F. Graydon's Forms.
Greav. R. C. or *Greav. Russ.* Greave's Edition of Russell on Crimes.
Green. Green's New Jersey Law or Equity Reports,—Green's Reports, vols. 11-17 Rhode Island,—G. Greene's Iowa Reports,—Greenleaf's Reports, vols 1-9 Maine,—Green's Reports, vol. 1 Oklahoma
Green Bag A legal Journal, Boston.
Green C E. C. E. Green's Reports, New Jersey Equity, vols. 16-27.
Green Ch. or *Green Eq* Green's Chancery Reports, New Jersey Equity, vols. 2-4.
Green Cr. L. Rep. Green's Criminal Law Reports, U. S.
Green L or *Green N J.* Green's Law Reports, New Jersey Law, vols. 13-15.
Green. Ov. Cas. Greenleaf's Overruled Cases.
Green (R. I). Green's Reports, Rhode Island, vol. 11.
Green Sc. Cr Cas. Green's Criminal Cases, Scotland.
Green Sc. Tr. Green's Scottish Trials for Treason
Green. & H. Greenwood & Horwood's Conveyancing.
Greene G. Greene's Iowa Reports;—C. E. Green's New Jersey Equity Reports, vols. 16-27 New Jersey Equity,—Greene's Reports, vol. 7 New York Annotated Cases.
Greene G. Greene's Iowa Reports.
Greenh. Sh. Greenhow's Shipping Law Manual.
Greenl. Greenleaf's Reports, vols. 1-9 Maine
Greenl. Cr. or *Greenl. Cruise.* Greenleaf's Cruise on Real Property.
Greenl. Ev. Greenleaf on Evidence.
Greenl. Ov. Cas. Greenleaf's Overruled Cases.

Green's Brice's U V. or *Green's Brice, Ultra Vires.* Green's Edition of Brice's Ultra Vires.
Greenw. Courts. Greenwood on Courts.
Greenw. & M. Greenwood & Martin's Police Guide.
Grein Dig. Greiner's Digest, Louisiana.
Gren. or *Gren. (Ceylon).* Grenier's Ceylon Reports.
Gresl. Eq. Ev. Gresley's Equity Evidence.
Grey Deb. Grey's Debates in Parliament.
Grif. L. Reg. Griffith's Law Register, Burlington, New Jersey.
Grif P. R. Cas Griffith's English Poor Rate Cases.
Griff. Cr. Griffith on Arrangements with Creditors.
Griff Ct Mar. Griffith on Courts-Martial.
Griff Inst. Griffith's Institutes of Equity.
Griff L. R. Griffith's Law Register, Burlington, N. J.
Griff Pat. Cas Griffin's Abstract of Patent Cases
Griffith. Griffith's Reports, vols. 1-5 Indiana Appeals and vols. 117-132 Indiana
Grimke Ex. Grimke on Executors and Administrators.
Grimke Just. Grimke's Justice.
Grimke P. L. Grimke's Public Laws of South Carolina.
Griswo. (O.). Griswold's Reports, Ohio.
Griswo. Und T. B. Griswold's Fire Underwriters' Text Book.
Gro. or *Gro. B. et P.*, or *Gro. de J. B.* or *Grot.* or *Grot. de Jur. B.* Grotius, *De Jure Belli et Pacis.*
Grot. Dr. de la Guer. Grotius *Le Droit de la Guerre.*
Gude Pr. Gude's Practice on the Crown Side of the King's Bench.
Guern Eq Jur. Guernsey's Key to Equity Jurisprudence.
Guizot, Hist. Civilization. Guizot, General History of Civilization in Europe.
Guizot, Rep Govt. Guizot, History of Representative Government.
Gundry. Gundry Manuscripts in Lincoln's Inn Library.
Guth. Sh. Cas. Guthrie's Sheriff Court Cases, Scotland.
Guthrie. Guthrie's Reports, vols. 33-83 Missouri Appeals.
Guthrie. Guthrie's Sheriff Court Cases, Scotland.
Guy, Med. Jur. Guy on Medical Jurisprudence.
Guy Réper. Guy's *Repertoire de la Jurisprudence.*
Guyot, Inst Feod. Guyot, Institutes Feodales.
Gwil Ti Cas or *Gwill.* Gwillim's Tithe Cases.
H. Howard's United States Supreme Court Reports,—Hill's New York Reports,—Hilary Term;—King Henry, thus 1 H. I. signifies the first year of the reign of King Henry I.
h. a. Hoc anno.
H. Bl. or *H. Bla.* Henry Blackstone's English Common Pleas Reports.
H C. House of Commons.
H. C. R. High Court Reports, India.
H. C. R. N. W. P. High Court Reports, Northwest Provinces, India.
H. E. C. Hodgin's Election Cases, Ontario.
H. H. C. L. Hale's History of the Common Law.
H. H. P. C. Hale's History, Pleas of the Crown.
H. L. House of Lords.
H. L. C. or *H. L. Cas.* House of Lords Cases (Clark's).
H. L. F. Hall's Legal Forms.
H. L. Rep. Clark and Finnelly's House of Lords Reports, New Series.
H. P. C. Hale's Pleas of the Crown;—Hawkins' Pleas of the Crown.
H. T. Hilary Term.
h. t Hoc titulum, or hoc titulo.
h. v. Hoc verbum, or his verbis.
H. W. Gr. H. W. Green's New Jersey Equity Reports.
H. & B. Hudson & Brooke's Irish King's Bench Reports.
H. & C. Hurlstone & Coltman's English Exchequer Reports.
H. & D. Lalor's Supplement to Hill and Denio's Reports, New York.
H. & Disb. Pr. Holmes and Disbrow's Practice.
H. & G. Harris & Gill's Maryland Reports;—Hurlstone & Gordon's English Reports.
H. & H. Horn & Hurlstone's English Exchequer Reports;—Harrison & Hodgin's Municipal Reports, Upper Canada.
H. & J. Harris & Johnson's Maryland Reports;—Hayes & Jones's Exchequer Reports, Ireland.
H. & J. Forms. Hayes and Jarman's Forms of Wills.
H. & J. Ir. Hayes and Jones's Reports, Irish Exchequer.
H. & M. Hening & Munford's Virginia Reports;—Hemming & Miller's English Vice-Chancellors' Reports.
H. & M. Ch. Hemming & Miller's English Vice-Chancellors' Reports.
H. & McH. Harris & McHenry's Maryland Reports.
H. & N. Hurlstone and Norman's Reports, English Exchequer.
H. & P. Hopwood and Philbrick's Election Cases.
H & R Harrison & Rutherford's English Common Pleas Reports.
H. & S. Harris and Simrall's Mississippi Reports.
H. & T. Hall and Twell's Reports, English Chancery.
H. & T. Self-Def. Horrigan & Thompson's Cases on the Law of Self-Defense.
H. & W. Harrison & Wollaston's English King's Bench Reports;—Hurlstone & Walmsley's English Exchequer Reports.
Ha Hare's Chancery Reports;—Hall;—Haggard.
Ha & Tw. Hall and Twell's Reports, English Chancery.
Hab Corp. Habeas Corpus.
Hab. fa. poss. Habere facias possessionem.
Hab fa seis. Habere facias seisinam.
Had Haddington,—Hadley's Reports, vols. 45-48 New Hampshire
Hadd. or *Haddington.* Haddington's Reports, Scotch Court of Session.
Hadl. Hadley's Reports, vols. 45-48 New Hampshire.
Hadl Int. R. L. or *Hadl. Rom. Law.* Hadley's Introduction to the Roman Law.
Hadley. Hadley's Reports, vols. 45-48 New Hampshire.
Hag. Adm. Haggard's English Admiralty Reports.
Hag. Con. Haggard's English Consistory Reports.
Hag. Ecc. Haggard's English Ecclesiastical Reports.
Hag. (Utah). Hagan's Utah Reports.
Hag. (W. Va.). Hagan's Reports, West Virginia.
Hagan. Hagan's Reports, vols. 1-2 Utah.
Hagans. Hagans's Reports, vols. 1-5 West Virginia.
Hagg. See Hag.
Hagg. Adm. Haggard's Admiralty Reports, English.
Hagg. Con. or *Hagg. Consist.* Haggard's Consistory Reports, English.
Hagg. Ecc. Haggard's Ecclesiastical Reports, English.
Hagn. & M. (Md.). Hagner and Miller's Maryland Reports.
Hailes. Hailes's Decisions, Scotch Court of Session.
Hailes Ann. Hailes's Annals of Scotland.
Haines Am. L. Man. Haines's American Law Manual.
Hal. Law. Halsted's New Jersey Law Reports.
Halc. Cas. or *Halc. Min. Cas.* Halcomb's Mining Cases, London, 1826.
Hale. Hale's Reports, vols. 33-37 California.
Hale Anal. Hale's Analysis of the Law.
Hale C. L. or *Hale Com. Law.* Hale's History of the Common Law.
Hale, De Jure Mar. Hale, De Jure Maris.
Hale Ecc. Hale's Ecclesiastical Reports, English.
Hale, Hist. Eng. Law. Hale's History of the English Law.
Hale Jur. H. L. Hale's Jurisdiction of the House of Lords.
Hale P. C. Hale's Pleas of the Crown.

Hale Prec. Hale's Precedents in (Ecclesiastical) Criminal Cases.
Hale Sum. Hale's Summary of Pleas.
Halk. Halkerston's Compendium of Scotch Faculty Decisions;—Halkerston's Digest of the Scotch Marriage Law,—Halkerston's Latin Maxims.
Halk. Comp. Halkerston's Compendium of Scotch Faculty Decisions.
Halk. Dig. Halkerston's Digest of the Scotch Marriage Law.
Halk. Lat. Max. Halkerston's Latin Maxims.
Hall Hall's New York Superior Court Reports;—Hall's Reports, vols. 56, 57 New Hampshire,—Hallett's Reports, vols. 1, 2 Colorado.
Hall Adm. Hall's Admiralty Practice.
Hall Am. L. J. American Law Journal (Hall's).
Hall (Col.). Hallett's Colorado Reports.
Hall. Const. Hist. Hallam's Constitutional History of England.
Hall, Émérig. Mar. Loans. Hall, Essay on Maritime Loans from the French of Émérigon.
Hall, Int. Law. Hall on International Law.
Hall Jour. Journal of Jurisprudence (Hall's).
Hall L. J. American Law Journal (Hall's).
Hall Law of W. Halleck's International Law and Law of War.
Hall, Marit. Loans. Hall, Essay on Maritime Loans from the French of Émérigon.
Hall, Mex. Law. Hall, Laws of Mexico Relating to Real Property, etc
Hall Middle Ages. Hallam's Middle Ages.
Hall Neut Hall on Neutrals.
Hall (N. H). Hall's New Hampshire Reports.
Hall, Profits à Prendre. Hall, Treatise on the Law Relating to Profits à Prendre, etc
Hall Sea Sh. Hall on the Sea Shore.
Hall & Tw. Hall and Twell's Reports, English Chancery.
Hallam. Hallam's Middle Ages.
Hallam's Const Hist. Hallam's Constitutional History of England.
Hallam, Mid. Ages. Hallam's Middle Ages.
Hallett. Hallett's Reports, Colorado Reports, vols. 1-2
Hallifax, Anal. or *Hallifax Civil Law.* Hallifax's Analysis of the Civil Law
Hals or *Halst.* or *Halst. L.* Halsted's New Jersey Law Reports, vols 6-12
Halst. Ch or *Halst Eq* Halsted's Chancery Reports, New Jersey Equity.
Halst. Ev. Halsted's Digest of the Law of Evidence
Ham Hammond's Nisi Prius;—Hammond's Reports, vols 1-9 Ohio,—Hamilton's Reports, Scotch Court of Session.
Ham A. & O Hammerton, Allen & Otter, English Magistrates' Cases, vol. 3 New Sessions Cases.
Ham. N. P Hammond's Nisi Prius.
Ham. Parties Hammond on Parties to Action.
Hamel, Cust. Hamel's Laws of the Customs.
Hamilton. (Hamilton of) Haddington's Manuscript Cases, Scotch Court of Session,—Hamilton, American Negligence Cases.
Hamlin. Hamlin's Reports, vols. 81-99 Maine.
Hamm. A. & O. Hamerton, Allen & Otter's Magistrate Cases, English Courts, vol. 3 New Session Cases.
Hamm. F. Ins. Hammond on Fire Insurance.
Hamm. (Ga.). Hammond's Reports, Georgia.
Hamm. Insan. Hammond on Insanity.
Hamm. (Ohio). Hammond's Reports, Ohio.
Hamm N. P. Hammond's Nisi Prius.
Hamm. Part. Hammond on Parties to Action.
Hamm. Pl. Hammond's Principles of Pleading.
Hamm. & J. Hammond and Jackson's Reports, Georgia, vol. 45.
Hammond Hammond's Reports, vols. 1-9 Ohio,—Hammond's Reports, vols. 36-45 Georgia.
Hammond & Jackson. Hammond & Jackson's Reports, vol. 45 Georgia.
Han. Handy's Ohio Reports;—Hannay's Reports, New Brunswick.
Han. Ent. Hansard's Entries.
Han. Horse. Hanover on the Law of Horses.
Han. (N. B.). Hannay's Reports, vols. 12, 13, New Brunswick.
Hand. Hand's Reports, vols. 40-45 New York;—Handy's Ohio Reports.
Hand Ch. Pr. Hand's Chancery Practice.
Hand Cr. Pr. Hand's Crown Practice.
Handy. Handy's Ohio Reports.
Hanes. Hanes's English Chancery.
Hanmer. Hanmer's Lord Kenyon's Notes, English King's Bench.
Hann. Hannay's Reports, New Brunswick.
Hans. Hansard's Entries.
Hans. Parl. Deb. Hansard's Parliamentary Debates.
Hansb. Hansbrough's Reports, vols. 76-90 Virginia.
Hanson. Hanson on Probate Acts, etc.
Har. Harmonized,—Harrison (see Harr.);—Harrington's Chancery Reports, Michigan.
Har. (Del.). Harrington's Reports, vols. 1-5 Delaware.
Har. St. Tr. Hargrave's State Trials.
Har. & G or *Har. & Gill.* Harris and Gill's Reports, Maryland.
Har & J. or *Har. & John. (Md.).* Harris and Johnson's Reports, Maryland
Har & McH. Harris and McHenry's Reports, Maryland
Har. & Ruth. Harrison & Rutherford's English Common Pleas Reports.
Har. & W or *Har. & Woll* Harrison and Wollaston's Reports, English King's Bench.
Harc. Harcase's Decisions, Scotch Court of Session.
Hard Hardres's Reports, English Exchequer.
Hard or *Hardin (Ky.).* Hardin's Reports, Kentucky.
Hard Stat. L Haldcastle's Construction and Effect of Statutory Law.
Hardes. Hardesty, Delaware Term Reports.
Hardr. or *Hardres.* Hardres's English Exchequer Reports.
Hardw. Cases *tempore* Hardwicke, by Ridgeway,—Cases *tempore* Hardwicke, by Lee.
Hare Haro's Reports, English Chancery.
Hare Const Hare on the Constitution of the U. S
Hare Dis. or *Hare Ev.* Hare on Discovery of Evidence.
Hare & W. or *Hare & Wal L C* American Leading Cases, edited by Hare & Wallace.
Harg Hargrave's State Trials;—Hargrove's Reports, vols 68-75 North Carolina.
Harg C. B. M. Hargrave's Collection, British Museum.
Harg. Co. Litt. Hargrave's Notes to Coke on Littleton.
Harg Coll. Hargrave's Judicial Arguments and Collection
Harg Exer. Hargrave's Jurisconsult Exercitations.
Harg Jud. Arg. Hargrave's Judicial Arguments.
Harg Law Tr. or *Harg. Law Tracts.* Hargrave's Law Tracts.
Harg Th. Hargrave on the Thellusson Act.
Harg. St. Tr. or *Harg State Tr.* Hargrave's State Trials.
Hargrove. Hargrove's Reports, vols. 68-75 North Carolina.
Harl C. B. M. Harleian Collection, British Museum.
Harm. Harmon's Reports, vols. 13-15 California;—Harmon's Upper Canada Common Pleas Reports.
Harm (U. C.). Harman's Common Pleas Reports, Upper Canada.
Harp. or *Harp. L.* or *Harp. L. S. C.* Harper's South Carolina Law Reports.
Harp. Con. Cas. Harper's Conspiracy Cases, Maryland.
Harp. Eq. Harper's Equity Reports, South Carolina.
Harp. L. or *Harp. L. S. C.* Harper's Law Reports, South Carolina.
Harr. Harrison's Reports, New Jersey Law,—Harrington's Reports, Delaware; — Harrington's Chancery Reports, Michigan;—Harris's Reports,

vols. 13-24 Pennsylvania;—Harrison's Reports, vols. 15-17 and 23-29 Indiana.

Harr. Ch. Harrison's Chancery Reports, Michigan.

Harr. Ch. Pr. Harrison's Chancery Practice.

Harr. Con La. R. Harrison's Condensed Louisiana Reports.

Harr (Del.). Harrington's Reports, Delaware.

Harr Dig. Harrison's Digest of English Common Law Reports.

Harr Ent. Harris's Book of Entries.

Harr. (Ind.). Harrison's Reports, Indiana.

Harr. (Mich.). Harrington's Chancery Reports, Michigan.

Harr. (N. J.). Harrison's Reports, New Jersey Law, vols. 16-19.

Harr. (Pa.). Harris's Reports, Pennsylvania.

Harr. Proc. Harrison's Common Law Procedure Act.

Harr. & G. Harris and Gill's Reports, Maryland

Harr & Hodg. Harrison & Hodgin's Upper Canada Municipal Reports.

Harr. & J. Harris and Johnson's Reports, Maryland.

Harr. & McH. Harris and McHenry's reports, Maryland.

Harr. & R. or *Harr. & Ruth.* Harrison and Rutherford's Reports, English Common Pleas.

Harr. & S. or *Harr. & Sim.* Harris and Simrall's Reports, Mississippi, vols 49-52.

Harr. & W. or *Harr & Woll* Harrison and Wollaston's Reports, English King's Bench.

Harring. Harrington's Delaware Reports;—Harrington's Michigan Chancery Reports.

Harris. Harris's Reports, vols. 13-24 Pennsylvania.

Harris Dig. Harris's Digest, Georgia.

Harris & Simrall Harris & Simrall's Reports, vols. 49-52 Mississippi.

Harrison. Harrison's Reports, vols. 15-17 and 23-29 Indiana

Hart Hartley's Reports, vols. 4-10 Texas;—Hartley's Digest of Texas Laws.

Hart Dig. Hartley's Digest of Laws, Texas.

Hartley. Hartley's Reports, vols. 4-10 Texas.

Hartley & Hartley. Hartley & Hartley's Reports, vols. 11-21 Texas.

Harv Law Rev Harvard Law Review.

Hask Haskell's Reports, United States Courts, Maine (Fox's Decisions).

Hasl. Med. Jur. Haslam's Medical Jurisprudence

Hast. Hastings's Reports, vols. 69, 70 Maine.

Hast Tr Sp Speeches in the trial of Warren Hastings, Ed. by Bond

Hats. Pr. Hatsell's Parliamentary Precedents.

Hav. Ch Rep Haviland's Chancery Reports, Prince Edward Island.

Hav P E. I. Haviland's Reports, Prince Edward Island.

Haw Hawkins (see Hawk);—Hawaiian Reports;—Hawley's Reports, vols. 10-20 Nevada

Haw. Am Cr. Rep. or *Haw. Cr. Rep* Hawley's American Criminal Reports.

Haw. W. C or *Haw W. Cas.* Hawes's Will Case.

Hawaii or *Hawaiian Rep.* Hawaii (Sandwich Islands) Reports.

Hawk. Hawkin's Reports, Louisiana Annual

Hawk Abr. or *Hawk Co Litt.* Hawkins's Coke upon Littleton.

Hawk P. C. or *Hawk. Pl. Cr.* Hawkins's Pleas of the Crown.

Hawk W. Hawkins on Construction of Wills.

Hawkins. Hawkins's Reports, vols. 19-24 Louisiana Annual.

Hawks. Hawks's North Carolina Reports

Hawl. Cr. R Hawley's American Criminal Reports.

Hawl. or *Hawley (Nev.).* Hawley's Nevada Reports and Digest.

Hawley Cr. R Hawley's American Criminal Reports.

Hay. Haywood's North Carolina Reports;—Haywood's Tennessee Reports (Haywood's Reports are sometimes referred to as though numbered consecutively from North Carolina through Tennessee);—Hayes's Irish Exchequer Reports. See also Hayes—Hayes's Reports, Calcutta;—Hay's Scotch Decisions.

Hay Acc. or *Hay Dec.* or *Hay Acc. Cas.* Hay's Decisions on Accidents and Negligence.

Hay (Calc.). Hay's Reports, Calcutta.

Hay. Conv. Hayes's Conveyancer.

Hay Dec. Hay's Decisions on Accidents and Negligence.

Hay Est. or *Hay. U. D & T.* Hayes on the Law of Uses, Devises, and Trusts, with reference to the Creation and Conveyance of Estates.

Hay. Exch. Hayes's Reports, Irish Exchequer.

Hay. Lim. Hayes on Limitations

Hay P. L. Hay's Poor Law Decisions.

Hay. U. D. & T. Hayes on the Law of Uses, Devises, and Trusts, with reference to the Creation and Conveyance of Estates.

Hay & H. or *Hay & Haz.* Hayward & Hazelton's United States Circuit Court Reports.

Hay. & J. Hayes and Jones's Reports, Irish Exchequer.

Hay. & J. Wills. Hayes and Jarman on Wills.

Hay & M. or *Hay & Marr.* Hay & Marriott's Admiralty Reports (usually cited, Marriott's Reports).

Hayes or *Hayes Exch.* Hayes's Irish Exchequer Reports.

Hayes Conv. Hayes on Conveyancing.

Hayes & Jo. or *Hayes & Jon.* Hayes & Jones's Irish Exchequer Reports.

Haynes Lead. Cas. Haynes's Students' Leading Cases.

Haynes, Eq. Haynes's Outlines of Equity.

Hays R. P. Hays on Real Property.

Hayw. Haywood's North Carolina Reports;—Haywood's Tennessee Reports (see Hay.).

Hayw L R. Hayward's Law Register, Boston.

Hayw. (N. C.). Haywood's Reports, North Carolina

Hayw. (Tenn.). Haywood's Reports, Tennessee

Hayw. & H or *Hayw & H. (D. C.).* Hayward & Hazelton's United States Circuit Court Reports.

Haz Pa Reg. Hazard's Pennsylvania Register

Haz. U. S. Reg. Hazard's United States Register.

Haz & Roch. M. War. Hazlitt and Roche on Maritime Warfare.

Head. Head's Reports, Tennessee.

Heard Civ. Pl. Heard's Civil Pleading.

Heard Cr. L. Heard's Criminal Law, Massachusetts.

Heard Cr. Pl Heard's Criminal Pleading

Heard L & Sl. Heard on Libel and Slander.

Heath. Heath's Reports, Maine.

Heath Max. Heath's Maxims.

Heck. Cas Hecker's Leading Cases on Warranty.

Hedges. Hedges's Reports, vols. 2-6 Montana.

Hein. Heineccius Opera.

Heinecc. Ant Rom. Heineccius (J. G) Antiquitatum Romanarum (Roman Antiquities.)

Heinecc dc Camb. Heineccius (J. G.) Elementa Juris Cambialis.

Heinecc. Elem. Heineccius (J. G.) Elementa Juris Civilis (Elements of the Civil Law.)

Heisk. Heiskell's Reports, Tennessee.

Helm. Helm's Reports, Nevada Reports.

Hem. Hempstead, United States;—Hemingway, Mississippi.

Hem. & M. or *Hem. & Mil.* Hemming & Miller's English Vice-Chancellors' Reports.

Heming. (Miss.). Hemingway's Mississippi Reports.

Hemp. Hempstead's United States Circuit Court Reports.

Hempst. Hempstead's Reports, U. S. 9th Circuit Ct. Reports.

Hen. King Henry; thus 1 Hen. I. signifies the first year of the reign of King Henry I.

Hen. Bl or *Hen. Bla.* Henry Blackstone's English Common Pleas Reports.

Hen. For. Law Henry on Foreign Law.

Hen. La. Dig. Hennen's Louisiana Digest.

Hen. Man. Cas. Henry's Manumission Cases.

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

Hen. & M. or *Hen. & Mun. (Va.).* Hening & Munford's Virginia Reports.
Hepb. Hepburn's Reports, vols. 3, 4 California.
Her. Herne's Pleader.
Her. Char. U. Herne's Law of Charitable Uses.
Her. Estop. Herman on Estoppel.
Her. Ex Herman on Executions.
Her. Hist. or *Her. Jur.* Heron's History of Jurisprudence.
Het. or *Hetl.* Hetley's English Common Pleas Reports.
Heyle Imp. D. Heyle's United States Import Duties.
Heyw. Ca. Heywood's Table of Cases, Georgia.
Heyw. El. Heywood on Elections.
Hibb. Hibbard's Reports, vol. 20 Opinions Attorneys-General;—Hibbard's Reports, vol. 67 New Hampshire.
Hig. Dig. Pat. Cas. Higgin's Digest of Patent Cases.
High. Bail. Highmore on Bail.
High Ct. or *High Ct. R* High Court Reports, Northwest Provinces of India.
High Inj. High on Injunction.
High Leg. Rem. High on Legal Remedies.
High. Lun. Highmore on Lunacy
High. Mortm. Highmore on Mortmain.
High Rec. High on Receivers.
Hight Hight's Reports, vols. 57-58 Iowa.
Hil. T Hilary Term.
Hildy M. Ins. Hildy on Marine Insurance.
Hill. Hill's New York Reports;—Hill's Law Reports, South Carolina.
Hill. Abr. Hilliard's Abridgment of the Law of Real Property.
Hill. Am. Jur. Hilliard's American Jurisprudence.
Hill Am. Law. Hilliard's American Law.
Hill B. & Ins. Hilliard on Bankruptcy and Insolvency.
Hill Ch. Hill's Chancery Reports, South Carolina.
Hill Ch. Pr. Hill's Chancery Practice.
Hill. Contr. Hilliard on Contracts.
Hill Eq. Hill's Equity, South Carolina Reports.
Hill Fixt. Hill on Fixtures.
Hill Inj. Hilliard on Injunction.
Hill. Mort. Hilliard on Mortgages
Hill. N. T. or *Hill. New Trials.* Hilliard on New Trials.
Hill (N. Y.). Hill's Reports, New York.
Hill. R. P. or *Hill. Real Prop.* Hilliard on Real Property.
Hill. Sales. Hilliard on Sales.
Hill S C. Hill's South Carolina Reports (Law or Equity)
Hill Tax. Hilliard on the Law of Taxation.
Hill. Tort Hilliard on Torts.
Hill Tr. Hill on Trustees.
Hill. Vend Hilliard on Vendors.
Hill & D. or *Hill & Den. (N. Y.).* Hill and Denio's New York Reports.
Hill & Den Sup. or *Hill & Den. Supp.* Lalor's Supplement to Hill and Denio's Reports, New York.
Hillyer. Hillyer's Reports, California Reports.
Hilt. Hilton's Reports, Common Pleas, New York.
Hind. Pat. Hindemarch on Patents.
Hinde Ch. Pr. Hinde, Modern Practice of the High Court of Chancery.
Hines. Hines's Reports, vols. 83-98 Kentucky.
Ho. Lord Cas. House of Lords Cases (Clark's).
Hob. Hobart's Reports, English Common Pleas and Chancery.
Hod. Hodge's Reports, English Common Pleas.
Hod. Railw. Hodge on the Law of Railways.
Hodg. Hodges's English Common Pleas Reports.
Hodg. Can Elec. Cas. or *Hodg. El. Cas. (Ont.).* Hodgin's Canada Election Cases
Hoff. Hoffman's Land Cases, United States District Court;—Hoffman's New York Chancery Reports.
Hoff. Ch. Hoffman's New York Chancery Reports.
Hoff. Ch. Pr. Hoffman's Chancery Practice.
Hoff. Ecc. L. Hoffman's Ecclesiastical Law.
Hoff. Land or *Hoff. Land Ca.* or *Hoff. L. C.* Hoffman's Land Cases, U. S. Dist. Ct. of California.
Hoff. Lead. Ca or *Hoff. Lead. Cas.* Hoffman's Leading Cases, Commercial Law.
Hoff. Leg. St. Hoffman's Legal Studies.
Hoff. Mas. Ch. or *Hoff. Mast.* Hoffman's Master in Chancery.
Hoff. or *Hoff. Ch. (N. Y.).* Hoffman's Chancery Reports, New York
Hoff. Outl. Hoffman's Outlines of Legal Studies.
Hoff. Publ. Pap. Hoffman's Public Papers, New York.
Hoff. Ref. Hoffman on Referees.
Hoffm. Ch. Hoffman's New York Chancery Reports.
Hog. Hogan's Irish Rolls Court Reports;—(Hogan of) Harcarse's Scotch Session Cases.
Hog. St Tr Hogan's Pennsylvania State Trials.
Hogue. Hogue's Reports, Florida.
Holc. D. & Cr. Holcombe's Law of Debtor and Creditor.
Holc. L. Cas. Holcombe's Leading Cases of Commercial Law.
Holc. Dig. Holcombe's Digest.
Holc Eq. Jur. Holcombe's Equity Jurisprudence.
Holc. Lead. Cas. Holcombe's Leading Cases on Commercial Law.
Hol Inst. Holland's Institutes of Justinian.
Holl. Jur Holland's Elements of Jurisprudence.
Holl or *Hollinshead (Minn.).* Hollinshead's Minnesota Reports
Holm or *Holmes* Holmes's United States Circuit Court Reports;—Holmes's Reports, vols. 15-17 Oregon.
Holt. Holt's English King's Bench Reports;—Holt's English Nisi Prius Reports;—Holt's English Equity Reports
Holt Adm. or *Holt Adm Cas.* Holt's Admiralty Cases (Rule of the Road at Sea)
Holt Ch. Holt's Equity V. C. Court.
Holt Eq. or *Holt Eq Rep.* Holt's English Equity Reports.
Holt K B. Holt's English King's Bench Reports
Holt L Dic Holthouse's Law Dictionary.
Holt N P. Holt's Nisi Prius Reports, English Courts
Holt R. of R. or *Holt Rule of R.* Holt's Rule of the Road Cases.
Holt Sh. Holt on Shipping.
Holthouse or *Holthouse Dic.* Holthouse's Law Dictionary.
Holtz Enc. Holtzendorff, Encyclopädie der Rechtswissenschaft (Encyclopedia of Jurisprudence)
Home or *Home H Dec* Home's Manuscript Decisions, Scotch Court of Session. See also Kames
Hood Ex. Hood on Executors
Hook. or *Hooker.* Hooker's Reports, Connecticut
Hoon. or *Hoonahan.* Hoonahan's Sind Reports, India.
Hop & C Hopwood & Coltman's English Registration Appeal Cases.
Hop & Ph. Hopwood & Philbrick's English Registration Appeal Cases
Hope Hope (of Kerse) Manuscript Decisions, Scotch Court of Session
Hope Min. Pr. Hope's Minor Practicks, Scotland
Hopk Hopkinson's Works
Hopk Adm. Hopkinson's Pennsylvania Admiralty Judgments.
Hopk Adm. Dec. Admiralty Decisions of Hopkinson in Gilpin's Reports.
Hopk. Ch. Hopkins's Chancery Reports, New York
Hopk Judg. Hopkinson's Pennsylvania Admiralty Judgments.
Hopk. Mar. Ins. Hopkins on Marine Insurance.
Hopw & C or *Hopw. & Colt* Hopwood and Coltman's English Registration Appeal Cases.
Hopw. & P. or *Hopw. & Phil* Hopwood and Philbrick's English Registration Appeal Cases.
Hor & Th Cas. Horrigan & Thompson's Cases on Self-Defense.
Horn & H. Horn and Hurlstone's Reports, English Exchequer.
Horne Mir. or *Horne M. J.* Horne's Mirror of Justices.
Horner. Horner's Reports, vols. 11-23 South Dakota.

Horr. & Th. or *Horr. & T. Cas.* Horrigan & Thompson's Cases on Self-Defense.

Horw. Y. B (Horwood's). Year-Books of Edward I.

Hoskins. Hoskins's Reports, vol. 2 North Dakota.

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

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

Hough Am. Con. Hough on the American Constitution.

Hough C. M. Hough on Court Martial.

Hough C -M. Cas. Hough's Court-Martial Case Book, London, 1821

Houghton. Houghton's Reports, vol. 97 Alabama.

Hous Houston's Delaware Reports

Hous. Pr. Housman's Precedents in Conveyancing.

House of L. House of Lords, House of Lords Cases.

Houst Houston's Reports, Delaware.

Houst. Cr. Cas. Houston's Criminal Cases, Delaware.

Houst. on St. in Tr. Houston on Stoppage in Transitu.

Hov. Hovenden on Frauds,—Hovenden's Supplement to Vesey, Jr 's, English Chancery Reports.

Hov. Fr. Hovenden on Frauds

Hov Sup. or *Hov. Sup. Ves.* Hovenden's Supplement to Vesey, Jr.'s, English Chancery Reports.

Hoved. Hoveden, Chronica.

How. Howard's United States Supreme Court Reports,—Howard's Mississippi Reports;—Howard's New York Practice Reports,—Howell's Reports, vols 22-26 Nevada.

How App or *How App. Cas.* Howard's New York Court of Appeals Cases.

How Cas. Howard's New York Court of Appeals Cases,—Howard's Popery Cases, Ireland.

How Cr Tr. Howison's Criminal Trials, Virginia.

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

How (N. Y). Howard's Reports, N. Y. Court of Appeals

How N. S. Howard's New York Practice Reports, New Series.

How Pop Cas. Howard's Popery Cases, Ireland

How. Pr. Howard's New York Practice Reports

How Pr N S Howard's New York Practice Reports, New Series.

How Prac or *How Pr R. (N. Y.).* Howard's New York Practice Reports

How. S. C. Howard's United States Supreme Court Reports

How. St. Tr. or *How. State Tr.* Howell's English State Trials.

How U. S. Howard's Reports, U. S. Supreme Court.

How & Beat. Howell & Beatty's Reports, Nevada

How. & Nor. Howell & Norcross's Reports, Nevada.

Howe Pr. Howe's Practice, Massachusetts

Howell N. P. Howell's Nisi Prius Reports, Michigan.

Hu. Hughes's United States Circuit Court Reports;—Hughes's Kentucky Reports

Hub. Leg Dir. or *Hub. Leg Direc* Hubbell's Legal Directory.

Hub Prael J. C. Huber, Prælectiones Juris Civilis.

Hubb. Hubbard's Reports, Maine.

Hubb. Succ. Hubback's Evidence of Succession.

Hubbard. Hubbard's Reports, Maine.

Hud. & B. or *Hud & Br.* Hudson and Brooke's Reports, Irish King's Bench.

Hud. & Will. Dig. (U. S.). Hudson and William's United States Digest.

Hugh. Hughes's United States 4th Circuit Court Reports;—Hughes's Kentucky Reports

Hugh Con. Hughes's Precedents in Conveyancing.

Hugh Ent. Hughes's Book of Entries.

Hugh Ins Hughes on Insurance.

Hugh. (Ky.). Hughes's Reports, Kentucky.

Hugh. Wills. Hughes on Wills.

Hugh. Writs. Hughes on Writs.

Hughes. Hughes's United States Circuit Court Reports

Hughs Abr. Hughs's Abridgment.

Hugo, Hist. du Droit Rom. Hugo, Histoire du Droit Romain.

Hum. (Tenn.). Humphrey's Tennessee Reports.

Hume. Hume's Decisions, Scotch Court of Session.

Hume Com or *Hume Cr. L* Hume's Commentaries on Criminal Law of Scotland

Hume, Hist Eng. Hume's History of England.

Humph. (Tenn.). Humphrey's Reports, Tennessee.

Humph. R. P. Humphrey on Real Property.

Hun Hun's New York Supreme Court Reports, also Appellate Division Supreme Court, New York.

Hunt or *Hunt Ann. Cas.* Hunt's Collection of Annuity Cases.

Hunt Bound. Hunt's Law of Boundaries and Fences

Hunt Cas. Hunt's Annuity Cases.

Hunt, Eq. Hunt's Suit in Equity.

Hunt Fr Conv. Hunt on Fraudulent Conveyances.

Hunt Mer. Mag. Hunt's Merchants' Magazine, New York.

Hunt. Rom. L. or *Hunter, Rom. Law.* Hunter on Roman Law

Hunter, Suit Eq. Hunter's Proceeding in a Suit in Equity.

Hur. Hurlstone (see Hurl.).

Hurd Hab. Corp. Hurd on Habeas Corpus.

Hurd Pers. Lib Hurd on Personal Liberty

Hurl. & C. or *Hurl. & Colt* Hurlstone & Coltman's English Exchequer Reports

Hurl & Gord Hurlstone & Gordon's Reports, vols. 10, 11 English Exchequer.

Hurl & N or *Hurl & Nor.* Hurlstone & Norman's English Exchequer Reports

Hurl & Walm Hurlstone & Walmsley's English Exchequer Reports

Hurlst & C Hurlstone and Coltman's Reports, English Exchequer

Hurlst & G. Hurlstone and Gordon's Reports, English Exchequer.

Hurlst & N Hurlstone and Norman's Reports, English Exchequer

Hurlst & W. Hurlstone and Walmsley's Reports, English Exchequer.

Husb Mar Wom Husband on Married Women.

Hust L. T. Huston on Land Titles in Pennsylvania

Hut Hutton's Reports, English Common Pleas.

Hutch Hutcheson's Reports, vol. 81 Alabama.

Hutch Car Hutchinson on Carriers.

Hutt Hutton's English Common Pleas Reports.

Hux Judg. Huxley's Judgments.

Hyde Hyde's Reports, India.

I. Idaho,—Illinois,—Indiana;—Iowa;—Irish (see Ir.);—The Institutes of Justinian.

I. A Irish Act

I. C C Interstate Commerce Commission Reports.

I C L R Irish Common Law Reports

I. C R. Irish Chancery Reports;—Irish Circuit Reports.

I. E. R. Irish Equity Reports.

I. J. C or *I J. Cas* Irvine's Justiciary Cases, Scotch Justiciary Court.

I. Jur. Irish Jurist, Dublin.

I. Jur N S Irish Jurist, New Series, Dublin.

I. L T. Irish Law Times, Dublin.

I O U I owe you.

I. P. Institutes of Polity.

I. R Irish Reports.

I. R C. L. Irish Reports, Common Law Series.

I. R Eq Irish Reports, Equity Series

I. R. R Internal Revenue Record, New York.

I. T R Irish Term Reports, by Ridgway, Lapp and Schoales

Ia. Iowa,—Iowa Reports.

Ib or *Id Ibidem* or *Idem,* The same.

Ida or *Idaho.* Idaho;—Idaho Reports.

Iddings T R. D. Iddings's Dayton Term Reports.

Il Cons. del Mar. Il Consolato del Mare. See Consolato del Mare, in the body of this work.

Ill. Illinois;—Illinois Reports.

Ill. App. Illinois Appellate Court Reports.

Imp. C. P. Impey's Practice, Common Pleas.

Imp. Fed. Imperial Federation, London

Imp K B. Impey's Practice, King's Bench.

Imp. Pl. Impey's Pleader's Guide.

Imp. Pr. C. P. Impey's Practice in Common Pleas.
Imp. Pr. K. B. Impey's Practice in King's Bench.
Imp. Sh. Impey's Office of Sheriff.
In Dom. Proc. In the House of Lords. See *Dom. Proc.*
In f. In fine. At the end of the title, law, or paragraph quoted.
In pr. In principio. At the beginning of a law, before the first paragraph.
In sum. In summa. In the summary.
Ind. Indiana,—Indiana Reports;—India;—(East) Indian.
Ind. App. Law Reports, Indian Appeals;—Indiana Appeals.
Ind. App Sup. or *Ind. App. Supp.* Indian Appeals Supplement, P. C.
Ind. Jur. Indian Jurist, Calcutta,—Indian Jurist, Madras.
Ind L. Mag. Indiana Law Magazine.
Ind L. R (East) Indian Law Reports
Ind. L. R. All. or *Ind. L. R Alla* Allahabad Series of Indian Law Reports.
Ind L. R. Bomb. Indian Law Reports, Bombay Series.
Ind L. R. Calc. Indian Law Reports, Calcutta Series
Ind L. R. Mad. Indian Law Reports, Madras Series
Ind L Reg. Indiana Legal Register, Lafayette.
Ind. L Rep. Indiana Law Reporter
Ind. Rep. Indiana Reports,—Index Reporter.
Ind Super. Indiana Superior Court Reports (Wilson's)
Ind T. Indian Territory,—Indian Territory Reports.
Inder. Com. L. Indermaur's Principles of the Common Law.
Inder L. C Com. L. Indermaur's Leading Common Law Cases.
Inder. L. C. Eq. Indermaur's Leading Equity Cases
Index Rep. Index Reporter.
Inf. Infra Beneath or below.
Ing. Dig. Ingersoll's Digest of the Laws of the U. S.
Ing Roc. Ingersoll's Roccus.
Ing Ves. Ingraham's edition of Vesey, Jr.
Ingr. Insolv Ingraham on Insolvency.
Inj. Injunction.
Ins. Insurance. Insolvency.
Ins L J. Insurance Law Journal, New York and St. Louis.
Ins. L. Mon Insurance Law Monitor New York.
Ins. Rep Insurance Reporter, Philadelphia
Inst. Institutes; when preceded by a number denoting a volume (thus 1 Inst.), the reference is to Coke's Institutes, when followed by several numbers (thus Inst 4, 2, 1), the reference is to the Institutes of Justinian.
1, 2, Inst. (1, 2) Coke's Inst.
Inst., 1, 2, 3. Justinian's Inst. lib. 1, tit. 2, § 3.
Inst, 1, 2, 31. Justinian's Institutes, lib 1, tit 2, § 31.
The Institutes of Justinian are divided into four books,—each book is divided into titles, and each title into paragraphs, of which the first, described by the letters *pr.*, or *princip.*, is not numbered. The old method of citing the Institutes was to give the commencing words of the paragraph and of the title; *e. g.*, § *si adversus, Inst. de Nuptiis.* Sometimes the number of the paragraph was introduced, *e. g.*, § 12, *si adversus, Inst. de Nuptiis.* The modern way is to give the number of the book, title, and paragraph, thus;—*Inst. 1.* 10, 12; would be read *Inst, Lib. I.* tit. 10, § 12.
Inst. Cler. Instructor Clericalis.
Inst. Com. Com. Interstate Commerce Commission Reports.
Inst. Epil. Epilogue to [a designated part or volume of] Coke's Institutes.
Inst. Jur. Angl. Institutiones Juris Anglicani, by Doctor Cowell.
Inst. Proem. Proeme [introduction] to [a designated part or volume of] Coke's Institutes.
Instr. Cler. Instructor Clericalis.

Int. Case. Rowe's Interesting Cases, English and Irish.
Int. Com. Rep. Interstate Commerce Reports.
Int Private Law. Westlake's Private International Law.
Int Rev. Rec. Internal Revenue Record, New York
Iowa. Iowa Reports.
Iowa Univ. L. Bul Iowa University Law Bulletin
Ir. Irish;—Ireland;—Iredell's North Carolina Law or Equity Reports.
Ir. Ch. or *Ir. Ch N. S.* Irish Chancery Reports.
Ir. Cir. or *Ir. Cir. Rep.* Irish Circuit Reports.
Ir. C L. or *Ir. Com. Law Rep.* or *Ir L. N S* Irish Common Law Reports.
Ir. Eccl. Irish Ecclesiastical Reports, by Milward.
Ir. Eq. Irish Equity Reports.
Ir. Jur. Irish Jurist, Dublin.
Ir. L. Irish Law Reports.
Ir. L. N. S. Irish Common Law Reports.
Ir. L. R. Irish Law Reports,—The Law Reports, Ireland, now cited by the year.
Ir. Law Rec. Irish Law Recorder.
Ir. Law Rep. Irish Law Reports.
Ir. Law Rep. N. S. Irish Common Law Reports.
Ir. L T. Irish Law Times and Solicitors's Journal, Dublin.
Ir. L. T Rep. Irish Law Times Reports.
Ir. Law & Ch. Irish Law and Equity Reports, New Series.
Ir. Law & Eq. Irish Law and Equity Reports, Old Series.
Ir R C L Irish Reports, Common Law Series.
Ir. R. Eq. Irish Reports, Equity Series.
Ir R. Reg App. Irish Reports, Registration Appeals.
Ir. R. Reg. & L. or *Ir. Reg. & Land Cas.* Irish Registry and Land Cases.
Ir Rep. Reg. App. Irish Reports, Registration Appeals.
Ir. Rep. Reg. & L. Irish Reports, Registry and Land Cases.
Ir. St. Tr. Irish State Trials (Ridgeway's).
Ir. T. R. or *Ir. Term Rep* Irish Term Reports (by Ridgeway, Lapp & Schoales).
Ired Iredell's North Carolina Law Reports.
Ired Dig. Iredell's Digest.
Ired. Eq. Iredell's Equity Reports, North Carolina.
Ired. L. Iredell's Law Reports, North Carolina
Irv. Irvine's Justiciary Cases, Scotch Justiciary Court.
Iv. Ersk Ivory's Notes on Erskine's Institutes
Ir. R 1894. Irish Law Reports for year 1894.
J. Justice;—Institutes of Justinian,—Johnson's New York Reports.
J. Adv. Gen. Judge Advocate General.
J. C. Johnson's Cases, New York Supreme Court,—Juris Consultus.
J. C P. Justice of the Common Pleas.
J. Ch or *J. C. R.* Johnson's New York Chancery Reports.
J. d'Ol. Les Jugemens d'Oleron.
J. et J. De Justitia et Jure.
J. Glo. Juncta Glossa.
J. H. Journal of the House.
JJ. Justices.
J. J. Mar. or *J J. Marsh. (Ky.).* J. J. Marshall's Reports, Kentucky.
J. K. B Justice of the King's Bench.
J. Kel. Sir John Kelyng's English Crown Cases
J. P. Justice of the Peace.
J. P. Sm. J. P. Smith's English King's Bench Reports.
J. Q. B. Justice of the Queen's Bench.
J. R. Johnson's New York Reports.
J. S. Gr. (N. J.). J. S. Green's New Jersey Reports.
J. Scott. Reporter English Common Bench Reports.
J. U. B. Justice of the Upper Bench.
J. Voet, Com. ad Pand. Voet (Jan), Commentarius ad Pandectas.
J. & H. Johnson and Hemming's Reports, English Chancery.

J. & L. or *J. & La T.* Jones & La Touche's Irish Chancery Reports.

J. & S. Jones & Spencer's New York Superior Court Reports.

J. & S. Jam. Judah & Swan's Jamaica Reports.

J. & W. Jacob and Walker's Reports, English Chancery.

Jac. Jacobus,—Jacob's English Chancery Reports;—Jacob's Law Dictionary,—King James, thus 1 Jac. I. signifies the first year of the reign of King James I

Jac. Dict or *Jac. L. D.* Jacob's Law Dictionary.

Jac. Fish Dig Jacob's Fisher's Digest.

Jac. Int. Jacob's Introduction to the Common, Civil and Canon Law.

Jac L. G. Jacob's Law Grammar.

Jac Lex Mer. Jacob's Lex Mercatoria, or the Merchant's Companion.

Jac. Sea Law. Jacobsen's Law of the Sea.

Jac & W. or *Jac & Walk.* Jacob & Walker's English Chancery Reports

Jack. Jackson's Reports, Georgia.

Jack. Tex. App. Jackson's Texas Court of Appeals Reports.

Jack. & G. Landl. & Ten. Jackson & Gross, Treatise on the Law of Landlord and Tenant in Pennsylvania.

Jackson. Jackson's Reports, vols. 43-66 Georgia;—Jackson's Reports, vols. 1-29 Texas Court of Appeals.

Jackson & Lumpkin (Ga.). Jackson & Lumpkin's Georgia Reports.

Jacob. Jacob's Law Dictionary.

James. James's Reports, Nova Scotia.

James Const Con Jameson on Constitutional Conventions

James (N. Sc.). James's Reports, Nova Scotia.

James Op. James's Opinions, Charges, etc., London, 1820.

James Sel Cas or *James Sel. Cases.* James's Select Cases, Nova Scotia

James. & Mont. Jameson and Montagu's English Bankruptcy Reports (in 2 Glyn and Jameson).

Jan. Angl. Jani Anglorum

Jar. Ch. Pr. Jarman's Chancery Practice.

Jar. Cr. Tr. Jardine's Criminal Trials.

Jar. Pow. Dev. Powell on Devises, with Notes by Jarman

Jar. Prec. Bythewood and Jarman's Precedents.

Jar. Wills. Jarman on Wills.

Jard. Tr. Jardine's Criminal Trials.

Jarm. Ch. Pr. Jarman's Chancery Practice.

Jarm. Pow. Dev. Powell on Devises, with Notes by Jarman.

Jarm. Wills. Jarman on Wills.

Jarm. & By. Conv. Jarman and Bythewood's Conveyancing.

Jctus. Jurisconsultus.

Jebb or *Jebb C. C.* or *Jebb Cr. Cas.* or *Jebb Ir. Cr. Cas.* Jebb's Irish Crown Cases.

Jebb Cr. & Pr. Cas. Jebb's Irish Crown and Presentment Cases.

Jebb & B. Jebb and Bourke's Reports, Irish Queen's Bench.

Jebb & S or *Jebb & Sym* Jebb and Symes's Reports, Irish Queen's Bench.

Jeff. Jefferson's Reports, Virginia.

Jeff. Man. Jefferson's Manual of Parliamentary Law.

Jenk. or *Jenk Cent.* Jenkins's Eight Centuries of Reports, English Exchequer.

Jenks. Jenks's Reports, vol. 58 New Hampshire.

Jenn. Jennison's Reports, vols. 14-18 Michigan.

Jer. Eq Jur. or *Jeremy, Eq Jur.* Jeremy's Equity Jurisdiction.

Jo. T. Sir T. Jones's Reports.

Jo. Juris. Journal of Jurisprudence.

Jo. & La T. Jones and La Touche's Reports, Irish Chancery.

John. Johnson's New York Reports;—Johnson's Reports of Chase's Decisions;—Johnson's Maryland Chancery Decisions;—Johnson's English Vice-Chancellors' Reports.

John. & H Johnson and Hemming's Reports, English Chancery.

Johns. Johnson's Reports, New York Supreme Court;—Johnson's Reports of Chase's Decisions;—Johnson's Maryland Chancery Decisions;—Johnson's English Vice-Chancellors' Reports.

Johns. Bills. Johnson on Bills of Exchange, etc.

Johns. Cas. Johnson's Cases, New York Supreme Court.

Johns. Ch. Johnson's New York Chancery Reports;—Johnson's English Vice-Chancellors' Reports;—Johnson's Maryland Chancery Decisions;—Johnston's Reports, New Zealand.

Johns. Ch. Cas. Johnson's Chancery Reports, New York.

Johns. Ct. Err. Johnson's Reports, New York Court of Errors.

Johns. Dec. Johnson's Maryland Chancery Decisions.

Johns. Eccl. Law. Johnson's Ecclesiastical Law.

Johns. Eng. Ch. Johnson's English Chancery Reports.

Johns. H. R. V. Johnson's English Chancery Reports.

Johns. (Md). Johnson's Maryland Reports.

Johns. (New Zealand). Johnson's New Zealand Reports.

Johns. Pat Man. Johnson's Patent Manual.

Johns. Rep. Johnson's Reports, New York Supreme Court.

Johns Tr. Johnson's Impeachment Trial.

Johns. U. S. Johnson's Reports of Chase's United States Circuit Court Decisions.

Johns. V. C. or *Johns V. Ch. Cas.* Johnson's Cases in Vice-Chancellor Wood's Court.

Johns. & H. or *Johns. & Hem.* Johnson & Hemming's English Chancery Reports.

Johnson. Johnson's Reports, New York;—Johnson's English Vice-Chancellors' Reports,—Johnson's Maryland Chancery Decisions.

Johnst. Inst. Johnston's Institutes of the Law of Spain.

Johnst. N. Z. Johnston's Reports, New Zealand

Jon Thos. Jones's Reports, English King's Bench and Common Pleas;—Wm. Jones's Reports, English King's Bench and Common Pleas

Jon. (Ala). Jones's Reports, Alabama, 62.

Jon. Bailm. Jones's Law of Bailments.

Jon B & W. Jones, Barclay, and Whittelsey's Reports, Missouri, vol. 31.

Jon. Corp. Secs. Jones on Corporate Securities.

Jon Eq. Jones's Equity Reports, North Carolina.

Jon. Exch. Jones's Irish Exchequer Reports.

Jon. Inst. Jones's Institutes of Hindoo Law.

Jon. Intr. Jones's Introduction to Legal Science.

Jon. Ir. Exch. Jones's Reports, Irish Exchequer.

Jon. L. O. T. Jones on Land Office Titles.

Jon. (Mo.). Jones's Reports, Missouri.

Jon. (N. C.). Jones's Law Reports, North Carolina.

Jon. (N. C.) Eq. Jones's Equity Reports, North Carolina.

Jon Mort. Jones on Mortgages.

Jon. (Pa). Jones's Reports, Pennsylvania.

Jon Railw. Sec. Jones on Railway Securities.

Jon. Salv. Jones on Salvage.

Jon. T. Thos. Jones's Reports, English King's Bench and Common Pleas. Sometimes cited as 2 Jones.

Jon. (U. C.). Jones's Reports, Upper Canada.

Jon. W. Wm. Jones's Reports, English King's Bench and Common Pleas. Sometimes cited as 1 Jones.

Jon & C. or *Jon. & Car.* Jones and Cary's Reports, Irish Exchequer.

Jon. & L or *Jon. & La T.* Jones and La Touche's Reports, Irish Chancery.

Jon. & S. Jones and Spencer's Reports, New York City Superior Court, vols. 33-46.

Jones. Jones's Reports, vols. 43-48, 52-57, 61, 62 Alabama;—Jones's Reports, vols. 11, 12 Pennsylvania;—Jones's Reports, vols. 22-31 Missouri;—Jones's Law or Equity Reports, North Carolina;—Jones's Irish Exchequer Reports;—Jones's Upper Canada Common Pleas Reports;—Jones & Spencer's New York Superior Court Reports;—Sir Thomas Jones's Eng

lish King's Bench Reports;—Sir William Jones's English King's Bench Reports;—See Jon.

Jones, Bailm. Jones's Law of Bailments.

Jones, Barclay & Whittelsey or *Jones, B. & W. (Mo.).* Jones, Barclay and Whittelsey's Reports, Missouri Supreme Court (31 Missouri).

Jones, Chat. Mortg. Jones on Chattel Mortgages.

Jones Eq. Jones's North Carolina Equity Reports.

Jones, French Bar. Jones's History of the French Bar.

Jones Ir. Jones's Irish Exchequer Reports.

Jones Law or *Jones N. C.* Jones's North Carolina Law Reports.

Jones (Pa). Jones's Reports, vols. 11, 12 Pennsylvania.

Jones T. Sir Thomas Jones's English King's Bench Reports.

Jones U. C. Jones's Reports, Upper Canada.

Jones W. Sir William Jones's English King's Bench Reports.

Jones & C. Jones & Cary's Irish Exchequer Reports.

Jones & La T. Jones & La Touche's Irish Chancery Reports

Jones & McM. (Pa.). Jones & McMurtrie's Pennsylvania Supreme Court Reports.

Jones & Spen. Jones & Spencer's New York Superior Court Reports.

Jord. P. J. Jordan's Parliamentary Journal.

Josephs. Josephs's Reports, vol. 21 Nevada.

Jour Jur. (Sc.). Journal of Jurisprudence and Scottish Law Magazine, Edinburgh.

Jour. Jur. Journal of Jurisprudence (Hall's), Philadelphia.

Jour. Law. Journal of Law, Philadelphia.

Jour. Trib. Com. Journal des Tribunaux de Commerce, Paris.

Joy Chal. Joy on Challenge to Jurors.

Joy Ev. Acc. Joy on the Evidence of Accomplices.

Jud. Judgments. Judicial. Judicature;—Book of Judgments, English Courts.

Jud. Chr. Judicial Chronicle.

Jud. Com. of P. C. Judicial Committee of the Privy Council.

Jud Repos. Judicial Repository, New York.

Jud. & Sw. (Jamaica). Judah and Swan's Reports, Jamaica.

Judd. Judd's Reports, vol. 4 Hawaii.

Jur. The Jurist Reports in all the Courts, London.

Jur. Eccl. Jura Ecclesiastica.

Jur. Mar. Molloy's De Jure Maritimo.

Jur. N. S. The Jurist, New Series, Reports in all the Courts, London.

Jur. (N. S) Ex. Jurist (New Series) Exchequer.

Jur. N. Y. The Jurist or Law and Equity Reporter, New York.

Jur Ros. Roscoe's Jurist, London.

Jur. Sc. Scottish Jurist, Court of Session, Scotland.

Jur. Soc. P. Juridical Society Papers, London.

Jur. St. Juridical Styles, Scotland.

Jur. Wash. D. C. The Jurist, Washington, D. C.

Jurisp The Jurisprudent, Boston.

Jus Nav. Rhod. Jus Navale Rhodiorum.

Just. Dig. Digest of Justinian, 50 books. Never translated into English.

Just. Inst. Justinian's Institutes. See note following "Inst. 1, 2, 31."

Just. Itin. Justice Itinerant *or* of Assize.

Just P. The Justice of the Peace, London.

Just. S. L. Justice's Sea Law.

Just. T. Justice of Trailbaston.

Juta. Juta's Cape of Good Hope Reports.

K. Keyes's New York Court of Appeals Reports;—Kenyon's English King's Bench Reports;—Kansas (see Kan).

K. B. or [*1901*] *K. B.* Law Reports, King's Bench Division, from 1901 onward.

K. B. (U. C.). King's Bench Reports, Upper Canada.

K. C. King's Council.

K. C. R. Reports *tempore* King, English Chancery.

K. & B. Dig. Kerford's and Box's Victorian Digest.

K. & F. N. S. W. Knox & Fitzhardinge's New South Wales Reports.

K. & G. R. C. Keane & Grant's English Registration Appeal Cases.

K. & J. Kay & Johnson's English Vice-Chancellors' Reports.

K. & O. Knapp and Ombler's Election Cases, English.

Kam. or *Kam. Dec.* Kames's Decisions, Scotch Court of Session.

Kam Eluc. Kames's Elucidations of the Law of Scotland.

Kam Eq. Kames's Principles of Equity.

Kam Ess. Kames's Essays

Kam. Hist. L. Tr. or *Kam L. T.* Kames's Historical Law Tracts.

Kam Rem Dec. Kames's Remarkable Decisions, Scotch Court of Session.

Kam Sel. Dec. Kames's Select Decisions, Scotch Court of Session.

Kam. Tr. Kames's Historical Law Tracts.

Kames, Eq Kames's Principles of Equity

Kan. (or Kans). Kansas,—Kansas Reports.

Kan. C. L. Rep Kansas City Law Reporter.

Kan L J. Kansas Law Journal.

Kan. Univ. Lawy. Kansas University Lawyer, Lawrence.

Kans App. Kansas Appeals Reports.

Kay Kay's English Vice-Chancellors' Reports.

Kay Sh. Kay on Shipping.

Kay & J. or *Kay & Johns.* Kay and Johnson's Reports, English Chancery.

Ke. Keen's English Rolls Court Reports

Keane & G R. C. or *Keane & Gr.* Keane and Grant's English Registration Appeal Cases.

Keat Fam Sett Keating on Family Settlements

Keb. or *Keble.* Keble's Reports, English King's Bench.

Keb J. Keble's Justice of the Peace.

Keb Stat. Keble's Statutes of England.

Keen. Keen's Reports, English Rolls Court.

Keen. Cas. Qua. Cont or *Keener, Quasi Contr* Keener's Cases on Quasi Contracts.

Keil. or *Keilw.* Keilway's Reports, English King's Bench.

Kel. 1. Sir John Kelyng's English Crown Cases

Kel 2. William Kelynge's English Chancery Reports.

Kel. Ga. Kelly's Reports, Georgia Reports, vols. 1-3.

Kel. J. or *1 Kel.* Sir John Kelyng's Reports, English Crown Cases.

Kel. W. or *2 Kel.* W. Kelynge's Reports, English Chancery and King's Bench.

Kel & C. Kelly and Cobb's Reports, Georgia

Kelh Norm. L. D. or *Kelham.* Kelham's Norman French Law Dictionary.

Kellen. Kellen's Reports, vols. 146-155 Massachusetts

Kelly Kelly's Reports, vols. 1-3 Georgia.

Kelly & C. or *Kelly & Cobb.* Kelly & Cobb's Reports, vols. 4, 5 Georgia.

Kelyng, J. Kelyng's English Crown Cases.

Kelynge, W. Kelynge's English Chancery Reports.

Kemble, Sax. Kemble, The Saxons in England

Ken. Kentucky (see Ky.);—Kenyon English King's Bench Reports.

Ken. Dec. Kentucky Decisions, by Sneed.

Ken. L. Rep. Kentucky Law Reporter.

Kenan. Kenan's Reports, vols. 76-91 North Carolina.

Kenn. Gloss Kennett's Glossary.

Kenn. Imp. Kennett on Impropriations.

Kenn. Par. Antiq. Kennett, Parochial Antiquities

Kennett. Kennett's Glossary;—Kennett upon Impropriations.

Kennett, Gloss. Kennett's Glossary.

Kent or *Kent Com.* or *Kent Comm.* Kent's Commentaries on American Law.

Keny. Kenyon's Notes, English King's Bench.

Keny. C. H. (or 3 Keny.). Chancery Reports at the end of 2 Kenyon

Kern. Kern's Reports, vols. 100-116 Indiana;—Kernan's Reports, vols. 11-14 New York Court of Appeals.

Kerr. Kerr's Reports, Indiana; — Kerr's New Brunswick Reports;—Kerr's Reports;—J. M. Kerr's Reports, vols. 27-29 New York Civil Procedure.
Kerr Act. Kerr on Actions at Law.
Kerr Anc. L. Kerr on Ancient Lights.
Kerr Disc. Kerr on Discovery.
Kerr Extra Kerr on Inter-State Extradition.
Kerr Fr. Kerr on Fraud and Mistake.
Kerr Inj. Kerr on Injunction.
Kerr (N. B.). Kerr's Reports, New Brunswick.
Kerr Rec. Kerr on Receivers.
Kerse. Kerse's Manuscript Decisions, Scotch Court of Session.
Key or *Keyes.* Keyes's Reports, New York Ct. of Appeals. Sometimes cited as vols. 40-43 N. Y.
Keyes F. I. C. Keyes on Future Interest in Chattels.
Keyes F. I. L. Keyes on Future Interest in Lands.
Keyes Rem. Keyes on Remainders.
Keyl. Keilwey's (or Keylway's) English King's Bench Reports.
Kilk. Kilkerran's Reports, Scotch Court of Session.
King. King's Reports, vols. 5, 6 Louisiana Annual.
King Cas. temp. Select Cases *tempore* King, English Chancery.
King's Conf. Ca. King's Conflicting Cases.
Kir. (Kirb. or *Kirby).* Kirby's Connecticut Reports.
Kirt. Sur. Pr. Kirtland on Practice in Surrogates' Courts.
Kitch. or *Kitch. Courts* or *Kitchin* Kitchin on Jurisdictions of Courts-Leet, Courts-Baron, etc.
Kn or *Kn. A. C.* or *Knapp* or *Knapp A. C.* Knapp's Appeal Cases (English Privy Council).
Kn. N. S. W. Knox, New South Wales Reports.
Kn. & M or *Kn & Mod.* or *Knapp & M.* Knapp and Moore's Reports, vol. 3 Knapp's English Privy Council.
Kn. & O. or *Knapp & Omb.* Knapp and Ombler's Election Cases.
Knapp. Knapp's Privy Council Reports, England.
Knowles Knowles's Reports, vol. 3 Rhode Island.
Knox. Knox, New South Wales Reports.
Knox & Fitz. Knox & Fitzhardinge, New South Wales.
Kolze. Transvaal Reports by Kolze.
Kreider. Kreider's Reports, vols 1-23 Washington.
Kress. Kress's Reports, vols. 166-194 Pennsylvania,—Kress's Pennsylvania Superior Court.
Kulp. Kulp's Luzerne Legal Register Reports, Pennsylvania.
Ky. Kentucky;—Kentucky Reports.
Ky. Dec. Kentucky Decisions, Sneed's Reports.
Ky L. R. or *Ky. L. Rep.* Kentucky Law Reporter.
Kyd Aw. Kyd on the Law of Awards.
Kyd Bills. Kyd on Bills of Exchange.
Kyd Corp. Kyd on Corporations
L. Lansing's Supreme Court Reports, New York; —Law. Loi. Liber.
L. A. Lawyers' Reports Annotated.
L. Alam. Law of the Alamanni.
L. Bawar. or *L. Bavor.* Law of the Bavarians.
L. C. Lord Chancellor;—Lower Canada;—Leading Cases.
L. C. B. Lord Chief Baron.
L. C. C. C. Lower Canada Civil Code.
L. C. C. P. Lower Canada Civil Procedure.
L. C. D. Lower Court Decisions, Ohio.
L. C. Eq. White and Tudor's Leading Cases in Equity.
L. C. G. Lower Courts Gazette, Toronto.
L. C. J. Lord Chief Justice.
L. C. J. or *L. C. Jur.* Lower Canada Jurist, Montreal.
L. C. L. J. Lower Canada Law Journal, Montreal.
L. C. R. Lower Canada Reports.
L. D. or *L. Dec.* Land Office Decisions, United States.
L. Ed. Lawyers' Edition Supreme Court Reports.
L. F. Leges Forestarum.
L. Fr. Law French.
L. H. C. Lord High Chancellor.
L. I. Legal Intelligencer, Philadelphia.
L. I. L. Lincoln's Inn Library.
L. J. House of Lords Journal;—Lord Justices Court;—The Law Journal, London.
L. J. or *L. J. O. S.* Law Journal Reports, in all the Courts.
L. J. Adm. Law Journal Reports, New Series, English Admiralty.
L. J. App. Law Journal Reports, New Series, English Appeals.
L. J. Bank. or *L. J. Bankr.* or *L. J. Bk.* Law Journal Reports, New Series, English Bankruptcy (1831 onward).
L. J. C. or *L. J. C. P.* Law Journal Reports, New Series, English Common Pleas.
L. J. C. C. R. Law Journal, New Series, Crown Cases Reserved.
L. J. Ch. Law Journal, New Series, English Chancery Division (1831 on).
L. J. Ch. (O. S.). Law Journal, Old Series, 1822, 1831.
L. J. Chan. Law Journal Reports, New Series, English Chancery Division (1831 on).
L. J. C. P. or *L. J. C P D* Law Journal, New Series, Common Pleas Decisions.
L. J. D & M. Law Journal, New Series, Divorce and Matrimonial.
L. J. Ecc. Law Journal Reports, New Series, Ecclesiastical (1831 on).
L. J. Ex or *L. J. Exch.* Law Journal, New Series, Exchequer Division (1831 on).
L. J. H. L. Law Journal Reports, New Series, English House of Lords.
L. J. K. B. Law Journal, King's Bench.
L. J. L. C. Law Journal, Lower Canada.
L. J. L. T. Law Journal, Law Tracts.
L. J. M. C. Law Journal, New Series, Divorce and Matrimonial;—Law Journal, Magistrates' Cases.
L. J. M. P. A. Law Journal, Matrimonial, Probate and Admiralty.
L. J. (M. & W.). Morgan and William's Law Journal, London.
L. J. N. S. The Law Journal, New Series, London (1831 onwards).
L. J. N. C or *L. J. Notes Cases.* Law Journal, Notes of Cases.
L. J. O. S. The Law Journal, Old Series, London (1822-1831)
L. J. P. or *L. J. P. C.* Law Journal, New Series, Privy Council;—Law Journal, Probate, Divorce and Admiralty.
L. J. P. D. & A. Law Journal Reports, New Series, English Probate, Divorce, and Admiralty
L. J. P. & M. or *L. J. Prob.* or *L. J Prob. & Mat.* Law Journal, New Series, Probate and Matrimonial (1831 onward).
L. J. Q. B. Law Journal Reports, New Series, English Queen's Bench (1831 on).
L. J. Rep. Law Journal Reports.
L. J. Rep. N. S. Law Journal Reports, New Series (1831 onward).
L. J. (Sm.). Smith's Law Journal, London.
L. J. U. C. Law Journal, Upper Canada.
LL. Laws.
L. L. Law Latin. Local Law;—Law Library, Philadelphia (reprint of English treatises).
L. L. N. S. Law Library, New Series.
L. Lat. Law Latin.
L. M. & P. Lowndes, Maxwell, and Pollock's Reports, English Bail Court.
L. Mag. Law Magazine, London.
L. Mag & L. R. or *L. Mag. & R.* Law Magazine and Law Review, London.
L. N. Liber Niger, or the Black Book.
L. O. Legal Observer, London.
L. P. B. Lawrence's Paper Book. See *A. P. B.*
L. P. C. Lord of the Privy Council.
L. P. R. Lilly's Practical Register.
L. R. Law Reports (English);—Law Reporter (Law Times Reports, New Series) Law Review;—(Irish) Law Recorder, Reports in all the Irish Courts;—Louisiana Reports.
L. R. A. Lawyers' Reports Annotated.
L. R. A. & E. English Law Reports, Admiralty and Ecclesiastical (1866-1875).

L. R. App. or *L. R. App. Cas.* English Law Reports, Appeal Cases, House of Lords.

L. R. Burm. Law Reports, British Burmah.

L. R. C. C. or *L. R. C. C R.* English Law Reports, Crown Cases Reserved (1866-1875).

L. R. C. P. English Law Reports, Common Pleas (1866-1875).

L R C. P D. Law Reports, Common Pleas Division, English Supreme Court of Judicature.

L. R Ch. English Law Reports, Chancery Appeal Cases (1866-1875).

L. R Ch. D. or *L. R. Ch. Div.* Law Reports, Chancery Division, English Supreme Court of Judicature.

L. R. E. & I. App. or *L. R E & Ir. App.* English Reports, English and Irish Appeals.

L. R Eq. English Law Reports, Equity (1866-1875).

L R. Ex or *L. R Exch.* English Law Reports, Exchequer (1866-1875)

L. R. Ex. D. or *L. R. Ex. Div.* Law Reports, Exchequer Division, English Supreme Court of Judicature.

L. R. H. L. Law Reports, English and Irish Appeal Cases, House of Lords.

L. R. H. L. Sc. English Law Reports, House of Lords, Scotch and Divorce Appeal Cases (1866-1875).

L. R. Ind App. English Law Reports, Indian Appeals.

L R. Ir. Law Reports, Ireland (1879-1893).

L. R. Misc. D. Law Reports, Miscellaneous Division

L. R. N S Irish Law Recorder, New Series.

L. R. N S. W Law Reports, New South Wales.

L. R. P. C. English Law Reports, Privy Council, Appeal Cases (1866-1875).

L. R. Q B. Law Reports, Queen's Bench (1866-1875).

L. R. Q. B. Div. Law Reports, Queen's Bench Division.

L. R P. Div. or *L. R. P. & D.* Law Reports, Probate, Divorce, and Admiralty Division, English Supreme Court.

L. R. P. & M. Law Reports, Probate and Matrimonial (1866-1875)

L. R. S A. Law Reports, South Australia.

L. R Sc Div. App Cas or *L. R. Sc. & D.* English Law Reports, Scotch and Divorce Cases, before the House of Lords.

L R. Sess. Cas. English Law Reports, Session Cases

L. R. Stat. English Law Reports, Statutes.

L. Rep. (Mont.). Law Reporter (Montreal).

L. Repos. Law Repository.

L. Rev. & Quart. J. Law Review and Quarterly Journal.

L Ripar. Law of the Riparians.

L. S. Locus sigilli, place of the seal.

L. Salic. Salic Law.

L. Stu Mag. N. S. Law Student's Magazine, New Series.

L. T. The Law Times, Scranton, Pa.;—The Law Times, London.

L. T. B. American Law Times Bankruptcy Reports

L. T. J. Law Times Journal.

L. T. N. S. or *L T R N. S.* or *L. T. Rep. N. S.* Law Times (New Series) Reports, London;—American Law Times Reports.

L. T. O. S. Law Times, Old Series.

L. T. R. Law Times Reports, in all the Courts.

L. V. Rep. Lehigh Valley Reporter, Pennsylvania.

L. & B. Bull. Law and Bank Bulletin.

L. & B. Ins. Dig. Littleton and Blatchley's Insurance Digest.

L. & C. or *L. & C. C. C.* Leigh & Cave's English Crown Cases, Reserved.

L. & E. English Law and Equity Reports, Boston Edition.

L. & E. Rep. Law and Equity Reporter, New York.

L. & G. t. Plunk. Lloyd and Goold's Cases *tempore* Plunkett, Irish Chancery.

L. & G. t. Sug. Lloyd and Goold *temp.* Sugden, Irish Chancery.

L. & M. Lowndes & Maxwell's English Practice Cases, Bail Court.

L. & T. Longfield and Townsend's Reports, Irish Exchequer.

L. & W. or *L. & Welsb.* Lloyd and Welsby's Mercantile Cases, English Courts.

La. Lane's Reports, English Exchequer;—Louisiana;—Louisiana Reports;—Lane's English Exchequer Reports.

La. An. Louisiana Annual Reports;—Lawyers' Reports, Annotated.

La. Ann. Louisiana Annual Reports.

La Laure des Ser. Traité des Servitudes réelles, par M. La Laure.

La. L. J. or *La. L. J. (Schm.).* Louisiana Law Journal (Schmidt's), New Orleans

La. T. R. Martin's Louisiana Term Reports, vols. 2-12.

La Thém. L. C. La Thémis (Periodical) Lower Canada.

Lab. Labatt's Reports, U. S. District Ct., California.

Lac Dig Ry. Dec. or *Lacey Dig.* Lacey's Digest of Railway Decisions.

Lack Leg. R. Lackawanna Legal Record, Scranton, Pa.

Ladd Ladd's Reports, vols. 59-64 New Hampshire.

Lal. R. P. Lalor on Real Property.

Lalor. Lalor's Supplement to Hill and Denio's Reports, New York.

Lalor, Pol Econ. Lalor, Cyclopædia of Political Science, Political Economy, etc.

Lamar. Lamar's Reports, vols. 25-42 Florida.

Lamb. Lamb's Reports, Wisconsin.

Lamb Arch. or *Lamb. Archai.* Lambard's Archaionomia.

Lamb Const. Lambard, Duties of Constables, etc.

Lamb Eir or *Lamb Eiren.* Lambard's Eirenarcha.

Lanc B. The Lancaster Bar, Pennsylvania.

Lanc. L Rev. Lancaster Law Review.

Land Com. Rep. Land Commissioners Reports, Ireland

Land. Est C. Landed Estates Court.

Lane. Lane's Reports, English Exchequer.

Lang Eq. Pl. Langdell's Summary of Equity Pleading.

Lang. Lead. Cas. Langdell's Leading Cases on Contracts.

Lang. L C. Sales. Langdell's Leading Cases on Sales.

Langd Cont Langdell's Leading Cases on Contracts;—Langdell's Summary of the Law of Contracts.

Lans. Lansing's Reports, New York Supreme Court Reports, vols. 1-7.

Lans Ch. or *Lans. Sel. Cas.* Lansing's Select Chancery Cases, New York.

Laper. Dec. Laperriere's Speaker's Decisions, Canada.

Las Partidas. Las Siete Partidas.

Lat or *Latch.* Latch's Reports, English King's Bench.

Lath. Lathrop's Reports, vols. 115-145 Massachusetts.

Lauder. (Lauder of) Fountainhall's Scotch Session Cases.

Laur. H. C. Ca. Lauren's High Court Cases (Kimberly).

Laur. Prim. Laurence on the Law and Custom of Primogeniture.

Lauss. Eq. Laussat's Equity in Pennsylvania.

Law Bul. Law Bulletin, San Francisco.

Law Chron. Law Chronicle, London;—Law Chronicle, Edinburgh.

Law. Con. Lawson on Contracts.

Law Ex. J. Law Examination Journal, London.

Law Fr. & Lat. Dict. Law French and Latin Dictionary.

Law Int. Law Intelligencer.

Law J. Ch. Law Journal, New Series, Chancery.

Law J. I B. Law Journal, New Series, English Queen's Bench.

Law J. P. D. Law Journal, Probate Division.

Law J. R., Q. B. Law Journal Reports, English Queen's Bench.

Law Jour. Law Journal. See *L. J.*
Law Jour. (M. & W.). Morgan and Williams's Law Journal, London.
Law Jour. (Smith's). J. P. Smith's Law Journal, London.
Law Jur. Law's Jurisdiction of the Federal Courts.
Law Lib. Law Library, Philadelphia (reprint of English treatises)
Law Lib. N. S. Law Library, New Series, Philadelphia.
Law Mag. Law Magazine, London.
Law News Law News, St. Louis, Mo.
Law Pat Dig. Law's Digest of Patent, Copyright and Trade-mark Cases.
Law Pl Lawes's Treatise on Pleading in Assumpsit
Law Pr. Law's Practice in the Courts of the U. S.
Law Quart Rev. Law Quarterly Review, London
Law Rec. Law Recorder, Reports in all the Irish Courts.
Law Rep. Law Reporter, Boston;—Law Reports See *L R.*
Law Rep. A & E. Law Reports, Admiralty and Ecclesiastical.
Law Rep. App. Cas. Law Reports, Appeal Cases.
Law Rep C C. Law Reports, Crown Cases
Law Rep. C P. or *Law Rep. C. P. D.* Law Reports, Common Pleas Division
Law Rep. Ch. Law Reports, Chancery Appeal Cases.
Law Rep. Ch. D. Law Reports, Chancery Division
Law Rep Eq Law Reports, Equity Cases.
Law Rep Ex. or *Law Rep. Ex. D.* Law Reports, Exchequer Division.
Law Rep. H. L. Law Reports, House of Lords, English and Irish Appeal Cases.
Law Rep H. L Sc. Law Reports, Scotch and Divorce Appeal Cases, House of Lords
Law Rep Ind. App. Law Reports, Indian Appeals.
Law Rep. Ir Law Reports, Irish
Law Rep. Misc. D. Law Reports, Miscellaneous Division.
Law Rep. N. S. Monthly Law Reporter, Boston
Law Rep. P. C. Law Reports, Privy Council, Appeal Cases.
Law Rep P. & D. Law Reports, Probate and Divorce Cases
Law Rep Q. B. or *Law Rep. Q. B. D.* Law Reports, Queen's Bench Division.
Law Repos. Carolina Law Repository, North Carolina.
Law Rep. (Tor). Law Reporter, Toronto
Law Repos. Carolina Law Repository, North Carolina.
Law Rev. Law Review, London.
Law Rev. Qu. Law Review Quarterly, Albany, N. Y.
Law Rev. & Qu. J. Law Review and Quarterly Journal, London.
Law Stu. Mag Law Students' Magazine, London.
Law Times or *Law Times N. S.* or *Law Times Rep N. S.* Law Times Reports, New Series, English Courts, with Irish and Scotch Cases.
Law Times (Scranton). Law Times, Scranton, Pa.
Law Weekly. Law Weekly, New York
Law & Mag. Mag. Lawyers' and Magistrates' Magazine, London.
Lawes C. Lawes on Charter Parties.
Lawes Pl. Lawes on Pleading.
Lawr. or *Lawrence.* Lawrence's Reports, vol. 20 Ohio.
Lawrence Comp. Dec. Lawrence's First Comptroller's Decisions
Laws. Cas Crim. L. Lawson's Leading Cases in Criminal Law.
Laws Cas Eq Lawson's Leading Cases in Equity and Constitutional Law.
Laws. Lead Cas. Simp. Lawson's Leading Cases Simplified.
Lawson Cont. Lawson on Contracts.
Lawson, Usages & Cust. Lawson on the Law of Usages and Customs.
Lawy. Mag. Lawyers' Magazine.
Lay. Lay's Reports, English Chancery.

Ld. Ken. Lord Kenyon's English King's Bench Reports.
Ld. Raym. Lord Raymond's English King's Bench Reports.
Le Mar. Le Marchant's Gardner Peerage Case.
Lea or *Lea B. J.* Lea's Tennessee Reports;—Leach.
Leach or *Leach C. C.* Leach's Crown Cases, English Courts.
Leach C. L. Leach, Cases in Crown Law.
Leach Cas. or *Leach Cl. Cas.* Leach's Club Cases, London.
Lead Cas. Am. American Leading Cases, by Hare & Wallace.
Lead. Cas Eq. White and Tutor's Leading Cases in Equity.
Leake. Leake on Contracts;—Leake's Digest of the Law of Property in Land.
Leake, Cont. or *Leake Contr.* Leake on Contracts.
Leç El. Dr. Civ. Rom. or *Lec. Elm.* Leçons Elémentaries du Droit Civil Romain.
Le Droit C. Can. Le Droit Civil Canadian, Montreal.
Lee Lee's English Ecclesiastical Reports;—Lee's Reports, vols. 9-12 California.
Lee Abs Lee on Abstracts of Title.
Lee (Cal.). Lee's Reports, California.
Lee Cas. Ecc. Lee's Cases, English Ecclesiastical Courts.
Lee Cas. t. H. or *Lee & H.* Lee's Cases *tempore* Hardwicke, English King's Bench.
Lee, Dict. or *Lee Pr.* Lee's Dictionary of Practice.
Lee G. Sir George Lee's English Ecclesiastical Reports.
Leese. Leese's Reports, vol. 26 Nebraska.
Lef Dec. Lefevre's Parliamentary Decisions, reported by Bourke.
Lefroy. Lefroy's English Railroad and Canal Cases.
Leg. Leges.
Leg Adv. Legal Adviser, Chicago, Ill
Leg. Alfred Leges Alfredi (laws of King Alfred)
Leg. Bibl. Legal Bibliography, by J. G. Marvin.
Leg Burg. Leges Burgorum, Scotland.
Leg. Canut. Leges Canuti (laws of King Canute or Knut.)
Leg. Chron. or *Leg Chron. Rep.* Legal Chronicle Reports, Pottsville, Pennsylvania.
Leg Edm. Leges Edmundi (laws of King Edmund)
Leg. Ethel. Leges Ethelredi.
Leg Exam. Legal Examiner, London
Leg. Exam. N. S. Legal Examiner, New Series, London
Leg. Exam. & L. C. Legal Examiner and Law Chronicle, London.
Leg. Exam & Med. J. Legal Examiner and Medical Jurist, London.
Leg. Exam. W. R. Legal Examiner, Weekly Reporter, London.
Leg. Exch. Legal Exchange, Des Moines, Iowa.
Leg. G. Legal Guide, London.
Leg. Gaz. or *Leg. Gaz. R.* or *Leg. Gaz. Rep. (Pa.).* Legal Gazette Reports, Pennsylvania.
Leg. H. I. Laws of [King] Henry the First.
Leg. Inq. Legal Inquirer, London.
Leg. Int. Legal Intelligencer, Philadelphia.
Leg. News. Legal News, Montreal.
Leg. Obs. Legal Observer, London.
Leg. Oler. The Laws of Oleron.
Leg. Op. Legal Opinions, Harrisburg, Penna.
Leg. Out. Legge on Outlawry.
Leg. Rec. Rep. Legal Record Reports.
Leg. Rem. Legal Remembrancer, Calcutta High Court.
Leg. Rep. Legal Reporter, Nashville, Tenn.
Leg. Rep (Ir.) Legal Reporter, Irish Courts.
Leg. Rev. Legal Review, London.
Leg. Rhod. Laws of Rhodes.
Leg. T. Cas. Legal Tender Cases.
Leg. Ult. The Last Law.
Leg. Wisb. Laws of Wisbuy.
Leg. Y. B. Legal Year Book, London.
Leg. & Ins Rept. Legal and Insurance Reporter, Philadelphia.

Legg. Leggett's Reports, Sind, India.
Legge. Legge's Supreme Court Cases, New South Wales.
Legul. The Leguleian, London.
Lehigh Val. L. Rep. Lehigh Valley Law Reporter.
Leigh. Leigh's Reports, Virginia.
Leigh N. P. Leigh's Nisi Prius Law.
Leigh & C. Leigh and Cave's Crown Cases, English Courts.
Leigh & D. Conv. Leigh and Dalzell on Conversion of Property.
Leith R. P. St. Leith's Real Property Statutes, Ontario.
Le Mar. Le Marchant's Gardner Peerage Case.
Leo. or *Leon.* Leonard's Reports, English King's Bench.
Lest. P. L. or *Lest. P. L. C.* Lester's Decisions in Public Land Cases, U. S. 1860-70.
Lester. Lester's Reports, vols. 31-33 Georgia.
Lester Supp. or *Lest & But* or *Lester & B* Lester & Butler's Supplement to Lester's 33d Georgia Reports.
Lev. Levinz's Reports, English King's Bench.
Lew. Lewin's English Crown Cases Reserved;—Lewis, Missouri,—Lewis's Reports, Nevada.
Lew. C. C. Lewin's Crown Cases, English Courts.
Lew. C. L. or *Lew. Cr. Law.* Lewis's Criminal Law of the U. S.
Lew L. Cas. or *Lew. L. Cas. on L. L.* Lewis's Leading Cases on Public Land Law
Lew. L. T. in Phila. Lewis on Land Titles in Philadelphia.
Lew. Perp. Lewis on the Law of Perpetuities.
Lew. Pr. Lewis's Principles of Conveyancing.
Lew. Stocks. Lewis on Stocks, Bonds, etc.
Lew. Tr. Lewin on Trusts.
Lewis. Lewis's Reports, vols. 29-35 Missouri Appeals;—Lewis's Reports, vol. 1 Nevada,—Lewis's Kentucky Law Reporter.
Lewis, Perp. Lewis on the Law of Perpetuity.
Lex Cust. Lex Custumaria
Lex. Jurid. Calvinus, Lexicon Juridicum Juris Cæsari simul et Canonici, etc.
Lex Man. Lex Manceriorum.
Lex Mer. or *Lex Mer. Red.* Lex Mercatoria, by Beawes.
Lex Mer. Am. Lex Mercatoria Americana.
Lex Parl. Lex Parliamentaria.
Lex Salic. Lex Salica
Ley. Ley's English King's Bench Reports;—Ley's Reports, English Court of Wards and other Courts.
Lib. Liber (book),—Library.
Lib. Ass. *Liber Assisarum* (Part 5 of the Year Books).
Lib. Ent. Old Book of Entries
Lib. Feud. *Liber Feudorum; Consuetudines Feudorum,* at end of *Corpus Juris Civilis*
Lib. Intr. *Liber Intrationum:* Old Book of Entries.
Lib. L. & Eq. Library of Law and Equity.
Lib. Niger. *Liber Niger,* or the Black Book.
Lib. Pl. *Liber Placitandi,* Book of Pleading.
Lib. Reg. Register Books.
Lib. Rub. *Liber Ruber,* the Red Book.
Lib. Ten. *Liber Tenementum.*
Lieb Civ Lib. Lieber on Civil Liberty and Self-Government
Lieb Herm. Lieber's Hermeneutics.
Lieber Civ. Lib. Lieber on Civil Liberty and Self-Government.
Life & Acc. Ins. or *Life & Acc. Ins. R.* Life and Accident Insurance Reports (Bigelow's).
Lig. Dig. Ligon's Digest (Alabama).
Lil. Lilly's Reports or Entries, English Court of Assize.
Lil. Abr. Lilly's Abridgment.
Lil. Reg. Lilly's Practical Register.
Lind. Jur. Lindley's Jurisprudence.
Lind. Part. or *Lindl. Partn.* Lindley on Partnership.
Linn Ind. Linn's Index of Pennsylvania Reports.
Linn, Laws Prov. Pa. Linn on the Laws of the Province of Pennsylvania.
Lit. or *Litt.* Littell's Kentucky Reports;—Littleton's English Common Pleas and Exchequer Reports.
Lit. Sel. Ca. Littell's Select Kentucky Cases.
Lit. s. Littleton, section.
Lit. Ten. Littleton's Tenures.
Lit. & Bl. Dig. Littleton & Blatchley's Insurance Digest.
Litt. (Ky.). Littell's Reports, Kentucky.
Litt. Sel. Cas. Littell's Select Cases, Kentucky.
Litt. Ten. Littleton's Tenures.
Litt. & B. Littleton and Blatchley's Digest of Insurance Decisions.
Littell. Littell's Kentucky Reports.
Littleton. Littleton's English Common Pleas and Exchequer Reports.
Liv. Livre, Book.
Liv. Cas. Livingston's Cases in Error, New York.
Liv. Jud. Op. Livingston's Judicial Opinions, New York.
Liv. L. Mag. Livingston's Law Magazine, New York.
Liv. L. Reg. Livingston's Law Register, New York.
Liverm Ag. Livermore on Principal and Agent.
Liverm Diss. Livermore's Dissertation on the Contrariety of Laws.
Liz. Sc Exch. Lizars's Scotch Exchequer Cases.
Ll. Leges, Laws.
Ll & G t. P. Lloyd & Goold's Irish Chancery Reports *tempore* Plunkett.
Ll & G. t. S. Lloyd & Goold's Irish Chancery Reports *tempore* Sugden.
Ll. & W. or *Lloyd & W.* Lloyd & Welsby's English Mercantile Cases.
Llo. Ch. St. Lloyd's Chitty's Statutes.
Llo. T. M. Lloyd on Trademarks
Llo. & G. t. P. Lloyd and Goold's Reports, *tempore* Plunkett, Irish Chancery.
Llo. & G. t. S. Lloyd and Goold's Reports, *tempore* Sugden, Irish Chancery.
Llo. & W., Lloyd & W., or *Llo. & W. Mer. Cas.* Lloyd and Welsby's Mercantile Cases, English King's Bench.
Loc. cit. Loco citato, in the place cited.
Loc. Ct. Gaz. Local Courts and Municipal Gazette, Toronto, Ont.
Locc. de Jur. Mar. Loccenius, de Jure Maritimo et Navali.
Lock. Rev. Ca. or *Lock. Rev. Cas.* Lockwood's Reversed Cases, New York.
Locus Standi. Locus Standi Reports, English.
Lofft Lofft's Reports, English King's Bench.
Lofft, Append. Lofft's Maxims, appended to Lofft's Reports.
Log. Comp. Logan's Compendium of English, Scotch, and Ancient Roman Law.
Lois des Batim. Lois des Batiments.
Lom. C. H. Rep. Lomas's City Hall Reporter, New York.
Lom Dig. Lomax's Digest of the Law of Real Property in the U. S.
Lond London Encyclopedia.
Lond. Jur. London Jurist, Reports in all the Courts.
Lond. Jur. N. S. London Jurist, New Series.
Lond. L. Mag. London Law Magazine
Long Q. or *Long Quint.* Long Quinto (Year Books, Part X)
Longf. & T. or *Long. & Town.* Longfield & Townsend's Irish Exchequer Reports.
Lor. Inst. Lorimer's Institutes
Lor. & Russ. Loring & Russell, Election Cases, Massachusetts.
Lords Jour. Journal of the House of Lords.
Lorenz (Ceylon). Lorenz's Ceylon Reports
Loring & Russell. Loring & Russell's Massachusetts Election Cases
Lou. or *Louis.* Louisiana (see La.).
Louis. Code. Civil Code of Louisiana.
Love. Wills. Lovelass on Wills.
Low. or *Low. Dis.* Lowell's Decisions, U. S. Dist of Massachusetts.
Low. Can. or *Low. Can. R.* Lower Canada Reports
Low. Can. Jur. Lower Canada Jurist, Montreal.
Low. Can. L. J. Lower Canada Law Journal.
Low. Can. Repts. Lower Canada Reports.
Low. C. Seign. or *Low. Can. Seign.* Lower Canada Seignorial Reports.

Lowell. Lowell's United States District Court Reports.
Lown. Av. Lowndes on Average.
Lown. Col. Lowndes on Collisions at Sea.
Lown. Leg. Lowndes on Legacies
Lown. M. & P. Lowndes, Maxwell and Pollock's Bail Court Reports, English.
Lown. & M. Lowndes and Maxwell's Bail Court Reports, English.
Lube Eq. Lube on Equity Pleading.
Luc. or *Lucas.* Lucas's Reports, Part X Modern Reports.
Lud El. Cas. Luder's Election Cases, English.
Ludd or *Ludden.* Ludden's Reports, vols. 43, 44 Maine.
Lum. Cas. or *Lum. P. L. Cas.* Lumley's Poor Law Cases.
Lum. Parl. Pr. Lumley's Parliamentary Practice.
Lum. Set. Lumley on Settlements and Removal
Lumpkin. Lumpkin's Reports, vols. 59-77 Georgia.
Lush. or *Lush. Adm.* Lushington's Admiralty Reports, English.
Lush P. L. Lushington on Prize Law.
Lush Pr. Lush's Common Law Practice.
Lut. Lutwyche's Reports, English Common Pleas.
Lut. Elec. Cas Lutwyche's Election Cases, English.
Lut Ent. Lutwyche's Entries
Lut. R. C. Lutwyche's English Registration Appeal Cases.
Lutw. E. Lutwyche's English Common Pleas Reports.
Luz. L. J. Luzerne Law Journal.
Luz L. T. Luzerne Law Times
Luz Leg. Ob. Luzerne Legal Observer, Carbondale, Pa.
Luz Leg. Reg. Luzerne Legal Register, Wilkesbarre, Pa
Lynd. Prov. Lyndwood's Provinciales
Lyne Lyne's Reports, Irish Chancery.
M Massachusetts, — Maryland, — Maine; — Michigan, — Minnesota, — Mississippi; — Missouri;—Montana;—Queen Mary; thus 1 M. signifies the first year of the reign of Queen Mary.—Michaelmas Term. Mortgage;—Morison's Dictionary of Decisions, Scotch Court of Session,—Session Cases, 3d Series, Scotland (Macpherson);—See *Mc.*
M. A Missouri Appeals.
M Cas. Magistrates' Cases.
M. C. C. Moody's English Crown Cases, Reserved
M. D. & D or *M. D. & De G* Montague, Deacon and DeGex's Reports, English Bankruptcy.
M. G & S. Manning, Granger and Scott's Reports, English Common Pleas, Common Bench Reports, vols. 1-8.
M. L. Mercian Law.
M. L. J. Memphis Law Journal, Tennessee.
M. L. R Maryland Law Record, Baltimore.
M. M R Mitchell's Maritime Register, London.
M. P. C. Moore's Privy Council Cases, English.
M. R. Master of the Rolls.
M. St. More's Notes on Stair's Institutes.
M. T. Michaelmas Term.
M & A. or *M & Ayr.* Montagu & Ayrton's English Bankruptcy Reports.
M & B Montagu and Bligh's Reports, English Bankruptcy.
M. & C. Mylne & Craig's English Chancery Reports;—Montagu & Chitty's English Bankruptcy Reports.
M & C. Bankr. or *M. & Cht. Bankr* Montagu and Chitty's Bankruptcy Reports, English.
M. & G. Manning & Granger's English Common Pleas Reports,—Maddock & Geldart's English Chancery Reports, vol. 6 Maddock's Reports.
M. & Gel. Maddock & Geldart's English Chancery Reports, vol. 6 Maddock's Reports.
M. & Gord Macnaghten & Gordon's English Chancery Reports.
M. & H. Murphy and Hurlstone's Exchequer Reports.
M & K. Mylne and Keen's Reports, English Chancery.
M. & M. Moody and Malkin's Reports, English Nisi Prius.
M. & McA. Montague and McArthur's Reports, English Bankruptcy.
M. & P. Moore and Payne's Reports, English Common Pleas and Exchequer.
M. & R. Manning & Ryland's English King's Bench Reports;—Moody & Robinson's English Nisi Prius Reports;—Maclean & Robinson's Scotch Appeal Cases.
M. & R. M. C. Manning and Ryland's Magistrate Cases, English King's Bench.
M. & Rob. Moody and Robinson's Nisi Prius Cases, English Courts.
M & S. Maule & Selwyn's English King's Bench Reports;—Moore & Scott's English Common Pleas Reports;—Manning & Scott's Reports, vol. 9 Common Bench.
M. & Scott. Moore and Scott's Reports, English Common Pleas.
M. & W. Meeson and Welsby's Reports, English Exchequer.
M. & Y. Martin and Yerger's Reports, Tennessee.
Mac. Macnaghten's English Chancery Reports.
MacAr. MacArthur's District of Columbia Reports,—MacArthur's Patent Cases.
MacAr. Pat. Cas. MacArthur's Patent Cases.
MacAr. & M. or *MacAr. & Mackey.* MacArthur and Mackey, Reports of District of Columbia Supreme Court.
MacArth. or *MacArthur.* MacArthur's District of Columbia Reports;—MacArthur's Patent Cases.
MacArth Pat. Cas. MacArthur, Patent Cases, District of Columbia.
Mac. N Z. Macassey's New Zealand Reports.
Mac. Pat Cas. Macrory's Patent Cases.
Mac. & G. Macnaghten & Gordon's English Chancery Reports.
Mac. & Rob. Maclean & Robinson's Scotch Appeal Cases.
Macas. Macassey's Reports, New Zealand.
Macc Cas Maccola's Breach of Promise Cases.
Maccl. Macclesfield's Reports, 10 Modern Reports.
Maccl Tr Macclesfield's Trial (Impeachment), London, 1725
Maccles. Macclesfield's Reports (10 Modern).
Macd. Jam. Macdougall's Jamaica Reports
Macf. or *Macfar.* Macfarlane's Reports, Jury Courts, Scotland.
Macf Pr. Macfarlane's Practice of the Court of Session.
Mack. C. L. Mackeldey on Civil Law.
Mack Cr. L. Mackenzie on the Criminal Law of Scotland.
Mack Inst. Mackenzie's Institutes of the Law of Scotland.
Mack. Obs. Mackenzie's Observations on Acts of Parliament.
Mack. Rom. L. Mackenzie's Studies in Roman Law.
Mackeld. Mackeldey on Modern Civil Law;—Mackeldey on Roman Law.
Mackeld. Civil Law. Mackeldey on Modern Civil Law.
Mackeld. Rom. Law. Mackeldey on Roman Law.
Mackey. Mackey's Supreme Court Reports, District of Columbia.
Macl. McLean's United States Circuit Court Reports;—Maclaurin's Scotch Criminal Decisions.
Macl. Dec. Maclaurin's Decisions, Scotch Courts.
Macl. Sh. Maclachlan on Merchant Shipping.
Macl. & R. Macleah and Robinson's Scotch Appeals.
Macn. Macnaghten's Select Cases in Chancery *tempore* King,—W. H. Macnaghten's Reports, India.
Macn. C. M. Macnaghten on Courts Martial.
Macn. F. or *Macn. (Fr.).* Sir Francis Macnaghten's Bengal Reports.
Macn. N. A. Beng. Macnaghten's Nizamut Adawlut Reports, Bengal.
Macn. Nul. Macnamara on Nullities and Irregularities in the Practice of the Law.
Macn. S. D. A. Beng. (W. H.) Macnaghten's Sudder Dewanny Adawlut Reports, Bengal.
Macn. & G. Macnaghten and Gordon's Reports, English Chancery.
Macomb C. M. Macomb on Courts Martial.

Macph. Macpherson, Lee & Bell's (Third Series) Scotch Court of Session Cases.
Macph. Inf. Macpherson on Infancy.
Macph. Jud. Com. Macpherson, Practice of the Judicial Committee of the Privy Council.
Macph. Priv. Coun. Macpherson's Privy Council Practice.
Macq. Macqueen's Scotch Appeal Cases (House of Lords).
Macq. Deb. Macqueen's Debates on Life Peerage Question.
Macq. H. L. Cas. Macqueen's Scotch Appeal Cases (House of Lords)
Macq. H. & W. Macqueen on Husband and Wife
Macq. M. & D. Macqueen on Marriage and Divorce.
Macr. P. Cas. Macrory's Patent Cases.
Macr. & H. Macrae and Hertslet's Insolvency Cases.
MacSwin. Mines. MacSwinney, Law of Mines, Quarries, and Minerals.
Mad. Maddock's English Chancery Reports;—Madras;—Maddox's Reports, vols. 9-19 Montana.
Mad Exch Madox's History of the Exchequer.
Mad. Form. Madox's Formulare Anglicarum.
Mad. H. C. or *Mad. H. Ct Rep.* Madras High Court Reports.
Mad Jur. Madras Jurist, India.
Mad. Papers. Madison's (James) Papers.
Mad S. D. A. R or *Mad S. D. R.* Madras Sudder Dewanny Adawlut Reports.
Mad Sel. or *Mad Sel Dec.* Madras Select Decrees.
Mad. Ser. Madras Series (East) India Law Reports.
Mad. & B. Maddox & Bach's Reports, vol. 19 Montana.
Mad. & Gel. Maddock & Geldart's English Chancery Reports, vol 6 Maddock's Reports.
Madd Maddock's English Chancery Reports;—Maddox's Reports, vols. 9-18 Montana.
Madd Ch Pr Maddock's Chancery Practice.
Madd & G. Maddock and Geldart's Reports, English Chancery (vol 6, Maddock's Reports).
Mag. The Magistrate, London.
Mag Cas. Magistrates's Cases, especially the series edited by Bittleston, Wise, & Parnell.
Mag Char. Magna Carta or Charta. See Barrington's Revised Statutes of England, 1870, vol. 1, p. 84, and Coke's Second Institute, vol. 1, first 78 pages.
Mag Dig. Magrath's South Carolina Digest.
Mag. Ins. Magen on Insurance.
Mag. (Md.) Magruder's Reports, Maryland, vols. 1-2.
Mag Rot. Magus Rotulus (the Great Roll of the Exchequer).
Mag & M. & P. L. Magistrate and Municipal and Parochial Lawyer.
Magr. or *Magruder.* Magruder's Reports, vols. 1, 2 Maryland.
Maine. Maine Reports.
Maine Anc. L. or *Maine Anc. Law.* Maine on Ancient Law.
Maine, Popular Govt. Maine, Popular Government.
Maine Vil. Com. Maine on Village Communities.
Maitland. Maitland's Manuscript Scotch Session Cases.
Mal. Malyne's Lex Mercatoria.
Mall. Ent. Mallory's Modern Entries.
Malloy. Malloy's Irish Chancery Reports.
Malone Editor, vols. 6, 9, and 10, Heiskell's Tennessee Reports.
Man. Manning's Reports (English Court of Revision);—Manitoba;—Manning's Reports, vol. 1 Michigan;—Manuscript;—Manson's English Bankruptcy Cases.
Man. Cas. Manumission Cases in New Jersey, by Bloomfield.
Man. El. Cas. Manning's English Election Cases (Court of Revision).
Man. Exch. Pr. Manning's Exchequer Practice.
Man. Gr. & S. Manning, Granger and Scott's Reports, English Common Pleas.
Man. Int. Law. Manning, Commentaries on the Law of Nations.
Man. L. R. Manitoba Law Reports.
Man. & G. Manning and Granger's Reports, English Common Pleas.
Man. & R. or *Man & Ry.* Manning and Ryland's Reports, English King's Bench.
Man. & R. Mag Cas or *Man & Ry Mag. Cas.* Manning and Ryland's Magistrate Cases, English King's Bench.
Man & S. Manning & Scott's Reports, vol 9 Common Bench.
Manb. Coke. Manby's Abridgment of Coke's Reports.
Manitoba. Armour's Queen's Bench and County Court Reports *tempore* Wood, Manitoba;—Manitoba Law Reports.
Manl. Fines. Manley on Fines.
Mann. Manning's Reports, Michigan Reports, vol. 1.
Mann. Com. Manning's Commentaries on the Law of Nations.
Manning. Manning's Unreported Cases;—Louisiana,—Manning's Reports, vol. 1 Michigan.
Manning, La. Unreported Cases, Louisiana.
Mans Mansfield's Reports, vols 49-52 Arkansas;—Manson, English Bankruptcy Cases.
Manson Manson's English Bankruptcy Cases
Manum. Cas. or *Manum Cases.* Manumission Cases, New Jersey (Bloomfield's).
Manw. or *Manw. For. Laws.* Manwood's Forest Laws.
Mar. March's English King's Bench Reports,—Marshall's United States Circuit Court Reports;—Marshall's Kentucky Reports;—Martin's Louisiana Reports,—Martin's North Carolina Reports,—Marshall's Reports, Bengal;—Maryland;—Maritime
Mar. Br. March's Translation of Brook's New Cases.
Mar. L. C. or *Mar. L. Cas.* or *Mar. L. Rep.* Maritime Law Cases (Crockford's), English.
Mar. L. C. N. S. or *Mar. L. Cas. N. S.* or *Mar. L. Rep. N. S.* Maritime Law Reports, New Series (Aspinall's), English.
Mar. La. Martin's Louisiana Reports
Mar. N. C. Martin's North Carolina Reports
Mar. N. S. Martin's Louisiana Reports, New Series.
Mar. R. English Maritime Law Reports.
Mar. Rec. B Martin's Recital Book.
Mar. Reg. Mitchell's Maritime Register, London.
March. March's Translation of Brooke's New Cases, King's Bench.
March N. C. March's New Cases, English King's Bench.
Marine Ct. R. Marine Court Reporter (McAdam's), New York.
Mark El. Markley's Elements of Law.
Marks & Sayre. Marks & Sayre's Reports, vol. 108 Alabama.
Marr. Marriott's English Admiralty Decisions;—Marrack's European Assurance Cases.
Marr. Adm. Marriott's Reports, English Admiralty.
Mars. Marsden's English Admiralty Reports.
Marsh. Marshall's United States Circuit Court Decisions;—Marshall's English Common Pleas Reports;—Marshall's Bengal Reports;—Marshall, Kentucky;—Marshall's Reports, vol. 4 Utah
Marsh. (A. K.). A. K. Marshall's Kentucky Reports.
Marsh. Beng. Marshall's Reports, Bengal.
Marsh. C. P. Marshall's English Common Pleas Reports.
Marsh. Calc. Marshall's Reports, Calcutta.
Marsh. Ceylon. Marshall's Ceylon Reports.
Marsh. Dec. Marshall's United States Circuit Court Decisions (Brockenbrough);—Marshall on the Federal Constitution.
Marsh. Ins. Marshall on Insurance.
Marsh. J. J. J. J. Marshall's Reports, Kentucky.
Marsh. (Ky.) or *Marsh. A. K.* A. K. Marshall's Reports, Kentucky.
Marsh. Op. Marshall's (Chief Justice) Constitutional Opinions.
Mart. or *Mart. (La.).* Martin's Reports, Louisiana;—(see Martin).

Mart. Cond. La. Martin's Condensed Louisiana Reports.
Mart. Dec. United States Decisions in Martin's North Carolina Reports.
Mart. (Ga.). Martin's Reports, Georgia.
Mart. (Ind.). Martin's Reports, Indiana.
Mart. (La.). Martin's Louisiana Reports.
Mart. Law Nat. Martin's Law of Nations.
Mart. (N. C.). Martin's Reports, North Carolina.
Mart. N. S or *Mart. (La.) N. S.* Martin's Reports, New Series, Louisiana.
Mart O. S. (La.). Martin's Louisiana Reports, Old Series.
Mart U. S. C. C. Martin's United States Circuit Court Reports.
Mart. & Y or *Mart. & Yeag.* Martin and Yeager's Reports, Tennessee.
Marth. W. Ca Martha Washington Case, see United States v. Cole, 5 McLean, 513, Fed. Cas. No. 14,832.
Martin. Martin's Louisiana Reports;—Martin's North Carolina Reports;—Martin's Reports, vols. 21-30 Georgia;—Martin's Reports, vols. 54-70 Indiana.
Martin Index. Martin's Index to Virginia Reports.
Marv. Marvel's Reports, Delaware.
Marv. Av. Marvin on General Average.
Marv. Leg. Bibl. Marvin's Legal Bibliography.
Marv Salv. or *Marv. Wr. & S.* Marvin on Wreck and Salvage.
Maryland Maryland Reports.
Mas or *Mason (U. S.).* Mason's United States Circuit Court Reports
Mass. Massachusetts;—Massachusetts Reports.
Mass. Dr. Com. Masse's Le Droit Commercial.
Mass. Elec. Ca. Massachusetts Election Cases.
Mass. L. R. Massachusetts Law Reporter, Boston.
Massey v. Headford. An Irish Criminal Conversation Case, 1804. Originally printed in Ireland and reprinted both in New York and Philadelphia.
Mast. Master's Reports, vols. 25-28 Canada Supreme Court.
Mat. Mathews.
Mat. Par. or *Paris.* Matthew Paris, Historia Minor.
Math. Ev. Matthews on Presumptive Evidence.
Mathews. Mathews's Reports, vols. 6-9 West Virginia.
Mats. or *Matson.* Matson's Reports, vols. 22-24 Connecticut.
Matth. (W. Va.). Matthews's Reports, West Virginia Reports, vol. 6
Matth Com. Matthews's Guide to Commissions in Chancery.
Matth Dig. Matthews's Digest.
Matthews. Matthews's Reports, vol 75 Virginia.
Mau. & Pol. Sh. Maude and Pollock's Law of Shipping.
Mau. & Sel. Maule & Selwyn's Reports, English King's Bench.
Maude & P. Mer. Shipp. Maude & Pollock's Law of Merchant Shipping.
Maude & P Shipp. Maude & Pollock's Law of Merchant Shipping.
Maug. Lit. Pr. Maughan on Literary Property.
Maul. & Sel. or *Maule & S.* Maule & Selwyn's English King's Bench Reports.
Maur. Dec. Mauritius Decisions.
Max. Maxims
Max. Dig. Maxwell's Nebraska Digest.
Maxw. Int. Sts. or *Maxw. Interp. St.* Maxwell on the Interpretation of Statutes.
May Const. Hist. May's Constitutional History of England.
May Crim. L. May's Criminal Law.
May Fr. Conv. May on Fraudulent Conveyances.
May Hist. May's Constitutional History of England.
May Ins. May on Insurance.
May. Merg. Mayhew on Merger.
May P. L. or *May, Parl. Law.* May's Parliamentary Law.
May, Parl. Pr. May's Parliamentary Practice.
Maymo Inst. Maymo's *Romani et Hispani Juris Institutiones.*
Mayn. Maynard's Reports, Edward II. (Year Books, Part I).
Mayne Dam. Mayne on Damages.
Mayo Just. Mayo's Justice.
Mayo & Moul. Mayo and Moulton's Pension Laws.
McAl. or *McAll.* McAllister's United States Circuit Court Reports.
McArth. McArthur's Reports, Dist. of Columbia.
McArth. C. M. McArthur on Courts Martial.
McBride. McBride's Reports, vol 1 Missouri.
McCah. or *McCahon.* McCahon's Reports, Supreme Court of Kansas and U. S. Courts, Dist. of Kansas.
McCall Pr. McCall's Precedents.
McCar. or *McCart.* McCarter's New Jersey Equity Reports, vols. 14, 15;—McCarty's New York Civil Procedure Reports.
McCl. McClelland's English Exchequer Reports.
McCl. & Y. McClelland & Younge's English Exchequer Reports.
McClain Cas. Car. McClain's Cases on Carriers.
McClel. McClelland's Reports, English Exchequer.
McClel. Pro. Pr. McClellan's Probate Practice.
McClel. & Y. McClelland and Younge's Reports, English Exchequer.
McCook. McCook's Reports, vol. 1 Ohio State.
McCord. McCord's Law Reports, South Carolina.
McCord Ch. or *McCord Eq.* McCord's Equity Reports, South Carolina.
McCork. or *McCorkle.* McCorkle's Reports, North Carolina, vol 65.
McCr. McCrary's United States Circuit Court Reports.
McCr. Elect. McCrary's American Law of Elections.
McCrary. McCrary, United States Circuit Court Reports.
McCul. Dict. McCullough's Commercial Dictionary.
McCul. Pol. Econ. McCulloch, Political Economy.
McCull. Dict. McCullough's Commercial Dictionary.
McDevitt. McDevitt's Land Commissioner's Reports, Ireland.
McDon Inst. McDonall's Institutes of the Law of Scotland.
McFar. McFarlane's Reports (Scotch Jury Court)
McGill or *McGill Sc Sess.* McGill's Manuscript Decisions Scotch Court of Session
McGl or *McGloin.* McGloin's Louisiana Reports.
McKinn. Jus McKinney's Justice.
McKinn. Phil. Ev. McKinnon's Philosophy of Evidence.
McL or *McLean.* McLean's United States Circuit Court Reports.
McL & R. McLean & Robinson's Scotch Appeal Cases.
McM Com. Dec. McMaster's Commercial Decisions
McMas. R. L. McMaster's Railroad Law, New York.
McMul. or *McMull.* McMullan's South Carolina Law Reports.
McMul. Eq. or *McMull. Ch.* or *McMull. Eq* McMullan's South Carolina Equity Reports.
McNagh. McNaghten (see Macn).
McNagh. Elem. McNaghten's Elements of Hindoo Law.
McPherson. McPherson, Lee, & Bell's (Third Series) Scotch Session Cases.
McWillie. McWillie's Reports, vols. 73-76 Mississippi.
Md. Maryland;—Maryland Reports;—Harris & McHenry's Maryland Reports.
Md. Ch. Maryland Chancery Decisions, by Johnson.
Md. L. Rec. Maryland Law Record, Baltimore.
Md L. Rep. Maryland Law Reporter, Baltimore.
Md. L. Rev. Maryland Law Review.
Me. Maine;—Maine Reports.
Means. Means's Kansas Reports.
Mechem. Ag. Mechem on Agency.
Mech. Cas. Ag. Mechem's Cases on Agency.
Med. Jur. Medical Jurisprudence.
Med. L. J. or *Med. Leg. J.* Medico Legal Journal, New York.

Med. L. N. Medico Legal News, New York.
Med. L. P. Medico Legal Papers, New York.
Medd. Meddaugh's Reports, vol. 13 Michigan.
Mees. & Ros. Meeson & Roscoe's English Exchequer Reports.
Mees. & W or *Mces. & Wels.* Meeson & Welsby's English Exchequer Reports.
Meg. Megone's Company Case.
Meigs. Meigs's Reports, Tennessee.
Melv. Tr. Melville's Trial (Impeachment), London.
Mem. in Scacc. Memorandum or memoranda in the Exchequer.
Mem L. J. Memphis Law Journal, Tennessee.
Menken. Menken's Reports, vol. 30 New York Civil Procedure Reports.
Menz. Menzies's Reports, Cape of Good Hope.
Mer. Merivale's Reports, English Chancery.
Merc. Cas. Mercantile Cases.
Merch. Dict. Merchant's Dictionary.
Meriv. Merivale's English Chancery Reports.
Merl Quest. Merlin, Questions de Droit.
Merl. Répert. Merlin's *Répertoire de Jurisprudence.*
Met. or *Metc.* Metcalf's Massachusetts Reports;—Metcalfe's Kentucky Reports,—Metcalf's Reports, vol. 3 Rhode Island.
Metc. Contr. Metcalf on Contracts.
Metc. (Ky.). Metcalfe's Reports, Kentucky.
Metc. (Mass.) Metcalf's Reports, Massachusetts Reports, vols 42-54.
Meth. Ch Ca or *Meth. Ch. Cas.* Report of Methodist Church Case.
Mich. Michigan;—Michigan Reports;—Michaelmas.
Mich. C. C R or *Mich Cir Ct Rep.* Michigan Circuit Court Reporter, Marquette.
Mich. L. Michigan Lawyer, Detroit, Mich.
Mich. L. J. Michigan Law Journal, Detroit, Mich.
Mich. Lawyer Michigan Lawyer, Detroit, Mich.
Mich. Leg. News Michigan Legal News
Mich. N. P. Michigan Nisi Prius Cases (Brown's).
Mich. Pol. Soc. Michigan Political Science Association.
Mich. Rev. St. Michigan Revised Statutes.
Mich. T. Michaelmas Term.
Mich. Vac. Michaelmas Vacation.
Middx. Sit. Middlesex Sittings at Nisi Prius.
Mil. Miles's Pennsylvania Reports;—Miller (see Mill.).
Miles. Miles's District Court Reports, City and County of Philadelphia, Pennsylvania
Mill. Mill's South Carolina Constitutional Reports,—Miller's Reports, vols. 1-5 Louisiana,—Miller's Reports, vols. 3-18 Maryland,—Miller's Decisions, United States.
Mill. Civ. L. Miller's Civil Law.
Mill, Const (S. C.). Mill's South Carolina Constitutional Reports.
Mill Dec. or *Mill Dec (U. S.).* Miller's Decisions (Woolworth's Reports) United States Circuit Court,—Miller's Decisions United States Supreme Court Reports, Condensed (Continuation of Curties).
Mill. Ins. Miller's Elements of the Law of Insurances.
Mill. La. Miller's Reports, vols. 1-5 Louisiana.
Mill, Log. Mill's Logic.
Mill Md. Miller's Reports, vols. 3-18 Maryland.
Mill. Op Miller's Decisions, U. S. Circuit Court (Woolworth's Reports).
Mill. Part. Miller on Partition.
Mill, Pol. Ec. Mill's Political Economy.
Mill. & C. Bills. Miller and Collier on Bills of Sale.
Miller. Miller's Reports, vols. 1-5 Louisiana;—Miller's Reports, vols. 3-18 Maryland.
Mills Em D. Mills on Eminent Domain.
Milw. or *Milw Eccl.* Milward's Reports, Irish Prerogative, Ecclesiastical.
Min. Minor;—Minor's Alabama Reports.
Min. Dig. Minot's Digest, Massachusetts.
Min. Ev. Minutes of Evidence
Min. Inst. Minor's Institutes Statute Law.
Minn. Minnesota;—Minnesota Reports.
Minn. Ct. Rep. Minnesota Court Reporter.
Minn. Law J. Minnesota Law Journal, St. Paul, Minn.
Minor. Minor's Alabama Reports;—Minor's Institutes.
Minshew. Minshew (John), "The Guide into the Tongues also the Exposition of the Terms of the Laws of this Land." (England.)
Mir. Jus. Horne's Mirror of Justices.
Mir. Parl. Mirror of Parliament, London.
Mir. Pat. Off. Mirror of the Patent Office, Washington, D. C.
Mirch. D. & S. Mirchall's Doctor and Student.
Mirr. Horne's Mirror of Justices.
Misc. R. or *Miscel.* Miscellaneous Reports, New York.
Miss. Mississippi;—Mississippi Reports;—Missouri.
Miss. Dec. Mississippi Decisions, Jackson.
Miss St. Ca. or *Miss. St. Cas.* Mississippi State Cases
Mister. Mister's Reports, vols. 17-32 Missouri Appeals.
Mitch. M. R. Mitchell's Maritime Register, London.
Mitf. Eq. Pl. Mitford on Equity Pleading.
Mitf & Ty. Eq Pl Mitford and Tyler's Practice and Pleading in Equity.
M'Mul. Ch. (S. C.). M'Mullan's South Carolina Equity Reports.
M'Mul. L. (S. C.). M'Mullan's South Carolina Law Reports.
Mo. Missouri;—Missouri Reports,—Moore's English King's Bench Reports;—Moore's English Common Pleas Reports;—Moore's English Privy Council Reports;—Modern Reports, English;—English King's Bench, etc, (see Mod);—Monthly,—Moore's Indian Appeal Cases;—J. B. Moore's Reports, English Common Pleas.
Mo. App Missouri Appeal Reports.
Mo. App. Rep. Missouri Appellate Reporter.
Mo. Bar. Missouri Bar, Jefferson City.
Mo (P.) Sir Francis Moore's English King's Bench Reports.
Mo. I. A. Moore's Indian Appeals.
Mo. (J. B.). J. B. Moore's English Common Pleas Reports.
Mo. Jur. Monthly Jurist, Bloomington, Ill.
Mo Law Mag. Monthly Law Magazine, London.
Mo Law Rep. Monthly Law Reporter, Boston.
Mo Leg. Exam. Monthly Legal Examiner, New York.
Mo. P. C. Moore's English Privy Council Reports
Mo. W. J. Monthly Western Jurist, Bloomington, Ill.
Mo. & P. Moore & Payne's English Common Pleas Reports.
Mo. & R. Moody & Robinson's English Nisi Prius Reports.
Mo. & S. Moore & Scott's English Common Pleas Reports.
Moak & Eng. Rep. Moak's English Reports.
Mob. or *Mobl.* Mobley, Contested Election Cases, U. S. House of Representatives, 1882-9
Mod Modern Reports, English King's Bench, etc.;—Modified.
Mod. Cas. L. & Eq. Modern Cases in Law and Equity (8 and 9 Modern Reports).
Mod. Cas. Modern Cases (6 Modern Reports).
Mod. Cas. per Far. or *t. Holt,* Modern Cases *tempore* Holt, by Farresley, vol. 7 Modern Reports.
Mod. Ent. Modern Entries.
Mod. Int. Modus Intrandi.
Mod. Rep. The Modern Reports, English King's Bench, etc.;—Modern Reports by Style (Style's King's Bench Reports).
Mol. or *Moll.* Molloy's Irish Chancery Reports.
Moly. Molyneaux's Reports, English Courts, *temp.* Car. I.
Mol. de J. M. or *Mol. de Jure Mar.* Molloy de Jure Maritimo et Navali.
Mon. Montana;—T. B. Monroe's Kentucky Reports;—Ben Monroe's Kentucky Reports;—Monaghan's Unreported Cases Supreme Court of Pennsylvania.
Mon. Angl. Monasticon Anglicanum.
Mon. B. Ben Monroe's Reports, Kentucky.
Mon. (T. B.). T. B. Monroe's Kentucky Reports.

Monagh. or *Monaghan.* Monaghan's Unreported Cases, S C. of Pennsylvania;—Monaghan's Reports, vols. 147-165 Pennsylvania.

Monr. Monroe (see Mon.);—T. B. Monroe's Reports, Kentucky.

Mont. Montana;—Montana Reports;—Montagu's English Bankruptcy Reports;—Montriou's Bengal Reports.

Mont. B. C. or *Mont. Bank. Rep.* Montagu's Reports, English Bankruptcy.

Mont. Cas. Montriou's Cases in Hindoo Law.

Mont. Co. L. R. Montgomery County Law Reporter, Pennsylvania.

Mont. Comp. Montagu on the Law of Composition

Mont. Cond. Rep. Montreal Condensed Reports.

Mont. D. & De G. Montagu, Deacon and De Gex's Reports, English Bankruptcy.

Mont Dig or *Mont Eq Pl.* Montagu's Digest of Pleadings in Equity.

Mont. Ind Monthly Index to Reporters (National Reporter System).

Mont. Inst. Montriou's Institutes of Jurisprudence

Mont. L. R. Montreal Law Reports, Queen's Bench;—Montreal Law Reports, Superior Court

Mont. L. R. Q. B. Montreal Law Reports, Queen's Bench.

Mont. L. R. S C. or *Mont. L. Rep. Super. Ct.* Montreal Law Reports, Superior Court

Mont Set-Off. Montagu on Set-Off

Mont. & A. or *Mont & Ayr.* Montagu and Ayiton's Reports, English Bankruptcy.

Mont. & B. or *Mont. & Bl.* Montagu and Bligh's Reports, English Bankruptcy.

Mont. & C. Montagu and Chitty's Reports, English Bankruptcy.

Mont & MacA. Montagu & MacArthur's English Bankruptcy Reports.

Montesq or *Montesq. Esprit des Lois.* Montesquieu, Esprit des Lois.

Montg. Co. L. Rep. or *Montg. Co. Law Rep'r (Pa.).* Montgomery County Law Reporter.

Month. J. L. Monthly Journal of Law, Washington.

Montr. Montriou's Reports, Bengal;—Montriou's Supplement to Morton's Reports.

Montr. L. R. Montreal Law Reports.

Moo. Francis Moore's English King's Bench Reports. When a volume is given, it refers to J. B. Moore's Reports, English Common Pleas;—J. M. Moore's English Common Pleas Reports;—Moody's English Crown Cases.

Moo A. Moore's Reports, English (1st Bosanquet and Puller's Reports, after page 470).

Moo. C. C. or *Moo. C. Cas.* or *Moo. Cr. C.* Moody's English Crown Cases Reserved.

Moo. C. P. J. B. Moore's Reports, English Common Pleas.

Moo. J. App. or *Moo. Ind. App.* Moore's Reports, English Privy Council, Indian Appeals.

Moo. J. B. J. B. Moore's Reports, English Common Pleas.

Moo. K. B. Moore's English King's Bench Reports.

Moo. P. C. or *Moo. P. C. Cas.* Moore's Privy Council Cases, Old and New Series.

Moo. P. C. Cas. N. S. Moore's Privy Council Cases, New Series, English.

Moo. Tr. Moore's Divorce Trials.

Moo. & M. or *Moo. & Mal.* Moody & Malkin's English Nisi Prius Reports.

Moo. & P. or *Moo. & Pay.* Moore and Payne's Reports, English Common Pleas

Moo. & R. or *Moo. & Rob.* Moody and Robinson's Nisi Prius Cases, English Courts.

Moo. & Sc. Moore and Scott's Reports, English Common Pleas.

Mood. or *Moody.* Moody's English Crown Cases, Reserved.

Mood. & Malk. Moody & Malkin's English Nisi Prius Reports.

Mood. & R. or *Mood. & Rob.* Moody & Robinson's English Nisi Prius Reports.

Moody, Cr. Cas. Moody's English Crown Cases.

Moody & M. Moody & Mackin's English Nisi Prius Reports.

Moon. Moon's Reports, vols. 133-144 Indiana and vols. 6-14 Indiana Appeals.

Moore. Moore's English King's Bench Reports,—Moore's English Common Pleas Reports;—Moore's English Privy Council Reports,—Moore's Reports, vols. 28-34 Arkansas,—Moore's Reports, vol. 67 Alabama,—Moore's Reports, vols. 22-24 Texas.

Moore (A.). A. Moore's Reports in 1 Bosanquet & Puller, after page 470.

Moore (Ark.). Moore's Reports, Arkansas.

Moore C. P. Moore's English Common Pleas Reports.

Moore E. I. Moore's East Indian Appeals.

Moore G. C. Moore's Gorham Case (English Privy Council).

Moore K. B. Sir F. Moore's English King's Bench Reports.

Moore P. C. Moore's English Privy Council Reports.

Moore P. C. N. S. Moore's English Privy Council Reports, New Series.

Moore & P. Moore & Payne's English Common Pleas Reports.

Moore & S. Moore & Scott's English Common Pleas Reports.

Moore & W. or *Moore & Walker.* Moore and Walker's Reports, Texas, vols. 22-24.

Mor. Morison's Dictionary of Decisions in the Court of Session, Scotland,—Morris (see Morr)

Mor. Dic. or *Mor. Dict. Dec.* Morison's Dictionary of Decisions, Scotch Court of Session.

Mor. Dig. Morley's Digest of the Indian Reports.

Mor. Ia. Morris' Iowa Reports.

Mor. Min. Rep. Morrison's Mining Reports

Mor. Priv. Corp. Morawetz on Private Corporations.

Mor. St. Cas. Morris' Mississippi State Cases.

Mor. Supp. Supplement to Morison's Dictionary, Scotch Court of Session.

Mor. Syn. Morison's Synopsis, Scotch Session Cases.

Mor. Tran. Morrison's Transcript of United States Supreme Court Decisions.

More St. More's Notes on Stair's Institutes, Scotland

Morg. Ch. A. & O. Morgan's Chancery Acts and Orders.

Morg. & W. L. J. Morgan and Williams's Law Journal, London.

Morl Dig. Morley's East Indian Digest.

Morr. Morris's Iowa Reports (see, also, Morris and Mor);—Morrow's Reports, vols 23-36 Oregon;—Morrell's English Bankruptcy Reports.

Morr. (Bomb.). Morris's Reports, Bombay.

Morr. (Cal.). Morris's Reports, California

Morr. Jam. (Jamaica). Morris's Jamaica Reports.

Morr. M. R. Morrison's Mining Reports, Chicago.

Morr. (Miss.). Morris's Reports, Mississippi.

Morr. Repl. Morris on Replevin.

Morr. St. Cas. Morris's State Cases, Mississippi.

Morr. Trans. Morrison's Transcript, United States Supreme Court Decisions.

Morrell. Morrell's Bankruptcy Cases.

Morris. Morris's Iowa Reports;—Morris's Reports, vol. 5 California;—Morris's Reports, vols. 43-48 Mississippi;—Morris's Jamaica Reports;—Morris's Bombay Reports;—Morrissett's Reports, vols. 80, 98 Alabama.

Morris & Har. Morris and Harrington's Sudder Dewanny Adawlut Reports, Bombay.

Morse Arb. & Aw. Morse on Arbitration and Award.

Morse Bk. Morse on Banks and Banking.

Morse Exch. Rep. Morse's Exchequer Reports, Canada.

Morse Tr. Morse's Famous Trials, Boston.

Mort. or *Morton.* Morton's Reports, Bengal.

Mos. Mosley's Reports, English Chancery.

Mos. Man. Moses on Mandamus.

Moult. Ch. or *Moult. Ch. P. (N. Y.).* Moulton's New York Chancery Practice.

Moy. Ent. Moyle's Book of Entries.
Moz. & W. or *Mozley & Whiteley.* Mozley & Whiteley's Law Dictionary.
MS. Manuscript, Manuscript Reports.
Mu. Corp. Ca. Withrow's Corporation Cases, vol. 2.
Mulford, Nation. Mulford, The Nation.
Mum. Jam. Mumford's Jamaica Reports.
Mumf. (Jamaica). Mumford's Jamaica Reports.
Mun. Municipal,—Munford's Virginia Reports.
Munf. Munford's Reports, Virginia.
Munic & P. L. Municipal and Parish Law Cases, English
Mur. Murphey's North Carolina Reports;—Murray's Scotch Jury Court Reports;—Murray's Ceylon Reports,—Murray's New South Wales Reports.
Mur. U. S. Ct. Murray's Proceedings in the United States Courts.
Mur. & H. or *Mur & Hurl* Murphy and Hurlstone's Reports, English Exchequer.
Murph. Murphy's Reports, North Carolina.
Murr. Murray's Scotch Jury Trials,—Murray's Ceylon Reports;—Murray's New South Wales Reports.
Murr Over. Cas. Murray's Overruled Cases.
Murray. Murray's Scotch Jury Court Reports.
Murray (Ceylon). Murray's Ceylon Reports.
Murray (New South Wales). Murray's New South Wales Reports.
Mut or *Mutukisna (Ceylon).* Mutukisna's Ceylon Reports
Myer Dig. Myer's Texas Digest
Myer Fed Dec. or *Myers Fed. Dec.* Myer's Federal Decisions
Myl. & C or *Myl. & Cr.* Mylne & Craig's English Chancery Reports.
Myl & K or *Mylne & K.* Mylne & Keen's English Chancery Reports
Myr or *Myr. Prob.* or *Myrick (Cal).* Myrick's California Probate Court Reports
N. Nebraska,—Nevada;—Northeastern Reporter (properly cited N E),—Northwestern Reporter (properly cited N. W.);—The Novels or New Constitutions.
N. A. Non allocatur.
N. B. New Brunswick Reports,—Nulla bona.
N. B. Eq Ca. New Brunswick Equity Cases.
N. B. Eq Rep New Brunswick Equity Reports.
N. B. N. R. National Bankruptcy News and Reports.
N. B R. National Bankruptcy Register, New York,—New Brunswick Reports.
N B. Rep New Brunswick Reports.
N B V. Ad. New Brunswick Vice Admiralty Reports.
N Benl New Benloe's Reports, English King's Bench, Edition of 1661.
N. C North Carolina;—North Carolina Reports;—Notes of Cases (English, Ecclesiastical, and Maritime),—New Cases (Bingham's New Cases).
N C. C. New Chancery Cases (Younge & Collyer).
N. C Conf. North Carolina Conference Reports.
N C. Ecc. Notes of Cases, English Ecclesiastical and Maritime Courts.
N C L. Rep. North Carolina Law Repository.
N C. Law Repos. North Carolina Law Repository.
N. C. Str. Notes of Cases, by Strange, Madras.
N. C. T. Rep. or *N. C. Term R.* North Carolina Term Reports.
N. Car. North Carolina;—North Carolina Reports.
N. Chip. or *N. Chip. (Vt).* N. Chipman's Vermont Reports.
N. D. North Dakota;—North Dakota Reports.
N E New England;—New edition;—Northeastern Reporter.
N E. I. Non est inventus.
N. E. R. Northeastern Reporter (commonly cited N. E);—New England Reporter.
N. E Rep. Northeastern Reporter.
N Eng. Rep New England Reporter.
N. F. Newfoundland;—Newfoundland Reports.
N. H. New Hampshire;—New Hampshire Reports.
N. H. R. New Hampshire Reports.
N. H & C. English Railway and Canal Cases, by Nicholl, Hare, Carrow, etc.
N. J. New Jersey,—New Jersey Reports.
N. J. Ch. or *N. J. Eq* New Jersey Equity Reports.
N. J. L. J. New Jersey Law Journal, Somerville, N. J.
N. J. Law. New Jersey Law Reports.
N. L. Nelson's Lutwyche, English Common Pleas Reports.
N. L. L. New Library of Law and Equity, English,—New Library of Law, etc, Harrisburg, Pa
N. M. New Mexico,—New Mexico Reports.
N. M. St. Bar Ass'n. New Mexico State Bar Association.
N. Mag. Ca. New Magistrates' Cases.
N. Mex. New Mexico Territorial Courts
N. of Cas. Notes of Cases, English Ecclesiastical and Maritime Courts;—Notes of Cases at Madras (by Strange).
N of Cas. Madras. Notes of Cases at Madras (by Strange).
N. P. Nisi Prius. Notary Public. Nova Placita. New Practice.
N. P. C. Nisi Prius Cases.
N. P. R. Nisi Prius Reports.
N. R New Reports (English, 1862-1865),—Bosanquet & Puller's New Reports,—Not Reported.
N R. B. P. New Reports of Bosanquet & Puller
N S. New Series;—Nova Scotia;—Nova Scotia Reports.
N S Dec. Nova Scotia Decisions.
N. S. L. R. Nova Scotia Law Reports.
N. S R. Nova Scotia Reports
N. S. W. New South Wales Reports, Old and New Series.
N. S. W. Eq. Rep. New South Wales Equity Reports.
N. S W. L. R. New South Wales Law Reports.
N. Sc Dec. Nova Scotia Decisions.
N T. Repts. New Term Reports, Q. B.
N. W. Law Rev. Northwestern Law Review, Chicago, Ill.
N. W. P. North West Provinces Reports, India
N. W R or *N. W. Rep.* or *N. W. Reptr.* Northwestern Reporter.
N. W. T. or *N. W. T. Rep.* Northwest Territories Reports, Canada.
N. Y. New York;—New York Court of Appeals Reports.
N Y. Ann. Ca. New York Annotated Cases.
N Y. App. Dec. New York Court of Appeals Decisions.
N. Y. Cas. Err. New York Cases in Error (Caines's Cases).
N. Y. Ch Sent. New York Chancery Sentinel.
N. Y. City H. Rec. New York City Hall Recorder
N. Y. Civ. Pr. Rep. New York Civil Procedure Reports.
N. Y. Code Report. or *N. Y. Code Rept.* New York Code Reporter.
N. Y. Code Reports, N. S. or *N. Y. Code Repts. N. S.* New York Code Reports, New Series.
N. Y Cond. New York Condensed Reports.
N. Y. Cr. New York Criminal Reports.
N Y. Cr. R. or *N. Y. Cr. Rep.* New York Criminal Reports.
N. Y Ct. App. New York Court of Appeals.
N. Y. Daily L. Gaz. New York Daily Law Gazette.
N. Y. El. Cas. or *N. Y. Elec. Cas.* New York Contested Election Cases.
N. Y Jud. Rep New York Judicial Repository, New York (Bacon's).
N. Y. Jur. New York Jurist.
N. Y. L. J. New York Law Journal, New York City.
N. Y. Law Gaz. New York Law Gazette, New York City.
N. Y. Law Rev. New York Law Review, Ithaca, N. Y.
N. Y. Leg. N. New York Legal News.
N. Y. Leg. Obs. New York Legal Observer, New York City (Owen's).
N. Y. Leg. Reg. New York Legal Register, New York City.
N. Y. Misc. New York Miscellaneous Reports
N. Y Mo. L. R. New York Monthly Law Reports.
N. Y. Mo. Law Bull. New York Monthly Law Bulletin, New York City.

N. Y. Mun. Gaz. New York Municipal Gazette, New York City.
N. Y. Op. Att.-Gen Sickels's Opinions of the Attorney-General of New York
N. Y. P. R. New York Practice Reports.
N. Y. Pr. Rep. New York Practice Reports.
N. Y. Rec. New York Record.
N. Y. Reg. New York Daily Register, New York City.
N. Y. Rep. New York Court of Appeals Reports.
N. Y. Reptr. New York Reporter (Gardenier's).
N. Y. S New York Supplement;—New York State;—New York State Reporter.
N. Y. Spec. Term R. Howard's Practice Reports.
N. Y. St. Rep. New York State Reporter, 1886-1896.
N. Y. Sup New York Supreme Court Reports;—New York Supplement, St. Paul, Minnesota.
N. Y. Sup. Ct or *N. Y. Super. Ct.* New York Superior Court Reports.
N. Y. Supp. New York Supplement.
N. Y. Supr. or *N Y Supr. Ct. Repts.* New York Supreme Court Reports.
N. Y. Supr. Ct Repts. (T. & C.). New York Supreme Court Reports, by Thompson and Cook.
N. Y. T. R. or *N Y. Term R.* New York Term Reports (Caines's Reports).
N. Y. Them. New York Themis, New York City.
N. Y. Trans. New York Transcript, New York City.
N. Y. Trans. N. S. New York Transcript, New Series, New York City.
N. Y. Week. Dig. New York Weekly Digest, New York City.
N. Z. New Zealand;—New Zealand Reports.
N Z App Rep. New Zealand Appeal Reports.
N. Z. Col. L. J. New Zealand Colonial Law Journal.
N. Z. Jur. New Zealand Jurist, Dunedin, N. Z.
N. Z. Jur. N S. New Zealand Jurist, New Series.
N. Z. Rep New Zealand Reports, Court of Appeals.
N. & H. Nott and Huntington's Reports, U. S. Court of Claims Reports, vols. 1-7.
N. & Hop Nott and Hopkins's Reports, U. S. Court of Claims Reports, vols. 8-29
N. & M. Neville and Manning's Reports, English King's Bench.
N. & M. Mag. Neville & Manning's English Magistrates' Cases.
N. & Mc or *N. & McC.* Nott & McCord's South Carolina Reports.
N. & P. Neville & Perry's English King's Bench Reports.
N. & P. Mag. Neville & Perry's English Magistrates' Cases.
Nal. St. P. Nalton's Collection of State Papers.
Nam. Dr. Com. Namur's Cour de Droit Commercial.
Nap. Napier.
Napt. or Napton. Napton's Reports, vol. 4 Missouri.
Narr. Mod. Narrationes Modernæ, or Style's King's Bench Reports.
Nas. Inst. Nasmith's Institutes of English Law.
Nat. B. C. or *Nat. Bk. Cas.* National Bank Cases, American.
Nat. B R. or *Nat. Bank. Reg.* National Bankruptcy Register Reports.
Nat. Brev. Natura Brevium
Nat. Corp. Rep. National Corporation Reporter, Chicago.
Nat. L. Rec. National Law Record.
Nat. L. Rep. National Law Reporter.
Nat. L. Rev. National Law Review, Philadelphia.
Nat. Reg. National Register, Edited by Mead, 1816.
Nat. Rept. Syst. National Reporter System.
Nat. Rev. National Review, London.
Nd. Newfoundland Reports.
Neal F. & F. Neal's Feasts and Fasts.
Neb. Nebraska;—Nebraska Reports.
Neg. Cas. Bloomfield's Manumission or Negro Cases, New Jersey.
Nel. Nelson's English Chancery Reports.
Nell (Ceylon). Nell's Ceylon Reports.
Nels. Nelson's Reports, English Chancery.
Nels. Abr. Nelson's Abridgment of the Common Law.
Nels. Fol. Rep. Reports *temp.* Finch, Edited by Nelson.
Nels. Lex Maner. Nelson's Lex Maneriorum.
Nels. Rights Cler. Nelson's Rights of the Clergy.
Nem. con. Nemine contradicente.
Nem. dis. Nemine dissentiente.
Nev. Nevada;—Nevada Reports.
Nev. & M or *Nev. & Man.* Neville & Manning's English King's Bench Reports.
Nev. & M. M. Cas. Neville and Manning's Magistrate Cases, English.
Nev. & M. R. & C. Cas. Neville and McNamara's Railway and Canal Cases.
Nev. & Mac. or *Nev & Macn.* Neville & Macnamara's English Railway and Canal Cases.
Nev. & Man. Mag. Cas. Nevile & Manning's English Magistrate's Cases.
Nev. & P. Nevile & Perry's English King's Bench Reports.
Nev. & P. M. Cas. or *Nev. & P. Mag Cas.* Neville and Perry's Magistrate Cases, English.
New. Newell, Illinois Appeal Reports.
New Ann. Reg. New Annual Register, London.
New B. Eq Ca. New Brunswick Equity Cases.
New B. Eq. Rep. New Brunswick Equity Reports, vol. 1.
New Benl. New Benloe's Reports, English King's Bench, Edition of 1661.
New Br. New Brunswick Reports
New Cas. New Cases (Bingham's New Cases).
New Cas. Eq. New Cases in Equity, vols. 8, 9 Modern Reports.
New Eng Hist. New England Historical and Genealogical Register.
New M Cas. or *New Mag. Cas.* New Magistrate Cases, English Courts (Battleston, Wise & Parnell).
New Nat Brev. New Natura Brevium.
New Pr. Cas. or *New Pr. Cases.* New Practice Cases, English Courts.
New Rep. New Reports in all the Courts, London;—Bosanquet & Puller's New Reports, vols. 4, 5 Bosanquet & Puller.
New Sess. Cas. Carrow, Hamerton and Allen's Reports, English Courts.
New So. W. New South Wales.
New Term Rep. New Term Reports;—Dowling & Ryland's King's Bench Reports.
New York. See *N. Y.*
New York Supp. New York Supplement.
Newb or *Newb. Adm.* Newberry's United States District Court, Admiralty Reports.
Newbyth. Newbyth's Manuscript Decisions, Scotch Session Cases.
Newell. Newell's Reports, vols. 48-90 Illinois Appeals.
Newf. Newfoundland Reports.
Newf. Sel. Cas. Newfoundland Select Cases.
Newl. Contr. Newland on Contracts.
Newm. Conv. Newman on Conveyancing.
Nich. Adult. Bast. Nicholas on Adulterine Bastardy.
Nich. H. & C. or *Nicholl.* Nicholl, Hare and Carrow's English Railway and Canal Cases, vols. 1-2.
Nicholson. Nicholson's Manuscript Decisions, Scotch Session Cases.
Niebh. Hist. Rom. Niebuhr, Roman History.
Nient Cul. Nient culpable, Not guilty.
Nil Reg. or *Niles Reg.* Niles's Weekly Register, Baltimore.
Nisbet. (Nisbet of) Dirleton's Scotch Session Cases.
Nix. F. Nixon's Forms.
No. Ca. Ecc. & Mar. or *No. Cas. Ecc. & M.* Notes of Cases in the English Ecclesiastical and Maritime Courts.
No. East. Rep. Northeastern Reporter (commonly cited N. E.).
No. N. Novæ Narrationes.
No. West. Rep. Northwestern Reporter (commonly cited N. W.).
Nol. M. Cas. or *Nol. Mag.* or *Nol. Just.* or *Nol. Sett. Cas.* Nolan's English Magistrates' Cases.
Nol. Sett. Nolan's Settlement Cases.

Non. Cul. Non culpabilis, Not guilty.
Nor. Fr. Norman French.
Nor. L. C. Inh. Norton's Leading Cases on Inheritance, India.
Norc. Norcross's Reports, vols. 23-24 Nevada.
Norr. Norris's Reports, vols. 82-96 Pennsylvania.
Norr. Peake. Norris's Peake's Law of Evidence.
North. Northington's Reports, English Chancery, Eden's Reports.
North. Co. Rep. Northampton County Reporter, Pennsylvania.
North W. L. J. Northwestern Law Journal.
North & G. North & Guthrie's Reports, vols. 68-80 Missouri Appeals.
Northam. Northampton Law Reporter, Pennsylvania.
Northum. Northumberland County Legal News, Pennsylvania.
Northw. Pr. Northwest Provinces, India.
Northw. Rep or *Northwest Rep.* Northwestern Reporter (commonly cited N. W.).
Not. Cas. Notes of Cases in the English Ecclesiastical and Maritime Courts,—Notes of Cases at Madras (Strange).
Not Cas. Ecc. & M. Notes of Cases in the English Ecclesiastical and Maritime Courts.
Not Cas. Madras. Notes of Cases at Madras (Strange).
Not. Dec. Notes of Decisions (Martin's North Carolina Reports).
Not J. Notaries Journal.
Not. Op. Wilmot's Notes of Opinions and Judgments
Notes of Ca. Notes of Cases, English.
Notes on U. S. Notes on United States Reports.
Nott Mech. L. L. Nott on the Mechanics' Lien Law.
Nott & H. Nott and Huntington's Reports, U. S. Court of Claims Reports, vols. 1-17.
Nott & Hop. Nott & Hopkins's United States Court of Claims Reports, vols 8-29
Nott & Hunt. Nott & Huntington's Reports, vols. 1-7 United States Court of Claims
Nott & McC. Nott & McCord's South Carolina Reports.
Nott & McC. Nott and McCord's Reports, South Carolina.
Nouv. Den. Denizart Collection de Decisions Nouvelles.
Nouv. Rev. Nouvelle Revue de Droit Francais, Paris.
Nov. Novellæ. The Novels, or New Constitutions.
Nov. Rec. Novisimi Recopilacion de las Leyes de Espana.
Nov. Sc. Nova Scotia Supreme Court Reports.
Nov. Sc. Dec. Nova Scotia Decisions.
Nov. Sc. L. R. or *Nova Scotia L. Rep.* Nova Scotia Law Reports.
Noy. Noy's English King's Bench Reports.
Noy Max. Noy's Maxims.
Noyes Char U. Noyes on Charitable Uses.
Nye. Nye's Reports, vols. 18-21 Utah.
O. Ohio Reports,—Ontario,—Ontario Reports;—Oregon Reports;—Otto's United States Supreme Court Reports;—Ordonnance;—Ohio Reports. Otto's Reports, U. S. Supreme Court Reports, vols. 91-107.
O. B. Old Bailey,—Old Benloe;—Orlando Bridgman;—Session Papers of the Old Bailey.
O. B. S. Old Bailey's Sessions Papers.
O. B. & F. N. Z. Ollivier, Bell & Fitzgerald's New Zealand Reports.
O. Ben. or *O. Beni.* Old Benloe's Reports, English Common Pleas (Benloe, of Benloe and Dalison, Edition of 1689).
O. Bridg. Orlando Bridgman's English Common Pleas Reports;—Carter's Reports, *tempore* Bridgman's English Common Pleas.
O'Brien M. L. O'Brien's Military Law.
O. C. Orphans' Court;—Old Code (Louisiana Civil Code of 1808).
O. C. C. Ohio Circuit Court Reports.
O. C. C. N. S. Ohio Circuit Court Reports, New Series.
O. C. D. Ohio Circuit Decisions.
O. D. Ohio Decisions.
O. D. C. C. Ohio Decisions, Circuit Court (properly cited Ohio Circuit Decisions).
O. G. Official Gazette, U. S. Patent Office, Washington, D. C.
O. J. Act. Ontario Judicature Act.
O'Mal. & H. O'Malley and Hardcastle's Election Cases.
O. N. B. Old Natura Brevium.
O'Neal Neg. L. O'Neal's Negro Law of South Carolina.
O. R. Ontario Reports.
O. S. Ohio State Reports;—Old Series;—Old Series King's & Queen's Bench Reports, Ontario, (Upper Canada).
O. S. C. D. or *O. S. U.* Ohio Supreme Court Decisions, Unreported Cases.
O. St. Ohio State Reports.
O S & C. P. Dec. Ohio Superior and Common Pleas Decisions.
O. & T. Oyer and Terminer.
O'Brien O'Brien's Upper Canada Reports.
O'Callaghan, New Neth. O'Callaghan's History of New Netherland.
Oct Str. Octavo Strange, Select Cases on Evidence.
Odeneal. Odeneal's Reports, vols. 9-11 Oregon.
Off. Br. Officina Brevium
Off. Ex. or *Off. Exec.* Wentworth's Office of Executors.
Off. Gaz. Pat. Off. Official Gazette, U. S. Patent Office, Washington, D. C.
Off Min Officer's Reports, Minnesota.
Officer. Officer's Reports, vols. 1-9 Minnesota.
Ogd or *Ogden.* Ogden's Reports, vols. 12-15 Louisiana.
Ohio. Ohio;—Ohio Reports.
Ohio C. C. Ohio Circuit Court Reports.
Ohio L. J. Ohio Law Journal.
Ohio Leg. N. Ohio Legal News, Norwalk, Ohio.
Ohio N. P. Ohio Nisi Prius Reports.
Ohio Prob. Ohio Probate Court Reports.
Ohio R. Cond. Ohio Reports, Condensed.
Ohio St. Ohio State Reports.
Ohio Sup. & C. P. Dec. Ohio Superior and Common Pleas Decisions.
O'Keefe Ord. O'Keefe's Orders in Chancery, Ireland.
Oke Mag. Syn. Oke's Magisterial Synopsis.
Okla. Oklahoma Territorial Reports.
Ol Con. Oliver's Conveyancing.
Ol Prec. Oliver's Precedents.
Olc or *Olc. Adm.* Olcott's Admiralty Reports, U. S. So. Dist. of N. Y.
Old Ben. Benloe in Benloe & Dalison, English Common Pleas Reports.
Old Nat. Brev. Old Natura Brevium.
Oliph. Oliphant on Law of Horses.
Oldr. Oldright's Reports, Nova Scotia.
Oliv. B. & L. Oliver, Beavan and Lefroy's Reports, English Railway and Canal Cases, vols. 5-7.
Oll B. & F. or *Oll. B. & Fitz (New Zealand).* Ollivier, Bell and Fitzgerald's New Zealand Reports.
Oll. Bell & Fitz. Sup. Ollivier, Bell and Fitzgerald (Supreme Ct. N. Z.).
O'Mal. & H. O'Malley & Hardcastle's English Election Cases.
Onsl. N. P. Onslow's Nisi Prius.
Ont. Ontario;—Ontario Reports.
Ont. App. R. or *Ont. App. Rep.* Ontario Appeal Reports, Canada.
Ont. El. Ca. Ontario Election Cases.
Ont. P. R. or *Ont. Pr.* or *Ont. Pr. Rep.* Ontario Practice Reports.
Op. Att. Gen. Opinions of the Attorneys General of the United States.
Op. Att.-Gen. N. Y. Opinions of the Attorney-Generals, New York (Sickels's Compilation).
Op. Att.-Gen. (U. S.). Opinions of the Attorney-Generals, United States.
Op. N. Y. Atty. Gen. Sickels's Opinions of Attorneys-General of New York.
Or. Oregon;—Oregon Reports.
Or. T. Rep. Orleans Term Reports, vols. 1, 2 Martin, Louisiana.
Ord. Ord on Usury.
Ord. Amst. Ordinance of Amsterdam.

Ord. Ant. Ordinance of Antwerp.
Ord. Bilb. Ordinance of Bilboa.
Ord Ch. Orders in Chancery.
Ord. Cla. Lord Clarendon's Orders.
Ord. Copenh. Ordinance of Copenhagen.
Ord Ct. Orders of Court.
Ord. de la Mar. or *Ord. Mar.* Ordonnance de la Marine de Louis XIV.
Ord Flor. Ordinances of Florence.
Ord. Gen. Ordinance of Genoa
Ord. Hamb. Ordinance of Hamburg.
Ord. Konigs. Ordinance of Konigsberg.
Ord. Leg Ordinances of Leghorn.
Ord Port. Ordinances of Portugal.
Ord Prus. Ordinances of Prussia.
Ord Rott. Ordinances of Rotterdam.
Ord Swed. Ordinances of Sweden.
Ord U. Ord on the Law of Usury.
Ordr Jud. Ins. Ordronaux on Judicial Aspects of Insanity.
Ordr. Med. Jur. Ordronaux's Medical Jurisprudence.
Oreg. Oregon;—Oregon Reports.
Orf M L Orfila's Medecine Legale.
Orl. Bridg. or *Orl Bridgman.* Orlando Bridgman's Reports, English Common Pleas.
Orl T. R Orleans Term Reports, vols. 1 and 2, Martin's Reports, Louisiana.
Orm. or *Ormond.* Ormond's Reports, vols. 12-15 Alabama.
Ort Inst. Ortolan's Institutes of Justinian.
Ort. R. L. Ortolan's Hlistory of Roman Law.
Ot. or *Otto.* Otto's United States Supreme Court Reports.
Ought. Oughton's Ordo Judiciorum.
Out. Outerbridge's Reports, vols. 97-110 Pennsylvania State.
Over. or *Overton.* Overton's Tennessee Reports.
Ow. or *Owen.* Owen's English King's Bench and Common Pleas Reports;—New South Wales Reports.
Oxley. Young's Vice-Admiralty Decisions, Nova Scotia, edited by Oxley.
P. Easter (Paschal) Term;—Pennsylvania;—Peters,—Pickering's Massachusetts Reports;—Probate;—Pacific Reporter.
P. 1891, or *1891 P.* English Law Reports, Probate Division, from 1891 onward
P. A. D Peters's Admiralty Decisions.
P. C. Pleas of the Crown;—Parliamentary Cases;—Practice Cases,—Prize Cases,—Patent Cases,—Privy Council,—Prize Court;—Probate Court,—Precedents in Chancery,—Penal Code,—Political Code,—Procédure Civile
P. C. Act. Probate Court Act.
P. C. App. Privy Council Appeals, English Law Reports.
P. C. C. Privy Cases;—Peters's Circuit Court Reports.
P. C. L. J. Pacific Coast Law Journal, San Francisco.
P. C. R. Parker's Criminal Reports, New York.
P. C. Rep. Privy Council Reports, English.
P. Cl. R. Parker's Criminal Reports, New York;—Privy Council Reports.
P. D. or *P. Div* Probate Division, English Law Reports (1876-1890).
P. E. I or *P E I. Rep.* Prince Edward Island Reports (Haviland's).
P. F S. P F. Smith's Reports, vols. 51-81½ Pennsylvania State.
P. Jr. & H. Patton, Jr., & Heath's Virginia Reports
P. L. Pamphlet Laws. Public Laws. Poor Laws.
P. L. Com. Poor Law Commissioners.
P. L. J. Pennsylvania Law Journal;—Pittsburgh Legal Journal, Pa.
P. L. R. Pennsylvania Law Record, Philadelphia.
P. N. P. Peake's English Nisi Prius Cases.
P. O. Cas. Perry's Oriental Cases, Bombay.
P. O. G. Patent Office Gazette.
P. O. R. Patent Office Reports.
P. P. Parliamentary Papers.
P. P. A. P. Precedents of Private Acts of Parliament.
P. R. Parliamentary Reports;—Pennsylvania Reports, by Penrose & Watts;—Pacific Reporter;—Probate Reports;—Pyke's Reports, Canada.
P. R. C. P. Practical Register in Common Pleas.
P. R. Ch. Practical Register in Chancery.
P. R. U. C. Practice Reports, Upper Canada.
P. R. & D. Power, Rodwell and Dew's Election Cases, English.
P. S. C. U S. Peters's United States Supreme Court Reports.
P. S. R. Pennsylvania State Reports.
P. W or *P. Wms.* Peere Williams's Reports, English Chancery.
P. & B. Pugsley & Burbridge's Reports, New Brunswick.
P. & C. Prideaux & Cole's Reports, English Courts, vol. 4 New Session Cases.
P. & D. Perry & Davison's English Queen's Bench Reports,—Probate and Divorce.
P. & H. Patton, Jr., & Heath's Virginia Reports.
P. & K Perry & Knapp's English Election Cases.
P. & M Philip and Mary; thus 1 P. & M. signifies the first year of the reign of Philip & Mary;—Pollock and Maitland's History of English Law.
P & R. Pigott and Rodwell's Election Cases, English.
P. & W. Penrose and Watt's Pennsylvania Reports.
Pa Pennsylvania, — Pennsylvania Reports, by Penrose & Watts;—Pennsylvania State Reports;—Paine, United States.
Pa. Co Ct or *Pa. Co. Ct. R.* Pennsylvania County Court Reports.
Pa Dist or *Pa. Dist. R.* Pennsylvania District Court Reports.
Pa L G or *Pa. Leg Gaz.* Legal Gazette Reports (Campbell's), Pennsylvania
Pa L. J. Pennsylvania Law Journal Reports (Clark's);—Pennsylvania Law Journal, Philadelphia.
Pa. L J. Rep. Pennsylvania Law Journal Reports (Clark's Reports).
Pa. L. Rec or *Pa La. Rec.* Pennsylvania Law Record, Philadelphia.
Pa Law Jour. Pennsylvania Law Journal, Philadelphia.
Pa Law Jour. Rep. Pennsylvania Law Journal Reports (Clark's).
Pa. Law Rec. Pennsylvania Law Record, Philadelphia.
Pa. Law Ser. Pennsylvania Law Series.
Pa N. P. Brightly's Nisi Prius Reports, Pennsylvania.
Pa Rep. Pennsylvania Reports.
Pa St. Pennsylvania State Reports.
Pa St. Tr. Pennsylvania State Trials (Hogan's)
Pa. Super. Ct. Pennsylvania Superior Court.
Pac. Pacific Reporter.
Pac Coast L. J. Pacific Coast Law Journal, San Francisco.
Pac. Law Mag. Pacific Law Magazine, San Francisco.
Pac. Law Reptr. Pacific Law Reporter, San Francisco.
Pac. R. or *Pac. Rep.* Pacific Reporter (commonly cited Pac. or P.).
Page Div. Page on Divorce.
Pai. Paine's United States Circuit Court Reports,—Paige's New York Chancery Reports.
Pai Ch. or *Paige Ch.* Paige's New York Chancery Reports.
Paige Cas. Dom. Rel. Paige's Cases in Domestic Relations.
Paige Cas. Part. Paige's Cases in Partnership.
Paine or *Paine C. C.* Paine's United States Circuit Court Reports.
Pal Ag. Paley on Agency.
Pal. Conv. Paley on Summary Convictions.
Paley, Prin. & Ag. Paley on Principal and Agent.
Palgrave. Palgrave's Proceedings in Chancery;—Palgrave's Rise and Progress of the English Commonwealth.
Palm. Palmer's English King's Bench Reports;—Palmer's Reports, vols. 53-60 Vermont.
Palm. Pr. Lords. Palmer's Practice in the House of Lords.

Palm. (Vt.). Palmer's Vermont Reports.
Pamph. Pamphlets.
Pand. Pandects.
Papy. Papy's Reports, vols. 5, 6 Florida.
Par. Paragraph;—Parker's English Exchequer Reports;—Parsons's Reports, vols. 65-66 New Hampshire;—Parker's New York Criminal Reports.
Par. Dec. Parsons's Decisions, Massachusetts.
Par. Eq. Cas. Parsons's Select Equity Cases, Pennsylvania.
Par. W. C. Parish Will Case.
Par. & Fonb M. J. Paris and Fonblanque on Medical Jurisprudence.
Pard or *Pard Droit Commer.* Pardessus, Cours de Droit Commercial.
Pard. Lois Mar. Pardessus's Lois Maritimes.
Pard. Serv Pardessus's Traités des Servitudes.
Pardessus Pardessus, Cours de Droit Commercial; — Pardessus, Lois Maritimes; — Pardessus, Traités des Servitudes.
Park. Parker's New York Criminal Reports;—Parker's English Exchequer Reports.
Park Cr. Cas. or *Park Cr. Rep.* Parker's Criminal Reports, New York.
Park. Dig. Parker's California Digest.
Park Dow. Park on Dower.
Park. Exch. Parker's English Exchequer Reports.
Park. Hist. Ch Parker's History of Chancery.
Park Ins. Park on Insurance.
Park (N. H.). Parker's New Hampshire Reports.
Park. Pr. Ch. Parker's Practice in Chancery.
Park. Rev. Cas Parker's English Exchequer Reports (Revenue Cases).
Park. Sh. Parker on Shipping and Insurance.
Parker. Parker's English Exchequer Reports;—Parker's New York Criminal Reports,—Parker's New Hampshire Reports
Parker, Cr. Cas or *Parker, Cr. R. (N. Y.).* Parker's New York Criminal Reports.
Parl. Cas. Parliamentary Cases House of Lords.
Parl Hist. Parliamentary History.
Parl Reg Parliamentary Register.
Paroch Ant. Kennett's Parochial Antiquities.
Pars. Parsons (see Par.).
Pars. Ans Parsons's Answer to the Fifth Part of Coke's Reports.
Pars. Bills & N. Parsons on Bills and Notes.
Pars. Cas. Parsons's Select Equity Cases, Pennsylvania.
Pars. Com. Parsons's Commentaries on American Law.
Pars. Con. or *Pars. Cont.* Parsons on Contracts.
Pars. Costs. Parsons on Costs
Pars. Dec. Parsons's Decisions, Massachusetts.
Pars. Eq. Cas. Parsons's Select Equity Cases, Pennsylvania.
Pars. Essays. Parsons's Essays on Legal Topics.
Pars Ins. Parsons on Marine Insurance.
Pars. Law Bus. Parsons's Law of Business.
Pars Mar. Ins. Parsons on Marine Insurance.
Par. Mar. L. or *Pars. Mar. Law.* Parsons on Maritime Law.
Pars. Merc. L. Parsons on Mercantile Law.
Pars Notes & B. Parsons on Notes and Bills.
Pars. Part. Parsons on Partnership.
Pars. Sh. & Adm. Parsons on Shipping and Admiralty.
Pars. Wills. Parsons on Wills.
Pas. Terminus Paschæ. Easter Term.
Pasch. Paschal's Reports, Texas.
Pasch. Ann Const. Paschal's Annotated Constitution of the U. S.
Paschal. Paschal's Reports, vols. 28-31 Texas and Supplement to vol. 25.
Pat. Patent;—Paton's Scotch Appeal Cases;—Paterson's Scotch Appeal Cases;—Paterson's New South Wales Reports.
Pat. App. Cas. Paton's Scotch Appeal Cases (Craigie, Stewart & Paton);—Paterson's Scotch Appeal Cases.
Pat. Com. or *Pat. Comp.* Paterson's Compendium of English and Scotch Law.
Pat. Dec. Patent Decisions.
Pat. H. L. Sc. See *Pat. App. Cas.*
Pat. Law Rev. Patent Law Review, Washington, D. C.
Pat. Off. Gaz. Official Gazette, U. S. Patent Office, Washington, D. C.
Pat. St. Ex. Paterson's Law of Stock Exchange.
Pat. & H. Patton and Heath's Reports, Virginia
Pat. & Mur. Paterson and Murray's Reports, New South Wales.
Pater. Paterson's Scotch Appeal Cases;—Paterson's New South Wales Reports.
Paters. App. Cas. Paterson's Scotch Appeal Cases.
Paters. Comp. Paterson's Compendium of English and Scotch Law.
Paters. St. Ex. Paterson's Law of Stock Exchange.
Paterson. Paterson's Compendium of English and Scotch Law;—Paterson on the Game Laws,—Paterson's Liberty of the Press;—Paterson on the Liberty of the Subject,—Paterson's Law and Usages of the Stock Exchange;—Paterson's Scotch Appeal Cases.
Paton. Craigie, Stewart, & Paton's Scotch Appeal Cases.
Patr. El. Cas. or *Patr. Elect. Cas.* Patrick's Election Cases, Upper Canada.
Patt. & H. or *Patton & H.* Patton, Jr., & Heath's Virginia Reports.
Paul Par. Off. Paul's Parish Officer.
Paulus Julius Paulus, Sententiæ Receptæ
Pay. Munc. Rights. Payne on Municipal Rights.
Pea Peake's English Nisi Prius Reports
Peach. Mar. Sett. Peachey on Marriage Settlements
Peak Peake's Nisi Prius Cases, English Courts
Peak Add. Cas. Peake's Additional Cases, Nisi Prius, English
Peak. Ev. Peake on Evidence.
Peak N P. Cas Peake's Nisi Prius Cases, English.
Peake Add. Cas. Peake's Additional Cases, vol. 2 of Peake.
Peake N P. Peake's English Nisi Prius Cases.
Pear. Pearson's Reports, Pennsylvania.
Pearce C. C. Pearce's Reports in Dearsly's Crown Cases English.
Pears. Pearson's Reports, Pennsylvania.
Peck. Peck's Tennessee Reports;—Peck's Reports, vols. 11-30 Illinois;—Peckwell's English Election Cases.
Peck. El. Cas. Peckwell's Election Cases, English.
Peck. (Ill.). Peck's Reports, Illinois Supreme Court (11-38 Illinois).
Peck Mun. L Peck's Municipal Laws of Ohio.
Peck (Tenn.). Peck's Tennessee Reports.
Peck Tr. Peck's Impeachment Trial.
Peckw. or *Peckw. Eng. El. Cas.* Peckwell's English Election Cases.
Peeples. Peeples' Reports, vols. 78, 79 Georgia.
Peeples & Stevens. Peeples & Stevens's Reports, vols. 80-97 Georgia.
Peere Wms. or *Peere Williams.* Peere Williams's Reports, English Chancery.
Pemb J. & O Pemberton's Judgments and Orders.
Pen. Pennington's Reports, New Jersey Law.
Pen. Code. Penal Code.
Pen. N. J. Pennington's New Jersey Reports.
Pen. & W. Penrose & Watts's Pennsylvania Reports.
Penn Pennsylvania;—Pennsylvania State Reports,—Pennypacker's Unreported Pennsylvania Cases;—Pennington's New Jersey Reports;—Pennewill's Delaware Reports.
Penn. Bla. Pennsylvania Blackstone, by John Reed.
Penn. Co. Ct. Rep. Pennsylvania County Court Reports.
Penn. Del. Pennewill's Delaware Reports.
Penn. Dist. Rep. Pennsylvania District Reports.
Penn. L. G. Pennsylvania Legal Gazette Reports (Campbell's).
Penn. L. J. Pennsylvania Law Journal, Philadelphia.
Penn. L. J. R. Pennsylvania Law Journal Reports (Clark's).
Penn. Law Jour. Pennsylvania Law Journal, Pennsylvania.

Penn. Law Jour. Rep. Pennsylvania Law Journal Reports (Clark's).

Penn. Law Rec. Pennsylvania Law Record, Philadelphia.

Penn. Leg. Gaz. Pennsylvania Legal Gazette Reports (Campbell's).

Penn. Pr. Pennsylvania Practice, by Troubat and Haly.

Penn. R. or *Penn. Rep.* Pennsylvania Reports.

Penn. St. or *Penn St. R.* Pennsylvania State Reports.

Penna. L. R. Pennsylvania Law Record, Philadelphia.

Penning. Pennington's Reports, New Jersey.

Penny. Pennypacker's Unreported Pennsylvania Cases,—Pennypacker's Pennsylvania Colonial Cases.

Penr. & W. Penrose and Watts's Pennsylvania Reports.

Penrud. Anal. Penruddock's Analysis of the Criminal Law.

Peo. L Adv. People's Legal Adviser, Utica, N. Y.

Per. Or. Cas. Perry's Oriental Cases, Bombay.

Per T. & T. Perry on Trusts and Trustees.

Per. & Dav. Perry & Davison's English King's Bench Reports.

Per. & K El. Cas. or *Per. & Kn.* Perry and Knapp's Election Cases, English.

Perk. Perkins on Conveyancing;—Perkins on Pleading;—Perkins's Profitable Book (Conveyancing).

Perk Prof. Bk. Perkins's Profitable Book.

Perp. Pat. Perpigna on Patents

Perry. Sir Erskine Perry's Reports, in Morley's (East) Indian Digest;—Perry's Oriental Cases, Bombay.

Perry & D. Perry & Davison's English King's Bench Reports.

Perry & Kn. Perry & Knapp's English Election Cases.

Pet. Peters's United States Supreme Court Reports;—Peters's United States Circuit Court Reports;—Peters's United States District Court Reports (Admiralty Decisions),—Peters's Prince Edward Island Reports.

Pet. Ad or *Pet Adm.* Peters's United States District Court Reports (Admiralty Decisions).

Pet. Br or *Pet Brooke.* Petit Brooke or Brooke's New Cases, English King's Bench (Bellewe's Cases *temp.* Hen. VIII)

Pet. C. C. Peters's United States Circuit Court Reports.

Pet. Cond. Peters's Condensed Reports, United States Supreme Court

Pet. Dig. Peters's United States Digest,—Peticolas's Texas Digest.

Pet. S. C. Peters's United States Supreme Court Reports.

Peters. Peters's Reports, U. S Supreme Court.

Peters Adm. Peters's United States District Court Reports (Admiralty Decisions).

Peters C. C. Peters's Reports, U. S Circuit Court, 3d Circuit.

Petersd. Abr. Petersdorff's Abridgment

Petersd. B. Petersdorff on the Law of Bail.

Petersd. L. of N. Petersdorff on the Law of Nations.

Petersd. Pr. Petersdorff's Practice.

Peth. Int. Petheram on Interrogatories.

Petit Br. Petit Brooke, or Brooke's New Cases, English King's Bench.

Ph. Phillips' English Chancery Reports;—Phillimore's English Ecclesiastical Reports (see Phil.).

Ph. Ch. Phillips's English Chancery Reports.

Ph St. Tr. Phillipps's State Trials.

Phal. C. C. or *Phalcn.* Phalen's Criminal Cases.

Phear W. Phear on Rights of Water.

Pheney Rep. Pheney's New Term Reports.

Phil. Phillips's English Chancery Reports;—Phillips's North Carolina Reports;—Phillips's English Election Cases,—Phillimore's English Ecclesiastical Reports;—Philadelphia Reports;—Phillips's Illinois Reports.

Phil. Ecc. Judg. Phillimore's Ecclesiastical Judgments.

Phil. Ecc. R. Phillimore's English Ecclesiastical Reports.

Phil. El. Cas. Phillips's English Election Cases.

Phil. Eq. Phillips's North Carolina Equity Reports.

Phil. Ev. Phillips on Evidence.

Phil. Fam. Cas. Phillipps's Famous Cases in Circumstantial Evidence.

Phil. Ins. Phillips on Insurance.

Phil. Law or *Phil. N. C.* Phillips's North Carolina Law Reports.

Phil. Pat. Phillips on Patents.

Phil. St. Tr. Phillipps's State Trials.

Phila. Philadelphia Reports, Common Pleas of Philadelphia County.

Phila. Law Lib. Philadelphia Law Library.

Phila. (Pa.). Philadelphia Reports, Common Pleas of Philadelphia County.

Philippine Co. Philippine Code.

Phill Phillimore's Reports, English Ecclesiastical Courts;—Phillips (see Phil. and Phillips).

Phill. Copyr. Phillips on Copyright.

Phill. Cr. L. Phillimore's Study of the Criminal Law.

Phill Dom. Phillimore on the Law of Domicil.

Phill Eccl. Phillimore on Ecclesiastical Law.

Phill. Eccl. Judg. Phillimore's Ecclesiastical Judgments

Phill. El. Cas. Phillips's Election Cases.

Phill. Eq. Phillips's Equity Reports, North Carolina

Phill. Ev. Phillimore on Evidence;—Phillips on Evidence.

Phill Fam Cas. Phillipps's Famous Cases in Circumstantial Evidence.

Phill. Ins Phillips on Insurance.

Phill. Insan. Phillips on Insanity.

Phill. Int. Phillimore on International Law.

Phill. Jur. Phillimore on Jurisprudence.

Phill. Law (N. C.). Phillips's Law Reports, North Carolina.

Phill Mech. Liens. Phillips on Mechanics' Liens.

Phill. Prin Jur. Phillimore's Principles and Maxims of Jurisprudence.

Phill Priv. L. Phillimore's Private Law among the Romans.

Phill Rom L. Phillimore's Study and History of the Roman Law.

Phill St. Tr Phillips's State Trials.

Phillim. Phillimore's English Ecclesiastical Reports. See, also, Phil, Phill.

Phillim Dom. Phillimore on the Law of Domicil.

Phillim. Ecc. Law. Phillimore's Ecclesiastical Law

Phillips. Phillips's English Chancery Reports;—Phillips's North Carolina Reports, Law and Equity;—Phillips's Reports, vols 152-187 Illinois.

Pick. Pickering's Reports, Massachusetts.

Pickle. Pickle's Reports, vols 85-108 Tennessee.

Pierce R. R Pierce on Railroads.

Pig. Rec. Pigott on Common Recoveries.

Pig. & R. Pigott and Rodwell's Registration Appeal Cases, English

Pike. Pike's Reports, vols. 1-5 Arkansas.

Pin or *Pinn* Pinney's Wisconsin Reports.

Pist. or *Piston.* Piston's Reports, Mauritius.

Pitc. Crim. Tr. Pitcairn's Ancient Criminal Trials, Scotland.

Pitc. Tr. Pitcairn's Ancient Criminal Trials, Scotland.

Pitm. Prin. & Sur. Pitman on Principal and Surety.

Pitm. S. Pitman on Suretyship.

Pitts. L. J. or *Pitts. Leg. Jour.* Pittsburg Legal Journal, Pittsburg, Penn.

Pitts. Rep. or *Pitts. Repts.* Pittsburgh Reports, Pennsylvania Courts (reprinted from the Journal).

Pittsb. Leg. J. (O. S.). Pittsburg Legal Journal, Old Series.

Pittsb. R. (Pa.). Pittsburg Reports, Pennsylvania Courts (reprinted from the Journal).

Pl. Placiti Generalia;—Plowden's Commentaries or Reports, English King's Bench, etc.

Pl. C. Placita Coronæ (Pleas of the Crown).

Pl. Com. Plowden's Commentaries or Reports, English King's Bench.
Pl. U. Plowden on Usury.
Platt Cov. Platt on the Law of Covenants.
Platt Lease Platt on Leases.
Plcb. Plébiscite.
Plf. Plaintiff.
Plow. or *Plowd.* or *Plowd. Com.* Plowden's English King's Bench Commentaries or Reports.
Plowd. Crim. Con Tr. Plowden's Crim. Con. Trials.
Plum. Contr. Plumptre on Contracts.
Po. Ct. Police Court.
Pol. Pollexfen's English King's Bench Reports, etc ;—Police.
Pol. Code. Political Code.
Pol. Cont Pollock on Contracts.
Pol. Sci. Quar. Political Science Quarterly.
Poll. Pollexfen's English King's Bench Reports.
Poll. C. C. Pr. Pollock's Practice of the County Courts.
Poll. Contr. Pollock on Contracts.
Poll Dig Part. Pollock's Digest on the Law of Partnership.
Poll Doc. Pollox on Production of Documents.
Poll Lead Cas Pollock's Leading Cases.
Poll. Part. Pollock on Partnership.
Poll & Maitl. Pollock & Maitland's History of English Law.
Pollex. Pollexfen's English King's Bench Reports, etc.
Pols. Int. or *Pols. Law of Nat.* Polson on Law of Nations.
Pom. Con. L. or *Pom. Const. Law.* Pomeroy's Constitutional Law of the United States.
Pom. Contr. Pomeroy on Contracts.
Pom. Mun. L. Pomeroy's Municipal Law.
Pomeroy. Pomeroy's Reports, vols. 73-128 California.
Poore Const. Poore's Federal and State Constitutions.
Pop. Popham's English King's Bench Reports.
Pop. Sci. Mo. Popular Science Monthly.
Pope. (Pope) Opinions Attorney General, pt. 1, vol. 22.
Pope C. & E. Pope on Customs and Excise.
Pope, Lun. Pope on Lunacy
Poph. Popham's Reports, English King's Bench.
Poph. (2). Cases at the end of Popham's Reports.
Port. (Ala.). Porter's Alabama Reports.
Port. (Ind.). Porter's Reports, Indiana.
Porter. Porter's Alabama Reports ;—Porter's Reports, vols. 3-7 Indiana
Posey. Unreported Commissioner Cases, Texas.
Post. Post's Reports, vols. 23-26 Michigan,—Post's Reports, vols. 42-64 Missouri.
Poste's Gaius Inst Poste's Translation of Gaius.
Postl. Dict. Postlethwaite's Commercial Dictionary.
Pot. Dwar. Potter's Dwarris on Statutes.
Poth. Baild Rente. Pothier, Traité du Contrat de Bail à Rente
Poth. Cont. Pothier on Contracts.
Poth. Cont. de Change. Pothier, Traité du Contrat de Change.
Poth. Cont. Sale or *Poth. Contr. Sale.* Pothier, Treatise on the Contract of Sale.
Poth. de Change. Pothier, Traité du Contrat de Change.
Poth. de l'Usure. Pothier, Traité de l'Usure.
Poth. de Société App. Pothier, Traité du Contrat de Société.
Poth. du Depot. Pothier, Traité du Dépôt.
Poth. Œuv. Pothier's Œuvres
Poth. Louage. Pothier, Traité du Contrat de Louage.
Poth. Mar. Cont. Pothier's Treatise on Maritime Contracts.
Poth. Mar. Louage. Pothier, Traité du Contrat de Louage.
Poth. Obl. Pothier, Traité des Obligations.
Poth. Pand. Pothier's Pandects
Poth. Part. Pothier on Partnership.
Poth. Proc. Civ. or *Poth. Proc. Civil.* Pothier, Traité de la Procédure Civile.
Poth. Proc. Crim. Pothier, Traité de la Procédure Criminale.
Poth. Société. Pothier, Traité du Contrat de Société.
Poth. Traité de Change. Pothier, Traité du Contrat de Change.
Poth. Vente Pothier, Traité du Contrat de Vente.
Pothier, Pand Pothier, Pandectæ Justinianeæ, etc.
Potter Potter's Reports, vols. 4-7 Wyoming.
Potter Corp. Potter on Corporations.
Potter's Dwar. St. Potter's Dwarris on Statutes.
Potts L. D. Potts's Law Dictionary.
Pow. Am. L. Powell's American Law.
Pow Apr. Pr. Powell's Appellate Proceedings.
Pow. Con. Powell on Contracts
Pow. Conv. Powell on Conveyancing.
Pow. Dev. Powell, Essay upon the Learning of Devises, etc.
Pow. Ev. Powell on Evidence.
Pow. Mort. or *Pow. Mortg* Powell on Mortgages.
Pow. Powers Powell on Powers.
Pow. Pr. Powell's Precedents in Conveyancing.
Pow. R. & D. Power, Rodwell and Dew's Election Cases, English.
Poyn. M. & D. Poynter on Marriage and Divorce.
Pr. Price's English Exchequer Reports ,—*Principium* (the beginning of a title, law, or section) ;—Practice Reports (Ontario).
Pr. C. K. B. Practice Cases in the King's Bench.
Pr. Ch. Precedents in Chancery, by Finch ;—Practice in the High Court of Chancery.
Pr. Ct. Prerogative Court.
Pr. Dec. Printed Decisions (Sneed's), Kentucky.
Pr. Div. Probate Division, Law Reports ;—Pritchard s Divorce and Matrimonial Cases.
Pr. Exch. Price's Exchequer Reports, English.
Pr. Falc. President Falconer's Reports, Scotch Court of Session.
Pr. L Private Law or Private Laws.
Pr. Min. Printed Minutes of Evidence.
Pr R. Practice Reports.
Pr. Reg. B. C. Practical Register in the Bail Court.
Pr. Reg. C. P. Practical Register in the Common Pleas
Pr. Reg. Ch. Practical Register in Chancery (Styles's).
Pr. St. Private Statutes.
Pr. & Div. Probate and Divorce, English Law Reports.
Pra. Cas. Prater's Cases on Conflict of Laws.
Pract. The Practitioner.
Prat. Cas. Prater's Cases on Conflict of Laws.
Prat. H. & W. Prater on the Law of Husband and Wife
Pratt B. S. Pratt on Beneficial Building Societies.
Pratt C. W. Pratt on Contraband of War.
Pratt Cont. Cas. Pratt's Contraband-of-War Cases.
Preb. Dig. Preble Digest, Patent Cases.
Prec. Ch. Precedents in Chancery.
Pref. Preface.
Prel. Préliminaire.
Prer. Prerogative Court.
Pres. Abs. Preston on Abstracts.
Pres. Conv. Preston on Conveyancing.
Pres. Est. Preston on Estates.
Pres. Falc. President Falconer's Scotch Session Cases (Gilmour & Falconer).
Pres. Leg. Preston on Legacies.
Pres. Merg. Preston on Merger.
Pres. Shep. T. Preston's Sheppard's Touchstone.
Prest. Conv. Preston on Conveyancing.
Prest. Est. Preston on Estates.
Prest Merg. Preston on Merger.
Prs. or *Price.* Price's Exchequer Reports.
Price Exch. Price's Reports, Exchequer, English.
Price Liens. Price on Liens.
Price Notes P. P. or *Price P. P.* Price's Notes of Points of Practice, English Exchequer Cases.
Price R. Est. Price on Acts Relating to Real Estate (Pa).
Price & St. Price and Steuart Trade-mark Cases.
Prick. or *Prickett (Id.).* Prickett's Idaho Reports.
Prid. Chu. Gui. Prideaux's Churchwarden's Guide.

Prid. Prec. Prideaux's Precedents in Conveyancing.

Prid. & C. Prideaux and Cole's Reports, English, New Sessions Cases, vol. 4.

Prin. Principium. The beginning of a title or law.

Prin. Dec. Printed Decisions (Sneed's), Kentucky.

Prior Lim. Prior on Construction of Limitations.

Pritch. Ad. Dig. Pritchard's Admiralty Digest.

Pritch. M. & D. Pritchard on Marriage and Divorce.

Pritch. Quar. Sess. Pritchard, Quarter Sessions.

Priv. Counc App. Privy Council Appeals.

Priv. Lond. Customs or Privileges of London.

Pro. L. Province Law.

Pro quer. Pro querentem. For the plaintiff.

[1891] Prob. Law Reports, Probate Division, from 1891 onward.

Prob. Code. Probate Code.

Prob. Div. Probate Division, English Law Reports.

Prob. Rep. Probate Reports

Prob Rep. Ann. Probate Reports Annotated.

Prob & Adm Div. Probate and Admiralty Division, Law Reports.

Prob. & Div. Probate and Divorce, English Law Reports.

Prob & Mat. or *Prob. & Matr.* Probate and Matrimonial Cases.

Proc. Ch. Proceedings in Chancery.

Proc. Pr. or *Proc. Prac.* Proctor's Practice.

Proff. Corp. Proffatt on Corporations

Proff. Jury Tr. Proffatt on Jury Trials.

Proff. Not. Proffatt on Notaries.

Proff. Wills Proffatt on Wills.

Prop. Lawyer N. S. Property Lawyer, New Series (periodical), England.

Proud Dom. Pub. Proudhon's Domaine Public.

Proudf. Land Dec. (U. S.). Proudfit's United States Land Decisions.

Prouty. Prouty's Reports, vols. 61-68 Vermont.

Pr. t. Rep. Practice Reports.

Psych. & M L J. Psychological and Medico-Legal Journal, New York.

Puff. Puffendorf's Law of Nature and Nations.

Pugs Pugsley's Reports, New Brunswick

Pugs. & Bur or *Pugs. & Burb.* Pugsley and Burbridge's Reports, New Brunswick

Pull. Accts Pulling's Law of Mercantile Accounts.

Pull. Attor. Pulling on the Law of Attorneys

Pull. Laws & Cust Lond Pulling's Treatise on the Laws, Customs, and Regulations of the City and Port of London.

Pull. Port of London. Pulling, Treatise on the Laws, Customs, and Regulations of the City and Port of London.

Puls. or *Pulsifer.* Pulsifer's Reports, vols. 65-68 Maine.

Pult. Pulton de Pace Regis.

Pump Ct. Pump Court (London).

Punj Rec. Punjab Record.

Purd. Dig. (Pa.). Purdon's Digest of Pennsylvania Laws.

Purd. Dig. (U. S.). Purdon's Digest of United States Laws.

Puter. Pl Puterbauch's Pleading.

Pyke. Pyke's Lower Canada King's Bench Reports

Q Question, — Quorum; — Quadragesms (Year Books Part IV); — Quebec; — Queensland; — *Attach* Quoniam Attachiamenta.

Q B. Queen's Bench;—Queen's Bench Reports (Adolphus & Ellis, New Series, English);—English Law Reports, Queen's Bench (1841-1852);—Queen's Bench Reports, Upper Canada;—Queen's Bench Reports, Quebec;—English Law Reports, Queen's Bench Division, 1891

[1891] Q B. Law Reports, Queen's Bench Division, from 1891 onward.

Q B Div or *Q B D* Queen's Bench Division, English Law Reports (1876-1890).

Q B R Queen's Bench Reports, by Adolphus & Ellis (New Series).

Q. B. U. C Queen's Bench Reports, Upper Canada.

Q. C. Queen's Counsel.

Q. L. R. Quebec Law Reports,—Queensland Law Reports.

Q. P. R. Quebec Practice Reports.

Q. R. Official Reports, Province of Quebec.

Q. R. Q. B. Quebec Queen's Bench Reports.

Q. S. Quarter Sessions.

Q. t. Qui tam.

Q. v. Quod vide; Which see.

Q. Vict. Statutes of Province of Quebec (Reign of Victoria).

Q. War. Quo Warranto.

Qu. L. Jour. Quarterly Law Journal, Richmond, Va.

Qu. L. Rev. Quarterly Law Review, Richmond, Va.

Qua. cl. fr. Quare clausum fregit *(q. v.).*

Quadr. Quadragesms (Year Books, Part IV).

Quart. Rev. Quarterly Law Review, Richmond, Virginia.

Queb. L. R. Quebec Law Reports, two series, Queen's Bench or Superior Court.

Queb. Q B. Quebec Queen's Bench Reports.

Quebec L. Rep. Quebec Law Reports, two series, Queen's Bench or Superior Court.

Queens. L. J. Queensland Law Journal.

Queens. L. R. Queensland Law Reports.

Quin or *Quincy.* Quincy's Massachusetts Reports.

Quint, Quinto. Year Book, 5 Hen. V.

Quo War. Quo Warranto.

R. Resolved. Repealed. Revised. Revision. Rolls;—King Richard, thus 1 R. III. signifies the first year of the reign of King Richard III.,—Rawle's Reports, S. C. of Pennsylvania

R. A. Regular Appeals Registration Appeals.

Rc. Rescriptum,—Rolls of Court,—Record Commissioners,—Railway Cases;—Registration Cases;—Revue Critique, Montreal.

R. C. & C R. Revenue, Civil and Criminal Reporter, Calcutta

R. G. Regulæ Generales, Ontario.

R. I. Rhode Island,—Rhode Island Reports.

R. J & P. J. Revenue, Judicial and Police Journal, Calcutta.

R L. Roman Law;—Revised Laws;—Revue Legale

R L & S. Ridgeway, Lapp and Schoales's Reports, Irish King's Bench

R. L. & W. Roberts, Leaming and Wallis's County Court Reports, English.

R M Ch or *R. M. Charlt.* R. M. Charlton's Georgia Reports

R. P C. Real Property Cases, English;—Reports Patent Cases.

R P. Cas. Real Property Cases, English.

R. P. & W. (Pa.). (Rawle) Penrose and Watt's Pennsylvania Reports.

R. R. & Can. Cas. Railway and Canal Cases, English.

R S. Revised Statutes.

R. S L. Reading on Statute Law.

R. t. F. Reports *tempore* Finch, English Chancery.

R. t. H. Reports *tempore* Hardwicke (Lee) English King's Bench;—Reports *tempore* Holt (Cases Concerning Settlement).

R. t. Hardw. Reports *tempore* Hardwicke, English King's Bench.

R. t. Holt. Reports *tempore* Holt, English King's Bench.

R. t Q. A. Reports *tempore* Queen Anne, vol. 11 Modern Reports

R. & B. Cas. Redfield and Bigelow's Leading Cases on Bills and Notes.

R. & C. Cas. Railway and Canal Cases, English.

R. & C. N. Sc. Russell & Chesley's Reports, Nova Scotia.

R. & G. N. Sc. Russell & Geldert's Reports, Nova Scotia.

R. & H. Dig. Robinson & Harrison's Digest, Ontario

R. & J. Dig. Robinson & Joseph's Digest, Ontario.

R. & M. Russell & Mylne's English Chancery Reports;—Ryan & Moody's English Nisi Prius Reports.

R. & My. Russell and Mylne's Reports, English Chancery.

R. & M. C. C. Ryan and Moody's Crown Cases Reserved, English.
R. & M. Dig. Rapalje & Mack's Digest of Railway Law.
R. & M. N. P. Ryan and Moody's Nisi Prius Cases, English.
R. & R. C. C. Russell and Ryan's Crown Cases Reserved, English.
Ra. Ca. English Railway and Canal Cases.
Rader. Rader's Reports, vols. 138-163 Missouri.
Raff Pens Man. Raff's Pension Manual.
Rail. & Can. Cas. English Railway and Canal Cases;—Railway and Canal Traffic Cases.
Railw. Cas. Railway Cases.
Railw. & C. Cas. Railway and Canal Cases, English.
Railw. & Corp. Law J. Railway and Corporation Law Journal.
Ram A. Ram on Assets.
Ram Cas. P. & E. Ram's Cases of Pleading and Evidence.
Ram F. Ram on Facts.
Ram Judgm. Ram on Science of Legal Judgment.
Ram Leg. Judgm. (Towns. Ed). Ram's Science of Legal Judgment, Notes by Townshend
Ram W. Ram on Exposition of Wills.
Ram. & Mor. Ramsey & Morin's Montreal Law Reporter.
Rand. Randolph's Virginia Reports;—Randolph's Reports, vols. 21-56 Kansas,—Randolph's Reports, vols. 7-11 Louisiana Annual;—Randall's Reports, vols. 52-71 Ohio State
Rand (Kan). Randolph's Reports, Kansas
Rand. (La.). Randolph's Reports, Louisiana Annual Reports, vols. 7-11.
Rand Perp. Randall on Perpetuities.
Raney Raney's Reports, vols. 16-20 Florida
Rang Dec. Sparks's Rangoon Decisions, British Burmah
Rank P. Rankin on Patents.
Rap Fed Ref. Dig. Rapalje's Federal Reference Digest
Rap Jud Q B R Rapport's Judiciaries de Quebec Cour du Banc de la Reine
Rap. Jud. Q C. S. Rapport's Judiciaries de Quebec Cour Superieure.
Rap. Lar. Rapalje on Larceny.
Rap N. Y Dig Rapalje's New York Digest.
Rap & L or *Rap & Law.* or *Rapal & L* Rapalje & Lawrence, American and English Cases.
Rast. Rastell's Entries and Statutes.
Ratt. L C. Rattigan's Leading Cases on Hindoo Law.
Ratt R. L. Rattigan's Roman Law
Rawle or *Rawle* Rawle's Pennsylvania Reports.
Rawle Const. Rawle on the Constitution.
Rawle, Cov. or *Rawle Covt.* Rawle on Covenants for Title.
Rawle Eq. Rawle's Equity in Pennsylvania.
Rawle Pen. & W. (Rawle) Penrose & Watts, Pennsylvania.
Ray Med. Jur. Ray's Medical Jurisprudence of Insanity.
Ray Men. Path. Ray's Mental Pathology.
Raym. or *Raym. Ld.* Lord Raymond's Reports, English King's Bench.
Raym. B. of Ex. Raymond on Bill of Exceptions.
Raym. Ch Dig. Raymond's Chancery Digest.
Raym Ent. Raymond's Book of Entries.
Raym Sir T. or *Raym T.* Sir Thomas Raymond's English King's Bench Reports.
Raymond. Raymond's Reports, vols. 81-89 Iowa.
Rayn. Rayner's English Tithe Cases, Exchequer.
Re-af. Re-affirmed.
Re. de J. Revue de Jurisprudence, Montreal.
Re. de L. Revue de Jurisprudence et Legislation, Montreal.
Real Est. Rec. Real Estate Record, New York.
Real Pr. Cas. Real Property Cases (English).
Rec. Records;—Recorder;—American Law Record.
Rec. Com. Record Commission.
Rec. Dec. Vaux's Recorder's Decisions, Philadelphia.
Red. Redfield's New York Surrogate Reports;—Reddington, Maine.
Red. Am. R. R. Cas. or *Red. Cas. R. R.* Redfield's Leading American Railway Cases.
Red. Cas. Wills. Redfield's Leading Cases on Wills.
Red. R. L. Reddie's Roman Law.
Red. R. R. Cas. Redfield's Leading American Railway Cases.
Red. & Big. Cas. B. & N. Redfield & Bigelow's Leading Cases on Bills and Notes.
Redes. Pl. Mitford's Chancery Pleading.
Redf. Redfield's Surrogate Court Reports, N. Y.
Redf. Am. Railw. Cas. Redfield's American Railway Cases.
Redf. Bailm. Redfield on Carriers and Bailments.
Redf. L. Cas. Wills. Redfield's Leading Cases on Wills.
Redf. Pr. Redfield's Practice, New York.
Redf R. Cas. Redfield's American Railway Cases.
Redf Railw. Redfield on Railways.
Redf. Railw. Cas. Redfield's American Railway Cases
Redf Sur. or *Redf Surr, (N. Y.).* Redfield's New York Surrogate Court Reports.
Redf. Wills. Redfield's Leading Cases on Wills.
Redf & Big. L. Cas. Redfield and Bigelow's Leading Cases on Notes and Bills.
Reding or *Redington* Redington's Reports, vols. 31-35 Maine.
Redm Redman on Arbitrations and Awards
Reed Fraud or *Reed Lead. Cas.* Reed's Leading Cases in Law of Statute of Frauds.
Reese. Reporter, vols. 5, 11 Heiskell's Tennessee Reports.
Reeve Des. Reeve on Descents.
Reeve Dom R. Reeve on Domestic Relations.
Reeve, Eng. Law or *Reeve H. E. L* or *Reeve, Hist. Eng. Law.* Reeve's History of the English Law.
Reeve Sh Reeve on the Law of Shipping and Navigation.
Reg. The Daily Register, New York City.
Reg App. Registration Appeals.
Reg. Brev. Register of Writs.
Reg Cas Registration Cases.
Reg. Deb. (Gales) Register of Debates in Congress, 1789-91 (Gales's).
Reg Deb. (G. & S). Register of Debates in Congress, 1824-37 (Gales and Seaton's).
Reg. Gen. Regulæ Generales.
Reg. Jud. Registæm Judiciale.
Reg Lib. Register Book.
Reg Maj. Books of Regiam Majestatem.
Reg. Om Brev Registrum Omnium Brevium.
Reg. Orig. Registrum Originale.
Reg. Pl. Regula Placitandi.
Reg Writ Register of Writs.
Reilly. Reilly's English Arbitration Cases.
Rem. Cr Tr. Remarkable Criminal Trials.
Rem. Tr. Cummins & Dunphy's Remarkable Trials.
Rem Tr. No. Ch. Benson's Remarkable Trials and Notorious Characters.
Remy Remy's Reports, vols. 145-154 Indiana; also Indiana Appellate Court Reports.
Rep. Report, — Reports; — Reporter; — Repealed,—Wallace's The Reporters;—Répertoire. Coke's Reports, English King's Bench
Rep. (1, 2, etc.). Coke's English King's Bench Reports.
Rep. Ass. Y. Clayton's Reports of Assizes at Yorke.
Rep. Cas. Eq. Gilbert's Chancery Reports.
Rep. Cas. Madr. Reports of Cases, Dewanny Adawlut, Madras.
Rep. Cas. Pr. Reports of Cases of Practice (Cooke's).
Rep. Ch. Reports in Chancery, English.
Rep. Ch. Pr. Reports on the Chancery Practice.
Rep. Com. Cas. Reports of Commercial Cases, Bengal.
Rep Const. or *Rep. Const. Ct.* Reports of the Constitutional Court, South Carolina (Treadway, Mill, or Harper).

Rep. Cr. L. Com. Reports of Criminal Law Commissioners.
Rep. de Jur. Répertoire de Jurisprudence, Paris.
Rep. de Jur. Com Répertoire de Jurisprudence Commerciale, Paris
Rep. du Not Répertoire du Notariæ, Paris.
Rep. Ec. C. C. Repetitions Ecrites sur le Code Civil.
Rep. Eq. Guilbert's Reports in Equity, English.
Rep. in Ch Reports in Chancery, English.
Rep. (N. Y.) The Reporter, Washington and New York.
Rep Q. A. Report *tempore* Queen Anne, vol. 11 Modern.
Rep. Sel Cas Ch. or *Rep Sel Cas in Ch.* Kelynge's (W.) Reports, English Chancery.
Rep t Finch Reports *tempore* Finch, English Chancery
Rep t Hard Lee's Reports *tempore* Hardwicke, English King's Bench Reports.
Rep. t Holt Reports *tempore* Holt, English King's Bench,—Reports *tempore* Holt (English Cases of Settlement)
Rep. t. O Br. Carter's English Common Pleas Reports *tempore* O. Bridgman.
Rep. t. Q. A. Reports *tempore* Queen Anne (11 Modern).
Rep. t. Talb. Reports *tempore* Talbot, English Chancery.
Rep. (Wash.). The Reporter, Washington and New York.
Rep. Yorke Ass. Clayton's Reports of Assizes at Yorke.
Report or *Reports.* Coke's Reports, English King's Bench.
Reptr. The Reporter, Boston, Mass.
Res. Cas. Reserved Cases.
Ret Brev Retorna Brevium
Rettie. Rettie, Crawford & Melville's Scotch Session Cases (4th Series).
Rev. Reversed Revised Revenue.
Rev. C. & C. Rep. Revenue, Civil, and Criminal Reporter, Bengal
Rev. Cas. Revenue Cases.
Rev Crit. La Révue Critique, Montreal.
Rev. Crit. de Leg. Révue Critique de Legislation, Paris.
Rev. de Leg. Révue de Legislation, Montreal
Rev. Dr. Int. Révue de Droit International, Paris
Rev. Dr. Leg Révue de Droit Législation, Paris.
Rev. Laws. Revised Laws
Rev. Leg. La Révue Légale, Sorel, Quebec.
Rev Ord N W T. Revised Ordinances, Northwest Territories (Canada) 1888.
Rev. St or *Rev. Stat.* Revised Statutes.
Reyn. Reynolds's Reports, vols. 40-42 Mississippi
Reyn Steph Reynolds's Stephens on Evidence
Rho L Rhodian Law.
Rice Rice's Law Reports, South Carolina.
Rice Ch. Rice's Equity Reports, South Carolina
Rice. Dig. Pat. Rice's Digest of Patent Office Decisions.
Rice Eq. Rice's South Carolina Equity Reports
Rich Richardson's South Carolina Law Reports;—Richardson's Reports, vols 2-5 New Hampshire.
Rich. Cas. Ch or *Rich. Ch.* Richardson's South Carolina Equity Reports.
Rich Ct. Cl. Richardson's Court of Claims Reports
Rich Eq Richardson's South Carolina Equity Reports.
Rich Eq Cas. Richardson's South Carolina Equity Reports.
Rich Law (S. C.). Richardson's South Carolina Law Reports.
Rich (N. H.). Richardson's Reports, New Hampshire Reports, vols. 3-5.
Rich. N. S Richardson's Reports, New Series, South Carolina
Rich. P. R C. P. Richardson's Practical Register, Common Pleas.
Rich. Pr. C. P. Richardson's Practice Common Pleas.
Rich. Pr K. B. Richardson's Practice in the King's Bench.
Rich. Pr. Reg. Richardson's Practical Register English Common Pleas.
Rich. & H. or *Rich. & Hook.* Richardson & Hook's Street Railway Decisions.
Rich. & W Richardson & Woodbury's Reports, vol. 2 New Hampshire.
Ridg. Ridgeway's Reports *tempore* Hardwicke, Chancery and King's Bench.
Ridg Ap. or *Ridg. App.* Ridgeway's Irish Appeal (or Parliamentary) Cases.
Ridg Cas. Ridgeway's Reports *tempore* Hardwicke, Chancery and King's Bench.
Ridg. L. & S. Ridgeway, Lapp and Schoales's Reports (Irish Term Reports).
Ridg P. C. or *Ridg Parl.* Ridgeway's Irish Appeal (or Parliamentary) Cases.
Ridg Rep or *Ridg. St. Tr.* Ridgeway's (Individual) Reports of State Trials in Ireland.
Ridg t Hard or *Ridg & Hard.* Ridgeway's Reports *tempore* Hardwicke, Chancery and King's Bench.
Ridgew. Ridgeway (see Ridg.).
Ridley, Civil & Ecc. Law. Ridley's Civil and Ecclesiastical Law.
Ried Riedell's Reports, vols. 68, 69 New Hampshire.
Ril Riley's South Carolina Law Reports,—Riley's Reports, vols 37-42 West Virginia
Ril. Ch or *Ril. Eq.* Riley's South Carolina Chancery Reports.
Ril Harp Riley's Edition of Harper's South Carolina Reports.
Riley Riley's South Carolina Chancery Reports, —Riley's South Carolina Law Reports;—Riley's Reports, vols 37-42 West Virginia.
Riley Ch or *Riley Eq.* Riley's Chancery Reports, South Carolina.
Riner. Riner's Reports, vol. 2 Wyoming.
Riv Ann Reg. Rivington's Annual Register.
Rob. Robinson's Virginia Reports,—Robinson's Louisiana Reports,—Robinson's Reports, vols. 2-9 and 17-23 Colorado Appeals;—Robertson's New York Superior Court Reports,—Robinson's English Ecclesiastical Reports,—Chr. Robinson's English Admiralty Reports,—W. Robinson's English Admiralty Reports;—Robinson's Reports, English House of Lords Scotch Appeals,—Robertson's Scotch Appeal Cases,—Robinson's Reports, vol. 38 California,—Robinson's Reports, vols 1-4 Louisiana Annual;—Roberts's Reports, vols. 29-31 Louisiana Annual;—Robards's Reports, vols. 12, 13 Missouri;—Robards's Conscript Cases, Texas,—Chr. Robinson's Upper Canada Reports,—J. L Robinson's Upper Canada Reports,—Robertson's Reports, vol. 1 Hawaii;—Robinson's Reports, vol. 1 Nevada.
Rob Adm. Chr. Robinson's English Admiralty Reports.
Rob Adm. Chr. Robinson's Reports, English Admiralty
Rob Adm. & Pr. Roberts on Admiralty and Prize
Rob. App. Robinson's Scotch Appeals, English House of Lords.
Rob (Cal.). Robinson's Reports, California.
Rob Car V. Robertson's History of the Reign of the Emperor Charles V.
Rob. Cas. Robertson's Scotch Appeal Cases.
Rob Chr. Chr. Robinson's English Admiralty Reports.
Rob Chr. Adm. Chr. Robinson's Reports, English Admiralty.
Rob. Consc Cas. or *Rob. Conscr. Cas.* Robard's Conscript Cases, Texas.
Rob. Ecc. Robertson's Ecclesiastical Reports, English.
Rob. Ent. Robinson's Entries.
Rob Eq. Roberts's Principles of Equity.
Rob Fr. Roberts on Frauds.
Rob. Fr. Conv. Roberts on Fraudulent Conveyances.
Rob. Gavelk. Robinson on Gavelkind.
Rob (Hawaiian). Robinson's Hawaiian Reports.
Rob. Jr. or *Rob. Jun.* William Robertson's English Admiralty Reports.
Rob. Jus. Robinson's Justice of the Peace.
Rob. L. & W. Roberts, Leaming & Wallis's County Court Reports.

Rob. (La.). Robinson's Reports, Louisiana.
Rob. (La. Ann.). Robinson's Reports, Louisiana Annual, vols. 1-4.
Rob. Mar. (N. Y.). Robertson & Jacob's New York Marine Court Reports.
Rob. (Mo.). Robard's Reports, Missouri.
Rob. (N. Y.). Robertson's Reports, New York City Superior Court Reports, vols. 24-30.
Rob. (Nev.). Robinson's Reports, Nevada Reports, vol. 1.
Rob. Pr. Robinson's Practice.
Rob S. I. Robertson's Sandwich Island (Hawaiian) Reports.
Rob. Sc. App. Robinson's Scotch Appeals, English House of Lords
Rob. Sr. Ct. Robertson's New York Superior Court Reports.
Rob. St. Fr. Roberts on the Statute of Frauds.
Rob. U C. Robinson's Reports, Upper Canada.
Rob. (Va). Robinson's Reports, Virginia.
Rob. Wills. Roberts on Wills.
Rob. Wm. or *Rob. Wm. Adm.* Wm. Robinson's Reports, English Admiralty.
Rob. & J. Robard and Jackson's Reports, Texas Reports, vols. 26-27.
Robards. Robards's Reports, vols. 12, 13 Missouri; —Robards's Texas Conscript Cases.
Robards & Jackson. Robards & Jackson's Reports, vols. 26-27 Texas.
Robb or *Robb Pat. Cas.* Robb's United States Patent Cases.
Robert. Robertson's Scotch Appeals, English House of Lords
Roberts. Roberts' Reports, vols 29-31 Louisiana Annual.
Robertson. Robertson's Scotch Appeal Cases;—Robertson's New York Superior Court Reports;—Robertson's New York Marine Court Reports;—Robertson's English Ecclesiastical Reports;—Robertson's Hawaiian Reports See, also, Rob.
Robin. App. Robinson's Scotch Appeal Cases.
Robinson. Chr. Robinson's English Admiralty Reports;—W. Robinson's English Admiralty Reports;—Robinson's Virginia Reports;—Robinson's Louisiana Reports;—Robinson's Scotch Appeal Cases;—Robinson's Reports, vol. 38 California;—Chr. Robinson's Reports, Upper Canada,—J. L Robinson's Reports, Upper Canada,—Robinson's Reports, Colorado;—Robinson's Reports, vol. 1 Nevada.
Robs Bankr. Robson's Bankrupt Practice;—Robertson's Handbook of Bankers' Law.
Robt. Robert;—Robertson.
Robt. (N. Y.). Robertson's Reports, New York City Superior Court Reports, vols. 24-30.
Roc. Ins. Roccus on Insurance.
Roc. Mar. L. Roccus on Maritime Law.
Roc. & H. Bank. Roche and Hazlitt on Bankruptcy.
Roccus, Ins. Roccus on Insurance.
Rockw. Sp. & Mex. L. Rockwell's Spanish and Mexican Law.
Rodm. (Ky.). Rodman's Kentucky Reports, vols. 78-82.
Rodman. Rodman's Reports, vols. 78-82 Kentucky.
Roelk. Man. Roelker's Manual for Notaries and Bankers.
Rog. Ecc. or *Rog. Ecc. Law.* Rogers's Ecclesiastical Law.
Rog. Rec. Rogers's City Hall Recorder, New York.
Rogers. Rogers's Reports, vols. 47-51 Louisiana Annual.
Rol. Rolle's English King's Bench Reports.
Roll. Roll of the Term;—Rolle's English King's Bench Reports.
Rolle. Rolle's Reports, English King's Bench.
Rolle Abr. Rolle's Abridgment.
Rolle R. Rolle's English King's Bench Reports.
Rolls Ct. Rep. Rolls Court Reports, English.
Rom. Romilly's Notes of Cases, English Chancery.
Rom. Cr. L. Romilly's Criminal Law.
Rom. Law. Mackeldy's Handbook of the Roman Law.
Root. Root's Reports, Connecticut.
Rop. H. & W. or *Rop. Husb. & Wife.* Roper on Husband and Wife.
Rop. Leg. Roper on Legacies.
Rop. Prop. Roper on Property.
Rop. Rev. Roper on Revocation of Wills.
Rorer Int. St. L. Rorer on Inter-State Law.
Rorer Jud. Sales. Rorer on Judicial Sales.
Rosc. Adm. Roscoe's Admiralty Jurisdiction and Practice.
Rosc. Bills. Roscoe on Bills and Notes.
Rosc. Civ. Ev. Roscoe on Civil Evidence.
Rosc. Cr. Ev. or *Rosc. Crim. Ev.* Roscoe on Criminal Evidence.
Rosc. Jur. Roscoe's Jurist, London.
Rosc. N. P. Roscoe on Nisi Prius Evidence.
Rosc. Pl. Roscoe on Pleading.
Rosc. R. Ac. or *Rosc. Real Act.* Roscoe on Real Actions.
Rosc. St. D. Roscoe on Stamp Duties.
Rose or *Rose B. C.* Rose's Reports, English Bankruptcy.
Rose Notes. Rose's Notes on United States Reports
Rose W. C. Rose Will Case, New York.
Ross, Conv. Ross's Lectures on Conveyancing, etc., Scotland.
Ross Ldg. Cas. Ross's Leading Cases on Commercial Law.
Ross Lead. Cas. Ross's Leading Cases on Commercial Law.
Ross V. & P. Ross on Vendors and Purchasers.
Rot. Chart. Rotulus Chartarum.
Rot. Cur. Reg. Rotuli Curiæ Regis.
Rot. Flor. Rotæ Florentine (Reports of the Supreme Court, or Rota, of Florence).
Rot. Parl. Rotulæ Parliamentariæ.
Rouse Cop. Rouse's Copyhold Enfranchisement Manual.
Rouse Pr. Mort. Rouse on Precedents of Mortgages.
Rowe. Rowe's Reports, English Parliamentary and Military Cases.
Rowe Rep. Rowe's Reports (Irish).
Rowe Sci. Jur. Rowe's Scintilla Juris
Rowell. Rowell's Contested Election Cases, U. S. House of Representatives, 1889-1891,—Rowell's Reports, vols. 45-52 Vermont
Roy Dig. Royall's Digest Virginia Reports.
Royle Stock Sh. Royle on the Law of Stock Shares, etc.
Rt. Law Repts. Rent Law Reports, India.
Rub. Rubric
Rucker. Rucker's Reports, vols. 43-46 West Virginia
Ruff. or *Ruff. & H.* Ruffin & Hawks's North Carolina Reports.
Ruffh or *Ruffh. St.* Ruffhead's Statutes-at-Large of England.
Rules Sup. Ct. Rules of the Supreme Court.
Runn. Runnell's Reports, Iowa
Runn Stat. Runnington's Statutes-at-Large of England.
Runnells. Runnells's Reports, vols. 38, 56 Iowa.
Rus. Russell
Rush. Rushworth's Historical Collection.
Russ. Russell's Reports, English Chancery.
Russ. Arb. Russell on Arbitrators.
Russ. Cr. or *Russ. Crimes.* Russell on Crimes and Misdemeanors.
Russ. Elect. Cas. Russell's Election Cases, Nova Scotia;—Russell's Election Cases, Massachusetts.
Russ. Eq. Rep. Russell's Equity Decisions, Nova Scotia.
Russ. Merc. Ag. Russell on Mercantile Agency.
Russ. N. Sc. Russell's Equity Cases, Nova Scotia.
Russ. t. Eld. Russell's English Chancery Reports *tempore* Elden.
Russ. & Ches. Russell and Chesley's Reports, Nova Scotia.
Russ. & Ches. Eq. Russell and Chesley's Equity Reports, Nova Scotia.
Russ. & Geld. Russell and Geldert's Reports, Nova Scotia.
Russ. & M. Russell and Mylne's Reports, English Chancery.
Russ. & R. or *Russ. & Ry.* Russell and Ryan's Crown Cases Reserved, English.

Rutg. Cas. or *Rutger Cas.* Rutger-Waddington Case, New York City, 1784 (First of New York Reports).

Ruth. Inst. or *Ruth. Nat. L.* Rutherford's Institutes of Natural Law.

Ry. Cas. Reports of Railway Cases.

Ry. F. Rymer's Fœdera, Conventiones, etc.

Ry. Med. Jur. Ryan's Medical Jurisprudence.

Ry. & Can. Cas. Railway and Canal Cases, England.

Ry. & Can. Traf. Ca. Railway and Canal Traffic Cases.

Ry. & Corp Law Jour. Railway and Corporation Law Journal

Ry & M. Ryan & Moody's Nisi Prius Reports, English

Ry. & M. C. C. Ryan and Moody's Crown Cases Reserved, English

Ry. & M. N P. Ryan and Moody's Nisi Prius Reports, English.

Rymer. Rymer's Fœdera.

S. Shaw, Dunlop & Bell's Scotch Court of Session Reports (1st Series),—Shaw's Scotch House of Lords Appeal Cases;—Southeastern Reporter (properly cited S. E);—Southwestern Reporter (properly cited S. W),—New York Supplement,—Supreme Court Reporter,—Section.

S. A. L R. South Australian Law Reports.

S. App. Shaw's Appeal Cases, Scotland

S. Aust L. R South Australian Law Reports.

S. B. Upper Bench, or Supreme Bench.

S. C. South Carolina,—South Carolina Reports, New Series,—Same Case,—Superior Court,—Supreme Court,—Sessions Cases,—Samuel Carter (see Orlando Bridgman);—Senatus-Consulti.

S C. A. Supreme and Exchequer Courts Act, Canada.

S. C. Bar Assn. South Carolina Bar Association

S. C C. Select Chancery Cases (part 3 of Cases in Chancery);—Small Cause Court, India

S. C. Dig. Cassell's Supreme Court Digest, Canada.

S. C E. Select Cases relating to Evidence

S C R. South Carolina Reports, New Series,—Harper's South Carolina Reports,—Supreme Court Reports,—Supreme Court Rules,—Supreme Court of Canada Reports.

S. C. Rep Supreme Court Reports.

S. Car. South Carolina,—South Carolina Reports, New Series.

S. Ct. Supreme Court Reporter.

S. D. South Dakota,—South Dakota Reports.

S. D. A. Sudder Dewanny Adawlut Reports, India.

S Dak. South Dakota Reports

S. D. & B Shaw, Dunlop & Bell's Scotch Court of Session Reports (1st Series).

S. D. & B Sup. Shaw, Dunlop & Bell's Supplement, containing House of Lords Decisions.

S E. or *S. E. R.* or *S. E. Rep.* Southeastern Reporter.

S. F. A. Sudder Foujdaree Adawlut Reports, India.

S. J. Solicitors' Journal.

S. Just. Shaw's Justiciary Cases, Scotch.

S L. Session Law,—Solicitor at Law,—Statute Law.

S L C. Smith's Leading Cases.

S. L. C. App Stuart's Lower Canada Appeal Cases.

S. L D. Sudder Dewanny Adawlut Reports, India.

S. L. Ev. Select Laws relating to Evidence.

S. L J Scottish Law Journal, Edinburgh.

S L R Scottish Law Reporter, Edinburgh;—Southern Law Review, St. Louis.

S. P. Same Point,—Same Principle.

S. R. State Reporter, New York

S. S. Synopsis Series of U. S Treasury Decisions.

S S C. Sandford's New York City Superior Court Reports.

S. T. State Trials.

S. T. D. Synopsis Treasurer's Decisions.

S Teind. or *S. Teinds.* Shaw's Teinds Cases, Scotch Courts.

S. V. A. R. Stuart's Vice-Admiralty Reports, Quebec.

S. W. Southwestern,—Southwestern Reporter.

S. W. L. J. Southwestern Law Journal, Nashville, Tenn.

S. W. Rep. Southwestern Reporter (commonly cited S. W.).

S. & B. Smith and Batty's Reports, Irish King's Bench.

S & C. Saunders & Cole's English Bail Court Reports;—Swan & Critchfield, Revised Statutes, Ohio.

S & D. Shaw, Dunlop & Bell's Scotch Court of Session Reports (1st series).

S. & G. Smale & Giffard, English.

S. & L. Schoales and Lefroy's Reports, Irish Chancery.

S. & M. Shaw & Maclean's Appeal Cases, House of Lords,—Smedes & Marshall's Mississippi Reports.

S. & M'L. Shaw and Maclean's Appeal Cases, English House of Lords.

S. & Mar. Smedes and Marshall's Reports, Mississippi Reports, vols. 9-22.

S & M. Ch. or *S. & Mar. Ch.* Smedes and Marshall's Chancery Reports, Mississippi.

S. & R. Sergeant and Rawle's Reports, Pennsylvania.

S & S. Sausse & Scully's Irish Rolls Court Reports;—Simons & Stuart, English Vice-Chancellors' Reports,—Swan & Sayler, Revised Statutes of Ohio.

S & Sc. Sausse and Scully's Reports, Irish Chancery.

S & Sm. Searle and Smith's Reports, English Probate and Divorce Cases

S & T. Swabey and Tristram's Reports, English Probate and Divorce Cases.

Sal. Salinger's Reports, vols 90-117 Iowa.

Salk. Salkeld's Reports, English Courts.

Salm Abr or *Salm. St. R.* Salmon's Abridgment of State Trials.

San Fr. L. J. San Francisco Law Journal, California.

San U. Sanders on Uses and Trusts.

Sand. Sandford's New York Superior Court Reports.

Sand Ch. Sandford's New York Chancery Reports.

Sand. Eq. Sands's Suit in Equity.

Sand. Essays Sanders's Essays.

Sand. Inst Sandars's Institutes of Justinian.

Sand. I. Rep. Sandwich Island (Hawaiian) Reports.

Sand Jus or *Sandars, Just. Inst.* Sandars's Edition of Justinian's Institutes.

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

Sandf. Sandford's New York Superior Court Reports.

Sandf. Ch. Sandford's Chancery Reports, New York.

Sandf. Ent. Sandford on Entails.

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

Sanf (Ala). Sanford's Reports, Alabama.

Sant de Assec. Santerna de Assecurationibus.

Sar Ch Sen Saratoga Chancery Sentinel.

Sau & Sc. Sausse & Scully's Irish Rolls Court Reports.

Sauls. Saulsbury's Reports, vols. 5-6 Delaware.

Saund. Saunders's Reports, English King's Bench.

Saund Bank. Pr. Saunders's Bankrupt Practice.

Saund Neg Saunders on the Law of Negligence.

Saund Pl. Saunders on Civil Pleading.

Saund Pl. & Ev. Saunders's Pleading and Evidence.

Saund. & C. Saunders and Cole's Reports, English Bail Court.

Saund & Mac. Saunders & Macrae's English County Court Cases.

Sausse & Sc. Sausse & Scully's Irish Rolls Court Reports.

Sav Saville's English Common Pleas Reports.

Sav. Dr. Rom. Savigny, Droit Romain.

Sav His. Rom. L. Savigny's History of the Roman Law.

Sav. Obl. Savigny on Obligations.

Sav. Priv. Trial of the Savannah Privateers.

Sav Priv. Int. L. Savigny on Private International Law.

Sav. Syst. Savigny, System des Heutigen Römischen Richts.

Saw. or *Sawy.* Sawyer's United States Circuit Court Reports.

Sax. or *Saxt.* or *Saxt. Ch.* Saxton's Chancery Reports, New Jersey Equity Reports, vol. 1.

Say. Sayer's Reports, English King's Bench.

Say. Costs. Sayer on Costs.

Say. Pr. Sayle's Practice in Texas.

Sayer. Sayer's English King's Bench Reports.

Sc. Scilicet (that is to say);—Scott's Reports, English Common Pleas;—Scotch;—Scammon's Reports, vols. 2-5 Illinois;—Liber Rubeus Scaccarii, Scottish.

Sc. Jur. Scottish Jurist, Edinburgh.

Sc. L. J. Scottish Law Journal, Glasgow.

Sc. L. M. Scottish Law Magazine, Edinburgh.

Sc. L. R. Scottish Law Reporter, Edinburgh.

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

Sc. Sess. Cas. Scotch Court of Session Cases.

Sc. & Div. App. Scotch and Divorce Appeals (Law Reports).

Scac. or *Scaccaria Curia* Court of Exchequer.

Scam. Scammon's Reports, vols. 2-5 Illinois.

Scan. Mag. Scandalum Magnatum.

Sch. & Lef. Schoales and Lefroy's Reports, Irish Chancery.

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

Schalck or *Schalk (Jam).* Schalck's Jamaica Reports.

Scheiff. Pr. Scheiffer's Practice.

Scher. Scherer, New York Miscellaneous Reports.

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

Schm. L. J. Schmidt's Law Journal, New Orleans.

Schomberg, Mar. Laws Rhodes Schomberg, Treatise on the Maritime Laws of Rhodes.

Schoul Bailm. Schouler on Bailments, including Carriers

Schoul. Dom. Rel. Schouler on Domestic Relations.

Schoul. Per. Pr. or *Shoulер, Pers. Prop.* Schouler on Personal Property.

Schouler, Wills. Schouler on Wills.

Schuyl. Leg. Rec. Schuylkill Legal Record, Pottsville, Pa.

Sci. fa. Scire facias.

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

Scil. Scilicet, That is to say.

Sco. Scott's Reports, English Common Pleas.

Sco Costs. Scott on Costs.

Sco. Int. Scott's Intestate Laws.

Sco. Nat. Scott on Naturalization of Aliens.

Sco. N. R. Scott's New Reports, English Common Pleas.

Sco. & J. Tel. Scott and Jarnigan on the Law of Telegraphs.

Scot. Scotland;—Scottish.

Scot. Jur. Scottish Jurist, Edinburgh.

Scot. L. J. Scottish Law Journal, Glasgow.

Scot. L. M. Scottish Law Magazine, Edinburgh.

Scot. L. R. Scottish Law Reporter, Edinburgh;—Scottish Law Review, Glasgow

Scot L. T. Scot Law Times, Edinburgh.

Scott. Scott's English Common Pleas Reports;—Scott's New York Civil Procedure.

Scott J. Reporter, English Common Bench Reports.

Scott N. R. Scott's New Reports, English Common Pleas.

Scr. L. T. Scranton Law Times, Pennsylvania.

Scrat. Life As. Scratchley on Life Assurance.

Scrib. Dow. Scribner on Dower.

Scriv. Cop. Scriven on Copyholds.

Seab. V. & P. Seaborne on Vendors and Purchasers.

Searle & Sm. Searle and Smith's Reports, English Probate and Divorce.

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

Seb. T. M. or *Seb. Trade-Marks.* Sebastian on Trademarks.

Sec. Section.

Sec. leg. Secundum legum (according to law).

Sec. reg. Secundum regulam (according to rule).

Secd pt Edw. III. Part 3 of the Year Books.

Secd. pt. H. VI. Part 8 of the Year Books.

Sedg. L. Cas. Sedgwick's Leading Cases on the Measure of Damages;—Sedgwick's Leading Cases on Real Property.

Sedg. Meas. D. Sedgwick on the Measure of Damages.

Sedg. St. L. or *Sedg. St. & Const. Law.* Sedgwick on Statutory and Constitutional Law.

Seign. or *Seign. Rep.* Seigniorial Reports, Quebec.

Sel. Cas. Select Cases in Chancery, English.

Sel. Cas. A. S. Law. Select Cases in Anglo-Saxon Law.

Sel. Cas. Ch. Select Cases in Chancery (part 3 of Cases in Chancery).

Sel. Cas D. A. Select Cases, Sudder Dewanny Adawlut, India.

Sel. Cas. Ev. Select Cases in Evidence, English

Sel. Cas. N. F. Select Cases, Newfoundland Courts.

Sel. Cas. N. W. P. Selected Cases, Northwest Provinces, India.

Sel. Cas. N. Y. Yates's Select Cases, New York.

Sel. Cas. t. Br. Cooper's Select Cases *tempore* Brougham.

Sel. Cas. t. King. Select Cases in Chancery *tempore* King.

Sel. Cas. t. Nap. (Drury's) Select Cases *tempore* Napier, Irish Chancery.

Sel Cas with Opin. Select Cases with Opinions, by a Solicitor.

Sel Ch. Cas. Select Cases in Chancery, English.

Sel. Dec. Bomb. Selected Decisions, Sudder Dewanny Adawlut, Bombay.

Sel. Dec. Mad. or *Sel Dec. Madr.* Selected Decrees, Suder Udawlut, Madras

Sel. L. Cas. Select Law Cases.

Sel. Pr. Sellon's Practice.

Seld. or *Seld. (N. Y.).* Selden's Reports, New York Ct. of Appeals Reports, vols. 5-10.

Seld. Notes. Selden's Notes of Cases, New York Court of Appeals.

Seld Tit. Hon. Selden's Titles of Honor.

Selden. Selden's Reports, New York Court of Appeals.

Self. Tr. Selfridge's Trial.

Sell Pr. Sellon's Practice in the King's Bench.

Selw N. P. Selwin's Nisi Prius.

Selw. & Barn. The First Part of Barnewall & Alderson's English King's Bench Reports.

Serg. Attach. Sergeant on Attachment Law, Pa.

Serg. Const. L Sergeant on Constitutional Law.

Serg Land L. or *Serg Land Laws Pa.* Sergeant on the Land Laws of Pennsylvania.

Serg. Mech. L. L. Sergeant on Mechanics' Lien Law.

Serg. & Lowb. Rep. English Common Law Reports, American reprints edited by Sergeant & Lowber.

Serg. & R. or *Serg. & Rawle.* Sergeant & Rawle's Pennsylvania Reports.

Sess. Cas. Sessions Cases (English King's Bench Reports);—Scotch Court of Session Cases.

Scss. Cas. Sc. Session Cases, Scotch Court of Session.

Sess. Pap. C. C. C. Session Papers, Central Criminal Court.

Scss. Pap. O. B. Session Papers, Old Bailey.

Set Cas. English Settlement and Removal Cases (Burrow's Settlement Cases).

Set. Dec. or *Set. F. Dec.* Seton's Forms of Equity Decrees.

Sett. Cas. Settlement Cases.

Sett. & Rem Cas English Settlement & Removal Cases (Burrow's Settlement Cases).

Sev. Sevestre's Reports, Calcutta.

Sev. H. C. Sevestre's High Court Reports, Bengal.

Sev. S. D. A. Sevestre's Sudder Dewanny Adawlut Reports, Bengal.

Sewell, Sheriffs. Sewell on the Law of Sheriffs.

Sh. Shower's English Parliamentary Cases;—Shower's English King's Bench Reports;—Shepley's Reports, vols. 13-18 and 21-30 Maine;—Shaw's Scotch Appeal Cases;—Shaw's, etc., Decisions in the Scotch Court of Session (1st Series);—Shaw's Scotch Justiciary Cases;—Shaw's Scotch Teind Court Reports;—G. B. Shaw's Reports, vols. 10, 11 Vermont;—W. G. Shaw's Reports, vols. 30-35 Vermont;—Shir-

ley's Reports, vols. 49-55 New Hampshire;—Sheldon's Buffalo, New York, Superior Court Reports,—Shepherd's Reports, Alabama,—Shipp's Reports, vols. 66, 67 North Carolina,—Shand's Reports, vols. 11-44 South Carolina,—Shadforth's Reserved Judgments, Victoria.

Sh. App. Shaw's Appeal Cases, English House of Lords, Appeals from Scotland.

Sh. Crim. Cas. Shaw's Criminal Cases (Justiciary Court).

Sh. Dig. Shaw's Digest of Decisions, Scotland.

Sh. Jus. Shaw's Justiciary Cases, Scotland.

Sh. W. & C. Shaw, Wilson and Courtnay's Reports, English House of Lords, Scotch Appeals (Wilson and Shaw's Reports).

Sh. & Dunl. Shaw and Dunlop's Reports, First Series, Scotch Court of Session.

Sh. & Macl. Shaw and Maclean's Appeal Cases, English House of Lords.

Shad. Shadford's Victoria Reports.

Shan. Shannon's Tennessee Cases.

Shand. Shand's Reports, South Carolina.

Shand Pr. Shand's Practice, Court of Session.

Sharp. Sharpstein's Digest of Life and Accident Insurance Cases.

Shars. Bl. Comm. Sharswood's Blackstone's Commentaries.

Shars. Tab. Ca. Sharswood's Table of Cases, Connecticut.

Sharsw. Bla. Com. Sharswood's Blackstone's Commentaries.

Sharsw. Comm. Law. Sharswood on Commercial Law.

Sharsw. Law Lec. Sharswood's Law Lectures.

Sharsw. Leg. Eth. Sharswood's Legal Ethics.

Sharsw. & B. R. P. Cas. Sharswood & Budd Real Property Cases.

Shaw. Shaw's Reports, First Series, Scotch Court of Session.

Shaw. Shaw's Scotch Appeal Cases;—Shaw's etc., Decisions in the Scotch Court of Session (1st Series);—Shaw's Scotch Justiciary Cases;—Shaw's Scotch Teind Court Reports;—G. B. Shaw's Reports, vols 10, 11 Vermont,—W. G. Shaw's Reports, vols. 30-35 Vermont.

Shaw App. Shaw's Appeal Cases, English House of Lords, Appeals from Scotland.

Shaw, Dec. Shaw's, etc., Decisions in the Scotch Court of Session (1st Series).

Shaw Dig. Shaw's Digest of Decisions, Scotch Courts.

Shaw, Dunl & B. Shaw, Dunlop & Bell's (1st Series) Scotch Session Cases.

Shaw (G. B.). G. B. Shaw's Reports, vols. 10, 11 Vermont.

Shaw, H. L. Shaw's Scotch Appeal Cases, House of Lords.

Shaw Jus. Shaw's (John) Scotch Justiciary Cases.

Shaw T. Cas. Shaw's Scotch Teind Court Reports.

Shaw (Vt.). Shaw's Reports, Vermont.

Shaw (W. G.). W. G. Shaw's Reports, 30-35 Vermont.

Shaw, W. & C. Shaw, Wilson and Courtnay's Reports, English House of Lords, Scotch Appeals (Wilson and Shaw's Reports).

Shaw & Dunl. Shaw and Dunlop's Reports, First Series, Scotch Court of Session.

Shaw & Macl. Shaw and Maclean's Scotch Appeal Cases, English House of Lords.

Shearm. & Red. Neg. Shearman and Redfield on the Law of Negligence

Shel. Sheldon (see Sheld.).

Shel. Ca. Shelley's Case in vol. 1 Coke's Reports.

Sheld or *Sheldon.* Sheldon's Reports, Superior Court of Buffalo, New York.

Shelf. Copy Shelford on Copyholds.

Shelf. J. S. Co. Shelford on Joint Stock Companies.

Shelf. Lun. Shelford on Lunacy.

Shelf. M. & D. or *Shelf. Mar. & Div.* Shelford on Marriage and Divorce.

Shelf. Mort. Shelford on Mortmain.

Shelf. Railw. Shelford on Railways.

Shelf. R. Pr. Shelford's Real Property Statutes.

Shep. Shepley's Reports, vols. 13-18 and 21-30 Maine;—Shepherd's Reports, Alabama.

Shep. Abr. Sheppard's Abridgment.

Shep. Sel. Cas. Shepherd's Select Cases, Alabama.

Shep. Touch. Sheppard's Touchstone.

Shepl. Shepley's Reports, Maine.

Shepp. Abr. Sheppard's Abridgment.

Shepp. Act. Sheppard's Action upon the Case.

Shepp. Cas. Sheppard's Cases on Slander.

Shepp. Touch. Sheppard's Touchstone.

Sher. Ct. Rep Sheriff Court Reports, Scotland;—Sheriff Court Reporter.

Shiel. Shiel's Reports, Cape Colony.

Ship. Gaz. Shipping Gazette, London.

Shipp. Shipp's Reports, North Carolina.

Shirl. Shirley's Reports, New Hampshire.

Shirl. L. C. Shirley's Leading Crown Cases.

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Show. K. B. Shower's English King's Bench Reports.

Show. P. C. Shower's English Parliamentary Cases.

Sick. Sickels's Reports, N. Y. Court of Appeals Reports.

Sick. Min. Dec. or *Sick Min. Laws & D.* Sickels's Mining Laws and Decisions.

Sick Op. Sickels's Opinions of the New York Attorneys-General.

Sid. Siderfin's Reports, English King's Bench.

Sid. Gov. Sidney on Government.

Sieye. Sieye Traité sur l'Adultère.

Silv. Silvernail's Unreported Cases, New York Court of Appeals;—Unreported Cases, New York Supreme Court,—Criminal Reports, New York.

Silv Ct. Silvernail's New York Citations.

Silvern. N. Y. Silvernail's New York Court of Appeals.

Silvern. N. Y. Sup. Ct. Silvernail's New York Supreme Court.

Sim Simons's English Vice-Chancery Reports;—Simmons's Reports, vols. 99, 100 Wisconsin.

Sim Dig. Simond's Digest of Patent Office Decisions.

Sim. Int. Simon on the Law of Interpleader.

Sim. N S. Simons's English Vice-Chancery Reports, New Series.

Sim. Pat. L. Simond's Manual of Patent Law.

Sim. Pr. Ct. M. Simmon's Practice of Courts Martial.

Sim. R. A. Simon's Law relating to Railway Accidents.

Sim. & C. Simmons & Conover's Reports, vols 99, 100 Wisconsin.

Sim & S or *Sim. & Stu.* Simon and Stuart's English Chancery Reports.

Sinclair. Sinclair's Manuscript Decisions, Scotch Session Cases.

Sir T J. Sir Thomas Jones's Reports.

Six Circ. or *Six Circ. Cas.* Cases on the Six Circuits, Irish N. P.

Skene or *Skene Verb. Sign.* Skene's De Verborum Significatione.

Skill. Pol Rep. or *Skillm.* Skillman's New York Police Reports.

Skin. Skinner's English King's Bench Reports.

Skink. or *Skinker.* Skinker's Reports, Missouri.

Skinn. Skinner's Reports, English King's Bench

Slade. Slade Reports, Vermont.

Sloan Leg Reg Sloan's Legal Register, New York.

Sm. Smith's Reports, English King's Bench.

Sm. Ac. or *Sm. Act.* Smith's Actions at Law.

Sm. C. C. M. Smith's Circuit Courts-Martial Reports, Maine.

Sm. Ch. Pr. Smith's Chancery Practice.

Sm. Cond. Ala. Smith's Condensed Alabama Reports.

Sm. Cont. Smith on Contracts.

Sm. E. D. or *Sm. (E. D.).* E. D. Smith's Reports, New York Common Pleas.

Sm. Eng. Smith's Reports, English King's Bench.

Sm. Eq. Smith's (J. W.) Manual of Equity;—Smith's Principles of Equity.

Sm. Ex. Int. Smith on Executory Interest.

Sm. For. Med. Smith's Forensic Medicine.

Sm. Forms. Smith's Forms of Procedure.

Sm. (Ind.). Smith's Reports, Indiana.

Sm. (K. B.). Smith's Reports, English King's Bench.
Sm. L. C. Smith's Leading Cases.
Sm. L. C. Comm. L. or *Sm. L. Cas. Com. L.* Smith's Leading Cases on Commercial Law.
Sm L. J. Smith's Law Journal.
Sm Law of Prop. Smith on Real and Personal Property.
Sm Lead. Cas Smith's Leading Cases.
Sm. L & T. Smith on Landlord and Tenant.
Sm Mast. & S Smith on Master and Servant.
Sm (Me.). Smith's Reports, Maine.
Sm. Merc. L. Smith's Mercantile Law.
Sm (N H.). Smith's Reports, New Hampshire.
Sm (N. Y.). Smith's Reports, New York Court of Appeals Reports, vols. 15-27
Sm or *Sm. (P F.) (Pa.).* Smith's Reports, Pennsylvania State Reports, vols. 51-81.
Sm Pat. Smith on Patents.
Sm. Prob L Smith's Probate Law and Practice.
Sm Real & P. Pr. Smith on Real and Personal Property.
Sm Recc. Smith's Law of Receivers.
Sm. Repar. Smith's Law of Reparation.
Sm Stat. L. Smith's Statutory and Constitutional Law.
Sm. (Wis.). Smith's Reports, Wisconsin.
Sm. & B R. R. Cas or *Sm. & B. Railw. Cas.* Smith and Bates's Railway Cases, American Courts.
Sm & Bat or *Sms & Bat.* Smith & Batty's Irish King's Bench Reports.
Sm & G Smale & Giffard's English Vice-Chancellors' Reports,—Smith & Guthrie's Reports, vols. 81-101 Missouri Appeals.
Sm & M. Smedes & Marshall's Mississippi Reports.
Sm & M. Ch. Smedes and Marshall's Chancery Reports, Mississippi.
Sma & Giff. Smale & Giffard's English Vice-Chancellors' Reports.
Smale & Giff. Smale and Giffard's Reports, English Chancery.
Smed & M. Smedes & Marshall's Mississippi Reports
Smed & M Ch. Smedes & Marshall's Mississippi Chancery Reports
Smedes & M (Miss.). Smedes & Marshall's Mississippi Reports.
Sm & S Dig Vict. Smith & Skinner's Digest of Victorian Reports.
Sm & Sod L & T. Smith and Soden on Landlord and Tenant.
Smedes & M. Smedes and Marshall's Reports, Mississippi Reports
Smedes & M. Ch. Smedes and Marshall's Chancery Reports, Mississippi
Smith See *Sm* Smith's New Hampshire Reports; Smith's Reports, vols. 2-4 Dakota,—J. P. Smith's English King's Bench Reports,—Smith, in continuation of Fox & Smith;—Smith, English Registration,—P. F. Smith's Pennsylvania State Reports;—E. P. Smith's Reports, vols. 15-27 New York Court of Appeals,—E D Smith's New York Common Pleas Reports,—E. H. Smith's Reports, vols. 147-162 New York Court of Appeals;—Smith's Reports, vols. 54-62 California;—Smith's Indiana Reports;—Smith's Reports, vols. 61-64 Maine;—Smith's Reports, vols. 1-11 Wisconsin;—E. B. Smith's Reports, vols. 21-47 Illinois Appeals;—Smith, Reporter vols. 7, 12 Heiskell's Tennessee Reports;—Smith's Reports, vols. 81-101 Missouri Appeals.
Smith, Act Smith's Actions at Law.
Smith C. P. E. D. Smith's Common Pleas Reports, New York.
Smith, Ch. Pr. Smith's Chancery Practice.
Smith, Cont. Smith on Contracts.
Smith de Rep. Angl. Smith (Sir Thomas), De Republica Anglica [The Commonwealth of England and the Manner of Government Thereof. 1621.]
Smith, Dict. Antiq. Smith's Dictionary of Greek and Roman Antiquities.
Smith E. H. Smith's (E. H.) Reports, vols. 147-162 New York Court of Appeals.
Smith E. P. or *Smith E. P. Ct. App.* E. P. Smith's Reports, vols. 15-27 New York Court of Appeals.
Smith Ind. Smith's Indiana Reports.
Smith J. P. J. P. Smith's English King's Bench Reports.
Smith L. C. Smith's Leading Cases.
Smith, Laws Pa. Smith's Laws of Pennsylvania.
Smith, Lead. Cas. Smith's Leading Cases.
Smith Me. Smith's Reports, vols. 61-64 Maine.
Smith, Merc. Law. Smith on Mercantile Law.
Smith N. H. Smith's New Hampshire Reports.
Smith N. Y. Smith's Reports, vols. 15-27 and 147-162 New York Court of Appeals.
Smith P. F. or *Smith P. F. Pa.* P. F. Smith's Pennsylvania State Reports.
Smith, Wealth Nat. Smith, Inquiry into the Nature and Causes of the Wealth of Nations.
Smith Wis. Smith's Reports, vols. 1-11 Wisconsin
Smith & B. Smith & Batty's Irish King's Bench Reports,—Smith & Bates's American Railway Cases.
Smith & B. R. R. C. Smith & Bates's American Railway Cases.
Smith & G. Smith & Guthrie's Missouri Appeals Reports.
Smoult. Notes of cases in Smoult's Collection of Orders, Calcutta.
Smy or *Smythe.* Smythe's Irish Common Pleas Reports.
Sn or *Sneed.* Sneed's Tennessee Reports;—Sneed's Kentucky Decisions.
Sneed Dec. or *Sneed Ky.* Sneed's Kentucky Decisions.
Snell Eq Snell's Principles of Equity.
Snell, Eq. Snell's Principles in Equity.
Snow. Snow's Reports, Utah.
Snow Cas. Int. L. Snow's Cases on International Law
Snyder Rel Corp. Snyder on Religious Corporations
So. Aus. L R. or *So Austr. L. R.* South Australian Law Reports
So Car. South Carolina;—South Carolina Reports.
So Car Const. South Carolina Constitutional Reports (by Treadway, by Mill, or by Harper).
So. Car. L. J. South Carolina Law Journal, Columbia.
So. East. Rep. Southeastern Reporter.
So L J. Southern Law Journal and Reporter, Nashville, Tenn.
So. L R. Southern Law Review, Nashville, Tenn.
So. L. R. N S. Southern Law Review, New Series, St Louis, Mo.
So L T. Southern Law Times.
So. Rep Southern Reporter (commonly cited South. or So.).
So West L. J. Southwestern Law Journal, Nashville, Tenn.
So. West Rep. Southwestern Reporter (commonly cited S. W.).
Soc. Econ. Social Economist.
Sol. Gen. Solicitor General.
Sol. J. Solicitor's Journal, London.
Sol. J. & R. Solicitors' Law Journal and Reporter, London.
Somn. Gavelkind or *Somner.* Somner on Gavelkind.
Sou. Aus. L. R. South Australian Law Reports.
South. Southard's Reports, New Jersey Law.
South. Southern Reporter.
South Car. South Carolina.
South. L. J. & Rep. Southern Law Journal and Reporter, Nashville, Tenn.
South. L. Rev. Southern Law Review, Nashville, Tenn.
South. L. Rev. N. S. Southern Law Review, New Series, St. Louis, Mo.
Southard. Southard's New Jersey Reports.
Southw. L. J. Southwestern Law Journal and Reporter.
Sp. Spink's English Ecclesiastical and Admiralty Reports;—Spears's South Carolina Law Reports.
Sp. A. Special Appeal.
Sp. Ch. or *Sp. Eq.* Spears's South Carolina Equity Reports.
Sp. Laws. Spirit of Laws, by Montesquieu.
Sp. Pr. Cas. Spink's Prize Cases.
Sp. T. Special Term.
Sp. & Sel. Cas. Special and Selected Law Cases.

Sparks. Sparks's Reports, British Burmah.
Spaulding. Spaulding's Reports, vols. 71-80 Maine.
Spear. Spear's Reports, South Carolina.
Spear Ch. or *Spear Eq.* Spear's Chancery Reports, South Carolina.
Spear Extr Spear's Law of Extradition.
Spears Eq. or *Specrs Eq.* Spears's (or Speers's) South Carolina Equity Reports.
Spel. Spelman's Glossary.
Spel. Feud or *Spel. Feuds.* Spelman on Feuds.
Spel. Rep. Spelman's Reports, Manuscript, English King's Bench.
Spelman Spelman, Glossarium Archaiologicum.
Spenc. Spencer's Reports, New Jersey Law.
Spenc. (Minn). Spencer's Reports, Minnesota.
Spence, Ch. Spence's Equitable Jurisdiction of the Court of Chancery.
Spence, Eq Jur. Spence's Equitable Jurisdiction of the Court of Chancery.
Spence Or. L. Spence's Origin of Laws.
Spencer. Spencer's New Jersey Reports;—Spencer's Reports, vols. 10-20 Minnesota.
Spens Sel Cas. Spens's Select Cases, Bombay.
Spink. Spink's Reports, English Admiralty and Ecclesiastical.
Spink P. C. Spink's Prize Cases, English.
Spinks. Spinks's English Ecclesiastical and Admiralty Reports.
Spinks, P. C. Spinks's English Prize Cases.
Spoon. or *Spooner.* Spooner's Reports, Wisconsin, vols. 12-15.
Spott. Spottiswoode's Reports, Scotch Court of Session.
Spott. C. L. Rep. Spottiswoode's Common Law Reports.
Spott. Eq. Rep. Spottiswoode's English Equity Reports.
Spott. St. Spottiswoode's Styles, Scotland.
Spottis. Sir R. Spottiswoode's Reports, Scotch Court of Session.
Spottis. C. L & Eq. Rep. Common Law and Equity Reports, published by Spottiswoode.
Spr. or *Sprague.* Sprague's United States District Court (Admiralty) Decisions.
St. State,—Story's United States Circuit Court Reports (see Sto);—Stair's Scotch Court of Session Reports ,—Stuart's (Milne & Peddie) Scotch Session Cases,—Statutes ,—Statutes at Large.
St Abm Statham's Abridgment.
St. Armand. St. Armand on the Legislative Power of England.
St. at Large. South Carolina Session Laws.
St. Cas. Stillingfleet's Ecclesiastical Cases, English.
St. Ch Cas. Star Chamber Cases.
St. Clem. St. Clement's Church Case, Philadelphia.
St. Ecc. Cas. or *St Eccl. Cas.* Stillingfleet's Ecclesiastical Cases, English.
St Inst. Stair's Institutes of the Law of Scotland
St. Mark or *St. Marks.* St. Mark's Church Case, Philadelphia.
St. Marlb. Statute of Marlbridge.
St. Mert. Statute of Merton.
St M. & P. Stuart, Milne & Peddie, Scotch.
St. P. State Papers.
St. Rep. State Reports;—State Reporter.
St Tr or *St. Trt* State Trials.
St Westm. Statute of Westminster.
Stafford Stafford's Reports, vols 69-71 Vermont.
Stair. Stair's Reports, Scotch Court of Session
Stair Inst. Stair's Institutes of the Laws of Scotland.
Stair Pr. Stair's Principles of the Laws of Scotland.
Stant. or *Stanton.* Stanton's Reports, Ohio, vols. 11-13.
Star. Starkie's English Nisi Prius Reports.
Star Ch Ca. or *Star Ch. Cas.* Star Chamber Cases.
Stark. Cr. L. Starkie on Criminal Law.
Stark Cr. Pl. Starkie on Criminal Pleading.
Stark. Ev. Starkie on Evidence.
Stark. Jury Tr. Starkie on Trial by Jury.
Stark. N. P. Starkie's Reports, English Nisi Prius.
Stark Slan. Starkie on Slander and Libel.
Starkie, Ev. Starkie on Evidence.
Stat. Statute.
Stat. at L. or *Stat. at L. U. S.* Statutes at Large.
Stat. Glo. Statute of Gloucester.
Stat. Marl. Statute of Marlbridge.
Stat. Mer. Statute of Merton.
Stat. Westm. Statute of Westminster.
Stat. Winch. Statute of Winchester.
State Tr. State Trials.
Statham. Abr. Statham's Abridgment of the Law.
Staundef. Staundeforde, Exposition of the King's Prerogative.
Staundef. P. C. Staundeforde, Les Plees del Coron.
Staunf. P. C. & Pr. Staunforde's Pleas of the Crown and Prerogative.
Stearns R. A. or *Stearns, Real Act.* Stearns on Real Actions.
Steph. Com. or *Steph. Comm.* Stephen's Commentaries on English Law.
Steph. Const. Stephens on the English Constitution.
Steph. Cr. L. Stephen on Criminal Law.
Steph. Crim. Dig. Stephen's Digest of the Criminal Law.
Steph. Dig. Stephen's Digest, New Brunswick Reports.
Steph. Elect. Stephens on Elections
Steph. Ev. Stephen's Digest of Evidence.
Steph. Lect. Stephen, Lectures on History of France.
Steph. N. P. Stephens's Nisi Prius.
Steph Pl. Stephen on Pleading.
Stev. Dig. Stevens's New Brunswick Digest.
Stev & Ben. Av. Stevens and Benecke on Average and Insurance.
Stevens & G. Stevens & Graham's Reports, vols. 98-139 Georgia.
Stew. Stewart's Alabama Reports;—Stewart's New Jersey Equity Reports ,—Stewart's (R. W.) Reports, vols. 1-10 South Dakota.
Stew. (Ala.). Stewart's Reports, Alabama.
Stew. Adm. Stewart's Vice-Admiralty Reports, Nova Scotia.
Stew. Eq. Stewart's Reports, vols. 28-45 New Jersey Equity.
Stew. (N. J.). Stewart's Reports, New Jersey Equity Reports, vols 28-45.
Stew. N. Sc. Stewart's Admiralty Reports, Nova Scotia.
Stew. V. A. Stewart's Vice-Admiralty Reports, Nova Scotia.
Stew & P or *Stew. & Port.* Stewart & Porter's Alabama Reports.
Stiles Stiles's Reports, Iowa.
Still Eccl Cas. or *Stillingfl. Ecc.* Stillingfleet's Ecclesiastical Cases.
Stim Gloss. or *Stim. Law Gloss.* Stimson's Law Glossary.
Stimson. Stimson's Law Glossary.
Stiness. Stiness's Reports, vols. 20-34 Rhode Island.
Sto. or *Sto. C. C.* Story's United States Circuit Court Reports.
Sto. & H. Cr. Ab. Storer and Heard on Criminal Abortion.
Stock. Stockton's New Jersey Equity Reports;—Stockton, New Brunswick (same as Berton's Reports).
Stock. (Md.). Stockett's Reports, Maryland.
Stock Non Com. Stock on the Law of Non Compotes Mentis.
Stockett. Stockett's Reports, vols. 27-79 Maryland.
Stockt. Ch. Stockton's New Jersey Chancery Reports.
Stokes L. of A. Stokes on Liens of Attorneys.
Stone B. B. S. Stone on Benefit Building Societies.
Storer & H. Cr. Ab. Storer and Heard on Criminal Abortion.
Story. Story's United States Circuit Court Reports. See, also, Sto.
Story Ag. Story on Agency.
Story Bailm. Story on Bailments.
Story Bills. Story on Bills.
Story Comm. Story's Commentaries.
Story Confl. L. or *Story, Confl. Laws.* Story on Conflict of Laws.

Story Const. Story on the Constitution.
Story Cont. or *Story Contr.* Story on Contracts.
Story Eq. Jur. Story's Equity Jurisprudence.
Story Eq. Pl. Story's Equity Pleading.
Story Laws or *Story L. U. S.* Story's Laws of the United States.
Story Part. or *Story Partn.* Story on Partnership.
Story Prom. N. or *Story Prom. Notes.* Story on Promissory Notes.
Story Sales. Story on Sales of Personal Property.
Story, U. S. Laws. Story's Laws of the United States.
Str Strange's English King's Bench Reports.
Str. Cas. Ev. or *Str. Evo.* Strange's Cases of Evidence ("Octavo Strange").
Str. H. L. Strange's Hindoo Laws.
Str. N. C. Strange's Notes of Cases, Madras.
Stra. Strange,—Strange's Reports, English Courts
Straac de Mer. Straacha de Mercatura, Navibus Assecurationibus.
Strah. Dom. Strahan's Translation of Domat's Civil Law.
Strahan. Strahan's Reports, vol. 19 Oregon.
Stran. Strange.
Strange. Strange's Reports, English Courts.
Strange, Madras. Strange's Notes of Cases, Madras.
Stratton. Stratton's Reports, vols. 12-14, 19 Oregon.
Stringf. Stringfellow's Reports, Missouri.
Stringfellow. Stringfellow's Reports, vols. 9-11 Missouri.
Strob. Strobhart's Law Reports, South Carolina.
Strob. Ch. or *Strob Eq.* Strobhart's Equity Reports, South Carolina.
Struve. Struve's Reports, vol. 3 Washington Territory.
Stu. Stuart, Milne and Peddie's Reports, Scotch Court of Session.
Stu. Adm. Stuart's Lower Canada Vice-Admiralty Reports.
Stu Ap. Stuart's Appeal Cases (Lower Canada King's Bench Reports).
Stu K B or *Stu L. C.* Stuart's Reports, Lower Canada King's Bench
Stu Mil & Ped. Stuart, Milne & Peddie's Scotch Court of Session Reports.
Stu M. & P. Stuart, Milne and Peddie's Reports, Scotch Court of Session.
Stu V. A. Stuart's Vice-Admiralty Reports, Lower Canada
Stuart Stuart's Lower Canada King's Bench Reports,—Stuart's Lower Canada Vice-Admiralty Reports,—Stuart, Milne & Peddie's Scotch Court of Session Reports.
Stuart L C K. B. Stuart's Lower Canada King's Bench Reports.
Stuart L. C. V. A. Stuart's Lower Canada Vice-Admiralty Reports.
Stud. Hist. Studies in History, Economics and Public Law.
Sty. Style's English King's Bench Reports.
Sty Pr. Reg. Style's Practical Register.
Sud. Dew. Ad or *Sud. Dew. Adul.* Sudder Dewanny Adawlut Reports, India
Sud. Dew. Rep Sudder Dewanny Reports, N. W. Provinces, India.
Sugd. Est. Sugden on the Law of Estates.
Sugd. Pow. or *Sugd. Powers.* Sugden on Powers.
Sugd. Pr. Sugden on the Law of Property.
Sugd Pr St. Sugden on Property Statutes.
Sugd. Vend or *Sugd. Vend. & P.* Sugden on Vendors and Purchasers.
Sull. Land Tit. Sullivan on Land Titles in Massachusetts.
Sull. Lect. Sullivan's Lectures on Constitution and Laws of England.
Sum. Summa, the summary of a law;—Sumner's United States Circuit Court Reports.
Sum. Ves. Sumner's Edition of Vesey's Reports.
Summ. Dec Summary Decisions, Bengal.
Summerfield, S. Summerfield's (S) Reports, vol. 21 Nevada.
Sumn. Sumner's Reports, U. S. Circuit Court, 1st Circuit.
Sumn. Ves. Sumner's Edition of Vesey's Reports.
Sup. Superseded;—Superior;—Supreme;—Supplement.
Sup. Ct. or *Sup. Ct. Rep.* Supreme Court Reporter of Decisions of United States Supreme Court.
Super. Superior Court;—Superior Court Reports.
Supp. Supplement;—New York Supplement Reports.
Supp. Ves. Jun. or *Supp. Ves. Jr.* Supplement to Vesey, Jr.'s Reports.
Supr. Supreme;—Superior Court Reports.
Supr. Ct. Rep. Federal & Supreme Court Reporter. All the Federal Courts.
Surr. Surrogate.
Susq. L. C. Susquehanna Leading Chronicle.
Suth. Sutherland's Reports, Calcutta.
Suth. Bengal. Sutherland's High Court Reports, Bengal.
Suth. Dam. Sutherland on the Law of Damages.
Suth. F. B. R. Sutherland's Full Bench Rulings, Bengal.
Suth. P. C. A. or *Suth. P. C. J.* Sutherland's Privy Council Judgments or Appeals.
Suth. W. R or *Suth. W. Rep.* Sutherland's Weekly Reporter, Calcutta.
Sw. Swanston's English Chancery Reports;—Swabey's English Admiralty Reports;—Sweeney's New York Superior Court Reports;—Swan's Tennessee Reports,—Swinton's Scotch Justiciary Cases;—Swan,—Sweet,—Swift.
Swab or *Swab Adm* or *Swab. Admr.* Swabey's Admiralty Reports, English.
Swab & Tr or *Swab & Trist.* Swabey and Tristram's Reports, English Probate and Divorce.
Swan. Swan's Tennessee Reports;—Swanston's English Chancery Reports.
Swan '41. Swan's Revised Statutes of Ohio, 1841
Swan '54. Swan's Revised Statutes of Ohio, 1854.
Swan. Ch. Swanston's English Chancery Reports.
Swan Ecc. Cas. Swan on the Jurisdiction of Ecclesiastical Courts.
Swan Just. Swan's Justice
Swan Pl. & Pr. Swan's Pleading and Practice.
Swan Pr. Swan's Practice
Swan Tr. Swan's Treatise, Ohio.
Swans. Swanston's Reports, English Chancery.
Swans. or *Swanst.* Swanston's English Chancery Reports.
Sween. or *Sweeney* Sweeney's New York Superior Court Reports, vols. 31, 32.
Sweet Sweet's Law Dictionary,—Sweet on the Limited Liability Act,—Sweet's Marriage Settlement Cases;—Sweet's Precedents in Conveyancing;—Sweet on Wills.
Sweet M. Sett. Cas. Sweet's Marriage Settlement Cases.
Sweet Pr. Conv. Sweet's Precedents in Conveyancing
Swift Dig. Swift's Digest, Connecticut.
Swift Sys. Swift's System of the Laws of Connecticut.
Swin. or *Swin. Jus. Cas.* Swinton's Scotch Justiciary Cases.
Swin. Reg. App. Swinton's Scotch Registration Appeal Cases.
Swinb. Des. Swinburne on the Law of Descents.
Swinb. Mar. Swinburne on Marriage.
Swinb Spo. Swinburne on Spousals.
Swinb. Wills. Swinburne on Wills.
Swint. Swinton's Justiciary Cases, Scotland.
Syd App. Sydney on Appeals.
Syme. Syme's Justiciary Cases, Scotland.
Syn. Ser. Synopsis Series of the U. S. Treasury Decisions.
T. Territory;—Tappan's Ohio Reports;—*Tempore;*—Title;—Trinity Term.
T. B. Mon. or *T. B. Monr.* T. B. Monroe's Kentucky Reports.
T B. & M. Tracewell, Bowers & Mitchell, United States Comptroller's Decisions, 1898.
T. E R. Tempore Regis Edwardi.
T. Jones or *2 Jones.* T. Jones's English King's Bench and Common Pleas Reports.
T. L. Termes de la Ley.
T. L. R. Times Law Reports.

T. R. Term Reports, Durnford & East;—Teste Rege;—Dayton Term Reports
T. R. E. or *T. E. R* Tempore Regis Edwardi.
T. R. (N. Y.). Caines's (Term) Reports, New York.
T. R. N. S. Term Reports, New Series (East's Reports).
T. Raym. T. Raymond's Reports, English King's Bench.
T. T. Trinity Term.
T. T. R. Tarl Town Reports, New South Wales
T. U. P. Charlt. T. U. P. Charlton's Reports, Georgia.
T. & C. Thompson and Cook's Reports, New York Supreme Court.
T. & G. Tyrwhitt and Granger's Reports, English Exchequer
T. & M. Temple & Mew's Crown Cases, English.
T. & P. Turner and Phillips's Reports, English Chancery.
T. & R. Turner and Russell's Reports, English Chancery.
Tait. Tait's Manuscript Decisions, Scotch Session Cases.
Tait Ev. Tait on Evidence.
Tal. or *Talb.* Cases *tempore* Talbot, English Chancery.
Tam. Tamlyn's English Rolls Court Reports.
Taml. Tamlyn's Reports, English Chancery.
Taml. Ev. Tamlyn on Evidence.
Taml T. Y. Tamlyn on Term of Years.
Tan. or *Tan. Dec.* or *Taney.* Taney's Decisions, by Campbell, United States Circuit Court, 4th Circuit.
Tann. or *Tanner.* Tanner's Reports, vols 8-14 Indiana;—Tanner's Reports, vols. 13-17 Utah.
Tap. Tappan's Nisi Prius Reports, Ohio
Tap. C. M. Tapping's Copyholder's Manual.
Tap. Man. Tapping on the Writ of Mandamus.
Tapp. Tappan's Nisi Prius Reports, Ohio
Tapp M. & C. Tapp on the Law of Maintenance and Champerty.
Tarl Term R. Tarleton's Term Reports, New South Wales.
Tas.-Lang Const. His. Taswell-Langmead's Constitutional History of England
Taun. or *Taunt.* Taunton's English Common Pleas Reports.
Tax Law Rep. Tax Law Reporter.
Tay. Taylor (see Taylor);—Taylor's Reports, Ontario.
Tay. J. L or *Tay. N. C.* J. L. Taylor's North Carolina Reports.
Tay. U. C. Taylor's Upper Canada Reports.
Tay. & B. Taylor & Bell's Bengal Reports.
Tayl. Bank. L. Taylor on the Bankruptcy Law.
Tayl. Civ. L. or *Tayl. Civil Law.* Taylor on Civil Law.
Tayl. Ev. Taylor on Evidence.
Tayl. Gloss. Taylor's Law Glossary.
Tayl. Gov Taylor on Government
Tayl. Hist. Gav. Taylor (Silas), History of Gavelkind.
Tayl. (J. L.). Taylor's Reports, North Carolina Term Reports.
Tayl. L. & T. Taylor on Landlord and Tenant.
Tayl. Law Glos. Taylor's Law Glossary
Tayl. Med Jur. Taylor's Medical Jurisprudence.
Tayl. Pois. Taylor on Poisons.
Tayl. (U. C.). Taylor's Reports, Upper Canada King's Bench.
Tayl. Wills. Taylor on Wills.
Taylor. Taylor's North Carolina Reports;—Taylor's Upper Canada Reports;—Taylor's Bengal Reports
Taylor U. C. Taylor's King's Bench Reports, Upper Canada (now Ontario).
Tech. Dict. Crabb's Technological Dictionary.
Techn. Dict Crabb's Technological Dictionary.
Tel. The Telegram, London.
Temp. Tempore (in the time of).
Temp. Geo. II. Cases in Chancery *tempore* George II.
Temp. & M. Temple & Mew's English Crown Cases.
Ten. Cas. Thompson's Unreported Cases, Tennessee;—Shannon's Cases, Tennessee.
Tenn. Tennessee;—Tennessee Reports (Overton's).
Tenn. Ch. Tennessee Chancery Reports (Cooper's).
Tenn. Leg. Rep. Tennessee Legal Reporter, Nashville.
Term. Term Reports, English King's Bench (Durnford and East's Reports).
Term N. C. Term Reports, North Carolina, by Taylor.
Term R. Term Reports, English King's Bench (Durnford & East's Reports).
Termes de la Ley. Les Termes de la Ley.
Terr. Territory;—Terrell's Reports, vols. 52-71 Texas.
Terr. & Wal. or *Terr. & Walk.* Terrell and Walker's Reports, Texas Reports, vols. 33-51.
Tex. Texas;—Texas Reports.
Tex. App. Texas Court of Appeals Reports (Criminal Cases);—Texas Civil Appeals Cases
Tex. Civ. App. or *Tex. Civ. Rep.* Texas Civil Appeals Reports.
Tex. Cr. App. Texas Criminal Appeals.
Tex. Crim. Rep. Texas Criminal Reports.
Tex. Ct. Rep. Texas Court Reporter.
Tex L. J. Texas Law Journal, Tyler, Texas.
Tex. Supp. Supplement to vol 25, Texas Reports.
Tex. Unrep. Cas. Texas Unreported Cases, Supreme Court.
Th Thomas (see Thom);—Thomson (see Thom.);—Thompson (see Thomp.).
Th B. & N. Thomson on Bills and Notes.
Th. Br. Thesaurus Brevium.
Th. C. Theodon Capitula et Fragmenta.
Th. C. C. Thacher's Criminal Cases, Massachusetts.
Th. C. Const. Law. Thomas's Leading Cases in Constitutional Law.
Th Dig. Theloall's Digest.
Th. Ent. Thompson's Entries.
Th & C. Thompson & Cook's New York Supreme Court Reports
Thac. Cr. Cas or *Thach Cr. Cas.* Thacher's Criminal Cases, Massachusetts
Thayer. Thayer's Reports, vol. 18 Oregon.
Thayer Cas. Ev. Thayer's Select Cases on Evidence.
Thayer Cont. L. Thayer's Cases on Constitutional Law
The Rep. The Reporter;—The Reports (Coke's Reports).
Them. La Themis, Montreal, Quebec;—The American Themis, New York
Themis. The American Themis, New York.
Theo Pr. & S Theobald on Principal and Surety.
Theo Wills. Theobald on Construction of Wills.
Thes. Brev. Thesaurus Brevium
Tho. Thomas (see Thom);—Thomson (see Thom.);—Thompson (see Thomp.).
Thom. Thomson's Reports, Nova Scotia;—Thomas's Reports, vol. 1 Wyoming.
Thom Bills Thomson on Bills and Notes.
Thom. Co. Litt. Thomas's Edition of Coke upon Littleton.
Thom. Const. L. Thomas's Leading Cases on Constitutional Law.
Thom. Dec. 1 Thomson, Nova Scotia Reports.
Thom. L. C. Thomas's Leading Cases on Constitutional Law.
Thom. Mort. Thomas on Mortgages.
Thom. Rep. 2 Thomson, Nova Scotia Reports.
Thom. Sc. Acts. Thomson's Scottish Acts.
Thom. Sel. Dec. Thomson's Select Decisions, Nova Scotia.
Thom. U. Jur. Thomas on Universal Jurisprudence.
Thom. (Wy.). Thomas's Reports, Wyoming.
Thom. & Fr. Thomas & Franklin's Reports, Maryland Ch Dec, vol. 1.
Thomas. Thomas's Reports, Wyoming Territory.
Thomas, Mortg. Thomas on Mortgages.
Thomp. B. B. S. Thompson on Benefit Building Societies.
Thomp. (Cal.). Thompson's Reports, California Reports, vols 39-40.
Thomp. Car. Thompson on Carriers.
Thomp. Ch. Jury. Thompson on Charging the Jury.

Thomp. Cit. Thompson's Citations, Ohio;—Indiana.
Thomp. Corp. Thompson on Corporations.
Thomp. Ent. Thompson's Entries.
Thomp. High. Thompson on the Law of Highways.
Thomp. Home. & Exem. Thompson on Homestead and Exemption.
Thomp. Liab. Off. Thompson's Cases on Liability of Officers of Corporations.
Thomp. Liab. Stockh. Thompson on Liability of Stockholders.
Thomp. N. B. Cas. Thompson's National Bank Cases.
Thomp. (N. S.). Thompson's Reports, Nova Scotia.
Thomp. Neg. Thompson's Cases on Negligence.
Thomp Rem. Thompson's Provisional Remedies.
Thomp Tenn. Cas. Thompson's Unreported Tennessee Cases.
Thomp. & C. Thompson & Cook's New York Supreme Court Reports.
Thompson Thompson's Reports, vols. 39, 40 California,—Thompson's Nova Scotia Reports.
Thor. Thorington's Reports, vol. 107 Alabama.
Thorn. Thornton's Notes of Cases Ecclesiastical and Maritime, English.
Thorn. Conv. Thornton's Conveyancing.
Thorpe. Thorpe's Reports, vol. 52 Louisiana Annual.
Thos. Thomas (see Thom.).
Throop Ag. or *Throop V. Ag.* Throop on Verbal Agreements.
Tich. Tr. or *Tichb. Tr.* Report of the Tichborne Trial, London.
Tidd. Tidd's Costs;—Tidd's Practice.
Tidd Pr. Tidd's Practice.
Tidd Pr. Tidd's Practice in the King's Bench.
Tiff. Tiffany's Reports, vols. 28-39 New York Court of Appeals.
Tiff. Tiffany's Reports, New York Court of Appeals Reports, vols 28-39.
Tiff & B. Tr. Tiffany and Bullard on Trusts and Trustees.
Tiff. & S. Pr. Tiffany and Smith's Practice, New York.
Tiffany. Tiffany's Reports, vols. 28-39 New York Court of Appeals.
Till. Prec. Tillinghast's Precedents.
Till. & Sh. Pr. Tillinghast and Shearman's Practice.
Till. & Yates App. Tillinghast and Yates on Appeals.
Tillman. Tillman's Reports, vols. 68, 69, 71, 73, 75 Alabama
Times L. R. Times Law Reports.
Tinw. Tinwald's Reports, Scotch Court of Session.
Tit. Title.
To. Jo. Sir Thomas Jones's English King's Bench Reports.
Tobey. Tobey's Reports, vols. 9-10 Rhode Island.
Toll Ex. Toller on Executors.
Tomk. Inst or *Tomk R. L.* Tompkins's Institutes of Roman Law.
Tomk & J. R. L. Tompkins and Jeckens's Roman Law.
Tomkins & J Mod Rom Law. Tomkins & Jencken, Compendium of the Modern Roman Law.
Toml. or *Toml. Cas.* Tomlins's Election Evidence Cases.
Toml. L. D. Tomlin's Law Dictionary.
Toml Supp. Br Tomlin's Supplement to Brown's Parliamentary Cases.
Tor. Deb Torbuck's Reports of Debates.
Tot. or *Toth.* Tothill's English Chancery Reports.
Touch. Sheppard's Touchstone.
Toull. or *Toull Dr. Civ.* or *Toull. Droit Civil Fr.* or *Toullier, Dr. Civ. Fr.* Toullier's Droit Civil Français.
Town. Sl. & L. Townshend on Slander and Libel.
Town. St Tr. Townsend's Modern State Trials.
Town. Sum. Proc. Townshend's Summary Proceedings by Landlords against Tenants.
Townsh Pl. Townshend's Pleading.
Tr. Translation;—Translator.
Tr. App. New York Transcript Appeals.
Tr. Ch. Transactions of the High Court of Chancery (Tothill's Reports).
Tr. Eq Treatise of Equity, by Fonblanque.
Tr. & H. Pr. Troubat and Haly's Practice, Pennsylvania.
Tr & H. Prec. Troubat and Haly's Precedents of Indictments.
Trace & M. Tracewell and Mitchell, United States Comptroller's Decisions
Traill Med. Jur. Traill on Medical Jurisprudence.
Train & H Prec. Train and Heard's Precedents of Indictments.
Traité du Mar. Pothier, Traité du Contrat de Mariage.
Trans. App. Transcript Appeals, New York.
Trat. Jur. Mer. Tratade de Jurisprudentia Mercantil.
Trav. Tw. L. of N. Travers Twiss on the Law of Nations.
Tray. Lat Max or *Leg. Max.* Trayner, Latin Maxims and Phrases, etc.
Tread or *Tread Const. (S. C.).* Treadway's South Carolina Constitutional Reports.
Treb. Jur. de la Méd. Trebuchet, Jurisprudence de la Médecine.
Tred. Tredgold's Reports, Cape Colony.
Trem. Tremaine's Pleas of the Crown.
Trev. Tax. Suc. Trevor on Taxes on Succession.
Tri. Bish. Trial of the Seven Bishops.
Tri E. of Cov. Trial of the Earl of Coventry.
Tri. per Pais. Trials per Pais.
Trib. Civ. Tribunal Civil.
Trib de Com. Tribunal de Commerce.
Trin or *Trin T.* Trinity Term.
Tripp Tripp's Reports, vols 5-6 Dakota.
Tristram Tristram's Supplement to vol. 4 Swabey & Tristram.
Trop Dr Civ. Troplong's Droit Civil.
Troub. Lim. Part. or *Troub. Lim. Partn.* Troubat on Limited Partnerships.
Troub & H. Pr. Troubat and Haly's Practice, Pennsylvania.
Tru. Railw Rep. Truman's Railway Reports.
True. Trueman's New Brunswick Reports and Equity Cases.
Tuck. Tucker's New York Surrogate Reports;—Tucker's Select Cases, Newfoundland,—Tucker's Reports, vols. 156-175 Massachusetts,—Tucker's District of Columbia Appeals Reports.
Tuck. Bla. Com. Blackstone's Commentaries, by Tucker.
Tuck Lect. Tucker's Lectures.
Tuck Pl. Tucker's Pleadings.
Tuck Sel Cas. Tucker's Select Cases, Newfoundland Courts.
Tuck Surr. Tucker's Surrogate Reports, City of New York.
Tuck & Cl. Tucker and Clephane's Reports, D. of Col, vol. 21.
Tud Cas Merc. Law. Tudor's Leading Cases on Mercantile Law.
Tud. Cas. R. P. Tudor's Leading Cases on Real Property.
Tud. Char Tr. or *Tud. Char. Trusts* Tudor on Charitable Trusts.
Tud. L. Cas. or *Tud. L. Cas. M. L.* Tudor's Leading Cases on Mercantile Law
Tud. L. Cas. R. P. Tudor's Leading Cases on Real Property.
Tudor, Lead Cas. Real Prop. Tudor's Leading Cases on Real Property.
Tup. App. Tupper's Appeal Reports, Ontario.
Tupper. Tupper's Reports, Ontario Appeals;—Tupper's Upper Canada Practice Reports.
Tur. Turner & Russell's English Chancery Reports.
Turn. Turner's Reports, vols. 99-101 Kentucky;—Turner's Reports, vols. 35, 48 Arkansas.
Turn. Anglo Sax. Turner, History of the Anglo Saxons.
Turn. (Ark.). Turner's Reports, Arkansas, vols. 35-48.
Turn. Ch. Pr. Turner on Chancery Practice.
Turn. Pr. Turnbull's Practice, New York.

Turn. & Ph. Turner and Phillip's Reports, English Chancery.
Turn. & R. or *Turn & Rus.* or *Turn. & Russ.* Turner & Russell's English Chancery Reports.
Tutt. Tuttle's Reports, California.
Tutt. & Carp Tuttle and Carpenter's Reports, California Reports, vol. 52.
Tuttle. Tuttle's Reports, vols. 23-32 and 41-52 California.
Tuttle & Carpenter. Tuttle & Carpenter's Reports, vol. 52 California.
Twiss L of Nat. Twiss's Law of Nations.
Ty Tyler.
Tyl or *Tyler.* Tyler's Vermont Reports.
Tyler Bound & Fences. Tyler's Law of Boundaries and Fences
Tyler Ecc. Tyler on American Ecclesiastical Law.
Tyler Ej Tyler on Ejectment and Adverse Enjoyment
Tyler Fixt. Tyler on Fixtures.
Tyler Inf. Tyler on Infancy and Coverture.
Tyler Us Tyler on Usury
Tyng. Tyng's Reports, vols 2-17 Massachusetts.
Tyr. or *Tyrw.* Tyrwhitt & Granger's English Exchequer Reports.
Tyr & Gr Tyrwhitt & Granger's English Exchequer Reports.
Tyrw. Tyrwhitt's Reports, English Exchequer
Tyrw & G Tyrwhitt and Granger's Reports, English Exchequer.
Tytler, Mil Law. Tytler on Military Law and Courts-Martial
U. Utah,—Utah Reports.
U. B Upper Bench.
U B. Pr. or *U. B. Prec.* Upper Bench Precedents *tempore* Car. I
U. C Upper Canada.
U. C App Upper Canada Appeal Reports
U. C C P. Upper Canada Common Pleas Reports.
U. C. Ch. Upper Canada Chancery Reports
U. C. Cham. Upper Canada Chambers Reports.
U. C. Chan. Upper Canada Chancery Reports
U. C. E. & A. Upper Canada Error and Appeals Reports.
U C. Jur. Upper Canada Jurist
U. C. K. B. Upper Canada King's Bench Reports, Old Series
U. C L J. Upper Canada Law Journal, Toronto.
U. C. O. S. Upper Canada Queen's Bench Reports, Old Series.
U. C. P. R. Upper Canada Practice Reports.
U. C. Pr. Upper Canada Practice Reports
U. C. Q B. Upper Canada Queen's Bench Reports.
U. C. Q. B. O S Upper Canada Queen's (King's) Bench Reports, Old Series
U. C. R. Queen's Bench Reports, Ontario.
U. C. Rep Upper Canada Reports.
U. K. United Kingdom.
U. S United States,—United States Reports.
U. S. Ap. United States Appeals Reports
U. S App. United States Appeals, Circuit Courts of Appeals
U S. C. C. United States Circuit Court,—United States Court of Claims
U. S. C. S. United States Civil Service Commission.
U. S. Comp St United States Compiled Statutes.
U. S Comp St Supp. United States Compiled Statutes Supplement.
U. S. Crim Dig. United States Criminal Digest, by Waterman
U. S Ct. Cl. Reports of the United States Court of Claims.
U. S. D. C. United States District Court;—United States District of Columbia
U. S. Dig. Abbott's United States Digest.
U. S. Eq Dig United States Equity Digest.
U. S Jur. United States Jurist, Washington, D. C.
U S. L. Int. United States Law Intelligencer (Angell's), Providence and Philadelphia.
U. S L. J. United States Law Journal, New Haven and New York
U. S. L. M. or *U. S Law Mag.* United States Law Magazine (Livingston's), New York.
U. S. R. United States Supreme Court Reports.
U. S. Reg. United States Register, Philadelphia.
U. S. R. S. United States Revised Statutes.
U. S. Rev. St. United States Revised Statutes.
U. S. S. C. Rep. United States Supreme Court Reports.
U. S. St. at L. or *U. S. Stat.* United States Statutes at Large.
U. S St. Tr. United States State Trials (Wharton's)
U. S. Sup. Ct. Rep. United States Supreme Court Reporter.
Ulm L Rec. Ulman's Lawyer's Record, New York.
Ulp. Ulpian's Fragments
Underh. Torts. Underhill on Torts.
Up. Ben. Pre. Upper Bench Precedents, *tempore* Car. I.
Up. Can. Upper Canada (see U. C).
Upt Mar. W. & Pr. Upton on Maritime Warfare and Prize.
Url Trust. Urling on Trustees.
Utah. Utah Reports.
V. Vermont,—Vermont Reports;—Virginia;—Virginia Reports;—Versus Victoria. Victorian.
V. A. C. or *V. Adm.* Vice-Admiralty Court.
V. C. Vice-Chancellor. Vice-Chancellor's Court.
V. C. C. Vice-Chancellor's Court
V. C. Rep. Vice-Chancellor's Reports, English
V. L. R. Victorian Law Reports, Australia. (For Victorian see Vict)
V. N. Van Ness's Prize Cases.
V. O. De Verborum Obligationibus.
V. R. Vermont Reports
V. S. De Verborum Significatione.
V. & B. Vesey & Beames' English Chancery Reports
V. & S Vernon and Scriven's Reports, Irish King's Bench.
Va. Virginia;—Virginia Reports;—Gilmer's Virginia Reports.
Va. Bar Assn. Virginia State Bar Association.
Va Cas. Virginia Cases (by Brockenbrough & Holmes).
Va. Ch. Dec. Chancery Decisions, Virginia
Va. L. J. Virginia Law Journal, Richmond.
Va R Virginia Reports,—Gilmer's Virginia Reports.
Val. Com. Valen's Commentaries.
Vall. Ir. L. Vallencey's Ancient Laws of Ireland.
Van Hay. Eq. Van Haythuysen's Equity Draftsman
Van Hay. Mar. Ev. Van Haythuyer on Maritime Evidence.
Van K. Van Koughnet's Reports, vols. 15-21 Upper Canada Common Pleas
Van L Vander Linden's Practice, Cape Colony.
Van N or *Van Ness.* Van Ness's Prize Cases, United States District Court New York
Van Sant Eq. Pr. Van Santvoord's Equity Practice.
Van Sant. Pl. Van Santvoord's Pleadings
Van Sant Prec. Van Santvoord's Precedents.
Vanderstr. Vanderstraaten's Ceylon Reports.
Vatt. Vattel's Law of Nations.
Vatt. Law Nat (or Vattel). Vattel's Law of Nations.
Vaug or *Vaugh* or *Vaughan.* Vaughan's English Common Pleas Reports
Vaux. Vaux's Recorder's Decisions, Philadelphia.
Vaz. Extrad Vazelhes's Etude sur l'Extradition.
Ve or *Ves* Vesey's English Chancery Reports.
Ve. & B. or *Ves & B.* Vesey & Beames's English Chancery Reports.
Veaz. or *Veazey.* Veazey's Reports, vols. 36-46 Vermont.
Vend. Ex Venditioni Exponas.
Vent or *Ventr.* Ventris's English Common Pleas Reports;—Ventris's English King's Bench Reports.
Ver. or *Verm.* Vermont Reports.
Vern. Vernon's Reports, English Chancery.
Vern. & Sc. or *Vern. & Scr.* or *Vern. & Scriv.* Vernon & Scriven's Irish King's Bench Reports.
Verpl. Contr. Verplanck on Contracts.
Verpl. Ev. Verplanck on Evidence.
Ves. Vesey, Senior's Reports, English Chancery.

Ves. Jr. or *Ves. Jun.* Vesey, Junior's Reports, English Chancery.
Ves. Jun. Supp. Supplement to Vesey, Jr.'s, English Chancery Reports, by Hovenden.
Ves. Sen or *Ves. Sr.* Vesey, Sr.'s, English Chancery Reports.
Ves & B. or *Ves. & Bea.* or *Ves. & Beam.* Vesey & Beames's English Chancery Reports.
Vet. Entr. Old Book of Entries.
Vet. N. B. or *Vet Na B.* Old Natura Brevium.
Vez. Vezey's (Vesey's) English Chancery Reports.
Vic. or *Vict.* Queen Victoria.
Vicat. or *Vicat. Voc. Jur.* Vocabularium jurisutrisque, ex variis editis.
Vict. Queen Victoria.
Vict. C. S. Victorian Consolidated Statutes.
Vict. L. R. Victorian Law Reports, Colony of Victoria, Australia.
Vict. L. R. Min Victorian Mining Law Reports.
Vict. L. T. Victorian Law Times, Melbourne.
Vict Rep. Victorian Reports, Colony of Victoria.
Vict. Rev. Victorian Review.
Vict St. Tr. Victorian State Trials.
Vid. Entr. Vidian's Entries.
Vil. & Br Vilas & Bryant's Edition of the Wisconsin Reports.
Vilas Vilas's New York Criminal Reports.
Vin. Abr. Viner's Abridgment.
Vin. Supp. Supplement to Viner's Abridgment.
Vincens Leg. Com. Vincens's Legislation Commerciale.
Vinn. Vinnius.
Vint. Can. L. Vinton on American Canon Law.
Vir. Virgin's Reports, Maine
Virg. Virginia (see Va),—Virgin.
Virg. Cas. Virginia Cases
Virg. L. J. Virginia Law Journal.
Virgin. Virgin's Reports, vols. 52-60 Maine;—Virginia (see Va.).
Viz. Videlicet, That is to say.
Vo. Verbo.
Voet, Com. ad Pand. Voet, Commentarius ad Pandectas.
Von Holst Const. Hist. Von Holst's Constitutional History of the U. S.
Voorh. Code Voorhies's Code, New York.
Voorh Cr Jur Voorhies on the Criminal Jurisprudence of Louisiana.
Vr or *Vroom* Vroom's Reports, New Jersey Law Reports, vols 30-56.
Vroom (G D W) G D W. Vroom's Reports, vols. 36-63 New Jersey Law.
Vroom (P. D.) P. D. Vroom's Reports, vols. 30-35 New Jersey Law.
Vs. Versus
Vt. Vermont,—Vermont Reports
W. King William; thus 1 W. I. signifies the first year of the reign of King William I.,—Wheaton's United States Supreme Court Reports;—Wendell's New York Reports,—Watts' Reports, Pennsylvania; —Weekly,—Wisconsin,—Wyoming,—Wright's Ohio Reports,—Statuto of Westminster.
W A. Western Australia
W. Bl. or *W. Bla.* Sir William Blackstone's English King's Bench and Common Pleas Reports.
W. C. C. Washington's United States Circuit Court Reports.
W. Coast Rep. West Coast Reporter.
W Ent. Winch's Book of Entries
W. H. Chron. Westminster Hall Chronicle, London.
W. H. & G. Welsby, Hurlstone and Gordon's Reports, English Exchequer Reports, vols 1-9
W. J. Western Jurist, Des Moines, Iowa.
W. Jo. or *W. Jones.* Wm. Jones's Reports, English Courts
W. Kel. Wm. Kelynge's Reports, English King's Bench and Chancery.
W. L. Gaz. Western Law Gazette, Cincinnati, O.
W. L. Jour. Western Law Journal, Cincinnati, O.
W. L. M. Western Law Monthly, Cleveland, O.
W. L. R. Washington Law Reporter, Washington, D. C.
W. N. Weekly Notes, London
W. N. Cas. Weekly Notes of Cases, Philadelphia.
W. P. Cas. Wollaston's English Bail Court (Practice) Cases.
W R. Weekly Reporter, London;—Weekly Reporter, Bengal,—Wendell's New York Reports,—Wisconsin Reports,—West's Reports (English Chancery).
W. R. Calc. Southerland's Weekly Reporter, Calcutta
W. Rep. West's Reports *temp.* Hardwicke, English Chancery.
W. Rob. W. Robinson's English Admiralty Reports.
W. T. R. Weekly Transcript Reports, New York.
W. Ten. Wright's Tenures
W Ty. R. Washington Territory Reports
W. Va. West Virginia,—West Virginia Reports.
W. W. & A'B Vict. Wyatt, Webb & A'Beckett's Reports, Victoria
W. W. & D. Willmore, Wollaston and Davison's Reports, English Queen's Bench.
W. W. & H. Willmore, Wollaston and Hodge's Reports, English Queen's Bench
W. & B. Dig. Walker & Bates's Digest, Ohio.
W. & Buh. West & Buhler's Collection of Futwahs, India.
W. & C. Wilson & Courtenay's Scotch Appeal Cases (see Wilson & Shaw)
W & L. Dig Wood & Long's Digest, Illinois.
W. & M. Woodbury & Minot's United States Circuit Court Reports,—William & Mary.
W. & S Watts & Sergeant's Pennsylvania Reports,—Wilson & Shaw's Scotch Appeal Cases.
W. & S App. Wilson and Shaw's Scotch Appeals, English House of Lords
W. & T Eq Ca. or *W. & T. L. C.* White & Tudor's Leading Cases in Equity.
W. & W. White & Wilson's Texas Court of Appeals, Civil Cases.
W. & W. Vict. Wyatt & Webb's Victorian Reports.
Wa. Watts's Reports, Pennsylvania,—Wales
Wadd Dig. Waddilove's Digest of English Ecclesiastical Cases.
Wade Notice. Wade on the Law of Notice.
Wade Retro. L. Wade on Retroactive Laws.
Wait Act. & Def. Wait's Actions and Defence.
Wait Dig. Wait's Digest, New York.
Wait Pr. Wait's New York Practice.
Wait St. Pap. Wait's State Papers of the United States.
Wal. Wallace (see Wall).
Wal. by L. Wallis's Irish Reports, by Lyne
Wal. Jr. Wallace's (J. W.) United States Circuit Court Reports
Wal Sr. Wallace's (J. B.) United States Circuit Court Reports.
Walf Railw Walford on Railways.
Walk Walker's Mississippi Reports;—Walker's Michigan Chancery Reports,—Walker's Reports, vols 25, 72-88 Texas;—Walker's Reports, vols 1-16 Texas Civil Appeals,—Walker's Reports, vols. 96, 109 Alabama,—Walker's Pennsylvania Reports.
Walk. Am. L. Walker's Introduction to American Law.
Walk. Bank L. Walker on Banking Law.
Walk. Ch. or *Walk. Ch Cas.* Walker's Chancery Cases, Michigan.
Walk. Com. L. Walker's Theory of the Common Law.
Walk. (Mich.). Walker's Reports Michigan Chancery.
Walk. (Miss.). Walker's Reports, Mississippi Reports, vol. 1.
Walk. (Pa.). Walker's Pennsylvania Reports.
Walk. (Tex.). Walker's Reports, Texas Reports, vol. 25.
Walk. Wills. Walker on Wills.
Walker. Walker's Reports, vols. 96, 109, Alabama,—Walker's Michigan Chancery Reports;—Walker's Mississippi Reports;—Walker's Pennsylvania Reports;—Walker's Reports, vols. 25, 72-88 Texas,—Walker's Reports, vols. 1-10 Texas Civil Appeals.
Wall. Wallace's United States Supreme Court Reports;—Wallace's (Sr.) United States Circuit Court Reports,—Wallace's Philadelphia Reports;—Wallis's Irish Chancery Reports.

Wall. C. C. Wallace's United States Circuit Court Reports, Third Circuit.
Wall. Jr. or *Wall Jun.* Wallace, Junior's, Reports, U. S. Circuit Court, 3d Circuit.
Wall. Pr. Wallace's Principles of the Laws of Scotland.
Wall. Rep. Wallace on the Reporters;—Wallace's United States Supreme Court Reports.
Wall. S C. Wallace's United States Supreme Court Reports.
Wall. Sen. Wallace's (J. B.) United States Circuit Court Reports.
Wallis. Wallis's Reports, Irish Chancery.
Wallis by L. Wallis's Irish Chancery Reports, by Lyne.
Walsh. Walsh's Registry Cases, Ireland.
Ward. Warden's Reports, Ohio,—Warden & Smith's Reports, Ohio
Ward, Leg. Ward on Legacies.
Ward Nat. Ward on the Law of Nations.
Ward & Sm. Warden and Smith's Reports, Ohio State Reports, vol. 3
Warden. Warden's Reports, vols. 2, 4 Ohio State.
Warden & Smith. Warden & Smith's Reports, vol. 3 Ohio State.
Ware. Ware's Reports, United States District Court, Maine.
Warr. Bla. Warren's Blackstone.
Warr. L. S. Warren's Law Studies.
Warth Code. West Virginia Code, 1899.
Warv. Abst Warvelle on Abstracts of Title.
Wash Washington State Reports.
Wash. Washington;—Washington's Reports;—Washington's United States Circuit Court Reports;—Washington's Virginia Reports,—Washburn's Reports, vols. 16-23 Vermont.
Wash. C. C. Washington's United States Circuit Court Reports.
Wash. L. Rep. Washington Law Reporter, Washington, D. C.
Wash. Ter. Washington Territory Reports.
Wash. Ter. N. S. Allen's Washington Territory Reports, New Series
Wash. Ty. Washington Territory Reports.
Wash. (Va). Washington's Reports, Virginia.
Wash. & Haz P. E I. Washburton & Hazard's Reports, Prince Edward Island
Washb. Washburn's Reports, Vermont.
Washb. Cr L Washburn on Criminal Law.
Washb Easem. Washburn on Easements and Servitudes
Washb R. P. or *Washb. Real Prop.* Washburn on Real Property
Washburn. Washburn's Reports, vols. 16-23 Vermont.
Wat. Watkins,—Watson.
Wat (C G. H) Watermeyer's Cape of Good Hope Supreme Court Reports
Wat Cr Dig. Waterman's Criminal Digest, United States.
Wat. Cr, Proc Waterman's Criminal Procedure.
Wat Jus. Waterman's Justice
Wat Set-Off Waterman on Set-Off, etc.
Wat Tres. Waterman on Trespass
Watermeyer. Watermeyer's Cape of Good Hope Supreme Court Reports
Watk. Conv. Watkins's Conveyancing.
Watk Copyh. Watkins's Copyholds
Wats. Arb. Watson on Arbitration
Wats Cler Law. Watson's Clergyman's Law.
Wats. Comp. or *Wats. Comp. Eq.* Watson's Compendium of Equity.
Wats. Const Hist. Watson's Constitutional History of Canada
Wats Eq. Watson's Compendium of Equity.
Wats. Part. Watson on Partnership
Wats. Sher. Watson on Sheriffs
Watts. Watts's Pennsylvania Reports;—Watts's Reports, vols. 16-24 West Virginia.
Watts & S. or *Watts & Ser.* or *Watts & Serg.* Watts & Sergeant's Pennsylvania Reports.
Web. Pat Webster on Patents.
Web. Pat. Cas. Webster's Patent Cases, English Courts.
Web. Tr. The Trial of Professor Webster for Murder.
Webb. Webb's Reports, vols. 6-20 Kansas;—Webb's Reports, vols. 11-20 Texas Civil Appeals.
Webb, A'B. & W. Webb, A'Beckett & Williams's Victorian Reports, Australia.
Webb, A'B. & W. Eq. Webb, A'Beckett and Williams's Equity Reports, Victoria.
Webb, A'B. & W. I. P. & M. Webb, A'Beckett and Williams's Insolvency, Probate and Matrimonial Reports, Victoria.
Webb, A'B. & W. Min. Webb, A'Beckett and Williams's Mining Cases, Victoria.
Webb. & D. or *Webb & Duval.* Webb & Duval's Reports, vols. 1-3 Texas.
Webs. Webster.
Webs. Pat. Cas. Webster's Patent Cases, English Courts.
Webst. Dict. or *Webster.* Webster's Dictionary.
Wedg. Gov. & Laws. Wedgwood's Government and Laws of the U. S.
Week. Reptr Weekly Reporter, London;—Weekly Reporter, Bengal.
Week Trans. Repts. Weekly Transcript Reports, New York.
Weekl. Cin. L. B. Weekly Cincinnati Law Bulletin.
Weekl Dig. Weekly Digest, New York.
Weekl. Jur. Weekly Jurist, Illinois.
Weekl L. Record. Weekly Law Record.
Weekl L Rev. Weekly Law Review, San Francisco, Cal.
Weekl. No. Weekly Notes of Cases, London.
Weekl. No. Cas. Weekly Notes of Cases, Philadelphia.
Weekl. Reptr. Weekly Reporter, London.
Weekl. Trans. Repts. Weekly Transcript Reports, New York.
Weeks Att. at Law or *Weeks, Attys. at Law* Weeks on Attorneys at Law.
Weeks D. A Inj Weeks, Damnum Absque Injuria
Weeks Dep. Weeks on the Law of Deposition.
Weight. M. & L. Weightman's Marriage and Legitimacy.
Weight Med Leg. Gaz. Weightman's Medico-Legal Gazette, London.
Wel Welsh's Irish Registry Cases.
Welf Eq Pl. Welford on Equity Pleading.
Wells L & F. Wells's Questions of Law and Facts.
Wells, Repl. Wells on Replevin.
Wells Res. Ad & St. D. Wells on *Res Adjudicata* and *Stare Decisis.*
Wells Sep. Pr. of Mar. Wom. Wells on Separate Property of Married Women.
Wellw. Abr. Wellwood's Abridgment of Sea Laws
Welsb, H. & G. or *Welsby, H. & G.* Welsby, Hurlstone & Gordon's Reports, English Exchequer Reports, vols. 1-9.
Welsh. Welsh's Registry Cases, Ireland,—Welsh's Irish Cases at Sligo;—Welsh's (Irish) Case of James Feighny, 1838.
Welsh Reg. Cas Welsh's Irish Registry Cases
Wend. Wendell's Reports, New York Supreme Court.
Wendt Mar. Leg. Wendt on Maritime Legislation.
Went. Ex. or *Went. Off. Ex.* Wentworth on Executors.
Went. Pl. Wentworth on Pleading
Wenz Wenzell's Reports, vols. 60- — Minnesota
Wesk. Ins. Weskett on Insurance.
West. West's Reports, English Chancery, *tempore* Hardwicke.
West. West's Reports, English House of Lords;—West's Reports, English Chancery;—Western Tithe Cases;—Weston's Reports, vols. 11-14 Vermont.
West Aus. Western Australia.
West Ch. West's English Chancery Cases.
West Co. Rep. West Coast Reporter.
West Coast Rep. West Coast Reporter.
West Confl. Westlake on Conflict of Laws.
West H. L. West's Reports, English House of Lords.
West. Jur. Western Jurist, Des Moines, Iowa.
West. L. J. or *West. Law Jour.* Western Law Journal, Cincinnati, Ohio.
West. L. Mo. or *West. Law Mo.* Western Law Monthly, Cleveland, Ohio.
West. L. O. Western Legal Observer, Quincy, Ill

West. L. T. Western Law Times.
West. Leg. Obs. Western Legal Observer, Quincy, Ill.
West. Rep. Western Reporter, St. Paul.
West Symb. West's Symboleographie.
West. T. Cas. Western's Tithes Cases.
West t. H. West's Reports, English Chancery *tempore* Hardwicke.
West Va. West Virginia;—West Virginia Reports.
Westl. Priv. Int. Law or *Westlake Int. Private Law.* Westlake's Private International Law.
Westm. Statute of Westminster.
Westm. Rev Westminster Review.
Weston. Weston's Reports, vols. 11-14 Vermont.
Weth. (U. C). Wethey's Upper Canada Reports, Queen's Bench.
Wh. Wheaton's United States Supreme Court Reports;—Wharton's Pennsylvania Reports;—Wheeler's New York Criminal Reports.
Wh. Cr. Cas. Wheeler's Criminal Cases, New York.
Wh. & T. L. C. or *Wh. & T. L. Cas.* White and Tudor's Leading Cases, Equity.
Whar. Wharton's Pennsylvania Reports.
Whar. Dig Wharton's Digest, Pennsylvania.
Whar. St. Tr. Wharton's State Trials, United States.
Whart. Wharton's Reports, Pennsylvania.
Whart. Ag. Wharton on Agency and Agents.
Whart Confl. Wharton on Conflict of Laws.
Whart Conv Wharton's Conveyancing
Whart. Cr. Law or *Whart. Crim. Law.* Wharton's Criminal Law
Whart Ev. Wharton on Evidence in Civil Issues.
Whart Hom Wharton on Homicide.
Whart. Law Dic. or *Whart. Lex.* Wharton's Law Lexicon.
Whart. Neg. Wharton on Negligence.
Whart. (Pa). Wharton's Pennsylvania Reports.
Whart. Prec. Wharton's Precedents of Indictments.
Whart. St. Tr. or *Whart. State Tr.* Wharton's State Trials of the United States.
Whart. & S. Med. Jur or *Whart. & St. Med. Jur.* Wharton & Stille's Medical Jurisprudence.
Wheat. Wheaton's United States Supreme Court Reports.
Wheat Cap. & Pr. Wheaton on Maritime Captures and Prizes
Wheat. Hist L. of N. or *Wheat. Hist. Law Nat.* Wheaton's History of the Law of Nations.
Wheat. Int. L. or *Wheat. Int. Law.* Wheaton's International Law.
Wheel Wheeler's New York Criminal Cases;—Wheelock's Reports, vols. 32-37 Texas.
Wheel. Abr. Wheeler's Abridgment
Wheel. Br. Cas. Wheeling Bridge Case.
Wheel Cr C. or *Wheel. Cr. Cas* or *Wheeler, Cr. Cas.* Wheeler's Criminal Cases, New York
Wheel. Cr. Rec. Wheeler's Criminal Recorder, New York, vol. 1 Wheeler's Criminal Cases.
Whish. L. D. Whishaw's Law Dictionary.
Whishaw. Whishaw's Law Dictionary.
Whit. Eq Pr. Whitworth's Equity Precedents.
Whit. Pat. Cas. Whitman's Patent Cases, United States.
Whit. War P. Whiting on War Powers under the Constitution.
Whitak. Liens. Whitaker on Liens.
White. White's Reports, vols. 10-15 West Virginia;—White's Reports, vols. 30-40 Texas Court of Appeals;—White, Scotch Justiciary Reports.
White, Coll. White's New Collection of the Laws, etc., of Great Britain, France and Spain.
White L. L. White's Land Law of California.
White, New Recop. or *White Nov. Recop.* See White, Recop.
White Rec. or *White, Recop.* White, New Recopilacion. A New Collection of Laws and Local Ordinances of Great Britain, France, and Spain, Relating to the Concessions of Land in Their Respective Colonies, with the Laws of Mexico and Texas on the Same Subjects.
White Supp. White on Supplement and Revivor.
White & T. L. Cas. White & Tudor's Leading Cases in Equity.
White & W. White & Willson's Reports, vol. 142 Texas Civil Appeals.
Whitm. Lib. Cas. Whitman's Massachusetts Libel Cases.
Whitm. Pat. Cas. Whitman's Patent Cases.
Whitm. Pat. L. Whitman's Patent Laws.
Whitm. Pat. Law Rev. Whitman's Patent Law Review, Washington, D. C.
Whitney. Whitney's Land Laws, Tennessee.
Whitt. Whittelsey's Reports, vols. 31-41 Missouri.
Whitt. Co. Whittaker's Codes, Ohio.
Wig Disc. Wigram on Discovery.
Wig. Wills Wigram on Wills.
Wight or *Wightw.* Wightwick's English Exchequer Reports.
Wight El. Cas. Wight's Election Cases, Scotland.
Wil Williams (see Will),—Wilson (see Wils.).
Wilc. Wilcox's Reports, Ohio.
Wilc. Cond. Wilcox's Condensed Reports, Ohio.
Wilc. Mun. Corp. Wilcox on Municipal Corporations
Wilcox. Wilcox's Reports, vol. 10 Ohio;—Wilcox, Pennsylvania
Wilcox Cond. Wilcox, Condensed Ohio Reports.
Wild Int L. Wildman's International Law.
Wild. S. C. & P. Wildman on Search, Capture and Prize.
Wilde Sup. Wilde's Supplement to Barton's Conveyancing.
Wildm Int. Law. Wildman's International Law
Wilk. Wilkinson's Texas Court of Appeals and Civil Appeals,—Wilkinson's Reports, Australia.
Wilk. Leg. Ang. Sax. Wilkins's Leges Anglo-Saxonicæ.
Wilk. Lim. Wilkinson on Limitations
Wilk. P. & M. Wilkinson, Paterson and Murray's Reports, New South Wales.
Wilk. Prec. Wilkinson's Precedents in Conveyancing.
Wilk Pub. Funds. Wilkinson on the Law Relating to Public Funds.
Wilk. Repl. Wilkinson on Replevin.
Wilk. Ship. Wilkinson on Shipping.
Wilk & Mur. or *Wilk. & Ow.* or *Wilk. & Pat* Wilkinson, Owen, Paterson & Murray's New South Wales Reports.
Will. Willes's English Common Pleas Reports,—Willson's Reports, vols 29-30 Texas Appeals, also vols 1, 2 Texas Civil Appeals;—Williams on Executors;—See, also, Williams.
Will Ann. Reg. Williams's Annual Register, New York
Will Auct. Williams on the Law of Auctions.
Will Bankt. L. Williams on the Bankrupt Law
Will-Bund St. Tr. Willis-Bund's Cases from State Trials.
Will Just. Williams's Justice
Will. L D. Williams's Law Dictionary.
Will (Mass.). Williams's Reports, Massachusetts Reports, vol 1
Will P or *Will. (Peere).* Peere-Williams's English Chancery Reports
Will. Per. Pr. Williams on Personal Property.
Will Real As. Williams on Real Assets
Will Real Pr. Williams on Real Property.
Will. Saund. Williams's Notes to Saunders's Reports.
Will (Vt.). Williams's Reports, Vermont.
Will, Woll & Dav. Willmore, Wollaston & Davison's English Queen's Bench Reports
Will., Woll. & Hodg. Willmore, Wollaston & Hodges, English Queen's Bench Reports
Will. & Br. Adm Jur. Williams and Bruce on Admiralty Jurisdiction
Willard Eq. Willard's Equity.
Willard Ex. Willard on Executors.
Willard Real Est. & Con. Willard's Real Estate and Conveyancing.
Willc. Const Willcock, The Office of Constable.
Willc. L. Med. Pr. Willcock's Law Relating to the Medical Profession.
Willc. Mun. Corp. or *Willcock, Mun. Corp.* Willcock on Municipal Corporations.
Willes Willes's Reports, English King's Bench and Common Pleas.

Williams. Peere-Williams's English Chancery Reports;—Williams's Reports, vols. 27-29 Vermont;—Williams's Reports, vol. 1 Massachusetts;—Williams's Reports, vols. 10-12 Utah.

Williams, Common. Williams on Rights of Common.

Williams, Ex'rs. Williams on Executors.

Williams P or *Williams, Peere.* Peere Williams's Reports, English Chancery.

Williams, Pers. Prop. Williams on Personal Property.

Williams, Saund. Williams's Notes to Saunders's Reports

Williams, Seis. Williams on Seisin.

Williams & B Adm. Jur. Williams & Bruce on Admiralty Jurisdiction.

Willis Eq Willis on Equity Pleadings.

Willis Int. Willis on Interrogatories

Willis Trust. or *Willis, Trustees.* Willis on Trustees

Willm. W. & D. Willmore, Wollaston and Davison's Reports, English Queen's Bench.

Willm. W. & H. Willmore, Wollaston & Hodges's English Queen's Bench Reports.

Wills Circ. Ev. or *Wills, Circ. Ev.* Wills on Circumstantial Evidence

Willson. Willson's Reports, vols. 29-30 Texas Appeals, also vols. 1, 2 Texas Court of Appeals, Civil Cases.

Wilm. or *Wilm Op.* or *Wilm. Judg* Wilmot's Notes of Opinions and Judgments, English King's Bench.

Wils. Wilson's Reports, English King's Bench and Common Pleas.

Wils. (Cal.) Wilson's Reports, California.

Wils. Ch. Wilson's Reports, English Chancery.

Wils. Ent. Wilson's Entries and Pleadings (same as vol. 3 Lord Raymond).

Wils. Exch. Wilson's Reports, English Exchequer.

Wils Fines & Rec. Wilson on Fines and Recoveries

Wils (Ind). Wilson's Indiana Superior Court Reports.

Wils. Ind. Gloss. Wilson, Glossary of Indian Terms.

Wils. K. B. Sergeant Wilson's English King's Bench Reports

Wils (Oreg). Wilson's Reports, Oregon.

Wils. Parl. L Wilson's Parliamentary Law.

Wils. Uses. Wilson on Uses

Wils. & C. or *Wils & Court.* Wilson and Courtenay's Reports, English House of Lords, Appeals from Scotland.

Wils. & S. or *Wils & Sh.* Wilson and Shaw's Reports, English House of Lords, Appeals from Scotland (Shaw, Wilson & Courtenay)

Wilson. Wilson's English Common Pleas Reports;—Wilson's English Chancery Reports,—Wilson's English Exchequer Equity Reports;—Wilson's Indiana Superior Court Reports;—Wilson's Reports, vols. 1, 3, Oregon;—Wilson's Reports, vols. 48-59 Minnesota.

Win Winston's Law Reports, North Carolina;—Winch's English Common Pleas Reports.

Win. Ent. Winch's Entries.

Win Eq. Winston's Equity Reports, North Carolina.

Winch Winch's Reports, English Common Pleas.

Wing or *Wing. Max.* Wingate's Maxims

Wins. Winston's Reports, North Carolina.

Wins. Eq. Winston's Equity Reports, North Carolina.

Winst or *Winst. Eq* Winston's Law or Equity Reports, North Carolina.

Wis. Wisconsin,—Wisconsin Reports.

Wis. Bar Assn Wisconsin State Bar Association.

Wis Leg. N. Wisconsin Legal News, Milwaukee.

With. Withrow's Reports, Iowa.

With. Corp. Cas. Withrow's American Corporation Cases.

Withrow. Withrow's Reports, vols 9-21 Iowa.

Wkly. Notes Cas. (Pa.). Weekly Notes of Cases, Philadelphia, Pennsylvania.

Wm Bl. William Blackstone's Reports, English Courts.

Wm. Rob. William Robinson's New Admiralty Reports, English.

Wms. Williams (see Will.).

Wms. Ann. Reg. Williams's Annual Register, New York.

Wms. Auct. Williams on the Law of Auctions.

Wms. Ex. Williams on Executors.

Wms. Just. Williams's Justice.

Wms. L. D. Williams's Law Dictionary.

Wms. (Mass.). Williams's Reports, Massachusetts Reports, vol. 1.

Wms. Notes. Williams's Notes to Saunders' Reports.

Wms. P or *Wms Peere.* Peere Williams's Reports, English Chancery.

Wms Peere. Peere-Williams's English Chancery Reports.

Wms Per. Pr. Williams on Personal Property.

Wms Real As. Williams on Real Assets

Wms Real Pr. Williams on Real Property.

Wms. Saund. Williams's Notes to Saunders' Reports

Wms. Vt. Williams's Reports, vols. 27-29 Vermont.

Wms & Br Adm Jur. Williams and Bruce on Admiralty Jurisdiction.

Wol. Wollaston's English Bail Court Reports;—Wolcott's Reports, vol 7 Delaware Chancery

Wolf. Inst. Wolffius's Institutiones Juris Naturæ et Gentium.

Wolf. & B Wolferstan and Bristow's Election Cases.

Wolf. & D. Wolferstan and Dew's Election Cases.

Wolff, Dr. de la Nat Wolffius, Droit de la Nature.

Wolff Inst or *Wolff. Inst Nat* Wolffius, Institutiones Juris Naturæ et Gentium.

Wolffius or *Wolffius, Inst.* Wolffius, Institutiones Juris Naturæ et Gentium

Woll or *Woll. P. C.* Wollaston's English Bail Court Reports (Practice Cases).

Wood Woods's United States Circuit Court Reports,—Wood's English Tithe Cases.

Wood Civ L Wood's Institutes of the Civil Law.

Wood Com. L Wood's Institutes of the Common Law.

Wood Conv. Wood on Conveyancing.

Wood Decr. Wood's (Decrees in) Tithe Cases.

Wood Fire Ins Wood on Fire Insurance

Wood (H). Hutton Wood's Decrees in Tithe Cases, English

Wood, Ins Wood on Fire Insurance,—Wood's Institutes of English Law.

Wood, Inst or *Wood, Inst. Com. Law.* Wood's Institutes of the Common Law.

Wood Inst. Eng. L. Wood's Institutes of English Law.

Wood Lect. Wooddeson's Lectures on Laws of England.

Wood Man. Wood on Mandamus.

Wood Mast & St. Wood on Master and Servant.

Wood Mayne Dam. Wood's Mayne on Damages

Wood Nuis. Wood on Nuisances.

Wood Ti. Cas. Wood's Tithe Cases.

Wood. & M or *Woodb. & M.* Woodbury & Minot's United States Circuit Court Reports.

Woodd. Jur. Wooddeson's Elements of Jurisprudence.

Woodd Lect. Wooddeson's Lectures on the Laws of England.

Woodf Cel. Tr. Woodfall's Celebrated Trials

Woodf L. & T or *Woodf. Landl. & Ten.* Woodfall on Landlord and Tenant.

Woodf. Parl. Deb. Woodfall's Parliamentary Debates.

Woodm. Cr. Cas. Woodman's Reports of Thacher's Criminal Cases, Massachusetts.

Woodm. & T. on For. Med. Woodman and Tidy on Forensic Medicine.

Woods or *Woods C. C.* Woods's Reports, United States Circuit Courts, 5th Circuit.

Woodw Dec. Pa. Woodward's Common Pleas Decisions, Pennsylvania.

Wool Woolworth's United States Circuit Court Reports;—Woolrych.

Wool. C. C. Woolworth's Reports, United States Circuit Courts, 8th Circuit (Fuller's Opinions).

Woolr. Com. Woolrych on Commons.

Woolr. Comm. L. Woolrych on Commercial Law.
Woolr. P. W. Woolrych on Party Walls.
Woolr. Sew. Woolrych on Sewers.
Woolr. Waters. Woolrych on Law of Waters.
Woolr. Ways Woolrych on Law of Ways.
Woolr. Window L. Woolrych on Law of Window Lights.
Wools. Div. Woolsey on Divorce.
Wools. Int. L. Woolsey's International Law.
Wools. Pol. Science or *Woolsey, Polit. Science.* Woolsey's Political Science.
Woolw. Woolworth's United States Circuit Court Reports,—Woolworth's Reports, vol. 1 Nebraska.
Worcester. Worcester, Dictionary of the English Language.
Word. Elect. Wordsworth's Law of Election.
Word. Elect. Cas. or *Words. Elect. Cas.* Wordsworth's Election Cases.
Word Min. Wordsworth on the Law of Mining
Worth. Jur. Worthington on the Powers of Juries.
Worth. Prec. Wills. Worthington's Precedents for Wills
Wr. Wright (see Wright),—Wright's Reports, vols. 37-50 Pennsylvania State
Wr. Ch. Wright's Chancery Reports, Ohio.
Wr. Cr. Consp. Wright on Criminal Conspiracies
Wr. N P. Wright's Nisi Prius Reports, Ohio.
Wr Ohio. Wright's Chancery Reports, Ohio.
Wr Pa. Wright's Reports, Pennsylvania State Reports, vols. 37-50.
Wr Ten Wright on Tenures.
Wri or *Wright.* Wright's Reports, vols. 37-50 Pensylvania State,—Wright's Ohio Reports.
Wright N. P. Wright's Nisi Prius Reports, Ohio.
Wright, Ten. Wright on Tenures.
Wy. Wyoming, — Wyoming Reports; — Wythe's Virginia Chancery Reports.
Wy. Dic. Wyatt's Dickens's Chancery Reports.
Wyatt P. R. Wyatt's Practical Register in Chancery.
Wyatt, W & A'B. Wyatt, Webb and A'Beckett's Reports, Victoria.
Wyatt, W & A'B Eq. Wyatt, Webb and A'Beckett's Equity Reports, Victoria.
Wyatt, W. & A'B. I. P & M. Wyatt, Webb and A'Beckett's Insolvency, Probate and Matrimonial Reports, Victoria.
Wyatt, W & A'B Min. Wyatt, Webb and A'Beckett's Mining Cases, Victoria.
Wyatt & W Wyatt and Webb's Reports, Victoria.
Wyatt & W Eq. Wyatt and Webb's Equity Reports, Victoria.
Wyatt & W. I. P. & M. Wyatt and Webb's Insolvency, Probate and Matrimonial Reports, Victoria
Wyatt & W. Min. Wyatt & Webb's Mining Cases, Victoria
Wyatt & Webb Wyatt & Webb's Reports, Victoria.
Wym. or *Wyman.* Wyman's Reports, India.
Wyn or *Wynne.* or *Wynne Bov.* Wynne's Bovill's Patent Cases.
Wyo. Wyoming;—Wyoming Reports.
Wyo. T Wyoming Territory.
Wythe or *Wythe Ch.* Wythe's Virginia Chancery Reports.
Y. Yeates's Pennsylvania Reports.
Y. B Year Book, English King's Bench, etc.
Y. B. Ed I. Year Books of Edward I.
Y. B P. 1, Edw. II. Year Books, Part 1, Edward II.
Y. B. S. C. Year Books, Selected Cases, 1.
Y. L. R. York Legal Record
Y. & C. Younge & Collyer's English Chancery or Exchequer Reports.
Y. & C. C. C. Younge and Collyer's Chancery Cases, English.
Y. & J. Younge & Jervis's English Exchequer Reports.
Y. & J. Younge and Jervis's Reports, English Exchequer.
Yale Law J. Yale Law Journal.
Yates Sel. Cas. Yates's New York Select Cases.
Yea. Yeates's Pennsylvania Reports.
Yearb. Year Book, English King's Bench, etc.
Yearb. P. 7, Hen. VI. Year Books, Part 7, Henry VI.
Yeates. Yeates's Reports, Pennsylvania.
Yel. or Yelv. Yelverton's English King's Bench Reports.
Yerg. Yerger's Tennessee Reports.
Yo. Young (see You).
Yool Waste. Yool on Waste, Nuisance and Trespass.
York Ass. Clayton's Reports (York Assizes).
York Leg. Rec. York Legal Record.
You. Younge's English Exchequer Equity Reports.
You & Coll. Ch. Younge & Collyer's English Chancery Reports
You & Coll Ex. Younge & Collyer's English Exchequer Equity Reports.
You & Jerv. Younge & Jervis's English Exchequer Reports.
Young. Young's Reports, vols. 31-47 Minnesota.
Young Adm. Young's Nova Scotia Admiralty Cases.
Young Adm. Dec. Young's Admiralty Decisions.
Young M L. Cas. Young's Maritime Law Cases, English.
Young, Naut. Dict. Young, Nautical Dictionary.
Younge. Younge's English Exchequer Equity Reports.
Younge & Coll Younge and Collyer's Reports, English Exchequer Equity.
Younge & Coll. Ch. Younge's & Collyer's English Chancery Cases
Younge & Coll Ex. Younge & Collyer's English Exchequer Equity Reports.
Younge & J or *Younge & Jr.* Younge & Jervis, English Exchequer.
Yuk. Yukon Territory.
Zab. Zabriskie's New Jersey Law Reports.
Zach Dr. Civ Zachariae Droit Civil Français.
Zane. Zane's Reports, vols. 4-9 Utah.
Zinn Ca. Tr. Zinn's Select Cases in the Law of Trusts.
Zinn, L C. Zinn's Leading Cases on Trusts.
Zouch Adm. Zouch's Admiralty Jurisdiction.

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

ABBROCHMENT. Old Eng. Law. The forestalling of a market or fair.

ABBUTTALS. See ABUTTALS.

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

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

It was also declared that abdication meant more than desertion and amounted to a forfeiture by acts and deeds of which the desertion was a part. In England, the constitutional relation between the crown and the nation being in the nature of a contract, the king cannot abdicate without the consent of parliament. The House of Lords finally assented to the word *abdicate*

ABDITORIUM. An abditory or hiding place, to hide and preserve goods, plate or money. Jacob.

ABDUCTION. Forcibly taking away a man's wife, his child, or his ward. 3 Bla. Com. 139-141; State v. George, 93 N. C. 567.

The unlawful taking or detention of any female for purposes of marriage, concubinage, or prostitution. 4 Steph. Com. 84.

In many states this offence is created by statute and in most cases applies to females under a given age. The definitions of the crime differ in terms, but not in general results. They usually forbid the taking away or detaining or enticing of a female under a specified age, for purposes of concubinage or prostitution. In Minnesota the taking away for the purpose of marriage under the age of 15 is forbidden; and the statute is valid although some females are authorized by the law of that state to marry at that age; State v. Sager, 99 Minn. 54, 108 N. W. 812.

The important element of the offence is the taking for the unlawful purpose, which is accomplished when the female is removed from the custody of parents or others having control of her, by means of any device, enticement or persuasion; State v. Tucker, 72 Kan. 481, 84 Pac. 126. Unlawful detention and intention of having carnal knowledge are the necessary facts; Com. v. Littrell, 4 Ky. L. Rep. 251.

In some states the fact that a female taken for concubinage was not chaste is no defence; State v. Johnson, 115 Mo. 480, 22 S. W. 463, People v. Dolan, 96 Cal. 315, 31 Pac. 107; the law presumes a woman's previous life to have been chaste, and the burden of proof to show otherwise rests on the defendant; Slocum v. People, 90 Ill. 274; People v. Parshall, 6 Park. Cr. (N. Y.) 129; Carpenter v. People, 8 Barb. (N. Y.) 603; State v. Jones, 191 Mo. 653, 90 S. W. 465; State v. Bobbst, 131 Mo. 328, 32 S. W. 1149.

The offence is complete when there is a criminal intent at the time of the taking away, though there may be a subsequent purpose to marry; State v. Adams, 179 Mo. 334, 78 S. W. 588; State v. Sager, 99 Minn. 54, 108 N. W. 812.

Ignorance of the girl's age is no defence; Riley v. State (Miss.) 18 South. 117; Tores v. State (Tex. Cr. App.) 63 S. W. 880; nor is her request; Griffin v. State, 109 Tenn. 17, 70 S. W. 61; State v. Bussey, 58 Kan. 679, 50 Pac. 891; nor that he believed and with good reason that she was over the statutory age; L. R. 2 C. C. 154; Beckham v. Nacke, 56 Mo. 546; State v. Ruhl, 8 Ia. 447; nor the early abandonment of the relation and the return of the girl to her father with the man's assistance; State v. Neasby, 188 Mo. 467, 87 S. W. 468. It must appear that it was against her will; Hoskins v. Com., 7 Ky. L. Rep. 41; State v. Hromadko, 123 Ia. 665, 99 N. W. 560.

It is stated to be the better opinion, that if a man marries a woman under age, without the consent of her father or guardian, that act is not indictable at common law; but if children are taken from their parents or guardians, or others intrusted with the care of them, by any sinister means, either by violence, deceit, conspiracy, or any corrupt or improper practices, as by intoxication, for the purpose of marrying them, though the parties themselves consent to the marriage, such criminal means will render the act an offence at common law; 1 East, Pl. Cr. 458; 1 Rus. Cr. 962; Rosc. Cr. Ev. 260.

A mere attempt to abduct is not sufficient; People v. Parshall, 6 Park. Cr. (N. Y.) 129.

Solicitation or inducement is sufficient, and the taking need not be by force; People v. Seeley, 37 Hun (N. Y.) 190; Slocum v. People, 90 Ill. 274; People v. Carrier, 46 Mich. 442, 9 N. W. 487.

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

See KIDNAPPING; ENTICE; and as to whether criminals abducted from another state may be prosecuted, see FUGITIVE FROM JUSTICE; EXTRADITION.

Civil Action. At common law the father had no right of civil action for the abduction of a child, except in case of the heir, in which case there was an action because of the interest in his marriage; Cro. Eliz. 770; but afterwards the right of action was sustained upon the theory of loss of services; 1 Wood. Lect. 270; 3 Bla. Com. 140; and on that ground it has been generally recognized in this country; Caughey v. Smith, 47 N. Y. 244; Wodell v. Coggeshall, 2 Metc. (Mass.) 89, 35 Am. Dec. 391; Hills v. Hobert, 2 Root (Conn.) 48; Plummer v. Webb, 4 Mas. 380, Fed. Cas. No. 11,233; Cutting v. Seabury, 1 Sprague 522, Fed. Cas. No. 3,521; Steele v. Thacher, 1 Ware (Dav. 91) 85, Fed. Cas. No. 13,348; Kirkpatrick v. Lockhart, 2 Brev. (S. C.) 276; and the action lies by one standing *in loco parentis*, as the grandfather of an illegitimate child who has assumed the care of it; Moritz v. Garnhart, 7 Watts (Pa.) 302, 32 Am. Dec. 762. The proper form of action is in some states held to be trespass on the case; Sargent v. Mathewson, 38 N. H. 54; Jones v. Tevis, 4 Litt. (Ky.) 25, 14 Am. Dec. 98; in others, trespass *vi et armis;* Vaughan v. Rhodes, 2 McCord (S. C.) 227, 13 Am. Dec. 713; Schoul. Dom. Rel. 354. Exemplary damages may be recovered; Magee v. Holland, 27 N. J. L. 86, 72 Am. Dec. 341; Stowe v. Heywood, 7 Allen (Mass.) 118; and mental pain inflicted on the child may be considered; Brown v. Crockett, 8 La. Ann. 30. It is no defence that the abducted girl and her whole family were of loose and immoral character; Dobson v. Cothran, 34 S. C. 518, 13 S. E. 679. The right of action of the mother after the death of the father has been doubted, but is said to be sustained by the better opinion; 13 Am. Dec. 716, n.; see also Com. v. Murray, 4 Bin. (Pa.) 487, 5 Am. Dec. 412; Coon v. Moffet, 3 N. J. Law 583, 4 Am. Dec. 405.

ABEARANCE. Behavior; as a recogni-

zance to be of good abearance, signifies to be of good behavior. 4 Bla. Com. 251, 256. See Penna. Register 377, where William Penn, sitting judicially, used the term.

ABEREMURDER. In Old Eng. Law. An apparent, plain, or downright murder. It was used to distinguish a wilful murder from chance-medley, or manslaughter. Spel.; Cowell; Blount.

ABET. To encourage or set another on to commit a crime. This word is always applied to aiding the commission of a crime. To abet another to commit a murder, is to command, procure, or counsel him to commit it. Old Nat. Brev. 21; Co. Litt. 475. See AIDING AND ABETTING.

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

The distinction between abettors and accessaries is the presence or absence at the commission of the crime, Cowell; Fleta, *lib.* 1, *cap.* 34. Presence and participation are necessary to constitute a person an abettor; 4 Sharsw. Bla. Com. 33; Russ. & R. 99, 9 Bingh. N. C. 440; Green v. State, 13 Mo. 382; Connaughty v. State, 1 Wis. 159, 60 Am. Dec. 370; White v. People, 81 Ill. 333, Doan v. State, 26 Ind. 495; King v. State, 21 Ga. 220.

ABEYANCE (Fr. *abbayer*, to expect). In expectation, remembrance, and contemplation of law; the condition of a freehold when there is no person in being in whom it is vested.

In such cases the freehold has been said to be *in nubibus* (in the clouds), *in pendenti* (in suspension), and *in gremio legis* (in the bosom of the law). It has been denied by some that there is such a thing as an estate in abeyance; Fearne, Cont. Rem 513. See also the note to 2 Sharsw. Bla. Com. 107; 1 P. Wms. 516; 1 Plowd. 29.

The law requires that the freehold should never, if possible, be in *abeyance*. Where there is a tenant of the freehold, the remainder or reversion in fee may exist for a time without any particular owner, in which case it is said to be in abeyance; Lyle v. Richards, 9 S. & R. (Pa.) 367; 3 Plowd. 29 *a*, *b*, 35 *a*; 1 Washb. R. P. 47.

It is a maxim of the common law that a fee cannot be in abeyance. It rests upon reasons that now have no existence, and it is not now of universal application. But if it were, being a common-law maxim, it must yield to statutory provisions inconsistent with it; Wallach v. Van Riswick, 92 U. S. 212, 23 L. Ed. 473.

A glebe, parsonage lands, may be in abeyance; Terrett v. Taylor, 9 Cra. (U. S.) 47, 3 L. Ed. 650; Weston v. Hunt, 2 Mass. 500; 1 Washb. R. P. 48; or a grant of land to charity; Town of Pawlet v. Clark, 9 Cra. (U. S.) 292, 332, 3 L. Ed. 735. So may the franchise of a corporation; Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 691, 4 L. Ed. 629. So, too, personal property may be in abeyance or legal sequestration, as in case of a vessel captured at sea from its captors until it becomes invested with the character of a prize; 1 Kent 102; 1 C. Rob. Adm. 139; 3 *id.* 97, n.; or the rights of property of a bankrupt, pending adjudication; Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866. See Dillingham v. Snow, 5 Mass. 555; Jewett v. Burroughs, 15 Mass. 464.

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

ABIDE. To accept the consequences of; to rest satisfied with. With reference to an order, judgment, or decree of a court, to perform, to execute. Taylor v. Hughes, 3 Greenl. (Me.) 433; Hodge v. Hodgdon, 8 Cush. (Mass.) 294; Jackson v. State, 30 Kan. 88, 1 Pac. 317; Petition of Griswold, 13 R. I. 125. Where a statute provides for a recognizance "to *abide* the judgment of the court," one conditioned "to *await* the action of the court" is not sufficient; Wilson v. State, 7 Tex. App. 38.

To abide by an award. To await the award without revoking the submission. It does not mean to "acquiesce in" or "not dispute," in the sense of not being at liberty to contest the validity of the award when made; Hunt v. Wilson, 6 N. H. 36; Quimby v. Melvin, 35 N. H. 198; Marshall v. Reed, 48 N. H. 36, 40.

To abide the decision. An agreement in a cause of partition "to abide the decision" of a suit in equity involving the title to the same lands did not mean to postpone the former suit until a final decree in the latter, but only that the partition should be in accordance with the title as determined by it; Hodges v. Pingree, 108 Mass. 585.

To abide and satisfy is used to express the execution or performance of a judgment or order by carrying it into complete effect; Erickson v. Elder, 34 Minn. 371, 25 N. W. 804.

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

ABIDING CONVICTION. A definite conviction of guilt derived from a thorough examination of the whole case. Hopt v. Utah, 120 U. S. 439, 7 Sup. Ct. 614, 30 L. Ed. 708.

ABIGEATORES. See ABIGEUS.

ABIGEATUS. The offence of driving away and stealing cattle in numbers. See ABIGEUS.

ABIGEI. See ABIGEUS.

ABIGERE. See ABIGEUS.

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

This is the common word used to denote a stealer of cattle in large numbers, which latter circum-

stance distinguishes the *abigeus* from the *fur*, who was simply a thief. He who steals a single animal may be called *fur (q. v.)*; he who steals a flock or herd is an *abigeus*. The word is derived from *abigere*, to lead or drive away, and is the same in signification as *Abactor (q. v.)*, *Abigeatores*, *Abigatores*, *Abigei*. Du Cange; Guyot, Rép. Univ.; 4 Bla. Com. 239.

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

ABILITY. When the word is used in statutes, it is usually construed as referring to pecuniary ability, as in the construction of Lord Tenterden's Act (*q. v.*); 1 M. & W. 101.

A Wisconsin Act (1885), making a husband "being of sufficient ability" liable for the support of an abandoned wife, contemplates as well earning capacity as property actually owned; State v. Witham, 70 Wis. 473, 35 N. W. 934; a contrary view was taken in Washburn v. Washburn, 9 Cal. 475.

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

Used to indicate an adverse decision in a writ of right: Thus, the land is said to be *abjudged* from one of the parties and his heirs. 2 Poll. & Maitl. 62.

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

In Am. Law. Every alien, upon application to become a citizen of the United States, must declare on oath or affirmation before the court where the application is made, amongst other things, that he doth absolutely and entirely renounce and *abjure* all allegiance and fidelity which he owes to any foreign prince, state, etc., and particularly, by name, the prince, state, etc., whereof he was before a citizen or subject. Rawle, Const. 93; Rev. Stat. U. S. § 2165.

In Eng. Law. The oath by which any person holding office in England was formerly obliged to bind himself not to acknowledge any right in the Pretender to the throne of England; 1 Bla. Com. 368; 13 and 14 W. III, c. 6, repealed by 30 and 31 Vic. c. 59.

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

In the ancient English law, it was a renunciation of one's country and taking an oath of perpetual banishment. A man who had committed a felony, and for safety fled to a sanctuary, might within forty days confess and take the oath of abjuration and perpetual banishment, he was then transported This was abolished in 1624; Ayliffe, Pareg 14, Burr. L Dic, Abjuration of the Realm; 4 Bla Com 332

But the doctrine of abjuration has been referred to, at least, in much later times; 4 Sharsw Bla Com. 56, 124, 332; 11 East 301; 2 Kent 156, n, Termes de la Ley

In medieval times, every consecrated church was a sanctuary. If a malefactor took refuge therein, he could not be extracted he had a choice between *abjuring the realm* and submitting to trial. If he chose the former he left England, bound by his oath never to return. His lands were escheated, his chattels were forfeited, and if he came back he was an outlaw; 2 Poll. & Maitl. 588; *Réville, L'Abjuration regni, Revue historique*. 7 Val. 50, p. 1. See SANCTUARY.

ABLE BODIED. An absence of those palpable and physical defects which evidently incapacitate a person from performing the ordinary duties of a soldier. Darling v. Bowen, 10 Vt. 148. Ability to perform ordinary labor is not the test. Town of Marlborough v. Sisson, 26 Conn. 57.

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

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

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

ABODE. The place in which a person dwells. See Vanderpoel v. O'Hanlon, 53 Ia. 246, 5 N. W. 119, 36 Am. Rep. 216. It is the criterion determining the residence of a legal voter, and which must be with the present intention not to change it. Fry's Election Case, 71 Pa. 302, 10 Am. Rep. 698; Dale v. Irwin, 78 Ill 181. See RESIDENCE; DOMICIL.

ABOGADO (Sp.). An advocate. See BOZERO.

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

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

As to abolition of slavery, see BONDAGE; SLAVE.

ABORDAGE (Fr.). The collision of vessels. See ADMIRALTY; CODE; COLLISION; NAVIGATION, RULES OF.

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

The unlawful destruction, or the bringing forth prematurely, of the human fœtus before the natural time of birth; State v. Magnell, 3 Pennewill (Del.) 307, 51 Atl. 606.

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

ing in the ovum, in the membranes, the placenta, or the fœtus itself.

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

At common law, an attempt to destroy a child *en ventre sa mere* appears to have been held in England to be a misdemeanor; Rosc. Cr. Ev. 4th Lond. ed. 260; 1 Russ. Cr. 3d Lond. ed. 671, 3 Co. Inst. 50; 1 Hawk. c. 13, s. 16; 1 Whart. Crim. L. § 392; though Green, C. J., in State v. Cooper, 22 N. J. L. 52, 51 Am. Dec. 248, declares that he can find "no precedent, no authority, not even a dictum (prior to Lord Ellenborough's act, 43 Geo. III. c. 58) which recognizes the mere procuring of an abortion as a crime known to the law." It was said to be a misdemeanor only if the child were born dead, but if it were born alive and afterwards died, from injury received in the womb, it would be homicide; 1 Mood. C. C. 346; 3 Inst. 50; and this was true even if the child were still, at the time of death, attached to the mother by the umbilical cord; 1 C. & M. 650; 2 Mood. C. C. 260; see *infra*. In this country, it has been held that it is not an indictable offence at common law to administer a drug, or perform an operation upon a pregnant woman with her consent, with the intention and for the purpose of causing an abortion and premature birth of the fœtus of which she is pregnant, by means of which an abortion is in fact caused, unless, at the time of the administration of such drug or the performance of such operation, such woman was *quick* with child; Com. v. Wood, 11 Gray (Mass.) 85; Hatfield v. Gano, 15 Ia. 177; Evans v. People, 49 N. Y. 86; Smith v. State, 33 Me. 48, 54 Am. Dec. 607; State v. Cooper, 22 N. J. L. 52, 51 Am. Dec. 248; Sullivan v. State, 121 Ga. 183, 48 S. E. 949; Barrow v. State, 121 Ga. 187, 48 S. E. 950; Mitchell v. Com., 78 Ky. 204, 39 Am. Rep. 227. In Idaho the common law rule is as stated, but by statute the crime may be committed before quickening; State v. Alcorn, 7 Ida. 599, 64 Pac. 1014, 97 Am. St. Rep. 252. But in Pennsylvania a contrary doctrine has been held; Mills v. Com., 13 Pa. 631; Com. v. Demain, 6 Pa. L. J. 29. Wharton supports the latter doctrine on principle; 1 Cr. L. § 592 See also Com. v. Boynton, 116 Mass. 343, Com. v. Brown, 121 Mass. 69; Com. v. Corkin, 136 Mass. 429. Under the Massachusetts statute forbidding the procuring of a miscarriage, it is not necessary to allege that the child was born alive or that the woman was "quick with child"; Com. v. Wood, 11 Gray (Mass.) 85; or whether she did or did not die; Com. v. Thompson, 108 Mass. 461. In other states it is held that the death of the mother is not a constituent element of the offence of abortion; Worthington v. State, 92 Md. 222, 48 Atl. 355, 56 L. R. A. 353, 84 Am. St. Rep. 506; Railing v. Com., 110 Pa. 100, 1 Atl. 314. See QUICKENING. The Iowa cases cited *supra* were civil suits by husband and wife for slander in charging the latter with having procured an abortion, and it was held that no crime was committed unless the woman was "quick with child."

The former English statutes on this subject, 43 Geo. III. c. 58, and 9 Geo. IV. c. 51, § 14, distinguished between the case where the woman was quick and was not quick with child; and under both acts the woman must have been pregnant at the time; 1 Mood. Cr. Cas. 216; 3 C. & P. 605. The terms of the act of 24 and 25 Vict. c. 100, s. 62, are, "with intent to procure the miscarriage of any woman whether she be with child or not." See 1 Den. Cr. Cas. 18; 2 C. & K. 293.

When, in consequence of the means used to secure an abortion, the death of the woman ensues, the offence is criminal homicide, and though the cases are not uniform as to the degree, the preponderance of authority is that the crime is murder; State v. Dickinson, 41 Wis. 309, Com. v. Parker, 9 Metc. (Mass.) 263, 43 Am. Dec. 396; 1 Hale P. C. 430; 1 East P. C. 230; People v. Sessions, 58 Mich. 594, 26 N. W. 291; Wilson v. Com., 60 S. W. 400, 22 Ky. Law Rep. 1251; State v. Moore, 25 Ia. 128, 95 Am. Dec. 776; Smith v. State, 33 Me. 48, 54 Am. Dec. 607; Dears. & B. C. C. 288; Mood. C. C. 356; Commonwealth v. Keeper of Prison, 2 Ashm. (Pa.) 227; Montgomery v. State, 80 Ind. 338, 41 Am. Rep. 815; but the defendant may be prosecuted under the special statute for procuring a miscarriage; *id.* Where the offence is held to be murder, it is usually of the second degree, as in State v. Lodge, 9 Houst. (Del.) 542, 33 Atl. 312, where the defendant was convicted under an indictment specifically for that degree; so also in State v. Moore, 25 Ia. 128, 95 Am. Dec. 776, where Dillon, C. J., upon a careful examination of the authorities, sustained the indictment and held that the death of the mother was, at common law, murder, and under the Iowa statutes murder in the second degree. Conviction upon an indictment for manslaughter will be sustained; People v. Abbott, 116 Mich. 263, 74 N. W. 529; Yundt v. People, 65 Ill. 372; Dears. & B. C. C. 164; 7 Cox C. C. 404. The common law rule that homicide in an attempt to commit a felony is murder, and in the attempt to commit a misdemeanor is manslaughter, has been much discussed and was applied in Worthington v. State, 92 Md. 222, 48 Atl. 355, 56 L. R. A. 353, 84 Am. St.

Rep. 506, where an attempt to procure an abortion resulting in death was held manslaughter. Under the Pennsylvania act one causing the death of a woman in attempting to procure a miscarriage cannot be indicted for murder; Com. v. Railing, 113 Pa. 37, 4 Atl. 459. In Wisconsin it was held that from murder at common law, the crime was reduced to manslaughter by statute; State v. Dickinson, 41 Wis. 299, 309. A person may be convicted of manslaughter for causing the death of a woman in attempting an abortion, under a statute making it manslaughter to kill another in the performance of an unlawful act; the statute making the attempt to procure an abortion a misdemeanor does not take the offence out of the provisions of the other act; State v. Power, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902. Homicide in attempting an abortion may be either murder or manslaughter, but if the latter, it must be held to be voluntary, and not involuntary; People v. Com., 87 Ky. 487, 9 S. W. 509. Dr. Wharton suggests that where there was no intent to do the mother serious bodily harm, it is proper to indict separately for the manslaughter and the perpetration of the abortion; 1 Cr. L. 390. In North Carolina it was held a misdemeanor, and that a count for it may be joined with a count for murder; State v. Slagle, 82 N. C. 653. In New York, under a statute declaring it manslaughter to administer drugs, etc., to a pregnant woman with intent to destroy the child, an indictment in which the intent was not so alleged, but only to produce a miscarriage, was held not good as an indictment for manslaughter, but the jury could convict of misdemeanor; Lohman v. People, 1 N. Y. 379, 49 Am. Dec. 340.

In East P. C. 230, it is said that if death ensue it is murder, "though the original intent, had it succeeded, would not have been so but only a great misdemeanor," but the modern English decisions are by no means uniform. In a late edition of a book of great authority the annotator says: "And there appears to be considerable divergence of opinion amongst the judges as to the proper direction to the jury in these cases. See 33 L. J. Newsp. 546, 615;" Archb. Cr. Pl. & Pr. (23d Eng. Ed.) 798. A recent English case held that if the woman died as the result of the operation, it was murder, but if the jury were of the opinion that if the prisoner could not as a reasonable man have expected death to result, it was manslaughter, 62 J. P. 711. A note in 13 Harv. L. Rev. 51, criticizes a decision, then recent, remarking that the settled English rule holding that it is murder if death result from an attempt to procure an abortion, was not followed by Mr. Justice Dowling in a case at the Chester assizes, March 6, 1899.

Even if the wound or injury were not of itself sufficient to cause death, if it did so result, owing to the condition of the woman, it is to be treated as the cause of her death; Clark v. Com., 111 Ky. 443, 63 S. W. 740. See an exhaustive note on "Homicide in the Commission of or Attempt to Commit an Abortion"; 63 L. R. A. 902.

If a person, intending to procure abortion, does an act which causes a child to be born so much earlier than the natural time that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, such person is guilty of murder; and the mere existence of a possibility that something might have been done to prevent the death will not render it less murder; 2 C. & K. 784. Under statutes the offence of abortion is generally made punishable whether the woman be "quick with child," or no; Smith v. State, 33 Me. 48, 54 Am. Dec. 607; People v. Abbott, 116 Mich. 263, 74 N. W. 529; and in an indictment for causing death in an attempt to procure an abortion it is unnecessary so to allege; People v. Com., 87 Ky. 487, 9 S. W. 509. It is immaterial whether or not the woman was pregnant; Eggart v. State, 40 Fla. 527, 25 South. 144; the intent is the gravamen of the offence; State v. Jones, 4 Pennewill (Del.) 109, 53 Atl. 858.

The crime may be committed by one who, though prescribing medicine and giving directions, was not present when it was taken; McCaughey v. State, 156 Ind. 41, 59 N. E. 169; or by sending it through the mail; State v. Morthart, 109 Ia. 130, 80 N. W. 301; or if the pregnant woman consented to or urged the operation and the defendant was reluctant to do it; State v. Magnell, 3 Pennewill (Del.) 307, 51 Atl. 606; the consent of the woman is no defense; Barrow v. State, 121 Ga. 187, 48 S. E. 950; State v. Lodge, 9 Houst. (Del.) 542, 33 Atl. 312; Peoples v. Com., 87 Ky. 487, 9 S. W. 509; even where the indictment charges force and violence and the evidence showed consent; People v. Abbott, 116 Mich. 263, 74 N. W. 529; nor is it an excuse that prior to the attempt the woman had tried to do it herself, unless such effort by her contributed to her death; State v. Glass, 5 Or. 73.

A child *en ventre sa mere* ["an unborn quick child"] is not a human being within the meaning of a statute providing that whoever kills any human being, with malice aforethought, is guilty of murder; Abrams v. Foshee, 3 Ia. 274, 66 Am. Dec. 77.

The woman who takes the drug or on whom the criminal operation is performed, to procure an abortion, is not an accomplice; Com. v. Boynton, 116 Mass. 343; Com. v. Follansbee, 155 Mass. 274, 29 N. E. 471; State v. Hyer, 39 N. J. L. 598; People v. McGonegal, 136 N. Y. 62, 75, 32 N. E. 616; and if she had lived would not have been indictable for that offense, her action constituted a different one; *id.;* nor is one who attempts to procure it on herself indictable under a statute providing "that any person who shall

administer to any pregnant woman, etc."; Hatfield v. Gano, 15 Ia. 177; Smith v. Gaffard, 31 Ala. 45.

In New York if a person advises a woman to take medicine to procure a miscarriage the crime of abortion is not complete unless the advice is acted on; People v. Phelps, 133 N. Y. 267, 30 N. E. 1012; *id.*, 61 Hun 115, 15 N. Y. Supp. 440; but in New Jersey it is by statute criminal to advise a woman to take a drug for the purpose and it is unnecessary either to allege or prove that the drug was actually taken; State v. Murphy, 27 N. J. L. 112; one furnishing a residence for a woman who procures an abortion is an accessory before the fact; 12 Cox C. C. 463. An offer of proof by physicians that it is the universal custom for unmarried women, illegitimately pregnant, to take any character of drug to procure a miscarriage was properly rejected; Clark v. Com., 111 Ky. 443, 63 S. W. 740. One who induces a woman to take a harmless drug is not guilty of inciting, but the woman who takes it believing that it will bring on an abortion is guilty of an attempt; 63 J. P. 790. See FŒTUS; PREGNANCY; EMMENAGOGUES; EN VENTRE SA MERE.

ABORTIVE TRIAL. A phrase used "when a case has gone off and no verdict has been pronounced, without the fault, contrivance, or management of the parties." Jebb & B. 51.

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

ABOUT. Almost or approximately; near in time, quantity, number, quality or degree. The import of the qualifying word "about" is simply, that the actual quantity is a near approximation to that mentioned, and its effect is to provide against accidental variations; Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366. When there is a material and valuable variation, a court of equity upon a petition for specific performance will give the word its proper effect; Stevens v. McKnight, 40 Ohio St. 341.

In a charter party "about to sail" imports just ready to sail; [1893] 2 Q. B. 274.

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

ABOVE. Higher; superior. As, court above, bail above, plaintiff or defendant above. *Above all incumbrances* means in excess thereof; Williams v. McDonald, 42 N. J. Eq. 395, 7 Atl. 866.

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

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

To abridge a plaint is to strike out a part of the demand and pray that the tenant answer to the rest. This was allowable generally in real actions where the writ was *de libero tenemento,* as assize, dower, etc., where the demandant claimed land of which the tenant was not seized. See 1 Wms. Saund. 207, n. 2; 2 *id.* 24, 330; Brooke, Abr. *Abridgment*; Minor v. Bank, 1 Pet. (U. S.) 74, 7 L. Ed. 47; Stearns, Real Act. 204.

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

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

See COPYRIGHT.

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

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

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

Implied abrogation takes place when the new law contains provisions which are positively contrary to former laws, without expressly abrogating such laws; for it is a maxim, *posteriora derogant prioribus;* De Armas' Case, 10 Mart. O. S. (La.) 172; Bernard v. Vignaud, 10 Mart. O. S. (La.) 560; and also when the order of things for which the law has been made no longer exists, and hence the motives which have caused its enactment have ceased to operate; *ratione*

legis omnino cessante, cessat lex; Toullier, Dr. Civ. Fr. tit. prel. § 11, n. 151; Merlin, Répert. *Abrogation.*

As to the repeal of statutes by nonuser, see OBSOLETE.

ABSCOND. To go in a clandestine manner out of the jurisdiction of the courts, or to lie concealed, in order to avoid their process. Malvin v. Christoph, 54 Ia. 562, 7 N. W. 6. It has been held synonymous with conceal; Johnstone v. Thompson, 2 La. 411. See ABSCONDING DEBTOR.

ABSCONDING DEBTOR. One who absconds from his creditors. One who with intent to defeat or delay his creditors departs out of England, or being out, remains out. Bankcy. Act, 1883, § 4. The statutes of the various states and the decisions upon them have defined absconding debtors. A person who has been in a state only transiently, or has come into it without any intention of settling therein, cannot be treated as such; In re Fitzgerald, 2 Caines (N. Y.) 318; Dudley v. Staples, 15 Johns. (N. Y.) 196; nor can one who openly changes his residence; Dunn v. Myres, 3 Yerg. (Tenn.) 414; Fitch v. Waite, 5 Conn. 117; House v. Hamilton, 43 Ill. 185; In re Proctor, 27 Vt. 118; Mandel v. Peet, 18 Ark. 236. It is not necessary that the debtor should actually leave the state; Field v. Adreon, 7 Md. 209. If he depart from his usual place of abode secretly or suddenly, or retire or conceal himself from public view in order to avoid legal process; Bennett v. Avant, 2 Sneed (Tenn.) 152; Ives v. Curtiss, 2 Root (Conn.) 133; he is an absconder. It is essential that there should be an intention to delay and defraud creditors. The fact of converting a large amount of goods into money by auction sales, at a sacrifice and clandestinely, furnishes a reasonable presumption that the debtor intended to abscond to avoid service of process upon him; Ross v. Clark, 32 Mo. 296. It has been held to mean more than "absent debtor" and that to state that a debtor absents himself is not a compliance with a statute relating to absconding debtors; Conard v. Conard, 17 N. J. L. 154. See ABSENTEE.

ABSENCE. The state of being away from one's domicil or usual place of residence. It may mean non-appearance. L. R. 1 P. & D. 169; 14 L. T. 604; Strine v. Kaufman, 12 Neb. 423, 11 N. W. 867.

ABSENT. Being away from; at a distance from; not in company with. Paine v. Drew, 44 N. H. 306, where it was held that the word when used as an adjective referred only to the condition or situation of the person or thing spoken of at the time of speaking without any allusion or reference to any prior condition or situation of the same person or thing, but when used as a verb implies prior presence. It has also been held to mean "not being in a particular place at the time referred to," and *not* to import prior presence; [1893] A. C. 339; 62 L. J. C. P. 107; 62 L. T. 159. The term *absent defendants* does not embrace non-resident defendants but has reference to parties resident in the state, but temporarily absent therefrom; Wash v. Heard, 27 Miss. 400; Wheeler v. Wheeler, 35 Ill. App. 123. Although there is a difference between the act of "absenting oneself," which is purely voluntary, and the fact of "being absent," which is voluntary or involuntary as the case may be, yet the fact that a person is absent under some strong compulsion, which does not amount to physical necessity, does not necessarily negative the voluntary aspect of his act; [1901] 1 Ch. 728.

ABSENTE (Lat.). Being absent; used of one of the judges not present at the hearing of a cause. 2 Mod. 14. *Absente hoc* (Lat.). The defendant being absent.

ABSENTEE. A landlord who resides in a country other than that from which he draws his rents. McCulloch, Polit. Econ.; 33 British Quart. Rev. 455. One who has left his residence in a state leaving no one to represent him; Bartlett v. Wheeler, 31 La. Ann. 540; or who resides in another state but has property in Louisiana; Penn v. Evans, 28 *id.* 576. It has been also defined as one who has never been domiciled in the state and who resides abroad. Morris v. Bienvenu, 30 *id.* 878.

As to grant of administration upon property of persons long absent, see ADMINISTRATION.

ABSOILE. To pardon; to deliver from excommunication. Staunford, Pl. Cr. 72; Kelham. Sometimes spelled *assoile*, which see.

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

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

Absolute *rights* are such as appertain and belong to particular persons merely as individuals or single persons, as distinguished from relative rights, which are incident to them as members of society; 1 Sharsw. Bla. Com. 123; 1 Chit. Pr. 32.

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

An *absolute* estate in land is an estate in

fee simple; Johnson v. McIntosh, 8 Wheat. (U. S.) 543, 5 L. Ed. 681; Fuller v. Missroon, 35 S. C. 314, 14 S. E. 714; Columbia Water Power Co. v. Power Co., 172 U. S. 492, 19 Sup. Ct. 247, 43 L. Ed. 521.

In the law of insurance that is an *absolute interest* in property which is so completely vested in the individual that there could be no danger of his being deprived of it without his own consent; Hough v. Ins. Co., 29 Conn. 10, 76 Am. Dec. 581; Reynolds v. Ins. Co., 2 Grant, Cas. (Pa.) 326; Washington Fire Ins. Co. v. Kelly, 32 Md. 452, 3 Am. Rep. 149; Columbia Water Power Co. v. Power Co., 172 U. S. 492, 19 Sup. Ct. 247, 43 L. Ed. 521.

It may be used in the sense of vested; Williams v. Ins. Co., 17 Fed. 65; Hough v. Ins. Co., 29 Conn. 20, 76 Am. Dec. 581.

ABSOLUTELY. Completely. *Absolutely void* means utterly void; Pearsoll v. Chapin, 44 Pa. 9. *Absolutely necessary* may be used to make the idea of necessity more emphatic; State v. Tetrick, 34 W. Va. 137, 11 S. E. 1002.

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

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

In French Law. The dismissal of an accusation.

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

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

The word was first used at the beginning of this century, in Spain, where one who was in favor of the absolute power of the king, and opposed to the constitutional system introduced by the Cortes during the struggle with the French, was called *absolutista*. The term Absolutist spread over Europe, and was applied exclusively to absolute monarchism, but absolute power may exist in an aristocracy and in a democracy as well. Dr. Lieber, therefore, uses in his works the term Absolute Democracy for that government in which the public power rests unchecked in the multitude (practically speaking, in the majority).

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

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

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

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

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

ABSTRACT OF A FINE. A part of the record of a fine, consisting of an abstract of the writ of covenant and the concord; naming the parties, the parcel of land, and the agreement. 2 Bla. Com. 351.

ABSTRACT OF TITLE. An epitome, or brief statement of the evidences of ownership of real estate and its encumbrances. See Smith v. Taylor, 82 Cal. 533, 23 Pac. 217; Simon Safe Deposit Co. v. Chisholm, 33 Ill. App. 647; Heinsen v. Lamb, 117 Ill. 549, 7 N. E. 75.

An abstract should set forth briefly, but clearly, every deed, will, or other instrument, every recital or fact relating to the devolution of the title, which will enable a purchaser, or mortgagee, or his counsel, to form an opinion as to the exact state of the title. See 54 L. J. Ch. 466; Kane v. Rippey, 22 Or. 296, 23 Pac. 180.

In England this is usually prepared at the expense of the owner; 1 Dart, Vend. 279 The failure to deliver an abstract in England relieves the purchaser from his contract in law; *id.* 305. It should run back for sixty years; or, since the Act of 38 and 39 Vict. c. 78, forty years prior to the intended sale, etc.

In the United States, where offices for registering deeds are universal, and conveyancing much less complicated, abstracts are much simpler than in England, and are usually prepared at the expense of the purchaser, etc., or by his conveyancer. A person preparing the abstract must understand fully all the laws that can affect real estate; Banker v. Caldwell, 3 Minn. 94 (Gil. 46); and will be held to a strict responsibility in the exercise of the confidence reposed in him; Vallette v. Têdens, 122 Ill. 607, 14 N. E. 52, 3 Am. St. Rep. 502; Brown v. Sims, 22 Ind. App. 317, 53 N. E. 779, 72 Am. St. Rep. 308; Young v. Lohr, 118 Ia. 624, 92 N. W. 684; Security Abstract of Title Co. v. Longacre, 56 Neb. 469, 76 N. W. 1073; but his liability is not that of a guarantor of the title; Dundee Mortgage & Trust Inv. Co. v. Hughes, 20 Fed. 39; Wacek v. Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. Rep. 502; and will extend only to his employer; Symns v. Cutter, 9 Kan. App. 210, 59 Pac. 671; Equitable Building & Loan Ass'n v. Bank, 118 Tenn. 678, 102 S. W. 901, 12 L. R. A. (N. S.) 449, 12 Ann. Cas. 467.

Where an abstract of title is made for a vendor, warranted to be true and perfect, the vendee refusing to take the property without it, the company making it was held liable for omissions in it; Dickle v. Abstract Co., 89 Tenn. 431, 14 S. W. 896, 24 Am. St. Rep. 616. It is not necessary to state that the descriptions of the premises in the various instruments are inconsistent; American Trust Inv. Co. v. Abstract Co. (Tenn. Ch. App.) 39 S. W. 877. Where the register of deeds records full satisfaction instead of a partial release on the margin of the mortgage record, an abstract maker relying on the marginal entry is guilty of negligence; Wacek v. Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. Rep. 502.

See Equitable Bldg. & L. Ass'n v. Bank, 118 Tenn. 678, 102 S. W. 901, 12 L. R. A. (N. S.) 449, 12 Ann. Cas. 407; Ward. Abstr.; TITLE.

ABSURDITY. That which is both physically and morally impossible. State v. Hayes, 81 Mo. 574.

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

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

The word is used in statutes as applied to women with reference only to sexual intercourse, and imports an offence of that nature; 6 H. & N. 193; and is held synonymous with ravish; Palin v. State, 38 Neb. 862, 57 N. W. 743.

It has been held to include misuse; Erie & North-East R. Co. v. Casey, 26 Pa. 287; to signify to injure, diminish in value, or wear away by improper use; *id.;* to be synonymous with injure, Dawkins v. State, 58 Ala. 376, 29 Am. Rep. 754.

Abuse of a female child is an injury to the genital organs in an attempt at carnal knowledge, falling short of actual penetration; Dawkins v. State, 58 Ala. 376, 29 Am. Rep. 754. See RAPE.

Abuse of distress is such use of an animal or chattel distrained as makes the distrainer liable to prosecution as for wrongful appropriation.

Abuse of discretion. A discretion exercised to an end or purpose not justified by and clearly against reason and evidence. Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; Murray v. Buell, 74 Wis. 14, 43 N. W. 549; and see People v. R. Co., 29 N. Y. 418.

Abuse of process. Intentional irregularity for the purpose of gaining an advantage over one's opponent.

ABUT. To reach, to touch.

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

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

In Hughes v. R. Co., 130 N. Y. 14, 28 N. E. 765, an abutting lot was defined as a lot bounded on the side of a public street in the bed or soil of which the owner of the lot has no title, estate, interest, or private right except such as are incident to a lot so situated. And see Abendroth v. R. Co., 122 N. Y. 1, 25 N. E. 496, 11 L. R. A. 634, 19 Am. St. Rep. 461. Though the usual meaning of the word is that the things spoken of do actually adjoin, "bounding and abutting" have no such inflexible meaning as to require lots assessed or improved actually to touch the improvement; Cohen v. Cleveland, 43 Ohio St. 190, 1 N. E. 589; 1 Ex. D. 336; *contra,* Holt v. City Council, 127 Mass. 408.

Bounding or abutting on a street will include the soil of a private road opening into the street; 7 Q. B. 183. Where a strip of ground from one side of a street is appropriated for the purpose of widening such street, the lots fronting on the opposite sides of the street at the part widened will be deemed to abut on the improvement, though the street intervenes between the abutting lots and the strip appropriated; Cincinnati v. Batsche, 52 Ohio St. 324, 40 N. E. 21, 27 L. R. A. 536; and where a sidewalk intervened between the street improvement and lots bounding on the sidewalk, such lots were subject, as "contiguous" to the proposed improvement, to special taxation to defray the expense of the latter; Chicago, B. & Q. R. Co. v. City of Quincy, 136 Ill. 563, 27 N. E. 192, 29 Am. St. Rep. 334.

ABUTMENT. The walls of a bridge adjoining the land which support the end of the roadway and sustain the arches. See Board of Chosen Freeholders of Sussex County v. Strader, 18 N. J. L. 108, 35 Am. Dec. 530; Bardwell v. Town of Jamaica, 15 Vt. 438.

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

It has been used to express the end boundary lines as distinguished from those on the sides, as "buttals and sidings"; Cro. Jac. 183.

ABUTTER. One whose property abuts, is contiguous or joins at a border or boundary, as where no other land, road or street intervenes.

ABUTTING OWNER. An owner of land which abuts or adjoins. The term usually implies that the relative parts actually adjoin, but is sometimes loosely used without implying more than close proximity. See EMINENT DOMAIN; HIGHWAY.

AC ETIAM (Lat. and also). The introduction of the statement of the real cause of action, used in those cases where it was

necessary to allege a fictitious cause of action to give the court jurisdiction, and also the real cause in compliance with the statutes. It was first used in the K. B., and was afterwards adopted by C. J. North in addition to the *quare clausum fregit* writs of his court upon which writs of *capias* might issue. He balanced for a time whether he should not use the words *nec non* instead of *ac etiam*. It is sometimes written *accetiam*. 2 Stra. 922. This clause is no longer used in the English courts. 2 Will. IV. c. 39. 3 Bla. Com. 288. See BILL OF MIDDLESEX.

AC ETIAM BILLÆ. And also to a bill. See AC ETIAM.

ACADEMY. An institution of learning. An association of experts in some particular branch of art, literature or science. See SCHOOL.

ACCEDAS AD CURIAM (Lat. that you go to court). An original writ issuing out of chancery and directed to the sheriff, for the purpose of removing a suit from a Court Baron before one of the superior courts of law. It directs the sheriff *to go to the lower court*, and enroll the proceedings and send up the record. See Fitzh. N. B. 18; Dy. 169.

ACCEDAS AD VICECOMITEM (Lat. that you go to the sheriff). A writ directed to the coroner, commanding him to deliver a writ to the sheriff, when the latter, having had a *pone* delivered him, suppressed it. Reg. Orig. 83.

ACCELERATION. The shortening of the time for the vesting in possession of an expectant interest. Wharton.

ACCEPTANCE (Lat. *accipere*, to receive). The receipt of a thing offered by another with an intention to retain it, indicated by some act sufficient for the purpose. 2 Parsons, Contr. 221. It is necessary that each party should do some act by which he will be bound; 3 B. & Ald. 680.

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

An acceptance involves very generally the idea of a receipt in consequence of a previous undertaking on the part of the person offering to deliver such a thing as the party accepting is in some manner bound to receive. It is through this meaning that the term acceptance, as used in reference to bills of exchange, has a relation to the more general use of the term. As distinguished from assent, acceptance would denote receipt of something in compliance with, and satisfactory fulfilment of, a contract to which assent had been previously given, and the word has been held to mean something more than receive; Hall v. Los Angeles County, 74 Cal. 502, 16 Pac. 313. See ASSENT.

Under the statute of frauds delivery and *acceptance* are necessary to complete an oral contract for the sale of goods, in most cases. In such cases it is said the acceptance must be absolute and past recall; 2 Exch. 290; McCulloch v. Ins. Co., 1 Pick. (Mass.) 278; Mahan v. United States, 16 Wall. (U. S.) 146, 21 L. Ed. 307. If an article is found defective, but is retained and used, it is a sufficient acceptance; Logan v. Apartment House, 3 Misc. Rep. 296, 22 N. Y. Supp. 776. If goods are delivered to a third person by order of the purchaser they are deemed to have been received and accepted by the latter through his agent; Schroder v. Hardware Co., 88 Ga. 578, 15 S. E. 327. Where a verbal contract was made for the sale of goods to be delivered at a specified point where purchaser was to pay freight for the seller, it was held that the acceptance by the carrier and possession of freight after reaching its destination, was not such an acceptance by purchaser as would take it out of the statute; Agnew v. Dumas, 64 Vt. 147, 23 Atl. 634. As to how far a right to make future objections invalidates an acceptance, see 3 B. & Ald. 680; 10 Q. B. 111; 6 Exch. 903. See DELIVERY; BAILMENT; SALE.

Of a Dedication. See that title.

Of Bills of Exchange. An engagement to pay the bill in money when due. 4 East 72; Byles, Bills 288.

An acceptance is said to be:

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

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

The holder is not bound to receive such an acceptance, but if he does receive it, must observe its terms; 4 M. & S. 466, Freeman v. Perot, 2 Wash C. C. 485, Fed Cas. No. 5,087; Dan. Neg Inst. 411. For some examples of what do and what do not constitute conditional acceptances, see 6 C & P. 218; 3 C. B. 841; Heaverin v Donnell, 7 Smedes & M. (Miss) 245, 45 Am. Dec 302; Campbell v. Pettengill, 7 Greenl. (Me.) 126, 20 Am Dec 349, Swansey v. Breck, 10 Ala. 533, Hunton v. Ingraham, 1 Strob. (S. C.) 271; Tassey v Church, 4 W. & S (Pa.) 346, Cook v. Wolfendale, 105 Mass. 401; Marshall v. Clary, 44 Ga 513; Ray v Faulkner, 73 Ill. 469, Stevens v. Power Co., 62 Me. 498, Pope v. Huth, 14 Cal. 407; Palmer v. Rice, 36 Neb 844, 55 N. W. 256; Vanstrum v. Liljengren, 37 Minn. 191, 33 N. W. 555; Gerow v. Riffe, 29 W. Va. 462, 2 S. E. 104.

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

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

Where one receives certain goods and sells them, knowing that a draft has been drawn on him for their price, the retaining of the proceeds is equivalent to an acceptance of the draft; Hall v. Bank, 133 Ill. 234, 24 N. E. 546.

If the payee writes upon a bill of exchange drawn upon him the words "payable the 15th day of May, 1883," and signs it, it constitutes a qualified acceptance; Vanstrum v. Liljengren, 37 Minn. 191, 33 N. W. 555.

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

An acceptance to pay part of the amount for which the bill is drawn, 1 Strange 214, Freeman v. Perot, 2 Wash. C. C. 485, Fed. Cas. No. 5,087; or to pay at a different time, 14 Jur. 806, Hatcher v. Stolworth, 25 Miss. 376; Molloy, b. 2, c. 10, § 20; or at a different place, 4 M. & S. 462, would be partial.

Qualified, which is either conditional or partial, and introduces a variation in the sum, time, mode, or place of payment; 1 Dan. Neg. Inst. 414.

Supra protest, which is the acceptance of the bill after protest for non-acceptance by the drawee, for the honor of the drawer or a particular indorser. See ACCEPTOR SUPRA PROTEST.

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

The acceptance must be made by the drawee or some one authorized to act for him. The drawee must have capacity to act and bind himself for the payment of the bill, or it may be treated as dishonored. See ACCEPTOR SUPRA PROTEST; 2 Q. B. 16.

The acceptance and delivery of negotiable paper on Sunday is void between the parties, but if dated falsely as of another day, it is good in the hands of an innocent holder; Harrison v. Powers, 76 Ga. 218.

It may be made before the bill is drawn, in which case it must be in writing; Wilson v. Clements, 3 Mass. 1; Goodrich v. Gordon, 15 Johns. (N. Y.) 6; Kendrick v. Campbell, 1 Bail. (S. C.) 522; Williams v. Winans, 14 N. J. L. 339; Vance v. Ward, 2 Dana (Ky.) 95; Read v. Marsh, 5 B. Monr. (Ky.) 8, 41 Am. Dec. 253; Howland v. Carson, 15 Pa. 453; Beach v. Bank, 2 Ind. 488; Lewis v. Kramer, 3 Md. 265; Coolidge v. Payson, 2 Wheat. (U. S.) 66, 4 L. Ed. 185; Cassel v. Dows, 1 Blatchf. 335, Fed. Cas. No. 2,502. It may be made after it is drawn and before it comes due, which is the usual course, or after it becomes due; 1 H. Bla. 313; Williams v. Winans, 14 N. J. L. 339; or even after a previous refusal to accept; 5 East 514; Mitchell v. Degrand, 1 Mas. 176, Fed. Cas. No. 9,661. It must be made within twenty-four hours after presentment, or the holder may treat the bill as dishonored; Chit. Bills, 212, 217. And upon refusal to accept, the bill is at once dishonored, and should be protested; Chit. Bills, 217.

It may be in writing on the bill itself or on another paper; 4 East 91; Nimocks v. Woody, 97 N. C. 1, 2 S. E. 249, 2 Am. St. Rep. 268; and it seems that the holder may insist on having a written acceptance, and in default thereof consider the bill as dishonored; 1 Dan. Neg. Inst. 406; or it may be oral; 6 C. & P. 218; Leonard v. Mason, 1 Wend. (N. Y.) 522; Williams v. Winans, 14 N. J. L. 339; Walker v. Lide, 1 Rich. (S. C.) 249, 44 Am. Dec. 252; Edson v. Fuller, 22 N. H. 183; Pierce v. Kittredge, 115 Mass. 374; Scudder v. Bank, 91 U. S. 406, 23 L. Ed. 245; Sturges v. Bank, 75 Ill. 595; 11 Moore 320 (by the Law Merchant; Poll. Contr. 164); an acceptance by telegraph has been held good; Coffman v. Campbell, 87 Ill. 98; Central Sav. Bank v. Richards, 109 Mass. 414; Garrettson v. Bank, 39 Fed. 163, 7 L. R. A. 428; In re Armstrong, 41 Fed. 381; Garretison v. Bank, 47 Fed. 867; North Atchison Bank v. Garretson, 51 Fed. 168, 2 C. C. A. 145; but must now be in writing in many states. The usual form is by writing "accepted" across the face of the bill and signing the acceptor's name; 1 Pars. Contr. 223; 1 Man. & R. 90; but the drawee's name alone is sufficient, or any words of equivalent force to accepted. See Byles, Bills 147; 1 Atk. 611; 1 Man. & R. 90; Parkhurst v. Dickerson, 21 Pick. (Mass.) 307; Orear v. McDonald, 9 Gill. (Md.) 350, 52 Am. Dec. 703. So if the drawee writes the word "accept" and signs his name; Cortelyou v. Maben, 22 Neb. 697, 36 N. W. 159, 3 Am. St. Rep. 284.

The drawee cannot make his acceptance after the bill has been delivered to the holder's agent, though it had not been communicated to the holder; Fort Dearborn Bank v. Carter, 152 Mass. 34, 25 N. E. 27. See Trent Tile Co. v. Bank, 54 N. J. L. 599, 25 Atl. 411.

Unless forbidden by statute, a parol promise upon sufficient consideration to accept a bill of exchange binds the acceptor; Scudder v. Bank, 91 U. S. 406, 23 L. Ed. 245; Hall v. Cordell, 142 U. S. 116, 12 Sup. Ct. 154, 35 L. Ed. 956; Sturges v. Bank, 75 Ill. 595; 11 M. & W. 383; Neumann v. Schroeder, 71 Tex. 81, 8 S. W. 632; Short v. Blount, 99 N. C. 49, 5 S. E. 190; Kelley v. Greenough, 9 Wash. 659, 38 Pac. 158; Barney v. Worthington, 37 N. Y. 112; Bank of Rutland v. Woodruff, 34 Vt. 92; [1891] 2 Q. B. 885; *contra*, Haeberle v. O'Day, 61 Mo. App. 390; Erickson v. Inman, 34 Or. 44, 54 Pac. 949; but the Uniform Negotiable Instruments Act in force in nearly all the states (see NEGOTIABLE INSTRUMENTS) requires a written acceptance; see much learning in Walker v. Lide, 1 Rich. (S. C.) 249, 44 Am. Dec. 253; Allen v. Leavens, 26 Or. 164, 37 Pac. 488, 26 L. R. A. 620, 46 Am. St. Rep. 613; Lindley v. Bank, 76 Ia. 629, 41 N. W. 381, 2 L. R. A. 709, 14 Am. St. Rep. 254.

As to what law governs the mode of acceptance, see 61 L. R. A. 196, n., where the cases are examined and the conclusion reached that the weight of authority is in favor of the law of the place where the agreement to accept was made, rather than that of the place of payment.

Where the holder of an overdue bill of exchange agrees by parol to accept payment in instalments, the failure of acceptor to carry out his contract does not release the drawer; Trotter v. Phillips, 2 Pa. Dist. R. 279.

An acceptance made payable at a bank au-

thorizes its payment and charge to the acceptor's account; 18 L. J. Q. B. 218; Byles, Bills 198. But the acceptor is not liable unless he assented to its being so made payable; *id.* 188; 14 East 582; and he may prove that he was ready to pay at the place named; Green v. Goings, 7 Barb. (N. Y.) 652.

The acceptance of forged paper and its payment by the drawer to a *bona fide* holder gives no right of action to recover back the money; Hortsman v. Henshaw, 11 How. (U. S.) 177, 13 L. Ed. 653; so also of bills accompanied by a forged bill of lading; Hoffman & Co. v. Bank, 12 Wall. (U. S.) 181, 20 L. Ed. 366.

See CHECK. As to acceptance of offer, see OFFER.

See BILL OF EXCHANGE; PROTEST; ACCEPTOR.

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

Acceptilation may be defined *verborum conceptio qua creditor debitori, quod debet, acceptum fert;* or, a certain arrangement of words by which, on the question of the debtor, the creditor, wishing to dissolve the obligation, answers that he admits as received what in fact he has not received. The acceptilation is an imaginary payment; Dig 46. 4 1. 19; Dig. 2 14 27. 9; Inst 3. 30 1

ACCEPTOR. One who accepts a bill of exchange. 3 Kent 75.

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

The drawee is in general the acceptor; and unless the drawee accepts, the bill is dishonored. The acceptor of a bill is the principal debtor, and the drawer the surety. He is bound, though he accepted without consideration and for the sole accommodation of the drawer. By his acceptance he admits the drawer's handwriting; for before acceptance it was incumbent upon him to inquire into the genuineness of the drawer's handwriting; 3 Kent 75; 3 Burr. 1384; 1 W. Bla. 390; Levy v. Bank, 4 Dall. (U. S.) 234, 1 L. Ed. 814.

The drawee by acceptance only vouches for the genuineness of the signature of the drawer and not of the body of the instrument; White v. Bank, 64 N. Y. 316, 21 Am. Rep. 612; Young & Son v. Lehman, Durr & Co., 63 Ala. 519.

See ACCEPTANCE.

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

Any person, even the drawee himself, may accept a bill *supra protest;* Byles, Bills *262, and two or more persons may become acceptors *supra protest* for the honor of different persons. A *general* acceptance *supra protest* is taken to be for the honor of the drawer; Byles, Bills *263. The obligation of an acceptor *supra protest* is not absolute but only to pay if the drawee do not; 16 East 391. See Schofield v. Bayard, 3 Wend. (N. Y.) 491; Baring v. Clark, 19 Pick. (Mass.) 220; Exeter Bank v. Gordon, 8 N. H. 66. An acceptor *supra protest* has his remedy against the person for whose honor he accepted, and against all persons who stand prior to that person. If he takes up the bill for the honor of the endorser, he stands in the light of an endorsee paying full value for the bill, and has the same remedies to which an endorsee would be entitled against all prior parties, and he can, of course, sue the drawer and endorser; 1 Esp. 112; 3 Kent 75; Chit. Bills 312. The acceptor *supra protest* is required to give the same notice, in order to charge a party, which is necessary to be given by other holders; Baring v. Clark, 19 Pick. (Mass.) 220.

If a bill is accepted and is subsequently dishonored, the acceptor cannot then accept for the honor of the endorser, as he is already bound; 13 Ves. Jr. 180.

See ACCEPTANCE.

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

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

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

Parents are not allowed to prove non-access for the purpose of bastardizing the issue of the wife, whether the action be civil or criminal, or whether the proceeding is one of settlement or bastardy, or to recover property claimed as heir at law; Bull. N. P. 113; Bowles v. Bingham, 2 Munf. (Va.) 442, 5 Am. Dec. 497; State v. Pettaway, 10 N. C. 623; Cross v. Cross, 3 Pai. Ch. (N. Y.) 139, 23 Am. Dec. 778; Mink v. State, 60 Wis. 584, 19 N. W. 445, 50 Am. Rep. 386; Bell v. Territory, 8 Okl. 75, 56 Pac. 853; State v. Lavin, 80 Ia. 555, 46 N. W. 553; Egbert v. Greenwalt, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 266; Tioga County v. South Creek Township, 75 Pa. 436, where the common law rule was applied in an extreme case, and was held not to be affected by the statute abolishing the disqualification of parties by reason of interest. The rule has been held to be modified by statutes; Evans v. State, 165 Ind. 369, 74 N. E. 244, 75 N. E. 651, 6 Ann. Cas. 813, 2 L. R. A. (N. S.) 619 (where the cases are collected in a note); State v. McDowell, 101 N. C. 734, 7 S. E. 785, which changes the rule as laid down in Boykin v. Boykin, 70 N. C. 263, 16 Am. Rep. 776.

Non-access is not presumed from the mere

fact that husband and wife lived apart; 1 Gale & D. 7. See 3 C. & P. 215; 1 Sim. & S. 153; 1 Greenl. Ev. § 28.

In Canon Law. The right to some benefice at some future time.

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

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

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

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

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

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

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

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

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

Accessio includes both accession and accretion as used in the common law.

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

ACCESSION. Coming into possession of a right or office; increase; augmentation; addition.

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

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

The building of a rail fence on another's land vests the rails in the owner of the land; Wentz v. Fincher, 34 N. C. 297, 55 Am. Dec. 416. And see Merritt v. Johnson, 7 Johns. (N. Y.) 473, 5 Am. Dec. 289; Pulcifer v. Page, 32 Me. 404, 54 Am. Dec. 582.

If the materials of one person are united by labor to the materials of another, so as to form a single article, the property in the joint product is, in the absence of any agreement, in the owner of the principal part of the materials by accession; Merritt v. Johnson, 7 Johns. (N. Y.) 473, 5 Am. Dec. 289; Stevens v. Briggs, 5 Pick. (Mass.) 177; Glover v. Austin, 6 *id.* 209; Pulcifer v. Page, 32 Me. 404, 54 Am. Dec. 582, and note (where the whole subject is treated); Beers v. St. John, 16 Conn. 322; Inst. 2. 1. 26; Eaton v. Lynde, 15 Mass. 242; Wetherbee v. Green, 22 Mich 311, 7 Am. Rep. 653; Ryder v. Hathaway, 21 Pick. (Mass.) 305; Stephens v. Santee, 49 N. Y. 35; Mack v. Snell, 140 N. Y. 193, 35 N. E. 493, 37 Am. St. Rep. 534. But a vessel built of materials belonging to different persons, it has been said, will belong to the owner of the keel, according to the rule, *proprietas totius navis carinæ causam sequitur;* 2 Kent 361; Glover v. Austin, 6 Pick. (Mass.) 209; Merritt v. Johnson, 7 Johns. (N. Y.) 473, 5 Am. Dec. 289; Johnson v. Hunt, 11 Wend. (N. Y.) 139; but see Coursin's Appeal, 79 Pa. 220. It is said to be the doctrine of the civil law, that the rule is the same though the adjunction of materials may have been dishonestly contrived; for, in determining the right of property in such a case, regard is had only to the *things joined*, and not to *the persons*, as where the materials are changed in species; Wood, Inst. 93; Inst. 2. 1. 25. And see ADJUNCTION.

The tree belongs to the owner of the land on which the root is, and its fruit is to the owner of the tree; 1 Ld. Raym. 737; although limbs overhang a neighbor's land; Hoffman v. Armstrong, 46 Barb. (N. Y.) 337. The original title to ice is in the possessor of the water where it is formed; State v. Pottmeyer, 33 Ind. 402, 5 Am. Rep. 224; Higgins v. Kusterer, 41 Mich. 318, 2 N. W. 13, 32 Am. Rep. 160; but the sale of ice in the water is a sale of personalty; *id.*

Where, by agreement, an article is manufactured for another, the property in the article, while making and when finished, vests in him who furnished the whole or the principal part of the materials; and the maker, if he did not furnish the same, has simply a lien upon the article for his pay; Jones v. Gardner, 10 Johns. (N. Y.) 268; Eaton v. Lynde, 15 Mass. 242; Worth v. Northam, 26 N. C. 102; Foster v. Warner, 49 Mich. 641, 14 N. W. 673; Eaton v. Munroe, 52 Me. 63.

The increase of an animal, as a general thing, belongs to the owner of the dam or mother; Arkansas Valley Land and Cattle Co. v. Mann, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854; Stewart v. Ball's Adm'r, 33 Mo.

154; Hanson v. Millett, 55 Me. 184; Hazelbaker v. Goodfellow, 64 Ill. 238; but, if it be let to another, the person who thus becomes the temporary proprietor will be entitled to its increase; Putnam v. Wyley, 8 Johns. (N. Y.) 435, 5 Am. Dec. 346; Inst. 2. 1. 38; Hanson v. Millett, 55 Me. 184; Stewart v. Ball's Adm'r, 33 Mo. 154; Kellogg v. Lovely, 46 Mich. 131, 8 N. W. 699, 41 Am. Rep. 151; though it has been held that this would not be the consequence of simply putting a mare to pasture, in consideration of her services; Heartley v. Beaum, 2 Pa. 166. The increase of a female animal held under a bailment or executory contract belongs to the bailor or vendor until the agreed price is paid; Allen v. Delano, 55 Me. 113, 92 Am. Dec. 573; Elmore v. Fitzpatrick, 56 Ala. 400. See note as to title to increase of animals; 17 L. R. A. 81. The Civil Code of Louisiana, following the Roman law, made a distinction in respect of the issue of slaves, which, though born during the temporary use or hiring of their mothers, belonged not to the hirer, but to the permanent owner; Inst. 2. 1. 37; and see Jordan v. Thomas, 31 Miss. 557; Seay v. Bacon, 4 Sneed (Tenn.) 99, 67 Am. Dec. 601; 2 Kent 361; Fowler v. Merrill, 11 How. (U. S.) 396, 13 L. Ed. 736. But the issue of slaves born during a tenancy for life belonged to the tenant for life; Bohn v. Headley, 7 Harr. & J. (Md.) 257.

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

If, by the labor of one man, the property of another has been converted into a thing of different species, so that its identity is destroyed, the original owner can only recover the value of the property in its unconverted state, and the article itself will belong to the person who wrought the conversion, if he wrought it *believing the material to be his own.* Such a change is said to be wrought when wheat is made into bread, olives into oil, or grapes into wine; Inst. 2. 1. 25; Silsbury v. McCoon, 4 Denio (N. Y.) 332; Year B. 5 H. VII. 15; Brooke, Abr. *Property* 23; or bricks out of clay; Baker v. Meisch, 29 Neb. 227, 45 N. W. 685.

But, if there be a mere change of form or value, which does not destroy the identity of the materials, the original owner may still reclaim them or recover their value as thus improved; Brooke, Abr. *Property* 23; F. Moore 20; Wright v. Douglass, 2 N. Y. 379; Frost v. Willard, 9 Barb. (N. Y.) 440. So, if the change have been wrought by a wilful trespasser, or by one who knew that the materials were not his own; in such case, however radical the change may have been, the owner may reclaim them, or recover their value in their new shape: Wooden-Ware Co. v. U. S., 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230, thus, where whiskey was made out of another's corn, Wright v. Douglass, 2 N. Y. 379; shingles out of another's trees, Chandler v. Edson, 9 Johns. (N. Y.) 362; coals out of another's wood, Curtis v. Groat, 6 Johns. (N. Y.) 168, 5 Am. Dec. 204; Riddle v. Driver, 12 Ala. 590; leather out of another's hides, Hyde v. Cookson, 21 Barb. (N. Y.) 92; in all these cases, the change having been made by one who knew the materials were another's, the original owner was held to be entitled to recover the property, or its value in the improved or converted state. And see Snyder v. Vaux, 2 Rawle (Pa.) 427, 21 Am. Dec. 466; Betts v. Lee, 5 Johns. (N. Y.) 348, 4 Am. Dec. 368; Williard v. Rice, 11 Metc. (Mass.) 493, 45 Am. Dec. 226.

An aerolite which is imbedded to a depth of 3 feet is the property of the owner of the land on which it falls, rather than of the person who finds it; Goddard v. Winchell, 86 Ia. 71, 52 N. W. 1124, 17 L. R. A. 788, 41 Am. St. Rep. 481.

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

It may be of two kinds: *First*, the formal entrance of a third state into a treaty so that such state becomes a party to it; and this can only be with the consent of the original parties. The accession becomes itself a treaty, and is frequently invited or provided for in the original treaty, as in the Declaration of Paris and the Convention of Geneva, 1864, Art. 9, and that of 1868, Art. 15. To the first Geneva Convention the accession of Great Britain was signified Feb. 18, 1865. So the Declaration of St. Petersburg, 1868, relative to explosive bullets is said to have "been acceded to by all the civilized states of the world." Higgins, The Hague and Other Conferences 23. *Second*, a state may accede to a treaty between other states solely for the purpose of guarantee, in which case, though a party, it is affected by the treaty only as a guarantor. 1 Oppenheim, Int. L. sec. 532.

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

For example, the halter of a horse, the frame of a picture, the keys of a house, and the like, each belong to the principal thing. The sale of the materials of a newspaper establishment will carry with it, as an accessory, the subscription list; McFarland v. Stewart, 2 Watts (Pa.) 111, 26 Am. Dec. 109; but a bequest of a house would not carry the furniture in it, as accessory to it. Domat, Lois Civ. Part. 2, liv. 4, tit. 2, s. 4, n. 1. *Accessorium non ducit sed sequitur principale.* Co. Litt. 152, *a.*

SEE ACCESSION; ADJUNCTION; APPURTENANCES.

In Criminal Law. He who is not the

chief actor in the perpetration of the offence, nor present at its performance, but is some way concerned therein, either before or after the fact committed.

An accessory before the fact is one who, being absent at the time of the crime committed, yet procures, counsels, or commands another to commit it. 1 Hale, Pl. Cr. 615.

Any one who incites persons or commands another to commit a felony is an accessory before fact and punishable as the principal felon. An accessory is never present at the commitment of the crime; Odger, C. L. 132.

In some states an accessory before the fact is treated as a principal, as also in England by statute; 2 C. & K. 887; L. R. 1 C. C. R. 77.

With regard to those cases where the principal goes beyond the terms of the solicitation, the approved test is, "Was the event alleged to be the crime to which the accused is charged to be accessory, a probable effect of the act which he counselled?" 1 F. & F. Cr. Cas. 242; Rosc. Cr. Ev. 181. When the act is committed through the agency of a person who has no legal discretion or will, as in the case of a child or an insane person, the incitor, though absent when the crime was committed, will be considered, not an accessory, for none can be accessory to the acts of a madman, but a principal in the first degree; 1 Hale, Pl. Cr. 514; U. S. v. Gooding, 12 Wheat. (U. S.) 469, 6 L. Ed. 693. But if the instrument is aware of the consequences of his act, he is a principal in the first degree, and the employer, if he is absent when the act is committed, is an accessory before the fact; 1 R. & R. Cr. Cas. 363; 1 Den. Cr. Cas. 37; 1 C. & K. 589; or if he is present, as a principal in the second degree; 1 Fost. Cr. Cas. 349; unless the instrument concur in the act merely for the purpose of detecting and punishing the employer, in which case he is considered as an innocent agent.

An accessory after the fact is one who, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon; 4 Bla. Com. 37.

In England one who harbors a felon, knowing him to be a felon (unless it is a wife harboring her husband). This does not apply to a misdemeanant. In treason such person is deemed a principal traitor; Odger, C. L. 132.

No one who is a principal can be an accessory; but if acquitted as principal he may be indicted as an accessory after the fact; State v. Davis, 14 R. I. 283.

In certain crimes, there can be no accessories; all who are concerned are principals, whether they were present or absent at the time of their commission. These are treason, and all offences below the degree of felony; 4 Bla. Com. 35; 2 Den. Cr. Cas. 453; Com. v. McAtee, 8 Dana (Ky.) 28; Williams v. State, 12 Smedes & M. (Miss.) 58; Com. v. Ray, 3 Gray (Mass.) 448; Schmidt v. State, 14 Mo. 137; Sanders v. State, 18 Ark. 198; Com. v. Burns, 4 J. J. Marsh. (Ky.) 182; Stevens v. People, 67 Ill. 587; Griffith v. State, 90 Ala. 583, 8 South. 812; U. S. v. Boyd, 45 Fed. 851. Such is the English rule; but in the United States it appears not to be determined as regards the cases of persons assisting traitors; Sergeant, Const. Law 382; In re Burr, 4 Cr. 472, 501; U. S. v. Fries, 3 Dall. 515, 1 L. Ed. 701. See Charge to Grand Jury, 2 Wall. Jr. 134, Fed. Cas. No. 18,276; U. S. v. Hanway, 2 Wall. Jr. 139, Fed. Cas. No. 15,299; Carlisle v. U. S., 16 Wall. (U. S.) 147, 21 L. Ed. 426; Hanauer v. Doane, 12 Wall. (U. S.) 347, 20 L. Ed. 439. That there cannot be an accessory in cases of treason, see Davis, Cr. L. 38. *Contra*, 1 Whart. Cr. L. § 224.

There can be no accessory when there is no principal; if a principal in a transaction be not liable under our laws, no one can be charged as a mere accessory to him; U. S. v. Libby, 1 Woodb. & M. 221, Fed. Cas. No. 15,597; Armstrong v. State, 28 Tex. App. 526, 13 S. W. 864. But see Scarles v. State, 6 Ohio Cir. Ct. R. 331. This rule was changed by the Stat. 1 Anne, 2, c. 9, so that if the principal felon was delivered in any way after conviction and before attainder, as by pardon or being admitted to benefit of clergy, the accessory might be tried; and that rule is substantially enacted by the Ga. Penal Code § 49, but the common law is otherwise unchanged in this country; Smith v. State, 46 Ga. 298.

Where two persons are indicted, one as principal and the other as aider or abettor, the latter may be convicted as principal, where the evidence shows he was the perpetrator of the deed; Benge v. Com., 92 Ky. 1, 17 S. W. 146.

At common law, an accessory cannot be tried, without his consent, before the conviction of the principal; (unless they are tried together; Fost. Cr. Cas. 360; Com. v. Woodward, Thatch. Cr. Cas. (Mass.) 63; Baron v. People, 1 Park. Cr. Cas. (N. Y.) 246; State v. Groff, 5 N. C. 270; Whitehead v. State, 4 Humph. (Tenn.) 278; at least not without some special reason, recognized by law, why the principal has not been tried; Smith v. State, 46 Ga. 298). This is altered by statute in most of the states. This rule is said to have been the outcome of strict medieval logic. The trial of the accused being by sacred or supernatural processes, it would be a shame to the law if the principal were acquitted after the accessory had been hanged. 2 Poll. & Maitl. 508.

But an accessory to a felony committed by several, some of whom have been convicted, may be tried as accessory to a felony committed by these last; but if he be indicted and tried as accessory to a felony committed by them all, and some of them have not been proceeded against, it is error; Stoops v. Com., 7 S. & R. (Pa.) 491, 10 Am.

Dec. 482; Com. v. Knapp, 10 Pick. (Mass.) 484, 20 Am. Dec. 534. If the principal is dead, the accessory cannot, by the common law, be tried at all. Com. v. Phillips, 16 Mass. 423; State v. McDaniel, 41 Tex. 229.

If the principal has been tried and acquitted, a person charged as accessory should be discharged on motion, but if the former is not found the latter may by statute be tried and convicted; United States v. Crane, 4 McLean, 317, Fed. Cas. No. 14,888. The trial of an accessory may proceed where the principal enters a plea of guilty, and his withdrawal of it during the trial of the former does not affect the validity of a conviction.

One indicted as an aider and abettor of the crime of murder may be convicted and sentenced for that offence, notwithstanding the principal offender had been tried previously, and convicted and sentenced for manslaughter only; Goins v. State, 46 Ohio St. 457, 21 N. E. 476.

In offenses less than felony all are principals, and on information charging one as principal he may be convicted of aiding and abetting; [1907] 1 K. B. 40.

See ABETTOR; AIDING AND ABETTING; PRINCIPAL.

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

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

It is a general rule that payment or release of the debt due, or the performance of a thing required to be performed by the first or principal contract, is a full discharge of such accessory obligation; Pothier, Ob. 1, c. 1, s. 1, art. 2, n. 14; *id.* n. 182, 186; see 8 Mass. 551; Waring v Smyth, 2 Barb. Ch. (N. Y.) 119, 47 Am. Dec. 299; Blodgett v. Wadhams, Lalor's Supp. (N. Y.) 65; Ackla v. Ackla, 6 Pa. 228; Whittemore v. Gibbs, 24 N. H. 484; and that an assignment of the principal contract will carry the accessory contract with it; Donley v. Hays, 17 S. & R. (Pa.) 400; Jackson v. Blodget, 5 Cow. (N. Y.) 202; Ord v. McKee, 5 Cal. 515; Crow v. Vance, 4 Ia. 434; Whittemore v. Gibbs, 24 N. H. 484.

If the accessory contract be a contract by which one is to answer for the debt, default or miscarriage of another, it must, under the statute of frauds, be in writing, and disclose the consideration, either explicitly, or by the use of terms from which it may be implied; 5 M. & W. 128; 5 B. & Ad. 1109; Bickford v. Gibbs, 8 Cush. (Mass.) 156; Campbell v. Knapp, 15 Pa. 27; Gates v. McKee, 13 N. Y. 232, 64 Am. Dec. 545; Spencer v. Carter, 49 N. C. 287; Schoch v. McLane, 62 Mich. 454, 29 N. W. 76. Such a contract is not assignable so as to enable the assignee to sue thereon in his own name; True v. Fuller, 21 Pick. (Mass.) 140; Lamourieux v. Hewit, 5 Wend. (N. Y.) 307. A pledge of property to secure the debt of another does not come within the statute of frauds; Smith v. Mott, 76 Cal. 171, 18 Pac. 260.

ACCIDENT (Lat. *accidere,—ad,* to, and *cadere,* to fall). An event which, under the circumstances, is unusual and unexpected. An event the real cause of which cannot be traced, or is at least not apparent. Wabash, St. L. & Pac. Ry. Co. v. Locke, 112 Ind. 404, 14 N. E. 391, 2 Am. St. Rep. 193.

The happening of an event without the concurrence of the will of the person by whose agency it was caused; or the happening of an event without any human agency. The burning of a house in consequence of a fire made for the ordinary purposes of cooking or warming the house is an accident of the first kind; the burning of the same house by lightning would be an accident of the second kind; 1 Fonbl. Eq. 374, 375, n.; Morris v. Platt, 32 Conn. 85; Crutchfield v. R. Co., 76 N. C. 322; Hutchcraft's Ex'r v. Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484. An accident may proceed or result from negligence; McCarty v. Ry. Co., 30 Pa. 247; Schneider v. Ins. Co., 24 Wis. 28, 1 Am. Rep. 257; and see 11 Q. B. 347; but a misfortune in business is not an accident; Langdon v. Bowen, 46 Vt. 512 As to what the term includes see INSURANCE, *sub-tit. Accident Insurance.* See INEVITABLE ACCIDENT.

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

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

In general, courts of equity will relieve a party who cannot obtain justice at law from the consequences of an accident which will justify the interposition of a court of equity.

The jurisdiction which equity exerts in case of accident is mainly of two sorts: over bonds with penalties to prevent a forfeiture where the failure is the result of accident; 2 Freem. Ch. 128; 1 Spence, Eq. Jur. 629; Rives v. Toulmin, 25 Ala. 452; Garvin v. Squires, 9 Ark. 533, 50 Am. Dec. 224; Chase v. Barrett, 4 Paige, Ch. (N. Y.) 148; Price's Ex'r v. Fuqua's Adm'r, 4 Munf. (Va.)

68; Streeper v. Williams, 48 Pa. 450; as sickness; Jones v. Woodhull, 1 Root (Conn.) 298; Doty v. Whittlesey, 1 Root (Conn.) 310; or where a bond has been lost; Deans v. Dortch, 40 N. C. 331; but if the penalty be liquidated damages, there can be no relief; Merwin, Eq. § 409. And, second, where a negotiable or other instrument has been lost, in which case no action lay at law, but where equity will allow the one entitled to recover upon giving proper indemnity; 4 Price 176; 7 B. & C. 90; Savannah Nat. Bank v. Haskins, 101 Mass. 370, 3 Am. Rep. 373; Bisph. Eq. § 177. In some states it has been held that a court of law can render judgment for the amount, requiring the defendant to give a bond of indemnity; Bridgeford v. Mfg. Co., 34 Conn. 516, 91 Am. Dec. 744; Swift v. Stevens, 8 Conn. 431; Almy v. Reed, 10 Cush. (Mass.) 421. Relief against a penal bond can now be obtained in almost all common-law courts; Merwin, Eq. § 411.

The ground of equitable interference where a party has been defeated in a suit at law to which he might have made a good defence had he discovered the facts in season, may be referred also to this head; Jones v. Kilgore, 2 Rich. Eq. (S. C.) 63; Pearce v. Chastain, 3 Ga. 226, 46 Am. Dec. 423; Brandon v. Green, 7 Humphr. (Tenn.) 130; Meek v. Howard, 10 Smedes & M. (Miss.) 502; Davis v. Tileston, 6 How. (U. S.) 114, 12 L. Ed. 366; see Pemberton v. Kirk, 39 N. C. 178, but in such case there must have been no negligence on the part of the defendant; Semple v. McGatagan, 10 Smedes & M. (Miss.) 98; Brandon v. Green, 7 Humphr. (Tenn.) 130; Miller v. McGuire, Morr. (Ia.) 150; Cosby's Heirs v. Wickliffe, 7 B. Monr. (Ky.) 120.

Under this head equity will grant relief in cases of the defective exercise of a power in favor of a purchaser, creditor, wife, child, or charity, but not otherwise; Bisph. Eq. § 182. So also in other cases, viz, where a testator cancels a will, supposing that a later will is duly executed, which it is not; where boundaries have been accidentally confused; where there has been an accidental omission to endorse a promissory note, etc.; *id.* § 183.

It is exercised by equity where there is not a plain, adequate, and complete remedy at law; Tucker v. Madden, 44 Me. 206; but not where such a remedy exists; Hudson v. Kline, 9 Gratt. (Va.) 379; Grant v. Quick, 5 Sandf. (N. Y.) 612; and a complete excuse must be made; English v. Savage, 14 Ala. 342.

See INEVITABLE ACCIDENT; MISTAKE; FORTUITOUS EVENT; NEGLIGENCE; INSURANCE; ACT OF GOD.

ACCIDENT INSURANCE. See INSURANCE.

ACCIDENTAL. Not according to the usual course of things; casual; fortuitous. United States Mut. Acc. Ass'n v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60.

ACCIDENTAL DEATH. See DEATH; INSURANCE.

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

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

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

Such paper, in the hands of the party to whom it is made or for whose benefit the accommodation is given, is open to the defence of want of consideration, but when taken by third parties in the usual course of business, is governed by the same rules as other paper; 2 Kent 86; 1 M. & W. 212; 33 Eng. L. & Eq. 282; Pierson v. Boyd, 2 Duer (N. Y.) 33; Farmers' & Mechanics' Bank v. Rathbone, 26 Vt. 19, 58 Am. Dec. 200; Yates v. Donaldson, 5 Md 389, 61 Am. Dec. 283; Mosser v. Criswell, 150 Pa. 409, 24 Atl. 618.

Where an accommodation note is purchased from the payee at a usurious rate, it is void as against the accommodation maker, though it was represented as business paper; Whedon v. Hogan, 8 Misc. Rep. 323, 28 N. Y. Supp. 554.

An endorsement on accommodation paper may be withdrawn before it is discounted unless rights have in the meantime, for valuable consideration, attached to others; Berkeley v. Tinsley, 88 Va. 1001, 14 S. E 842.

The Neg. Instr. Acts do not change the former rules as to who may become accommodation parties. Selover, Neg. Instr. 105.

ACCOMMODATUM. The same as *commodatum, q. v.;* Anders. Law Dict., quoting Sir William Jones. The word is not found in Kent, or in Edw. Bailments.

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

In Criminal Law. One who is concerned in the commission of a crime.

"One who is in some way concerned in the commission of a crime, though not as a principal." Cross v. People, 47 Ill. 152, 95 Am. Dec. 474.

"One of many equally concerned in a felony, the term being generally applied to those who are admitted to give evidence against their fellow criminals for the fur-

therance of justice, which might otherwise be eluded." Cross v. People, 47 Ill. 152, 95 Am. Dec. 474.

"One who being present aids by acts or encourages by words the principal offender in the commission of the offense," is erroneous as a definition; such person is a principal; Smith v. State, 13 Tex. App. 507. He must in some manner assist or participate in the criminal act, and by that connection he becomes equally involved in guilt with the other party; People v. Smith, 28 Hun (N. Y.) 626; Cross v. People, 47 Ill. 152, 95 Am. Dec. 474. The purchaser of liquor sold in violation of the law is not an accomplice; State v. Teahan, 50 Conn. 92; People v. Smith, 28 Hun (N. Y.) 626; nor is a minor child who is coerced into assisting in an unlawful act; People v. Miller, 66 Cal. 468, 6 Pac. 99; Beal v. State, 72 Ga. 200; nor one who does not immediately disclose the fact that a homicide has been committed; Bird v. U. S., 187 U. S. 118, 23 Sup. Ct. 42, 47 L. Ed. 100; nor one who joins in a game with others who are betting, but does not bet himself; Bass v. State, 37 Ala. 469.

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

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

It has been held, that, if one counsels another to commit suicide, he is principal in the murder; for it is a presumption of law that advice has the influence and effect intended by the adviser, unless it is shown to have been otherwise, as, for example, that it was received with scoff or manifestly rejected and ridiculed at the time; Commonwealth v. Bowen, 13 Mass. 359, 7 Am. Dec. 154.

It is now finally settled that it is not a rule of law but of *practice* only that a jury should not convict on the unsupported testimony of an accomplice. Therefore, if a jury choose to act on such evidence only, the conviction cannot be quashed as bad in law. The better practice is for the judge to advise the jury to acquit, unless the testimony of the accomplice is corroborated, not only as to the circumstances of the offence, but also as to the participation of the accused in the transaction; and when several parties are charged, that it is not sufficient that the accomplice should be confirmed, as to one or more of the prisoners, to justify a conviction of those prisoners with respect to whom there is no confirmation; 1 Leach 464; 31 How. St. Tr. 967; 7 Cox, Cr. Cas. 20; Com. v. Savory, 10 Cush. (Mass.) 535; Collins v. People, 98 Ill. 584, 38 Am. Rep. 105; Flanagin v. State, 25 Ark. 92; People v. Jenness, 5 Mich. 305; Carroll v. Com., 84 Pa. 107. See 1 Fost. & F. 388; Com. v. Holmes, 127 Mass. 424, 34 Am. Rep. 391, 408.

Though the evidence of an accomplice uncorroborated is sufficient, if the jury are fully convinced of the truth of his statements; Linsday v. People, 63 N. Y. 143; Collins v. People, 98 Ill. 584, 38 Am. Rep. 105; it is the settled course of practice in England not to convict a prisoner, excepting under very special circumstances, upon the uncorroborated testimony of an accomplice; [1908] 2 K. B. 680; C. of Cr. App. In the federal courts the testimony of an accomplice need not necessarily be corroborated; Ahearn v. U. S., 158 Fed. 606, 85 C. C. A. 428; it should be received with caution; U. S. v. Ybanez, 53 Fed. 536; State v. Minor, 117 Mo. 302, 22 S W. 1085; State v. Patterson, 52 Kan. 335, 34 Pac. 784.

This general statement is substantially the result of the cases in both countries as to the treatment of the testimony of an accomplice. As to the corroboration required, the cases may be divided into three classes, requiring corroboration—1. Of that part of the testimony which connects the prisoner with the crime. 2. Of a material part of the testimony. 3. Of any portion of the testimony. The cases may be found in an able note in 71 Am. Dec. 671.

An accomplice, upon making a full disclosure, has a just claim but not a legal right to recommendation for a pardon, which cannot however be pleaded in bar to the indictment; U. S. v. Ford, 99 U. S. 594, 25 L. Ed. 399; Ex parte Wells, 18 How. (U. S.) 307, 15 L. Ed. 421; but he may use it to put off the trial, in order to give him time to apply for a pardon; *id.;* Cowp. 331; 1 Leach 115.

An accomplice is not incompetent when indicted separately; State v. Umble, 115 Mo. 452, 22 S. W. 378.

See KING'S EVIDENCE; TROVER; ACCESSORY; ABORTION.

ACCORD AND SATISFACTION. An agreement between two parties to give and accept something in satisfaction of a right of action which one has against the other, which when performed is a bar to all actions upon this account; generally used in the phrase "accord and satisfaction." 3 Bla. Com. 15; Bacon, Abr. *Accord;* Franklin Fire Ins. Co. v. Hamill, 5 Md. 170. It may be pleaded to all actions except real actions; Bacon, Abr. *Accord* (B); Pulliam v. Taylor, 50 Miss. 257.

Though here correctly defined as now

recognized as "an agreement," it should be borne in mind that the acceptance of satisfaction for damages caused by a tort was recognized as a bar to a subsequent action long before the recognition of the validity of contracts. This is shown by Professor Ames in 9 Harv. L. Rev. 285, by authorities as far back as the time of Edward I. The recognition of an accord as a valid bilateral contract was a tardy one as shown by the early cases collected in 17 Harv. L. Rev. 459, though it may now be considered as a contract for the breach of which an action will lie; Very v. Levy, 13 How. (U. S.) 345, 14 L. Ed. 173; Savage v. Everman, 70 Pa. 319, 10 Am. Rep. 680; Schweider v. Lang, 29 Minn. 254, 13 N. W. 33, 43 Am. Rep. 202; White v. Gray, 68 Me. 579; Hunt v. Brown, 146 Mass. 253, 15 N. E. 587; Chicora Fertilizer Co. v. Dunan, 91 Md. 144, 46 Atl. 347, 50 L. R. A. 401; 15 Q. B. 677; 10 C. B. (N. S.) 259.

It must be *legal*. An agreement to drop a criminal prosecution, as a satisfaction for an assault and imprisonment, is void; 5 East 294; Smith v. Grable, 14 Ia. 429; Walan v. Kerby, 99 Mass. 1.

It must be *advantageous* to the creditor, and he must receive an actual benefit therefrom which he would not otherwise have had; Keeler v. Neal, 2 Watts (Pa.) 424; Davis v. Noaks, 3 J. J. Marsh (Ky.) 497; Hutton v. Stoddart, 83 Ind. 539. Restoring to the plaintiff his chattels or his land, of which the defendant has wrongfully dispossessed him, will not be any consideration to support a promise by the plaintiff not to sue him for those injuries; Bacon, Abra. *Accord*, A; Jones v. Bullitt, 2 Litt. (Ky.) 49; Blinn v. Chester, 5 Day (Conn.) 360; Williams v. Stanton, 1 Root (Conn.) 426; Le Page v. McCrea, 1 Wend. (N. Y.) 164, 19 Am. Dec. 469. The payment of a part of the whole debt due is not a good satisfaction, even if accepted; 1 Stra. 426; 2 Greenl. Ev. § 28; 10 M. & W. 367; 12 Price, Ex. 183; Hardey v. Coe, 5 Gill (Md.) 189; Warren v. Skinner, 20 Conn. 559; Hayes v. Davidson, 70 N. C. 573; Foster v. Collins, 6 Heisk. (Tenn.) 1; Smith v. Bartholomew, 1 Metc. (Mass.) 276, 35 Am. Dec. 365; Hinckley v. Arey, 27 Me. 362; White v. Jordon, 27 Me. 370; Eve v. Mosely, 2 Strobh. (S. C.) 203; Williams v. Langford, 15 B. Monr. (Ky.) 566; Line v. Nelson, 38 N. J. L. 358; Gussow v. Beineson, 76 N. J. L. 209, 68 Atl. 907; Schlessinger v. Schlessinger, 39 Colo. 44, 88 Pac. 970, 8 L. R. A. (N. S.) 863; Hayes v. Davidson, 70 N. C. 573; Curran v. Rummell, 118 Mass. 482; Tucker v. Murray, 2 Pa. Dist. R. 497; otherwise, however, if the amount of the claim is disputed; Cro. Eliz. 429; 3 M. & W. 651; McDaniels v. Lapham, 21 Vt. 223; Stockton v. Frey, 4 Gill (Md.) 406, 45 Am. Dec. 138; Palmerton v. Huxford, 4 Denio (N. Y.) 166; Howard v. Norton, 65 Barb. (N. Y.) 161; Bull v. Bull, 43 Conn. 455; Tyler Cotton Press Co. v. Chevalier, 56 Ga. 494; McCall v. Nave, 52 Miss. 494; Childs v. Lus. Co., 56 Vt. 609; Brooks v. Moore, 67 Barb. (N. Y.) 393; Stimpson v. Poole, 141 Mass. 502, 6 N. E. 705; Perkins v. Headley, 49 Mo. App. 556; or contingent; Bryant v. Proctor, 14 B. Monr. (Ky.) 451; even if a favorable result of a suit could not have been predicted; Zoebisch v. Von Minden, 120 N. Y. 406, 24 N. E. 795; or there is a release under seal; Redmond & Co. v. Ry., 129 Ga. 133, 58 S. E. 874; Gordon v. Moore, 44 Ark. 349, 51 Am. Rep. 606; or a receipt in full upon payment of an undisputed part of the claim after a refusal to pay what is disputed; Chicago, M. & St. P. R. Co. v. Clark, 178 U. S. 353, 20 Sup. Ct. 924, 44 L. Ed. 1099 (citing a long line of cases); Tanner v. Merrill, 108 Mich. 58, 65 N. W. 664, 31 L. R. A. 171, 62 Am. St. Rep 687; Ostrander v. Scott, 161 Ill. 339, 43 N. E. 1089; or the debtor is insolvent; Shelton v. Jackson, 20 Tex. Civ. App. 443, 49 S. W. 415; or even thought to be insolvent but found not to be; Rice v. Mortgage Co., 70 Minn. 77, 72 N. W 826 (see criticism of the last two cases in 12 Harv. L. Rev. 515, 521); or in contemplation of bankruptcy; Melroy v. Kemmerer, 218 Pa. 381, 67 Atl. 699, 11 L. R. A. (N. S.) 1018, 120 Am. St. Rep. 888; or there are mutual demands; 6 El. & B. 691; and if the negotiable note of the debtor, 15 M. & W. 23, or of a third person, Brooks v. White, 2 Metc. (Mass.) 283, 37 Am. Dec. 95; Bank of Montpelier v. Dixon, 4 Vt. 587, 24 Am. Dec. 640 (where the cases are collected); Boyd v. Hitchcock, 20 Johns. (N. J.) 76, 11 Am. Dec. 247; Kellogg v. Richards, 14 Wend. (N. Y.) 116; Sanders v. Bank, 13 Ala. 353; 4 B. & C. 506; Brassell v. Williams, 51 Ala. 349; for part, be given and received, it is sufficient; or if a part be given at a different place, Jones v. Perkins, 29 Miss. 139, 64 Am. Dec. 136, or an earlier time, it will be sufficient; Goodnow v. Smith, 18 Pick. (Mass.) 414, 29 Am. Dec. 600; and, in general, payment of part suffices if any additional benefit be received; Bowker v. Harris, 30 Vt. 424; Rose v. Hall, 26 Conn. 392, 68 Am. Dec. 402; Keeler v. Salisbury, 27 Barb. (N. Y.) 485; Mathis v. Bryson, 49 N. C. 508; Cool v. Stone, 4 Ia. 219; Potter v. Douglass, 44 Conn. 541.

"The result of the modern cases is that the rule only applies when the larger sum is liquidated, and where there is no consideration whatever for the surrender of part of it; and while the general rule must be regarded as well settled, it is considered so far with disfavor as to be confined strictly to cases within it;" Chicago, M. & St. P. R. Co. v. Clark, 178 U. S. 353, 20 Sup. Ct. 924, 44 L. Ed. 1099, reversing 92 Fed. 968, 35 C. C. A. 120.

Acceptance by several creditors, by way of

composition of sums respectively less than their demands, held to bar actions for the residue; Murray v. Snow, 37 Ia. 410; and it makes no difference that one creditor refuses to sign, where the agreement is not upon condition that all should sign; Crawford v. Krueger, 201 Pa. 348, 50 Atl. 931. The receipt of specific property, or the performance of services, if agreed to, is sufficient, whatever its value; Reed v. Bartlett, 19 Pick. (Mass.) 273; Blinn v. Chester, 5 Day (Conn.) 360; Brassell v. Williams, 51 Ala. 349; provided the value be not agreed upon; Howard v. Norton, 65 Barb. (N. Y.) 161; but both delivery and acceptance must be proved; Maze v. Miller, 1 Wash. C. C. 328, Fed. Cas. No. 9,362; Sinard v. Patterson, 3 Blackf. (Ind.) 354; State Bank v. Littlejohn, 18 N. C. 565; Stone v. Miller, 16 Pa. 450; 4 Eng. L. & Eq. 185. See full notes in 20 L. R. A. 785; 11 L. R. A. (N. S.) 1018; 14 *id.* 954.

It must be *certain*. An agreement that the defendant shall relinquish the possession of a house in satisfaction, etc., is not valid, unless it is agreed at what time it shall be relinquished; Yelv. 125. See 4 Mod. 88; Bird v. Caritat, 2 Johns. (N. Y.) 342, 3 Am. Dec. 433; Frentress v. Markle, 2 G. Greene (Ia.) 553; United States v. Clarke, 1 Hempst. 315, Fed. Cas. No. 14,812; Costello v. Cady, 102 Mass. 140.

It must be *complete*. That is, everything must be done which the party undertakes to do; Comyns, Dig. *Accord*, B, 4; Cro. Eliz. 46; Eng. L. & Eq. 296; Frentress v. Markle, 2 G. Greene (Ia.) 553; Clark v. Dinsmore, 5 N. H. 136; Watkinson v. Inglesby, 5 Johns. (N. Y.) 386; Bigelow v. Baldwin, 1 Gray (Mass.) 245; Frost v. Johnson, 8 Ohio 393; Woodruff v. Dobbins, 7 Blackf. (Ind.) 582; Bryant v. Proctor, 14 B. Monr. (Ky.) 459; Ballard v. Noaks, 2 Ark. 45; Cushing v. Wyman, 44 Me. 121; Reed v. Martin, 29 Pa. 179; Flack v. Garland, 8 Md. 188; Overton v. Conner, 50 Tex. 113; Young v. Jones, 64 Me. 563, 18 Am. Rep. 279; but this performance may be merely the substitution of a new undertaking for the old by way of novation if the parties so intended, whereby the original claim is extinguished; 2 B. & Ad. 328; Nassoiy v. Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695; Gerhart Realty Co. v. Assurance Co., 94 Mo. App. 356, 68 S. W. 86; Brunswick & Western R. Co. v. Clem, 80 Ga. 534, 7 S. E. 84; Yazoo & Mississippi Val. R. Co. v. Fulton, 71 Miss. 385, 14 South. 271; Goodrich v. Stanley, 24 Conn. 613; Creager v. Link, 7 Md. 259; 16 Q. B. 1039.

The doctrine that payment by or with the money of a third person is not a discharge of the debtor was established in Cro. Eliz. 541, which was followed in the early American cases, but its doctrine was much limited in 9 C. B. 173, and 10 Exch. 845, where it was held that payment would be good if made either with previous authority or subsequent ratification of the debtor, and that the latter could be made at the trial. This view has prevailed in England and it is held that a plea of payment is sufficient ratification; L. R. 6 Exch. 124.

In this country the weight of authority is in favor of recognizing such payment as a defense, special recognition being accorded to facts showing that the payment was on behalf of the debtor and ratified by him; Snyder v. Pharo, 25 Fed. 398; Hartley v. Sandford, 66 N. J. L. 632, 50 Atl. 454, 55 L. R. A. 206. In New York the early case cited was followed in Bleakley v. White, 4 Paige (N. Y.) 654; Daniels v. Hallenbeck, 19 Wend. (N. Y.) 408; Atlantic Dock Co. v. Mayor, 53 N. Y. 64; but in Wellington v. Kelly, 84 N. Y. 543, the question was not decided, but passed with a reference to the limitation in England which had been followed in Clow v. Borst, 6 Johns. (N. Y.) 37, which had "not been authoritatively overruled, and we need not now determine whether it should any longer be regarded as authority." And see City of Albany v. McNamara, 117 N. Y. 168, 22 N. E. 931, 6 L. R. A. 212; Windmuller v. Rubber Co., 123 App. Div. 424, 107 N. Y. Supp. 1095. In Kentucky the case cited *supra* from Stark's Adm'r v. Thompson's Ex'rs, 3 T. B. Monr. (Ky.) 302, stands without any subsequent ruling on the point.

The cases are collected in 23 L. R. A. 120, and 17 Harv. L. Rev. 472.

It is a question for the jury whether the agreement or the performance was accepted in satisfaction; Bahrenburg v. Fruit Co., 128 Mo. App. 526, 107 S. W. 440; 16 Q. B. 1039; and in some cases it is sufficient if performance be tendered and refused; 2 B. & Ad. 328. If, however, it was the performance of the accord which was to be the satisfaction, the creditor may sue on either the old cause of action or the accord; Babcock v. Hawkins, 23 Vt. 561; but if he sues on the original claim without giving time for performance, the debtor must not go into equity, but may have his action on the accord; Hunt v. Brown, 146 Mass. 253, 15 N. E. 587.

An accord with tender of satisfaction is not sufficient, but it must be executed; 3 Bingh. N. C. 715; Brooklyn Bank v. De Grauw, 23 Wend. (N. Y.) 342, 35 Am. Dec. 569; Simmons v. Clark, 56 Ill. 96; Cushing v. Wyman, 44 Me. 121; Hosler v. Hursh, 151 Pa. 415, 25 Atl. 52; Phinizy v. Bush, 129 Ga. 479, 59 S. E. 259; Clarke v. Hawkins, 5 R. I. 219; but where there is a sufficient consideration to support the agreement, it may be that a tender, though unaccepted, would bar an action; Story, Contr. § 1357; Coit v. Houston, 3 Johns. Cas. (N. Y.) 243. Satisfaction without accord is not sufficient; 9 M. & W. 596; nor is accord without satisfaction; 3 B. & C. 257.

The burden of proving accord and satisfaction is on him who alleges it; but it may

be established by conduct and circumstances, such as the silence of the debtor after notice that the creditor will not accept a tender in full payment; Bahrenburg v. Fruit Co., 128 Mo. App. 526, 107 S. W. 440.

A case of very frequent occurrence is where the amount is disputed or unliquidated and the debtor sends a check for part of the amount as in full if accepted, which the creditor retains and protests that it is received only in part payment. The weight of American authority now holds that there is an accord and satisfaction; Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785; Nassoiy v. Tomlinson, 148 N. Y. 326, 42 N E. 715, 51 Am. St. Rep. 695; Pollman & Bros. Coal & Sprinkling Co. v. City of St. Louis, 145 Mo. 651, 47 S. W. 563; McCormick v. City of St. Louis, 166 Mo. 315, 65 S W. 1038; Bingham v. Browning, 197 Ill. 122, 64 N. E. 317; Anderson v. Granite Co., 92 Me. 429, 43 Atl. 21, 69 Am. St. Rep. 522; Connecticut River Lumber Co. v. Brown, 68 Vt. 239, 35 Atl. 56; Potter v. Douglass, 44 Conn. 541; Talbott v. English, 156 Ind. 299, 59 N. E. 857; Hamilton & Co. v. Stewart, 108 Ga. 472, 34 S. E. 123; Neely v. Thompson, 68 Kan. 193, 75 Pac. 117; Cooper v. R. Co., 82 Miss. 634, 35 South. 162 (where a receipt in full was signed and a verbal protest made to the creditor's agent that no rights were waived); Hull v. Johnson & Co., 22 R. I. 66, 46 Atl. 182 (where the check was specifically marked good only if accepted in full, and those words were stricken out before cashing it). Some cases explicitly require the statement that the payment is in full or circumstances amounting to it in effect; Fremont Foundry & Mach. Co. v. Norton, 3 Neb. (Unof.) 804, 92 N. W. 1058; Whitaker v. Ellenberg, 70 App Div. 489, 75 N Y Supp. 106; Van Dyke v. Wilder, 66 Vt. 579, 29 Atl 1016.

One New York case requires separate notice. The indebtedness was for legal services and a check was sent for less than the amount named; plaintiff wrote that under no circumstances would he accept it in full but would apply it on account; having waited two days for a reply and received none, he collected the check; held no accord and satisfaction; Mack v. Miller, 87 App. Div. 359, 84 N. Y. Supp. 440. See 17 Harv. L. Rev. 272, 469.

In other states it is held to be no satisfaction, but only, as tendered, a payment on account; Krauser v. McCurdy, 174 Pa. 174, 34 Atl. 518; Louisville, N. A. & C. Ry. Co. v. Helm, 109 Ky. 388, 59 S. W. 323; Demeules v. Tea Co., 103 Minn. 150, 114 N. W. 733, 14 L. R. A. (N. S.) 954, 123 Am. St. Rep. 315; and with these courts is the English Court of Appeal; 22 Q. B. D. 610, where it was held that the keeping of the check sent in satisfaction of a claim for a larger amount was not in law conclusive, but that whether there was an accord and satisfaction was a question for the jury.

It must be *by the debtor or his agent;* Booth v. Smith, 3 Wend. (N. Y.) 66; Ellis v. Bibb, 2 Stew. (Ala.) 84; and if made by a stranger, will not avail the debtor in an action at law; Stra. 592; Stark's Adm'r v. Thompson's Ex'rs, 3 T. B. Monr. (Ky.) 302; Clow v. Borst, 6 Johns. (N. Y.) 37. His remedy in such a case is in equity; 3 Taunt. 117; 5 East 294. It is often difficult to distinguish whether an agreement for compromise is an accord without satisfaction or a novation. It is the tendency of the courts to construe a doubtful case as the latter, which extinguishes the old contract; see 16 Y. L. J. 133. It was held that an agreement to pay less than the amount contemplated in an unmatured and contingent obligation, for which the plaintiff had no cause of action, was a novation and that no recovery could be had on the original contract; Bandman v. Finn, 185 N. Y. 508, 78 N. E. 175, 12 L. R. A. (N. S.) 1134. The new undertaking may be executory; Morehouse v. Bank, 98 N. Y. 503; but if it appears directly or inferentially that it is accepted in satisfaction, the original cause of action is extinguished; Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491; as also if the new contract is inconsistent with the old; Renard v. Sampson, 12 N. Y. 561; Stow v. Russell, 36 Ill. 18. The original claim need not have been valid, but must have been *bona fide;* Flegal v. Hoover, 156 Pa. 276, 27 Atl. 162; Wehrum v. Kuhn, 61 N. Y. 623. The cases are collected in Clark, Cont. 125. When the consideration is executory, the original obligation continues until the new agreement is executed; and if that fails, it is revived; Ramborger's Adm'r v. Ingraham, 38 Pa. 147. It is not the new agreement, but its execution, which discharges the old one; Rogers v. Rogers, 139 Mass. 440, 1 N. E. 122; Thomson v. Poor, 147 N. Y. 402, 42 N. E. 13.

Where an accord and satisfaction is the substitution of a new contract for an old one, and the promise is accepted without performance, it is a novation; Harrison v. Henderson, 67 Kan. 194, 72 Pac. 875, 62 L. R. A. 760, 100 Am. St. Rep. 393. In case of a disputed claim, an agreement to pay part to a third person in satisfaction of the whole is a good consideration; Mitchell v. Knight, 7 Ohio Cir. Ct. R. 204.

Certain English rules are thus stated: Where there has been no performance and a right of action has accrued to one party, the other party may offer a different performance and other amends, which if accepted and executed will discharge his liability.

Where performance is to be the payment of a sum of money, payment of a smaller sum is not accord and satisfaction. There must be some other consideration. But if paid at an earlier date, or in a different place than that agreed, it is a discharge. A negotiable instrument for a less amount may be a sat-

isfaction if accepted for the purpose; Odger, C. L. 757.

Accord with satisfaction, when completed, has two effects: it is a payment of the debt; and it is a species of sale of the thing given by the debtor to the creditor, in satisfaction; but it differs from it in this, that it is not valid until the delivery of the article, and there is no warranty of the thing thus sold, except perhaps the title; for in regard to this it cannot be doubted that if the debtor gives on an accord and satisfaction the goods of another, there would be no satisfaction. But the intention of the parties is of the utmost consequence; Bowker v. Harris, 30 Vt. 424; Sutherlin v. Bloomer, 50 Or. 398, 93 Pac. 135; as the debtor will be required only to execute the new contract to that point whence it was to operate a satisfaction of the pre-existing liability.

An accord and satisfaction may be rescinded by subsequent agreement; Heavenrich v. Steele, 57 Minn. 221, 58 N. W. 982; Alexander v. R. Co., 54 Mo. App. 66; it may be avoided on account of fraud; Butler v. R. Co., 88 Ga. 594, 15 S. E. 668; Ball v. McGeoch, 81 Wis. 160, 51 N. W. 443.

In America accord and satisfaction may be given in evidence under the general issue in *assumpsit*, but it must be pleaded specially in debt, covenant and trespass; 2 Greenl. Ev. (15th ed.) § 29. In England it must be pleaded specially in all cases; Rose. N. P. 569. See PAYMENT; ACCEPTANCE; AGREEMENT; NOVATION.

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

ACCOUNT. A detailed statement of the mutual demands in the nature of debit and credit between parties, arising out of contracts or some fiduciary relation; Whitwell v. Willard, 1 Metc. (Mass.) 216; Blakeley v. Biscoe, 1 Hempst. 114, Fed. Cas. No. 18,239; Portsmouth v. Donaldson, 32 Pa. 202, 72 Am. Dec. 782; Turgeon v. Cote, 88 Me. 108, 33 Atl. 787.

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

An *open* account is one in which some term of the contract is not settled by the parties, whether the account consists of one item or many; Sheppard v. Wilkins, 1 Ala. 62; Goodwin v. Hale, 6 Ala. 438; Dunn v. Fleming's Estate, 73 Wis. 545, 41 N. W. 707.

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

In Practice. In Equity. Jurisdiction concurrent with courts of law is taken over matters of account; Post v. Kimberly, 9 Johns. (N. Y.) 470; Bruce v. Burdet, 1 J. J. Marsh (Ky.) 82; Nelson v. Allen, 1 Yerg. (Tenn.) 360; McLaren v. Steapp, 1 Ga. 376, on three grounds: mutual accounts; 18 Beav. 575; dealings so complicated that they cannot be adjusted in a court of law; 1 Sch. & L. 305; 2 H. L. Cas. 28; Hickman v. Stout, 2 Leigh (Va.) 6; Whitwell v. Willard, 1 Metc. (Mass.) 216; Cullum v. Bloodgood, 15 Ala. 34; Printup v. Mitchell, 17 Ga. 558, 63 Am. Dec. 258; Kaston v. Paxton, 46 Or. 308, 80 Pac. 209, 114 Am. St. Rep. 871; McMullen Lumber Co. v. Strother, 136 Fed. 295, 69 C. C. A. 433; Chase v. Phosphate Co., 32 App. Div. 400, 53 N. Y. Supp. 220; the existence of a fiduciary relation between the parties; 1 Sim. Ch. N. S. 573; Massachusetts General Hospital v. Assur. Co., 4 Gray (Mass.) 227; Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005. A bill for an account must show by specific allegations one of these grounds of equity; Walker v. Brooks, 125 Mass. 241; and it must appear in the stating part of the bill; a prayer for an account is not sufficient; Bushnell v. Avery, 121 Mass. 148.

In addition to these peculiar grounds of jurisdiction, equity will grant a discovery in cases of account on the general principles regulating discoveries; Knotts v. Tarver, 8 Ala. 743; Wilson v. Mallett, 4 Sandf. (N. Y.) 112; Walker v. Cheever, 35 N. H. 339; Sheridan v. Ferry Co., 214 Pa. 117, 63 Atl. 418; Sanborn v. Kittredge, 20 Vt. 632, 50 Am. Dec. 58; and will afterwards proceed to grant full relief in many cases; 6 Ves. 136; Rathbone v. Warren, 10 Johns. (N. Y.) 587; Fowle v. Lawrason, 5 Pet. (U. S.) 495, 8 L. Ed. 204. But "to say that whenever there is a right of discovery there must be an account allowed is rather reversing the thing. Discovery, on the contrary, is incident to the order to account. The two things are separate." 2 H. L. Cas. 28.

The remedy of part owners of a ship for adjustments of accounts between themselves is in equity; Milburn v. Guyther, 8 Gill (Md.) 92, 50 Am. Dec. 681; State v. Watts, 7 La. 440, 26 Am. Dec. 507; and so it is when business is carried on upon joint account, whether as partners or not; Clarke v. Pierce, 52 Mich. 157, 17 N. W. 780; Coward v. Clanton, 122 Cal. 451, 55 Pac. 147.

Equitable jurisdiction over accounts applies to the *appropriation of payments;* 1 Story, Eq. Jur. (8th Ed.) § 459; *agency;* Henderson v. McClure, 2 McCord, Eq. (S. C.) 469; including factors, bailiffs, consignees, receivers, and stewards, where there are mutual or complicated accounts; 9 Beav. 284; 2 H. L. Cas. 28 (where, however, it was held that the relation of banker and customer is not such fiduciary relation as to give jurisdiction; *id.* 35); Rembert v. Brown, 17 Ala. 667; *trustees' accounts;* 1

Story, Eq. Jur. § 465; 2 M. & K. 664; Scott v. Gamble, 9 N. J. Eq. 218; administrators and executors; Adams' Heirs v. Adams, 22 Vt. 50; Stong v. Wilkson, 14 Mo. 116; Fleming v. McKesson, 56 N. C. 316; Colbert v. Daniel, 32 Ala. 314; Guardians, etc.; Moore v. Hood, 9 Rich. Eq. (S. C.) 311, 70 Am. Dec. 210; Johnson v. Miller, 33 Miss. 553; *tenants in common*, joint tenants of real estate or chattels; 4 Ves. 752; 1 Ves. & B. 114; partners; Perkins v. Perkins' Ex'r, 3 Gratt. (Va.) 364; Carter v. Holbrook, 3 Cush. (Mass.) 331; Washburn v. Washburn, 23 Vt. 576; Hough v. Chaffin, 4 Sneed (Tenn.) 238; Long v. Majestre, 1 Johns. Ch. (N. Y.) 305; *directors of companies*, and similar officers; 1 Y. & C. 326; *apportionment* of apprentice fees; 2 Bro. C. C. 78; or rents; 2 P. Wms. 176, 501; see 1 Story, Eq. Jur. § 480; *contribution* to relieve real estate; 3 Co. 12; 2 Bos. & P. 270; Cheesebrough v. Millard, 1 Johns. Ch. (N. Y.) 409, 7 Am. Dec. 494; Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 425, 7 Am. Dec. 499; Taylor v. Porter, 7 Mass. 355; *general average;* 4 Kay & J. 367; Sturgess v. Cary, 2 Curt. 59, Fed. Cas. No. 13,572; between *sureties;* 1 Story, Eq. Jur. § 492; *liens;* Skeel v. Spraker, 8 Paige Ch. (N. Y.) 182; Patty v. Pease, 8 Paige Ch. (N. Y.) 277, 35 Am. Dec. 683; *rents* and *profits* between landlord and tenant; 1 Sch. & L. 305; Livingston v. Livingston, 4 Johns. Ch. (N. Y.) 287, 8 Am. Dec. 562; in case of *torts;* Bacon, Abr. *Accompt*, B; a levy; 1 Ves. Sen. 250; 1 Eq. Cas. Abr. 285; and in other cases; McClandish v. Edloe, 3 Gratt. (Va.) 330; *waste;* 1 P. Wms. 407; 6 Ves. 88; *tithes* and *moduses;* Com. Dig. *Chancery* (3 C.), *Distress* (M. 13).

But equity will not entertain a suit for a naked account of profits and damages against an infringer of a patent; Waterman v. Mackenzie, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. Ed. 923; Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975; nor will an account for infringing a trademark be ordered where the infringer acted in good faith, or the profits were small; Saxlehner v. Siegel-Cooper Co., 179 U. S. 42, 21 Sup. Ct. 16, 45 L. Ed. 77. Neither will an account be ordered merely to establish by testimony the allegations of the bill; Tilden v. Maslin, 5 W. Va. 377; nor when the accounts are all on one side and no discovery is needed; Graham v. Cummings, 208 Pa. 516, 57 Atl. 943.

On a bill for an account the right of the defendant to affirmative relief is as broad as that of complainant; Wilcoxon v. Wilcoxon, 111 Ill. App. 90; even if the answer contains no demand for it; Consolidated Fruit Jar Co. v. Wisner, 110 App. Div. 99, 97 N. Y. Supp. 52, affirmed 188 N. Y. 624, 81 N. E. 1162.

A decree for an accounting under a decree is not necessarily delayed or prevented by the fact that it may affect the interests of persons not then in being, as after-born children, and the latter may be bound by it; as in the case of trustees of land subject to a life tenancy; 2 Vern. 526; Harrison v. Wallton's Ex'r, 95 Va. 721, 30 S. E. 372, 41 L. R. A. 703, 64 Am. St. Rep. 830; decrees of probate courts construing a will; Ladd v. Weiskopf, 62 Minn. 29, 64 N. W. 99, 69 L. R. A. 785; or distributing a decedent's estate; Rhodes v. Caswell, 41 App. Div. 232, 58 N. Y. Supp. 470.

Equity follows the analogy of the law in refusing to interfere with stated accounts; 2 Sch. & L. 629; 3 Bro. C. C. 639, n.; Lewis v. Baird, 3 McLean 83, Fed. Cas. No. 8,316; Robinson v. Hook, 4 Mas. 143, Fed. Cas. No. 11,956; Piatt v. Vattier, 9 Pet. (U. S.) 405, 9 L. Ed. 173. See ACCOUNT STATED.

Equity does not deal with accounts upon the principle of mercantile bookkeeping. It requires the items of charge and discharge; Langd. Eq. Pl. § 75, n. Producing books of account is not stating an account.

The approved practice is to enter an interlocutory decree for an account, but a failure to do so is not error; Hollahan v. Sowers, 111 Ill. App. 263; but see Silliman v. Smith, 72 App. Div. 621, 76 N. Y. Supp. 65; but the court has power to pass on the account without the intervention of a master; Glover v. Jones, 95 Me. 303, 49 Atl. 1104; Davis v. Hofer, 38 Or. 150, 63 Pac. 56; Darby v. Gilligan, 43 W. Va. 755, 28 S. E. 737. A reference will not be ordered to afford opportunity for evidence to support the bill; Beale v. Hall, 97 Va. 383, 34 S. E. 53; Ammons v. Oil Co., 47 W. Va. 610, 35 S. E. 1004.

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

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

In several states, the action has received a liberal extension; Curtis v. Curtis, 13 Vt. 517; Dennison v. Goehring, 7 Pa. 175, 47 Am. Dec. 505; Barnum v. Landon, 25 Conn. 137; Knowles v. Harris, 5 R. I. 402, 73 Am. Dec. 77.

In general it lies "in all cases where a man has received money as the agent of another, and where relief may be had in chancery"; Bredin v. Kingland, 4 Watts (Pa.) 421. It is said to be the proper remedy for one partner against another; Irvine v. Hanlin, 10 S. & R. (Pa.) 220; Beach v. Hotchkiss, 2 Conn. 425; Wiswell v. Wilkins, 4 Vt. 137; Kelly v. Kelly, 3 Barb. (N. Y.) 419; Young v. Pearson, 1 Cal. 448; for money used by one partner after the dissolution of the firm; Fowle v. Kirkland, 18 Pick.

(Mass) 299; though equity seems to be properly resorted to where a separate tribunal exists; Calloway v. Tate, 1 Hen. & M. (Va.) 9; Long v. Majestre, 1 Johns. Ch. (N. Y.) 305. The action lies for salary of an officer of a corporation; Talbotton R. Co. v. Gibson, 106 Ga. 229, 32 S. E. 151; timber taken from land; Bernstein v. Smith, 10 Kan. 60; club dues; Elm City Club v. Howes, 92 Me. 211, 42 Atl. 392; for materials furnished and superintendence of work under an agreement existing for so long as both parties should see fit; Quin v. Distilling Co., 171 Mass. 283, 50 N. E. 637; commissions to a real estate agent on a sale; Reynolds-McGinness Co. v. Green, 78 Vt. 28, 61 Atl. 556; work and labor and money lent; Miller v. Armstrong, 123 Ia. 86, 98 N. W. 561; Horning v. Poyer, 18 Ohio Cir. Ct. R. 732; Hartsell v. Masterson, 132 Ala. 275, 31 South. 616; use and occupation of land; Ketcham v. Barbour, 102 Ind. 576, 26 N. E. 127; the price of land sold and conveyed; Curran v. Curran, 40 Ind 473; money received by an attorney for his client; Bredin v. Kingland, 4 Watts (Pa.) 421.

In other states, reference may be made to an auditor by order of the court, in the common forms of actions founded on contract or tort, where there are complicated accounts or counter-demands; Pierce v. Thompson, 6 Pick. (Mass.) 193; King v. Lacey, 8 Conn. 499; Brewster v. Edgerly, 13 N. H. 275; Farley v. Ward, 1 Tex. 646; and see Cozzens v. Hodges, 1 R. I. 491. See AUDITOR. In the action of account, an interlocutory judgment of *quod computet* is first obtained; McPherson v. McPherson, 33 N. C. 391, 53 Am. Dec. 416; Lee v. Abrams, 12 Ill. 111, on which no damages are awarded except *rationc interplacitationis;* Cro. Eliz. 83; Gratz v. Phillips, 5 Binn. (Pa.) 564.

The account is then referred to an auditor, who now generally has authority to examine parties; Hoyt v. French, 24 N. H. 198 (though such was not the case formerly); before whom issue of law and fact may be taken in regard to each item, which he must report to the court; 2 Ves. 388; Thompson v. Arms, 5 Vt. 546; King v. Hutchins, 26 N. H. 139; Crousillat v. McCall, 5 Binn. (Pa.) 433; on their decision the auditors make up the account, report it and are discharged; *id.* Upon the facts reported by the auditor the court decides the law of the case; Matthews v. Tower, 39 Vt. 433. Only the controverted items need be proved in an action on a verified account; Shuford v. Chinski (Tex.) 26 S. W. 141.

A final judgment *quod recuperet* is entered for the amount found by him to be due; and the auditor's account will not be set aside except upon a very manifest case of error; Appeal of Stehman, 5 Pa. 413; Tourne v. Riviere, 1 La. Ann. 380. See AUDITOR.

In case of mutual accounts the statute of limitations commences to run from the date of the last item on either side; 2 Wood, Lim. 714; where the last item of a mutual running account is within six years from the commencement of a suit, the statute does not apply; McFarland v. O'Neil, 155 Pa. 260, 25 Atl. 756; Chadwick v. Chadwick, 115 Mo. 581, 22 S. W. 479; but in Vermont the debt runs from the date of the last credit, and not from the last debit; George v. Mach. Co., 65 Vt. 287, 26 Atl. 722.

If the defendant is found in surplusage, that is, is creditor of the plaintiff on balancing the accounts, he cannot in this action recover judgment for the balance so due. He may bring an action of debt, or, by some authorities, a sci. fa., against the plaintiff, whereon he may have judgment and execution against the plaintiff. See Palm. 512; 1 Leon. 219; 3 Kebl. 362; 1 Rolle, Abr. 599, pl. 11; Brooke, Abr. *Accord*, 62; 1 Rolle 87.

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

The fact that one possesses an open account in favor of another is not presumptive evidence of the holder's ownership; Gregg v. Mallett, 111 N. C. 74, 15 S. E. 936. In a statement of account it is not necessary to say "E. & O. E."; that is implied; 6 El. & Bl. 69.

ACCOUNT BOOK. A book kept by a merchant, trader, mechanic, or other person, in which are entered from time to time the transactions of his trade or business. Such books, when regularly kept, may be admitted in evidence; Greenl. Ev. §§ 115–118; Bicknell v. Mellett, 160 Mass. 328, 35 N. E. 1130; Kohler v. Lindenmeyr, 129 N. Y. 498, 29 N. E. 957.

See ORIGINAL ENTRIES, BOOK OF.

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

ACCOUNT RENDER. See ACCOUNT.

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

An account cannot become an account stated with reference to a debt payable on a contingency; Tuggle v. Minor, 76 Cal. 96, 18 Pac. 131. Although an item of an account may be disputed, it may become an account stated as to the items admittedly correct; Mulford v. Cæsar, 53 Mo. App. 263.

In Equity. Acceptance may be inferred

from circumstances, as where an account is rendered to a merchant and no objection is made, after sufficient time; 1 Sim. & S. 333; Murry v. Toland, 3 Johns. Ch. (N. Y.) 569; Freeland v. Heron, 7 Cra. 147, 3 L. Ed. 297; Pratt v. Weyman, 1 McCord Ch. (S. C.) 156; Wood v. Gault, 2 Md. Ch. Dec. 433; Dows v. Durfee, 10 Barb. (N. Y.) 213. Such an account is deemed conclusive between the parties; 2 Bro. C. C. 62, 310; Desha v. Smith, 20 Ala. 747; Consequa v. Fanning, 3 Johns. Ch. (N. Y.) 587; Stiles v. Brown, 1 Gill. (Md.) 350; Farmer v. Barnes, 56 N. C. 109; to the extent agreed upon; Troup v. Haight, 1 Hopk. Ch. (N. Y.) 239; unless some fraud, mistake, or plain error is shown; Barrow v. Rhinelander, 1 Johns. Ch. (N. Y.) 550; Pratt v. Weyman, 1 McCord Ch. (S. C.) 156; and in such case, generally, the account will not be opened, but liberty to surcharge or falsify will be given; 9 Ves. 265; 1 Sch. & L 192; Hutchins v. Hope, 7 Gill (Md.) 119. A consideration and legal liability for each item, aside from the stated account, is not essential to sustain an action for the balance; Patillo v. Commission Co., 131 Fed. 680, 65 C. C. A. 508.

At Law. An account stated is conclusive as to the liability of the parties, with reference to the transactions included in it; Murray v. Toland, 3 Johns Ch. (N. Y.) 569; except in cases of fraud or manifest error; 1 Esp. 159; Goodwin v. Insurance Co, 24 Conn. 591; Martin v. Beckwith, 4 Wis. 219; White v. Walker, 5 Fla. 478. See Ogden v. Astor, 4 Sandf. (N. Y.) 311; Neff v. Wooding, 83 Va. 432, 2 S. E. 731.

Acceptance by the party to be charged must be shown; Bussey v. Gant's Adm'r, 10 Humphr. (Tenn.) 238; Lee v. Abrams, 12 Ill. 111. The acknowledgment that the sum is due is sufficient; 2 Term 480; though there be but a single item in the account; 13 East 249; 5 M. & S. 65.

The acceptance need not be in express terms; Powell v. R. R., 65 Mo. 658; Volkening v. De Graaf, 81 N. Y. 268. Acceptance may be inferred from retaining the account a sufficient time without making objection; Freeland v. Heron, 7 Cra. (U. S.) 147, 3 L. Ed. 297; Jones v. Dunn, 3 W. & S. (Pa.) 109; Dows v. Durfee, 10 Barb. (N. Y.) 213; Ogden v. Astor, 4 Sandf. (N. Y.) 311; Patillo v. Commission Co., 131 Fed. 680, 65 C. C. A. 508; and from other circumstances; Berry v. Pierson, 1 Gill (Md.) 234.

If the parties had already come to a disagreement when the account is rendered, assent cannot be inferred from silence; Edwards v. Hoeffinghoff, 38 Fed. 635.

A definite ascertained *sum* must be stated to be due; Andrews v. Allen, 9 S. & R. (Pa.) 241.

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

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

An agent may bind his principal; Murray v. Toland, 3 Johns. Ch. (N. Y.) 569; but he must show his authority; Thallhimer v. Brinckerhoff, 4 Wend. (N. Y.) 394, 21 Am. Dec. 155; Harvey v. Ry. Co., 13 Hun (N. Y.) 392. Partners may state accounts; and an action lies for the party entitled to the balance; Ozeas v. Johnson, 4 Dall. (Pa.) 434, 1 L. Ed. 897; Lamalere v. Caze, 1 Wash. C. C. 435, Fed. Cas. No. 8,003; Kidder v. Rixford, 16 Vt. 169, 42 Am. Dec. 504.

The acceptance of the account is an acknowledgment of a debt due for the balance, and will support assumpsit. It is not, therefore, necessary to prove the items, but only to prove an existing debt or demand, and the stating of the account; Ware v. Dudley, 16 Ala. 742; Auzerais v. Naglee, 74 Cal. 60, 15 Pac. 371.

Facts known to a party when he settles an account stated cannot be used later to impeach it; Marmon v. Waller, 53 Mo. App. 610; and it should not be set aside except for clear showing of fraud or mistake; Greenhow v. Edler, 51 Fed. 117; Marmon v. Waller, 53 Mo. App. 610.

On an account stated and a balance due, a promise is implied to pay this balance on demand; a subsequent promise differing therefrom is *nudum pactum*. Odger, C. L. 683.

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

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

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

ACCOUNTANTS, CHARTERED. Persons skilled in the keeping and examination of accounts, who are employed for the purpose of examining and certifying to the correctness of accounts of corporations and others. The business is usually carried on by corporations. See AUDITOR.

ACCOUPLE. To unite; to marry.

ACCREDIT. In International Law. To acknowledge; send (an envoy) with credentials.

Used of the act by which a diplomatic agent is acknowledged by the government to which he is

sent. This at once makes his public character known and becomes his protection. It is used also of the act by which his sovereign commissions him. This latter use is now the accepted one.

ACCRESCERE (Lat.). To grow to; to be united with; to increase.

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

It is used in a related sense in the common-law phrase *jus accrescendi*, the right of survivorship; 1 Washb. R. P. 426.

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

ACCRETION (Lat. *accrescere*, to grow to). The increase of real estate by the addition of portions of soil, by gradual deposition through the operation of natural causes, to that already in possession of the owner. 3 Washb. R. P. (5th ed.) 50.

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

If an island in a non-navigable stream results from accretion, it belongs to the owner of the bank on the same side of the *filum aquæ;* 3 Washb. R. P. 60; 2 Bla. Com. 261, n.; 3 Kent 428; Hargrave, Law Tracts 5; Hale, de Jur. Mar. 14; 3 Barn. & C. 91, 107; Ex parte Jennings, 6 Cow. (N. Y.) 537, 16 Am. Dec. 447; Ingraham v. Wilkinson, 4 Pick. (Mass.) 268, 16 Am. Dec. 342; Woodbury v. Short, 17 Vt. 387, 44 Am. Dec. 344.

"It is generally conceded that the riparian title attaches to subsequent accretions to the land effected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river, or to sudden accretions produced by unusual floods, is a question which each state decides for itself;" Barney v. Keokuk, 94 U. S. 337, 24 L. Ed. 224; Missouri v. Nebraska, 196 U. S. 23, 25 Sup. Ct. 155, 49 L. Ed. 372; Goddard v. Winchell, 86 Ia. 71, 52 N. W. 1124, 17 L. R. A. 788, 41 Am. St. Rep. 481. As a general rule, such accretions do not belong to the riparian owner; City of Victoria v. Schott, 9 Tex. Civ. App. 332, 29 S. W. 681; Cox v. Arnold, 129 Mo. 337, 31 S. W. 592, 50 Am. St. Rep. 450; Cooley v. Golden, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300; but if, after an avulsion, an accretion forms within the original land line, it belongs to the riparian owner, though separated from the main land by a slough; Minton v. Steele, 125 Mo. 181, 28 S. W. 746. Land remade by accretion after it has been washed away belongs to the original proprietor; Ocean City Ass'n v. Shriver, 64 N. J. L. 550, 46 Atl. 690, 51 L. R. A. 425, n., which see as to the right of the owner to follow accretions across a division line previously submerged by the action of the water.

However accretions may be commenced or continued, the right of one who is the owner of uplands to follow and appropriate them ceases when the formation passes laterally the land of his conterminous neighbor; Mulry v. Norton, 100 N. Y. 425, 3 N. E. 581, 53 Am. Rep. 206, where a bar separated from the mainland by a lagoon was claimed as an accretion by the owner of the portion of the bar where the formation began. This bar merely replaced a formation which had been in part washed away, and the court said that the owner of the nucleus of the bar could not, even if the process of its extension was effected by accretion, claim beyond the point where such accretions began to be adjacent to the property of adjoining owners. See 51 L. R. A. 425, n.

An accretion formed on the other side of a public street which bounds the property of an individual belongs to the street, if the fee of that is in the public; Ellinger v. R. Co., 112 Mo. 525, 20 S. W. 800; City of St. Louis v. R. Co., 114 Mo. 13, 21 S. W. 202. A reliction formed by the gradual drying up of a lake belongs to the riparian owners; Poynter v. Chipman, 8 Utah, 442, 32 Pac. 690; Olson v. Huntamer, 6 S. D. 364, 61 N. W. 479; but not one formed by artificial drainage; Noyes v. Collins, 92 Ia. 566, 61 N. W. 250, 26 L. R. A. 609, 54 Am. St. Rep. 571.

See AVULSION; ALLUVION; RIPARIAN PROPRIETOR; ISLAND; RELICTION.

ACCROACH. To attempt to exercise royal power. 4 Bla. Com. 76.

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

In French Law. To delay. Whishaw.

ACCRUAL, CLAUSE OF. A clause in a deed of settlement or a will providing that the share of one dying shall vest in the survivor or survivors.

ACCRUE. To grow to; to be added to; to become a present right or demand, as the interest accrues on the principal. *Accruing costs* are those which become due and are created after judgment; as the costs of an execution. See Johnson v. Ins. Co., 91 Ill. 95, 33 Am. Rep. 47; Strasser v. Staats, 59 Hun 143, 13 N. Y. Supp. 167.

To rise, to happen, to come to pass; as the statute of limitation does not commence running until the cause of action has *accrued;* Scheerer v. Stanley, 2 Rawle (Pa.) 277; Braddee v. Wiley, 10 Watts (Pa.) 363; Bacon, Abr. Limitation of Actions (D, 3); Emerson v. The Shawano City, 10 Wis. 433. A cause of action *accrues* when suit may be commenced for a breach of contract; Amy v. Dubuque, 98 U. S. 470, 25 L. Ed. 228. It is distinguished from sustain; Adams v. Brown, 4 Litt. (Ky.) 7; and from owing; 6 C. B. N. S. 429; Gross v. Partenheimer, 159 Pa. 556, 28 Atl. 370; but see Cutcliff v. McAnally, 88 Ala. 507, 7 South. 331; Fay v. Holloran, 35 Barb. (N. Y.) 295.

ACCUMULATION, TRUST FOR. See PERPETUITY.

ACCUMULATIVE LEGACY. See LEGACY.

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

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

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

ACCUSE. To charge or impute the commission of crime or immoral or disgraceful conduct or official delinquency. It does not necessarily import the charge of a crime by judicial procedure; State v. South, 5 Rich. (S. C.) 489, 493; Com. v. O'Brien, 12 Cush. (Mass.) 84; Robbins v. Smith, 47 Conn. 182; 1 C. & P. 479. See People v. Braman, 30 Mich. 460, where the court was divided as to the meaning of the term, Cooley, C J., and Christiancy, J., holding that it meant any public accusation of crime as well as a formal complaint, and Graves and Campbell, JJ., *contra;* and Com. v. Cawood, 2 Va. Cas. 527 where, Barbour, J, dissenting, it was held that one is not *accused* until indicted.

ACCUSED. One who is charged with a crime or misdemeanor. See People v. Braman, 30 Mich. 468. The term cannot be said to apply to a defendant in a civil action; Castle v. Houston, 19 Kan. 417, 37 Am Rep. 127; and see Mosby v. Ins. Co., 31 Gratt. (Va.) 629.

ACCUSER. One who makes an accusation.

ACCUSTOMED. Habitual; often used, synonymous with usual; Farwell v. Smith, 16 N. J. L. 133.

ACEQUIA. A canal for irrigation; a public ditch.

Where irrigation is necessary, as in New Mexico, there is much legislation respecting public ditches and streams, and those used for the purpose of irrigation are declared to be "public ditches or acequias"; Comp. L. N. Mex. tit. 1, ch. 1, § 6.

ACHAT, also ACHATE, ACHATA, ACHET. In French Law. A purchase.

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

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

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

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

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

Nature of. In some states the act is held to be a judicial or quasi-judicial one; Wasson v. Connor, 54 Miss. 351; Harmon v. Magee, 57 Miss. 410; Grider v. Mortgage Co., 99 Ala. 281, 12 South. 775, 42 Am. St. Rep. 58 (changing the rule of earlier cases); Thompson v. Mortgage Security Co, 110 Ala. 400, 18 South. 315, 55 Am. St. Rep. 29; Hellman v. Kroh, 155 Pa. 1, 25 Atl. 751; Murrell v. Diggs, 84 Va. 900, 6 S. E. 461, 10 Am. St. Rep. 893; while in others it is held to be a ministerial act; Lynch v. Livingston, 6 N. Y. 422; Loree v. Abner, 57 Fed. 159, 6 C. C. A. 302; Ford v. Osborne, 45 Ohio St. 1, 12 N. E. 526; Learned v. Riley, 14 Allen (Mass.) 109.

Who may take. An officer related to the parties; Lynch v. Livingston, 6 N. Y. 422; Remington Paper Co. v. O'Dougherty, 81 N. Y. 474. The presumption is that the officer took it within his jurisdiction; Morrison v. White, 16 La. Ann. 100; Rackleff v. Norton, 19 Me. 274; Bradley v. West, 60 Mo. 33; and that it was duly executed; Albany County Savings Bank v. McCarty, 71 Hun 227, 24 N. Y. Supp. 991.

In some states a notary cannot take acknowledgment in another county than the one within which he was appointed and resides; Utica & Black River R. Co. v. Stewart, 33 How. Pr. (N. Y.) 312; Rehkoph v. Miller, 59 Ill. App. 662; nor the attorney of record; Gilmore v. Hempstead, 4 How. Pr. (N. Y.) 153; Thurman v Cameron, 24 Wend. (N. Y.) 91; Hughes v. Wilkinson's Lessee, 37 Miss. 482; Hedger v. Ward, 15 B. Mon. (Ky.) 106; nor if his term has expired; Gilbraith v. Gallivan, 78 Mo. 452; Carlisle v. Carlisle, 78 Ala. 542. In Pennsylvania, by statute, a notary may act anywhere within the state; Acts, 1893, p 323.

Taking an acknowledgment is not public business such as may not be transacted on a legal holiday; Slater v. Schack, 41 Minn. 269, 43 N. W. 7.

One cannot take an acknowledgment of a deed in which he has any interest; Beaman v. Whitney, 20 Me. 413; Groesbeck v. Seeley, 13 Mich. 329; Wasson v. Connor, 54 Miss. 351; Brown v. Moore, 38 Tex. 645; Withers v. Baird, 7 Watts (Pa.) 227, 32 Am. Dec. 754. *Contra*, Davis v. Beazley, 75 Va. 491; Dail v. Moore, 51 Mo. 589; West v. Krebaum, 88 Ill. 263; Green v. Abraham, 43 Ark. 420.

Sufficiency of. Certificate need only substantially comply with the statute. The fact

of acknowledgment and the identity of the parties are the essential parts, and must be stated; Bryan v. Ramirez, 8 Cal. 461, 68 Am. Dec. 340; Morse v. Clayton, 13 Smedes & M. (Miss.) 373; Alexander v Merry, 9 Mo. 514.

The general rule applied in cases of grammatical or clerical errors is that the courts will disregard obvious mistakes, and read into the acknowledgment the proper word, if such word can be easily ascertained; Merritt v. Yates, 71 Ill. 636, 23 Am. Rep. 128; Cairo & St. L. R. Co. v. Parrott, 92 Ill. 194; Durst v. Daugherty, 81 Tex. 650, 17 S. W. 388; McCardia v. Billings, 10 N. D. 373, 87 N. W. 1008, 88 Am. St. Rep. 729; Frostburg Mut. Bldg. Ass'n v. Brace, 51 Md. 508; Hughes v. Wright, 100 Tex. 511, 101 S. W. 789, 11 L. R. A. (N. S.) 643, 123 Am. St. Rep. 827; but it is held that important words omitted cannot be supplied by intendment; Jackway v Gault, 20 Ark. 190, 73 Am. Dec. 494; Hayden v. Westcott, 11 Conn. 129; Newman v. Samuels, 17 Ia. 528; Wetmore v. Laird, 5 Biss. 160, Fed. Cas. No. 17,467.

In the following cases it was held that the statute must be strictly complied with; Buell v. Irwin, 24 Mich. 145; Rogers v. Adams, 66 Ala. 600; Myers v. Boyd, 96 Pa. 427; Wetmore v. Laird, 5 Biss. 160, Fed. Cas. No. 17,467; Tully v. Davis, 30 Ill. 103, 83 Am. Dec. 179; Ridgely v. Howard, 3 H. & McK. (Md.) 321. Where a notary takes the acknowledgment and attaches his seal, but fails to sign his name, it is not sufficient; Clark v. Wilson, 127 Ill. 429, 19 N. E. 860, 11 Am. St. Rep. 143.

Effect of. Only purchasers for value can take advantage of defects; Mastin v. Halley, 61 Mo. 196.

An acknowledged deed is evidence of seizin in the grantee, and authorizes recording it; Kellogg v. Loomis, 16 Gray (Mass) 48.

An unacknowledged deed is good between the parties and subsequent purchasers with actual notice; Gray v. Ulrich, 8 Kan. 112; Kellogg v. Loomis, 16 Gray (Mass.) 48; Stevens v. Hampton, 46 Mo. 404; Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533; Ryan v. Carr, 46 Mo. 483.

The certificate will prevail over the unsupported denial of the grantor; Lickmon v. Harding, 65 Ill. 505.

Identification of Grantor. An introduction by a common friend is sufficient to justify officer in making certificate; Carpenter v. Dexter, 8 Wall. (U. S.) 513, 19 L. Ed. 426. *Contra*, Jones v. Bach, 48 Barb. (N. Y.) 568; Nippel v. Hammond, 4 Col. 211. See ACQUAINTED.

A notary imposed upon by a personation is liable only for clear negligence. It is a legal presumption that he acted on reasonable information, and his absence of memory as to details of what occurred does not destroy that presumption; **Com. v. Haines**, 97 Pa. 228.

The certificate is not invalidated by want of recollection of the officer; Tooker v. Sloan, 30 N. J. Eq. 394; nor by mistake in, or omission of, the date; Huxley v. Harrold, 62 Mo. 516; Kelly v. Rosenstock, 45 Md. 389; Webb v. Huff, 61 Tex. 677; Yorty v. Paine, 62 Wis. 154, 22 N. W. 137.

It is always permissible to show that the party never appeared before the officer and acknowledged the deed; Donahue v. Mills, 41 Ark. 421; Pickens v. Knisely, 29 W. Va. 1, 11 S. E. 932, 6 Am. St. Rep. 622; but if he appeared, the recitals in the certificate of acknowledgment can only be impeached for fraud or imposition, with knowledge brought home to the grantee; Bouvier-Iaeger Coal Land Co. v. Sypher, 186 Fed. 660.

Correction. Where a notary fails to set forth the necessary facts, he may correct his certificate, and may be compelled by mandamus, but equity has no jurisdiction to correct it; Wannall v. Kem, 51 Mo. 150; Hutchinson v. Ainsworth, 63 Cal. 286; Merritt v. Yates, 71 Ill. 636, 23 Am. Rep. 128.

See paper by Judge Cooley, 4 Amer. Bar Assoc. 1881.

ACKNOWLEDGMENT MONEY. A sum paid by tenants of copyhold in some parts of England, as a recognition of their superior lords. Cowell; Blount. Called a fine by Blackstone; 2 Bla. Com. 98.

ACOLYTE. An inferior church servant, who, next under the sub-deacon, follows and waits upon the priests and deacons, and performs the offices of lighting the candles, carrying the bread and wine, and paying other servile attendance. Spelman; Cowell.

ACQUAINTED. Having personal knowledge of. Kelly v. Calhoun, 95 U. S. 710, 24 L. Ed. 544. Acquaintance expresses less than familiarity; In re Carpenter's Estate, 94 Cal. 406, 29 Pac. 1101. It is "familiar knowledge"; Wyllis v. Haun, 47 Ia. 614; Chauvin v. Wagner, 18 Mo. 531. To be "personally acquainted with," and to "know personally," are equivalent terms; Kelly v. Calhoun, 95 U. S. 710, 24 L. Ed. 544. When used with reference to a paper to which a certificate or affidavit is attached, it indicates a substantial knowledge of the subject-matter thereof. Bohan v. Casey, 5 Mo. App. 101; U. S. v. Jones, 14 Blatchf. 90, Fed. Cas. No. 15,491.

ACQUEREUR. In French and Canadian Law. One who acquires title, particularly to immovable property, by purchase.

ACQUEST. An estate acquired by purchase. 1 Reeves, Hist. Eng. Law 56.

ACQUETS. In Civil Law. Property which has been acquired by purchase, gift, or otherwise than by succession. Immovable property which has been acquired otherwise than by succession. Merlin, Répert.

The profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the prod-

uce of the joint industry of both husband and wife, and of the estates which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two, and not of both.

This is the signification attached to the word in Louisiana; La. Civ. Code 2371. The rule applies to all marriages contracted in that state, or out of it, when the parties afterward go there to live, as to acquets afterward made there. The acquets are divided into two equal portions between the husband and wife, or between their heirs at the dissolution of their marriage.

The parties may, however, lawfully stipulate there shall be no community of profits or gains; but have no right to agree that they shall be governed by the laws of another country; Bourcier v. Lanusse, 3 Mart. O. S. (La.) 581; Saul v. His Creditors, 5 Mart. N. S. (La.) 571, 16 Am. Dec. 212. See 2 Kent 153, n. See COMMUNITY; CONQUETS.

As to the sense in which it is used in Canada, see 2 Low. Can. 175.

ACQUIESCENCE. A silent appearance of consent. Worcester, Dict.

Failure to make any objections. 2 Phil. 117; 8 Ch. Div. 286; Scott v. Jackson, 89 Cal. 258, 26 Pac. 898. Submission to an act of which one had knowledge. See Pence v. Langdon, 99 U. S. 578, 25 L. Ed. 420. It imports full knowledge; 3 De G. F. & J. 58. Tacit assent to an *ultra vires* act, after knowledge of it, causing innocent third persons to assume positions of which they cannot be deprived without loss. Rabe v. Dunlap, 51 N. J. Eq. 40, 25 Atl. 959; Kent v. Mining Co., 78 N. Y. 159.

It is to be distinguished from avowed consent, on the one hand, and from open discontent or opposition, on the other. It amounts to a consent which is impliedly given by one or both parties to a proposition, a clause, a condition, a judgment, or to any act whatever.

It implies active, as distinguished from laches, which implies passive assent; Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674.

When a party is bound to elect between a paramount right and a testamentary disposition, his acquiescence in a state of things which indicates an election, when he was aware of his rights, will be *prima facie* evidence of such election. See 2 Rop. Leg. 439; 1 Ves. 335; 12 *id.* 136; 3 P. Wms. 315. The acts of acquiescence which constitute an implied election must be decided rather by the circumstances of each case, than by any general principle; 1 Swans. 382, note, and the numerous cases there cited.

Acquiescence in the acts of an agent, or one who has assumed that character, will be equivalent to an express authority; 2 Kent 478; Story, Eq. Jur. § 255; U. S. v. Snyder, 4 Wash. C. C. 559, Fed. Cas. No. 16,351; Richmond Manuf'g Co. v. Starks, 4 Mas. 296, Fed. Cas. No. 11,802; Bell v. Cunningham, 3 Pet. (U. S.) 69, 81, 7 L. Ed. 606; Erick v. Johnson, 6 Mass. 193; Towle v. Stevenson, 1 Johns. Cas. (N. Y.) 110; Vianna v. Barclay, 3 Cow. (N. Y.) 281.

Mere delay in repudiating an agent's unauthorized contract will not ratify it, but is evidence from which the jury may so infer; Meyer v. Smith, 3 Tex. Civ. App. 37, 21 S. W. 995; but the disapproval must be within a reasonable time; Johnson v. Carrere, 45 La. Ann. 847, 13 South. 195; and if payment has been made to an agent after his authority has been revoked, the presumption is that he has accounted to the principal when there is long-continued silence on the latter's part; Long v. Thayer, 150 U. S. 520, 14 Sup. Ct. 189, 37 L. Ed. 1167.

See AGENCY; ESTOPPEL.

ACQUIETANDIS PLEGIIS. A writ of justices, formerly lying for the surety against a creditor who refuses to acquit him after the debt has been satisfied. Reg. of Writs 158; Cowell; Blount.

ACQUIRE (Lat. *ad*, for, and *quærere*, to seek). To make property one's own. To gain permanently.

It is regularly applied to a permanent acquisition. A man is said to obtain or procure a mere temporary acquisition. It has been held to include a taking by devise; Santa Clara Female Academy v. Sullivan, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776.

ACQUISITION. The act by which a person procures the property in a thing.

The thing the property in which is secured.

Original acquisition is that by which a man secures a property in a thing which is not at the time he acquires it, and in its then existing condition, the property of any other individual. It may result from occupancy; 2 Kent 289; accession; 2 Kent 293; intellectual labor—namely, for inventions, which are secured by patent rights; and for the authorship of books, maps, and charts, which is protected by copyrights; 1 Bouv. Inst. 508, n.

Derivative acquisitions are those which are procured from others, either by act of law or by act of the parties. Goods and chattels may change owners by act of law in the cases of forfeiture, succession, marriage, judgment, insolvency, and intestacy; or by act of the parties, as by gift or sale.

An acquisition may result from the act of the party himself, or those who are in his power acting for him, as his children while minors; Gale v. Parrot, 1 N. H. 28. See Dig. 41. 1. 53; Inst. 2. 9. 3.

ACQUITMENT. See ABSOLUTION.

ACQUITTAL. A release or discharge from an obligation or engagement.

According to Lord Coke, there are three kinds of acquittal, namely: by deed, when the party re-

leases the obligation; by prescription; by tenure; Co. Litt. 100 *a*.

The absolution of a party charged with a crime or misdemeanor.

The absolution of a party accused on a trial before a traverse jury. Shackleford v. Smith, 1 Nott & McC. (S. C.) 36; Teague v. Wilks, 3 McCord (S. C.) 461. Though frequently expressed as "by the jury," it is in fact by the judgment of the court; 7 M. & G. 481.

Acquittals in fact are those which take place when the jury, upon trial, finds a verdict of not guilty.

Acquittals in law are those which take place by mere operation of law; as where a man has been charged merely as an accessary, and the principal has been acquitted. Coke, 2 Inst. 364.

An acquittal is a bar to any future prosecution for the offence alleged in the first indictment.

If accused is placed upon trial under a valid indictment before a legal jury, and the latter is discharged by the court without good cause and without defendant's consent, it is equivalent to an acquittal; State v. Walker, 26 Ind. 346; Mount v. State, 14 Ohio 295, 45 Am. Dec. 542; Klock v. People, 2 Parker Cr. R. (N. Y.) 676. There may be an acquittal by reason of a discharge without a trial on the merits; Junction City v. Keeffe, 40 Kan. 275, 19 Pac. 735. Acquittal discharges from guilt, pardon only from punishment; Younger v. State, 2 W. Va. 579, 98 Am. Dec. 791.

When a prisoner has been acquitted, he becomes competent to testify either for the government or for his former co-defendants; 7 Cox, Cr. Cas. 341. And it is clear, that where a married defendant is entirely removed from the record by a verdict pronounced in his favor, his wife may testify either for or against any other persons who may be parties to the record; 12 M. & W. 49; 8 Carr. & P. 284. See JEOPARDY; AUTREFOIS ACQUIT; AUTREFOIS CONVICT.

ACQUITTANCE. An agreement in writing to discharge a party from an engagement to pay a sum of money. It is evidence of payment, and differs from a release in this, that the latter must be under seal, while an acquittance need not be under seal. Pothier, Oblig. n. 781. See 3 Salk. 298; Co. Litt. 212 *a*, 273 *a*; Milliken v. Brown, 1 Rawle (Pa.) 391.

ACQUITTED. See ACQUITTAL.

ACRE. A quantity of land containing one hundred and sixty square rods of land, in whatever shape. Cro. Eliz. 476, 665; 6 Co. 67; Co. Litt. 5 *b*. The word formerly signified an open field; whence *acre-fight*, a contest in an open field. Jacob, Dict.

The measure seems to have been variable in amount in its earliest use, but was fixed by statute at a remote period. As originally used, it was applicable especially to meadowlands; Cowell. Originally a strip in the fields that was ploughed in the forenoon. Maitland, Domesday and Beyond 387.

ACRE RIGHT. "The share of a citizen of a New England town in the common lands. The value of the acre right was a fixed quantity in each town, but varied in different towns. A 10-acre lot or right in a certain town was equivalent to 113 acres of upland and 12 acres of meadow, and a certain exact proportion was maintained between the acre right and salable lands." Messages, etc., of the Presidents, Richardson, X, 230.

ACROSS. From side to side. Transverse to the length of. Hannibal & St. J. R. Co. v. Packet Co., 125 U. S. 260, 8 Sup. Ct. 874, 31 L. Ed. 731; but see Appeal of Bennett's Branch Imp. Co., 65 Pa. 242. It may mean over; Brown v. Meady, 10 Me. 391, 25 Am. Dec. 248. See Comstock v. Van Deusen, 5 Pick. (Mass.) 163, where a grant of a right of way *across* a lot of land was held not to mean a right to enter at one side, go partly across and come out at a place on the same side.

ACT (Lat. *agere*, to do; *actus*, done). Something done or established.

In its general legal sense, the word may denote something done by an individual, as a private citizen, or as an officer; or by a body of men, as a legislature, a council, or a court of justice, including not merely physical acts, but also decrees, edicts, laws, judgments, resolves, awards, and determinations. Some general laws made by the Congress of the United States are styled joint resolutions, and these have the same force and effect as those styled acts.

An instrument in writing to verify facts. Webster, Dict.

It is used in this sense of the published acts of assembly, congress, etc. In a sense approaching this, it has been held in trials for treason that letters and other written documents were *acts;* 1 Fost Cr. Cas 198; 2 Stark 116

In Civil Law. A writing which states in a legal form that a thing has been done, said, or agreed. Merlin, Répert.

Private acts are those made by private persons as registers in relation to their receipts and expenditures, schedules, acquittances, and the like. Nov. 73, c. 2; Code 7. 32. 6; 4. 21; Dig. 22. 4; La. Civ. Code art. 2231 to 2254; 8 Toullier, *Droit Civ. Francais* 94.

Acts under private signature are those which have been made by private individuals under their hands. An act of this kind does not acquire the force of an authentic act by being registered in the office of a notary; Marie Louise v. Caucholx, 11 Mart. O. S. (La.) 243; Priou v. Adams, 5 Mart. N. S. (La.) 693; unless it has been properly acknowledged before the officer by the parties to it; Bullard v. Wilson, 5 Mart. N. S. (La.) 196.

Public acts are those which have a public

authority, and which have been made before public officers, are authorized by a public seal, have been made public by the authority of a magistrate, or which have been extracted and been properly authenticated from public records.

In Evidence. The act of one of several conspirators, performed in pursuance of the common design, is evidence against all of them. And see TREASON; PARTNER; PARTNERSHIP; AGENT; AGENCY.

In Legislation. A statute or law made by a legislative body; an approved bill.

The words *bill* and *law* are frequently used synonymously with *act*, but incorrectly; Sedgwick County Com'rs v. Bailey, 13 Kan 600; a bill being only the draft or form of the act presented to the legislature but not enacted; Southwark Bank v. Com., 26 Pa. 446.

General or *public* acts are those which bind the whole community. Of these the courts take judicial cognizance.

Private or *special* acts are those which operate only upon particular persons and private concerns.

The recitals of public acts are evidence of the facts recited, but in private acts they are only evidence against the parties securing them; Branson v. Wirth, 17 Wall. (U. S.) 32, 21 L. Ed. 566.

Judicial Act. An act performed by a court touching the rights of parties or property brought before it by voluntary appearance, or by the prior action of ministerial officers; in short by ministerial acts Flournoy v. Jeffersonville, 17 Ind. 173, 79 Am. Dec. 468; Union Pac. R. Co. v. U. S., 99 U. S. 700, 761, 25 L. Ed. 496.

See STATUTE; CONSTITUTIONAL; CONSTRUCTION; INTERPRETATION; PUNCTUATION.

Act in pais. An act performed out of court, and which is not a matter of record.

A deed or an assurance transacted between two or more private persons in the country, that is, according to the old common law, upon the very spot to be transferred, is matter in pais. 2 Bla. Com. 294.

ACT OF BANKRUPTCY. An act which subjects a person to be proceeded against as a bankrupt. See BANKRUPT; BANKRUPT LAWS; INSOLVENCY.

ACT OF GOD. Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight and pains, and care reasonably to have been expected. L. R. 1 C. P. D. 423. See also L. R. 10 Ex. 255. The civil law employs, as a corresponding term, *vis major*.

The term generally applies, broadly, to natural accidents, such as those caused by lightning, earthquakes, and tempests; Story, Bailm. § 511; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393. A severe snow-storm, which blocked up railroads, held within the rule; Ballentine v. R. Co., 40 Mo. 491, 93 Am. Dec. 315. So where fruit-trees were frozen, in transit, it was held to be by the act of God, unless there had been improper delay on the part of the carrier; Vail v. R. Co., 63 Mo. 230. Also where fruit is in transit; Swetland v. R. Co., 102 Mass. 276. The freezing of a canal or river held within the rule; Parsons v. Hardy, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; Bowman v. Teall, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562; Harris v. Rand, 4 N. H. 259, 17 Am. Dec. 421; Allen v. Ins. Co., 44 N. Y. 437, 4 Am. Rep. 700. A frost of extraordinary severity; 11 Ex. 781; and an extraordinary fall of snow; 28 L. J. Ex. 51; have been held to be the act of God. A sudden failure of wind has been held to be an act of God; Colt v. McMechen, 6 Johns. (N. Y.) 160, 5 Am. Dec. 200; but this case has been doubted; 1 Sm. L. C. Am. ed. 417; and Kent, Ch. J., substantially dissented; see also McArthur v. Sears, 21 Wend (N. Y.) 190. Also a sudden gust of wind or tempest; Gillett v. Ellis, 11 Ill. 579; City of Allegheny v. Zimmerman, 95 Pa. 287, 40 Am. Rep. 649. Losses by fire have not generally been held to fall under the act of God; 1 T. R. 33; Miller v. Navigation Co., 10 N. Y. 431; Chicago & N. W. R. Co. v. Sawyer, 69 Ill. 285, 18 Am. Rep. 613; Merchants' Dispatch Co. v. Smith, 76 Ill. 542 (the Chicago fire); though otherwise when the fire is caused by lightning; Parker v. Flagg, 26 Me. 181, 45 Am. Dec. 101; but where a distant forest fire was driven by a tornado, to where a carrier's cars were on the track awaiting a locomotive, their destruction was held to be by the act of God; Pennsylvania R. Co. v. Fries, 87 Pa. 234; but see Chevallier v. Straham, 2 Tex. 115, 47 Am. Dec. 639, *contra*. When a flood had risen higher than ever before, destruction of goods thereby was held to be by act of God; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426, or where there is a flood; Long v. R. Co., 147 Pa. 343, 23 Atl. 459, 14 L. R. A. 741, 30 Am. St. Rep. 732; Livezey v. Philadelphia, 64 Pa. 106, 3 Am. Rep. 578. The bursting of a boiler does not come within the act of God; M'Call v. Brock, 5 Strob. (S. C.) 119. See Sherman v. Wells, 28 Barb. (N. Y.) 403; Fergusson v. Brent, 12 Md. 9, 71 Am. Dec. 582; Sprowl v. Kellar, 4 Stew. & P. (Ala.) 382; Hill v. Sturgeon, 28 Mo. 323. If water in a spring failed by reason of drouth, there is no breach of contract for its supply; Ward v. Vance, 93 Pa. 502. If a person is thrown from his horse and injured, the resulting illness was considered an act of God; People v. Tubbs, 37 N. Y. 586; so where a railroad engineer became insane; Central of Georgia Ry. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170, 4 Ann. Cas. 128.

In 1 C. P. D. 34, 423, Cockburn, C. J., held, in an action for the loss of a horse on shipboard, that if a carrier "uses all the known

means to which prudent and experienced carriers usually have recourse, he does all that can be reasonably required of him, and if under such circumstances he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such *vis major* as the act of God." The accident, to come within the rule, must be due entirely to natural causes without human intervention; *ibid.*, also Mershon v. Hobensack, 22 N. J. L. 373; Backhouse v. Sneed, 5 N. C. 173; Ewart v. Street, 2 Bailey (S. C.) 157, 23 Am. Dec. 143; Smyrl v. Niolon, 2 Bailey (S. C.) 421, 23 Am. Dec. 146.

The term is sometimes defined as equivalent to inevitable accident; Neal v. Saunderson, 2 Sm. & M. (Miss.) 572, 41 Am. Dec. 609; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; but incorrectly, as there is a distinction between the two; although Sir William Jones proposed the use of inevitable accident instead of *Act of God;* Jones, Bailm. 104. See Story, Bailm. § 25; 2 Bla. Com. 122; 4 Dougl. 287; McArthur v. Sears, 21 Wend. (N. Y.) 190; Neal v. Saunderson, 2 Smedes & M. (Miss.) 572, 41 Am. Dec. 609; Bolton v. Burnett, 5 Blackf. (Ind.) 222.

Where the law casts a *duty* on a party, the performance shall be excused if it be rendered impossible by the act of God; *lex neminem cogit ad impossibilia;* 1 Q. B. D. 548; but where the party *by his own contract* engages to do an act, it is deemed to be his own fault that he did not thereby provide against contingencies, and exempt himself from responsibilities in certain events; and in such case (that is, in the instance of an absolute general contract) the non-performance is not excused by an inevitable accident, or other contingency, although not foreseen by, nor within the control of, the party; 3 M. & S. 267; L. R. 5 C. P. 586; L. R. 4 Q. B. 134; Leake, Contr. 683.

As to goods destroyed after delay in transit, see Alabama G. S. R. Co. v. Quarles, 145 Ala. 436, 40 South. 120, 5 L. R. A. (N. S.) 867, 117 Am. St. Rep. 54, 8 Ann. Cas. 308; Green-Wheeler Shoe Co. v. R. Co., 130 Ia. 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882, 8 Ann. Cas. 45.

See BAILMENT; COMMON CARRIER; INEVITABLE ACCIDENT; PERIL OF THE SEA; SPECIFIC PERFORMANCE.

ACT OF GOVERNMENT. The usual name of Cromwell's Constitution vesting the supreme power in a Protector and two houses of Parliament, passed March 25, 1657.

ACT OF GRACE. A term sometimes applied to a general pardon or the granting or extension of some privilege at the beginning of a new reign or the coming of age or marriage of a sovereign.

ACT OF HONOR. An instrument drawn up by a notary public, after protest of a bill of exchange, when a third party is desirous of paying or accepting the bill for the honor of any or all of the parties to it.

The instrument describes the bill, recites its protest, and the fact of a third person coming forward to accept, and the person or persons for whose honor the acceptance is made. The right to pay the debt of another, and still hold him, is allowed by the law merchant in this instance, and is an exception to the general rule of law; and the right can only be gained by proceeding in the form and manner sanctioned by the law, Gazzam v. Armstrong's Ex'r, 3 Dana (Ky.) 554, Bayley, Bills.

ACT OF INDEMNITY. An act or decree absolving a public officer or other person who has used doubtful powers or usurped an authority not belonging to him from the technical legal penalties or liabilities therefor or from making good losses incurred thereby. Cent. Dict.

ACT OF INSOLVENCY. Within the meaning of the national currency act, an act which shows a bank to be insolvent; such as non-payment of its circulating notes, etc., failure to make good the impairment of capital or to keep good its surplus or reserve; any act which shows the bank is unable to meet its liabilities as they mature or to perform those duties which the law imposes for the purpose of sustaining its credit; In re Manufacturers' Nat. Bank, 5 Biss. 504, Fed. Cas. No. 9,051; Irons v. Bank, 6 Biss. 301, Fed. Cas. No. 7,068. See INSOLVENCY.

ACT OF PARLIAMENT. See STATUTE.

ACT ON PETITION. A form of summary proceeding formerly in use in the High Court of Admiralty, in England, in which the parties stated their respective cases briefly, and supported their statements by affidavit. 2 Dods. Adm. 174, 184; 1 Hagg. Adm. 1, note.

The suitors of the English Admiralty were, under the former practice, ordinarily entitled to elect to proceed either by act on petition, or by the ancient and more formal mode of "plea and proof;" that is, by libel and answer, and the examination of witnesses, W. Rob. Adm. 169, 171, 172.

ACT OF SETTLEMENT. In English Law. The statute of 12 & 13 Will. III. c. 2, by which the crown of England was limited to the present royal family. 1 Bla. Com. 128; 2 Steph. Com. 290. It excluded the sons and successors of James II. and all other Roman Catholics, entailed the crown on the Electoress Sophia of Hanover as the nearest Protestant heir in case neither William III. nor Anne (afterwards queen) should leave issue. The electoress was a daughter of Elizabeth, sister of Charles I. One clause of it made the tenure of judges' office for life or good behavior independent of the crown.

ACT OF STATE. See GOVERNMENTAL ACT.

ACT OF SUPREMACY. An act of 26 Hen. VIII. c. 1, which recognized the king as the only supreme head on earth of the Church of England having full power to correct all errors, heresies, abuses, offenses, contempts and enormities. The oath, taken

under the act, denies to the Pope any other authority than that of the Bishop of Rome.

ACT OF UNIFORMITY. An act for the regulation of public worship obliging all the clergy to use only the Book of Common Prayer; 13 & 14 Car. II. c. 4.

ACT OF UNION. The statutes uniting England and Wales, 27 Hen. VIII. c 26, confirmed by 34 & 35 Hen. VIII. c. 26; England and Scotland, 5 Anne, c. 8; Great Britain and Ireland, 39 & 40 Geo. III. c. 67.

The act uniting the three lower counties (now Delaware) to the province of Pennsylvania, passed at Upland, Dec. 7, 1682, is so called.

ACTA DIURNA (Lat.). A formula often used in signing. Du Cange.

Daily transactions, chronicles, journals, registers. I do not find the thing published in the *acta diurna* (daily records of affairs); Tacitus, Ann. 3, 3; Ainsworth, Lex.; Smith, Lex.

ACTA PUBLICA (Lat.). Things of general knowledge and concern; matters transacted before certain public officers. Calvinus, Lex.

ACTING. Performing; operating. See Meyer v. Johnston, 64 Ala. 603, 665. When applied to a supervising executive, it designates, not an appointed incumbent, but merely a *locum tenens*. Fraser v. U. S., 16 Ct. Cl. 507. See AD INTERIM.

ACTIO. In Civil Law. A specific mode of enforcing a right before the courts of law: *e. g. legis actio; actio sacramenti.* In this sense we speak of *actions* in our law, *e. g.* the action of debt. The right to a remedy, thus; *ex nudo pacto non oritur actio;* no *right of action* can arise upon a naked pact. In this sense we rarely use the word action; 3 Ortolan, Inst. § 1830; 5 Savigny, System 10; Mackeldey, Civ. L. (13th ed) § 193.

The first sense here given is the older one. Justinian, following Celsus, gives the well-known definition: *Actio nihil aliud est quam jus persequendi in judicio quod sibi debetur,* which may be thus rendered: An action is simply the *right* to enforce one's demands in a court of law. See Inst. Jus 4. 6, *de Actionibus;* Pollock, Expansion of C. L. 92

In the sense of a specific form of remedy, there are various divisions of *actiones.*

Actiones civiles are those forms of remedies which were established under the rigid and inflexible system of the civil law, the *jus civilis. Actiones honorariæ* are those which were gradually introduced by the prætors and ædiles, by virtue of their equitable powers, in order to prevent the failure of justice which too often resulted from the employment of the *actiones civiles.* These were found so beneficial in practice that they eventually supplanted the old remedies, of which in the time of Justinian hardly a trace remained. Mackeldey, Civ. L. § 194; 5 Savigny, System.

Directæ actiones, as a class, were forms of remedies for cases clearly defined and recognized as actionable by the law. *Utiles actiones* were remedies granted by the *magistrate* in cases to which no *actio directa* was applicable. They were framed for the special occasion, by analogy to the existing forms, and were generally fictitious; that is, they proceeded upon the assumption that a state of things existed which would have entitled the party to an *actio directa,* and the cause was tried upon this assumption, which the other party was not allowed to dispute. 5 Savigny, System § 215.

Again, there are *actiones in personam* and *actiones in rem.* The former class includes all remedies for the breach of an *obligation,* and are considered to be directed against the person of the wrong-doer. The second class comprehends all remedies devised for the recovery of property, or the enforcement of a right not founded upon a contract between the parties, and are therefore considered as rather aimed at the *thing* in dispute, than at the person of the defendant. Mackeldey, Civ. L. § 195; 5 Savigny, System, § 206; 3 Ortolan, Inst. § 1952.

In respect to their *object,* actions are either *actiones rei persequendæ causa comparatæ,* to which class belong all *in rem actiones,* and those of the *actiones in personam* which were directed merely to the recovery of the value of a thing, or compensation for an injury; or they are *actiones pœnales,* called also *actiones ex delicto,* in which a penalty was recovered of the delinquent, or *actiones mixtæ,* in which were recovered both the actual damages and a penalty in addition. These classes, *actiones pœnales* and *actiones mixtæ,* comprehended cases of injuries, for which the civil law permitted redress by private action, but which modern civilization universally regards as crimes; that is, offences against society at large, and punished by proceedings in the name of the state alone. Thus, theft, receiving stolen goods, robbery, malicious mischief, and the murder or negligent homicide of a slave (in which case an injury to property was involved), gave rise to private actions for damages against the delinquent. Inst. 4. 1. *De obligationibus quæ ex delicto nascuntur; id.* 2. *De bonis vi raptis; id.* 3. *De lege Aquilia.* And see Mackeldey, Civ. L. § 196; 5 Savigny, System § 210.

In respect to the mode of procedure; *actiones in personam* are divided into *stricti juris,* and *bonæ fidei actiones.* In the former the court was confined to the strict letter of the law; in the latter something was left to the discretion of the judge, who was governed in his decision by considerations of what ought to be expected from an honest man under circumstances similar to those of the plaintiff or defendant. Mackeldey, Civ. L. § 197 *a.*

In Savigny's System there are more than a hundred different species of *actio* mentioned, and even in the succinct treatise of Mackeldey nearly eighty are enumerated.

In addition to the works cited may be added the Introduction to Sandars' Justinian, which may be profitably consulted.

To this brief explanation of the most important classes of *actiones* we subjoin an outline of the Roman system of procedure. From the time of the twelve tables (and probably from a much earlier period) down to about the middle of the sixth century of Rome, the system of procedure was that known as the *actiones legis*. Of these but five have come down to us by name; the *actio sacramenti*, the *actio per judicis postulationem*, the *actio per condictionem*, the *actio per manus injectionem*, and the *actio per pignoris captionem*. The first three of these were actions in the usual sense of the term; the last two were modes of execution. The *actio sacramenti* is the best known of all, because from the nature of the questions decided by means of it, which included those of *status*, of property *ex jure Quiritium*, and of successions; and from the great popularity of the tribunal, the *centumviri*, which had cognizance of these questions, it was retained in practice long after the other actions had succumbed to a more liberal system of procedure. As the *actio sacramenti* was the longest-lived, so it was also the earliest, of the *actiones leges;* and it is not only in many particulars a type of the whole class, but the other species are conceived to have been formed by successive encroachments upon its field. The characteristic feature of this action was the *sacramentum*, a pecuniary deposit made in court by each party, which was to be forfeited by the loser. Subsequently, however, the parties were allowed, instead of an actual deposit, to give security in the amount required. Our knowledge of all these actions is exceedingly slight, being derived from fragments of the earlier jurisprudence preserved in literary works, laboriously pieced together by commentators, and the numerous gaps filled out by aid of ingenious and most copious conjectures. They abounded in sacramental words and significant gestures, and, while they were inflexibly rigid in their application, they possessed a character almost sacred, so that the mistake of a word or the omission of a gesture might cause the loss of a suit. In the nature of things, such a system could not maintain itself against the advance of civilization, bringing with it increased complications in all the relations of man to man; and accordingly we find that it gradually, but sensibly, declined, and that at the time of Justinian not a trace of it existed in practice. See 3 Ortolan, Justinian 467 *et seq.*

About the year of Rome 507 began the introduction of the system known as the procedure *per formulam*, or *ordinaria judicia*. An important part of the population of Rome consisted of foreigners, whose disputes with each other or with Roman citizens could not be adjusted by means of the *actiones legcs*, these being entirely confined to questions of the strict Roman law, which could only arise between Roman citizens.

To supply the want of a *forum* for foreign residents, a magistrate, the *prætor peregrinus*, was constituted with jurisdiction over this class of suits, and from the procedure established by this new court sprang the formulary system, which proved so convenient in practice that it was soon adopted in suits where both parties were Roman citizens, and gradually withdrew case after case from the domain of the *legis actiones*, until few questions were left in which that cumbrous procedure continued to be employed.

An important feature of the formulary system, though not peculiar to that system, was the distinction between the *jus* and the *judicium*, between the magistrate and the judge. The magistrate was vested with the civil authority, *imperium*, and that jurisdiction over law-suits which in every state is inherent in the supreme power; he received the parties, heard their conflicting statements, and referred the case to a special tribunal of one or more persons, *judex, arbiter, recuperatores*. The function of this tribunal was to ascertain the facts and pronounce judgment thereon, in conformity with a special authorization to that effect conferred by the magistrate. Here the authority of the judge ended; if the defeated party refused to comply with the sentence, the victor must again resort to the magistrate to enforce the judgment. From this it would appear that the functions of the judge or judges under the Roman system corresponded in many respects with those of the jury at common law. They decided the question of fact submitted to them by the magistrate, as the jury decides the issue eliminated by the pleadings; and, the decision made, their functions ceased, like those of the jury.

As to the amount at stake, the magistrate, in cases admitting it, had the power to fix the sum in dispute, and then the judge's duties were confined to the simple question whether the sum specified was due the plaintiff or not; and if he increased or diminished this amount he subjected himself to an action for damages. In other cases, instead of a precise sum, the magistrate fixed a *maximum* sum, beyond which the judge could not go in ascertaining the amount due; but in most cases the magistrate left the amount entirely to the discretion of the judge.

The directions of the magistrate to the judge were made up in a brief statement called the *formula*, which gives its name to this system of procedure. The composition of the formula was governed by well-established rules. When complete, it consisted of four parts, though some of these were frequently omitted, as they were unnecessary in certain classes of actions. The *first* part of the formula, called the *demonstratio*, recited the subject submitted to the judge, and consequently the facts of which he was to take cognizance. It varied of course, with the subject-matter of the suit, though each class of cases had a fixed and appropriate form. This form, in an action by a vendor against his vendee, was as follows: *"Quod Aulus Agerius Numerio Negidio hominem vendidit;"* or, in case of a bailment, *"Quod Aulus Agerius apud Numerium Negidium hominem deposuit."* The *second* part of the *formula* was the *intentio:* in this was stated the claim of the plaintiff, as founded upon the facts set out in the *demonstratio*. This, in a question of contracts, was in these words: *"Si paret Numerium Negidium Aulo Agerio sestertium X milia dare oportere,"* when the magistrate fixed the amount; or, *"Quidquid paret Numerium Negidium Aulo Agerio dare facere oportere,"* when he left the amount to the discretion of the judge. In a claim of property the form was, *"Si paret hominem ex jure Quiritium Auli Agerii esse."* The *third* part of the complete *formula* was the *adjudicatio*, which contained the authority to the judge to award to one party a right of property belonging to the other. It was in these words: *"Quantum adjudicari oportet, judex Titio adjudicato."* The *last* part of the *formula* was the *condemnatio*, which gave the judge authority to pronounce his decision for or against the defendant. It was as follows. *"Judex, Numerium Negidium Aulo Agerio sestertium X milia condemna: si non paret, absolve,"* when the amount was fixed, or, *"Judex, Numerium Negidium Aulo Agerio dumtaxat X milia condemna: si non paret, absolvito"* when the magistrate fixed a *maximum;* or, *"Quanti ea res erit, tantum pecuniam, judex, Numerium Negidium Aulo Agerio condemna: si non paret, absolvito,"* when it was left to the discretion of the judge.

Of these parts, the *intentio* and the *condemnatio* were always employed: the *demonstratio* was sometimes found unnecessary, and the *adjudicatio* only occurred in three species of actions—*familiæ erciscundæ communi dividundo*, and *finium regundorum*—which were actions for division of an inheritance, actions of partition, and suits for the rectification of boundaries.

The above are the essential parts of the *formula* in their simplest form; but they are often enlarged

by the insertion of clauses in the *demonstratio*, the *intentio*, or the *condemnatio*, which were useful or necessary in certain cases. these clauses are called *adjectiones*. When such a clause was inserted for the benefit of the defendant, containing a statement of his defence to the claim set out in the *intentio*, it was called an *exceptio*. To this the plaintiff might have an answer, which, when inserted, constituted the *replicatio*, and so on to the *duplicatio* and *triplicatio*. These clauses like the *intentio* in which they were inserted, were all framed conditionally, and not, like the common-law pleadings, affirmatively. Thus: *"Si paret Numerium Negidium Aulo Agerio X milia dare oportere* (intentio), *si in ea re nihil dolo malo Auli Agerii factum sit neque fiat* (exceptio), *Si non, etc.* (replicatio).

In preparing the *formula* the plaintiff presented to the magistrate his *demonstratio, intentio,* etc., which was probably drawn in due form under the advice of a jurisconsult; the defendant then presented his *adjectiones,* the plaintiff responded with his replications and so on The magistrate might modify these, or insert new *adjectiones,* at his discretion. After this discussion *in jure, pro tribunali,* the magistrate reduced the results to form, and sent the *formula* to the judge, before whom the parties were confined to the case thus settled. See 3 Ortolan, Justinian, §§ 1909 *et seq.*

The procedure *per formulam* was supplanted in course of time by a third system, *extraordinaria judicia,* which in the days of Justinian had become universal The essence of this system consisted in dispensing with the judge altogether, so that the magistrate decided the case himself, and the distinction between the *jus* and the *judicium* was practically abolished. This new system commenced with usurpation by the magistrates, in the extension of an exceptional jurisdiction, which had existed from the time of the *leges actiones,* to cases not originally within its scope Its progress may be traced by successive enactments of the emperors, and was so gradual that, even when it had completely undermined its predecessor, the magistrate continued to reduce to writing a sort of formula representing the result of the pleadings In time, however, this last relic of the former practice was abolished by an imperial constitution Thus the formulary system, the creation of the great Roman jurisconsults, was swept away, and carried with it in its fall all those refinements of litigation in which they had so much delighted Thenceforth the distinctions between the forms of actions were no longer regarded, and the word *actio,* losing its signification of a *form,* came to mean a *right, jus persequendi in judicio quod sibi debetur.*

See Ortolan, Hist no 392 *et seq ; id* Instit. nos. 1833-2067, 5 Savigny, System § 6, Sandars, Justinian, Introduction, Gaius, by Abdy & Walker

The English "formulary system" of actions is "distinctively English but also in a certain sense very Roman." It was not "invented in one piece by some all-wise legislator," but "grew up little by little." The age of its rapid growth was between 1154 and 1272. The similarity between the Roman and English formulary systems is so patent that it has naturally aroused the suggestion that one must have been the model for the other, and it is very true that between 1150 and 1350, or thereabouts, the old Roman law in its medieval form exercised a powerful influence on some of the English rules But the differences in the system were as remarkable as the resemblances. Thus the *Prætor* heard both parties before he composed his formula, while the chancellor issues the writ before he hears the defendant's story. It is usually "as of course" The English forms of action were therefore not mere rubrics, but were institutes of the law. There were in common use some thirty or forty actions between which there were large differences. 2 Poll & Maitl. 556

See JUS AD REM.

ACTIO ÆSTIMATORIA, ACTIO QUANTI MINORIS. In the civil law two names of an action which lay on behalf of a buyer to reduce the contract price proportionately to the defects of the object, not to cancel the sale; the *judex* had power, however, to cancel the sale; Hunter, Rom. Law 505.

ACTIO ARBITRARIA. An action depending on the discretion of the judge. In this, unless the defendant makes amends to the plaintiff at the judge's discretion, he must be condemned; Hunter, Rom. Law 987.

ACTIO BONÆ FIDEI (Lat. an action of good faith). A class of actions in which the judge might at the trial take into account any equitable circumstances affecting either of the parties to the action. 1 Spence, Eq. Jur. 210.

ACTIO CALUMNIÆ. An action to restrain the defendant from prosecuting a trumped up charge against the plaintiff. Hunter, Rom. Law 1020. An action for malicious prosecution. So. Afr. Leg. Dict.

ACTIO CIVILIS. A civil as distinguished from a criminal action.

ACTIO COMMODATI CONTRARIA. An action by the borrower against the lender, to compel the execution of the contract. Pothier, *Prêt à Usage* n. 75.

ACTIO COMMODATI DIRECTA. An action by a lender against a borrower, the principal object of which is to obtain a restitution of the thing lent. Pothier, *Prêt à Usage* nn. 65, 68.

ACTIO COMMUNI DIVIDUNDO. An action for a division of the property held in common. Story, Partn. Bennett ed. § 352.

ACTIO CONDICTIO INDEBITATI. An action by which the plaintiff recovers the amount of a sum of money or other thing he paid by mistake. Pothier, *Promutuum* n. 140; Merlin, Rép.

ACTIO EX CONDUCTO. An action which the bailor of a thing for hire may bring against the bailee, in order to compel him to re-deliver the thing hired. Pothier, *du Contr. de Louage* n. 59; Merlin, Rép.

ACTIO CONFESSORIA. An affirmative petitory action for the enforcement of a servitude. Hunter, Rom. Law 425.

ACTIO EX CONTRACTU. See ACTION.

ACTIO DAMNI INJURIA. The name of a general class of actions for damages.

ACTIO EX DELICTO. See ACTION.

ACTIO DEPOSITI CONTRARIA. An action which the depositary has against the depositor, to compel him to fulfil his engagement towards him. Pothier, *Du Dépôt* n. 69.

ACTIO DEPOSITI DIRECTA. An action which is brought by the depositor against the depositary, in order to get back the thing deposited. Pothier, *Du Dépôt* n. 60.

ACTIO DIRECTA. A direct action; an action founded on strict law and conducted

according to fixed forms founded on certain legal obligations.

ACTIO DE DOLO MALO. An action of fraud. It lay for a defrauded person against the defrauder and his heirs who had been enriched by the fraud, to obtain restitution of the thing of which he had been fraudulently deprived with all its accessions, or, where this was not practicable, for compensation in damages; Black, citing Mackeldy, Rom. Law § 227.

ACTIO EMPTI. An action to compel a seller to perform his obligations or pay compensation; also to enforce any special agreements by him embodied in a contract of sale. Hunter, Rom. L. 505.

ACTIO EXERCITORIA. An action against the *exercitor* or employer of a vessel. Black L. Dict.

ACTIO AD EXHIBENDUM. An action instituted for the purpose of compelling the person against whom it was brought to exhibit some thing or title in his power.

It was always preparatory to another action, which lay for the recovery of a thing movable or immovable; 1 Merlin, *Quest. de Droit* 84.

ACTIO IN FACTUM. An action adapted to the particular case which had an analogy to some *actio in jus* which was founded on some subsisting acknowledged law. 1 Spence, Eq. Jur. 212. The origin of these actions is strikingly similar to that of actions on the case at common law. See CASE.

ACTIO FAMILIÆ ERCISCUNDÆ. An action for the division of an inheritance. Inst. 4. 6. 20; Bracton 100 *b*.

ACTIO FURTI. An action of theft. Just. 4, 1, 13–17. This could only be brought for the penalty attached to the offence, and not to recover the thing stolen, for which other actions were provided. Just. 4, 1, 13. An appeal of larceny. The old process by which a thief can be pursued and the goods vindicated. 2 Holdsw. Hist. Eng. L. 202.

ACTIO HONORARIA. An honorary or prætorian action. Dig. 44, 7, 25, 35.

ACTIO JUDICATI. An action instituted, after four months had elapsed after the rendition of judgment, in which the judge issued his warrant to seize, first, the movables, which were sold within eight days afterwards; and then the immovables, which were delivered in pledge to the creditors, or put under the care of a curator, and if, at the end of two months, the debt was not paid, the land was sold. Dig. 42. 1; Code, 8. 34.

According to some authorities, if the defendant then utterly denied the rendition of the former judgment, the plaintiff was driven to a new action, conducted like any other action, which was called *actio judicati*, and which had for its object the determination of the question whether such a judgment had been rendered. The exact meaning of the term is by no means clear. See Savigny, Syst. 305, 411; 3 Ortolan, Just. § 2033.

ACTIO LEGIS AQUILIÆ. In Civil Law. An action under the Aquilian law to recover damages for maliciously injuring in any way a thing belonging to another. Dropsie's Mackeldey's Rom. Law, § 486.

ACTIO EX LOCATO. An action which a person who let a thing for hire to another might have against the hirer. Dig. 19, 2.

ACTIO MANDATI. An action founded upon a mandate. Dig. 17. 1.

ACTIO MIXTA. A mixed action for the recovery of a thing, or compensation for damages and also for the payment of a penalty partaking of the nature of an action *in rem* and *in personam*. Hunter, Rom. L. 340.

ACTIO NON. In Pleading. The declaration in a special plea "that the said plaintiff ought not to have or maintain his aforesaid action thereof against" the defendant (in Latin, *actionem non habere debet*).

It follows immediately after the statement of appearance and defence; 1 Chit. Plead. 531; 2 *id.* 421; Stephens, Plead. 394.

ACTIO NON ACCREVIT INFRA SEX ANNOS (Lat.). The action did not accrue within six years.

A plea of the statute of limitations, by which the defendant insists that the plaintiff's action has not accrued within six years It differs from *non assumpsit* in this: *non assumpsit* is the proper plea to an action on a simple contract, when the action accrues on the promise; but when it does not accrue on the promise, but subsequently to it, the proper plea is *actio non accrevit*, etc.; Lawes, Plead. 733; Meade v. M'Dowell, 5 Binn. (Pa.) 200, 203; 2 Salk. 422; 2 Saund. 63 *b*.

ACTIO NON ULTERIUS. A name given in English pleading to the distinctive clause in the plea to the further maintenance of the action; introduced in place of the plea *puis darrein continuance*. Steph. Pl. 64, 65, 401; Black, Law Dict.

ACTIO DE PECULIO. An action concerning or against the *peculium* or separate property of a party.

ACTIO DE PECUNIA CONSTITUTA. An action for money due under a promise. Campbell, Rom. L. 150.

ACTIO PERSONALIS. A personal action. The proper term in the civil law is *actio in personam*. See that title and ACTIO.

ACTIO PERSONALIS MORITUR CUM PERSONA (Lat.). A personal action dies with the person.

In Practice. A maxim which expressed the law in regard to the surviving of personal actions.

This maxim does not apply in case of the civil death of either persons or corporations; Shayne v. Publishing Co., 168 N. Y. 70, 61 N. E. 115, 55 L. R. A. 777, 85 Am. St. Rep. 654.

To render the maxim perfectly true, the expression "personal actions" must be restricted very much within its usual limits. In the most extensive sense, all actions are *personal* which are neither *real* nor *mixed*, and in this sense of the word personal the maxim is not true. A further distinction, moreover, is to be made between personal actions actually commenced and pending at the death of the plaintiff or defendant, and causes of action upon which suit might have been, but was not, brought by or against the deceased in his lifetime. In the case of actions actually commenced, the old rule was that the suit abated by the death of either party. In re Connaway, 178 U. S. 421, 20 Sup. Ct. 951, 44 L. Ed. 1134; Macker's Heirs v. Thomas, 7 Wheat. (U. S.) 530, 5 L. Ed. 515. But the inconvenience of this rigor of the common law has been modified by statutory provisions in England and the states of this country, which prescribe in substance that when the *cause of action* survives to or against the personal representatives of the deceased, the suit shall not abate by the death of the party, but may proceed on the substitution of the personal representatives on the record by *scire facias*, or in some states by simple suggestion of the facts on the record. See Green v. Watkins, 6 Wheat. (U. S.) 260, 5 L. Ed. 256.

CONTRACTS.—It is clear that, in general, a man's personal representatives are liable for his breach of contract on the one hand, and, on the other, are entitled to enforce contracts made with him. This is the rule; but it admits of a few exceptions; Stimpson v. Sprague, 6 Greenl. (Me.) 470; Wright v. Eldred, 2 D. Chipm. (Vt.) 41.

No action lies against executors upon a covenant to be performed by the testator in person, and which consequently the executor cannot perform, and the performance of which is prevented by the death of testator; 3 Wils. Ch. 99; Cro. Eliz. 553; Howe Sewing Mach. Co. v. Rosensteel, 24 Fed. 583; as if an author undertakes to compose a work, or a master covenants to instruct an apprentice, but is prevented by death. See Wms. Exec. 1467. But, for a breach committed by deceased in his lifetime, his executor would be answerable; 1 M. & W. 423, *per* Parke, B.; Dickinson v. Calahan's Adm'rs, 19 Pa. 234.

As to what are such contracts, see 2 Perr. & D. 251; 10 Ad. & E. 45; 1 M. & W. 423; Dempsey v. Hertzfield, 30 Ga. 866; Siler v. Gray, 86 N. C. 566. But whether the contract is of such a nature is a mere question of construction, depending upon the intention of the parties; Cro. Jac. 282; 1 Bingh. 225; unless the intention be such as the law will not enforce; Dickinson v. Calahan's Adm'rs, 19 Pa. 233.

Under a statute recognizing as surviving causes of action those which survived at common law, a cause of action, on a covenant on which a decedent might have been sued, may be enforced against his representatives, and it was held that the rule of common law that a suit abated though the cause of action survived, was modified by the statute, and a suit pending against decedent on a covenant did not abate; Sprague v. Greene, 20 R. I. 153, 37 Atl. 699.

Again, an executor, etc., cannot maintain an action on a promise made to decedent where the damage consisted entirely in the personal suffering of the deceased without any injury to his personal estate, as a breach of promise of marriage; 2 M. & S. 408; Smith v. Sherman, 4 Cush. (Mass.) 408; Hovey v. Page, 55 Me. 142; L. R. 10 C. P. 189; Lattimore v. Simmons, 13 S. & R. (Pa.) 183; Miller v. Wilson, 24 Pa. 115; Wade v. Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250; Stebbins v. Palmer, 1 Pick. (Mass.) 71, 11 Am. Dec. 146; Hayden v. Vreeland, 37 N. J. L. 372, 18 Am. Rep. 723; Grubb's Adm'r v. Sult, 32 Grat. (Va.) 203, 34 Am. Rep. 765. But in Louisiana the action survives if there has been a default, on the ground that the obligation to fulfill the engagement is merged in the obligation to respond in damages for the default; Johnson v. Levy, 118 La. 447, 43 South. 46, 9 L. R. A. (N. S.) 1020, 118 Am. St. Rep. 378, 10 Ann. Cas. 722.

Upon the question whether the action survives where there is not only personal injury but damage to property also—where the latter is the chief element of the damages sought, the action survives; 2 M. & S. 409; Lattimore v. Simmons, 13 S. & R. (Pa.) 183; Hovey v. Page, 55 Me. 142; but when the damages to the property are incidental merely to the personal injury there is less certainty. That the action survives is the inclination of English cases; L. R. C. P. 189; 30 L. T. Rep. N. S. 765; S. C. 32 *id.* 36; so also in Lattimore v. Simmons, 13 S. & R. (Pa.) 183, Hovey v. Page, 55 Me. 142; at least to the extent of damage to property; Hegerich v. Keddie, 99 N. Y. 269, 1 N. E. 787, 52 Am. Rep. 25; Vittum v. Gilman, 48 N. H. 416; Cravath v. Plympton, 13 Mass. 454. To the contrary are Smith v. Sherman, 4 Cush. (Mass.) 408; Wade v. Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250, which, however, was for breach of promise of marriage, and therefore, *sui generis;* and on this ground it is distinguished in Cregin v. R. Co., 75 N. Y. 192, 31 Am. Rep. 459, where an action by a husband against a carrier for personal injuries to his wife was held to survive as for a wrong to property rights or interests. Nor will an action of breach of promise of marriage survive against the executor of the promisor where no special damage to property is alleged; Chase v. Fitz, 132 Mass. 359;

Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336; Stebbins v. Palmer, 1 Pick. (Mass.) 71, 11 Am. Dec. 146; Larocque v. Conheim, 42 Misc. 613, 87 N. Y. Supp. 625; and this rule is not changed by statutes providing that actions for personal injuries shall not abate; Wade v. Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250; Hayden v. Vreeland, 37 N. J. L. 372, 18 Am. Rep. 723; Smith v. Sherman, 4 Cush. (Mass) 408; Hullett v. Baker, 101 Tenn. 689, 49 S. W. 757. This action does not survive the death of either party; French v. Merrill, 27 App. Div. 612, 50 N. Y. Supp. 776. See Johnson v. Levy, 118 La. 447, 43 South. 46, 9 L. R. A. (N. S.) 1020, 118 Am. St. Rep. 378, 10 Ann. Cas. 722.

Nor does a right of action against a surgeon for malpractice survive his death; Boor v. Lowrey, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; Vittum v. Gilman, 48 N. H. 416; Jenkins v. French, 58 N. H. 532; Wolf v. Wall, 40 Ohio St. 111; Best v. Vedder, 58 How. Pr. (N. Y.) 187.

But a right of action for work and labor survives against one who induced plaintiff to marry and live with him on the false representation that he was a widower; Higgins v. Breen, 9 Mo. 497; as also the right to recover as for goods sold and delivered for goods transferred in consideration of a promise of marriage; Frazer v. Boss, 66 Ind. 1. And as to the right of an executor or administrator to sue on a contract broken in the testator's lifetime, where no damage to the personal estate can be stated, see 2 Cr. M. & R. 588; 5 Tyrwh. 985, and the cases there cited. The right to redeem survives; Clark v. Seagraves, 186 Mass. 430, 71 N. E. 813; and so does the statutory right of action for money paid on purchase or sale of securities with intention of no actual delivery; Anderson v. Stock Exchange, 191 Mass. 117, 77 N. E. 706; and the statutory action by a married woman for damages from sale of liquor to her husband survives after the death of the saloon keeper; Garrigan v. Huntimer, 20 S. D. 182, 105 N. W. 278.

Divorce proceedings being a personal action, death of either of the parties before decree abates the proceedings; Ewald v. Corbett, 32 Cal. 493; Pearson v. Darrington, 32 Ala. 257; Danforth v. Danforth, 111 Ill. 236; Swan v. Harrison, 2 Cold. (Tenn.) 534; and the court will not require the executor to become a party in order to answer the wife's demand for additional allowance for counsel fees; McCurley v. McCurley, 60 Md. 185, 45 Am. Rep. 717. But defendant's death after trial but before judgment, will not abate the suit; Danforth v. Danforth, 111 Ill. 236.

The fact whether or not the estate of the deceased has suffered loss or damage would seem to be the criterion of the right of the personal representative to sue in another class of cases, that is, where there is a breach of an implied promise founded on a *tort*. For where the action, though in form *ex contractu*, is founded upon a *tort to the person*, it does not in general survive to the executor. Thus, with respect to injuries affecting the life and health of the deceased; all such as arise out of the unskilfulness of medical practitioners; or the imprisonment of the party occasioned by the negligence of his attorney, no action, generally speaking, can be sustained by the executor or administrator on a breach of the *implied promise* by the person employed to exhibit a proper portion of skill and attention; such cases being in substance actions for injuries to the person; 2 M. & S. 415; 8 M. & W. 854; Jenkins v. French, 58 N. H. 532. And it has been held that for the breach of an implied promise of an attorney to investigate the title to a freehold estate, the executor of the purchaser cannot sue without stating that the testator sustained some actual damage to his estate; 4 J. B. Moore 532. But the law on this point has been considerably modified by statute.

On the other hand, where the breach of the implied promise has occasioned damage to the *personal estate* of the deceased, though it has been said that an action in form *ex contractu* founded upon a *tort* whereby damage has been occasioned to the estate of the deceased, as debt against the sheriff for an escape, does not survive at common law; Neal v. Haygood, 1 Ga. 514 (though in this case the rule is altered in that state by statute), yet the better opinion is that, if the executor can show that damage has accrued to the *personal estate* of the deceased by the breach of an express or implied promise, he may well sustain an action at common law, to recover such damage, though the action is in some sort founded on a *tort;* Wms. Exec. 676; citing, *in extenso*, 2 Brod. & B. 102; 4 J. B. Moore 532. And see 3 Woodd. Lect. 78. So, by waiving the *tort* in a trespass, and going for the value of the property, the action of *assumpsit* lies as well for as against executors; Middleton's Ex'rs v. Robinson, 1 Bay (S. C.) 58, 1 Am. Dec. 596.

A claim for money paid as usury survives against the estate of the person to whom it was paid; Roberts v. Burton's Estate, 27 Vt. 396; and so does an action against a justice of the peace on his official bond for neglect of duty; State v. Houston, 4 Blackf. (Ind.) 291. The liability of a deceased joint debtor survives; Megrath v. Gilmore, 15 Wash. 558, 46 Pac. 1032; and the right of action of a joint payee; Semper v. Coates, 93 Minn. 76, 100 N. W. 662; and of the survivor of two joint parties to a contract; Northness v. Hillestad, 87 Minn. 304, 91 N. W. 1112.

In an action on a contract commenced against joint defendants, one of whom dies pending the suit, the rule varies. In some of the states the personal representatives of

the deceased defendant may be added as parties and the judgment taken against them jointly with the survivors; Smith v. Crutcher, 27 Miss. 455; Bennett v. Spillars, 9 Tex. 519; Ewell v. Tye, 76 S. W. 875, 25 Ky. L. Rep. 976; Strause v. Braunreuter, 14 Pa. Super. Ct. 125. In others the English rule obtains which requires judgment to be taken against the survivors only; and this is conceived to be the better rule, because the judgment against the original defendants is *de bonis propriis*, while that against the executors is *de bonis testatoris;* New Haven & N. Co. v. Hayden, 119 Mass. 361.

The death of one of several defendants works a severance and the plaintiff should either dismiss as to all except the administrator, or proceed against the living defendant only; Marcy v. Whallon, 115 Ill. App. 435.

Where action is pending against two partners, and the death of one is not suggested before judgment, the judgment is a lien on the partnership assets and binds the surviving partner personally; Sullivan v. Susong, 40 S. C. 154, 18 S. E. 268. On the death of a joint owner of a mortgage debt, it survives at law to the remaining owners who alone can sue for it; Cote v. Dequindre, Walk. Ch. (Mich) 64; Martin v. McReynolds, 6 Mich. 70. This is under a statute whereby mortgages are excepted from the provision that grants to two or more persons are to be construed to create estates in common. In a comment upon an English case where the personal representative was held to be a necessary party, as he would in equity be entitled to the decedent's share of the debt when collected (1 Beav. 539), the Michigan court says: "The reason given for the decision is true in point of fact, but the consequence deduced from it does not follow."

In an action commenced against directors, where one dies after the suit commenced, his executor need not be joined; Githers v. Clark, 158 Pa. 616, 28 Atl. 232. On the death of a joint guarantor, the action cannot be revived against his representatives; American Copper Co. v. Lowther, 25 Misc. 441, 54 N. Y. Supp. 960, affirmed, and in a joint bond, if one obligor die, the debt survives, but the facts must be pleaded; Bentley v. Harmanson's Ex'rs, 1 Wash. (Va.) 273.

TORTS.—The ancient maxim which we are discussing applies more peculiarly to cases of *tort*. It was a principle of the common law that, if an injury was done either to the person or property of another for which *damages* only could be recovered in satisfaction,—where the declaration imputes a tort done either to the person or property of another, and the plea must be *not guilty*,—the action died with the person to whom or by whom the wrong was done. See Wms. Exec. 668; 3 Bla. Com. 302; 1 Saund. 216, 217, n. (1); Viner, Abr. *Executors* 123; Comyn, Dig. *Administrator*, B. 13.

But if the goods, etc., of the testator taken away continue in specie in the hands of the wrong-doer, it has long been decided that *replevin* and *detinue* will lie for the executor to recover back the specific goods, etc.; W. Jones 173, 174; 1 Saund. 217; Trigg v. Conway, 1 Hempst. 711, Fed. Cas. No. 14,173; Noland v. Leech, 10 Ark. 504; or, in case they are sold, an action for money had and received will lie for the executor to recover the value; 1 Saund. 217. And actions *ex delicto*, where one has obtained the property of another and converted it, survive to the representatives of the injured party, as replevin, trespass *de bonis asport.* But where the wrong-doer acquired no gain, though the other party has suffered loss, the death of either party destroys the right of action; Taylor v. Lowell, 3 Mass. 351, 3 Am. Dec. 141; U. S. v. Daniel, 6 How. (U. S.) 11, 12 L. Ed. 323; Middleton's Ex'rs v. Robinson, 1 Bay (S. C.) 58, 1 Am. Dec. 596; Mellen v. Baldwin, 4 Mass. 480; McEvers v. Pitkin, 1 Root (Conn.) 216.

Successive innovations upon this rule of the common law have been made by various statutes *with regard to actions which survive to* executors and administrators.

The stat. 4 Ed. III. c. 7, gave a remedy to executors for a *trespass* done to the personal estate of their testators, which was extended to executors of executors by the stat. 25 Ed. III. c. 5. But these statutes did not include wrongs done to the person or freehold of the testator or intestate; Wms. Exec. 670. By an equitable construction of these statutes, an executor or administrator shall now have the same actions for any injury done to the personal estate of the testator in his lifetime, *whereby it has become less beneficial* to the executor or administrator, as the deceased himself might have had, whatever the form of action may be; 1 Saund. 217; 1 Carr. & K. 271; W. Jones 173; 2 M. & S. 416; 5 Co. 27 *a;* Cro. Car. 297. These statutes are a recognized part of the common law in this country; Hegerich v. Keddie, 99 N. Y. 260, 1 N. E. 787, 52 Am. Rep. 25; they are followed by many state statutes and both these and the English statutes have been liberally construed in favor of survival in both countries; 7 East 134; Baker's Adm'r v. Crandall, 78 Mo. 584, 47 Am. Rep. 126; Ten Eyck v. Runk, 31 N. J. L. 428; Withee v. Brooks, 65 Me. 18; Aldrich v. Howard, 8 R. I. 125, 86 Am. Rep. 615; Fried v. R. Co., 25 How. Pr. (N. Y.) 287; Nettles' Ex'rs v. D'Oyley, 2 Brev. (S. C.) 27. And the laws of the different states, either by express enactment or by having adopted the English statutes, give a remedy to executors in cases of injuries done to the personal property of their testator in his lifetime. At common law an action of replevin was abated by the death of the defendant, but not by the death of the plaintiff; Potter v. Van Vranken, 36 N. Y. 619, 627; Mellen v. Bald-

win, 4 Mass. 480; 1 And. 241; and see Reist v. Heibrenner, 11 S. & R. (Pa.) 131; Keite v. Boyd, 16 *id.* 300; but the effect of the death of defendant is generally dependent upon the construction of state statutes under which, in most states, the action is saved, as in Kingsbury's Ex'rs v. Lane's Ex'rs, 21 Mo. 115; McCrory v. Hamilton, 39 Ill. App. 490; O'Neill v. Murry, 6 Dak. 107, 50 N. W. 619. In Hambly v. Trott, Cowp. 37, Lord Mansfield held that in actions *ex delicto*, the liability for the tort died with the person, but that if thereby property was acquired, the personal representatives were liable, and this principle has been extensively applied in connection with the stat. 4 Edw. III. both in the enactment and construction of the state statutes. The cases are collected and classified in 53 Am. Rep. 525, note.

Trover for a conversion in the lifetime of the testator may be brought by his executor; Parrott's Adm'rs v. Dubignon, T. U. P. Charlt. (Ga.) 261; Eubanks v. Dobbs, 4 Ark. 173; Nations v. Hawkins' Adm'rs, 11 Ala. 859. But an executor cannot sue for expenses incurred by his testator in defending against a groundless suit; Deming v. Taylor, 1 Day (Conn.) 285; nor in *Alabama* (under the Act of 1826) for any injury done in the lifetime of deceased; Garey v. Edwards, 15 Ala. 109; nor in *Vermont* can he bring *trespass on the case*, except to recover damages for an injury to some specific property; Barrett's Adm'r v. Copeland, 20 Vt. 244. And he cannot bring *case* against a sheriff for a false return in testator's action; *ibid.* But he may have *case* against the sheriff for not keeping property attached, and delivering it to the officer holding the execution in his testator's suit; Barrett's Adm'r v. Copeland, 20 Vt. 244, n.; and case against the sheriff for the default of his deputy in not paying over to testator money collected in execution; Bellows v. Allen's Adm'r, 22 Vt. 108. An action in the nature of an action on the *case* for injuries resulting from breach of carrier's contract to transport a passenger safely, survives to the personal representative; Winnegar's Adm'r v. Ry. Co., 85 Ky. 547, 4 S. W. 237. An executor may revive an action against the sheriff for misfeasance of his deputy, but not an action against the deputy for his misfeasance; Valentine v. Norton, 30 Me. 194. So, where the action is merely penal, it does not survive; Estis' Ex'x v. Lenox, 1 N. C. 292; as to recover penalties for taking illegal fees by an officer from the intestate in his lifetime; Reed v. Cist, 7 S. & R. (Pa.) 183. But in such case the administrator may recover back the excess paid above the legal charge; *ibid.*

Under the common law an action to recover a penalty or forfeiture dies with the person; U. S. v. De Goer, 38 Fed. 80. The action will not abate upon death of the relator, if it is brought by the state upon an official bond; Davenport v. McKee, 98 N. C. 500, 4 S. E. 545.

The stat. 3 & 4 W. IV. c. 42, § 2, gave a remedy to executors, etc., for injuries done in the lifetime of the testator or intestate to his real property, which case was not embraced in the stat. Ed. III. This statute introduced a material alteration in the maxim *actio personalis moritur cum persona* as well in favor of executors and administrators of the party injured as against the personal representatives of the wrongdoer, but respects only injuries to personal and real property; Chit. Pl. Parties to Actions in form *ex delicto*. Similar statutory provisions have been made in most of the states. Thus, *trespass quare clausum fregit* survives; Dobbs v. Gulldge, 20 N. C. 197; McPherson v. Seguine, 14 N. C. 153; Kennerly v. Wilson, 1 Md. 102; Winters v. McGhee, 3 Sneed 128; Musick v. Ry. Co., 114 Mo. 309, 21 S. W. 491; Wilbur v. Gilmore, 21 Pick. (Mass.) 250; even if action was begun after the death of the injured party; Goodridge v. Rogers, 22 Pick. (Mass.) 495; Herbert v. Hendrickson, 38 N. J. L. 296; *proceedings to recover damages* for injuries to land by overflowing; Howcott's Ex'rs v. Warren, 29 N. C. 20; Upper Appomattox Co. v. Harding, 11 Gratt. (Va.) 1; *contra*, McLaughlin v. Dorsey, 1 Harr. & McH. (Md.) 224. *Ejectment* in the United States circuit court does not abate by death of plaintiff; Hatfield v. Bushnell, 22 Vt. 659, Fed. Cas. No. 6,211. In *Illinois* the statute law allows an action to executors only for an injury to the personalty, or personal wrongs, leaving injuries to realty as at common law; Reed v. R. Co., 18 Ill. 403.

Injuries to the person. In cases of injuries to the *person*, whether by assault, battery, false imprisonment, slander, negligence, or otherwise, if either the party who received or he who committed the injury die, the maxim applies rigidly, and no action at *common law* can be supported either by or against the executors or other personal representatives; 3 Bla. Com. 302; 2 M. & S. 408; Mobile Life Ins. Co. v. Brame, 95 U. S. 756, 24 L. Ed. 580; Connecticut Mut. Life Ins. Co. v. R. Co., 25 Conn. 265, 65 Am. Dec. 571; Indianapolis, P. & C. R. Co. v. Keely's Adm'r, 23 Ind. 133; Hyatt v. Adams, 16 Mich. 180; Winnegar's Adm'r v. R. Co., 85 Ky. 547, 4 S. W. 237; Roche v. Carroll, 6 D. C. 79; Thayer v. Dudley, 3 Mass. 296; and the action is not impliedly saved by a statute giving a right of action after death to the personal representatives; Martin's Adm'r v. R. Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311. A case for the seduction of a man's daughter; Brawner v. Sterdevant, 9 Ga. 69; for libel; Walters v. Nettleton, 5 Cush. (Mass.) 544; for malicious prosecution; Nettleton v. Dinehart, 5 Cush. (Mass.) 543; are instances of the general rule stated. The death of one defendant, where partners are

sued for libel, does not abate the action, even aside from the statute; Brown v. Kellogg, 182 Mass. 297, 65 N. E. 378. But in one respect this rule has been materially modified in England by Lord Campbell's Act, and in this country by like acts in many states. These provide for the case where a wrongful act, neglect, or default has caused the death of the injured person, and the act is of such a nature that the injured person, had he lived, would have had an action against the wrong-doer. In such cases the wrong-doer is rendered liable, in general, not to the executors or administrators of the deceased, but to his near relations, husband, wife, parent or child. In the construction given to these acts, the courts have held that the measure of damages is in general the pecuniary value of the life of the person killed to the person bringing suit, and that vindictive or exemplary damages by reason of gross negligence on the part of the wrong-doer are not allowable; Sedg. Damages.

Most states have statutes founded on Lord Campbell's Act. In some states, by statute, an action may be brought against a city or town for damages to the person of deceased occasioned by an assault by another's dogs; Wilkins v. Wainwright, 173 Mass. 212, 53 N. E. 397; or by reason of a defect in a highway; Demond v. City of Boston, 7 Gray (Mass.) 544; Roberts v. City of Detroit, 102 Mich. 64, 60 N. W. 450, 27 L. R. A. 572; but it is otherwise in South Carolina; All v. Barnwell County, 29 S. C. 161, 7 S. E. 58. In Ohio it is considered to be an action "for a nuisance" and abates at the death of the party injured; Village of Cardington v. Fredericks, 46 Ohio 442, 21 N. E. 766. But where the death, caused by a railway collision, was instantaneous, no action can be maintained under the statute of Massachusetts; for the statute supposes the party deceased to have been once entitled to an action for the injury, and either to have commenced the action and subsequently died, or, being entitled to bring it, to have died before exercising the right; Kearney v. R. Co., 9 Cush. (Mass.) 108. Where a person during his lifetime commenced an action for damages for injuries, and the action was pending at his death, an action to recover damages for his death by his representative was barred; but such representatives had the right to continue the action commenced by the decedent in his lifetime; Edwards v. Gimbel, 202 Pa. 30, 51 Atl. 357. But it has been held that an administrator cannot continue an action brought by the decedent in his lifetime, as the only action maintainable is by the administrator under the statute for the benefit of the heirs; Martin v. R. Co., 58 Kan. 475, 49 Pac. 605. But the accruing of the right of action does not depend upon intelligence, consciousness, or mental capacity of any kind on the part of the person injured; Hollenbeck v. R. Co., 9 Cush. (Mass.) 478. By the removal of a case to the Federal Court, the right to revive an action for personal injuries, upon the death of the plaintiff, is not lost; In re Connaway, 178 U. S. 421, 20 Sup. Ct. 951, 44 L. Ed. 1134; Baltimore & Ohio R. Co. v. Joy, 173 U. S. 226, 19 Sup. Ct. 387, 43 L. Ed. 677.

In some of the states the statutes vest the right of action in the personal representatives, but the damages recovered accrue to the benefit of the widow and next of kin; City of Chicago v. Major, 18 Ill. 349, 68 Am. Dec. 553; Whiton v. R. Co., 21 Wis. 305; Needham v. R. Co., 38 Vt. 294. And, by act of May 30, 1908, provision is made for compensation to government employés for injuries, or, in case of death, to the widow and children; Comp. Laws (1911) 468.

Damages may be recovered by the parents in an action for death of minor child; Baltimore & O. R. Co. v. State, 24 Md. 271; Ihl v. R. Co., 47 N. Y. 317, 7 Am. Rep. 450; Ewen v. R. Co., 38 Wis. 613; Pennsylvania R. Co. v. Bantom, 54 Pa. 495; but there must have been a prospect of some pecuniary benefit had the child lived; 11 Q. B. D. 160; Rains v. R. Co., 71 Mo. 164, 36 Am. Rep. 459; 3 H. & N. 211. Where a father and daughter were injured by the same accident, and he died within an hour, held that the cause of action in him for his daughter's death did not survive to the mother, no action having been brought by him; King v. R. Co., 126 Ga. 794, 55 S. E. 965, 8 L. R. A. (N. S.) 544.

Actions against the executors or administrators of the wrong-doer. The common-law principle was that if an injury was done either to the person or property of another, for which *damages* only could be recovered in satisfaction, the action died with the person by whom the wrong was committed; 1 Saund. 216 *a*, note (1); McLaughlin v. Dorsey, 1 H. & McH. (Md.) 224. And where the cause of action is founded upon any *malfeasance* or *misfeasance*, is a *tort*, or arises *ex delicto*, such as trespass for taking goods, etc., trover, false imprisonment, assault and battery, slander, deceit, diverting a watercourse, obstructing lights, and many other cases of the like kind, where the *declaration* imputes a tort done either to the person or the property of another, and the *plea* must be *not guilty*, the rule of the common law is *actio personalis moritur cum persona;* and if the person by whom the injury was committed die, no action of that kind can be brought against his executor or administrator. But now in England the stat. 3 & 4 W. IV. c. 42, § 2, authorizes an action of trespass, or trespass on the case, for an injury committed by deceased in respect to property *real* or *personal* of another. And similar provisions are in force in most of the states of this country. Thus, in *Alabama*, by statute, *trover* may be maintained against an executor for a conversion by his testator; Nations v. Hawkins' Adm'rs, 11 Ala. 859.

So in *New Jersey*, Terhune v. Bray's Ex'rs, 16 N. J. L. 54; *Georgia*, Woods v. Howell, 17 Ga. 495; and *North Carolina;* Weare v. Burge, 32 N. C. 169.

In *Virginia*, by statute, *detinue* already commenced against the wrongdoer survives against his executor, if the chattel actually came into the executor's possession; otherwise not; Allen's Ex'r v. Harlan's Adm'r, 6 Leigh (Va.) 42, 29 Am. Dec. 205; Catlett's Ex'r v. Russell, 6 Leigh (Va.) 344. So in *Kentucky*, Gentry's Adm'r v. McKehen, 5 Dana (Ky.) 34. *Replevin* in *Missouri* does not abate on the death of defendant; Kinsbury's Ex'rs v. Lane's Ex'r, 21 Mo. 115; nor does an action on a *replevin bond* in *Delaware*, Waples v. Adkins, 5 Harr. (Del.) 381. It has, indeed, been said that where the wrongdoer has secured no benefit to himself at the expense of the sufferer, the cause of action does not survive, but that where, by means of the offence, property is acquired which benefits the testator, then an action for the value of the property survives against the executor; U. S. v. Daniel, 6 How. (U. S.) 11, 12 L. Ed. 323; Coburn v. Ansart, 3 Mass. 321; Troup v. Smith's Ex'r, 20 Johns. (N. Y.) 43; McEvers v. Pitkin, 1 Root (Conn.) 216; Cummins v. Cummins, 8 N. J. Eq. 173; Middleton's Ex'rs v. Robinson, 1 Bay (S. C.) 58, 1 Am. Dec. 596; and that where the wrongdoer has acquired gain by his wrong, the injured party may waive the *tort* and bring an action *ex contractu* against the representatives to recover compensation; Jones v. Hoar, 5 Pick. (Mass.) 285; Cummins v. Cummins, 8 N. J. Eq. 173.

But this rule, that the wrongdoer must have acquired a gain by his act in order that the cause of action may survive against his representatives, is not universal. Thus, though formerly in *New York* an action would not lie for a fraud of deceased which did not benefit the assets, yet it was otherwise for his fraudulent performance of a contract; Troup v. Smith's Ex'r, 20 Johns. (N. Y.) 43; and now the statute of that state gives an action against the executor for every injury done by the testator, whether by force or negligence, to the property of another; Elder v. Bogardus, Lalor's Supp. (N. Y.) 116; as for fraudulent representations by the deceased in the sale of land; Haight v. Hayt, 19 N. Y. 464; or wasting, destroying, taking, or carrying away personal property; Snider v. Croy, 2 Johns. (N. Y.) 227. Cases in which the survival of actions is fully considered are: Right of action against a sheriff does survive; Lynn's Adm'r v. Sisk, 9 B. Monr. 135; Paine v. Ulmer, 7 Mass. 317; Cravath v. Plympton, 13 Mass. 454 (but not one against a deputy sheriff; *id.*); one for a false return of execution; Jewett v. Weaver, 10 Mo. 234 (but not one against a constable for unnecessary assault in an arrest; Melvin v. Evans, 48 Mo. App. 421); case for injury to property; Jones v. Vanzandt, 4 McLean, 599, Fed. Cas. No. 7,503; trespass; Hamilton v. Jeffries, 15 Mo. 619; (both under statutes); suit against owner for criminal act of slave; Phillips v. Towler's Adm'rs, 23 Mo. 401; deceit in sale of chattels; 1 Car. L. Rev. 529; the remedy by petition for damages by overflowing lands; Raleigh & G. R. Co. v. Jones, 23 N. C. 24; against an attorney for neglect; Miller v. Wilson, 24 Pa. 114; 3 Stark. 154; 1 D. & R. 30; damages by reason of false representations as to value of land; Henderson v. Henshall, 54 Fed. 320, 4 C. C. A. 357. Cases in which the right of action was held not to survive the death of the wrongdoer or defendant are: For torts unconnected with contract; Watson v. Loop, 12 Tex. 11; trespass; O'Conner v. Corbitt, 3 Cal. 370; actions for malicious prosecution; Conly v. Conly, 121 Mass. 550; whether brought in the lifetime of the wrongdoer or not; Jones v. Littlefield, 3 Yerg. (Tenn.) 133; McDermott v. Doyle, 17 Mo. 362; trespass for *mesne* profits; Harker v. Whitaker, 5 Watts (Pa.) 474; Means v. Presbyterian Church, 3 Pa. 93; Burgess v. Gates, 20 Vt. 326; In re Renwick's Estate, 2 Bradf. Sur. (N. Y.) 80; (but the representative may be sued on contract; *id.*); *contra*, Molton v. Munford's Adm'r, 10 N. C. 490; Burgess v. Gates, 20 Vt. 326 (by statute); case for false representation; Henshaw v. Miller, 17 How. (U. S.) 212, 15 L. Ed. 222. *Trespass for crim. con.*, where defendant dies pending the suit, does not survive against his personal representatives; Clarke v. McClelland, 9 Pa. 128. Where an action of trespass is brought by a widow for killing her husband, it abates with death of defendant; Weiss v. Hunsicker, 14 Pa. Co. Ct. 398.

Where the intestate had falsely pretended that he was divorced from his wife, whereby another was induced to marry him, the latter cannot maintain an action against his personal representatives; Grim v. Carr's Adm'rs, 31 Pa. 533. *Case* for nuisance does not lie against executors of a wrongdoer; Hawkins' Ex'rs v. Glass, 1 Bibb. (Ky.) 246; Knox v. Sterling, 73 Ill. 214; nor for fraud in the exchange of horses; Coker v. Crozier, 5 Ala. 369; nor, under the statute of *Virginia*, for fraudulently recommending a person as worthy of credit; Henshaw v. Miller, 17 How. (U. S.) 212, 15 L. Ed. 222; nor for negligence of a constable, whereby he failed to make the money on an execution; Logan v. Barclay, 3 Ala. 361; nor for misfeasance of constable; Gent v. Gray, 29 Me. 462; nor against the personal representatives of a sheriff for an escape, or for taking insufficient bail bond; Cunningham v. Jaques, 19 N. J. L. 42; nor against the administrators of the marshal for a false return of execution, or imperfect and insufficient entries thereon; U. S. v. Daniel, 6 How. (U. S.) 11, 12 L. Ed. 323; nor does *debt* for an escape survive against the sheriff's executors; Martin v.

Bradley, 1 Caines (N. Y.) 124; *aliter* in *Georgia*, by statute; Neal v. Haygood, 1 Ga. 514. An action against the sheriff to recover penalties for his failure to return process does not survive against his executors; Mason v. Ballew, 35 N. C. 483; nor does an action lie against the representatives of a deceased postmaster for money feloniously taken out of letters by his clerk; Franklin v. Low, 1 Johns. (N. Y.) 396. See ABATEMENT.

ACTIO IN PERSONAM (Lat. an action against the person).

A personal action.

This is the term in use in the civil law to denote the actions which in the common law are called personal. In modern usage it is applied in English and American law to those suits in admiralty which are directed against the person of the defendant, as distinguished from those *in rem* which are directed against the specific thing from which (or rather the proceeds of the sale of which) the complainant expects and claims a right to derive satisfaction for the injury done to him; 2 Pars. Mar. Law 663.

ACTIO PIGNERATITIA. An action for a thing pledged after payment of the debt. Hunter, Rom. L. 448.

ACTIO PRÆSCRIPTIS VERBIS. A form of action which derived its force from continued usage or the *responsa prudentium*, and was founded on the unwritten law. 1 Spence, Eq. Jur. 212.

The distinction between this action and an *actio in factum* is said to be, that the latter was founded not on usage or the unwritten law, but by analogy to or on the equity of some subsisting law; 1 Spence, Eq Jur. 212

ACTIO REALIS (Lat.). A real action. The proper term in the civil law was *Rei Vindicatio;* Inst. 4. 6. 3.

ACTIO REDHIBITORIA. An action to compel a vendor to take back the thing sold and return the price paid. See REDHIBITORY ACTIONS.

ACTIO IN REM. An action against the thing. See ACTIO IN PERSONAM; ACTIO.

ACTIO RESCISSORIA. An action for rescinding a title acquired by prescription in a case where the party bringing the action was entitled to exemption from the operation of the prescription.

ACTIO PRO SOCIO. An action by which either partner could compel his co-partners to perform the partnership contract. Story, Partn., Bennett ed. § 352; Pothier, Contr. de Société, n. 34.

ACTIO EX STIPULATU. An action brought to enforce a stipulation.

ACTIO STRICTI JURIS (Lat. an action of strict right). An action in which the judge followed the formula that was sent to him closely, administered such relief only as that warranted, and admitted such claims as were distinctly set forth by the pleadings of the parties. 1 Spence, Eq. Jur. 218.

ACTIO DE TIGNO JUNCTO. An action by the owner of material built by another into his building. If so used in good faith double their value could be recovered; if in bad faith, the owner could recover suitable damage for the wrong, and recover the property when the building came down. So. African Leg. Dict.

ACTIO UTILIS. An action for the benefit of those who had the beneficial use of property, but not the legal title; an equitable action. 1 Spence, Eq. Jur. 214.

It was subsequently extended to include many other instances where a party was equitably entitled to relief, although he did not come within the strict letter of the law and the formulæ appropriate thereto.

ACTIO VENDITI. Where a person selling seeks to secure the performance of a special obligation found in a contract of sale or to compel the buyer to pay the price through an action. Hunter, Roman Law 332.

ACTIO VULGARIS. A legal action; a common action. Sometimes used for *actio directa*. 1 Mackeldey, Civ. L. 189.

ACTION (Lat. *agere*, to do). A doing of something; something done.

The formal demand of one's right from another person, made and insisted on in a court of justice. In a quite common sense, action includes all the formal proceedings in a court of justice attendant upon the demand of a right made by one person of another in such court, including an adjudication upon the right and its enforcement or denial by the court.

In the Institutes of Justinian an action is defined as *jus persequendi in judicio quod sibi debetur* (the right of pursuing in a judicial tribunal what is due one's self); Inst. 4 6. In the Digest, however, where the signification of the word is expressly treated of, it is said, *Actio generaliter sumitur, vel pro ipso jure quod quis habet persequendi in judicio quod suum est sibive debetur; vel pro hac ipsa persecutione seu juris exercitio* (Action in general is taken either as that right which each one has of pursuing in a judicial tribunal his own or what is due him; or as the pursuit itself or exercise of the right), Dig 50. 16 16. Action was also said *continere formam agendi* (to include the form of proceeding); Dig 1. 2 10.

This definition of action has been adopted by Taylor (Civ. Law, p 50). These forms were prescribed by the prætors originally, and were to be very strictly followed. The actions to which they applied were said to be *stricti juris*, and the slightest variation from the form prescribed was fatal. They were first reduced to a system by Appius Claudius, and were surreptitiously published by his clerk, Cneius Flavius. The publication was so pleasing to the people that Flavius was made a tribune of the people, a senator, and a curule edile (a somewhat more magnificent return than is apt to await the labors of the editor of a modern book of forms); Dig. 1. 2. 5.

These forms were very minute, and included the form for pronouncing the decision. See ACTIO.

In modern law the signification of the right of pursuing, etc., has been generally dropped, though it is recognized by Bracton, 98 *b;* Coke, 2d Inst. 40; 3 Bla. Com. 116; while the two latter senses of the exercise of the right and the means or method of its exercise are still found.

The vital idea of an action is a proceeding on the part of one person as actor against another, for the infringement of some right of the first, before a

court of justice, in the manner prescribed by the court or the law.

Subordinate to this is now connected in a quite common use, the idea of the answer of the defendant or person proceeded against; the adducing evidence by each party to sustain his position; the adjudication of the court upon the right of the plaintiff; and the means taken to enforce the right or recompense the wrong done, in case the right is established and shown to have been injuriously affected.

Actions are to be distinguished from those proceedings, such as writ of error, *scire facias*, mandamus, and the like, where, under the form of proceedings, the court, and not the plaintiff, appears to be the actor; Com. v. Commissioners of Lancaster County, 6 Binn. (Pa.) 9. And the term is not regularly applied, it would seem, to proceedings in a court of equity; Allen v. Partlow, 3 S. C. 417; Ulshafer v. Stewart, 71 Pa. 170.

In the Civil Law.

Civil Actions.—Those personal actions which are instituted to compel payments or do some other thing purely civil. Pothier, *Introd. Gen. aux Coutumes* 110.

Criminal Actions.—Those personal actions in which the plaintiff asks reparation for the commission of some tort or injury which he or those who belong to him have sustained.

Mixed Actions are those which partake of the nature of both real and personal actions; as, actions of partition, actions to recover property and damages. Just. Inst. 4, 6, 18–20; Domat, *Supp. des Lois Civiles* liv. 4, tit. 1, n. 4.

Mixed Personal Actions are those which partake of both a civil and a criminal character.

Personal Actions are those in which one person (*actor*) sues another as defendant (*reus*) in respect of some obligation which he is under to the actor, either *ex contractu* or *ex delicto*, to perform some act or make some compensation.

Real Actions.—Those by which a person seeks to recover his property which is in the possession of another.

In the Common Law.

The action properly is said to terminate at judgment; Co. Litt. 289 *a*; Rolle, Abr. 291; 3 Bla. Com. 116.

Civil Actions.—Those actions which have for their object the recovery of private or civil rights, or of compensation for their infraction.

Criminal Actions.—Those actions prosecuted in a court of justice, in the name of the government, against one or more individuals accused of a crime. See 1 Chitty, Crim. Law.

Local Actions.—Those civil actions which can be brought only in the county or other territorial jurisdiction in which the cause of action arose. See LOCAL ACTION.

Mixed Actions.—Those which partake of the nature of both real and personal actions.

Personal Actions.—Those civil actions which are brought for the recovery of personal property, for the enforcement of some contract, or to recover damages for the commission of an injury to the person or property. See PERSONAL ACTION.

Real Actions.—Those brought for the specific recovery of lands, tenements, or hereditaments. Steph. Pl. 3. See REAL ACTION.

Transitory Actions.—Those civil actions the cause of which might well have arisen in one place or county as well as another. See TRANSITORY ACTION.

ACTION OF BOOK DEBT. A form of action in Connecticut and Vermont for the recovery of claims, such as are usually evidenced by a book account. Bradley v. Goodyear, 1 Day (Conn.) 105; Smith v. Gilbert, 4 Day (Conn.) 105; Newton v. Higgins, 2 Vt. 366.

ACTION ON THE CASE. This was a remedy given by the common law, but it appears to have existed only in a limited form and to a certain extent until the statute of Westminster 2d. In its most comprehensive signification it includes *assumpsit* as well as an action in form *ex delicto;* at present when it is mentioned it is usually understood to mean an action in form *ex delicto.*

It is founded on the common law or upon acts of Parliament, and lies generally to recover damages for torts not committed with force, actual or implied; or having been occasioned by force where the matter affected was not tangible, or the injury was not immediate but consequential; or where the interest in the property was only in reversion, in all of which cases trespass is not sustainable; 1 Chit. Pl. 132. See CASE; ASSUMPSIT.

ACTION REDHIBITORY. See REDHIBITORY ACTION.

ACTION RESCISSORY. See RESCISSORY ACTIONS.

ACTIONABLE. For which an action will lie. 3 Bla. Com. 23.

ACTIONARY. A commercial term used in Europe to denote a proprietor of shares or *actions* in a joint stock company.

ACTIONES NOMINATÆ (Lat. named actions).

In English Law. Those writs for which there were precedents in the English Chancery prior to the statute 13 Edw. I. (Westm. 2d) c. 34.

Prior to this statute, the clerks would issue no writs except in such actions. Steph. Pl. 8; Barnet v. Ihrie, 17 S. & R. (Pa.) 195. See CASE; ACTION.

ACTIONS (Fr.). Shares of corporate stock.

ACTIONS ORDINARY. In Scotch Law. All actions which are not rescissory. Ersk. Inst. 4, 1, 18.

ACTIVE TRUST. See TRUST.

ACTON BURNELL. An ancient English statute, so called because enacted by a par-

liament held at the village of Acton Burnell. 11 Edw. I.

It is otherwise known as *statutum mercatorum* or *de mercatoribus*, the statute of the merchants. It was a statute for the collection of debts, the earliest of its class, being enacted in 1283.

A further statute for the same object, and known as De Mercatoribus, was enacted 13 Edw. I. (c. 3.). See STATUTE MERCHANT.

ACTOR (Lat. *agere*). **In Civil Law.** A patron, pleader, or advocate. Du Cange; Cowell; Spelman.

Actor ecclesiæ.—An advocate for a church; one who protects the temporal interests of a church *Actor villæ* was the steward or head-bailiff of a town or village. Cowell.

One who takes care of his lord's lands. Du Cange.

A guardian or tutor. One who transacts the business of his lord or principal; nearly synonymous with agent, which comes from the same word.

The word has a variety of closely-related meanings, very nearly corresponding with manager Thus, *actor dominæ*, manager of his master's farm; *actor ecclesiæ*, manager of church property; *actores provinciarum*, tax-gatherers, treasurers, and managers of the public debt.

A plaintiff; contrasted with *reus*, the defendant. A proctor in civil courts or causes. *Actores regis*, those who claimed money of the king. Du Cange, *Actor;* Spelman, Gloss.; Cowell.

ACTRIX (Lat.). A female plaintiff. Calvinus, Lex.

ACTS OF COURT. Legal memoranda made in the admiralty courts in England, in the nature of pleas.

For example, the English court of admiralty disregards all tenders except those formally made by acts of court; Abbott, Shipp. 403; Dunlop, Adm. Pr. 104, 105; 4 C. Rob. Adm. 103; 1 Hagg. Adm. 157.

ACTS OF SEDERUNT. In Scotch Law. Ordinances for regulating the forms of proceeding, before the court of session, in the administration of justice, made by the judges, who have the power by virtue of a Scotch Act of Parliament passed in 1540. Erskine, Pract. book 1, tit. 1, § 14.

ACTUAL. Real, in opposition to constructive or speculative, something "existing in act;" State v. Wells, 31 Conn. 213; real as opposed to nominal; Astor v. Merritt, 111 U. S. 202, 4 Sup. Ct. 413, 28 L. Ed. 401. Wearing apparel "in actual use" is not confined to what is worn at the time or what has been worn, but includes what is set apart to be used as a part of one's wardrobe; *id.*, where the phrase is carefully examined and defined.

It is used as a legal term in contradistinction to virtual or constructive as of possession or occupation; Cleveland v. Crawford, 7 Hun (N. Y.) 616; or an actual settler, which implies actual residence; McIntyre v. Sherwood, 82 Cal. 139, 22 Pac. 937. An actual seizure means nothing more than seizure, since there was no fiction of constructive seizure before the act; L. R. 6 Exch. 203.

Actually is opposed to seemingly, pretendedly, or feignedly, as *actually engaged in farming* means really, truly, in fact; In re Strawbridge & Mays, 39 Ala. 367.

ACTUAL CASH VALUE. The term means the sum of money the insured goods would have brought for cash, at the market price, at the time when, and place where, they were destroyed by fire. Mack v. Ins. Co., 4 Fed. 59. See INSURANCE.

ACTUAL COST. The true and real price paid for goods upon a genuine *bona fide* purchase. Alfonso v. U. S., 2 Sto. 421, Fed. Cas. No. 188. Money actually paid out. Lexington & W. R. Co. v. R. Co., 9 Gray (Mass.) 226. It is said not to include interest on capital during construction; [1906] A. C. 368; nor "wasted expenditure" such as that on a condemned culvert, under a government contract; 20 S. C. 133, 416 (South African). Under a contract to supply electric light to a municipality, for which it was to pay such sum as would yield a return of 10 per cent. on the "actual cost of generating the light," it was held that this did not include interest on capital, but did include depreciation of plant and rents, taxes and insurance; [1908] A. C. 241.

ACTUAL DAMAGES. The damages awarded for a loss or injury actually sustained; in contradistinction from damages implied by law, and from those awarded by way of punishment. See DAMAGES.

ACTUAL DELIVERY. It is held commonly to apply to the ceding of the corporal possession by the seller, and the actual apprehension of corporal possession by the buyer, or by some person authorized by him to receive the goods as his representative for the purpose of custody or disposal, but not for mere conveyance. Bolin v. Huffnagle, 1 Rawle (Pa.) 19. See DELIVERY.

ACTUARIUS (Lat.). One who drew the acts or statutes.

One who wrote in brief the public acts.

An officer who had charge of the public baths; an officer who received the money for the soldiers, and distributed it among them; a notary.

An *actor*, which see. Du Cange.

ACTUARY. The manager of a joint stock company, particularly an insurance company.

An officer of a mercantile or insurance company skilled in financial calculations, especially respecting such subjects as the expectancy of the duration of life.

A clerk, in some corporations vested with various powers.

In Ecclesiastical Law. A clerk who registers the acts and constitutions of the convocation.

ACTUM (Lat. *agere*). A deed; something done.

Datum relates to the time of the delivery of the instrument; *actum*, the time of making it; *factum*, the thing made. *Gestum*, denotes a thing done without writing; *actum*, a thing done in writing. See Du Cange; ACTUS.

ACTUS (Lat. *agere*, to do; *actus*, done).

In Civil Law. A thing done. See ACTUM. A servitude which carried the right of driving animals and vehicles across the lands of another.

It included also the *iter*, or right of passing across on foot or on horseback.

In English Law. An act of parliament. 8 Coke 40.

A foot and horse way. Co. Litt. 56 *a*.

AD (Lat.). At; by; for; near; on account of; to; until; upon; with relation to or concerning.

AD ABUNDANTIOREM CAUTELAM (Lat.). For greater caution.

AD ALIUD EXAMEN (Lat.). To another tribunal. Calvinus, Lex.

AD ASSISAM CAPIENDAM. To take an assize. Bract. 110 *b*.

AD AUDIENDAM CONSIDERATIONEM CURIÆ. To hear the judgment of the court. Bract. 383 *b*.

AD AUDIENDUM ET DETERMINANDUM. To hear and determine. 4 Bla. Com. 278.

AD BARRAM EVOCATUS. Called to the bar. 1 Ld. Raym. 59.

AD CAMPI PARTEM. For a share of the land. Fleta, II, c. 36, § 4.

AD CAPIENDAS ASSISAS. To try writs of assize. 3 Bla. Com. 352.

AD COLLIGENDUM. For collecting; as an administrator or trustee *ad colligendum*. 2 Kent 414.

AD COMMUNE NOCUMENTUM. To the common nuisance. Broom & H. Com. 196.

AD COMMUNEM LEGEM. At common law. 2 Eden 39.

AD COMPARENDUM. To appear. Cro. Jac. 67.

AD CULPAM. Until misbehavior.

AD CURIAM. At court. 1 Salk. 195; 1 Ld. Raym. 638.

AD CUSTAGIA. At the costs. Toullier; Cowell; Whishaw.

AD CUSTUM. At the cost. 1 Sharsw. Bla. Com. 314.

AD DAMNUM (Lat.). To the damage. The technical name of that part of the declaration or statement of claim which contains a statement of the amount of the plaintiff's injury. The plaintiff cannot recover greater damages than he has laid in the *ad damnum;* 2 Greenl. Ev. § 260. The amount claimed may be amended by the court on motion. In Bierce v. Waterhouse, 219 U. S. 320, 31 Sup. Ct. 241, 55 L. Ed. 237, it was held that in replevin, the *ad damnum* could be increased to conform to the proofs without discharging the sureties.

AD DIEM. At the day. *Ad alium diem.* At another day. Y. B. 7 Hen. VI, 13. *Ad certum diem.* At a certain day. 2 Str. 747.

AD EVERSIONEM JURIS NOSTRI. To the overthrow of our right. 2 Kent 91.

AD EXCAMBIUM (Lat.). For exchange; for compensation. Bracton, fol. 12 *b*, 37 *b*.

AD EXHÆREDATIONEM. To the disherison, or disinheriting.

The writ of waste calls upon the tenant to appear and show cause why he hath committed waste and destruction in the place named, *ad exhæredationem*, etc.; 3 Bla. Com. 228; Fitzherbert, Nat. Brev. 55.

AD FACIENDUM. To do. Co. Litt. 204 *a*.

AD FACTUM PRÆSTANDUM. In Scotch Law. The name given to a class of obligations of great strictness.

A debtor *ad fac. præs.* is denied the benefit of the act of grace, the privilege of sanctuary, and the *cessio bonorum;* Erskine, Inst. lib. 3, tit. 3, § 62; Kames, Eq. 216.

AD FIDEM. In allegiance. 2 Kent 56. Subjects born in allegiance are said to be born *ad fidem*.

AD FILUM AQUÆ. To the thread of the stream; to the middle of the stream. Knight v. Wilder, 2 Cush. (Mass.) 207, 48 Am. Dec. 660; Child v. Starr, 4 Hill (N. Y.) 369; Claremont v. Carlton, 2 N. H. 369, 9 Am. Dec. 88; 2 Washb. R. P. 632; 3 Kent 428.

A former meaning seems to have been, to a stream of water. Cowell; Blount. *Ad medium filum aquæ* would be etymologically more exact; 2 Eden, Inj. 260; and is often used; but the common use of *ad filum aquæ* is undoubtedly to the thread of the stream; Thomas v. Hatch, 3 Sumn. 170, Fed. Cas. No. 13,899; Cates' Ex'rs v. Wadlington, 1 McCord (S. C.) 580, 10 Am. Dec. 699; 3 Kent 431; Starr v. Child, 20 Wend. (N. Y.) 149; Ingraham v. Wilkinson, 4 Pick. (Mass.) 272, 16 Am. Dec. 342; State v. Canterbury, 28 N. H. 195.

AD FILUM VIÆ (Lat.). To the middle of the way. Parker v. Inhabitants of Framingham, 8 Metc. (Mass.) 260.

AD FIRMAM. To farm.

Derived from an old Saxon word denoting rent, according to Blackstone, occurring in the phrase, *dedi concessi et ad firmam tradidi* (I have given, granted, and to farm let): 2 Bla. Com. 317. *Ad firmam noctis* was a fine or penalty equal in amount to the estimated cost of entertaining the king for one night. Cowell. *Ad feodi firmam*, to fee farm. Spelman, Gloss.; Cowell.

AD FUNDANDAM JURISDICTIONEM. To make the basis of jurisdiction. [1905] 2 K. B. 555.

AD GAOLAS DELIBERANDAS. To deliver the gaols. Bract. 109 *b*.

AD HOC. As to this.

AD IDEM. To the same point.

AD INQUIRENDUM (Lat. for inquiry). A judicial writ, commanding inquiry to be made of anything relating to a cause depending in court.

AD INSTANTIAM. At the instance. 2 Mod. 43.

AD INTERIM (Lat.). In the meantime.

An officer is sometimes appointed *ad interim*, when the principal officer is absent, or for some cause incapable of acting for the time. See ACTING.

AD JURA REGIS (Lat.). To the rights of the king. An old English writ to enforce a presentation by the king to a living against one who sought to eject the clerk presented.

AD LARGUM. At large: as, title at large; assize at large. See Dane, Abr. c. 144, art. 16, § 7.

AD LIBITUM. At pleasure. 3 Bla. Com. 292.

AD LITEM (Lat. *litcs*). For the suit.

Every court has the power to appoint a guardian *ad litem;* 2 Kent 229, 2 Bla. Com. 427.

AD LUCRANDUM VEL PERDENDUM. For gain or loss.

AD MAJOREM CAUTELAM (Lat.). For greater caution.

AD MEDIUM FILUM AQUÆ. See AD FILUM AQUÆ.

AD NOCUMENTUM (Lat.). To the hurt or injury.

In an assize of nuisance, it must be alleged by the plaintiff that a particular thing has been done, *ad nocumentum liberi tenementi sui* (to the injury of his freehold); 3 Bla. Com. 221.

AD OMISSA VEL MALE APPRETIATA. With relation to omissions or wrong interpretations. 3 Ersk. Inst. 9, § 36.

AD OPUS. To the work. See 21 Harv. L. Rev. 264, citing 2 Poll. & Maitl. 232 *et seq.;* USE.

AD OSTIUM ECCLESIÆ (Lat.). At the church-door.

One of the five species of dower formerly recognized at the common law. 1 Washb. R. P. 149; 2 Bla. Com. 132. It was in common use in the time of Glanville. Glanv. lib. 6, c. 1; 4 Kent 36. See DOWER.

AD PIOS USUS. To religious purposes.

AD PROSEQUENDAM. To prosecute. 11 Mod. 362.

AD PUNCTUM TEMPORIS. At the point of time. Sto. Bailm. § 263.

AD QUÆRIMONIAM. On complaint of.

AD QUEM (Lat.). To which.

The correlative term to *a quo*, used in the computation of time, definition of a risk, etc., denoting the end of the period or journey.

The *terminus a quo* is the point of beginning or departure; the *terminus ad quem*, the end of the period or point of arrival.

AD QUOD DAMNUM (Lat.). What injury.

A writ issuing out of and returnable into chancery, directed to the sheriff, commanding him to inquire by a jury what damage it will be to the king, or any other, to grant a liberty, fair, market, highway, or the like.

The name is derived from the characteristic words denoting the nature of the writ, to inquire how great an injury it will be to the king to grant the favor asked, Whishaw, Fitzherbert, Nat. Brev. 221; Termes de la Ley.

AD RATIONEM PONERE. To cite a person to appear.

AD RECTUM (L. Lat.). To right. To do right. To meet an accusation. To answer the demands of the law. *Habeant eos ad rectum.* They shall render themselves to answer the law, or to make satisfaction. Bract. fol. 124 *b*.

AD RESPONDENDUM. To make answer. Fleta, lib. II, c. 65. It is used in certain writs to bring a person before the court in order to make answer, as in *habeas corpus ad respondendum* or *capias ad respondendum.*

AD SATISFACIENDUM. To satisfy. It is used in the writ *capias ad satisfaciendum* and is an order to the sheriff to take the person of the defendant to satisfy the claims of the plaintiff.

AD SECTAM. At the suit of.

It is commonly abbreviated. It is used where it is desirable to put the name of the defendant first, as in some cases where the defendant is filing his papers, thus, Roe *ads* Doe, where Doe is plaintiff and Roe defendant It is found in the indexes to cases decided in some of our older American books of reports, but has become pretty much disused.

AD TERMINUM QUI PRÆTERIT. A writ of entry which formerly lay for the lessor or his heirs when a lease had been made of lands and tenements for a term of life or years, and, after the term had expired, the lands were withheld from the lessor by the tenant or other person possessing the same. Fitzherb. Nat. Brev. 201.

AD TUNC ET IBIDEM. The technical name of that part of an indictment containing the statement of the subject-matter "then and there being found." Bacon, Abr. *Indictment*, G. 4; 1 No. C. 93.

In an indictment, the allegation of time and place must be repeated in the averment of every distinct material fact; but after the day, year, and place have once been stated with certainty, it is afterwards, in subsequent allegations, sufficient to refer to them by the words *et ad tunc et ibidem*, and the effect of these words is equivalent to an actual rep-

etition of the time and place. The *ad tunc et ibidem* must be added to every material fact in an indictment; Saund. 95. Thus, an indictment which alleged that J. S. at a certain time and place made an assault upon J. N., *et eum cum gladio felonice percussit,* was held bad, because it was not said, *ad tunc et ibidem percussit;* Dy. 68, 69. And where, in an indictment for murder, it was stated that J. S. at a certain time and place, having a sword in his right hand, *percussit* J. N., without saying *ad tunc et ibidem percussit,* it was held insufficient; for the time and place laid related to the having the sword, and consequently it was not said when or where the stroke was given; Cro. Eliz. 738; 2 Hale, Pl. Cr. 178. And where the indictment charged that A. B. at N, in the county aforesaid, made an assault upon C. D. of F. in the county aforesaid, and him *ad tunc et ibidem quodam gladio percussit,* this indictment was held to be bad, because two places being named before, if it referred to both, it was impossible; if only to one, it must be to the last, and then it was insensible; 2 Hale, Pl. Cr. § 180.

AD ULTIMAM VIM TERMINORUM. To the most extended import of the term. 2 Eden 39.

AD VALOREM (Lat.). According to the valuation.

Duties may be specific or *ad valorem. Ad valorem* duties are always estimated at a certain per cent. on the valuation of the property; 3 U. S. Stat. L 732; Bailey v. Fuqua, 24 Miss. 501.

AD VITAM AUT CULPAM. For life or until misbehavior.

Words descriptive of a tenure of office "for life or good behavior," equivalent to *quamdiu bene se gesserit.*

ADD. To unite; attach; annex; join. Board of Com'rs of Hancock County v. State, 119 Ind. 473, 22 N. E. 10.

ADDICERE (Lat.). **In Civil Law.** To condemn. Calvinus, Lex.

Addictio denotes a transfer of the goods of a deceased debtor to one who assumes his liabilities, Calvinus, Lex. Also used of an assignment of the person of the debtor to the successful party in a suit.

ADDITION (Lat. *additio,* an adding to). Whatever is added to a man's name by way of title or description, as additions of mystery, place, or degree. Cowell; Termes de la Ley; 10 Wentw. Pl. 371; Salk. 5; 2 Ld. Raym. 988; 1 Wils. 244.

Additions of estate are esquire, gentleman, and the like.

These titles can be claimed by none, and may be assumed by any one. In Nash v. Battersby (2 Ld. Raym 986; 6 Mod. 80), the plaintiff declared with the addition of gentleman. The defendant pleaded in abatement that the plaintiff was no gentleman. The plaintiff demurrer, and it was held ill; for, said the court, it amounts to a confession that the plaintiff is no gentleman, and then not the person named in the count. He should have replied that he is a gentleman.

Additions of mystery are such as scrivener, painter, printer, manufacturer, etc.

Additions of place are descriptions by the place of residence, as A. B. of Philadelphia, and the like. See Bacon, Abr. *Addition;* Doctr. Plac. 71; 2 Viner, Abr. 77; 1 Lilly, Reg. 39; Com. v. Lewis, 1 Metc. (Mass.) 151.

The statute of additions extends only to the party indicted. An indictment, therefore, need not describe, by any addition, the person upon whom the offence therein set forth is alleged to have been committed; 2 Leach, Cr. Cas. (4th ed.) 861; Com. v. Varney, 10 Cush. (Mass.) 402. And if an addition is stated, it need not be proved; 2 Leach, Cr. Cas. (4th ed.) 547; 2 Carr. & P. 230. But where a defendant was indicted for marrying E. C., "widow," his first wife being alive, it was held that the addition was material; 1 Mood. Cr. Cas. 303; 4 C. & P. 579. At common law there was no need of addition in any case; 2 Ld. Raym. 988; it was required only by stat. 1 Hen. V. c. 5, in cases where process of outlawry lies. In all other cases it is only a description of the person, and common reputation is sufficient; 2 Ld. Raym. 849. No addition is necessary in a *Homine Replegiando;* 2 Ld. Raym. 987; Salk. 5; 1 Wils. 244, 245; 6 Co. 67. See WOMAN.

Addition in the law of mechanics' liens. An addition erected to a former building to constitute a building within the meaning of the mechanics' lien law must be a lateral addition. It must occupy ground without the limits of the building to which it constitutes an addition; so that the lien shall be upon the building formed by the addition, and not the land upon which it stands. An alteration in a former building by adding to its height, or its depth, or to the extent of its interior accommodations, is an alteration merely, and not an addition; Updike v. Skillman, 27 N. J. L. 132. See LIEN; ACCESSION.

In addition to means not exclusive of, but by way of increase or accession to. In re Daggett's Estate, 9 N. Y. Supp. 652.

In French Law. A supplementary process to obtain additional information; Guyot, *Répert.*

ADDITIONAL. This term embraces the idea of joining or uniting one thing to another, so as thereby to form *one aggregate.* We add by bringing things together; State v. Hull, 53 Miss. 626, 645.

ADDITIONAL BURDEN. See EMINENT DOMAIN.

ADDITIONALES. Additional terms or propositions to be added to a former agreement.

ADDLED PARLIAMENT. The parliament which met in 1614 was so called. It sat for but two months and none of its bills received the royal assent. Taylor, Jurispr. 359.

ADDRESS. That part of a bill in equity which contains the appropriate description of the court where the plaintiff seeks his remedy. Cooper, Eq. Plead. 8; Story, Eq. Plead. § 26; Van Heyth. Eq. Draft. 2.

In Legislation. A formal request addressed to the executive by one or both branches

of the legislative body, requesting him to perform some act.

It is provided as a means for the removal of judges who are deemed unworthy longer to occupy their situations, although the causes of removal are not such as would warrant an impeachment. It is not provided for in the Constitution of the United States; and even in those states where the right exists it is exercised but seldom, and generally with great unwillingness.

ADDRESS TO THE CROWN. When the royal speech has been read in Parliament, an address in answer thereto is moved in both houses. Two members are selected in each house by the administration for moving and seconding the address. Since the commencement of the session 1890–1891, it has been a single resolution expressing their thanks to the sovereign for his gracious speech.

ADELANTADO. In Spanish Law. The military and political governor of a frontier province. This office has long since been abolished.

ADEMPTION (Lat. *ademptio*, a taking away). The extinction or withholding of a legacy in consequence of some act of the testator which, though not directly a revocation of the bequest, is considered in law as equivalent thereto, or indicative of an intention to revoke.

It is a distinction between the revocation of a will and the ademption of a legacy that the former cannot be done wholly or partly by words, but parol evidence is admissible to establish the latter; 2 Tayl. Ev. § 1146; and it may also be rebutted by parol; *id.* § 1227.

The question of ademption of a *general legacy* depends entirely upon the intention of the testator, as inferred from his acts under the rules established in law; Cowles v. Cowles, 56 Conn. 240, 13 Atl. 414; Richards v. Humphreys, 15 Pick. (Mass.) 133. Where the relations of the parties are such that the legacy is, in law, considered as a portion, an advancement during the life of the testator will be presumed an ademption, at least, to the extent of the amount advanced; 5 M. & C. 29; 3 Hare 509; Roberts v. Weatherford, 10 Ala. 72; Moore v. Hilton, 12 Leigh (Va.) 1; Hansbrough's Ex'rs v. Hooe, 12 Leigh (Va.) 316, 37 Am. Dec. 659; Carmichael v. Lathrop, 108 Mich. 473, 66 N. W. 350, 32 L. R. A. 232; and see 3 C. & F. 154; 18 Ves. 151, but this presumption may be rebutted; Jones v. Mason, 5 Rand. (Va.) 577, 16 Am. Dec. 761; and to raise the presumption, the donor must put himself *in loco parentis;* 2 Bro. C. C. 499. There is no ademption where the advancement and portion are not *ejusdem generis;* 1 Bro. C. C. 555; or where the advancement is contingent and the portion certain; 2 Atk. 493; 3 M. & C. 374; or where the advancement is expressed to be in *lieu* of, or *compensation* for, an interest; 1 Ves. Jr. 257; or where the bequest is of uncertain amount; 15 Ves. 513; 4 Bro. C. C. 494; but see 2 H. L. Cas. 131; or where the legacy is absolute and the advancement for life merely; 2 Ves. 38; 7 Ves. 516; or where the devise is of real estate; 3 Y. & C. 397; but in the Virginia case above cited the doctrine was held to apply as well to devises of realty as to bequests of personalty; Hansbrough's Ex'rs v. Hooe, 12 Leigh (Va.) 316, 37 Am. Dec. 659. See Marshall v. Rench, 3 Del. Ch. 239, where Bates, C., treats this subject in an able opinion.

It was treated as a settled rule in 5 Ves. 79, and in 1 Cox 187, that a residuary bequest to wife or children is never adeemed by an advancement, not being the gift of a portion; but in some cases there has been a tendency to qualify this doctrine, as also that of requiring the advancement and the legacy to be *ejusdem generis*, as above stated, and as bearing upon one or both of these points these cases should be consulted; 10 Ves. 1; 15 *id.* 507; 2 Bro. C. C. 394; Carmichael v. Lathrop, 108 Mich. 473, 66 N. W. 350, 32 L. R. A. 232; and see 10 Harv. L. Rev. 52. The doctrine will not be applied to a gift of residue to an adopted child and a stranger jointly; [1906] 2 Ch. 230; L. R. 7 Ch. App. 670. See note on these cases in 20 Harv. L. Rev. 72.

Where deposits are made in a bank by a father for the use of his daughter and in her name and the passbook is delivered to her, it will not work an ademption of a pecuniary legacy, although deposits are made partly after the execution of the will; In re Crawford, 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71.

But where the testator was not a parent of the legatee, nor standing *in loco parentis*, the legacy is not to be held a portion, but a bounty, and the rule as to ademption does not apply; 2 Hare 424; 2 Story, Eq. Jur. § 1117; Wms. Exrs. 1338; except where there is a bequest for a particular purpose and money is advanced by the testator for the same purpose; 2 Bro. C. C. 166; 1 Ball & B. 303; see 6 Sim. 528; 3 M. & C. 359; 2 P. Wms. 140; 1 Pars. Eq. Cas. 139; Richards v. Humphreys, 15 Pick. (Mass.) 133; a legacy of a sum of money to be received in lieu of an interest in a homestead is satisfied by money amounting to the legacy during testator's lifetime; Roquet v. Eldridge, 118 Ind. 147, 20 N. E. 733.

The ademption of a *specific* legacy is effected by the extinction of the thing or fund, as it is generally stated, without regard to the testator's intention; 3 Bro. C. C. 432; 2 Cox, Ch. 182; Blackstone v. Blackstone, 3 Watts (Pa.) 338, 27 Am. Dec. 359; and see White v. Winchester, 6 Pick. (Mass.) 48; Richards v. Humphreys, 15 Pick. (Mass.) 133; Stout v. Hart, 7 N. J. L. 414; Bell's Estate, 8 Pa. Co. Ct. 454; but not where the extinction of the specific thing is by act of law and a new thing takes its place; Ambl. 59; 9 Hare 666; Cas. *temp.* Talbot 226; Walton v. Walton,

7 Johns. Ch. 258, 11 Am. Dec. 456; but see 4 C. P. D. 336; Kay & J. 341; [1906] 2 Ch. 480; and note thereon in 20 Harv. L. Rev. 239. The last cited case is rather a departure from the rule of the cases cited *supra* as to extinction of the legacy by act of law which does not rest on intention, but see Mahoney v. Holt, 19 R. I. 660, 36 Atl. 1, where the supposed intention of the testator was held to require the substitution of a money equivalent for certain stock bequeathed. Where a breach of trust has been committed or any trick or device practised with a view to defeat the specific legacy; 8 Sim. 171; or where the fund remains the same in substance, with some unimportant alterations; 1 Cox, Ch. 427; 3 Bro. C. C. 416; 3 M. & K. 296; Havens v. Havens, 1 Sandf. Ch. (N. Y.) 334; Ford v. Ford, 23 N. H. 212; as a lease of ground rent for 99 years after a devise of it; Eberhardt v. Perolin, 49 N. J. Eq. 570, 25 Atl. 511; or where the testator lends the fund on condition of its being replaced; 2 Bro. C. C. 113. A devise of a leasehold estate is adeemed if the lease expire and is renewed; 1 Bro. C. C. 261; 2 Ves. 418; 16 Ves. 197; 2 Atk. 593; or where it is assigned upon other trusts; 22 Beav. 223; but a bequest of an interest in profits of a firm is not lost by the expiration and renewal of the partnership agreement; Amb. 260. A specific legacy is not adeemed by a pledge of the subject; 3 Bro. C. C. 108; 3 Myl. & K. 358; but the legatee is entitled to have it redeemed; *id.* A specific legacy of a debt due testator from a third party is adeemed by its payment; 2 P. Wms. 328; 3 Bro. C. C. 431; 2 *id.* 108; 2 Cox C. C. 180; Ludlam's Estate, 1 Pars. Eq. (Pa.) 116; or partially to the extent of part payment; Gardner v. Printup, 2 Barb. (N. Y.) 83; but not by substitution of a new security or a change in its form; Ford v. Ford, 23 N. H. 212; New Hampshire Bank v. Willard, 10 N. H. 210; Dunham v. Dey, 15 Johns. (N. Y.) 555, 8 Am. Dec. 282. But courts have been astute to construe a legacy to be demonstrative, if possible, to avoid an ademption; Walton v. Walton, 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456. See *infra*, subhead *Demonstrative Legacies*.

But when a mortgage specifically bequeathed was foreclosed and a new bond and mortgage taken from the purchaser, and a memorandum was found after testator's death in his handwriting to the effect that it was but a renewal of the old bond and that it was his intention that it should pass to the legatee, there was held an ademption; Beck v. McGillis, 9 Barb. (N. Y.) 35. In this case the hardship and defeat of intention was admitted, but it was considered that the rule could not be relaxed that if the subject of a specific legacy did not exist at the death of the testator it was adeemed and nothing else could be substituted.

A legacy of stock is adeemed by its sale though testator purchased back an equal amount of similar but not identical securities; 1 Myl. & K. 12.

The removal of goods from a place named in the legacy will work an ademption; 1 Bro. C. C. 129, n.; 3 Madd. 276; 21 Beav. 548; *contra*, 27 Beav. 138; and it makes no difference if the removal was because a lease had expired; 6 Sim. 19. Ademption is not worked by a mere temporary or accidental removal; 4 Bro. C. C. 537; or for repairs; 2 De G. & Sm. 425; or "for a necessary purpose," or on account of fire; 1 Ves. 271.

In the case of *demonstrative* legacies, to be paid out of a particular fund pointed out, there is no ademption, and if the fund does not exist, they are payable from the general assets; Armstrong's Appeal, 63 Pa. 312; Giddings v. Seward, 16 N. Y. 365; 4 Hare, 276; 1 P. Wms. 777; Walton v. Walton, 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456; T. Raym. 335; 2 Bro. C. C. 114; Kenaday v. Sinnott, 179 U. S. 606, 21 Sup. Ct. 233, 45 L. Ed. 339; Ives v. Canby, 48 Fed. 718; Gelbach v. Shively, 67 Md. 498, 10 Atl. 247. The statement that the testator's intention has no bearing on the question of the ademption of specific legacies, made in 2 Cox 180, has been so frequently repeated as to be commonly accepted as a rule of decision; but, as remarked by Chancellor Kent in Walton v. Walton, 7 Johns. Ch. (N. Y.) 258, these words are to be taken with considerable qualification. It is certainly true that when it is necessary to label the legacy as general or specific, which is necessarily done in the case of *demonstrative* legacies, the question of intention is material and in 2 Ves. Jr. 639, Lord Loughborough makes the matter of intention the criterion, and there are few cases in which it is not discussed. In Kenaday v. Sinnott, 179 U. S. 606, 21 Sup. Ct. 233, 45 L. Ed. 339, it was said that "the ademption of a specific legacy is effected by the extinction of the thing or fund bequeathed, and the intention that the legacy should fail is presumed"; but there a legacy to the wife of deposits in a bank "amounting to $10,000 more or less" was held not adeemed by purchasing bonds after the will was made, reducing the amount in bank, and the wife was awarded the amount of the legacy, which was held to be demonstrative upon the "manifest general intention of the testator" as shown by the whole will.

The courts lean against holding that there is an ademption unless the intention is clearly shown, and, to avoid it, favor the construction of a legacy as demonstrative rather than specific; Norris v. Thomson's Ex'rs, 16 N. J. Eq. 218; Cogdell's Ex'rs v. Cogdell's Heirs, 3 Desaus. (S. C.) 373; In re Foote, 22 Pick. (Mass.) 302; Bradford v. Haynes, 20 Me. 105; Boardman v. Boardman, 4 Allen (Mass.) 179; 8 Ves. 413; Appeal of Balliet, 14 Pa. 461. See 11 Am. Dec. 470, note.

Republication of a will may prevent the effect of what would otherwise work an ademption: 1 Rop. Leg. 351.

A specific legacy which has been adeemed will not be revived by a republication of the will after the ademption; Trustees of Unitarian Society in Harvard v. Tufts, 151 Mass. 76, 23 N. E. 1006, 7 L. R. A. 390. See LEGACY; ADVANCEMENT; GIFT; 37 Am. Dec. 667, note.

ADEQUATE CAUSE. Sufficient cause for a particular purpose. Pennsylvania & N. Y. Canal & R. Co. v. Mason, 109 Pa. 296, 58 Am. Rep. 722. Such a cause as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. Boyett v. State, 2 Tex. App. 100. It is to be determined by the particular circumstances of each particular case; Williams v. State, 7 *id.* 396.

ADEU. Without day, as when a matter is finally dismissed by the court. *Alez adeu*, go without day. Y. B. 5 Edw. II. 173.

ADHERING (Lat. *adhærere*, to cling to). Cleaving to, or joining; as, adhering to the enemies of the United States.

The constitution of the United States, art. 3, s. 3, defines treason against the United States to consist only in levying war against them, or in *adhering* to their enemies, giving them aid and comfort

A citizen's cruising in an enemy's ships with a design to capture or destroy American ships, would be an adhering to the enemies of the United States; 4 State Trials 328; Salk. 634; 2 Gilbert, Ev. Loift ed. 798.

ADHESION. The entrance of another state into an existing treaty with respect only to a part of the principles laid down or the stipulations agreed to. Opp. Int. L. § 533.

Though, properly speaking, by adhesion the third state becomes a party only to such parts as are specifically agreed to, and by accession it accepts and is bound by the whole treaty, the distinction between the two terms is not always observed, as appears even in the Hague "Convention with Respect to the Laws and Customs of War on Land" 1899, which in art. iv authorizes non-signatory powers "to adhere" and provides how they shall make known their "adhesion"; while, as is remarked by the writer above cited, "accession" is meant. See ACCESSION.

ADIT. In mining law, an entrance or approach. A horizontal excavation used as an entrance to a mine, or a vent by which ores and water are carried away.

An excavation "in and along a lode," which in statutes of Colorado and other mining states is made the equivalent of a discovery shaft. Snyder, Mines 1296, App. B. I. § 6; Gray v. Truby, 6 Col. 278; Electro-Magnetic M. & D. Co. v. Van Auken, 9 Col. 204, 11 Pac. 80.

ADITUS (Lat.). An approach; a way; a public way. Co. Litt. 56 *a*.

ADJACENT. Next to, or near, neighboring. 29 Alb. L. J. 24.

Two of three lots of land might be described as adjacent to the first, while only the second could be said to be adjoining; 1 Cooke 128; Municipality No. 2, For Opening Roffignac St., 7 La. Ann. 76; Continental Imp. Co. v. Phelps, 47 Mich. 299, 11 N. W. 167.

Land is adjacent to the line of a railroad, where by reason of its proximity thereto it is directly and materially benefitted by the construction thereof; U. S. v. Chaplin, 31 Fed. 890. Where a statute authorized the taking of material for building a railroad from public lands "adjacent" to the line thereof, what is adjacent land must depend on the circumstances of the particular case; where the adjacent ends and the non-adjacent begins may be difficult to determine. It is a word of flexible meaning, depending upon context and subject matter. U. S. v. R. Co., 31 Fed. 886.

ADJECTIVE LAW. Rules of procedure or administration as distinguished from rules of substantive law. See Holland, Jurispr. 76.

See SUBSTANTIVE LAW.

ADJOINING. The word in its etymological sense, means touching or contiguous, as distinguished from lying near or adjacent. In re Ward, 52 N. Y. 397; Miller v. Mann, 55 Vt. 479; Akers v. Canal Co., 43 N. J. L. 110. It is held that a yard may be separated by a street and yet adjoin; Com. v. Curley, 101 Mass. 25. Towns touching at corners adjoin; Holmes v. Carley, 31 N. Y. 289. The words "along" and "adjoining" are used as synonymous terms and as used in a statute imply contiguity, contact; Walton v. Ry. Co., 67 Mo. 58.

ADJOINING LANDOWNERS. See EMINENT DOMAIN; LATERAL SUPPORT; FENCE; WINDOW.

ADJOURN. To put off; to dismiss till an appointed day, or without any such appointment. But it has also acquired the meaning of suspending business for a time—deferring, delaying. Probably, as to a sale or judicial proceeding, it would include the fixing of another day; La Farge v. Van Wagenen, 14 How. Pr. (N. Y.) 54. See ADJOURNMENT.

ADJOURNED TERM. A continuation of a previous or regular term. Harris v. Gest, 4 Ohio St. 473; Van Dyke v. State, 22 Ala. 57.

ADJOURNMENT. The dismissal by some court, legislative assembly, or properly authorized officer, of the business before them, either finally (which, as popularly used, is called an adjournment *sine die*, without day), or to meet again at another time appointed (which is called a temporary adjournment).

The constitution of the United States, art. 1, s. 5, 4, directs that "neither house, during the session of congress, shall, without the

consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting."

An adjournment of an annual town meeting to another place or a later hour of the same day was held valid, but with hesitation as involving possible hardship; and the power should not be exercised except in extreme necessity; People v. Martin, 5 N. Y. 22.

In Civil Law. A calling into court; a summoning at an appointed time. Du Cange.

ADJOURNMENT DAY. In English Practice. A day appointed by the judges at the regular sittings for the trial of causes at *nisi prius*.

ADJOURNMENT DAY IN ERROR. In English Practice. A day appointed some days before the end of the term at which matters left undone on the affirmance day are finished. 2 Tidd, Pract. 1224.

ADJOURNMENT IN EYRE. The appointment of a day when the justices in eyre mean to sit again. 1 Bla. Com. 186.

ADJUDGE. To decide or determine. It is sometimes used with "considered, ordered, determined, decreed as one of the operative words of a final judgment," but is also applicable to interlocutory orders. It is synonymous with "decided," "determined," etc., "and may be used by a judge trying a case, without a jury with reference to his findings of fact, but they would not be a judgment"; Edwards v. Hellings, 99 Cal. 214, 33 Pac. 799. "Convicted and adjudged" not to be lawfully entitled to remain in the United States, under the Chinese Exclusion Act, means "found, decided by the Commissioner, representing, not the administration of criminal law, but the political department of the government;" U. S. v. Hing Quong Chow, 53 Fed. 233.

Adjudged does not mean the same as *deemed*, nor is one disqualified as a witness who "shall, upon conviction, be adjudged guilty of perjury" merely by verdict of guilty or until sentence; Blaufus v. People, 69 N. Y. 107, 25 Am. Rep. 148. It was said by Gibson, C. J., that the word "can be predicated only of an act of the court"; Searight v. Com., 13 S. & R. (Pa.) 301.

ADJUDICATAIRE. In Canadian Law. A purchaser at a sheriff's sale. See 1 Low. Can. 241; 10 *id.* 325.

ADJUDICATION. A judgment; giving or pronouncing judgment in a case. Determination in the exercise of judicial power. Street v. Benner, 20 Fla. 700; Joseph C. Irwin & Co. v. U. S., 23 Ct. Cl. 149.

In Scotch Law. A process for transferring the estate of a debtor to his creditor. Erskine, Inst. lib. 2, tit. 12, §§ 39-55.

ADJUNCTION (Lat. *adjungere*, to join to). **In Civil Law.** The attachment or union permanently of a thing belonging to one person to that belonging to another. This union may be caused by *inclusion*, as if one man's diamond be set in another's ring; by *soldering*, as if one's guard be soldered on another's sword; by *sewing*, as by employing the silk of one to make the coat of another; by *construction*, as by building on another's land; by *writing*, as when one writes on another's parchment; or by *painting*, as when one paints a picture on another's canvas.

In these cases, as a general rule, the accessory follows the principal; hence those things which are attached to the things of another become the property of the latter. The only exception which the civilians made was in the case of a picture, which, although an accession, drew to itself the canvas, on account of the importance which was attached to it; Inst. 2. 1. 34; Dig. 41. 1. 9. 2. The common law implicitly adopts the civil law doctrines. See 2 Bla. Com. 404. See ACCESSION.

ADJUNCTS. Additional judges sometimes appointed in the Court of Delegates, *q. v.* See Shelford, Lun. 310; 1 Hagg. Eccl. Rep. 384; 2 *id.* 84; 3 *id.* 471.

ADJUST. To put in order; to determine an amount due. See State v. Staub, 61 Conn. 553, 23 Atl. 924; State v. Moore, 40 Neb. 854, 59 N. W. 755, 25 L. R. A. 774. Accounts are adjusted when they are settled and a balance struck; Townes v. Birchett, 12 Leigh (Va.) 173, 201. It is sometimes used in the sense of pay; see Lynch v. Nugent, 80 Ia. 422, 46 N. W. 61.

ADJUSTMENT. The determining of the amount of a loss. 2 Phillips, Ins. §§ 1814, 1815. To settle or bring to a satisfactory state so that parties are all agreed. Mayor of New York v. Ins. Co., 39 N. Y. 45, 100 Am. Dec. 400.

There is no specific form essentially requisite to an adjustment. To render it binding, it must be intended, and understood by the parties to a policy, to be absolute and final. It may be made by indorsement on the policy, or by payment of the loss, or the acceptance of an abandonment; 4 Burr. 1966; 1 Campb. 134, 274; Barlow v. Ins. Co., 4 Metc. (Mass.) 270; Reynolds v. Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727. It must be made with full knowledge of all the facts material to the right of the insured to recover, and the adjustment can be impeached only for fraud or mistake of such material fact; Remington v. Ins. Co., 14 R. I. 247. If there is fraud by either party to an adjustment, it does not bind the other; Faugier v. Hallett, 2 Johns. Cas. (N. Y.) 233; 3 Campb. 319. If one party is led into a material mistake of fact by fault of the other, the adjustment will not bind him; 2 East 469; Elting v. Scott, 2 Johns. (N. Y.) 157; Faugier v. Hallett, 2 Johns. Cas. (N. Y.) 233.

It is a sufficient adjustment if the party employed by an insurance company goes upon the premises, makes calculations, and

states the loss; Fame Ins. Co. v. Norris, 18 Ill. App. 570.

See INSURABLE INTEREST; ABANDONMENT; INSURANCE; POLICY.

ADMEASUREMENT OF DOWER. A remedy which lay for the heir on reaching his majority, to rectify an assignment of dower made during his minority, by which the doweress had received more than she was legally entitled to. 2 Bla. Com. 136; Gilbert, Uses 379.

The remedy is still subsisting, though of rare occurrence. See 1 Washb. R. P. 225, 226; Jones v. Brewer, 1 Pick. (Mass.) 314; McCormick v. Taylor, 2 Ind. 336.

In some of the states, the special proceeding which is given by statute to enable the widow to compel an assignment of dower, is termed an admeasurement of dower.

ADMEASUREMENT OF PASTURE. A remedy which lay in certain cases for surcharge of common of pasture. It lay where a common of pasture appurtenant or in gross was certain as to number; or where one had common appendant or appurtenant, the quantity of which had never been ascertained. The sheriff proceeded, with the assistance of a jury of twelve men, to admeasure and apportion the common as well of those who had surcharged as those who had not, and, *when the writ was fully executed*, returned it to the superior court. Termes de la Ley.

The remedy is now abolished in England; 3 Sharsw. Bla. Com. 239, *n.*; and in the United States; 3 Kent 419.

In English Law. Aid; support. Stat. 1 Edw. IV. c. 1.

In Civil Law. Imperfect proof. Merlin, *Répert.*

ADMINICULAR. Auxiliary and subordinate to. The Marianna Flora, 3 Mas. 116, 121, Fed. Cas. No. 9,080. *Adminicular evidence*, as used in ecclesiastical law, is evidence to explain and complete other evidence. 2 Lee, Eccl. 595. See 1 Gr. Ev. Sec. 606.

ADMINISTER. To give, to direct or cause to be taken. Gilchrist v. Comfort, 34 N. Y. 239; Brinson v. State, 89 Ala. 105, 8 South. 527.

ADMINISTERING POISON. An offence of an aggravated character, punishable under the various statutes defining the offence.

The stat. 9 G. IV. c. 31, s. 11, enacts "that if any person unlawfully and maliciously shall *administer*, or attempt to administer, to any person, or shall cause to be taken by any person, any poison or other destructive thing," etc., every such offender, etc. In a case under this statute, it was decided that, to constitute the act of administering the poison, it was not absolutely necessary that there should have been a delivery to the party poisoned, but that if she took it from a place where it had been put for her by the defendant, and any part of it went into her stomach, it was an administering; 4 Carr. & P. 369; 1 Mood. Cr. Cas. 114; Brown v. State, 88 Ga. 257, 14 S. E. 578; Bell v. Com., 88 Va. 365, 13 S. E. 742; Blackburn v. State, 23 Ohio St. 146; La Beau v. People, 34 N. Y. 223.

The statute 7 Will. IV. & 1 Vict. c. 85 enacts that "Whosoever, with intent to procure the miscarriage of any woman, shall unlawfully administer to her, or cause to be taken by her, any poison, or other noxious thing," shall be guilty of felony. Upon an indictment under this section, it was proved that the woman requested the prisoner to get her something to procure miscarriage, and that a drug was both given by the prisoner and taken by the woman with that intent, but that the taking was not in the presence of the prisoner. It was held, nevertheless, that the prisoner had caused the drug to be taken within the meaning of the statute; 1 Dears. & B. 127, 164. It is not sufficient that the defendant merely imagined that the thing administered would have the effect intended, but it must also appear that the drug administered was either a "poison" or a "noxious thing."

See ACCESSORY; ABORTION.

ADMINISTRATION (Lat. *administrare*, to assist in).

Of Estates. SEE EXECUTORS AND ADMINISTRATORS.

Of Government. The management of the executive department of the government.

Those charged with the management of the executive department of the government.

ADMINISTRATOR. See EXECUTORS AND ADMINISTRATORS.

See ORDINARY.

ADMINISTRATRIX. A woman to whom letters of administration have been granted and who administers the estate.

When an administratrix marries, that fact does not prevent her from suing as such; Cosgrove v. Pitman, 103 Cal. 268, 37 Pac. 232; nor does the marriage of a *feme sole* annul her appointment; Hamilton v. Levy, 41 S. C. 374, 19 S. E. 610.

ADMIRAL (Fr. *amiral*). A high officer or magistrate that hath the government of the king's navy, and the hearing of all causes belonging to the sea. Cowell. See ADMIRALTY.

By statute of July 25, 1866, the active lists of line-officers of the navy of the United States were divided into ten grades, of which the highest is that of admiral, and the next that of vice-admiral. By statute of Jan 24, 1873, these grades ceased to exist when the offices became vacant, and the highest rank is rear-admiral.

ADMIRALTY. A court which has a very extensive jurisdiction of maritime causes, civil and criminal.

On the revival of commerce after the fall of the Western empire, and the conquest and settlement by the barbarians, it became necessary that some tribunal should be established that might hear and decide causes that arose out of maritime commerce. The rude courts established by the conquerors had properly jurisdiction of controversies that arose on land, and of matters pertaining to land, that being at the time the only property that was considered of value. To supply this want, which was felt by merchants, and not by the government or the people at large, on the coast of Italy and the northern shores of the Mediterranean, a court of consuls was established in each of the principal maritime cities. Contemporaneously with the establishment of these courts grew up the customs of the sea, partly borrowed, perhaps, from the Roman law, a copy of which had at that time been discovered at Amalfi, but more out of the usage of trade and the practice of the sea. These were collected from time to time, embodied in the form of a code, and published under the name of the *Consolato del Mare*. See that sub-

title under CODE. The first collection of these customs is said to be as early as the eleventh century; but the earliest authentic evidence we have of their existence is their publication, in 1266, by Alphonso X., King of Castile; 1 Pardessus, *Lois Maritimes*, 201. See 3 Kent 16.

On Christmas of each year, the principal merchants made choice of judges for the ensuing year, and at the same time of judges of appeal, and their courts had jurisdiction of all causes that arose out of the custom of the sea, that is, of all maritime causes whatever. Their judgments were carried into execution, under proper officers, on all movable property, ships as well as other goods, but an execution from these courts did not run against land; *Ordonnance de Valentia*, 1283, c. 1, §§ 22, 23.

When this species of property came to be of sufficient importance, and especially when trade on the sea became gainful and the merchants began to grow rich, their jurisdiction in most maritime states was transferred to a court of admiralty; and this is the origin of admiralty jurisdiction. The admiral was originally more a military than a civil officer, for nations were then more warlike than commercial; *Ordonnance de Louis XIV.*, liv. 1; 2 Brown, Civ. & Adm Law, c. 1. The court had jurisdiction of all national affairs transacted at sea, and particularly of prize, and to this was added jurisdiction of all controversies of a private character that grew out of maritime employment and commerce; and this, as nations grew more commercial, became in the end its most important jurisdiction.

The admiralty is, therefore, properly the successor of the consular courts, which were emphatically the courts of merchants and sea-going persons. The most trustworthy account of the jurisdiction thus transferred is given in the *Ordonnance de Louis XIV.*, published in 1681. This was compiled under the inspiration of his great minister Colbert, by the most learned men of that age, from information drawn from every part of Europe, and was universally received at the time as an authoritative exposition of the common maritime law; Valin, Preface to his Commentaries; 3 Kent 16. They have been recognized as authority in maritime causes by the courts of this country, both federal and state, The Seneca, 3 Wall. Jr. 395, Fed Cas No 12,670; Morgan v. Ins. Co., 4 Dall (U. S.) 455, 1 L. Ed. 907, where Tilghman, C. J., referred to them "not as containing any authority in themselves but as evidence of the general marine law." The changes made in the *Code de Commerce* and in the other maritime codes of Europe are unimportant and inconsiderable. This ordinance describes the jurisdiction of the admiralty courts as embracing all maritime contracts and torts arising from the building, equipment, and repairing of vessels, their manning and victualling, the government of their crews and their employment, whether by charter-party or bill of lading, and from bottomry and insurance. This was the general jurisdiction of the admiralty; it took all the consular jurisdiction which was strictly of a maritime nature and related to the building and employment of vessels at sea. See CODE.

In English Law. The court of the admiral.

This court was erected by Edward III. At least so it is affirmed by Blackstone, 3 Com. 69; but Judge Story cited Selden as having collected much evidence to carry back the origin of the jurisdiction more than two centuries before that, to the time of Henry I.; De Lovio v. Boit, 2 Gall. 398, Fed Cas. No. 3,776; and Coke, the bitterest enemy of the Admiralty, refers to the jurisdiction as "so ancient that its commencement cannot be known"; 12 Rep. 80. The question, however, is merely academic, except as the jurisdiction of the Continental Courts at the period of its origin may aid in determining the extent and limitations of the early English Court. Authorities are collected in 66 L. R. A. 193, note, to show that Blackstone was mistaken.

It is said in Halsbury's Laws of England, § 86, that prior to the Judicature Act of 1873 the seal of the Judicial Committee of the Privy Council, affixed to orders in Admiralty appeals, bears upon its face the words "*Ab Edgare vindico*, thus picturesquely suggesting a very ancient origin of jurisdiction," but whether its origin was in Saxon times or those of Henry I., the jurisdiction of this court in the reign of Edw. III. was undisputed. It was held by the Lord High Admiral, and was called the High Court of Admiralty, or before his deputy, the Judge of the Admiralty, by which latter officer it has for a time been exclusively held. It sat as two courts, with separate commissions, known as the Instance Court and the Prize Court, the former of which was commonly intended by the term *admiralty*. At its origin the jurisdiction of this court was very extensive, embracing all maritime matters. By the statutes 13 Rich. II. c. 5, and 15 Rich. II. c. 3, especially as explained by the common law courts, its jurisdiction was much restricted; and this restriction was further provided for by the statute of 2 Hen. IV. c. 11, prescribing penalties for wrongfully suing in admiralty. A violent and long-continued contest between the admiralty and common law courts resulted in the establishment of the restriction which continued without interruption, except that abortive efforts were made to compromise the differences between the two jurisdictions, in 1575 and 1632, until the statutes 3 & 4 Vict. c. 65, and 9 & 10 Vict. c. 99, and 24 & 25 Vict. c. 10, materially enlarged its powers. See 2 Pars. Mar. Law 479, 1 Kent Lect. XVII; Smith. Adm. 1; De Lovio v. Boit, 2 Gall. 398, Fed Cas. No. 3,776; Ramsey v. Allegre, 12 Wheat (U. S.) 611, 6 L. Ed. 746, Bains v The James, 1 Baldw. 544, Fed. Cas. No. 756; Davies 93. This court was abolished by the Judicature Act of 1873, and its functions transferred to the High Court of Justice (Probate, Divorce, and Admiralty Division), with appeal to the Court of Appeal and thence to the House of Lords; Halsbury, Laws of Eng. § 93. As to the effect of the early English restriction statutes, see Judge Story's opinion in De Lovio v. Boit, 2 Gall 398, Fed Cas No. 3,776, and also the L. R. A. note cited *supra*, which contains a review of English and American Admiralty jurisdiction.

For a historical review of the English Admiralty jurisdiction and how it was administered from time to time and the legislation on the subject, see the introduction to Williams & Bruce, Adm. Jur. & Prac. 3d Ed.

The *civil* jurisdiction of the court extends to *torts* committed on the high seas, including personal batteries and false representations; 4 C. Rob. Adm. 73; collision of ships; Abbott, Shipp. 230; [1893] A. C. 468; Lush. 539; restitution of possession from a claimant withholding unlawfully; 2 B. & C. 244; 1 Hagg. 81, 240, 342; 2 Dods. Adm. 38; 3 C. Rob. Adm. 93, 133, 213; 4 *id.* 275, 287; 5 *id.* 155; to dispossess masters; 4 C. Rob. 287; but not when title is to be decided as between conflicting claims or ownership, in which case the jurisdiction is in the Common Law Courts; 2 Dods. 289; cases of piratical and illegal taking at sea and *contracts* of a maritime nature, including suits between part owners; 1 Hagg. 306; 3 *id.* 299; 1 Ld. Raym. 223; 2 *id.* 1235; 2 B. & C. 248; for mariners' and officers' wages; 2 Ventr. 181; 3 Mod. 379; 1 Ld. Raym. 632; 2 *id.* 1206; 2 Str. 858, 937; 1 *id.* 707; Swab. 86; 2 Dods. 11; master's disbursements for which there is a lien; [1904] P. 422; seaman's suit for wrongful dismissal; L. R. 1 A. & E. 384; pilotage; [1898] P. 36; 2 Hagg. Adm. 326; Abbott. Shipp. 198, 200; towage; 3 W. Rob. 138; 5 P. D. 227; bottomry and respondentia bonds; 6 Jur. 241; 3 Hagg. Adm. 66; 3 Term 267; 2 Ld. Raym. 982; Rep. *temp.*

Holt, 48; 3 Ch. Rob. 240; 3 Moo. P. C. C. 1; [1899] P. 295; and by statute to questions of title arising in a bottomry suit; Halsb. L. Eng. Sec. 101; and salvage claims; 2 Hagg. Adm. 3; 3 C. Rob. Adm. 355; 1 W. Rob. Adm. 18; [1901] P. 304; *id.* 243; [1898] P. 179; *id.* 206; life salvage, if there is some property saved; 8 P. D. 115; damage to cargo; Lush. 458; Br. & L. 102; necessaries; [1895] P. 95; 13 P. D. 82. It has no jurisdiction over an action *in personam* against a pilot for damages arising from a collision between ships on the high seas, due to his negligence; [1892] 1 Q. B. 273.

Formerly the remedy *in rem* could not be enforced beyond the property proceeded against, but when owners appeared in such an action it was said by Sir F. Jeune, that the judgment can be enforced to the full amount although exceeding the value of the property; [1892] P. 304; [1899] P. 285; but see extended comment on these cases in Wms. & Br. Adm. Pr. Introd. 19, where it is pointed out that the point did not arise for decision.

In Gager v. The A. D. Patchin, 1 Am. L. J. (N. S.) 529, Fed. Cas. No. 5,170, Conkling, D. J., said: "But by a long series of American decisions terminating with that in New Jersey Steam Nav. Co. v. Bank, 6 How. (U. S.) 344, 12 L. Ed. 465, the principle is now firmly established that the jurisdiction of the American courts of Admiralty does not depend on the decisions of the English Common Law Courts, relative to the jurisdiction of the high court of admiralty of England, but that all contracts in their nature strictly maritime are cognizable in the Admiralty." It was a suit *in rem* for salvage and as there was a special agreement, it was objected that it was a mere case of contract and not within the admiralty jurisdiction, but the decision was otherwise and was affirmed; The A. D. Patchin, 1 Blatchf. 414, Fed. Cas. No. 87.

It was therefore not practicable to rest the American jurisdiction upon the English system and ignore those decisions. The struggle in our courts was not so much between the two contentions which had distracted the English courts, as whether the narrow jurisdiction finally imposed upon the admiralty in England was that which our Constitution contemplated. While some of our judges contended for this view, the weight of authority was finally given to the more logical conclusion that the Admiralty and Maritime jurisdiction which was by the Constitution included within the judicial power of the United States was not limited by the Admiralty jurisdiction of England but is to be determined by the general maritime law.

The *criminal* jurisdiction of the court was transferred to the Central Criminal Court by the 4 & 5 Will. IV. c. 36. It extended to all crimes and offences committed on the high seas, or within the ebb and flow of the tide, and not within the body of a county. A conviction for manslaughter committed on a German vessel, by reason of negligent collision with an English vessel, within two and a half miles of the English coast, whereby a passenger on the English vessel was lost, is not within the jurisdiction of the English criminal courts; 46 L. J. M. C. 17.

The first step in the process in a plenary action may be the arrest of the person of the defendant, or of the ship, vessel, or furniture; in which cases the defendant must find bail or *fidejussors* in the nature of bail, and the owner must give bonds or stipulations equal to the value of the vessel and her immediate earnings; or the first step may be a monition to the defendant. In 1840, the form of proceeding in this court was very considerably changed. The advocates, surrogates, and proctors of the Court of Arches were admitted to practice there; the proceedings generally were assimilated to those of the common-law courts, particularly in respect of the power to take *viva voce* evidence in open court; power to compel the attendance of witnesses and the production of papers; to ordering issues to be tried in any of the courts of Nisi Prius, and allowing bills of exception on the trial of such issues, and the grant of power to admiralty to direct a new trial of such issues; to make rules of court, and to commit for contempt. The judge may have the assistance of a jury, and in suits for collision he usually decides upon his own view of the facts and law, after having been assisted by, and hearing the opinion of, two or more Trinity Brethren.

A court of admiralty exists in Ireland; but the Scotch court was abolished by 1 Will. IV. c. 69. See ELDER BRETHREN.

In American Law. A tribunal exercising jurisdiction over all maritime contracts, torts, injuries, or offences. 2 Pars. Mar. Law 508.

After a somewhat protracted contest the jurisdiction of admiralty was extended beyond that of the English admiralty court and has been said to be coequal with that of the English court as defined by the statutes of Rich. II., under the construction given to them by the contemporaneous or immediately subsequent courts of admiralty; 2 Pars Mar. Law 508; Bened. Admir. §§ 7, 8. There is early English authority, mainly collected by Judge Story in his famous opinion in De Lovio v. Boit, 2 Gall. 398, Fed. Cas. No. 3,776, that the common law courts were wrong when, in their controversy with the admiralty court, they contended for the original narrow limit of the jurisdiction. It would seem, however, to be the more accurate view that the cases which settled the American jurisdiction established it not so much upon the basis of any construction of the English restraining statutes as upon the theory that they were not to be recognized as having force in this country, either in Colonial times or after the Revolution. In Waring v. Clarke, 5 How. (U. S.) 441, 12 L. Ed. 226, it was held that "the statutes of Richard II. were never in force in any of the colonies, except as they were adopted by the legislatures of some of them." And in a judgment much referred to and commended in subsequent cases, Judge Winchester, characterized by Judge Peters as "a distinguished ornament" of his

profession, in Stevens v. The Sandwich, 1 Pet. Adm. 233 n, was of opinion that "the statutes 11 & 15 Rich. II. have received in England a construction which must at all times prohibit their extension to this country." So Judge Wilson in Kynock v. The Propeller S. C. Ives, Newb. 205, Fed. Cas. No. 7,958, said: "The district courts of the United States, sitting as courts of admiralty, are not embarrassed by the restraining statutes of Richard II. and Henry IV., but exercise as large jurisdiction and are governed by the same principles of maritime law as are recognized by the courts of admiralty in the maritime nations of continental Europe."

It came to be generally conceded that at the time of the Revolution the English admiralty jurisdiction was emasculated by the construction put upon the restrictive statutes by the common law courts, but it must likewise be admitted that the decisions of those courts were the paramount law of England. It was therefore not practicable to rest the American jurisdiction upon the English system and ignore those decisions. The struggle in our courts was not so much between the two contentions which had distracted the English courts, as whether the narrow jurisdiction finally imposed upon the admiralty court in England was that which our constitution contemplated While some of our judges contended for this view, the weight of authority was finally given to the more logical conclusion that the admiralty and maritime jurisdiction which was by the constitution included within the judicial power of the United States was not limited by the admiralty jurisdiction of England, but is to be determined by the recognized principles of the maritime law which were invoked by Mr Justice Washington in Davis v. Brig Seneca, 3 Wall Jr 395, Fed Cas. No. 12,670, as having "been respected by maritime courts of all nations and adopted by most, if not by all of them on the continent of Europe."

Finally, in a note to The Huntress, 2 Ware (Dav. 93) 102, Fed. Cas. No 6,914, which is considered an authoritative discussion of the American admiralty jurisdiction, attention is directed to "contemporaneous declarations of every branch of the government, and the quiet assent of the people to an unbroken and unvarying practice of more than half a century, all concurring in one point, that the admiralty and maritime jurisdiction, under the constitution, is of larger extent than that of the English court of admiralty, and all repudiating the assumption that we are to look to the laws of England for the definition of these terms in the constitution." See De Lovio v. Bolt, 2 Gall. 398, Fed. Cas. No. 3,776; The Huntress, 2 Ware (Dav. 93) 102, Fed Cas. No. 6,914; Peele v. Ins. Co., 3 Mas. 28, Fed Cas No 10,905; Read v. Hull of a New Brig, 1 Sto 244, Fed. Cas. No. 11,609; Hale v. Ins Co., 2 Sto. 176, Fed. Cas. No. 5,916, Ramsey v. Allegro, 12 Wheat (U S.) 611, 6 L Ed. 746, U. S. v. The Sally, 2 Cr. (U. S) 406, 2 L. Ed 320; U. S. v The Betsey, 4 Cr. (U S) 444, 2 L. Ed. 673; U S. v. La Vengeance, 3 Dall. (U. S.) 297, 1 L. Ed. 610; New Jersey Steam Nav. Co. v. Bank, 6 How. (U. S) 344, 12 L. Ed. 465, Bogart v. The John Jay, 17 How. (U. S) 399, 15 L. Ed. 95; Minturn v. Maynard, 17 How. (U. S) 477, 15 L. Ed. 235; Ward v. Peck, 18 How. (U. S.) 267, 15 L. Ed. 383; Thomas v. Osborn, 19 How. (U. S.) 22, 15 L. Ed. 534; Schuchardt v. Babbage, 19 How. (U. S) 239, 15 L Ed. 625, Jackson v. The Magnolia, 20 How. (U. S.) 296, 15 L. Ed. 909; Taylor v. Carryl, 20 How. 583, 15 L. Ed. 1028.

The court of original admiralty jurisdiction in the United States is the United States District Court. From this court causes could formerly be removed, in certain cases, to the Circuit and ultimately to the Supreme Court.

So much of the foregoing as relates to appeals from Circuit and District Courts of the United States to the Supreme Court was changed by chap. 517, 1 Sup. Rev. Stats., so that appeals may be taken direct from those courts to the Supreme Court from the final sentences and decrees in prize causes; in other admiralty cases appeals will now lie from the District Court to the Circuit Court of Appeals, the decision of the latter court being final. In certain cases, however, the decisions of the Circuit Courts of Appeals may be reviewed by the Supreme Court, for which see UNITED STATES COURTS.

It extends to the navigable rivers of the United States, whether tidal or not, the lakes, and the waters connecting them; The Propeller Genesee Chief v. Fitzhugh, 12 How. (U. S.) 443, 13 L. Ed. 1058; The Moses Taylor, 4 Wall. (U. S.) 411, 18 L. Ed. 397; The Eagle, 8 Wall. (U. S.) 15, 19 L. Ed. 365; The Belfast, 7 Wall. (U. S.) 624, 19 L. Ed. 266; Garcia y Leon v. Galceran, 11 Wall. (U. S.) 185, 20 L. Ed. 74; American Steamboat Co. v. Chace, 16 Wall. (U. S.) 522, 21 L. Ed. 369; Assante v. Bridge Co., 40 Fed. 765; to rivers which either alone or with others are highways for commerce with other states or foreign countries; The Daniel Ball, 10 Wall. (U. S.) 557, 19 L. Ed. 999; U. S. v. Ferry Co., 21 Fed. 332; to a stream tributary to the lakes, but lying entirely within one state; The General Cass, 1 Brown, Adm. 334, Fed. Cas. No. 5,307; to a ferry boat plying between opposite sides of the Mississippi River; The Gate City, 5 Biss. 200, Fed. Cas. No. 5,267; to a steam ferryboat to carry railway cars across the Mississippi; The St. Louis, 48 Fed. 312; to the Illinois and Lake Michigan Canal; The Oler, 2 Hughes 12, Fed. Cas. No. 10,485; Ex parte Boyer, 109 U. S. 629, 3 Sup. Ct. 434, 27 L. Ed. 1056; to the Welland Canal; The Avon, 1 Brown, Adm. 170, Fed. Cas. No. 680; Scott v. The Young America, Newb. 101, Fed. Cas. No. 12,549; to the Erie Canal; The E. M. McChesney, 8 Ben. 150, Fed. Cas. No. 4,463; The Robert W. Parsons, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. Ed. 73; to the Detroit River, out of the jurisdiction of any particular state and within the territorial limits of Canada; U. S. v. Rodgers, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071. But it does not extend to a creek which, though accessible from the sea, has no public wharf or terminus for travel; Manigault v. S. M. Ward & Co., 123 Fed. 707; nor to a river which is not of itself a highway for interstate or foreign commerce; The Montello, 11 Wall. 411, 20 L. Ed. 191. For specific enumeration of certain navigable waters see notes, 48 L. Ed. 74; 22 *id.* 391, and 42 L. R. A. 305. The Judiciary Act of 1789 (R. S. § 563), while conferring admiralty jurisdiction upon the Federal courts, saves to suitors their common-law remedy, which has always existed for damages for collision at sea; Schoonmaker v. Gilmore, 102 U. S. 118, 26 L. Ed. 95; where a vessel is outside of the territorial limitation of the civil process of a court, jurisdiction by stipulation or consent of the master cannot be obtained for the purpose of a libel *in rem;* The Hungaria, 41 Fed. 109.

Admiralty has jurisdiction of a libel by mariners for wages against a vessel plying on navigable waters, even though lying en-

tirely within one state; The Sarah Jane, 2 Am. L. Rev. 455, Fed. Cas. No. 12,349; but see The Scotia, 3 Am. L. Rev. 610, Fed. Cas. No. 12,513, where the then cases on admiralty jurisdiction by reason of locality are fully treated. Also for services as engineer on a tug-boat; The W. F. Brown, 46 Fed. 290.

Its *civil* jurisdiction extends to cases of salvage; Mason v. The Blaireau, 2 Cr. (U. S.) 240, 2 L. Ed. 266; American Ins. Co. v. Canter, 1 Pet. (U. S.) 511, 7 L. Ed. 242; U. S. v. Coombs, 12 Pet. (U. S.) 72, 9 L. Ed. 1004; The Louisa Jane, 2 Low. 302, Fed. Cas. No. 8,532; The Roanoke, 50 Fed. 574; McMullin v. Blackburn, 59 Fed. 177; De Leon v. Leitch, 65 Fed. 1002; bonds of bottomry, respondentia, or hypothecation of ship and cargo; The Ann C. Pratt, 1 Curt. C. C. 340, Fed. Cas. No. 409; The Fortitude, 3 Sumn. 228, Fed. Cas. No. 4,953; The Aurora, 1 Wheat. (U. S.) 96, 4 L. Ed. 45; Blaine v. The Charles Carter, 4 Cr. (U. S.) 328, 2 L. Ed. 636; The Virgin v. Vyfhius, 8 Pet. (U. S.) 538, 8 L. Ed. 1036; Carrington v. The Ann C. Pratt, 18 How. (U. S.) 63, 15 L. Ed. 267; seamen's wages; The Sarah Jane, 1 Low. 203, Fed. Cas. No. 12,349; 2 Pars. Mar. Law 509; The Karoo, 49 Fed. 651; Sheppard v. Taylor, 5 Pet. (U. S.) 675, 8 L. Ed. 269; The Thomas Jefferson, 10 Wheat. (U. S.) 428, 6 L. Ed. 358; seizures under the laws of impost, navigation, or trade; 1 U. S. Stat. at Large, 76; The Lewellen, 4 Biss. 156, Fed. Cas. No. 8,307; U. S. v. The Queen, 11 Blatchf. 416, Fed. Cas. No. 16,108; Two Hundred and Fifty Barrels of Molasses v. U. S., Chase, Dec. 503, Fed. Cas. No. 14,293; The North Cape, 6 Biss. 505, Fed. Cas. No. 10,316; cases of prize or ransom; Glass v. The Sloop Betsey, 3 Dall. (Pa.) 6, 1 L. Ed. 485; charter-parties; The Volunteer, 1 Sumn. 551, Fed. Cas. No. 16,991; Certain Logs of Mahogany, 2 Sumn. 589, Fed. Cas. No. 2,559; Arthur v. The Cassius, 2 Sto. 81, Fed. Cas. No. 564; Drinkwater v. The Spartan, 1 Ware 149, Fed. Cas. No. 4,085; contracts of affreightment between different states or foreign ports; The Maggie Hammond, 9 Wall. (U. S.) 449, 19 L. Ed. 772; The Queen of the Pacific, 61 Fed. 213; Church v. Shelton, 2 Curt. C. C. 271, Fed. Cas. No. 2,714; Oakes v. Richardson, 2 Low. 173, Fed. Cas. No. 10,390; The Reeside, 2 Sumn. 567, Fed. Cas. No. 11,657; The Rebecca, 1 Ware 188, Tex. Cas. No. 11,619; The Phebe, 1 Ware 263, Fed. Cas. No. 11,064; The Paragon, 1 Ware 322, Fed. Cas. No. 10,708; New Jersey Steam Nav. Co. v. Bank, 6 How. (U. S.) 344, 12 L. Ed. 465; and upon a canal-boat without powers of propulsion, upon an artificial canal; The E. M. McChesney, 21 Int. Rev. Rec. 221, Fed. Cas. No. 4,463; but not to coal barges, not licensed or enrolled; Wood v. Two Barges, 46 Fed. 204; for injury to vessel in passing through a drawbridge over a navigable river; Assante v. Charleston Bridge Co., 40 Fed. 705; Hill v. Board of Chosen Freeholders of Essex County, 45 Fed. 260; but not against schooner for damages done to drawbridge; The John C. Sweeney, 55 Fed. 540; but see also, *contra*, Greenwood v. Town of Westport, 60 Fed. 560; contracts for conveyance of passengers; The New World v. King, 16 How. (U. S.) 469, 14 L. Ed. 1019; The Pacific, 1 Blatchf. 569, Fed. Cas. No. 10,643; The Zenobia, 1 Abbott, Adm. 48, Fed. Cas. No. 18,208; Walsh v. Wright, 1 Newb. 494, Fed. Cas. No. 17,115; The Hammonia, 10 Ben. 512, Fed. Cas. No. 6,006; and suits for loss of their baggage; Walsh v. Wright, Newb. 494, Fed. Cas. No. 17,115; The Priscilla, 106 Fed. 739; contracts with material-men; The General Smith, 4 Wheat. (U. S.) 438, 4 L. Ed. 609; The Onore, 6 Ben. 564, Fed. Cas. No. 10,538; see People's Ferry Co. v. Beers, 20 How. (U. S.) 393, 15 L. Ed. 961; 21 Bost. Law Rep. 601; jettisons, maritime contributions, and averages; Dike v. The St. Joseph, 6 McLean 573, Fed. Cas. No. 3,908; Cutler v. Rae, 7 How. (U. S.) 729, 12 L. Ed. 890; Dupont de Nemours v. Vance, 19 How. (U. S.) 162, 15 L. Ed. 584; 21 Bost. Law Rep. 87, 96; pilotage; The Anne, 1 Mas. 508, Fed. Cas. No. 412; Hobart v. Drogan, 10 Pet. (U. S.) 108, 9 L. Ed. 363; Cooley v. Board of Wardens of Port of Philadelphia, 12 How. (U. S.) 299, 13 L. Ed. 996; see Wave v. Hyer, 2 Paine, C. C. 131, Fed. Cas. No. 17,300; Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 207, 6 L. Ed. 23; Ex parte McNiel, 13 Wall. (U. S.) 236, 20 L. Ed. 624; The America, 1 Low. 177, Fed. Cas. No. 289; The California, 1 Sawy. 463, Fed. Cas. No. 2,312; Low v. Com'rs of Pilotage, R. M. Charlt. (Ga.) 302, 314; Smith v. Swift, 8 Metc. (Mass.) 332; 4 Bost. Law Rep. 20; contracts for wharfage; Ex parte Easton, 95 U. S. 68, 24 L. Ed. 373; The Kate Tremaine, 5 Ben. 60, Fed. Cas. No. 7,622; Banta v. McNeil, 5 Ben. 74, Fed. Cas. No. 966; The J. H. Starin, 15 Blatchf. 473, Fed. Cas. No. 7,320; Upper Steamboat Co. v. Blake, 2 D. C. App. 51; to injuries to a vessel by reason of a defective dock; Ball v. Trenholm, 45 Fed. 588; but not to injuries to wharves; The Ottawa, 1 Brown, Adm. 356, Fed. Cas. No. 10,616; contracts for towage; The W. J. Walsh, 5 Ben. 72, Fed. Cas. No. 17,922; surveys of ship and cargo; Story, Const. § 1665; The Tilton, 5 Mas. 465, Fed. Cas. No. 14,054; Janney v. Ins. Co., 10 Wheat. (U. S.) 411, 6 L. Ed. 354; but see 2 Pars. Mar. Law 511, n.; and generally to all assaults and batteries, damages, and trespasses, occurring on the high seas; 2 Pars. Mar. Law; see Thomas v. Lane, 2 Sumn. 1, Fed. Cas. No. 13,902; The Sea Gull, Chase, Dec. 145, Fed. Cas. No. 145; Chase, Dec. 150, Fed. Cas. No. 6,477; The Normannia, 62 Fed. 469; Jervey v. The Carolina, 66 Fed. 1013; but not where the injury was received on land though the wrongful action was done on ship; The Mary Garrett, 63 Fed. 1009; Price v. The Belle of the Coast, 66 Fed. 62; The Haxby, 95 Fed. 170; or where the origin

of the wrong is on the water but the substance or consummation of the injury on land; The Plymouth, 3 Wall. (U. S.) 20, 18 L. Ed. 125; Ex parte Phenix Ins. Co., 118 U. S. 610, 7 Sup. Ct. 25, 30 L. Ed. 274; Johnson v. Elevator Co., 119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 447; Cleveland T. & V. R. Co. v. Steamship Co., 208 U. S. 316, 28 Sup. Ct. 414, 52 L. Ed. 508, 13 Ann. Cas. 1215; The Troy, 208 U. S. 321, 28 Sup. Ct. 416, 52 L. Ed. 512; and see The Blackheath, 195 U. S. 361, 25 Sup. Ct. 46, 49 L. Ed. 236; for injury to seamen in consequence of negligence of master or owner; The A. Heaton, 43 Fed. 592; Grimsley v. Hankins, 46 Fed. 400; contract for supplies to a vessel; The Electron, 48 Fed. 689; The Ella, 48 Fed. 569; but see The H. E. Willard, 53 Fed. 599; Diefenthal v. Hamburg-Amerikanische Packetfahrt Actien-Gesellschaft, 46 Fed. 397; and to enforce a lien for repairs on a canal boat in a dry dock; The Robert W. Parsons, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. Ed. 73; but not for supplies to a pile-driver; Pile Driver E. O. A., 69 Fed. 1005; for labor and material in completing and equipping a new vessel after she has been launched and named; The Manhattan, 46 Fed. 797; but not to contracts to procure insurance; Marquardt v. French, 53 Fed. 603; for insurance premium; The Daisy Day, 40 Fed. 603; nor to reform a policy of marine insurance; Williams v. Ins. Co., 56 Fed. 159. It also includes actions for damages for death caused by collision on navigable waters; The City of Norwalk, 55 Fed. 98; and for injury to a seaman from the explosion of a steamtug boiler due to negligence; Grimsley v. Hankins, 46 Fed. 400; or to a laborer, working in the hold of a vessel, from a piece of timber sent without warning down a chute by a person working on a pier; Hermann v. Mill Co., 69 Fed. 646. It extends to a bath-house built on boats but designed for transportation; The Public Bath No. 13, 61 Fed. 692.

With respect to the cases in which the cause of action arises partly on shipboard and partly on land, the admiralty jurisdiction of the United States is much more liberal than that of England, and the different classes of cases are enumerated in the opinion of Thomas, D. J., in The Strabo, 90 Fed. 110, where he lays down what seem to be the settled principles as to the jurisdiction with respect to maritime torts.

(1) Where the cause arises on the ship and is communicated to the property on land, as fire; The Plymouth, 3 Wall. (U. S.) 20, 18 L. Ed. 125; Ex parte Phenix Ins. Co., 118 U. S. 610, 7 Sup. Ct. 25, 30 L. Ed. 274; when missives are sent from the ship and take effect elsewhere; U. S. v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932; The Epsilon, 6 Ben. 378, Fed. Cas. No. 4,506; where some part of the ship comes in contact with the land to the injury of persons or property; Johnson v. Elevator Co., 119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 447; The Maud Webster, 8 Ben. 547, Fed. Cas. No. 9,302; and herein where the vessel does damage to wharves; The C. Accame, 20 Fed. 642; Homer Ramsdell T. Co. v. Compagnie Generale Transatlantique, 63 Fed. 845; also where material discharged from a ship comes in contact with persons on land; The Mary Garrett, 63 Fed. 1009; see also Price v. The Belle of the Coast, 66 Fed. 62. In all cases under this class there is no jurisdiction, the injured person or thing being on the land when the negligent act operates upon him or it.

(2) Cases where the primal cause arises on land and is injuriously communicated to the ship, as structures wrongfully maintained and interrupting navigation; Atlee v. Packet Co., 21 Wall. (U. S.) 389, 22 L. Ed. 619; The Maud Webster, 8 Ben. 547, Fed. Cas. No. 9,302; Greenwood v. Town of Westport, 60 Fed. 560; Oregon City Transp. Co. v. Bridge Co., 53 Fed. 549; City of Boston v. Crowley, 38 Fed. 202, 204; The Arkansas, 17 Fed. 383; where material discharged from the land into the ship does injury to persons on the ship; Hermann v. Mill Co., 69 Fed. 646. In this class admiralty has jurisdiction. The case of The H. S. Pickands, 42 Fed. 239, was said to be different from those last mentioned, the injury to the libellant being caused by the falling of a ladder against the side of the ship, and there was held to be no jurisdiction since the negligence was an act done on the wharf; but in The Strabo, 98 Fed. 998, 39 C. C. A. 375, a fall from a ladder was caused by its being negligently left fastened from the rail of the vessel so that libellant was thrown to the wharf and injured, and there was jurisdiction. The ultimate authority to which all cases referred was that of The Plymouth, 3 Wall. (U. S.) 20, 18 L. Ed. 125, cited *supra*. In The Mary Stewart, 10 Fed. 137, it was said that there must be two ingredients, the wrong on the water and the damage resulting, both of which must concur to constitute a maritime cause. This was criticized in City of Milwaukee v. The Curtis, 37 Fed. 705, where it was said that "it suffices if the damage, the substantial cause of action arising out of the wrong, is complete upon navigable waters." So in Hermann v. Mill Co., 69 Fed 646, cited *supra*, it was thought that the language in The Mary Stewart, 10 Fed. 137, was too broad. It is said that the proper solution of the question of jurisdiction "is to ascertain the place of the consummation and substance of the injury."

There is no jurisdiction in Admiralty to administer relief as courts of equity, and an executory contract for the purchase of a vessel could not be enforced; Kynoch v. The S. C. Ives, Newb. 205, Fed. Cas. No. 7,958.

The jurisdiction may be invoked by one of two vessels, both held in fault for collision, to enforce contribution against the other

Erie R. Co. v. Transp. Co., 204 U. S. 220, 27 Sup. Ct. 246, 51 L. Ed. 450.

The jurisdiction extends to all maritime torts, *q. v.*, and as to maritime contracts, see that title.

Its *criminal* jurisdiction extends to all crimes and offences committed on the high seas or beyond the jurisdiction of any country. The criminal jurisdiction of the United States courts is extended to the Great Lakes by 26 St. L. 424. The open waters of the Great Lakes are high seas within the meaning of R. S. § 5346; U. S. v. Rodgers, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071. See JURISDICTION.

A civil suit is commenced by filing a libel, upon which a warrant for arrest of the person, or attachment of his property if he cannot be found, even though in the hands of third persons, or a simple monition to appear, may issue; or, in suits *in rem*, a warrant for the arrest of the thing in question; or two or more of these separate processes may be combined. Thereupon bail or stipulations are taken if the party offer them.

In most cases of magnitude, oral evidence is not taken; but it may be taken, and it is the general custom to hear it in cases where smaller amounts are involved The decrees are made by the court without the intervention of a jury.

A suit *in rem* and a suit *in personam* may be brought concurrently in the same court, when arising on the same cause of action; The Normandie, 40 Fed. 590; The Baracoa, 44 Fed. 102.

In criminal cases the proceedings are similar to those at common law.

See UNITED STATES COURTS; BOTTOMRY; SALVAGE; COLLISION; COURT OF LORD HIGH ADMIRAL; COURTS OF ENGLAND; ELDER BRETHREN; ABANDONMENT; MARITIME CAUSE.

ADMIRALTY, FIRST LORD OF THE. At the head of the British Navy are five Lords Commissioners. The First Lord is a member of the Cabinet, the others are called Sea Lords.

ADMISSIBLE. Pertinent and proper to be considered in reaching a decision. Used with reference to the issues to be decided in any judicial proceeding.

ADMISSION (Lat. *ad*, to, *mittere*, to send). The act by which attorneys and counsellors become recognized as officers of the court and are allowed to practise. The qualifications required vary widely in the different states. See ATTORNEY.

ADMISSIONS. Confessions or voluntary acknowledgments made by a party of the existence of certain facts.

As distinguished from confessions, the term is applied to civil transactions and to matters of fact in criminal cases where there is no criminal intent.

As distinguished from consent, an admission may be said to be evidence furnished by the party's own act of his consent at a previous period.

Direct, called also *express*, admissions are those which are made in direct terms.

Implied admissions are those which result from some act or failure to act of the party.

Incidental admissions are those made in some other connection, or involved in the admission of some other fact.

As to the *parties* by whom admissions must have been made to be considered as evidence:—

They may be made by a party to the record, or by one identified in interest with him; 9 B. & C. 535; Morris' Lessee v. Vanderen, 1 Dall. (U. S.) 65, 1 L. Ed. 38. Not, however, where the party of record is merely a nominal party and has no active interest in the suit; 1 Campb. 392; 3 B. & C. 421; Appleton v. Boyd, 7 Mass. 131; Head v. Shaver, 9 Ala. 791; Frear v. Evertson, 20 Johns. (N. Y.) 142; Owings v. Low, 5 Gill & J. (Md.) 134; nor by one of several devisees on a contest of a will for incapacity and undue influence; O'Connor v. Madison, 98 Mich. 183, 57 N. W. 105.

They may be made by one of several having a joint interest, so as to be binding upon all; 8 B. & C. 36; Hunt v. Bridgham, 2 Pick. (Mass.) 581, 13 Am. Dec. 458; Beitz v. Fuller, 1 McCord (S. C.) 541, 10 Am. Dec. 693; Patterson v. Choate, 7 Wend. (N. Y.) 441; Bound v. Lathrop, 4 Conn. 336, 10 Am. Dec. 147; Getchell v. Heald, 7 Greenl. (Me.) 26; Owings v. Low, 5 Gill & J. (Md.) 144; Van Reimsdyk v. Kane, 1 Gall. 635; Fed. Cas. No. 16,872. Mere community of interest, however, as in case of coexecutors; 1 Greenl. Ev. § 176; Hammon v. Huntley, 4 Cow (N. Y.) 493; James v. Hackley, 16 Johns. (N. Y.) 277; trustees; 3 Esp. 101; co-tenants; Dan v. Brown, 4 Cow. (N. Y.) 483, 15 Am. Dec. 395; Smith v. Vincent, 15 Conn. 1, 38 Am. Dec. 59; is not sufficient. Admissions of one of several defendants against his interests will be receivable in evidence against him only; Kiser v. Dannenberg, 88 Ga. 541, 15 S. E. 17.

The interest in all cases must have subsisted at the time of making the admissions; 2 Stark. 41; Plant v. McEwen, 4 Conn. 544; Packer's Lessee v. Gonsalus, 1 S. & R. (Pa.) 526. Admissions made by one subsequently appointed administratrix are not admissible against her when suing as such nor against her successor in office; Gooding v. Ins. Co., 46 Ill. App. 307; More v. Finch, 65 Hun 404, 20 N. Y. Supp. 164. An admission of debt by an executor does not bind the estate; Orr's Appeal, 7 W. N. C. (Pa.) 126.

They may be made by any person interested in the subject-matter of the suit, though the suit be prosecuted in the name of another person as a cestui que trust; 1 Wils. 257; 1 Bingh. 45; but see 3 N. & P.

598; 6 M. & G. 261; or by an indemnifying creditor in an action against the sheriff; 7 C. & P. 629.

They may be made by a third person, a stranger to the suit, where the issue is substantially upon the rights of such a person at a particular time; 1 Greenl. Ev. § 181; or one who has been expressly referred to for information; 3 C. & P. 532; or where there is a privity as between ancestor and heir; 5 B. & Ad. 223; assignor and assignee; Inhabitants of West Cambridge v. Inhabitants of Lexington, 2 Pick. (Mass.) 536; Little v. Libby, 2 Greenl. (Me.) 242, 11 Am. Dec. 68; Gibblehouse v. Strong, 3 Rawle (Pa.) 437; Snelgrove v. Martin, 2 McCord (S. C.) 241; Smith v. Martin, 17 Conn. 399; intestate and administrator; 1 Taunt. 141; grantor and grantee of land; Jackson v. Bard, 4 Johns. (N. Y.) 230, 4 Am. Dec. 267; Norton v. Pettibone, 7 Conn. 319, 18 Am. Dec. 116; Weidman v. Kohr, 4 S. & R. (Pa.) 174; and others. Letters written by a third person at defendant's request about the matter in controversy, are admissible; Holley v. Knapp, 45 Ill. App. 372. Statements by a third person used by a party are evidence against him as admissions in a subsequent controversy; 4 Best & S. 641.

They may be made by an agent, so as to bind the principal; Steph. Ev. 17; declarations of an architect to the contractor in directing operations are admissible against the owner in an action for price of work and material; Wright v. Reusens, 133 N. Y. 298, 31 N. E. 215; so far only, however, as the agent has authority; Western Union Telegraph Co. v. Way, 83 Ala. 542, 4 South. 844; Barry v. Insurance Co, 62 Mich. 424, 29 N. W. 31; Ruggles v. Insurance Co., 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 674; and not, it would seem, in regard to past transactions; 11 Q. B. 46; Haven v. Brown, 7 Greenl. (Me.) 421, 22 Am. Dec. 208; Thallhimer v. Brinckerhoff, 4 Wend. (N. Y.) 394, 21 Am. Dec. 155; City Bank of Baltimore v. Bateman, 7 Harr. & J. (Md.) 104; Parker v. Green, 8 Metc. (Mass.) 142. Declarations of an agent not in the course of the business of the agency, will not prove agency or ratification; Ransom v. Duckett, 48 Ill. App. 659. One cannot prove agency by the declarations of an alleged agent only; Sier v. Bache, 7 Misc. 165, 27 N. Y. Supp. 255; nor will acts and conduct of an alleged agent not acquiesced in by the principal, establish agency; Martin v. Suber, 39 S. C. 525, 18 S. E. 125.

The admissions of the wife bind the husband so far only as she has authority in the matter; 1 Carr. & P. 621; and so the formal admissions of an attorney bind his client; 7 C. & P. 6; but not a necessarily fatal admission unintentionally made; Nesbitt v. Turner, 155 Pa. 429. 26 Atl. 750; nor when not within the scope of his authority; Lewis v. Duane, 69 Hun 28, 23 N. Y. Supp. 433; and see 2 C. & K. 216; 3 C. B. 608. Declarations of a husband in the absence of his wife are not admissible to affect the title of his wife to personal property; Leedom v. Leedom, 160 Pa. 273, 28 Atl. 1024; nor will his admissions affect the wife's separate estate; Clapp v. Engledow, 82 Tex. 290, 18 S. W. 146. See EVIDENCE.

Implied admissions may result from assumed character; 1 B. & Ald. 677; from conduct; 6 C. & P. 241; Tilgham v. Fisher, 9 Watts (Pa.) 441; from acquiescence, which is positive in its nature; Carter v. Bennett, 4 Fla. 340; from possession of documents in some cases; 5 C. & P. 75; 25 State Tr. 120.

The omission to answer a letter is not evidence of the truth of statements made in the letter; see 16 Cyc. 960.

In civil matters, constraint will not avoid admissions, if imposition or fraud were not made use of.

Admissions of one in possession of lands, made to others than the owner, are to be considered in determining whether his possession is adverse to the owner; Lochausen v. Laughter, 4 Tex. Civ. App. 291, 23 S. W. 513.

Judicial admissions; 2 Campb. 341; Boyden v. Moore, 5 Mass. 365; Jones v. Hoar, 5 Pick. (Mass.) 285; those which have been acted on by others; Commercial Bank v. King, 3 Rob. (La.) 243; Kinney v. Farnsworth, 17 Conn. 355; 13 Jur. 253; and those contained in deeds as between parties and privies; Crane v. Morris, 6 Pet. (U. S.) 611, 8 L. Ed. 514; are conclusive evidence against the party making them.

Declarations and admissions are admissible to prove partnership, if made by alleged partners; Schulberg v. Gutterman, 8 Misc. 502, 28 N. Y. Supp. 763; admission of one that he is in partnership with another, is not binding on the latter; Bank of Osceola v. Outhwaite, 50 Mo. App. 124.

It frequently occurs in practice, that, in order to save expenses as to mere formal proofs, the attorneys on each side consent to admit, reciprocally, certain facts in the cause without requiring proof of them. These are usually reduced to writing. Such admissions are in general conclusive; 1 Gr. Ev. § 186, 205; Holley v. Young, 68 Me. 215, 28 Am. Rep. 40; Woodcock v. City of Calais, 68 Me. 244; Marsh v. Mitchell, 26 N. J. Eq. 497; Perry v. Mfg. Co, 40 Conn. 313; 1 Camp. 139; 1 M. & W. 507; and may be used in evidence on a new trial; State v. Bryan, 3 Gill (Md.) 389; Merchants' Bank v. Bank, 3 Gill (Md) 96, 43 Am. Dec. 300; Farmers' Bank v. Sprigg, 11 Md. 389; Elwood v. Lannon's Lessee, 27 Md. 209; 5 C. & P. 386; but may be withdrawn if improvidently made, but only in a clear case of mistake; 1 Gr. Ev. § 206; Marsh v. Mitchell, 26 N. J. Eq. 501; and on timely notice; Hargroves v. Redd, 43 Ga. 150; 5 C. & P. 386; and upon leave granted in the exercise of a sound

discretion; Perry v. Mfg. Co., 40 Conn. 313; 7 *id.* 6; but not after the position of the parties has been changed, as by the death of a party or witness; Wilson v. Bank, 55 Ga. 98.

Admissions against interest in a bill in equity cannot be used as such in another case; Gresl. Eq. Ev. 323; Wigm. Evid. § 1065.

As to admissions during negotiations for a compromise, see COMPROMISE.

In Pleading. The acknowledgment or recognition by one party of the truth of some matter alleged by the opposite party.

IN EQUITY.

Partial admissions are those which are delivered in terms of uncertainty, mixed up with explanatory or qualifying circumstances.

Plenary admissions are those which admit the truth of the matter without qualification, whether it be asserted as from information and belief or as from actual knowledge.

AT LAW.

In all pleadings in confession and avoidance, admission of the truth of the opposite party's pleading is made. Express admissions may be made of matters of fact only.

The usual mode of making an express admission in pleading is, after saying that the plaintiff ought not to have or maintain his action, etc., to proceed thus, "Because he says that, although it be true that," etc., repeating such of the allegations of the adverse party as are meant to be admitted; Lawes, Civ. Pl. 143, 144. See 1 Chitty, Pl. 600; Archb. Civ. Pl. 215.

Pleadings which have been withdrawn from a court of law may be offered in evidence subject to explanation, to prove admissions of the pleader: Soaps v. Eichberg, 42 Ill. App. 375; but admissions contained in an original answer are not conclusive, where an amended answer has been filed excluding such matter; Baxter v. R. Co. (Tex.) 22 S. W. 1002. The plea of the general issue admits the corporate existence of the plaintiff corporation; Bailey v. Bank, 127 Ill. 332, 19 N. E. 695. In many states, in a suit against a firm or corporation, the partnership or corporate existence is taken as admitted unless denied by affidavit filed with the plea. Where complainant sets a plea down for argument, he admits its truth, but denies its sufficiency; Burrell v. Hackley, 35 Fed. 833. Allegations of the complaint not denied by the answer are to be taken as true; Robertson v. Perkins, 129 U. S. 233, 9 Sup. Ct. 279, 32 L. Ed. 686. Where two defences are set up, a denial in one is qualified by an admission in the other; Northern Pac. R. Co. v. Paine, 119 U. S. 564, 7 Sup. Ct. 323, 30 L. Ed. 513.

See CONFESSION and AVOIDANCE.

ADMITTANCE. The act of giving possession of a copyhold estate. It is of three kinds: namely, upon a voluntary grant by the lord, upon a surrender by the former tenant, and upon descent. 2 Bla. Com. 366. See COPYHOLD.

ADMITTENDO CLERICO. An old English writ issuing to the bishop to establish the right of the Crown to make a presentation to a benefice.

ADMITTENDO IN SOCIUM. A writ associating certain persons to justices of assize. Cowell.

ADMONITIO TRINA. The three fold warning given to a prisoner who stood mute, before he was subjected to *peine forte et dure* (*q. v.*).

ADMONITION. A reprimand from a judge to a person accused, on being discharged, warning him of the consequences of his conduct, and intimating to him that, should he be guilty of the same fault for which he has been admonished, he will be punished with greater severity. Merlin, *Répert.* The admonition was authorized as a species of punishment for slight misdemeanors.

ADNEPOS. The son of a great-great-grandson. Calvinus, Lex.

ADNEPTIS. The daughter of a great-great-granddaughter. Calvinus, Lex.

ADNOTATIO (Lat. *notare*). A subscription or signing.

In the civil law, casual homicide was excused by the indulgence of the emperor, signed with his own sign-manual, called *adnotatio;* Code, 9. 16. 5; 4 Bla. Com. 187. See RESCRIPT.

ADOLESCENCE. That age which follows puberty and precedes the age of majority. It commences for males at fourteen, and for females at twelve years completed, and continues until twenty-one years complete. Wharton.

ADOPTION. The act by which a person takes the child of another into his family, and treats him as his own.

A juridical act creating between two persons certain relations, purely civil, of paternity and filiation. 6 Demolombe, § 1.

Adoption was practised in the remotest antiquity Cicero asks, *"Quod est jus adoptionis? nempe ut is adoptet, qui neque procreare jam liberos possit, et cum potuerit, sit expertus."* At Athens, he who had adopted a son was not at liberty to marry without the permission of the magistrates. Gaius, Ulpian, and the Institutes of Justinian only treat of adoption as an act creating the paternal power. Originally, the object of adoption was to introduce a person into the family and to acquire the paternal power over him. The adopted took the name of the adopter, and only preserved his own adjectively, as *Scipio Æmilianus; Cæsar Octavianus,* etc. According to Cicero, adoptions produced the right of succeeding to the name, the property, and the lares *"hereditates nominis, pecuniæ, sacrorum secutæ sunt;" Pro Dom.* § 13.

The first mode of adoption was in the form of a law passed by the *comitia curiata.* Afterwards, it was effected by the *mancipatio, alienatio per æs et libram,* and the *in jure cessio;* by means of the first the paternal authority of the father was dissolved, and by the second the adoption was completed. The *mancipatio* was a solemn sale made to the *emptor* in presence of five Roman citizens (who represented the five classes of the Roman people), and

a *libripens*, or scalesman, to weigh the piece of copper which represented the price. By this sale the person sold became subject to the *mancipium* of the purchaser, who then emancipated him; whereupon he fell again under the paternal power; and in order to exhaust it entirely it was necessary to repeat the *mancipatio* three times: *si pater filium ter venumdabit, filius a patre liber esto.* After the paternal power was thus dissolved, the party who desired to adopt the son instituted a fictitious suit against the purchaser who held him *in mancipium*, alleging that the person belonged to him or was subject to his paternal power; the defendant not denying the fact, the prætor rendered a decree accordingly, which constituted the *cessio in jure*, and completed the adoption. *Adoptantur autem, cum a parente in cujus potestate sunt, tertia mancipatione in jure ceduntur, atque ab eo, qui adoptat, apud eum apud quem legis actio est, vindicantur;* Gell 5. 19.

Towards the end of the Republic another mode of adoption had been introduced by custom. This was by a declaration made by a testator, in his will, that he considered the person whom he wished to adopt as his son: In this manner Julius Cæsar adopted Octavius.

It is said that the adoption of which we have been speaking was limited to persons *alieni juris*. But there was another species of adoption, called adrogation, which applied exclusively to persons who were *sui juris*. By the adrogation a *pater-familias*, with all who were subject to his *patria potestas*, as well as his whole estate, entered into another family, and became subject to the paternal authority of the chief of that family. *Quæ species adoptionis dicitur adrogatio, quia et is qui adoptat rogatur, id est interrogatur, an velit eum quem adopturus sit justum sibi filium esse; et is, qui adoptatur rogatur an id fieri patiatur; et populus rogatur an id fieri jubeat;* Gaius, 1. 99 The formulæ of these interrogations are in Aul Gell. (see Hunter, Rom. Law 205): *"Velitis, jubeatis, Quirites, uti L. Valerius L. Titio tam jure legeque filius sibi siet, quam si ex eo patre matreque familias ejus natus esset, utique ei vitæ necisque in eo potestas siet uti pariendo filio est; hoc ita ut dixi vos, Quirites, rogo."* This public and solemn form of adoption remained unchanged, with regard to adrogation, until the time of Justinian: up to that period it could only take place *populi auctoritate*. According to the Institutes, 1. 11. 1, adrogation took place by virtue of a rescript of the emperor,—*principali rescripto*, which only issued *causa cognita;* and the ordinary adoption took place in pursuance of the authorization of the magistrate,—*imperio magistratus*. The effect of the adoption was also modified in such a manner, that if a son was adopted by a stranger, *extranea persona*, he preserved all the family rights resulting from his birth, and at the same time acquired all the family rights produced by the adoption.

There is no law of adoption in Scotland; Bell's Dict.; nor in England. In the latter country any renunciation by parents of their legal rights and liabilities is a mere empty form; [1901] 2 K. B. 385; 3 M. & G. 547.

In the United States, adoption exists only by statute; In re Thorne, 155 N. Y. 140, 49 N. E. 661; Ballard v. Ward, 89 Pa. 358. One of the first states to introduce it was Massachusetts in 1851; Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321. Its object is to change the succession of property and to create relations of paternity and affiliation not before existing; Morrison v. Sessions' Estate, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500. In Louisiana it was abolished by the Code of 1808, art. 35, p. 50. See Vidal v. Commagére, 13 La. Ann. 517, but the right has since been restored; Civ. Code 1870, Art. 214. In Clarkson v. Hatton, 143 Mo. 47, 44 S. W. 761, 39 L. R. A. 748, 65 Am. St. Rep. 635, it was said to exist in every state. In many of the continental states of Europe it is still permitted under various restrictions.

Adoption is never sustained by mere presumption; Sackman v. Campbell, 10 Wash. 533, 39 Pac. 145; In re Romero, 75 Cal. 379, 17 Pac. 434; Henry v. Taylor, 16 S. D. 424, 93 N. W. 641; even though the child had been taken from an asylum at the age of seven, given the name of the people with whom he lived and treated by them as a son until majority; In re Huyck, 49 Misc. 391, 99 N. Y. Supp. 502; and where the method of adoption is provided by statute, it can be done in no other way; Taylor v. Deseve, 81 Tex. 246, 16 S. W. 1008; Foley v. Foley, 61 Ill. App. 577. There must be a substantial compliance with all statutory requirements; Smith v. Allen, 161 N. Y. 478, 55 N. E. 1056; Bresser v. Saarman, 112 Ia. 720, 84 N. W. 920.

A husband and wife may adopt a child jointly; Markover v. Krauss, 132 Ind. 294, 31 N. E. 1047, 17 L. R. A. 806 (but not if the husband be insane; Watts v. Dull, 184 Ill. 86, 56 N. E. 303, 75 Am. St. Rep. 141); or an unmarried person of suitable age; Krug v. Davis, 87 Ind. 590. The mere fact that one is in the senile age of life will not render him incompetent to adopt one in the prime and vigor of life; Collamore v. Learned, 171 Mass. 99, 50 N. E. 518. It is held that a nonresident may not adopt a child; Knight v. Gallaway, 42 Wash. 413, 85 Pac. 21. An adult may be an adopted child; Sheffield v. Franklin, 151 Ala. 492, 44 South. 373, 12 L. R. A. (N. S.) 884, 125 Am. St. Rep. 37, 15 Ann. Cas. 90; In re Moran's Estate, 151 Mo. 555, 52 S. W. 377; Succession of Caldwell, 114 La. 195, 38 South. 140, 108 Am. St. Rep. 341; Markover v. Krauss, 132 Ind. 294, 31 N. E. 1047, 17 L. R. A. 806; Collamore v. Learned, 171 Mass. 99, 50 N. E. 518; but see *contra;* Petition of Moore, 14 R. I. 38; Williams v. Knight, 18 R. I. 333, 27 Atl. 210. Where the word "child" was used, the statute was held not to include an adult.

Usually the consent of the natural parents is required; Hopkins v. Antrobus, 120 Ia. 21, 94 N. W. 251; In re Estate of McCormick, 108 Wis. 234, 84 N. W. 148, 81 Am. St. Rep. 890; Succession of Vollmer, 40 La. Ann. 593, 4 South. 254; Luppie v. Winans, 37 N. J. Eq. 245; In re Bastin, 10 Pa. Super. Ct. 570; and in some states the consent of the child, when he is above a certain age; In re Johnson, 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380; Morrison v. Sessions' Estate, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500.

If the child be a foundling, the parents have no authority over it and the situation is as if the parents were dead; Succession of Dupre, 116 La. 1090, 41 South. 324. A charitable society which maintains and cares

for a child may consent to its adoption; Booth v. Van Allen, 7 Phila. (Pa.) 401; and a probate court may appoint a guardian *ad litem* with power to give or withhold consent to adoption, where the parents are unknown and there is no guardian; In re Edds, 137 Mass. 346. To constitute abandonment there must be some act on the part of the parent evincing a settled purpose to forego all parental duties; Winans v. Luppie, 47 N. J. Eq. 302, 20 Atl. 969.

If the court be satisfied that the proceedings are for his benefit, the consent of a minor will be presumed; Morrison v. Sessions' Estate, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500.

The surrender of the child by its parents constitutes a valuable consideration for a promise of adoption; Healy v. Simpson, 113 Mo. 340, 20 S. W. 881; Godine v. Kidd, 64 Hun 585, 19 N. Y. Supp. 335; Lynn v. Hockaday, 162 Mo. 111, 61 S. W. 885, 85 Am. St. Rep. 480.

Where there is a contract for adoption and a sufficient consideration therefor on the part of the child, such contract will be enforced; McElvain v. McElvain, 171 Mo. 241, 71 S. W. 142; 8 Hawaii 40.

When an infant child has been released to another, such release is not revocable without sufficient legal reasons; Janes v. Cleghorn, 54 Ga. 10; and unless proceedings to revoke are made promptly, it will be fatal to their maintenance; Brown v. Brown, 101 Ind. 340.

The right of inheritance. In the District of Columbia the right of inheritance is not included in the rights acquired by adoption; Moore v. Hoffman, Fed. Cas. No. 9,764*a*; In New York it is; Theobald v. Smith, 103 App. Div. 200, 92 N. Y. Supp. 1019. In Ohio an adopted child inherits from the adopting parent but not through him; Phillips v. McConica, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. Rep. 753; in Illinois such child can take by descent only from the person adopting him and not from lineal or collateral kindred of the adopting parent; Van Matre v. Sankey, 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. Rep. 196; Keegan v. Geraghty, 101 Ill. 26; and see Van Derlyn v. Mack, 137 Mich. 146, 100 N. W. 278, 66 L. R. A. 437, 109 Am. St. Rep. 669, 4 Ann. Cas. 879. In Pennsylvania an adopted child can not take under a devise to "children" as it is not a child by nature; Schafer v. Eneu, 54 Pa. 304. He is held not to be within a conveyance to "bodily heirs"; Balch v. Johnson, 106 Tenn. 249, 61 S. W. 289; nor is he a lineal descendant; Com. v. Ferguson, 137 Pa. 595, 20 Atl. 870, 10 L. R. A. 240; or lineal issue; Kerr v. Goldsborough, 150 Fed. 289, 80 C. C. A. 177. The word "child" in a statute relating to adoption has a broader signification than "issue"; Virgin v. Marwick, 97 Me. 578, 55 Atl. 520; and the adopted child has the same right of inheritance as a natural child; *id.* In Massachusetts an adopted child was held to be entitled to take from the deceased son of one of the adopting parents; Stearns v. Allen, 183 Mass. 404, 67 N. E. 349, 97 Am. St. Rep. 441.

The right of inheritance from adoption arises by operation of law from the acts of the parties in compliance with the statute and not from contract; Jordan v. Abney, 97 Tex. 296, 78 S. W. 486.

As an adopted child is not a lineal descendant, a legacy to him will not be exempted from payment of the collateral inheritance tax; Com. v. Ferguson, 137 Pa. 595, 20 Atl. 870, 10 L. R. A. 240; otherwise in New York by statute; In re Butler, 58 Hun 100, 12 N. Y. Supp. 201; but see In re Bird's Estate, 11 N. Y. Supp. 895, where payment of such a tax was required, in the case of a legacy to the child of an adopted child.

The adoptive parent may disinherit the child; Logan v. Lennix, 40 Tex. Civ. App. 62, 88 S. W. 364; and he has the same unlimited power of disposition of his property that a natural father has; Burnes v. Burnes, 132 Fed. 485.

Adopting parents inherit from the child in preference to the natural parents; Swick v. Coleman, 218 Ill. 33, 75 N. E. 807; Paul v. Davis, 100 Ind. 422; see Hyatt v. Pugsley, 33 Barb. (N. Y.) 373; Estate of Foley, 1 W. N. C. (Pa.) 301; but this rule is not always followed. In many cases the estate of the deceased child goes to his relatives by blood; Upson v. Noble, 35 Ohio St. 655; Com. v. Powel, 16 W. N. C. (Pa.) 297; Hole v. Robbins, 53 Wis. 514, 10 N. W. 617; Hill v. Nye, 17 Hun (N. Y.) 457. In Pennsylvania, although the act does in express words confer the right of inheritance upon the child from the adopting parent, the latter cannot inherit from the adopted child, because "the act does not so declare"; Com. v. Powel, 16 W. N. C. (Pa.) 297.

A child adopted in one state, where both it and its adopted parent are domiciled, can inherit land in another state having substantially similar adoption laws and permitting adopted children to inherit; Finley v. Brown, 122 Tenn. 316, 123 S. W. 359, 25 L. R. A. (N. S.) 1285; see cases in 65 L. R. A. 186, note; *contra*, Brown v. Finley, 157 Ala. 424, 47 South. 577, 21 L. R. A. (N. S.) 679, 131 Am. St. Rep. 68, 16 Ann. Cas. 778.

To "enact" implies the creating anew of a law which did not exist before; but "adopt," no doubt, implies the making that their own which was created by another, as the adoption of our statute laws of Great Britain, as they stood, by the Colonial Government; Williams v. Bank, 7 Wend. (N. Y.) 539.

The word "adoption" in a state constitution providing for a continuance in office of judges in office at the adoption of the constitution means when it is fully consummated and complete—not inchoate and imperfect; People v. Norton, 59 Barb. (N. Y.) 169.

"The primary and natural signification of the word adoption.....includes both take effect and in force"; People v. Norton, 59 Barb. (N. Y.) 169.

ADPROMISSOR (Lat. *promittere*). One who binds himself for another; a surety; a peculiar species of *fidejussor*. Calvinus, Lex.

The term is used in the same sense in the Scotch law. The cautionary engagement was undertaken by a separate act: hence, one entering into it was called *adpromissor* (promisor in addition to). Erskine, Inst. 3. 3. 1.

ADROGATION. One of two procedures for adoption under the Roman Law, i. e. by bill (*rogatio*) passed by the *comitia curiata*, with the formal consent of the intended father and son. 1 Roby, Rom. Priv. Law 60. See ADOPTION.

ADS. See AD SECTAM.

ADSCRIPTI (Lat. *scribere*). Joined to by writing; ascribed; set apart; assigned to; annexed to.

ADSCRIPTI GLEBÆ. Slaves who served the master of the soil; who were annexed to the land, and passed with it when it was conveyed. Galvinus, Lex.

These *servi adscripti* (or *adscriptitii*) *glebæ* held the same position as the *villeins regardant* of the Normans; 2 Bla. Com. 93. See 1 Poll & Mait. 372

ADSCRIPTICII (Lat.). A species of serfs or slaves. See 1 Poll. & Mait. 372.

Those persons who were enrolled and liable to be drafted as legionary soldiers. Calvinus, Lex

ADSESSORES (Lat. *sedere*). Side judges. Those who were joined to the regular magistrates as assistants or advisers; those who were appointed to supply the place of the regular magistrates in certain cases. Calvinus, Lex. See ASSESSORS.

ADSTIPULATOR. In Civil Law. One who supplied the place of a procurator at a time when the law refused to allow stipulations to be made by procuration. Sand. Inst. 354.

ADULT. In Civil Law. A male infant who has attained the age of fourteen; a female infant who has attained the age of twelve. Domat. *Liv. Prel.* tit. 2, § 2, n. 8.

In Common Law. One of the full age of twenty-one. Swanst. Ch. 553; George v. State, 11 Tex. App. 95.

ADULTER (Lat.). One who corrupts; one who corrupts another man's wife.

Adulter solidorum. A corrupter of metals; a counterfeiter. Calvinus, Lex.

ADULTERA (Lat.). A woman who commits adultery. Calvinus, Lex.

ADULTERATION. The act of corrupting or debasing; the act of mixing something impure or spurious with something pure or genuine, or an inferior article with a superior one of the same kind. See 16 M. & W. 644: State v. Norton, 24 N. C. 40.

See FOOD AND DRUG LAWS.

ADULTERATOR (Lat.). A corrupter; a counterfeiter.

Adulterator monetæ. A forger. Du Cange.

ADULTERINE. The issue of adulterous intercourse.

Those are not deemed adulterine who are begotten of a woman openly married through ignorance of a former wife being alive.

Adulterine children are regarded more unfavorably than the illegitimate offspring of single persons. The Roman law refused the title of natural children, and the canon law discouraged their admission to orders.

ADULTERINE GUILDS. Companies of traders acting as corporations, without charters, and paying a fine annually for the privilege of exercising their usurped privileges. Smith, Wealth of Nat. book 1, c. 10; Wharton, Dict.

ADULTERIUM. A fine imposed for the commission of adultery. Barrington, Stat. 62, n.

ADULTERY. The voluntary sexual intercourse of a married person with a person other than the offender's husband or wife. Bishop, Mar. & D. § 415; Moore v. Com., 6 Metc. (Mass.) 243, 39 Am. Dec. 724; State v. Hutchinson, 36 Me. 261; Cook v. State, 11 Ga. 56, 56 Am. Dec. 410; Hull v. Hull, 2 Strobh. Eq. (S. C.) 174.

Unlawful voluntary sexual intercourse between two persons, one of whom at least is married, is the essence of the crime in all cases. In general, it is sufficient if either party is married; and the crime of the married party will be adultery, while that of the unmarried party will be fornication; Respublica v. Roberts, 1 Yeates (Pa.) 6; *id.*; 2 Dall. (Pa.) 124, 1 L. Ed. 316; State v. Parham, 50 N. C. 416; Smitherman v. State, 27 Ala. 23; State v. Thurstin, 35 Me. 205, 58 Am. Dec. 695; Com. v. Cregor, 7 Gratt. (Va.) 591; Com. v. Lafferty, 6 Gratt. (Va.) 673; Banks v. State, 96 Ala. 78, 11 South. 404; Hunter v. U. S., 1 Pinney (Wis.) 91, 39 Am. Dec. 277. In Massachusetts, however, and some of the other states, by statute, if the woman be married, though the man be unmarried, he is guilty of adultery; Com. v. Call, 21 Pick. (Mass.) 509, 32 Am. Dec. 284, and note; Com. v. Elwell, 2 Metc. 190, 39 Am. Dec. 398 (where the man was ignorant that the woman was married); State v. Pearce, 2 Blackf. (Ind.) 318; Wasden v. State, 18 Ga. 264; State v. Wallace, 9 N. H. 515; and see State v. Lash, 16 N. J. L. 380, 32 Am. Dec. 397; Mosser v. Mosser, 29 Ala. 313. In Connecticut and some other states, it seems that to constitute the offence of adultery it is necessary that the *woman* should be married; that if the man only is married, it is not the crime of adultery at common law or

under the statute, so that an indictment for adultery could be sustained against either party; though within the meaning of the law respecting divorces it is adultery in the man. Cohabitation with a man after marriage is not adultery, unless the woman knows of such marriage; Banks v. State, 96 Ala. 78, 11 South. 404; Vaughan v. State, 83 Ala. 55, 3 South. 530; it is not necessary to prove emission on prosecution for adultery; Com. v. Hussey, 157 Mass. 415, 32 N. E. 362.

A charge of open and notorious adultery is not sustained by proof of occasional illicit intercourse; Wright v. State, 5 Blackf. (Ind.) 358, 35 Am. Dec. 126, and note; State v. Crowner, 56 Mo. 147; Brevaldo v. State, 21 Fla. 789; Searls v. People, 13 Ill. 597; nor by merely living together as man and wife without any circumstances to cause scandal or suspicion; People v. Salmon, 148 Cal. 303, 83 Pac. 42, 2 L. R. A. (N. S.) 1186, 113 Am. St. Rep. 268; Schoudel v. State, 57 N. J. L. 209, 30 Atl. 598. While ordinarily marriage may be proved by admission or matrimonial cohabitation there is some conflict as to whether the fact of marriage can be proved by admission of a party so as to render him guilty of a crime, as of adultery. In many courts such evidence is held insufficient; People v. Humphrey, 7 Johns. (N. Y.) 314; State v. Roswell, 6 Conn. 446; State v. Medbury, 8 R. I. 543; People v. Isham, 109 Mich. 72, 67 N. W. 819; State v. Armstrong, 4 Minn. 335 (Gil. 251); but the weight of authority is against that rule; Cameron v. State, 14 Ala. 546, 48 Am. Dec. 111, and note; State v. Libby, 44 Me. 469, 69 Am. Dec. 115; Com. v. Holt, 121 Mass. 61; Cook v. State, 11 Ga. 53, 56 Am. Dec. 410; Murphy v. State, 50 Ga. 150; State v. Sanders, 30 Ia. 582.

It was not, by itself, indictable at common law; 4 Bla. Com. 65; Whart. Cr. Law 1717; Anderson v. Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776; Com. v. Isaacs, 5 Rand. (Va.) 634; but was left to the ecclesiastical courts for punishment. In the United States it is usually punishable by fine and imprisonment under various statutes.

Parties to the crime may be jointly indicted; Com. v. Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398; or one may be convicted and punished before or without the conviction of the other; 2 Whart. Cr. L. § 1730; "but when one has been previously tried and acquitted, or when both are tried together and the verdict is for one, the other cannot be found guilty;" State v. Mainor, 28 N. C. 340; State v. Parham, 50 N. C. 416; *contra;* State v. Caldwell, 8 Baxt. (Tenn.) 576; Alonzo v. State, 15 Tex. App. 378, 49 Am. Rep. 207; Solomon v. State, 39 Tex. Cr. R. 140, 45 S. W. 706; and see 12 Harv. L. R. 282. The adultery of the wife will not avoid a previous voluntary settlement; Lister v. Lister, 35 N. J. Eq. 49; but if, in contemplation of future adultery, she induce a gift of property, it is revocable; 2 De G. F. & J. 481; Evans v. Evans, 118 Ga. 890, 45 S. E. 612, 98 Am. St. Rep. 180. The equitable jurisdiction is founded on fraud in concealing a material fact which, by reason of the relation, there was a duty to disclose; 17 Harv. L. Rev. 202. Where the petitioner in divorce was only able to prove acts of familiarity, suggestive of adultery, before the date of the petition, he was permitted to prove actual adultery after that date as showing what inferences should be drawn from the prior conduct; [1900] P. 63.

As to civil remedies, see CRIM. CON.

ADVANCE. To supply beforehand; to furnish something before an equivalent is received; to loan. Rogers v. Bank, 108 N. C. 574, 13 S. E. 245.

ADVANCEMENT. A gift by anticipation from a parent to a child of the whole or a part of what it is supposed such child will inherit on the death of the parent. Hengst's Estate, 6 Watts (Pa.) 87; Sampson v. Sampson, 4 S. & R. (Pa.) 333; Osgood v. Breed's Heirs, 17 Mass. 358; Jackson v. Matsdorf, 11 Johns. (N. Y) 91, 6 Am. Dec. 355; Parish v. Rhodes, Wright (Ohio) 339; Darnes' Ex'r v. Lloyd, 82 Va. 859, 5 S. E. 87, 3 Am. St. Rep. 123. The doctrine applies only to intestate estates, and proceeds upon the presumption, in the absence of a will, that the gift is in anticipation of the parent's death, and that he intended equality; but a subsequent disposal by will rebuts the presumption; Marshall v. Rench, 3 Del. Ch. 239, per Bates, Ch.

But an advancement, properly so called, though a thing known under certain ancient customs in England, is now a creature of statute, and, by the statute, is confined to intestate estates, and never applied to lands devised; Marshall v. Rench, 3 Del. Ch. 239, 253, where the opinion states fully the English statutes and policy.

An advancement can only be made by a parent to a child; Callender v. McCreary, 4 How. (Miss.) 356; Shiver v. Brock, 55 N. C. 137; Bisph. Eq. 84; or in some states, by statute, to a grandchild; 4 Kent 419; Dickinson v. Lee, 4 Watts (Pa.) 82, 28 Am. Dec. 684; 4 Ves. 437. It must be *ejusdem generis;* 3 Yo. & Coll. 397; as is the rule with respect to ademption, *q. v.*

It is held that a gift to a husband by wife's father is considered an advancement to the wife; Bruce v. Slemp, 82 Va. 352, 4 S. E. 692; and that it is a question of fact, where decedent in his lifetime made a conveyance to his daughter-in-law; Palmer v. Culbertson, 65 Hun 625, 20 N. Y. Supp. 391.

The intention of the parent is to decide whether a gift is intended as an advancement; Lawson's Appeal, 23 Pa. 85; Jackson v. Matsdorf, 11 Johns. (N. Y.) 91, 6 Am. Dec. 355; McPaw v. Blewit, 2 McCord Ch. (S.

C.) 103. See Weatherhead v. Field, 26 Vt. 665.

A mere gift is presumptively an advancement, but the contrary intention may be shown; Brown v. Burke, 22 Ga. 574; Grattan v. Grattan, 18 Ill. 167, 65 Am. Dec. 726; Lawrence v. Mitchell, 48 N. C. 190; Hatch v. Straight, 3 Conn. 31, 8 Am. Dec. 152; Scott v. Scott, 1 Mass. 527; Bruce v. Slemp, 82 Va. 352, 4 S. E. 692; Culp v. Wilson, 133 Ind. 294, 32 N. E. 928. The maintenance and education of a child, or the gift of money without a view to a portion or settlement in life, is not deemed an advancement; Ison v. Ison, 5 Rich. Eq. (S. C.) 15; Sherwood v. Smith, 23 Conn. 516. If security is taken for repayment, it is a debt and not an advancement; High's Appeal, 21 Pa. 283; West v. Bolton, 23 Ga. 531; Barton v. Rice, 22 Pick. (Mass.) 508; and see Procter v. Newhall, 17 Mass. 93; Osgood v. Breed's Heirs, 17 Mass. 359; Stewart v. State, 2 Harr. & G. (Md.) 114. Payment of a son's debts will be considered an advancement; Steele v. Frierson, 85 Tenn. 430, 3 S. W. 649; or the payment by the father as surety of the notes of his son who had no estate; Reynolds' Adm'r v. Reynolds, 92 Ky. 556, 18 S. W. 517.

No particular formality is requisite to indicate an advancement; 1 Madd. Ch. Pr. 507; 4 Kent 418; Brown v. Brown, 16 Vt. 197; unless prescribed by statute; 4 Kent 418; Hartwell v. Rice, 1 Gray (Mass.) 587; Mowry v. Smith, 5 R. I. 255; Sayles v. Baker, 5 R. I. 457.

Where a father divides his property equally between two sons, conveying to one his share, it is considered an advancement where no deed is delivered to the other; O'Connell v. O'Connell, 73 Ia. 733, 36 N. W. 764.

The effect of an advancement is to reduce the distributive share of the child by the amount so received, estimating its value at the time of receipt; Oyster v. Oyster, 1 S. & R. (Pa.) 422; Nelson v. Wyan, 21 Mo. 347; Burton v. Dickinson, 3 Yerg. (Tenn.) 112; Warfield v. Warfield, 5 Harr. & J. (Md.) 459; Beckwith v. Butler, 1 Wash. (Va.) 224; Hall v. Davis, 3 Pick. (Mass.) 450; in some states the child has his option to retain the advancement and abandon his distributive share; Clark v. Fox, 9 Dana (Ky.) 193; Taylor v. Reese, 4 Ala. 121; to abandon his advancement and receive his equal share of the estate; Knight v. Oliver, 12 Gratt. (Va.) 33; Andrews v. Hall, 15 Ala. 85; Phillips v. McLaughlin, 26 Miss. 592; Grattan v. Grattan, 18 Ill. 167, 65 Am. Dec. 726; but this privilege exists only in case of intestacy; Newman v. Wilbourne, 1 Hill, Ch. (S. C.) 10; Sturdevant v. Goodrich, 3 Yerg. (Tenn.) 95; Howland v. Heckscher, 3 Sandf. Ch. (N. Y.) 520; Hawley v. James, 5 Paige, Ch. (N. Y.) 450; Ves. Ch. 323. See ADEMPTION; GIFT.

It is not chargeable with interest; Miller's Appeal, 31 Pa. 337; until the settlement of the estate.

ADVANCES. Payments made to the owner of goods by a factor or agent, who has or is to have possession of the goods for the purpose of selling them.

An agent is entitled to reimburse himself from the proceeds of the goods, and has a lien on them for the amount paid; Liverm. Ag. 38; Merchants' National Bank v. Pope, 19 Or. 35, 26 Pac. 622; and an action over for the balance, against his principal, if the sales are insufficient to cover the advances; Parker v. Brancker, 22 Pick. (Mass.) 40; Marfield v. Goodhue, 3 N. Y. 62; Frothingham v. Everton, 12 N. H. 239; Harrison, Frazier & Co. v. Mora, 150 Pa. 481, 24 Atl. 705; Eichel v. Sawyer, 44 Fed. 845; but he must first exhaust the property in his hands; Balderston v. Rubber Co., 18 R. I. 338, 27 Atl. 507, 49 Am. St. Rep. 772. Where to save himself from loss the factor buys the goods himself, the consignor may elect whether he will ratify the sale or demand the value of the goods; Sims v. Miller, 37 S. C. 402, 16 S. E. 155, 34 Am. St. Rep. 762.

See AGENT; FACTOR.

In the case of a contract for the manufacture and sale of merchandize, a stipulation to advance money on account means to supply beforehand, to loan before the work is done or the goods made; Powder Co. v. Burkhardt, 97 U. S. 110, 24 L. Ed. 973.

It also refers to a case where money is paid before, or in advance of, the proper time of payment; it may characterize a loan or a gift, or money advanced to be repaid conditionally; Vail v. Vail, 10 Barb. (N. Y.) 73.

Though in its strict legal sense the word does not mean gifts or advancements, but rather a sort of loan, in its ordinary and usual sense it includes both loans and gifts—rather the former than the latter; Prouty v. Swift, 51 N. Y. 597; Nolan's Ex'rs v. Bolton, 25 Ga. 352.

As to mortgages to secure future advancements, see MORTGAGE.

ADVANTAGE. Preference or priority. United States v. Preston, 4 Wash. 446, Fed. Cas. No. 16,087.

ADVENA (Lat. *venire*). **In Roman Law.** One of foreign birth, who has left his own country and settled elsewhere, and who has not acquired citizenship in his new locality; often called *albanus*. Du Cange.

ADVENT. The period commencing on Sunday falling on St. Andrew's day (30th of November), or the nearest Sunday to it, and continuing till Christmas. Blount.

It took its name from the fact that it immediately preceded the day set apart to commemorate the birth or coming (advent) of Christ. Cowel; Termes de la Ley.

Formerly, during this period, "all contentions at law were omitted." But, by statute 13 Edw. I. (Westm. 2) c. 48, certain actions were allowed.

ADVENTITIOUS (Lat. *adventitius*). That which comes incidentally, or out of the regular course.

ADVENTITIUS (Lat.). Foreign; coming from an unusual source.

Adventitia bona are goods which fall to a man otherwise than by inheritance.

Adventitia dos is a dowry or portion given by some friend other than the parent.

ADVENTURE. Sending goods abroad under charge of a supercargo or other agent, which are to be disposed of to the best advantage for the benefit of the owners.

The goods themselves so sent.

It is used synonymously with "perils"; it is often used by writers to describe the enterprise or voyage as a "marine adventure" insured against; Moores v. Louisville Underwriters, 14 Fed. 233. See INSURANCE; BILL OF ADVENTURE.

ADVENTURER. One who undertakes uncertain or hazardous actions or enterprises. It is also used to denote one who seeks to advance his own interests by unscrupulous designs on the credulity of others. It has been held that to impute that a person is an adventurer is a libel; 18 L. J. C. P. 241.

ADVERSE CLAIM. See ADVERSE POSSESSION.

ADVERSE ENJOYMENT. The possession or exercise of an easement or privilege under a claim of right against the owner of the land out of which the easement is derived. 2 Washb. R. P. 42.

Such an enjoyment, if open, 4 M. & W. 500; 4 Ad. & E. 369, and continued uninterruptedly; Powell v. Bagg, 8 Gray (Mass.) 441, 69 Am. Dec. 262; Colvin v. Burnet, 17 Wend. (N. Y.) 564; Pierre v. Fernald, 26 Me. 440, 46 Am. Dec. 573; Bullen v. Runnels, 2 N. H. 255, 9 Am. Dec. 55; Watt v. Trapp, 2 Rich. (S. C) 136; 11 Ad. & E. 788; Grace Methodist Episcopal Church v. Dobbins, 153 Pa. 294, 25 Atl. 1120, 34 Am. St. Rep. 706, for the term of twenty years, raises a conclusive presumption of a grant, provided that there was, during the time, some one in existence, in possession and occupation, who was not under disability to resist the use; 2 Washb. R. P. 48. See PRESUMPTION; EASEMENT; ADVERSE POSSESSION.

ADVERSE POSSESSION. The enjoyment of land, or such estate as lies in grant, under such circumstances as indicate that such enjoyment has been commenced and continued under an assertion or color of right on the part of the possessor. 3 East 394; Wallace v. Duffield, 2 S. & R. (Pa) 527, 7 Am. Dec. 660; French v. Pearce, 8 Conn. 440, 21 Am. Dec. 680; Robinson v. Douglass, 2 Aik. (Vt.) 364; Smith v. Burtis, 9 Johns. (N. Y.) 174; Jackson v. Huntington, 5 Pet. (U. S.) 402, 8 L. Ed. 170; Bowles v. Sharp, 4 Bibb (Ky.) 550. See 15 L. R. A. (N. S.) 1178, note.

A prescriptive title rests upon a different principle from that of a title arising under the statute of limitations. Prescription operates as evidence of a grant and confers a positive title; Cruise, Dig. tit. 31, ch. 1, § 4. The statute of limitations operates not so much to confer positive title on the occupant, as to bar the remedy. Hence it is said to be properly called a negative prescription; *id.* It applies only when there has been a disseisin or some actionable invasion of the real owner's possession; Clawson v. Primrose, 4 Del. Ch. 670 *n.*

When such possession has been actual, Mather v. Ministers of Trinity Church, 3 S. & R. (Pa.) 517, 8 Am. Dec. 663, and has been adverse for twenty years, the law raises the presumption of a grant; Angell, Wat. Cour. 85. But this presumption arises only when the use or occupation would otherwise have been unlawful; Tinkham v. Arnold, 3 Greenl. (Me.) 120; Jackson v. Richards, 6 Cow. (N. Y.) 617; Jackson v. Vermilyea, *id.* 677; Hall v. Powel, 4 S. & R. (Pa.) 456, 8 Am. Dec. 722.

The statute of limitations is the source of title by adverse possession; Armijo v. Armijo, 4 N. M. (Gild) 57, 13 Pac. 92. It is held to be not grounded upon the presumption of a grant; but is the fiat of the legislature cutting off the right to maintain suit; Louisville & N. R. Co. v. Smith, 125 Ky. 336, 101 S. W. 317, 31 Ky. L. Rep. 1, 128 Am. St. Rep. 254; and is for the interest of the stability of titles; Northern Pac. R. Co. v. Ely, 25 Wash. 384, 65 Pac. 555, 54 L. R. A. 526, 87 Am. St. Rep. 766. It protects the disseisor in his possession not out of regard to the merits of his title, but because the real owner has acquiesced in his possession; Foulke v. Bond, 41 N. J. L. 527. It must be complied with in every substantial particular; Brokel v. McKechnie, 69 Tex. 33, 6 S. W. 623.

A mere possession, without color or claim of an adverse title, will not enable one in an action of right to avail himself of the statute of limitations; Clagett v. Conlee, 16 Ia. 487; Jasperson v. Scharnikow, 150 Fed. 571, 80 C. C. A. 373, 15 L. R. A. (N. S.) 1178; Jackson v. Huntington, 5 Pet. (U. S.) 402, 8 L. Ed. 170; Stevens v. Brooks, 24 Wis. 329; Harvey v. Tyler, 2 Wall. (U. S.) 328, 17 L. Ed. 871. The terms "color of title" and "claim of title" are not synonymous; Herbert v. Hanrick, 16 Ala. 581. To constitute the former there must be a paper title, but the latter may rest wholly in parol; Hamilton v. Wright, 30 Ia. 480. The claim of right may be made inferentially by unequivocal acts of ownership; Barnes v. Light, 116 N. Y. 34, 22 N. E. 441; Wilbur v. R. Co., 116 Ia. 65, 89 N. W. 101; as by the occupation and use of land by a railroad for a right of way; Illinois Cent. R. Co. v. Houghton, 126 Ill. 235, 18 N. E. 301, 1 L. R. A. 213, 9 Am. St. Rep. 581; or by visible, hostile, exclusive, and continuous appropriation of the land;

Cox v. Hotel Co. (Tex.) 47 S. W. 808. It need not be a valid claim, so long as it is made and relied on by the person in possession; Jackson v. Ellis, 13 Johns. (N. Y.) 118; Clapp v. Bromagham, 9 Cow. (N. Y.) 530; Grant v. Fowler, 39 N. H. 101; Cornelius v. Giberson, 25 N. J. L. 1; Montgomery County v. Severson, 64 Ia. 326, 17 N. W. 197, 20 N. W. 458; Virginia Midland R. Co. v. Barbour, 97 Va. 118, 33 S. E. 554; Dothard v. Denson, 72 Ala. 541; and where all the other elements of an adverse possession have concurrently and persistently existed for the statutory time, color of title has been usually held not essential; Moore v. Brownfield, 7 Wash. 23, 34 Pac. 199; Dibble v. Land Co., 163 U. S. 63, 16 Sup. Ct. 939, 41 L. Ed. 72; and see the cases collected on this point, 15 L. R. A. (N. S.) 1178, *n.*

The intention must be manifest; Lewis v. Railroad Co., 162 N. Y. 202, 56 N. E. 540; Haney v. Breeden, 100 Va. 781, 42 S. E. 916; Marcy v. Marcy, 6 Metc. (Mass.) 360. It guides the entry and fixes its character; Jasperson v. Scharnikow, 150 Fed. 571, 80 C. C. A. 373, 15 L. R. A. (N. S.) 1178, citing Ewing v. Burnet, 11 Pet. (U. S.) 51, 9 L. Ed. 624. Possession taken under claim of title shows such intention; Probst v. Trustees, 129 U. S. 182, 9 Sup. Ct. 263, 32 L. Ed. 642. But if by mistake one oversteps his bounds and encroaches upon his neighbor's lands, not knowing the location of the true line and intending to claim no more than he really is entitled to possess, his possession is not adverse, and will not give him title no matter how long he actually holds it; Shirey v. Whitlow, 80 Ark. 444, 97 S. W. 444; Gordon v. Booker, 97 Cal. 586, 32 Pac. 593; Mills v. Penny, 74 Ia. 172, 37 N. W. 135, 7 Am. St. Rep. 474; Silver Creek Cement Corp. v. Cement Co., 138 Ind. 297, 35 N. E. 125, 37 N. C. 721; Preble v. Railroad Co., 85 Me. 260, 27 Atl. 149, 21 L. R. A. 829, 35 Am. St. Rep. 366; Kirkman v. Brown, 93 Tenn. 476, 27 S. W. 709. In such a case the intent to claim title exists only upon the condition that his belief as to his boundary is true. The intention is not absolute, but provisional, and the possession is not adverse; Preble v. Railroad Co., 85 Me. 260, 27 Atl. 149, 21 L. R. A. 829, 35 Am. St. Rep. 366. When a boundary line between adjoining landowners is perpetually in dispute, and neither has actual occupation to any definite line, there is no adverse possession beyond the true line; Liddle v. Blake, 131 Ia. 165, 105 N. W. 649; nor will the encroachment of one in the erection of his building on neighboring property through mistake constitute such a possession as will ripen into title by the lapse of time; Davis v. Owen, 107 Va. 283, 58 S. E. 581, 13 L. R. A. (N. S.) 728, nor where a deed, by mistake, covered land not intended to be conveyed; Garst v. Brutsche, 129 Ia. 501, 105 N. W. 452.

Where one enters into possession of real property by permission of the owner, without any tenancy whatever being created, except at sufferance, possession being given as a mere matter of favor, he can never acquire title by adverse possession, no matter how long continued against the true owner thereof, unless there is a clear, positive, unequivocal disclaimer and disavowal of the owner's title and an assertion by the occupant of a title in hostility thereto, notice thereof being brought home to the landowner. See McCutchen v. McCutchen, 77 S. C. 129, 57 S. E. 678, 12 L. R. A. (N. S.) 1140, and cases cited.

The adverse possession must be "actual, continued, visible, notorious, distinct, and hostile;" Boaz v. Heister, 6 S. & R. (Pa.) 21; Evans v. Templeton, 69 Tex. 375, 6 S. W. 843, 5 Am. St. Rep. 71; Haffindorfer v. Gault, 84 Ky. 124; Paldi v. Paldi, 95 Mich. 410, 54 N. W. 903; Chastang v. Chastang, 141 Ala. 451, 37 South. 799, 109 Am. St. Rep 45; Foulke v. Bond, 41 N. J. L. 527; Jasperson v. Scharnikow, 150 Fed. 571, 80 C. C. A. 373, 15 L. R. A. (N. S.) 1178. It is founded in trespass and disseisin, an ouster and continued exclusion of the true owner for the period prescribed by the statute; Olewine v. Messmore, 128 Pa. 470, 18 Atl. 495; Ward v. Cochran, 150 U. S. 597, 14 Sup. Ct. 230, 37 L. Ed. 1195. Nepean v. Doe, 2 Sm. Lead. Cas. 597; 16 Harv. L. Rev. 224. Even the sole possession by one tenant in common is not presumed adverse to a cotenant; the ordinary presumption is that such possession is held in the right of both tenants; Farmers' & Merchants' Nat. Bank v. Wallace, 45 Ohio St. 152, 12 N. E. 439; mere occupation and appropriation of rents; Todd v. Todd, 117 Ill. 92, 7 N. E. 583; Blackaby v. Blackaby, 185 Ill. 94, 56 N. E. 1053; or acquiescing in an adverse claim of a sub-tenant; Lee v. Livingston, 143 Mich. 203, 106 N. W. 713; will not affect the rights of the cotenants; and see Velott v. Lewis, 102 Pa. 326. There must be an actual ouster; Morris v. Davis, 75 Ga. 169; or exclusive possession after demand; or express notice of adverse possession; or acts of exclusive ownership of an unequivocal character; Rodney v. McLaughlin, 97 Mo. 426, 9 S. W. 726; Lindley v. Groff, 37 Minn. 338, 34 N. W. 26; Breden v. McLaurin, 98 N. C. 307, 4 S. E. 136; Killmer v. Wuchner, 74 Ia. 359, 37 N. W. 778. The receipt of the entire profits, the exclusive possession for twenty-one years, and a claim of right for that time, will constitute an ouster; Abrams v. Rhoner, 44 Hun (N. Y.) 507; Dobbins v. Dobbins, 141 N. C. 210, 53 S. E. 870, 10 L. R. A. (N. S.) 185, 115 Am. St. Rep. 682; or where a co-tenant asserts possession under a deed purporting to convey the whole title, he will be deemed to have ousted his co-tenant; Wright v. Kleyla, 104 Ind. 223, 4 N. E. 16; or where he devises by will read in the presence of his cotenant; Miller v. Miller, 60 Pa. 16, 100 Am. Dec. 538. The registration of a deed pur-

porting to vest title to the entire tract in the grantee is notice to the co-tenant of an adverse holding; McCann v. Welch, 106 Wis. 142, 81 N. W. 996. One claiming by adverse possession cannot avail himself of the previous possession of another person with whose title he is in no way connected; Stout v. Taul, 71 Tex. 438, 9 S. W. 329; Heflin v. Burns, 70 Tex. 347, 8 S. W. 48; Witt v. Ry. Co., 38 Minn. 122, 35 N. W. 862. If the combined periods of adverse possession of two successive holders equal twenty years, the true owner will be deprived of his title; but there must be a privity of estate such as a devise or conveyance; Sawyer v. Kendall, 10 Cush. (Mass.) 241; Frost v. Courtis, 172 Mass. 401, 52 N. E. 515. Where privity is required, a defective deed or even a mere oral transfer is sufficient; Weber v. Anderson, 73 Ill. 439; and see 13 Harv. L. Rev. 52. There can be no adverse possession against a state; Hurst v. Dulany, 84 Va. 701, 5 S. E. 802; but a state may acquire a title by adverse possession; Attorney General v. Ellis, 198 Mass. 91, 84 N. E. 430, 15 L. R. A. (N. S.) 1120; Eldridge v. City of Binghamton, 120 N. Y. 309, 24 N. E. 462; Birdsall v. Cary, 66 How. Pr. (N. Y.) 358; but see Whatley v. Patten, 10 Tex. Civ. App. 77, 31 S. W. 60. No length of adverse possession by user on the side of a highway by an abutting owner gives title to him; Parsons v. Village of Rye, 140 N. Y. Supp. 961.

When both parties claim under the same title; as, if a man seised of certain land in fee have issue two sons, and die seised, and one of the sons enter by abatement into the land, the statute of limitations will not operate against the other son; Co. Litt. s. 396.

There can be no adverse possession between husband and wife while the marital relation continues to exist; Bell v. Bell, 37 Ala. 536, 79 Am. Dec. 73; Veal v. Robinson, 70 Ga. 809; Hendricks v. Rasson, 53 Mich. 575, 19 N. W. 192.

As against the purchaser at an execution sale subject to dower, the possession of the widow is not adverse; Robinson v. Allison, 124 Ala. 325, 27 South. 461; see 14 Harv. L. Rev. 157.

When the possession of the one party is consistent with the title of the other; as, where the rents of a trust estate were received by a *cestui que trust* for more than twenty years without any interference of the trustee, it was held not to be adverse to the title of the trustee; 8 East 248. See Poston v. Balch, 69 Mo. 117. When trust property is taken possession of by a trustee, it is the possession of the *cestui que trust* and cannot be adverse until the trust is disavowed, to the knowledge of the *cestui que trust;* Reynolds v. Sumner, 126 Ill. 58, 18 N. E. 334, 1 L. R. A. 327, 9 Am. St. Rep. 523.

When the occupier has acknowledged the claimant's title; as, if a lease be granted for a term, and, after paying the rent for the land during such term, the tenant hold for twenty years without paying rent, his possession will not be adverse. See 1 B. & P. 542; 8 B. & C. 717.

The possession of the tenant becomes adverse where, to the knowledge of the landlord, the tenant disclaims the tenancy, and sets up a title adverse to the landlord; Willison v. Watkins, 3 Pet. (U. S.) 43, 7 L. Ed. 596, where it was held that the rule that a tenant cannot dispute his landlord's title during the existence of his lease would not defeat the right of tenant to acquire title by adverse possession, after a repudiation of the tenancy brought home to the landlord. If a tenant disclaims the tenure, and claims in his own right, of which the landlord has notice, the tenancy is terminated and the tenant becomes a trespasser, though the period of the lease has not expired; Walden v. Bodley, 14 Pet. (U. S.) 156, 10 L. Ed. 398; Fusselman v. Worthington, 14 Ill. 145; and the statute of limitations begins to run from the time of the tenant's disclaimer and the landlord's knowledge of it; Tillotson v. Doe, 5 Ala. 407, 39 Am. Dec. 330; Duke v. Harper, 6 Yerg. (Tenn.) 280, 27 Am. Dec. 462; Farrow's Heirs v. Edmundson, 4 B. Monr. (Ky.) 606, 41 Am. Dec. 250; and if continued will ripen into title; Sherman v. Transp. Co., 31 Vt. 162. There must be a disclaimer by the tenant and hostile possession to the landlord's knowledge, or such open and notorious possession as to raise a presumption of notice; Dothard v. Denson, 72 Ala. 541. See generally Townsend v. Boyd, 217 Pa. 386, 66 Atl. 1099, 12 L. R. A. (N. S.) 1149 And see Jasperson v. Scharnikow, 150 Fed. 571, 80 C. C. A. 373, 15 L. R. A. (N. S.) 1178. See LANDLORD AND TENANT; COLOR OF TITLE.

The title by adverse possession for such a period as is required by statute to bar an action, is a fee-simple title, and is as effective as any otherwise acquired; Cox v. Cox, 17 Wash. L. Rep. 53; Northern Pac. R. Co. v. Hasse, 197 U. S. 9, 25 Sup. Ct. 305, 49 L. Ed. 642.

When there has been a severance of the title to the surface and that to the minerals beneath it, adverse possession of the surface will not affect the title to the minerals; Moreland v. Frick Coke Co., 170 Pa. 33, 32 Atl. 634; Lulay v. Barnes, 172 Pa. 331, 34 Atl. 52.

It is not material that a break in the continuity of possession has been due to outside causes; Holliday v. Cromwell, 37 Tex. 437; but in such a case it was held that the running of the statute was suspended; Western v. Flanagan, 120 Mo. 61, 25 S. W. 531.

ADVERTISEMENT. Information or knowledge communicated to individuals or the public in a manner designed to attract general attention.

A notice published in handbills, placards, a newspaper, etc.; cited in Darst v. Doom, 38 Ill. App. 397.

The law in many instances requires parties to advertise in order to give notice of acts which are to be done; in these cases, the advertisement is in general equivalent to notice. But there are cases in which such notice is not sufficient, unless brought home to the actual knowledge of the party. Thus, notice of the dissolution of partnership by advertisement in a newspaper printed in the place where the business is carried on, although it is of itself notice to all persons who have had no previous dealings with the firm, yet is not notice to those who have had such previous dealings; it must be shown that persons of the latter class have received actual notice; Watkinson v. Bank, 4 Whart. (Pa.) 484, 34 Am. Dec. 521. See Vernon v. Manhattan Co., 17 Wend. (N. Y.) 526; *id.*, 22 Wend. (N. Y.) 183; Lind. Part. *222; Mauldin v. Bank, 2 Ala. 502; Hutchins v. Bank, 8 Humphr. (Tenn.) 418; 3 Bingh. 2. It has been held that the printed conditions of a line of public coaches are sufficiently made known to passengers by being posted up at the place where they book their names; Whitesell v. Crane, 8 W. & S. (Pa.) 373; 3 Esp. 271. An advertisement by a railroad corporation in a newspaper in the English language of a limitation of its liability for baggage is not notice to a passenger who does not understand English; Camden & A. R. Co. v. Baldauf, 16 Pa. 68, 55 Am. Dec. 481.

An ordinary advertising sheet is not a newspaper for the purpose of advertisement as required by law, and when notice is required to be published in two newspapers, English papers are presumed to be intended; Tyler v. Bowen, 1 Pittsb. (Pa.) 225; the posting up of a page of a newspaper, containing a large number of separate advertisements, will not be considered a handbill; Clark v. Chambers, 1 Pittsb. (Pa.) 224.

When an advertisement contains the terms of sale, or description of the property to be sold, it will bind the seller.

Advertisements published *bona fide* for the apprehension of a person suspected of crime, or for the prevention of fraud, are privileged; Heard, Lib. & Sland. § 131.

A sign-board, at a person's place of business, giving notice of lottery-tickets being for sale there, is an "advertisement"; Com. v. Hooper, 5 Pick. (Mass.) 42.

See NOTICE; FLAG.

ADVICE. Information given by letter by one merchant or banker to another in regard to some business transaction which concerns him. Chit. Bills 185.

ADVISARI (Lat.). To advise; to consider; to be advised; to consult. See CURIA ADVISARI VULT.

ADVISE. To give advice; to counsel. Long v. State, 23 Neb. 33, 36 N. W. 310. It is different in meaning from instruct; People v. Horn, 70 Cal. 17, 11 Pac. 470; or persuade; Wilson v. State, 38 Ala. 411.

ADVISEDLY. With deliberation; intentionally. 15 Moore P. C. 147.

ADVISEMENT. Consideration; deliberation; consultation. "Upon deliberate advisement, we are of opinion," etc. In re Hohorst, 150 U. S. 662, 14 Sup. Ct. 221, 37 L. Ed. 1211.

ADVISORY. Suggestive, but not conclusive.

ADVISORY OPINION. See OPINION OF JUDGES.

ADVOCATE. An assistant; adviser; a pleader of causes.

Derived from *advocare*, to summon to one's assistance; *advocatus* originally signified an assistant or helper of any kind, even an accomplice in the commission of a crime; Cicero, *Pro Cæcina*, c. 8, Livy, lib ii 55; iii. 47; Tertullian, *De Idolatr.* cap xxiii.; Petron. *Satyric.* cap. xv. Secondarily, it was applied to one called in to assist a party in the conduct of a suit; Inst. 1, 11, D, 50, 13. *de extr. cogn.* Hence, a pleader, which is its present signification.

In Scotch and Ecclesiastical Law. An officer of the court, learned in the law, who is engaged by a suitor to maintain or defend his cause. Advocates, like counsellors, have the exclusive privilege of addressing the court either orally or in written pleadings; and, in general, in regard to duties, liabilities, and privileges, the same rules apply *mutatis mutandis* to advocates as to counsellors See COUNSELLOR.

In the English ecclesiastical and admiralty courts, advocates had the exclusive right of acting as counsel. They were incorporated (8 Geo. III.) under the title of "The College of Doctors of Law Exercent in the Ecclesiastical and Admiralty Courts." In 1857, on the creation of the new court of probate and matrimonial causes, this college was empowered to surrender its charter and sell its real estate.

In Scotland all barristers are called advocates.

Lord Advocate.—An officer in Scotland appointed by the crown, during pleasure, to take care of the king's interest before the courts of session, justiciary, and exchequer. All actions that concern the king's interest, civil or criminal, must be carried on with concourse of the lord advocate. He also discharges the duties of public prosecutor, either in person or by one of his four deputies, who are called *advocates-depute*. Indictments for crimes must be in his name as accuser. He supervises the proceedings in important criminal cases, and has the right to appear in all such cases. He is, in fact, secretary of state for Scotland, and his principal duties are connected directly with the administration of the government.

Inferior courts have a *procurator fiscal*, who supplies before them the place of the

lord advocate in criminal cases. See 2 Bankt. Inst. 492.

College or Faculty of Advocates.—A corporate body in Scotland, consisting of the members of the bar in Edinburgh. A large portion of its members are not active practitioners, however; 2 Bankt. Inst. 486.

Queen's Advocate.—A member of the College of Advocates, appointed by letters patent to advise the crown on questions of civil, canon, and ecclesiastical law. He takes precedence next after the solicitor general.

Church or Ecclesiastical Advocates.—Pleaders appointed by the church to maintain its rights.

In Ecclesiastical Law. A patron of a living; one who has the advowson, *advocatio*. Tech. Dict.; Ayliffe, Par. 53; Dane, Abr. c. 81, § 20; Erskine, Inst. 79, 9.

Those persons whom we now call patrons of churches, and who reserved to themselves and their heirs a license to present on any avoidance. The term originally belonged to the founders of churches and convents and their heirs, who were bound to protect their churches as well as to nominate or present to them. But when the patrons grew negligent of their duty or were not of ability or interest in the courts of justice, then the religious began to retain law *advocates*, to solicit and prosecute their causes. Spelm.; Jacob, Law Dict.

A person admitted by the Archbishop of Canterbury to practise in the court of arches in the same manner as barristers in the common law courts. Rap. & Law. Law Dict.

ADVOCATI (Lat.). **In Roman Law.** Patrons; pleaders; speakers.

Originally the management of suits at law was undertaken by the *patronus* for his *cliens* as a matter of duty arising out of their reciprocal relation. Afterwards it became a profession, and the relation, though a peculiarly confidential one while it lasted, was but temporary, ending with the suit. The profession was governed by very stringent rules: a limited number only were enrolled and allowed to practise in the higher courts—one hundred and fifty before the *prætectus prætorio;* Dig 8, 11; Code 2, 7; fifty before the *præf. aug.* and *dux Ægyptious* at Alexandria; Dig. 8, 13; etc., etc. The enrolled advocates were called *advocati ordinarii*. Those not enrolled were called *adv supernumerarii* or *extraordinarii*, and were allowed to practise in the inferior courts; Dig 8, 13. From their ranks vacancies in the list of *ordinarii* were filled, *Ibid.* The *ordinarii* were either *fiscales*, who were appointed by the crown for the management of suits in which the imperial treasury was concerned, and who received a salary from the state; or *privati* whose business was confined to private causes. The *advocati ordinarii* were bound to lend their aid to every one applying to them, unless a just ground existed for a refusal; and they could be compelled to undertake the cause of a needy party; l. 7, c. 2, 6. The *supernumerarii* were not thus obliged, but, having once undertaken a cause, were bound to prosecute or defend it with diligence and fidelity.

The client must be defended against every person, even the emperor, though the *advocati fiscales* could not undertake a cause against the *fiscus* without a special permission; ll 1 et 2, C. 2, 9; unless such cause was their own, or that of their parents, children, or ward; l. 10, pr. C. 11, D. 3, 1.

An advocate must have been at least seventeen years of age; l. 1, § 3, D. 3, 1; he must not be blind or deaf; l. 1, §§ 3 et 5, D. 3, 1; he must be of good repute, not convicted of an infamous act; l. 1, § 3, D. 3, 1; he could not be advocate and judge in the same cause; l. 6, pr. C. 2, 6; he could not even be a judge in a suit in which he had been engaged as advocate; l. 17, D. 2, 1; l. 14, C. 1, 51; nor after being appointed judge could he practise as advocate even in another court; l. 14, pr. C. 1, 51; nor could he be a witness in the cause in which he was acting as advocate; l. ult. D. 22, 5; 22 Glück, Pand. p. 161, *et seq.*

He was bound to bestow the utmost care and attention upon the cause, *nihil studii reliquentes quod sibi possibile est;* l. 14, § 1, C. 3, 1. He was liable to his client for damages caused in any way by his fault, 5 Glück, Pand. 110. If he had signed the *concept*, he was responsible that it contained no matter punishable or improper; Boehmer, Cons. et Decis. t. ii. p. 1, resp. cviii. no. 5. He must clearly and correctly explain the law to his clients, and honestly warn them against transgression or neglect thereof. He must frankly inform them of the lawfulness or unlawfulness of their cause of action, and must be especially careful not to undertake a cause clearly unjust, or to let himself be used as an instrument of chicanery, malice, or other unlawful action; l. 6, §§ 3, 4, C. 2, 6; l. 13, § 9, l. 14, § 1, C. 3, 1. In pleading, he must abstain from invectives against the judge, the opposite party or his advocate; l. 6, § 1, C 2, 6. Should it become necessary or advantageous to mention unpleasant truths, this must be done with the utmost forbearance, and in the most moderate language; 5 Glück, Pand. 111. Conscientious honesty forbade his betraying secrets confided to him by his client or making any improper use of them; he should observe inviolable secrecy in respect to them; *ibid;* he could not, therefore, be compelled to testify in regard to such secrets; l. ult. D. 22, 5.

If he violated the above duties, he was liable, in addition to compensation for the damage thereby caused, to fine, or imprisonment, or suspension, or entire removal from practice, or to still severer punishment, particularly where he had been guilty of a *prævaricatio*, or betrayal of his trust for the benefit of the opposite party, 5 Glück, Pand 111.

Compensation—By the *lex Cincia*, A. U. C. 549, advocates were prohibited from receiving any reward for their services. In course of time this became obsolete. Claudius allowed it, and fixed ten thousand sesterces as the maximum fee. Trajan prohibited this fee, called *honorarium*, from being paid before the termination of the action. This, too, was disregarded, and prepayment had become lawful in the time of Justinian; 5 Glück, Pand. 117. The fee was regulated by law, unless the advocate had made a special agreement with his client, when the agreement fixed the amount. But a *pactum de quota litis, i. e*, an agreement to pay a contingent fee, was prohibited, under penalty of the advocate's forfeiting his privilege of practising; l. 5, C. 2, 6. A *palmarium*, or conditional fee in addition to the lawful charge and depending upon his gaining the cause, was also prohibited; 5 Glück, Pand. 120 *et seq.* But an agreement to pay a *palmarium* might be enforced when it was not entered into till after the conclusion of the suit; l. 1, § 12, D. 50, 13. The compensation of the advocate might also be in the way of an annual salary; 5 Glück, Pand. 122.

Remedy.—The advocate had the right to retain papers and instruments of his client until payment of his fee; l. 26, Dig. 3, 2. Should this fail, he could apply for redress to the court where the cause was tried by petition, a formal action being unnecessary; 5 Glück, Pand. 122.

Anciently, any one who lent his aid to a friend, and who was supposed to be able in any way to influence a judge, was called *advocatus*.

Causidicus denoted a speaker, or pleader merely; *advocatus* resembled more nearly a counsellor; or, still more exactly, causidicus might be rendered *barrister*, and advocatus *attorney*, or *solicitor*,

though the duties of an *advocatus* were much more extended than those of a modern attorney; Du Cange; Calvinus, Lex.

A witness.

ADVOCATI ECCLESIÆ. Advocates of the church.

These were of two sorts: those retained as pleaders to argue the cases of the church and attend to its law-matters; and advocates, or patrons of the advowson. Cowell; Spelman, Gloss.

ADVOCATI FISCI. In Civil Law. Those chosen by the emperor to argue his cause whenever a question arose affecting his revenues. 3 Bla. Com. 27.

ADVOCATIA. In Civil Law. The functions, duty, or privilege of an advocate. Du Cange, *Advocatia.*

ADVOCATUS. A pleader; a narrator. Bracton, 412 *a*, 372 *b*.

ADVOWSON. A right of presentation to a church or benefice.

He who possesses this right is called the patron or advocate When there is no patron, or he neglects to exercise his right within six months, it is called a *lapse,* and a title is given to the ordinary to collate to a church when a presentation is made by one who has no right, it is called a *usurpation.*

Advowsons are of different kinds; as *advowson appendant,* when it depends upon a manor, etc.; *advowson in gross,* when it belongs to a person and not to a manor; *advowson presentative,* where the patron presents to the bishop; *advowson donative,* where the king or patron puts the clerk into possession without presentation; *advowson collative,* where the bishop himself is a patron; *advowson of the moiety of the church,* where there are two several patrons and two incumbents in the same church; *a moiety of advowson,* where two must join the presentation of one incumbent; *advowson of religious houses,* that which is vested in the person who founded such a house. 2 Bla. Com. 21; Mirehouse, *Advowsons;* Comyns, Dig. *Advowson, Quare Impedit;* Bacon, Abr. *Simony;* Burns, Eccl. Law. See 2 Poll. & Maitl. 135.

An advowson in modern times and in ordinary language has, no doubt, been used to mean the perpetual right of presentation to a church or ecclesiastical benefice. An advowson in the limited sense of the word may be separated from the manor to which it is attached and perpetual right of presentation to a church may be severed from the lordship of the manor. Where an almshouse has been established by a lord of the manor, which afterwards became vested in the Crown by attainder, the charity also vested in the Crown by attainder and the right of nominating a master was analogous to an advowson separable from the manor and capable of being passed by grant from the Crown subsequent to the attainder; 22 L. J. Ch. 846.

ADVOWTRY, ADVOUTRY. The crime committed by a woman who, having committed adultery, continued to live with the adulterer. Cowell.

ÆDES. In Civil Law. A dwelling; a house; a temple. In the country everything upon the surface of the soil passed under the term *ædes.* Du Cange.

ÆDILE. In Roman Law. An officer who attended to the repairs of the temples and other public buildings; the repairs and cleanliness of the streets; the care of the weights and measures; the providing for funerals and games; and to regulating the prices of provisions. Ainsworth, Lex.; Smith, Lex.; Du Cange.

ÆDILITIUM EDICTUM. In Roman Law. That provision by which the buyer of a diseased or imperfect slave, horse, or other animal was relieved at the expense of the vendor who had sold him as sound knowing him to be imperfect. Calvinus, Lex.

AEL (Norman). A grandfather. Spelled also *aicul, ayle.* Kelham.

ÆQUITAS. In Roman Law. Referring to the use of this term, Prof. Gray says (Nature and Sources of the Law 290): "Austin and Maine take *æquitas* as having an analogous meaning to equity; they apply the term to those rules which the prætors introduced through the Edict in modification of the *jus civile,* but it seems to be an error to suppose that *æquitas* had this sense in the Roman Law." He quotes Prof. Clark (Jurisprudence 367) as doubting "whether *æquitas* is ever clearly used by the Roman jurists to indicate simply a *department* of Law" and expresses the opinion that an examination of the authorities more than justifies his doubt. *Æquitas* is opposed to *strictum jus* and varies in meaning between reasonable modification of the letter and substantial justice. It is to be taken as a frame of mind in dealing with legal questions and not as a source of law.

See ÆQUUM ET BONUM.

ÆQUUM ET BONUM. "The Roman conception involved in '*æquum et bonum*' or '*æquitas*' is identical with what we mean by 'reasonable' or nearly so. On the whole, the natural justice or 'reason of the thing' which the common law recognizes and applies does not appear to differ from the 'law of nature' which the Romans identified with *jus gentium,* and the medieval doctors of the civil and common law boldly adopted as being divine law revealed through man's natural reason." Sir F. Pollock, Expans. of C. L. 111, citing [1902] 2 Ch. 661, where *jus naturale* and *æquum et bonum* were taken to have the same meaning.

AËRIAL NAVIGATION. See AVIATION.

ÆS ALIENUM. In Civil Law. A debt.

Literally translated, the money of another, the civil law considering borrowed money as the prop-

erty of another, as distinguished from *æs suum*, one's own.

ÆSNECIUS. See ANECIUS.

ÆSTIMATIO CAPITIS (Lat. the value of a head). The price to be paid for taking the life of a human being.

King Athelstan declared, in an assembly held at Exeter, that mulcts were to be paid *per æstimationem capitis*. For a king's head (or life), 30,000 thuringæ, for an archbishop's or prince's, 15,000; for a priest's or thane's, 2,000; Leg. Hen. I.

ÆTAS INFANTILI PROXIMA (Lat.). The age next to infancy. Often written *ætas infantiæ proxima*. This lasted until the age of twelve years; 4 Bla. Com. 22. See AGE.

ÆTAS PUBERTATI PROXIMA (Lat.). The age next to puberty. This lasted until the age of fourteen, in which there might or might not be criminal responsibility according to natural capacity or incapacity. Under twelve, an offender could not be guilty in will, neither after fourteen could he be supposed innocent, of any capital crime which he in fact committed. 4 Bla. Com. ch. ii. See AGE.

AFFAIR (Fr.). A law suit.

AFFECT. To lay hold of, to act upon, impress or influence. It is often used in the sense of acting injuriously upon persons and things. Ryan v. Carter, 93 U. S. 84, 23 L. Ed. 807; Baird v. Hospital Ass'n, 116 Mo. 419, 22 S. W. 726.

AFFECTION. The making over, pawning, or mortgaging a thing to assure the payment of a sum of money, or the discharge of some other duty or service. Crabb, Techn. Dict.

As to affection as a consideration, see CONSIDERATION.

AFFECTUS (Lat.). Movement of the mind; disposition; intention. See CHALLENGE.

AFFEER. To fix in amount; to liquidate; to settle.

To affeer an amercement. To establish the amount which one amerced in a court-leet should pay. See AMERCEMENT.

To affeer an account. To confirm it on oath in the exchequer. Cowell; Blount.

AFFEERORS. Those appointed by a court-leet to mulct those punishable, not by a fixed fine, but by an arbitrary sum called amercement, *q. v.*; 4 Bla. Com. 379.

AFFIANCE. To assure by pledge. A plighting of troth between man and woman. Littleton, § 39.

An agreement by which a man and woman promise each other that they will marry together. Pothier, *Traité du Mar.* n. 24. Co. Litt. 34 *a*. See Dig. 23, 1. 1; Code, 5. 1. 4.

AFFIANT. A deponent; one who makes an affidavit.

AFFIDARE (Lat. *ad fidem dare*). To pledge one's faith or do fealty by making oath. Cowell.

Used of the mutual relation arising between landlord and tenant; 1 Washb. R. P. 19; 1 Bla. Com. 367; Termes de la Ley, *Fealty*. Affidavit is of kindred meaning.

AFFIDATUS. One who is not a vassal, but who for the sake of protection has connected himself with one more powerful. Spelman, Gloss.; Jacob, L. Dict.

AFFIDAVIT. A statement or declaration reduced to writing, and sworn to or affirmed before some officer who has authority to administer an oath or affirmation. Quoted and approved in Shelton v. Berry, 19 Tex. 154, 70 Am. Dec. 326.

It differs from a deposition in this, that in the latter the opposite party has an opportunity to cross-examine the witness, whereas an affidavit is always taken *ex parte*; Gresley, Eq. Ev. 413; Stimpson v. Brooks, 3 Blatch. 456, Fed. Cas. No. 13,454.

An affidavit includes the oath, and may show what facts the affiant swore to, and thus be available as an oath, although unavailable as an affidavit; Burns v. Doyle, 28 Wis. 460.

By general practice, affidavits are allowable to present evidence upon the hearing of a motion, although the motion may involve the very merits of the action; but they are not allowable to present evidence on the trial of an issue raised by the pleadings. Here the witnesses must be produced before the adverse party. They are generally required on all motions to open defaults or to grant delay in the proceedings and in other applications by the parties addressed to the favor of the court.

Formal parts.—An affidavit must intelligibly refer to the cause in which it is made. The strict rule of the common law is that it must contain the exact title of the cause. This, however, is not absolutely essential; Harris v. Lester, 80 Ill. 307. If not entitled in the cause it cannot be considered in opposition to a motion for preliminary injunction; Goldstein v. Whelan, 62 Fed. 124.

The place where the affidavit is taken must be stated, to show that it was taken within the officer's jurisdiction; 1 Barb. Ch. Pr. 601; if the officer in signing the jurat fails to add the name of the county for which he is appointed, if it already appears in the caption, it will not be defective; Smith v. Runnells, 94 Mich. 617, 54 N. W. 375. The deponent must sign the affidavit at the end; Hathaway v. Scott, 11 Paige Ch. (N. Y.) 173. The jurat must be signed by the officer with the addition of his official title. In the case of some officers the statutes conferring authority to take affidavits require also his seal to be affixed.

In the absence of a rule of court or statute requiring it, if affiant's name appears in an affidavit as the person who took the oath, the subscription to it by affiant is not necessary; Norton v. Hauge, 47 Minn. 405, 50

N. W. 368; Shelton v. Berry, 19 Tex. 154, 70 Am. Dec. 326, or if his name is omitted in the body of the verification but it is properly signed, it is sufficient; Cunningham v. Doyle, 5 Misc. Rep. 219, 25 N. Y. Supp. 476. If the notary fails to attach his seal to an affidavit of an assignee in insolvency, it is not void; Clement v. Bullens, 159 Mass. 193, 34 N. E. 173; if he omits to add his name in the jurat in an affidavit for a writ of certiorari, the court may permit it to be done *nunc pro tunc;* State v. Cordes, 87 Wis. 373, 58 N. W. 771; if he omits to add his title it is not invalid; Jackman v. Gloucester, 143 Mass. 380, 9 N. E. 740.

In an affidavit which is to be the basis of judicial action the nature and quality and perhaps the source of information must be set forth, so that the court may be able to ascertain whether the party is right in entertaining the belief to which he deposes; Whitlock v. Roth, 10 Barb. (N. Y.) 78.

A "denial upon information and belief, without stating the sources of information and belief, can have no weight as against the appellant's positive affidavit as to what is still due him"; Harris v. Taylor, 35 App. Div. 462, 54 N. Y. Supp. 864. So-called evidence on information and belief "ought not to be looked at at all, not only unless the court can ascertain the sources of the information and belief, but also unless the deponent's statements are corroborated by someone who speaks from his own knowledge"; [1900] 2 Ch. 753. Such an affidavit should show that the persons from whom the information is obtained are absent or that their deposition cannot be obtained; Steuben County Bank v. Alberger, 78 N. Y. 252.

In general, an affidavit must describe the deponent sufficiently to show that he is entitled to offer it; for example, that he is a party, or agent or attorney of a party, to the proceeding; Ex parte Bank of Monroe, 7 Hill (N. Y.) 177, 42 Am. Dec. 61; Cunningham v. Goelet, 4 Denio (N. Y.) 71; Ex parte Shumway, *id.* 258, and this matter must be stated, not by way of recital or as mere description, but as an allegation in the affidavit; Staples v. Fairchild, 3 N. Y. 41; Payne v. Young, 8 N. Y. 158.

See JURAT.

AFFIDAVIT OF DEFENCE. A sworn statement made in proper form that the defendant has a good ground of defence to the action upon the merits.

The statements required in such an affidavit vary considerably in the different states where they are required. In some, it must state a ground of defence; McCarney v. McCamp, 1 Ashm. (Pa.) 4; in others, a simple statement of belief that a defence exists is sufficient. Called also an affidavit of merits, as in Massachusetts. See as to its salutary effect, Lord v. Bank, 20 Pa. 387, 59 Am. Dec. 728; Taggart v. Fox, 1 Grant (Pa.) 190.

It must be made by the defendant, or some person in his behalf who possesses a knowledge of the facts; McCarney v. McCamp, 1 Ashm. (Pa.) 4. In a suit against a corporation an affidavit of defence made by a mere stockholder should set out some reason why it is not made by an officer or director; Erie Boot & Shoe Co. v. Eichenlaub, 127 Pa. 164, 17 Atl. 889.

The effect of a failure to make such affidavit is, in a case requiring one, to default the defendant; Slocum v. Slocum, 8 Watts (Pa.) 367. It was first established in Philadelphia by agreement of members of the bar; Vanatta v. Anderson, 3 Binn. (Pa.) 417; and afterwards by act of assembly. A law permitting judgment in default of such an affidavit is constitutional; Lawrance v. Borm, 86 Pa. 225.

It is no part of the pleadings; it is merely to prevent a summary judgment; the case may be put at issue on other grounds than those stated therein; Muir v. Ins. Co., 203 Pa. 338, 53 Atl. 158.

AFFIDAVIT TO HOLD TO BAIL. An affidavit which is required in many cases before a person can be arrested.

Such an affidavit must contain a statement, clearly and certainly expressed, by some one acquainted with the fact, of an indebtedness from the defendant to the plaintiff, and must show a distinct cause of action; 1 Chit. Pl. 165. See BAIL.

AFFILARE. To put on record; to file. 8 Coke 319; 2 M. & S. 202.

AFFILIATION. The act of imputing or determining the paternity of a child.

A species of adoption which exists by custom in some parts of France. The person affiliated succeeded equally with other heirs to the property acquired by the deceased to whom he had been affiliated, but not to that which he inherited.

In Ecclesiastical Law. A condition which prevented the superior from removing the person affiliated to another convent. Guyot, *Répert.*

AFFINES. In Civil Law. Connections by marriage, whether of the persons or their relatives. Calvinus, Lex.

From this word we have affinity, denoting relationship by marriage; 1 Bla. Com. 434.

The singular, *affinis,* is used in a variety of related significations—a boundary; Du Cange; a partaker or sharer, *affinis culpæ* (an aider or one who has knowledge of a crime); Calvinus, Lex.

AFFINITAS. In Civil Law. Affinity.

AFFINITAS AFFINITATIS. That connection between parties arising from marriage which is neither consanguinity nor affinity.

This term signifies the connection between the kinsmen of the two persons married, as, for example, the husband's brother and the wife's sister; Erskine, Inst. 1. 6. 8.

AFFINITY. The connection existing, in consequence of marriage, between each of the married persons and the kindred of the

other. Solinger v. Earle, 45 N. Y. Super. Ct. 84.

It is distinguished from consanguinity, which denotes relationship by blood. Affinity is the tie which exists between one of the spouses with the kindred of the other. thus, the relations of my wife, her brothers, her sisters, her uncles, are allied to me by affinity, and my brothers, sisters, etc, are allied in the same way to my wife. But my brother and the sister of my wife are not allied by the ties of affinity.

A person cannot, by legal succession, receive an inheritance from a relation by affinity; neither does it extend to the nearest relations of husband and wife, so as to create a mutual relation between them. The degrees of affinity are computed in the same way as those of consanguinity. See 1 Bla. Com. 435; Pothier, Traité du Mar. pt. 3, c. 3, art. 2; Inst. 1, 10, 6; Dig. 38, 10, 4, 3; 1 Phill. Eccl. 210; Poydras v. Livingston, 5 Mart. O. S. (La.) 296.

AFFIRM (Lat. *affirmare*, to make firm; to establish).

To ratify or confirm a former law or judgment. Cowell.

Especially used of confirmations of the judgments of an inferior by an appellate tribunal

To ratify or confirm a voidable act of the party.

To make a solemn religious asseveration in the nature of an oath. See AFFIRMATION.

AFFIRMANCE. The confirmation of a voidable act by the party acting, who is to be bound thereby.

The term is in accuracy to be distinguished from *ratification*, which is a recognition of the validity or binding force as against the party ratifying, of some act performed by another person; and from *confirmation*, which would seem to apply more properly to cases where a doubtful authority has been exercised by another in behalf of the person ratifying; but these distinctions are not generally observed with much care, 1 Pars. Contr. 243.

Express affirmance takes place where the party declares his determination of fulfilling the contract; Martin v. Byrom, Dudl. (Ga.) 203.

A mere acknowledgment that the debt existed, or that the contract was made, is not an affirmance; Robbins v. Eaton, 10 N. H. 561, 2 Esp. 628; Chambers v. Wherry, 1 Bail. (S. C.) 28; Benham v Bishop, 9 Conn. 330, 23 Am. Dec. 353; Alexander v. Hutcheson, 9 N. C. 535; Ford v. Phillips, 1 Pick (Mass.) 203; Martin v. Byrom, Dudl (Ga.) 203; it must be a direct and express confirmation, and substantially (though it need not be in form) a promise to pay the debt or fulfill the contract; Goodsell v. Myers, 3 Wend. (N. Y.) 479; Rogers v. Hurd, 4 Day (Conn.) 57, 4 Am. Dec. 182, Wilcox v. Roath, 12 Conn. 550; Hale v. Gerrish, 8 N. H. 374, Bigelow v. Grannis, 2 Hill (N. Y.) 120; Millard v. Hewlett, 19 Wend. (N. Y.) 301.

Implied affirmance arises from the acts of the party without any express declaration; Boston Bank v. Chamberlin, 15 Mass. 220. See Aldrich v. Grimes, 10 N. H. 194; Curtin v. Patton, 11 S. & R. (Pa.) 305; 1 Bla. Com. 466, n. 10. See CONFIRMATION; RATIFICATION.

The confirmation by an appellate court of the judgment of a lower court.

AFFIRMANCE-DAY-GENERAL. In the English Court of Exchequer, is a day appointed by the judges of the common pleas and barons of the exchequer, to be held a few days after the beginning of every term for the general affirmance or reversal of judgments. 2 Tidd, Pract. 1091.

AFFIRMANT. One who makes affirmation instead of making oath that the evidence which he is about to give shall be the truth, as if he had been sworn.

He is liable to all the pains and penalty of perjury, if he shall be guilty of willfully and maliciously violating his affirmation. See PERJURY.

AFFIRMATION. A solemn religious asseveration in the nature of an oath. 1 Greenl. Ev. § 371.

Quakers, as a class, and other persons who have conscientious scruples against taking an oath, are allowed to make affirmation in any mode which they may declare to be binding upon their consciences, in confirmation of the truth of testimony which they are about to give; 1 Atk. 21, 46; Cowp. 340, 389; 1 Leach Cr. Cas. 64; 1 Ry. & M. 77; Vail v Nickerson, 6 Mass. 262; Com. v. Buzzell, 16 Pick. (Mass.) 153; Buller, N. P. 292; 1 Greenl. Ev. § 371. See oaths and affirmations in Great Britain and Ireland, etc, reviewed in 25 Law J. 169; OATH.

AFFIRMATIVE. That which establishes; that which asserts a thing to be true.

It is a general rule of evidence that the affirmative of the issue must be proved; Buller, N. P. 298; Peake, Ev. 2. But when the law requires a person to do an act, and the neglect of it will render him guilty and punishable, the negative must be proved, because every man is presumed to do his duty, and in that case they who affirm he did not must prove it; 1 Rolle 83; 3 Bos. & P. 307. See BURDEN OF PROOF.

AFFIRMATIVE PREGNANT. An affirmative allegation implying some negative in favor of the adverse party.

For example, if to an action of assumpsit, which is barred by the statute of limitations in *six* years, the defendant pleads that he did not undertake, etc., within *ten* years, a replication that he did undertake, etc., within ten years would be an affirmative pregnant; since it would impliedly admit that the defendant had not promised within six years. Such a plea should be demurred to; Gould, Pl. c. 6, §§ 29, 37; Steph. Pl. 381; Bacon, Abr. *Pleas* (n. 6).

AFFIX. To attach or annex. See FIXTURES.

AFFORCE THE ASSIZE. To compel unanimity among the jurors who disagree.

It was done either by confining them without meat and drink, or, more anciently, by adding other jurors to the panel, to a limited extent, securing the concurrence of twelve in a verdict. See Bracton, 185 *b*, 292 *a*; Fleta, book 4, c. 9, § 2.

The practice is now discontinued.

AFFORESTATION. The turning of a part of a country into forest or woodland or subjecting it to forest law. *q. v.*

AFFRANCHISE. To make free.

AFFRAY. The fighting of two or more persons in a public place to the terror of the people.

Mere words cannot amount to an affray. Any person is justified in using force to part the combatants; 1 Cr. M. & R. 757.

It differs from a riot in not being premeditated; for if any persons meet together upon any lawful or innocent occasion, and happen on a sudden to engage in fighting, they are not guilty of a riot, but an affray only; and in that case none are guilty except those actually engaged in it; 4 Bla. Com. 146; 1 Russell, Cr. 271; 2 Bish. Cr. L. 1150.

Fighting in a private place is only an assault; 1 C. M. & R. 757; 1 Cox, Cr. Cas. 177; it must be in a public place; Gamble v. State, 113 Ga. 701, 39 S. E. 301; and the indictment need not describe it; State v. Baker, 83 N. C. 649; State v. Heflin, 8 Humph. (Tenn.) 84; State v. Sumner, 5 Strobh. (S. C.) 53; and that fact must be avowed; State v. Woody, 47 N. C. 335. But it will be an affray if commenced in a private place and continued in a public one or if the disturbance is so continuous as not to be distinguishable; State v. Billings, 72 Mo. 662; or if continued in public after pursuit; Wilson v. State, 3 Heisk. (Tenn.) 278.

Going about armed with unusual or deadly weapons is an affray, though there is no actual violence or fighting; Hawk. P. C. b. 1, c. 28, § 1; State v. Huntly, 25 N. C. 418, 40 Am. Dec. 416; and the statute of Northampton, 2 Edw. III. c. 3, 4 Bla. Com. 149, forbidding it was declaratory of the common law; State v. Huntly, 25 N. C. 418, 40 Am. Dec. 416. For constituting this offense a gun is an unusual weapon; *id.* See RIOT.

The fighting of two persons in the presence of seven others was held an affray, the presence of the seven constituting the place a public one; State v. Fritz, 133 N. C. 725, 45 S. E. 957.

AFFRECTAMENTUM. Affreightment.

The word *fret* means tons, according to Cowell. *Affreightamentum* was sometimes used. Du Cange.

AFFREIGHTMENT. The contract by which a vessel, or the use of it, is let out to hire. See FREIGHT; GENERAL SHIP.

AFORESAID. Before mentioned; already spoken of or described.

Whenever in any instrument a person has once been described, all subsequent references therein may be made by giving his name merely and adding the term "aforesaid" for the purpose of identification. The same rule holds good also as to the mention of places or specific things described, and generally as to any description once given which it is desirable to refer to. So also as to a place in an indictment; 1 Gabbett, Cr. Law 212; 5 Term 616. See IDENTITY.

AFORETHOUGHT. Premeditated; prepense.

The length of time during which the accused has entertained the thought of committing the offence is not very material, provided he has in fact entertained such thought; he is thereby rendered criminal in a greater degree than if he had committed the offence without premeditation. See MALICE AFORETHOUGHT; PREMEDITATION; 2 Chit. Cr. Law, 785; 4 Bla. Com. 199; Fost. Cr. Cas. 132, 291; Respublica v. Mulatto Bob, 4 Dall. (Pa.) 146, 1 L. Ed. 776; Edwards v. State, 25 Ark. 446; U. S. v. Cornell, 2 Mas. 91, Fed. Cas. No. 14,868.

AFTER. Behind, following, subsequent to an event or date.

There is no invariable sense, however, to be attached to the word, but like "from," "succeeding," "subsequent," and similar words, where it is not expressly declared to be exclusive or inclusive, it is susceptible of different significations and is used in different senses, as will in the particular case effectuate the intention of the parties. Its true meaning must be collected from its context and the subject-matter; Sands v. Lyon, 18 Conn. 27.

AFTER ACQUIRED PROPERTY. See FUTURE ACQUIRED.

AFTER BORN CHILD. See EN VENTRE SA MERE; POSTHUMOUS CHILD.

AFTERMATH. The second crop of grass.

A right to have the last crop of grass or pasturage. 1 Chit. Prac. 181.

AFTERNOON. The word has two senses. It may mean the whole time from noon to midnight, or it may mean the earlier part of that time, as distinguished from the evening; 2 El. & Bl. 447, where an act forbidding innkeepers to have their houses open on Sunday during the usual hours of afternoon Divine Service was taken in the latter sense. See DAY; TIME.

AGAINST. Adverse or in opposition to. The meaning of the word varies according to the context; State v. Prather, 54 Ind. 63.

To marry "against one's consent" means without the consent; 2 Sim. & Stu. 179; 2 Vern. 572.

A verdict in disobedience of the instructions of the court upon a point of law is a verdict "against the law"; Declez v. Save, 71 Cal. 552, 12 Pac. 722; Bunten v. Ins. Co., 4 Bosw. (N. Y.) 254.

A statute providing that in an action by an administrator "neither party shall be allowed to testify against the other," or as to transactions with the deceased, does not preclude either party from being called to testify *for* the other; Dudley v. Steele, 71 Ala. 423.

AGAINST THE FORM OF THE STATUTE. Technical words which must be used

in framing an indictment for a breach of the statute prohibiting the act complained of. The Latin phrase is *contra formam statuti, q. v.*

AGAINST THE PEACE. See PEACE.

AGAINST THE WILL. Technical words which must be used in framing an indictment for robbery from the person. 1 Chit. Cr. Law 244.

In the statute of 13 Edw. I. (Westm. 2d) c. 34, the offence of rape is described to be ravishing a woman "where she did not consent," and not ravishing *against her will.* Per *Tindal*, C. J., and *Parke*, B., in the addenda to 1 Den Cr. Cas. 1. And in England this statute definition was adopted by all the judges; Bell, Cr. Cas. 63, 71.

AGARD. Award. Burrill, Dict.

AGE. The length of time a person has lived. Full age or majority is the age at which the law allows persons to do acts or discharge functions which for want of years they were prohibited from doing or undertaking before.

As to the age of consent in prosecution for rape, see RAPE, as to the age of responsibility see INFANT, and see also PARENT AND CHILD.

In the United States, at twenty-five, a man may be elected a representative in congress; at thirty, a senator; and at thirty-five, he may be chosen president. He is liable to serve in the militia from eighteen to forty-five inclusive, unless exempted for some particular reason. In England no one can be chosen member of parliament till he has attained twenty-one years; nor be ordained a priest under the age of twenty-four; nor made a bishop till he has completed his thirtieth year. The age of serving in the militia is from sixteen to forty-five years. The law, according to Blackstone, recognizes no minority in the heir to the throne. See 1 Bla. Com. 224, note, and 2 *id.* 208, note, where this appears to result from the charter under which the king's oldest son becomes Duke of Cornwall by inheritance.

In French Law. A person must have attained the age of forty to be a member of the legislative body; twenty-five, to be a judge of a tribunal *de première instance;* twenty-seven, to be its president, or to be judge or clerk of a *cour royale;* thirty, to be its president or *procureur-general;* twenty-five, to be a justice of the peace; thirty, to be judge of a tribunal of commerce, and thirty-five, to be its president; twenty-five, to be a notary public; twenty-one, to be a testamentary witness; thirty, to be a juror. At sixteen, a minor may devise one-half of his property as if he were a major. A male cannot contract marriage till after the eighteenth year, nor a female before full fifteen years. At twenty-one, both males and females are capable to perform all the acts of civil life; Touillier, *Droit Civ.* liv. 1, Intr. n. 188.

In Roman Law. Infancy (*infantia*) extended to the age of seven; the period of childhood (*pueritia*) which extended from seven to fourteen, was divided into two periods; the first, extending from seven to ten and a half, was called the period nearest childhood (*ætas infantiæ proxima*); the other, from ten and a half to fourteen, the period nearest puberty (*ætas pubertati proxima*); puberty (*pubertas*) extended from fourteen to eighteen; full puberty extended from eighteen to twenty-five; at twenty-five, the person was *major.* See Taylor, Civ. Law 254; *Leçon El. du Droit Civ.* 22

A witness may prove his own age; Cheever v. Congdon, 34 Mich. 296; State v. McClain, 49 Kan. 730, 31 Pac. 790; Morrel v. Morgan, 65 Cal. 575, 4 Pac. 580; State v. Best, 108 N. C. 747, 12 S. E. 907; Hill v. Eldridge, 126 Mass. 234; without giving his sources of information except on cross-examination; Central R. R. v. Coggin, 73 Ga. 689; even if the parent from whom it is admitted that the knowledge was derived is present; Loose v. State, 120 Wis. 115, 97 N. W. 526; or is living in the county where suit is brought; Pearce v. Kyzer, 84 Tenn. (16 Lea) 521, 57 Am. Rep. 240; but when the statement was made to a teacher for entry on school registry, that record is not admissible; Simpson v. State, 46 Tex. Cr. R. 551, 81 S. W. 320 The date of one's birth may be proved by himself or members of his family; Houlton v. Manteuffel, 51 Minn. 185, 53 N. W. 541; Chicago & A. R. Co. v. Lewandowski, 190 Ill. 301, 60 N. E. 497; but not when the knowledge is acquired from another person, the witness being an orphan; People v. Colbath, 141 Mich. 189, 104 N. W. 633. One's own statement of his age has been said to be the best evidence; Morrison v. Emsley, 53 Mich. 564, 19 N. W. 187.

In a trial for rape of a female under sixteen years, her testimony as to her age was held competent; Com. v. Phillips, 162 Mass 504, 39 N. E. 109; but a conviction for seduction under the age of eighteen could not be maintained when the oral evidence of the girl was contradicted by the church record of her birth on which she had stated her evidence was based; State v. Cougot, 121 Mo. 458, 26 S. W. 566.

A statement in a will that testator's daughter was born on a certain day is admissible; 3 Yo. & Coll. Ex. 82; and in 2 R. & Myl. 169, a person's age was proved by the declarations of a deceased relative.

The federal census returns have been held admissible on the question of age; Priddy v. Boice, 201 Mo. 309, 99 S. W. 1055, 9 L. R. A. (N. S) 718, 119 Am. St. Rep. 762, 9 Ann. Cas. 874; *contra,* Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201; see Wigm. Ev. 1671; and the testimony of an enumerator after refreshing his memory by examination of

his book and then stating particulars from recollection has been admitted; Battles v. Tallman, 96 Ala. 403, 11 South. 247; but a school census is inadmissible to prove age for any other than school purposes; Edwards v. Logan, 114 Ky. 312, 70 S. W. 852, 75 S. W. 257.

There is no presumption of law that at any age a woman is past the age of child bearing, but courts have recognized a presumption of fact as to a married woman of 49¾ years who had never borne a child; L. R. 14 Eq. 245; widow of 55¾; L. R. 11 Eq 408; a spinster of 53; 35 L. J. Ch. 303; and the presumption was refused in the case of a woman of 54½, married three years, who had never had a child; 9 Ch. D. 388. But in List v. Rodney, 83 Pa. 483, it was held that (quoting 2 Bla. Com. 125) "a possibility of issue is always supposed to exist in law . . . even though the donees be each of them one hundred years old," and that the law would not consider the physical impossibility of a woman's bearing children after she was seventy-five years old.

AGE-PRAYER. A statement made in a real action to which an infant is a party, of the fact of infancy and a request that the proceedings may be stayed until the infant becomes of age.

It is now abolished; stat. 11 Geo. IV.; 1 Will. IV. c. 37, § 10; 1 Lilly, Reg. 54; 3 Bla. Com. 300.

AGENCY. See PRINCIPAL AND AGENT.

AGENS (Lat. *agere*, to do; to conduct). A conductor or manager of affairs.

It is distinguished from *factor*, a workman.

A plaintiff. Fleta, lib. 4, c. 15, § 8.

AGENT. See PRINCIPAL AND AGENT.

AGENT AND PATIENT. A phrase indicating the state of a person who is required to do a thing, and is at the same time the person to whom it is done; as, when a man is indebted to another, and he appoints him his executor, the latter is required to pay the debt in his capacity of executor, and entitled to receive it in his own right; he is then *agent and patient*. Termes de la Ley.

AGER (Lat.). **In Civil Law.** A field; land generally.

A portion of land enclosed by definite boundaries.

Used like the word *acre* in the old English law, denoting a measure of undetermined and variable value. Spelman, Gloss.; Du Cange, 3 Kent 441.

AGGRAVATION. That which increases the enormity of a crime or the injury of a wrong.

One of the rules respecting variances is, that cumulative allegations, or such as merely *operate in aggravation*, are immaterial, provided that sufficient is proved to establish some right, offence, or justification included in the claim, charge, or defence specified on the record. This rule runs through the whole criminal law: that it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified; 2 Campb. 583; 4 B. & C. 329; Com. v. Livermore, 4 Gray (Mass.) 18; 1 Bish. Cr. L. 600. Thus, on an indictment for murder the prisoner may be convicted of manslaughter, for the averment of malice aforethought is merely matter of aggravation; Co. Litt. 282 *a*.

The introduction of matter into the declaration which tends to increase the amount of damages, but does not affect the right of action itself. Steph. Pl. 257; Gould, Pl. 42; 12 Mod. 597.

An example of this is found in the case where a plaintiff declares in trespass for entering his house, and breaking his close, and tossing his goods about, the entry of the house is the principal ground and foundation of the action, and the rest is only stated by way of aggravation. 3 Wils. 294, Hathaway v. Rice, 19 Vt. 107, and this matter need not be proved by the plaintiff or answered by the defendant.

See ALIA ENORMIA.

AGGREGATE. Consisting of particular persons or items, formed into one body. A combined whole.

See CORPORATION.

AGGREGATIO MENTIUM (Lat.). A meeting of minds. See AGREEMENT.

AGGRIEVED. Having a grievance, or suffered loss or injury.

The "parties aggrieved" are those against whom an appealable order or judgment has been entered; Ely v. Frisbie, 17 Cal. 260. One cannot be said to be aggrieved unless error has been committed against him; Kinealy v. Macklin, 67 Mo. 95; Wiggin v. Swett, 6 Metc. (Mass.) 197, 39 Am. Dec. 716; Swackhamer v. Kline's Adm'r, 25 N. J. Eq. 503; 4 Q. B. Div. 90.

AGIO. An Italian word for accommodation. A term used in commercial transactions to denote the difference of price between the value of bank-notes or other nominal money and the coin of the country.

AGISTMENT. The taking of another person's cattle into one's own ground to be fed, for a consideration to be paid by the owner. Williams v. Miller, 68 Cal. 290, 9 Pac. 166.

Tithe of Agistment was a small tithe paid to the rector or vicar on cattle or other produce of grass lands. It was paid by the occupier of the land and not by the person who put in his cattle to graze. Rawle, Exmoor 31.

In Canon Law. A composition or mean rate at which some right or due might be reckoned.

AGISTOR. An officer who had the charge of cattle pastured for a certain stipulated sum in the king's forest and who collected the money paid for them. One who takes in horses or other animals to pasture at certain

rates. Story, Bailm. § 443; Skinner v. Caughey, 64 Minn. 375, 67 N. W. 203.

He is not, like an innkeeper, bound to take all horses offered to him, nor is he liable for any injury done to such animals in his care, unless he has been guilty of negligence, or from his ignorance, negligence may be inferred; Holt 547. See Schroeder v. Faires, 49 Mo. App. 470; Brush v. Land Co., 2 Tex. Civ. App. 188, 21 S. W. 389.

In the absence of an express contract as to the degree of care to be taken, he is bound to provide reasonable feed and use ordinary care to protect cattle; Calland v. Nichols, 30 Neb. 532, 46 N. W. 631.

Where a number of animals are taken to pasture for an agreed compensation, one of them cannot be taken away without payment for all; Yearsley v. Gray, 140 Pa. 238, 21 Atl. 517; Kroll v. Ernst, 34 Neb. 482, 51 N. W. 1032. The lien of an agistor is prior to the claim of an assignee of overdue notes secured by mortgage on the horses; Blain v. Manning, 36 Ill. App. 214. That he has no lien, see Prof. J. B. Ames in 3 Sel. Essays in Anglo-Amer. Leg. Hist. 290, citing 5 M. & W. 342, which followed Cro. Car. 271.

See BAILMENT; ANIMAL; LIEN.

AGNATES. In Scotch Law. Relations on the father's side. See AGNATI.

AGNATI. In Civil Law. All individuals subject for the time being to the same *patria potestas*, or who would be so subject were the common ancestor alive. Brothers and sisters, with their uncles, aunts, nephews, nieces, and other collaterals (not having been received by adoption or marriage into another family), if related through males, were agnates. The civil issue of the state was the Agnatic Family. Cognates were all persons who could trace their blood to a single ancestor or ancestress, and agnates were those cognates who traced their connection exclusively through males. Maine, Anc. Law.

"The agnates were that assemblage of persons who would have been under the patriarchal authority of some common ancestor if he had lived long enough to exercise it." Maine, Early Hist. of Inst. 106. A son emancipated by his father lost all rights of agnation.

They were called *agnati—adgnati*, from the words *ad eum nati*. Ulpianus says: "*Adgnati autem sunt cognati virilis sexus ab eodem orti: nam post suos et consanguineos matrem mei filius, et ego ei; patris quoque frater qui patruus appellatur; deincepsque ceteri, si qui sunt, hinc orti in infinitum;*" Dig 38, 16. *De suis*, 2, § 1. Thus, although, the grandfather and father being dead, the children become *sui juris*, and the males become the founders of new families, still they all continue to be agnates; and the *agnatio* spreads and is perpetuated not only in the direct but also in the collateral line. Marriage, adoption, and adrogation also create the relationship of the *agnatio*. In the Sentences of Paulus, the order of inheritance is stated as follows: *Intestatorum hereditas, lege Duodecim Tabularum primum suis heredibus, deinde adgnatis et aliquando quoque gentibus deferebatur.* See COGNATI.

AGNATIO. In Civil Law. The relationship of *Agnati*.

AGNOMEN. A name or title which a *man* gets by some action or peculiarity; the last of the four names sometimes given a Roman. Thus, Scipio *Africanus*, from his African victories. Ainsworth, Lex.; Calvinus, Lex. See NOMEN.

AGNOSTIC. See OATH.

AGRARIAN LAWS. In Roman Law. Those laws by which the commonwealth disposed of its public land, or regulated the possession thereof by individuals were termed Agrarian Laws.

The greater part of the public lands acquired by conquest were laid open to the possession of any citizen, but the state reserved the title and the right to resume possession. The object of many of the agrarian laws was to limit the area of public land of which any one person might take possession. The law of Cassius, B. C. 486, is the most noted of these laws.

It was long assumed that these laws were framed to reach private property as well as to restrict possession of the public domain, and hence the term agrarian is, in legal and political literature, to a great degree fixed with the meaning of a confiscatory law, intended to reduce large estates and increase the number of landholders Harrington, in his "Oceana," and the philosophers of the French Revolution, have advocated agrarian laws in this sense. The researches of Heyne, Op. 4, 351; Niebuhr, Hist vol. ii. trans.; and Savigny, Das Recht des Besitzes, have redeemed the Roman word from the burden of this meaning

AGREAMENTUM. Agreement.

Spelman says that it is equivalent in meaning to *aggregatio mentium*, though not derived therefrom.

AGREE. To concur with or assent. Thornton v. Kelly, 11 R. I. 498; to promise or engage; Packard v. Richardson, 17 Mass. 122, 9 Am. Dec. 123; to contract; McKisick v. McKisick, 6 Meigs (Tenn.) 427. To say that a jury agrees upon a verdict is equivalent to *find;* Benedict v. State, 14 Wis. 423.

It sometimes means a grant or covenant, as when a grantor agrees that no building shall be erected on an adjoining lot; Hogan v. Barry, 143 Mass. 538, 10 N. E. 253.

AGRÉÉ (Fr.). A person authorized to represent a litigant before the Tribunals of Commerce in France. If such person be a lawyer, he is called an *avocat-agréé*. Coxe, Manual of French Law.

AGREED STATEMENT OF FACTS. See CASE STATED.

AGREEMENT. A coming together of parties in opinion or determination; the union of two or more minds in a thing done or to be done; a mutual assent to do a thing. Comyn, Dig. *Agreement*, A 1; Plowd. 5 *a*, 6 *a*.

Aggregatio mentium.—When two or more minds are united in a thing done or to be done.

It ought to be so certain and complete that either party may have an action on it, and there must be a *quid pro quo;* Dane, Abr. c. 11.

The consent of two or more persons concurring, the one in parting with, the other in receiving, some property, right, or benefit; Bacon, Abr. An act in the law whereby two or more persons declare their assent as to any act or thing to be done or forborne by some or one of those persons for the use of the others or other of them. Poll. Contr. 3, adopted in [1887] 36 Ch. D. 698. It must be concerned with duties or rights which can be dealt with in a court of justice; Poll. Contr. 3.

"The expression by two or more persons of a common intention to affect the legal relations of those persons." Anson, Contr. 3.

An agreement "consists of two persons being of the same mind, intention, or meaning concerning the matter agreed upon." Leake, Contr. 12.

"Agreement" is seldom applied to specialties; *"contract"* is generally confined to simple contracts; *"promise"* refers to the engagement of a party without reference to the reasons or considerations for it, or the duties of other parties; Pars. Contr 6.

An agreement ceases to be such by being put in writing under seal, but not when put in writing for a memorandum; Dane, Abr. c. 11.

It is a wider term than "contract;" Anson, Contr. 4; an agreement might not be a contract, because not fulfilling some requirement of the law of the place in which it is made.

The meaning of the contracting parties is their agreement; Whitney v. Wyman, 101 U. S. 396, 25 L. Ed. 1050.

An agreement of sale may imply not merely an obligation to sell, but an obligation on the part of the other party to purchase, while an agreement to sell is simply an obligation on the part of the vendor or promisor to complete his promise of sale; Treat v. White, 181 U. S. 264, 21 Sup. Ct. 611, 45 L. Ed. 853.

In its correct sense, as used in the statute of frauds, it signifies a mutual contract upon a consideration, between two or more parties; 5 East 10; although frequently used in a loose, incorrect, sense as synonymous with promise or undertaking; *id.;* but, in its popular signification it means no more than concord, the union of two or more minds, concurrence of views and intention. Everything done or omitted by the compact of two or more minds is universally and familiarly called an agreement. Whether a consideration exists is a distinct idea which does not enter into the popular notion. In most instances any consideration except the voluntary impluse of minds cannot be ascribed to the numberless agreements that are made daily; Marcy v. Marcy, 9 Allen (Mass.) 11; Sage v. Wilcox, 6 Conn. 85. Taken alone, it is sufficiently comprehensive to embrace all forms of stipulations, written or verbal; Wharton v. Wise, 153 U. S. 155, 14 Sup. Ct. 783, 38 L. Ed. 669.

The writing or instrument which is evidence of an agreement.

The agreement may be valid, and yet the written evidence thereof insufficient; as, if a promissory note be given for twenty dollars, the amount of a previous debt, where the note may generally be neglected and the debt collected by means of other evidence; or, again, if a note good in form be given for an illegal consideration, in which case the instrument is good and the agreement void.

See ACCORD AND SATISFACTION; ACCEPTANCE; CONSIDERATION; CONTRACT; NOVATION; PERFORMANCE; RESCISSION; INTERPRETATION.

The parties must agree or assent. There must be a definite offer by one party accepted by the other; Ives v. Hazard, 4 R. I. 14, 67 Am. Dec. 500; Emerson v. Graff, 29 Pa. 358. There must be a communication of assent by the party accepting; a mere mental assent to the terms in his own mind is not enough; L. R. 2 App. Ca. 691. See Allen v. Chouteau, 102 Mo. 309, 14 S. W. 869. But the assent need not be formally made; it can be inferred from the party's acts; L. R. 6 Q. B. 607; L. R. 10 C. P. 307; Smith v. Ingram, 90 Ala. 529, 8 South. 144. They must assent to the same thing in the same sense; Eliason v. Henshaw, 4 Wheat. (U. S.) 225, 4 L. Ed. 556; Greene v. Bateman, 2 Woodb. & M. 359, Fed. Cas. No. 5,762; 9 M. & W. 535; L. R. 6 Q. B. 597; New York Life Ins. Co. v. Levy's Adm'r, 122 Ky. 457, 92 S. W. 325, 5 L. R. A. (N. S.) 739. The assent must be mutual and obligatory; there must be a request on one side, and an assent on the other; 5 Bingh. N. C. 75; Abbott v. Hapgood, 150 Mass. 248, 22 N. E. 907, 5 L. R. A. 586, 15 Am. St. Rep. 193. Where there is a misunderstanding as to the date of performance there is no contract, for want of mutual assent; Pittsburg & S. Coal Co. v. Slack & Co., 42 La. Ann. 107, 7 South. 230; or where there is a misunderstanding as to the manner of payment; Robinson & Farrell v. Estes, 53 Mo. App. 582 The assent must comprehend the whole of the proposition; it must be exactly equal to its extent and provision, and it must not qualify them by any new matter; 1 Pars. Contr. 400; and even a slight qualification destroys the assent; 5 M. & W. 535; Hornbeck's Ex'r v. American Bible Society, 2 Sandf. Ch. (N. Y.) 133. The question of assent when gathered from conversations is for the jury; Thruston v. Thornton, 1 Cush. (Mass.) 89; De Ridder v. McKnight, 13 Johns. (N. Y.) 294.

A sufficient consideration for the agreement must exist; 2 Bla. Com. 444; 2 Q. B. 851; 5 Ad. & E. 548; as against third parties this consideration must be good or valuable; 10 B. & C. 606; as between the parties it may be equitable only; 1 Pars. Contr. 431.

But it need not be adequate, if only it have some real value; 2 Sch. & L. 395, n. *a;* 11 Ad. & E. 983; Hubbard v. Coolidge, 1 Metc. (Mass.) 84; Judy v. Louderman, 48 Ohio St. 562, 29 N. E. 181, refraining from use of tobacco and liquor for a period is sufficient consideration for a promise to pay the party a sum of money; Hamer v. Sidway, 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693.

If the consideration be illegal in whole or in part, the agreement will be void; Donallen v. Lennox, 6 Dana (Ky.) 91; Town of Hinesburgh v. Sumner, 9 Vt. 23, 31 Am Dec. 599; Filson's Trustees v. Himes, 5 Pa. 452, 47 Am. Dec. 422; Deering v. Chapman, 22 Me. 488, 39 Am Dec. 592; Ashbrook v. Dale, 27 Mo. App. 649; Smith v. Steely, 80 Ia. 738, 45 N. W. 912 A contract to regulate the price of commodities at a certain specified amount is a contract in restraint of trade, without consideration and cannot be enforced; 63 Law T. 455. Vulcan Powder Co. v Powder Co, 96 Cal. 510, 31 Pac. 581, 31 Am. St. Rep. 242; so also if the consideration be impossible; 5 Viner, Abr. 110, *Condition;* Co. Litt. 206 *a;* Shepp Touchst 161; L. R. 5 C. P. 588; 2 Lev. 161. See CONSIDERATION.

The agreement may be to do anything which is lawful, as to sell or buy real estate or personal property. But the evidence of the sale of real property must generally be by deed, sealed; and in many cases agreements in regard to personal property must be in writing. See STATUTE OF FRAUDS.

The construction to be given to agreements is to be favorable to upholding them, and according to the intention of the parties at the time of making it, as nearly as the meaning of the words used and the rules of law will permit, 2 Kent 555; 1 H Bla. 569, 614; 30 Eng. L. & E. 479; Potter v. Ins. Co, 5 Hill (N. Y.) 147; Ricker v. Fairbanks, 40 Me. 43; 10 A. & E. 326; Thrall v. Newell, 19 Vt. 202, 47 Am. Dec. 682. This intent cannot prevail against the plain meaning of words; 5 M. & W. 535. Neither will it be allowed to contravene established rules of law.

And that the agreement may be supported, it will be construed so as to operate in a way somewhat different from that intended, if this will prevent the agreement from failing altogether; Brewer v. Hardy, 22 Pick. (Mass.) 376, 33 Am. Dec. 747; Rogers v. Fire Co., 9 Wend. (N. Y.) 611; Bryan v. Bradley, 16 Conn. 474.

Agreements are construed most strongly against the party proposing (*i. e., contra proferentem*); 6 M. & W. 662; 2 Pars. Contr. 20; 3 B & S. 929; Deblois v. Earle, 7 R. I. 26. See CONTRACTS.

The effect of an agreement is to bind the parties to the performance of what they have thereby undertaken. In case of failure, the common law provides a remedy by damages, and equity will in some cases compel a specific performance.

The obligation may be avoided or destroyed by *performance* (*q. v.*), which must be by him who was bound to do it; and whatsoever is necessary to be done for the full discharge of this duty, although only incidental to it, must be done by him; 11 Q. B. 368; 4 B. & S. 556; Fauble v. Davis, 48 Ia. 462; Jennings v. Lyons, 39 Wis. 553, 20 Am. Rep. 57; by *tender* of exact performance according to the terms of the contract, which is sufficient when the other party refuses to accept performance under the contract; 6 M. & G. 610; Benj. Sales 563; Ans. Contr 274; an agreement to pay a sum of money upon receipt of certain funds is not broken on refusal to pay on receipt of part of the funds; Fox v. Walker, 62 N. H. 419; by *acts of the party* to be benefited, which prevent the performance, or where some act is to be done by one party before the act of the other, the second party is excused from performance, if the first fails; 15 M. & W. 109; 8 Q. B. 358; 6 B. & C. 325; 10 East 359; by *rescission* (*q. v.*), which may be made by the party to be benefited, without any provision therefor in the agreement, and the mere acquiescence of the other party will be evidence of sufficient mutuality to satisfy the general rule that rescission must be mutual, Hill v. Green, 4 Pick. (Mass.) 114; Quincy v. Tilton, 5 Greenl. (Me.) 277; 1 W. & S. 442, rescission, before breach, must be by agreement; Leake, Contr. 787; 2 H. & N. 79; 6 Exch. 39; by *acts of law*, as confusion, merger; Baxter v. Downer, 29 Vt. 412; *death*, as when a master who has bound himself to teach an apprentice dies; *inability* to perform a personal service, such as singing at a concert; L. R. 6 Exch. 269; or *extinction* of the subject-matter of the agreement. See also ASSENT; CONTRACT; DISCHARGE OF CONTRACTS; PARTIES; PAYMENT; RESCISSION.

AGREEMENT FOR INSURANCE. An agreement often made in short terms preliminary to the filling out and delivery of a policy with specific stipulations.

Such an agreement, specifying the rate of premium, the subject, and risk, and amount to be insured, in general terms, and being assented to by the parties, is binding; Tyler v. Insurance Co., 4 Rob. (N. Y.) 151; Oliver v. Insurance Co, 2 Curt. 277, Fed. Cas. No. 10,498; Trustees of First Baptist Church v. Insurance Co., 19 N. Y. 305. It is usually in writing, but may be by parol or by parol acceptance of a written proposal; Union Mut. Ins. Co. v. Insurance Co., 2 Curt. 524, Fed. Cas. No. 14,372; Commercial Mut. Marine Ins. Co. v. Insurance Co., 19 How. (U. S.) 318, 15 L. Ed. 636; Mobile Marine Dock & Mutual Ins. Co. v. McMillan, 31 Ala. 711; Ellis v. Insurance Co., 50 N. Y. 402, 10 Am. Rep. 495; Ela v. French, 11 N. H. 356. It must be in such form or expression that the parties, subject, and risk can be thereby distinctly known, either by being specified or by references so that it can be definitely reduced to writing; Trustees of First Baptist Church v. Insurance Co., 19 N. Y. 305.

Such an agreement must have an express or implied reference to some form of policy. The ordinary form of the underwriters in like cases is implied, where no other is specified or implied; Eureka Ins. Co. v. Robinson, 56 Pa. 256, 94 Am. Dec. 65; 2 C. & P.

91; 3 B. & Ad. 906; Hubbard v. Insurance Co., 33 Ia. 325, 11 Am. Rep. 125; Barre v. Insurance Co., 76 Ia. 609, 41 N. W. 373; Oliver v. Insurance Co., 2 Curt. 277, Fed. Cas. No. 10,498.

Where the agreement is by a communication between parties at a distance, an offer by either will be binding upon both on a despatch by the other of his acceptance within a reasonable or the prescribed time, and prior to the offer having been countermanded; 1 Phil. Ins. §§ 17, 21; Myers v. Insurance Co., 27 Pa. 268, 67 Am. Dec. 462.

It is a common practice to "bind" insurance against fire for a short period by mere oral communication.

See POLICY; INSURANCE.

AGRICULTURAL HOLDING. Land cultivated for profit in some way. Within the meaning of the English Agricultural Holdings act of 1883, the term will not include natural grass lands Such lands are pastoral holdings. 32 S. J. 630.

AGRICULTURAL PRODUCT. That which is the direct result of husbandry and the cultivation of the soil. The product in its natural unmanufactured condition; Getty v. Milling Co., 40 Kan. 281, 19 Pac. 617. It has been held not to include beef cattle; Davis & Co. v. City of Macon, 64 Ga. 128, 37 Am. Rep. 60.

AGRICULTURAL SOCIETY. One for the promotion of agricultural interests, such as the improvement of land, breeds of cattle, etc. Downing v. State Board of Agriculture, 129 Ind. 443, 28 N. E 123, 614, 12 L. R. A. 664. It is held a private corporation; Selinas v. State Agricultural Society, 60 Vt. 249, 15 Atl. 117, 6 Am. St. Rep. 114; Ismon v. Loder, 135 Mich. 345, 97 N. W. 769; Brown v. Agricultural Society, 47 Me. 275, 74 Am. Dec. 484; Lane v. Agricultural Society, 62 Minn. 175, 64 N. W. 382, 29 L. R. A. 708; but where its organization and the powers of its board of directors are provided for by statute, and it is not a society for pecuniary benefit, it is a public corporation; Hern v. State Agricultural Soc., 91 Ia. 97, 58 N. W. 1092.

As to their liability for negligence, see DANGEROUS PREMISES.

AGRICULTURE. The cultivation of soil for food products or any other useful or valuable growths of the field or garden; tillage, husbandry; also, by extension, farming, including any industry practised by a cultivator of the soil in connection with such cultivation, as breeding and rearing of stock, dairying, etc. The science that treats of the cultivation of the soil. Stand. Dict. The term refers to the field or farm, with all its wants, appointments and products, as distinguished from horticulture, which refers to the garden, with its less important though varied products; Dillard v. Webb, 55 Ala. 468.

A person is actually engaged in agriculture when he derives the support of himself and family in whole or in part from the cultivation of land; it must be something more than a garden, though it may be less than a field, and the uniting of any other business with this is not inconsistent with the pursuit of agriculture; Springer v. Lewis, 22 Pa. 193. See Bachelder v. Bickford, 62 Me. 526; Simons v. Lovell, 7 Heisk. (Tenn.) 515.

Within the meaning of an exemption law, one who cultivates a one acre lot and is also a butcher and day laborer is not engaged in agriculture.

AID AND ABET. See AIDING AND ABETTING.

AID AND COMFORT. Help; support; assistance; counsel; encouragement.

The constitution of the United States, art 3, s. 3, declares that adhering to the enemies of the United States, giving them aid and comfort, shall be treason. These words, as they are to be understood in the constitution, have not received a full judicial construction, but see Young v. U. S, 97 U. S. 39, 24 L Ed 992, as to their meaning in the Act of Congress, March 12, 1863. See also Lamar v. Browne, 92 U S 187, 23 L. Ed 650, U. S v. Klein, 13 Wall (U S.) 128, 20 L. Ed. 519, Hanauer v. Doane, 12 Wall. (U. S) 317, 20 L Ed. 439, Carlisle v. U. S., 16 Wall (U. S.) 147, 21 L Ed. 426, Witkowski v U. S, 7 Ct of Cl 398, Bond v U. S, 2 Ct of Cl 533. They import help, support, assistance, countenance, encouragement The voluntary execution of an official bond of a commissioned officer of the Confederacy from motives of personal friendship, is giving aid and comfort, U. S v. Padelford, 9 Wall (U S) 539, 19 L. Ed. 788; as is the giving of mechanical skill to build boats for the Confederacy, Gearing v. U. S., 3 Ct. of Cl. 172 The word *aid*, which occurs in the stat Westm I c. 14, is explained by Lord Coke (2 Inst 182) as comprehending all persons counselling, abetting, plotting, assenting, consenting, and encouraging to do the act (and he adds, what is not applicable to the crime of treason), who are not present when the act is done See also 1 Burn, Just. 5, 6, 4 Bla. Com. 37, 38

To constitute aid and comfort it is not essential that the effort to aid should be successful and actually render assistance, U S v. Greathouse, 4 Sawy 472, Fed. Cas. No. 15,254

AID BONDS. See BONDS.

AID OF THE KING. A city or borough that holds a fee farm of the king, if anything be demanded against them which belongs thereto, may pray in aid of the king. In these cases the proceedings are stopped until the king's counsel is heard to say what they think fit for avoiding the king's prejudice; and this aid shall not in any case be granted after issue; because the king ought not to rely on the defence made by another. Termes de la Ley.

AID PRAYER. A petition to the court calling in help from another person who has an interest in the matter in dispute. For example, a tenant for life, by the curtesy, or for years, being impleaded, may pray aid of him in reversion; that is, desire the court that he may be called by writ, to allege what he thinks proper for the maintenance of the right of the person calling him, and of his own. Fitzh. Nat. Brev. 50.

AIDER BY VERDICT. The presumption which arises after verdict, whether in a civil or criminal case, that those facts, without proof of which the verdict could not have been found, were proved, though they are not distinctly alleged in the record; provided it contains terms sufficiently general to comprehend them in reasonable intendment.

The rule is that where a matter is so essentially necessary to be proved that, had it not been in evidence, the jury could not have given such a verdict as that recorded, there the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by the verdict; and where a general allegation must, in fair construction, so far require to be restricted that no judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed after verdict that it was so restrained at the trial; 1 Maule & S. 234; 1 Saund. (6th Ed.) 227, 228; 1 Den. Cr. Cas. 356; 2 M. & G. 405; 13 M. & W. 377; 6 C. B 136; Worster v. Proprietors of Canal Bridge, 16 Pick. (Mass) 541; Wilson v. Coffin, 2 Cush. (Mass) 316; Bartlett v. Crozier, 17 Johns. (N. Y.) 439, 458, 8 Am. Dec. 428; Kain v. R. Co., 29 Mo. App. 53; Bronnenburg v. Rinker, 2 Ind. App. 391, 28 N. E. 568.

AIDING AND ABETTING. The offence committed by those persons who, although not the direct perpetrators of a crime, are yet present at its commission, doing some act to render aid to the actual perpetrator thereof. 4 Bla. Com. 34; Russ. & R. 363, 421; State v. Hildreth, 31 N. C. 440, 51 Am. Dec. 369; U. S. v. Libby, 1 Woodb. & M. 221, Fed. Cas. No. 15,597; Com. v. Knapp, 10 Pick. (Mass.) 477, 20 Am. Dec. 534; McCarty v. State, 26 Misc. 299. They are principals in the crime; U. S. v. Boyd, 45 Fed. 851; Engeman v. State, 54 N. J. L. 247, 23 Atl. 676. A common purpose to subserve the joint interests of the principal offender and his aider and abettor by misapplication of the funds of a bank is not necessary to create the offence of aiding and abetting a bank officer in misapplying its funds in violation of U. S. Rev. Stat. § 5209. It is immaterial whom they may have intended to benefit, if there existed the intent to defraud specified in the act; Coffin v. U. S., 162 U. S. 664, 16 Sup. Ct. 943, 40 L. Ed. 1109.

A principal in the second degree is one who is present aiding and abetting the fact to be done. 1 Hale, Pl. Cr. 615; 1 Bish. Cr. L. 648 (4). See State v. M'Gregor, 41 N. H. 407; Hill v. State, 28 Ga. 604; Doan v. State, 26 Ind. 496; State v. Squaires, 2 Nev. 226; State v. Fley, 2 Brev. (S. C.) 338, 4 Am. Dec. 583. Actual presence is not necessary: it is sufficient to be so situated as to come readily to the assistance of his fellows; Green v. State, 13 Mo. 382.

One cannot be convicted as aider and abettor unless the principal is jointly indicted with him, or if indicted alone, the indictment should give the name and description of the principal; Mulligan v. Com., 84 Ky. 229, 1 S. W. 417, and the one charged as an abettor may be convicted as principal; Benge v. Com., 92 Ky. 1, 17 S. W. 146, and the abettor may be convicted of murder in the second degree, though the principal has been acquitted; State v. Whitt, 113 N. C. 716, 18 S. E. 715; State v. Bogue, 52 Kan. 79, 34 Pac. 10.

The aider and abettor in a misdemeanor is chargeable as principal; Com. v. Ahearn, 160 Mass. 300, 35 N. E. 853; U. S. v. Sykes, 58 Fed. 1000.

To aid or abet a breach of an injunction decree is contempt of court; [1897] 1 Ch. 545. See ACCESSORY; PRINCIPAL; ABETTOR.

AIDS. In English Law. A species of tax payable by the tenant of lands to his superior lord on the happening of certain events.

They were originally mere benevolences granted to the lord in certain times of danger and distress, but soon came to be claimed as a right. They were originally given in three cases only, and were of uncertain amount. For a period they were demanded in additional cases, but this abuse was corrected by Magna Carta (of John) and the stat. 25 Edw. I *(confirmatio cartarum)*, and they were made payable only,—to ransom the lord's person, when taken prisoner, to make the lord's eldest son a knight, to marry the lord's eldest daughter, by giving her a suitable portion. The first of these remained uncertain; the other two were fixed by act of parliament (25 Edw. III. c. 11) at twenty shillings each, being the supposed twentieth part of a knight's fee; 2 Bla. Com. 64. They were abolished by the 12 Car. II. c. 24; 2 Bla. Com. 77, n. See 1 Poll. § Maitl 330.

AIEL (spelled also *Ayel*, *Aile*, and *Ayle*).

A writ which lieth where the grandfather was seized in his demesne as of fee of any lands or tenements in fee simple the day that he died, and a stranger abateth or entereth the same day and dispossesseth the heir. Fitzh. Nat. Brev. 222; Termes de la Ley; 3 Bla. Com. 186; 2 Poll. & Maitl. 57. See ABATEMENT.

AIELESSE (Norman). A grandmother. Kelham.

AILE. A corruption of the French word *aieul*, grandfather. see AIEL.

AIR. No property can be had in the air; it belongs equally to all men, being indispensable to their existence. But this must be understood with this qualification, that no man has a right to use the air over another man's land in such a manner as to be injurious to him. To poison or materially to change the air, to the annoyance of the public, is a nuisance; Cro. Car. 510; 1 Burr. 333; see NUISANCE.

That abutting landowners have rights of light and air over a public highway is held in many cases; Townsend v. Epstein, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409, 86 Am. St. Rep. 441; Story v. R. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; Adams v. R. R. Co., 39

Minn. 286, 39 N. W. 629, 1 L. R. A. 493, 12 Am. St. Rep. 644; Barnett v. Johnson, 15 N. J. Eq. 481; Field v. Barling, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406, 41 Am. St. Rep. 311. This right is said in Barnett v. Johnson, 15 N. J. Eq. 481, to be founded in such an urgent necessity that all laws and legal proceedings take it for granted; a right so strong that it protects itself, so urgent that upon any attempt to annul or infringe it, it would set at defiance all legislative enactments and all judicial decisions. This case, it has been said, anticipated the principle upon which compensation was at last secured in the elevated railroad cases in New York; 1 Lewis, Em. Dom. 183; Muhlker v. R. Co., 197 U. S. 544, 25 Sup. Ct. 522, 49 L. Ed. 872, where it is said: "It is manifest that easements of light and air cannot be made dependent upon easement of access, and whether they can be taken away in the interest of the public under the conditions upon which the city obtained title to the streets" depends upon the cases of Story v. R. Co., 90 N. Y. 122, 43 Am. Rep. 146, and Lahr v. R. Co., 104 N. Y. 268, 10 N. E. 528.

In the Story Case, the extent of the abutting owner's right was defined to be not only access to the lot, but light and air from the street. The court said: "The street occupies the surface, and to its uses the rights of the adjacent lots are subordinate, but *above the surface* there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner;" and "The elements of light and air are both to be derived from the space *over* the land on the *surface* of which the street is constructed, and which is made servient for that purpose." It is said that in that case a distinction was clearly made between the rights of abutting owners in the surface of the street and their rights in the space above the street; Muhlker v. R. Co., 197 U. S. 544, 25 Sup. Ct. 522, 49 L. Ed. 872, where it was held that the owner was protected against impairment of his easements of light and air by the substitution by a railway company of an elevated structure in lieu of its surface or partly depressed roadbed which occupied the street at the time of his purchase.

The erection over a street of an elevated viaduct, intended for general public travel, and not devoted to the exclusive use of a private transportation company, is a legitimate street improvement equivalent to a change of grade; and as in the case of a change of grade, an owner of land abutting on the street is not entitled to damages for the impairment of access to his land and the lessening of the circulation of light and air over it; Selden v. City of Jacksonville, 28 Fla. 558, 10 South. 457, 14 L. R. A. 370, 29 Am. St. Rep. 278; Willis v. Winona City, 59 Minn. 27, 60 N. W. 814, 26 L. R. A. 142; Colclough v. City of Milwaukee, 92 Wis. 182, 65 N. W. 1039; Walish v. City of Milwaukee, 95 Wis. 16, 69 N. W. 818; Home Building & Conveyance Co. v. City of Roanoke, 91 Va. 52, 20 S. E. 895, 27 L. R. A. 551; Meyer v. Richmond, 172 U. S. 82, 19 Sup. Ct. 106, 43 L. Ed. 374; Willets Mfg. Co. v. Board of Chosen Freeholders of Mercer County, 62 N. J. L. 95, 40 Atl. 782; Brand v. Multnomah County, 38 Or. 79, 60 Pac. 390, 62 Pac. 209, 50 L. R. A. 389, 84 Am. St. Rep. 772; Mead v. Portland, 45 Or. 1, 76 Pac. 347, affirmed in 200 U. S. 148, 26 Sup. Ct. 171, 50 L. Ed. 413; Sears v. Crocker, 184 Mass. 588, 69 N. E. 327, 100 Am. St. Rep. 577.

In some jurisdictions it is also held that recovery cannot be had by an abutting owner because of the interference with the light, air or prospect of his property through an elevation of railroad tracks, in the absence of any taking of his land or destruction of his easements, under a statute requiring compensation to be made for all damage caused by the taking of land, by the change or discontinuance of a private way, or by the taking of an easement; McKeon v. R. Co., 199 Mass. 292, 85 N. E. 475, 20 L. R. A. (N. S.) 1061; Egerer v. R. Co., 49 Hun 605, 2 N. Y. Supp. 69; and to the same effect, Austin v. R. Co., 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755; Pennsylvania R. Co. v. Lippincott, 116 Pa. 472, 9 Atl. 871, 2 Am. St. Rep. 618; Jones v. R. Co., 151 Pa. 30, 25 Atl. 134, 17 L. R. A. 758, 31 Am. St. Rep. 722. In Selden v. City of Jacksonville, 28 Fla. 558, 10 South. 457, 14 L. R. A. 370, 29 Am. St. Rep. 278, cited and approved in Sauer v. City of New York, 206 U. S. 544, 27 Sup. Ct. 686, 51 L. Ed. 1176, it is said that there are, incident to property abutting on a street certain property rights which the public generally do not possess, viz.: the right of ingress and egress to and from the lot by the way of the street, and of light and air. These incidental rights are, under a constitutional prohibition simply against the "taking" or "appropriation" of private property, subordinate to the right of the state to alter a grade or otherwise improve a street. The original and all subsequent purchasers of abutting lots take with the implied understanding that the public shall have the right to improve or alter the street so far as may be necessary for its use as a street, and that they can sustain no claim for damages resulting to their lots or property from the improvement or destruction of such incidental rights as a mere consequence of the lawful use or improvement of the street as a highway.

One may erect a high fence shutting off light and air from his neighbor; Saddler v. Alexander (Ky.) 56 S. W. 518; Giller v. West, 162 Ind. 17, 69 N. E. 548; Metz v. Tierney, 13 N. M. 363, 83 Pac. 788; Metzger v. Hochrein, 107 Wis. 267, 83 N. W. 308, 50 L. R. A. 305, 81 Am. St. Rep. 841; even though his motive is to annoy; Metzger v. Hochrein,

107 Wis. 267, 83 N. W. 308, 50 L. R. A. 305, 81 Am. St. Rep. 841; Bordeaux v. Greene, 22 Mont. 254, 56 Pac. 218, 74 Am. St. Rep. 600.

See EASEMENT; EMINENT DOMAIN; ANCIENT LIGHTS.

AIR SHIP. See AVIATION.

AISIAMENTUM (spelled also *Esamentum*, *Aismentum*). An easement. Spelman Gloss.

AJUAR. **In Spanish Law.** The jewels and furniture which a wife brings in marriage.

AJUTAGE (spelled also *Adjutage*). A conical tube used in drawing water through an aperture, by the use of which the quantity of water drawn is much increased.

When a privilege to draw water from a canal, through the forebay or tunnel, by means of an aperture, has been granted, it is not lawful to add an *ajutage*, unless such was the intention of the parties; Schuylkill Nav. Co. v. Moore, 2 Whart. (Pa.) 477.

ALABAMA. One of the United States of America, being the ninth admitted into the Union. It was formerly a part of Georgia, but in 1798 the territory now included in the states of Alabama and Mississippi was organized as a territory called Mississippi, which was cut off from the Gulf coast by Florida, then Spanish territory, extending to the French possessions in Louisiana. During the war of 1812, part of Florida lying between the Perdido and Pearl rivers was occupied by United States troops and afterwards annexed to Mississippi territory, forming part of the present state of Alabama, which was occupied principally by Creek Indians. The country becoming rapidly settled by the whites, the western portion was admitted into the Union as the state of Mississippi, and, by act of Congress of March 3, 1817, the eastern portion was organized as the territory of Alabama; 3 U. S. Stat. L. 371.

An act of Congress was passed March 2, 1819, authorizing the inhabitants of the territory of Alabama to form for themselves a constitution and state government. In pursuance of that act, the constitution of the state of Alabama was adopted by a convention which met at Huntsville, July 5, and adjourned August 2, 1819. *Amendment prohibiting sale and manufacture of intoxicating liquors, adopted 1909.*

ALASKA. Territory acquired by the United States under treaty with Russia dated March 30, ratified May 28, 1867. 15 Stat. L. 539. By this treaty the inhabitants of the territory were admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States. The status of Alaska as an incorporated territory was contemplated by its provisions and has been since so declared by the courts; Rassmussen v. U. S., 197 U. S. 516, 25 Sup. Ct. 514, 49 L. Ed. 862.

The general laws of the state of Oregon were declared to be the laws of the territory, so far as applicable and not in conflict with the laws of the United States By act of May 7, 1906, a delegate to congress was provided. By an order, May 11, 1891, under the Act of March 3, 1891, Alaska was assigned to the ninth judicial circuit. See TERRITORY.

ALBA FIRMA. White rents; rents reserved payable in silver, or white money.

They were so called to distinguish them from *reditus nigri*, which were rents reserved payable in work, grain, and the like. Coke, 2d Inst. 19.

ALBINATUS JUS. The *droit d'aubaine* in France whereby the king at the death of an alien was entitled to all his property, unless he had a peculiar exemption. Repealed in 1791.

ALCALDE. A judicial officer in Spain, and in those countries which have received the body of their laws from those of Spain. His powers and duties are similar to those of a justice of the peace.

ALDERMAN. Equivalent to senator or senior. Cowell.

In English Law. An associate to the chief civil magistrate of a corporate town or city.

The word was formerly of very extended signification. Spelman enumerates eleven classes of aldermen. Their duties among the Saxons embraced both magisterial and executive power, but would seem to have been rather an appellation of honor, originally, than a distinguishing mark of office Spelman, Gloss

Aldermannus civitatus burgi seu castellæ (alderman of a city, borough, or castle). 1 Bla Com 475, n.

Aldermannus comitatus (alderman of the county), who is thought by Spelman to have held an intermediate place between an earl and a sheriff, by others, held the same as the earl 1 Bla Com 116

Aldermannus hundredi seu wapentachii (alderman of a hundred or wapentake). Spelman

Aldermannus regis (alderman of the king) was so called, either because he was appointed by the king, or because he gave the judgment of the king in the premises allotted to him

Aldermannus totius Angliæ (alderman of all England) An officer of high rank whose duties cannot be precisely determined See Spelman, Gloss

The aldermen of the city of London were probably originally the chiefs of guilds See 1 Spence, Eq. Jur 54, 56 For an account of the selection and installation of aldermen of the guild merchant of a borough, see 1 Poll. & Maitl. 648

In American Cities. The aldermen are generally a municipal legislative body; though in many cities they hold separate courts, and have magisterial powers to a considerable extent.

Consult 1 Sharsw. Bla. Com. 116; Reeve, Hist. Eng. Law; Spence, Eq. Jur.

ALE-CONNER (also called *ale-taster*). An officer appointed by the court-leet, sworn to look to the assize and goodness of ale and beer within the precincts of the leet. Kitchin, Courts 46; Whishaw.

An officer appointed in every court-leet, and sworn to look to the assize of bread, ale, or beer within the precincts of that lordship. Cowell.

This officer is still continued in name,

though the duties are changed or given up; 1 Crabb, Real Prop. 501.

ALE SILVER. A duty anciently paid to the Lord Mayor of London by the sellers of ale.

ALEATOR (Lat. *alea*, dice.) A diceplayer; a gambler.

"The more skilful a player he is, the wickeder he is." Calvinus, Lex.

ALEATORY CONTRACT. In Civil Law. A mutual agreement, of which the effects, with respect both to the advantages and losses, whether to all the parties or to some of them, depend on an uncertain event. La. Civ. Code, art. 2982. See Moore v. Johnston, 8 La. Ann. 488; May, Ins. § 5.

The term includes contracts, such as insurance, annuities, and the like. See GAMING; MARGIN; OPTION.

An aleatory sale is one the completion of which depends on the happening of an uncertain event.

ALER SANS JOUR (Fr. *aller sans jour*, to go without day). A phrase formerly used to indicate the final dismissal of a case from court. The defendant was then at liberty to go, without any day appointed for his subsequent appearance; Kitchin, Courts 146; Termes de la Ley.

ALFET. The vessel in which hot water was put, for the purpose of dipping a criminal's arm in it up to the elbow in the ordeal by water Cowell. See ORDEAL.

ALIA (Lat.). Other things.

ALIA ENORMIA (Lat. other wrongs). A general allegation, at the end of a declaration, of wrongful acts committed by the defendant to the damage of the plaintiff. In form it is, "and other wrongs then and there did against the peace," etc. Under this allegation, damages and matters which naturally arise from the act complained of may be given in evidence; 2 Greenl. Ev. § 678; including battery of servants, etc., in a declaration for breaking into and entering a house; 2 Term 166; Shafer v. Smith, 7 Harr. & J. (Md.) 68; and all matters in general which go in aggravation of damages merely, but would not of themselves be ground for an action; Bull. N. P. 89; Heminway v. Saxton, 3 Mass. 222; Dimmett v. Eskridge, 6 Munf. (Va.) 308.

But matters in aggravation may be stated specially; Moore v. Fenwick, Gilm. (Va.) 227; and matters which of themselves would constitute a ground of action must be so stated; 1 Chit. Pl. 348; Loker v. Damon, 17 Pick. (Mass.) 284. See AGGRAVATION.

ALIAS (Lat. *alius*, another). At another time; otherwise.

The term is sometimes used to indicate an assumed name. See ALIAS DICTUS.

An *alias* writ is a writ issued where one of the same kind has been issued *before* in the same cause. See Roberts v. Church, 17 Conn. 145.

The second writ runs, in such case, "we command you as we have *before* commanded you" (*sicut alias*), and the Latin word *alias* is used to denote both the writ and the clause in which it or its corresponding English word is found. It is used of all species of writs.

No waiver can make an *alias* attachment writ good and it is unauthorized; Dennison v. Blumenthal, 37 Ill. App. 385; an *alias* execution should not issue on return of the original which had been delivered long prior thereto, except it be shown that it had been delivered to an officer during its life, and had not been satisfied; People v. Brayton, 37 Ill. App. 319.

ALIAS DICTUS (Lat. otherwise called). A description of the defendant by adding to his real name that by which he is known in some writing on which he is to be charged, or by which he is known. Reid v. Lord, 4 Johns. (N. Y.) 118; Meredith v. Hinsdale, 2 Caines (N. Y.) 362; Petrie v. Woodworth, 3 Caines (N. Y.) 219. From long usage the word *alias* alone is now considered sufficient; Kennedy v. People, 39 N. Y. 245. See NAME.

ALIBI (Lat. elsewhere). Presence in another place than that described.

When a person, charged with a crime, proves *(se eadem die fuisse alibi)* that he was, at the time alleged, in a different place from that in which it was committed, he is said to prove an *alibi*, the effect of which is to lay a foundation for the necessary inference that he could not have committed it. See Bracton 140.

This proof is usually made out by the testimony of witnesses, but it is presumed it might be made out by writings, as if the party could prove by a record, properly authenticated, that on the day or at the time in question he was in another place

It has been said that this defence must be subjected to a most rigid scrutiny, and that it must be established by a preponderance of proof; Com. v. Webster, 5 Cush. (Mass.) 324, 52 Am. Dec. 711; Washington Ben. Soc. v. Bacher, 20 Pa. 429; Creed v. People, 81 Ill. 565; State v. Reed, 62 Ia. 40, 17 N. W. 150. See remarks of Shaw, C. J., in Webster's Case, and 2 Alison's Cr. L. of Scotl. 624; Bish. Crim. L. 1061. In many states the defence is established if the evidence raises in the minds of the jury a reasonable doubt as to the guilt of the defendant; State v. Howell, 100 Mo. 628, 14 S. W. 4; Adams v. State, 28 Fla. 511, 10 South. 106; Pate v. State, 94 Ala. 14, 10 South. 665; People v. Fong Ah Sing, 64 Cal. 253, 28 Pac. 233; Landis v. State, 70 Ga. 651, 48 Am. Rep. 588, Howard v. State, 50 Ind. 190; People v. Pearsall, 50 Mich. 233, 15 N. W. 98; and if the testimony tends to prove an *alibi*, failure to instruct thereon is error; Fletcher v. State, 85 Ga. 666, 11 S. E. 872. An instruction that an *alibi* need not be established beyond a reasonable doubt, but it should be to the satisfaction of the jury, is correct; Peo-

ple v. Stone, 117 N. Y. 480, 23 N. E. 13; Caldwell v. State, 28 Tex. App. 566, 14 S. W. 122; Garrity v. People, 107 Ill. 162; State v. Jennings, 81 Mo. 185, 51 Am. Rep. 236; Ware v. State, 67 Ga. 349. It is peculiarly liable to be supported by perjury and false testimony of all sorts. There must be satisfactory proof that the prisoner could not have been at the place where the crime was committed, but the proof need not be higher than is required as to other facts; Johnson v. State, 59 Ga. 142. See State v. Northrup, 48 Ia. 583, 30 Am. Rep. 408; People v. Gam, 69 Cal. 552, 11 Pac. 183.

ALIEN (Lat. *alienus*, belonging to another; foreign). A foreigner; one of foreign birth.

In England, one born out of the allegiance of the king.

In the United States one born out of the jurisdiction of the United States and who has not been naturalized under their constitution and laws. 2 Kent 50.

The alien minor child of a naturalized citizen who has never dwelt in the United States is not invested with citizenship by the provision of § 2172, U. S. R. S. 1901, p. 1334, that minor children of naturalized citizens shall if dwelling in the U. S. be considered citizens thereof; Zartarian v. Billings, 204 U. S. 170, 27 Sup. Ct. 182, 51 L. Ed. 428.

Citizens of Porto Rico are not aliens; Gonzales v. Williams, 192 U. S. 1, 24 Sup. Ct. 177, 48 L. Ed. 317.

As to right to sue, see ABATEMENT.

An American woman who marries a foreigner takes her husband's nationality, but not if she continues to reside in the United States; Wallenburg v. R. Co., 159 Fed. 217. If she resides abroad at the termination of the marriage relation, she may resume her citizenship by registering as an American citizen with a consul of the United States or by returning to the United States; Act of March 2, 1907.

A treaty with Japan securing to her subjects full liberty to enter, travel or reside in any part of the United States will not include such persons as are likely to become a public charge, or those forbidden to enter by the immigrant acts; The Japanese Immigrant Case, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721; nor will any treaty give to a British subject any different measure of justice from our own; Barrington v. Missouri, 205 U. S. 487, 27 Sup. Ct. 582, 51 L. Ed. 890.

An alien cannot in general acquire title to real estate by descent, or by other mere operation of law; 7 Co. 25 *a*; Jackson v. Lunn, 3 Johns. Cas. (N. Y.) 109; Hunt v. Warnicke's Heirs, Hard. (Ky.) 61; Geofroy v. Riggs, 133 U. S. 265, 10 Sup. Ct. 295, 33 L. Ed. 642; and if he purchase land, he may be divested of the fee, upon an inquest of office found; but until this is done he may sell, convey, or devise the lands and pass a good title to the same; Orr v. Hodgson, 4 Wheat. (U. S.) 453, 4 L. Ed. 613; Fox v. Southack, 12 Mass. 143; Mooers v. White, 6 Johns. Ch. (N. Y.) 365; Montgomery v. Dorion, 7 N. H. 475; 1 Washb. R. P. 49; Oregon Mtg. Co. v. Carstens, 16 Wash. 165, 47 Pac. 421, 35 L. R. A. 841. The state alone can question his right to hold land; Belden v. Wilkinson, 33 Misc. 659, 68 N. Y. Supp. 205; Madden v. State, 68 Kan. 658, 75 Pac. 1023. The disabilities of aliens in respect to holding lands are removed by statute in many of the states of the United States and by United States treaties; Bahuaud v. Bize, 105 Fed. 485, and cases cited. The California Act of May 19, 1913, permits that aliens not eligible to citizenship may hold land to the extent provided by any existing treaty between the United States and such aliens' nation (and also may hold land for agricultural purposes for a term of not over three years).

Provisions in regard to the transfer, devise or inheritance of property by aliens are fitting subjects of regulation under the treaty-making power of the United States, and a treaty will control or suspend the statutes of the individual states whenever it differs from them and, for that reason, if the subject of a foreign government is disqualified, under the laws of a state, from taking, holding or transferring real property, such disqualification will be removed if a treaty between the United States and such foreign government confers the right to take, hold, or transfer real property; Wunderle v. Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84. So by virtue of treaties existing between the United States and France and Bavaria, citizens of the latter countries are exempt from the payment of a state tax imposed on foreign heirs and legatees; Succession of Dufour, 10 La. Ann. 391; Succession of Crusius, 19 *id.* 369; and by the "most favored nation" clause of the treaty with Italy, a subject of that country is likewise exempt from the same tax; Succession of Rixner, 48 La. Ann. 552, 19 South. 597, 32 L. R. A. 177.

The right of a state, in the absence of a treaty, to declare an alien capable of inheritance or taking property and holding the same within its borders, is not precluded by the constitution of the United States; Art. I, § 10, declaring that no state shall enter into any treaty, alliance or confederation; Blythe v. Hinckley, 180 U. S. 333, 21 Sup. Ct. 390, 45 L. Ed. 557.

An alien woman acquires citizenship by her marriage to an American, though she be an immigrant about to be deported; Hopkins v. Fachant, 130 Fed. 839, 65 C. C. A. 1.

After the termination of the marital relation, a woman who has acquired citizenship by marriage may retain it by continu-

ing in the United States. She may renounce it before a court having jurisdiction to naturalize aliens. If she reside abroad she may retain her citizenship by registering with a United States consul within the year; Act of March 2, '07.

The right to exclude or to expel aliens in war or in peace is an inherent and inalienable right of every independent nation; Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; so in England; [1891] A. C. 272. Congress may exclude aliens altogether and prescribe the conditions upon which they may come to this country; U. S. v. Bitty, 208 U. S. 393, 28 Sup. Ct. 396, 52 L. Ed. 543; and may have its policy in that respect enforced exclusively through executive officers without judicial intervention; The Chinese Exclusion Case, 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068; Nishimura Ekin v. U. S., 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146; Lem Moon Sing v. U. S., 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082; Fok Ying Yo v. U. S., 185 U. S. 296, 22 Sup. Ct. 686, 46 L. Ed. 917; Kaoru Yamataya v. Fisher, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721.

What classes are excluded: Alien anarchists; U. S. v. Williams, 194 U. S. 279, 24 Sup. Ct. 719, 48 L. Ed. 979; all idiots, insane persons, paupers, or persons likely to become a public charge, persons suffering from a loathsome disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also any person whose ticket or passage is paid for with the money of another, or who is assisted by others to come, unless it is satisfactorily shown that such person does not belong to one of the foregoing excluded classes or to the class of contract laborers; 26 Stat. L. 1084, U. S. Comp Stat. 1901, p. 1294; Kaoru Yamataya v. Fisher, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed 721; alien women for the purpose of prostitution or for any other immoral purpose are excluded; U. S. v. Bitty, 208 U. S. 393, 28 Sup. 396, 52 L. Ed. 543; and their importation is a crime against the United States; Act Feb. 20, 1907, 34 Stat. L. 898.

As to the exclusion of Chinese and Japanese, see those titles.

As to the nature of an alien's relation to the government, see ALLEGIANCE.

It is unlawful for any alien person or corporation to acquire, hold or own real estate or any interest therein in any of the territories of the United States, or in the District of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts, except where the right to hold and dispose of lands in the United States is secured by existing treaties with such foreign countries. Corporations of which more than twenty per cent. of the stock is held by aliens come within the same category; 24 U. S. Stat. L. 476; 1 R. S. Suppl. p. 556.

Foreign governments and their representatives may own real estate for legations or residences in the District of Columbia; 1 R. S. Suppl. 582.

An alien has a right to acquire personal estate, make and enforce contracts in relation to the same; he is protected from injuries and wrongs to his person and property; he may sue and be sued; 7 Co. 17; Dyer 2 *b;* Judd v. Lawrence, 1 Cush. (Mass.) 531; Slatter v. Carroll, 2 Sandf. Ch. (N. Y.) 582; Taylor v. Carpenter, 2 Woodb. & M. 1, Fed. Cas. No. 13,785; De Lavcaga v. Williams, 5 Sawy. 573, Fed. Cas. No. 3,759; Airhart v. Massieu, 98 U. S. 491, 25 L. Ed. 213; Carlisle v. U. S., 16 Wall. (U. S.) 147, 21 L. Ed. 426; McNair v. Toler, 21 Minn. 175; Crashley v. Pub. Co., 179 N. Y. 27, 71 N. E. 258, 1 Ann. Cas. 196. A state may debar an alien from holding stock in its corporations or admit him to that privilege on such terms as it may prescribe; State v. Ins. Co., 70 Conn. 590, 40 Atl. 465, 66 Am. St. Rep. 138.

He may be an executor or administrator unless prohibited by statute; Cutler v. Howard, 9 Wis. 309; 1 Schouler's Ex'rs, 270, 537; Carthey v. Webb, 6 N. C. 268.

Discrimination in favor of local creditors is not unconstitutional where the effect of judgment in favor of an alien creditor would be to remove a fund to a foreign country there to be administered in favor of foreign creditors; The Disconto Gesellschaft v. Umbreit, 208 U. S. 570, 28 Sup. Ct. 337, 52 L. Ed. 625. See 21 H. L. R. 537.

In England no alien can own a British ship or any share of one. He has no legal remedy in respect of an act of state. He will not be heard in an English court of law to complain of the acts of the English government. He has the protection of the laws of England against all private persons who do him an injury, but between him and the servants of the Crown, the laws are silent; 18 L. Q. Rev. 47.

See Pollock, Torts, as to what extent a resident alien is or ought to be protected against acts of state; See GOVERNMENTAL ACTS.

An alien may hold lands in Mexico, as a native, except that if within twenty leagues of the Northern frontier, he must have the consent of the government and if within five leagues of the coast, the consent of Congress; Taylor, Mex. Code, 1902, 313. The ordinary case of a sailor deserting while on shore leave is not comprehended by the provisions of the immigration act of March 3, 1903, making it the duty of any officer in charge of any vessel bringing an alien to the United States to adopt precautions to prevent the landing of such alien; Taylor v. U. S., 207 U. S. 120, 28 Sup. Ct. 53, 52 L. Ed. 130.

An alien, even after being naturalized, is ineligible to the office of president of the

United States, and in some states, as in New York, to that of governor; he cannot be a member of Congress till the expiration of seven years after his naturalization. An alien can exercise no political rights whatever; he cannot, therefore, vote at any political election, fill any office, or serve as a juror. See Bryce, Am. Com.; Collins v. Evans, 6 Johns. (N. Y.) 333. The disabilities of aliens may be removed and they may become citizens, under the provisions of the acts of Congress.

As to the case of alien enemies, see that title. As to contracts for alien labor, see LABOR.

As to their right to bring actions for death by wrongful act, see DEATH. See CHINESE; DEPORTATION; IMMIGRATION; JAPANESE, CITIZEN; NATURALIZATION; TREATY; EXPATRIATION; PARTIES.

ALIEN ENEMY. One who owes allegiance to the adverse belligerent. 1 Kent 73.

He who owes a temporary but not a permanent allegiance is an alien enemy in respect to acts done during such temporary allegiance only; and when his allegiance terminates, his hostile character terminates also; 1 B. & P. 163.

Alien enemies are said to have no rights, no privileges, unless by the king's special favor, during time of war; 1 Bla. Com. 372; Bynkershoek 195; 8 Term 166. But the tendency of modern law is to give them protection for person and property until ordered out of the country. If resident within the country, they may sue and be sued; 2 Kent 63; Clarke v. Morey, 10 Johns. (N. Y.) 69; Russel v. Skipwith, 6 Binn. (Pa.) 241; Zacharie v. Godfrey, 50 Ill. 186, 99 Am. Dec. 506; they may be sued as nonresident defendants; McVeigh v. U. S., 11 Wall (U. S.) 259, 20 L. Ed. 80; Dorsey v. Kyle, 30 Md. 512, 96 Am. Dec. 617; and may be served by publication, even though they had no actual notice, being within the hostile lines; Dorsey v. Thompson, 37 Md. 25. Partnership with a foreigner is dissolved by the same event that makes him an alien enemy; Hanger v. Abbott, 6 Wall. (U. S.) 532, 18 L. Ed. 939. See WAR.

ALIEN AND SEDITION LAWS. See SEDITION.

ALIENAGE. The condition or state of an alien.

ALIENATE. To convey; to transfer. Co. Litt. 118 *b*. *Alien* is very commonly used in the same sense; 1 Washb. R. P. 53.

ALIENATION. The transfer of the property and possession of lands, tenements, or other things, from one person to another. Termes de la Ley.

It is particularly applied to absolute conveyances of real property; Conover v. Ins. Co., 1 N. Y. 290, 294. See CONVEYANCE; DEED.

By matter of record may be: Private acts of the legislature; grants, patents of lands, fines, common recovery. See CONVEYANCE; DEED; GRANT; FINE; COMMON RECOVERY; DEVISE; WILL.

In Medical Jurisprudence. A generic term denoting the different kinds of aberration of the human understanding. 1 Beck, Med. Jur. 535. See INSANITY.

ALIENATION OF AFFECTIONS. The rank and condition of the defendant cannot be considered in assessing damages, though his occupation and perhaps his social position may be shown; Bailey v. Bailey, 94 Ia. 598, 63 N. W. 341; and evidence of the condition of defendant as to means is not admissible. Such evidence must be confined to general reputation and not extended to particulars; Kniffen v. McConnell, 30 N. Y. 285; Chellis v. Chapman, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784; 2 Fost. & F. 160. In other cases it is said that "evidence of the defendant's property was admissible to show the extent of the injury"; Lawrence v. Cooke, 56 Me 187, 96 Am. Dec. 443; Bennett v. Beam, 42 Mich 346, 4 N. W. 8, 36 Am. Rep 442; Allen v. Baker, 86 N. C. 91, 41 Am. Rep. 444.

See ENTICE.

ALIENATION OFFICE. An office in England to which all writs of covenants and entries were carried for the recovery of fines levied thereon.

ALIENEE. One to whom an alienation is made.

ALIENI GENERIS (Lat.). Of another kind.

ALIENI JURIS (Lat.). Subject to the authority of another. An infant who is under the authority of his father, or guardian, and a wife under the power of her husband, are said to be *alieni juris*. See SUI JURIS.

ALIENIGENA (Lat.). One of foreign birth; an alien. 7 Coke 31.

ALIENOR. He who makes a grant or alienation.

ALIGNMENT. The act of laying out or adjusting a line. The state of being so laid out or adjusted. The ground plan of a railway or other road or work as distinguished from its profile or gradients. Village of Chester v. Leonard, 68 Conn. 495, 37 Atl. 397.

ALIMENT. In Scotch Law. To support; to provide with necessaries. Paterson, Comp. §§ 845, 850.

Maintenance; support; an allowance from the husband's estate for the support of the wife. Paterson, Comp. § 893.

In Civil Law. Food and other things necessary to the support of life; money allowed for the purpose of procuring these. Dig. 50. 16. 43.

In Common Law. To supply with necessaries. Purcell v. Purcell, 3 Edw. Ch. (N. Y.) 194.

ALIMENTA (Lat. *alere*, to support). Things necessary to sustain life.

Under the term are included food, clothing, and a house; water also, it is said, in those regions where water is sold; Calvinus, Lex; Dig 50. 16 43.

ALIMONY. The allowance which a husband by order of court pays to his wife, living separate from him, for her maintenance. 2 Bish. Marr. & D. 351; Chase v. Chase, 55 Me. 21; Odom v. Odom, 36 Ga. 286.

It is also commonly used as equally applicable to all allowances, whether annual or in gross, made to a wife upon a decree of divorce. Burrows v. Purple, 107 Mass. 432 Parsons v. Parsons, 9 N. H. 309, 32 Am. Dec. 362, Buckminster v. Buckminster, 38 Vt. 248, 88 Am. Dec. 652; Hedrick v. Hedrick, 28 Ind. 291.

Alimony pendente lite is that ordered during the pendency of a suit in divorce.

Permanent alimony is that ordered for the use of the wife after the termination of the suit for divorce during their joint lives.

To entitle a wife to permanent alimony, the following conditions must be complied with:

First, a legal and valid marriage must be proved; 1 Rob. Eccl. 484; Purcell v. Purcell, 4 Hen. & M. (Va.) 507; McGee v. McGee, 10 Ga. 477; 5 Sess. Cas. N. S. Sc. 1288; Bowman v. Bowman, 24 Ill. App. 165. It will not be allowed where the marriage is denied; Hite v. Hite, 124 Cal. 389, 57 Pac. 227, 45 L. R. A. 793, 71 Am. St. Rep. 82; McKenna v. McKenna, 70 Ill. App. 340; Vreeland v. Vreeland, 18 N. J. Eq. 43; Collins v. Collins, 71 N. Y. 269; but see Schonwald v. Schonwald, 62 N. C. 219. But it has been held that where there had been a marriage which was void because the woman had another husband, alimony would be allowed; Cray v. Cray, 32 N. J. Eq. 25. So where there had been marriage ceremony, but its legality was questioned; Reifschneider v. Reifschneider, 241 Ill 92, 89 N. E. 255. In Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460, it was held that where the marriage is denied, the court will pass upon the question for the purpose of an application for alimony, and grant it if there is a fair presumption of marriage.

Second, by the common law the relation of husband and wife must continue to subsist; for which reason no alimony could be awarded upon a divorce *a vinculo matrimonii*, or a sentence of nullity; 1 Lee, Eccl. 621; Fischli v. Fischli, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251; Davol v. Davol, 13 Mass. 264; Jones v. Jones, 18 Me. 308, 36 Am. Dec. 723; Holmes v. Holmes, 4 Barb. (N. Y.) 295; Crane v. Meginnis, 1 Gill & J. (Md.) 463, 19 Am. Dec. 237; Richardson v. Wilson, 8 Yerg. (Tenn.) 67. This rule, however, has been very generally changed by statute in this country; 2 Bish. M. & D. § 376.

Third, the wife must be separated from the bed and board of her husband (or by divorce *a vinculo matrimonii*) by judicial decree; voluntary separation, for whatever cause, is insufficient. And, as a general rule, the alimony must be awarded by the same decree which grants the separation, or at least in the same suit, it not being generally competent to maintain a subsequent and independent suit for that purpose; Lawson v. Shotwell, 27 Miss. 630; Bankston v. Bankston, *id.* 692; Lyon v. Lyon, 21 Conn. 185; Fischli v. Fischli, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251; Richardson v. Wilson, 8 Yerg. (Tenn.) 67. The right to alimony need not be determined in the suit for divorce, if such right is reserved in the judgment; Galusha v. Galusha, 138 N. Y. 272, 33 N. E. 1062.

Fourth, the wife must not be the guilty party; Palmer v. Palmer, 1 Paige, Ch. (N. Y.) 276; Dailey v. Dailey, Wright (Ohio) 514; Pence v. Pence, 6 B. Monr. (Ky.) 496; Lovett v. Lovett, 11 Ala. 763; Sheafe v. Sheafe, 24 N. H 564; Hickling v. Hickling, 40 Ill. App. 73; Spaulding v. Spaulding, 133 Ind. 122, 32 N. E. 224, 36 Am. St. Rep. 534; but in some states there are statutes in terms which permit the court, in its discretion, to decree alimony to the guilty wife; 2 Bish. M. & D. 378; [1892] Prob. Div. 1; and continued adultery of wife after divorce, is no ground for vacating a previous order allowing her permanent alimony; Cole v. Cole, 35 Ill. App. 544; Brooks v. Brooks, 18 W. N. C. (Pa.) 115.

It is said to be usual in a divorce decree in England to add the words *dum sola et casta* (while she remains unmarried and chaste), "no doubt for the reason that it would seem a parody of justice to suggest that a woman should lose her allowance if she marries again, but should not lose it if she lives with a man as his mistress. When indeed the reputation of the wife is spotless, these words may be omitted." [1898] P. 138.

It may be that a divorce is refused and yet alimony allowed to the wife, but not if the husband is willing to be reconciled on proper terms and has not abandoned her; Latham v. Latham, 30 Gratt. (Va.) 307.

In California, a divorce having been decreed against a non-resident, an order for alimony and for custody of children was vacated on appeal, 30 Am. Law Rev. 604, with elaborate discussion and criticism of this ruling. A decree for it cannot be made against a defendant who is not served with process for appearance, does not appear, or has no property within control of the court; Lynde v. Lynde, 54 N. J. Eq. 473, 35 Atl. 641. Whether it can be had after a final decree in the divorce case which is silent as to it, except through amendment of decree, *quære; id.*

Where a judgment for alimony is rendered in a court of one state, its enforcement in

another, according to the laws of the latter, is not a deprivation of property without due process of law; Lynde v. Lynde, 181 U. S. 183, 21 Sup. Ct. 555, 45 L. Ed. 810.

Alimony *pendente lite* is granted much more freely than permanent alimony, it being very much a matter of course to allow the former, unless the wife has sufficient separate property, upon the institution of a suit; 1 Hagg. Eccl. 773; 1 Curt. Eccl. 444; Logan v. Logan, 2 B. Monr. (Ky.) 142; Collins v. Collins, 2 Paige Ch. (N. Y.) 9; Rose v. Rose, 11 Paige Ch. (N. Y.) 166; Harding v. Harding, 40 Ill. App. 202; either for the purpose of obtaining a separation from bed and board; Smith v. Smith, 1 Edw. Ch. (N. Y.) 255; a divorce *a vinculo matrimonii;* Ryan v. Ryan, 9 Mo. 539; Jones v. Jones, 18 Me. 308, 36 Am. Dec. 723; Hewitt v. Hewitt, 1 Bland Ch. (Md.) 101; or a sentence of nullity, and whether the wife is plaintiff or defendant. The reason is that it is improper for the parties to live in matrimonial cohabitation during the pendency of such a suit, whatever may be its final result. She need only show probable ground for divorce to entitle her to alimony; Wooley v. Wooley, 24 Ill. App. 431. Upon the same principle, the husband who has all the money, while the wife has none, is bound to furnish her, whether plaintiff or defendant, with the means to defray her expenses in the suit; Jones v. Jones, 2 Barb. Ch. (N. Y.) 146; Story v. Story, Walk. Ch. (Mich.) 421; Daiger v. Daiger, 2 Md. Ch. Dec. 335; Tayman v. Tayman, 2 Md. Ch. Dec. 393. See Taylor v. Taylor, 46 N. C. 528. This alimony ceases as soon as the fault of the wife is finally determined; Dawson v. Dawson, 37 Mo. App. 207.

It has been held that a court of chancery has jurisdiction to grant alimony to a wife when the conduct of the husband renders it unsafe for her to live with him or he turns her out of doors; Almond v. Almond, 4 Rand. (Va.) 662, 15 Am. Dec. 781; but there is a conflict of decisions as to whether, without a statute, an independent suit for alimony can be sustained; see 12 Am. Dec. 257, note, where the cases supporting both views are collected. Is not a matter of independent claim or right, but is incidental to a suit for divorce or other relief between husband and wife; Lynde v. Lynde, 54 N. J. Eq. 473, 35 Atl. 641.

Alimony is not a sum of money nor a specific proportion of the husband's estate given absolutely to the wife, but it is a continuous allotment of sums payable at regular intervals, for her support from year to year; Wallingsford v. Wallingsford, 6 Harr. & J. (Md.) 485; Parsons v. Parsons, 9 N. H. 309, 32 Am. Dec. 362; Clark v. Clark, 6 W. & S. (Pa.) 85; Miller v. Miller, 75 N. C. 70; Phelan v. Phelan, 12 Fla. 449; Crain v. Cavana, 62 Barb. (N. Y.) 109; but in some states statutory allowances of a gross sum have been given to the wife under the name of alimony; see Parsons v. Parsons, 9 N. H. 309, 32 Am. Dec. 362; Lyon v. Lyon, 21 Conn. 185; Herron v. Herron, 47 Ohio St. 544, 25 N. E. 420, 9 L. R. A. 667, 21 Am. St. Rep. 854; Burrows v. Purple, 107 Mass. 428; McClung v. McClung, 40 Mich. 493; Ross v. Ross, 78 Ill. 402; Williams v. Williams, 36 Wis. 362; Miller v. Clark, 23 Ind. 370; Blankenship v. Blankenship, 19 Kan. 159; Ex parte Spencer, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266. This would be enforced by the courts; Wilson v. Hinman, 182 N. Y. 408, 75 N. E. 236, 2 L. R. A. (N. S.) 232, 108 Am. St. Rep. 820, citing to the same effect Storey v. Storey, 125 Ill. 608, 18 N. E. 329, 1 L. R. A. 320, 8 Am. St. Rep. 417; followed in Whitney v. Warehouse Co., 183 Fed. 678, 106 C. C. A. 28; if in gross it should not ordinarily exceed one-half the husband's estate; McCartin v. McCartin, 37 Mo. App. 471. It must secure to her as wife a maintenance separate from her husband; an absolute title in specific property, or a sale of a part of the husband's estate for her use, cannot be decreed or confirmed to her as alimony; 3 Hagg. Eccl. 322; Maguire v. Maguire, 7 Dana (Ky.) 181; Wallingsford v. Wallingsford, 6 Harr. & J. (Md.) 485; Purcell v. Purcell, 4 Hen. & M. (Va.) 507; Rogers v. Vines, 28 N. C. 203. Nor is alimony regarded, in any general sense, as the separate property of the wife. Hence she can neither alienate nor charge it, Romaine v. Chauncey, 60 Hun 477, 15 N. Y. Supp. 198; if she suffers it to remain in arrear for more than one year, it has been held that she cannot generally recover such arrears; 3 Hagg. Eccl. 322; if she saves anything from her annual allowance, upon her death it will go to her husband; Clark v. Clark, 6 W. & S. (Pa.) 85; Sterling v. Sterling, 12 Ga. 201; if there are any arrears at the time of her death, they cannot be recovered by her executors; 8 Sim. 321; 8 Term 545; Clark v. Clark, 6 W. & S. (Pa.) 85; as the husband is only bound to support his wife during his own life, her right to alimony ceases with his death; Smith v. Smith, 1 Root (Conn.) 349; Sloan v. Cox, 4 Hayw. (Tenn.) 75; Jamison v. Jamison, 4 Md. Ch. Dec. 289; Wilson v. Hinman, 182 N. Y. 408, 75 N. E. 236, 2 L. R. A. (N. S.) 232, 108 Am. St. Rep. 820; Wagoner v. Wagoner, 132 Mich. 343, 93 N. W. 889; Lockwood v. Kium, 34 Ohio St. 1; Whitney v. Elevator & Warehouse Co., 183 Fed. 678, 106 C. C. A. 28; Martin v. Martin, 33 W. Va. 695, 11 S. E. 12; Storey v. Storey, 23 Ill. App. 558; Stahl v. Stahl, 114 Ill. 375, 2 N. E. 160; Casteel v. Casteel, 38 Ark. 477; and see Miller v. Miller, 64 Me. 484; In re Lawton, 12 R. I. 210; and it ceases upon reconciliation and cohabitation. The cases upon the effect of the husband's death upon a decree for alimony involve the question whether alimony is to be considered merely as support to which the wife is entitled by virtue of the marital relation, or as her interest in the joint prop-

erty. They are collected in a note in 2 L. R. A (N. S.) 232, where it is said that they cannot be satisfactorily harmonized on either theory.

Its amount is liable at any time to be increased or diminished at the discretion of the court; 8 Sim. 315; Clark v. Clark, 6 W. & S. (Pa.) 85; and the court may insert a provision in the decree allowing any interested party thereafter to apply, on account of changed conditions, for a modification of the amount allowed; Stahl v. Stahl, 59 Hun 621, 12 N. Y. Supp. 854. If, however, the right is not reserved in the decree or given by statute, the amount cannot subsequently be varied in the case of absolute divorce; Howell v. Howell, 104 Cal. 45, 37 Pac. 770, 43 Am. St. Rep. 70; Walker v. Walker, 155 N. Y. 77, 49 N. E. 663; otherwise under a decree for separation; Taylor v. Taylor, 93 N. C. 418, 53 Am. Rep. 460. And where a statute authorizes the amount decreed for alimony to be changed, it cannot operate retrospectively, as thereby it would deprive the person of property without due process of law; Livingston v. Livingston, 173 N. Y. 377, 66 N. E. 123, 61 L. R. A. 800, 93 Am. St. Rep. 600.

Equity has power to modify provisions as to alimony and to retain jurisdiction over such decrees. Where an agreement between the parties provides for something more than alimony (as where it binds the husband to pay the wife a certain sum until her death, irrespective of whether she survives him or not, and transfers certain property to her absolutely and to trustees to pay her an allowance during her life and such agreement is embodied in the divorce decree), equity should not afterwards destroy the agreement although the wife marries again; but three judges dissented on the ground that the insertion of such an agreement in the decree was improper and that the decree should be set aside, the wife retaining her rights at law for the breach of the agreement; Emerson v. Emerson, 120 Md 584, 87 Atl. 1033.

The preceding observations respecting the nature and incidents of alimony should be received with some caution in this country, where the subject is so largely regulated by statute; Burr v. Burr, 10 Paige, Ch. (N. Y.) 20; *id.*, 7 Hill (N. Y.) 207. It is said that alimony cannot be regarded as a debt owing from a husband to wife; Barclay v. Barclay, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351; but that it is rather to be considered as a penalty imposed for the failure to perform a duty; Wetmore v. Markoe, 196 U. S. 74, 25 Sup. Ct. 172, 49 L. Ed. 390, 2 Ann. Cas. 265; Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. Rep. 544. Nor is it a debt within the meaning of the constitutional inhibition against imprisonment for debt; State v. Cook, 66 Ohio St. 566, 64 N. E. 567, 58 L. R. A. 625. And a discharge in bankruptcy does not bar the collection of arrears of alimony and the allowance for the support of minor children; Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084; Wetmore v. Markoe, 196 U. S. 68, 25 Sup. Ct. 172, 49 L. Ed. 390, 2 Ann. Cas. 265; Deen v. Bloomer, 191 Ill. 416, 61 N. E. 131; and see Beach v. Beach, 29 Hun (N. Y.) 181; *contra*, Arrington v. Arrington, 131 N. C. 143, 42 S. E. 554, 92 Am. St. Rep. 769.

The amount to be awarded depends upon a great variety of considerations and is governed by no fixed rules; Ricketts v. Ricketts, 4 Gill (Md.) 105; Burr v. Burr, 7 Hill (N. Y.) 207; Richmond v. Richmond, 2 N. J. Eq. 90; McGee v. McGee, 10 Ga. 477; Muir v. Muir, 133 Ky. 125, 92 S. W. 314, 28 Ky. L. Rep. 1355, 4 L. R. A. (N. S.) 909. The ability of the husband, however, is a circumstance of more importance than the necessity of the wife, especially as regards permanent alimony; and in estimating his ability his entire income will be taken into consideration, whether it is derived from his property or his personal exertions; 3 Curt. Eccl. 3, 41; McCrocklin v. McCrocklin, 2 B. Monr. (Ky.) 370; Bursler v. Bursler, 5 Pick. (Mass.) 427; Battey v. Battey, 1 R. I. 212; Small v. Small, 28 Neb. 843, 45 N. W. 248; McGrady v. McGrady, 48 Mo. App. 668.

Future expectations may be taken into consideration; Cralle v. Cralle, 84 Va. 198, 6 S. E. 12; Horning v. Horning, 107 Mich. 587, 65 N. W. 555; Muir v. Muir, 133 Ky. 125, 92 S. W. 314, 4 L. R. A. (N. S.) 909 and note. But if the wife has separate property; 2 Phill. 40; or derives income from her personal exertions, this will also be taken into account. If she has sufficient means to support herself in the rank of life in which she moved, she is entitled to no alimony; Stevens v. Stevens, 49 Mich. 504, 13 N. W. 835; Miller v. Miller, 75 N. C. 70; 2 Hagg. Consis. 203. The method of computation is, to add the wife's annual income to her husband's; consider what, under all the circumstances, should be allowed her out of the aggregate; then from the sum so determined deduct her separate income, and the remainder will be the annual allowance to be made her. There are various other circumstances, however, beside the husband's ability, to be taken into consideration: as, whether the bulk of the property came from the wife, or belonged originally to the husband; Fishli v. Fishli, 2 Litt. (Ky.) 337; Robbins v. Robbins, 101 Ill. 416; or was accumulated by the joint exertions of both, subsequent to the marriage; Lovett v. Lovett, 11 Ala. 763; Jeans v. Jeans, 2 Harr. (Del.) 142; whether there are children to be supported and educated, and upon whom their support and education devolves; Amos v. Amos, 4 N. J. Eq. 171; Fishli v. Fishli, 2 Litt. (Ky.) 337; McGee v. McGee, 10 Ga. 477; Emerson v. Emerson, 68

Hun (N. Y.) 37, 22 N. Y. Supp. 684; Parkhurst v. Race, 100 Ill. 570; Call v. Call, 65 Me. 407; Halleman v. Halleman, 65 Ga. 476; the nature and extent of the husband's *delictum;* 3 Hagg. Eccl. 657; Turrel v. Turrel, 2 Johns. Ch. (N. Y.) 391; Williams v. Williams, 4 Dec. Eq. (S. C.) 183; Sheafe v. Sheafe, 24 N. H. 564; the demeanor and conduct of the wife towards the husband who desires cohabitation; Burr v. Burr, 7 Hill (N. Y.) 207; Dejarnet v. Dejarnet, 5 Dana (Ky.) 499; Stewartson v. Stewartson, 15 Ill. 145; Jones v. Jones, 95 Ala. 443, 11 South. 11, 18 L. R. A. 95; the condition in life, place of residence, health, and employment of the husband, as demanding a larger or smaller sum for his own support; 1 Hagg. Eccl. 526, 532; the condition in life, circumstances, health, place of residence, and consequent necessary expenditures of the wife; Bursler v. Bursler, 5 Pick. (Mass.) 427; Ricketts v. Ricketts, 4 Gill (Md.) 105; Lovett v. Lovett, 11 Ala. 763; the age of the parties; Miller v. Miller, 6 Johns. Ch. (N. Y.) 91; Ricketts v. Ricketts, 4 Gill (Md.) 105; Schlosser v. Schlosser, 29 Ind. 488; the ability of the husband to work; Canine v. Canine, 16 S. W. 367, 13 Ky. L. Rep. 124; Snedager v. Kincaid, 60 S. W. 522, 22 Ky. L. Rep. 1347; Furth v. Furth (N. J.) 39 Atl. 128; and whatever other circumstances may address themselves to a sound judicial discretion.

So far as any general rule can be deduced from the decisions and practice of the courts, the proportion of the joint income to be awarded for permanent alimony is said to range from one-half, where the property came from the wife (2 Phill. 235), to one-third, which is the usual amount; 29 L. J. Mat. Cas. 150; Ricketts v. Ricketts, 4 Gill (Md.) 105; Forrest v. Forrest, 8 Bosw. (N. Y.) 640; Musselman v. Musselman, 44 Ind. 106; Turner v. Turner, 44 Ala. 437; or even less; Draper v. Draper, 68 Ill. 17; Garner v. Garner, 38 Ind. 139. In case of alimony *pendente lite*, it is not usual to allow more than about one-fifth, after deducting the wife's separate income; 2 Bish. Mar. Div. & Sep. § 945; and generally a less proportion will be allowed out of a large estate than a small one; for, though no such rule exists in respect to permanent alimony, there may be good reasons for giving less where the question is on alimony during the suit; when the wife should live in seclusion, and needs only a comfortable subsistence; 2 Phill. Eccl. 40. See Llamosas v. Llamosas, 4 Thomp. & C. (N. Y.) 574; Briggs v. Briggs, 36 Ia. 383; Harrell v. Harrell, 39 Ind. 185; Williams v. Williams, 29 Wis. 517.

Courts will take judicial notice that it is not infrequent in divorce proceedings for parties to agree on details of alimony; Whitney v. Warehouse Co., 183 Fed. 678, 106 C. C. A. 28.

An action upon a decree for alimony may be maintained in a court of another state where the amount is fixed and presently due and enforceable, but not when payable in future instalments; Hunt v. Monroe, 32 Utah, 428, 91 Pac. 269, 11 L. R. A. (N. S.) 249, where the cases are critically reviewed; Page v. Page, 189 Mass. 85, 75 N. E. 92, 4 Ann. Cas. 296; *contra*, where there is power to change the decree for payments; Mayer v. Mayer, 154 Mich. 386, 117 N. W. 890, 19 L. R. A. (N. S.) 245, 129 Am. St. Rep. 477. Generally speaking, when a decree is rendered for alimony payable in instalments, the right to such instalments becomes absolute and vested upon becoming due and is protected by the full faith and credit clause of the United States constitution, provided, that no modification of the decree has been made prior to the maturity of the instalments. This general rule does not obtain where, by the law of the state in which such judgment is rendered, the right to such future alimony is discretionary with the court which made the decree, to such an extent that no absolute or vested right attaches to receive the instalments ordered to be paid; even although no application to annul or modify the decree in respect to alimony had been made prior to the instalments becoming due; Sistare v. Sistare, 218 U. S. 1, 30 Sup. Ct. 682, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061.

Though an action on a decree for alimony rendered in one state may be maintained in another state if the amount payable is fixed and presently due, yet a decree for alimony becoming due in the future and payable in instalments is not a final decree enforceable in another state, within the full faith and credit clause, until the court which rendered it fixes the specific amount due; Hunt v. Monroe, 32 Utah, 428, 91 Pac. 269, 11 L. R. A. (N. S.) 249; Israel v. Israel, 148 Fed. 576, 79 C. C. A. 32, 9 L. R. A. (N. S.) 1168, 8 Ann. Cas. 697.

Although judgments are, by statute, liens on the defendant's real estate, a decree for alimony payable by instalments does not create a lien unless the record affirmatively shows that the court so intended; Scott v. Scott, 80 Kan. 489, 103 Pac. 1005, 25 L. R. A. (N. S.) 132, 133 Am. St. Rep. 217, 18 Ann. Cas. 564, and note. It is held that a decree for alimony in gross operates as a lien on the husband's lands; Holmes v. Holmes, 29 N. J. Eq. 9; Coffman v. Finney, 65 Ohio St. 61, 61 N. E. 155, 55 L. R. A. 794; so of a monthly allowance; Raymond v. Blancgrass, 36 Mont. 449, 93 Pac. 648, 15 L. R. A. (N. S.) 976; but it is held that in the absence of a statute there is no lien; Kerr v. Kerr, 216 Pa. 641, 66 Atl. 107, 9 Ann. Cas. 89; Swansen v. Swansen, 12 Neb. 210, 10 N. W. 713; Kurtz v. Kurtz, 38 Ark. 119; In re Lawton, 12 R. I. 210; Campbell v. Trosper, 108 Ky. 602, 57 S. W. 245. A New York decree di-

recting the husband to mortgage his New Jersey lands to secure alimony will not be enforced in New Jersey; Bullock v. Bullock, 52 N. J. Eq. 561, 30 Atl. 676, 27 L. R. A. 213, 46 Am. St. Rep. 528.

Alimony, suit money and counsel fees cannot be allowed to the husband; State v. Templeton, 18 N. D. 525, 123 N. W. 283, 25 L. R. A. (N. S.) 234; Hoagland v. Hoagland, 19 Utah 103, 57 Pac. 20. Some allowance was made in Casey v. Casey, 116 Ia. 655, 88 N. W. 937, and 5 Quebec Pr. Rep. 137, under peculiar circumstances.

For an outside agreement for support of wife, not made part of a decree, see Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084.

See notes in 34 L. R. A. 110, and 25 L. R. A. (N. S.) 234.

ALIO INTUITU. Under a different aspect; with respect to another case or condition. 6 M. & S. 231. See DIVERSO INTUITU.

ALITER (Lat.). Otherwise; as otherwise held or decided.

ALIUNDE (Lat.). From another place. Evidence *aliunde* (*i. e.* from without the will) may be received to explain an ambiguity in a will. 1 Greenl. Ev. § 291. The word is also used in the same sense with respect to the admission of evidence to modify or explain other documents, generally treated as conclusive.

ALL. Completely, wholly, the whole amount, quantity or number.

It is frequently used in the sense of "each" or "every one of;" Sherburne v. Sischo, 143 Mass. 442, 9 N. E. 797; Towle v. Delano, 144 Mass. 100, 10 N. E. 769; 54 L. J. Q. B. 539; and is a general rather than a universal term, to be understood in one sense or the other according to the demands of sound reason; Kieffer v. Ehler, 18 Pa. 391; 9 Ves. Jr. 137. As to its use in a will, see DEVISE.

ALL AND SINGULAR. All without exception.

ALL FAULTS. A term in common use in the trade. A sale of goods with "all faults," in the absence of fraud on the part of the vendor, covers all such faults and defects as are not inconsistent with the identity of the goods as the goods described; Whitney v. Boardman, 118 Mass. 242; 5 B. & Ald. 240.

ALL FOURS. A metaphorical expression, signifying that a case agrees in all its circumstances with another.

ALLEGATA. A word which the emperors formerly signed at the bottom of their rescripts and constitutions; under other instruments they usually wrote *signata* or *testata*. Encyc. Lond.

ALLEGATA ET PROBATA (Lat. things alleged and proved). The allegations made by a party to a suit, and the proof adduced in their support.

It is a general rule of evidence that the *allegata* and *probata* must correspond; that is, the proof must at least be sufficiently extensive to cover all the allegations of the party which are material; 1 Greenl. Ev. § 51; The Sarah Ann, 2 Sumn. 206, Fed. Cas. No. 12,342; White v. Noland, 3 Mart. N. S. (La.) 636; Boone v. Chiles, 10 Pet. (U. S.) 177, 9 L. Ed. 388.

ALLEGATION. The assertion, declaration, or statement of a party of what he can prove.

In Ecclesiastical Law. The statement of the facts intended to be relied on in support of a contested suit.

It is applied either to the libel, or to the answer of the respondent setting forth new facts, the latter being, however, generally called the *defensive allegation*. See 1 Browne, Civ. Law, 472, 473, n.

ALLEGATION OF FACULTIES. A statement made by the wife of the property of her husband, for the purpose of obtaining alimony. Lovett v. Lovett, 11 Ala. 763; Wright v. Wright, 3 Tex. 168.

To such an allegation the husband makes answer, upon which the amount of alimony is determined; 2 Lee, Eccl. 593; 3 Phill. Eccl 387; or she may produce other proof, if necessary in consequence of his failure to make a full and complete disclosure; 2 Hagg. Cons. 199; 2 Bish. M. & Div. § 1082.

ALLEGIANCE. The tie which binds the citizen to the government, in return for the protection which the government affords him. The duty which the subject owes to the sovereign, correlative with the protection received.

It is a comparatively modern corruption of ligeance (*ligeantia*), which is derived from liege (*ligius*), meaning absolute or unqualified. It signified originally liege fealty, i. e. absolute and unqualified fealty. 18 L. Q. Rev. 47.

Acquired allegiance is that binding a citizen who was born an alien, but has been naturalized.

Local or *actual allegiance* is that which is due from an alien while resident in a country in return for the protection afforded by the government. From this are excepted foreign sovereigns and their representatives, naval and armed forces when permitted to remain in or pass through the country or its waters.

Natural allegiance is that which results from the birth of a person within the territory and under the obedience of the government. 2 Kent 42.

Allegiance may be an absolute and permanent obligation, or it may be a qualified and temporary one; the citizen or subject owes the former to his government or sovereign, until by some act he distinctly renounces it, whilst the alien domiciled in the country

owes a temporary and local allegiance continuing during such residence; Carlisle v. U. S., 16 Wall. (U. S.) 154, 21 L. Ed. 426.

At common law, in England and America, natural allegiance could not be renounced except by permission of the government to which it was due; 1 Bla. Com. 370, 371; 1 East, Pl. Cr. 81; Inglis v. Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 7 L. Ed. 617; Shanks v. Dupont, 3 Pet. (U. S.) 242, 7 L. Ed. 666; but see 8 Op. Att.-Gen. U. S. 139; 9 *id.* 356. Held to be the law of Great Britain in 1868; Cockb. Nationality. After many negotiations between the two countries, the rule has been changed in the United States by act of July 27, 1868, and in England by act of May 14, 1870. Whether natural allegiance revives upon the return of the citizen to the country of his allegiance is an open question; Whart. Confl. L. § 6. See Cockb. Nationality; Webster, Citizenship; Webster, Naturalization; 2 Whart. Int. L. Dig. ch. vii.; Whart. Confl. L.; Lawrence's Wheat. Int. L. App. It is said to be due to the king in his political, not his personal, capacity; L. R. 17 Q. B. D. 54, quoted in U. S. v. Wong Kim Ark, 169 U. S. 663, 18 Sup. Ct. 456, 42 L. Ed. 890; and so in this country "it is a political obligation" depending not on ownership of land, but on the enjoyment of the protection of government; Wallace v. Harmstad, 44 Pa. 492; and it "binds the citizen to the observance of all laws" of his own sovereign; Adams v. People, 1 N. Y. 173. See ALIEN; NATURALIZATION; EXPATRIATION.

ALLEGING DIMINUTION. See DIMINUTION OF THE RECORD.

ALLEVIARE. To levy or pay an accustomed fine. Cowell.

ALLEY. See STREET.

ALLIANCE. The union or connection of two persons or families by marriage; affinity.

In International Law. A contract, treaty, or league between two or more sovereigns or states, made for purposes of aggression or defence.

Defensive alliances are those in which a nation agrees to defend her ally in case the latter is attacked.

Offensive alliances are those in which nations unite for the purpose of making an attack, or jointly waging the war against another nation.

The term is also used in a wider sense, embracing unions for objects of common interest to the contracting parties, as the "Holy Alliance" entered into in 1815 by Prussia, Austria and Russia for the purpose of counteracting the revolutionary movement in the interest of political liberalism.

ALLISION. Running one vessel against another.

To be distinguished from collision, which denotes the running of two vessels against each other.

The distinction is not very carefully observed, but collision is used to denote cases strictly of allision.

ALLOCATIO NE FACIENDA. In English Law. A writ directed to the lord treasurer and barons of the exchequer, commanding that an allowance be made to an accountant for such moneys as he has lawfully expended in his office.

ALLOCATION. An allowance upon an account in the English Exchequer. Cowell. Placing or adding to a thing. Encyc. Lond.

ALLOCATO COMITATU. A new writ of exigent, allowed before any other county court, issued on the former not being fully served or complied with. Fitz. Exigent 14.

ALLOCATUR (Lat., it is allowed).

A Latin word formerly used to denote that a writ or order was allowed. See State v. Vanderveer, 7 N. J. L. 38.

A word denoting the allowance by a master or prothonotary of a bill referred for his consideration, whether touching costs, damages, or matter of account. Lee, Dict.; Archb. Pr. 129.

Where an appeal can be taken only by permission of the court, it is said to be by special allocatur.

ALLOCATUR EXIGENT. A writ of exigent which issued in a process of outlawry, upon the sheriff's making return to the original exigent that there were not five county courts held between the *teste* of the original writ and the return day. 1 Tidd, Pr. 128.

ALLOCUTION. The formal address of the judge to the prisoner, asking him if he has anything to say why sentence should not be pronounced against him.

In case of conviction of an offence not capital the omission is not fatal and the judgment will not be reversed therefor; State v. Ball, 27 Mo. 324.

In England it was held error, "for it is a necessary question, because he may have a pardon to plead, or may move in arrest of judgment," and for that reason the attainder was reversed; 3 Salk. 358; 2 *id.* 630. But in this country it is not material "whether a pardon was produced before or after judgment, as no attainder or other such consequences result from a capital conviction here, which a pardon may not remove"; State v. Ball, 27 Mo. 324. Form of entry was: "And thereupon it is forthwith demanded of the said J. S., if he hath or knoweth anything to say why the said justices here ought not upon the premises and verdict aforesaid to proceed to judgment against him; who nothing further saith, unless as he had before said. Whereupon," etc. Arch. Cr. Pl. & Pr. (23d ed.) 226.

ALLODIAL. Held in *alodum*. See ALOD, where the more recent understanding of the meaning and the accepted spelling of these words are found.

ALLONGE (Fr.). A piece of paper annexed to a bill of exchange or promissory note, on which to write endorsements for which there is no room on the instrument itself. Pardessus, n. 343; Story, Prom. Notes, §§ 121, 151; Tied. on Com. Paper 264. See INDORSEMENT.

ALLOTMENT. A share or portion; that which is allotted.

The division or distribution of land.

Allotment System. A system in England of assigning small portions of land, from the eighth of an acre to four or five acres, to be cultivated by day-laborers after their ordinary day's work. Brande.

Allotment Certificate. A document issued to an applicant for shares in a company or public loan announcing the number of shares allotted or assigned and the amounts and due dates of the calls or different payments to be made on the same. Where a letter withdrawing an application for shares was received after the shares had been allotted, but before the notice of allotment was mailed, the applicant was held entitled to have his name removed from the register of shareholders and to have the deposit returned; 81 L. T. R. 512. See SHAREHOLDER.

To constitute a public allotment of shares there must be an issue to persons other than those taking shares in payment of wares or for work done, or as a qualification for a seat on the board; 19 T. L. R. 614.

An allotment of shares is an appropriation by the directors of a company of shares to a particular person, but it does not necessarily create the status of membership; 80 L. T. 347.

ALLOTMENT NOTE. "A writing by a seaman, whereby he makes an assignment of part of his wages in favor of his wife, father or mother, grandfather or grandmother, brother or sister. Every allotment note must be in a form sanctioned by the Board of Trade. The allottee, that is the person in whose favor it is made, may recover the amount before justices of the peace." Moz. & Wh.

ALLOW. To sanction, either directly or indirectly; as opposed to merely suffering a thing to be done. [1894] 2 Q. B. 412. A claim is said to be *allowed* by a court.

To permit; Kearns v. Kearns, 107 Pa. 575; Doty v. Lawson, 14 Fed. 892; 3 H. & C. 75; to yield; Doty v. Lawson, 14 Fed. 892; to suffer, to tolerate; Gregory v. U. S., 17 Blatchf. 325, Fed. Cas. No. 5,803; to fix; Hinds v. Marmolejo, 60 Cal. 229; to substitute by way of compensation something for another; Gleun v. Glenn, 41 Ala. 571. I allow to give is equivalent to I intend to give; Harmon v. James, 7 Ind. 263; Hunter v. Stembridge, 12 Ga. 192; it is used as a synonym of intent by unlearned persons in wills; *id.*; it is also used as an equivalent of I will; Ramsey v. Hanlon, 33 Fed. 425. In the National Banking Act, providing that interest may be taken at a rate "allowed by the laws of the state or territory," it means fixed; Hinds v. Marmolejo, 60 Cal. 229.

ALLOWANCE. A definite sum or quantity set apart or granted. The share or portion given to a married woman, child, trustee, etc. Smith v. Smith, 45 Ala. 264. It is said to include what is awarded to a trustee for expenses, etc., in addition to his legal fees; Downing v. Marshall, 37 N. Y. 380; or a perquisite to an officer in addition to his salary, as for room, fire or light; 14 Q. B. D. 735; 23 *id.* 66, 531. The term is ordinarily only another name for a gift or gratuity to a child or other dependent; Taylor v. Staples, 8 R. I. 170, 5 Am. Rep. 556.

The term is not properly used to express contractual relation or regular compensation, but applies rather to the case of voluntary action in favor of dependents, servants or the poor; Mangam v. City of Brooklyn, 98 N. Y. 585, 50 Am. Rep. 705, where the meaning of the word is discussed critically and at length. It has been used in a judge's certificate as the equivalent of settlement; Atchison, T. & S. F. R. Co. v. Cone, 37 Kan. 567, 15 Pac. 499; or to express the approval of the court; Gildart's Heirs v. Starke, 1 How. (Miss.) 450.

ALLUVIO MARIS (Lat.). Soil formed by the washing-up of earth from the sea. Schultes, Aq. Rights 138.

ALLUVION. That increase of the earth on a bank of a river, or on the shore of the sea, by the force of the water, as by a current or by waves, or from its recession in a navigable lake, which is so gradual that no one can judge how much is added at each moment of time. Inst. l. 2, t. 1, § 20; 3 B. & C. 91; Ang. Watercourses 53; Trustees of Hopkins Academy v. Dickinson, 9 Cush. (Mass.) 551; Lovingston v. St. Clair County, 64 Ill. 58, 16 Am. Rep. 516; Gould, Waters § 155.

Conversely, where land is submerged by the gradual advance of the sea, the sovereign acquires the title to the part thereby covered and it ceases to belong to the former owner; Wilson v. Shiveley, 11 Or. 217, 4 Pac. 324; 5 Mees & W. 327, 4 C. P. D. 438; Trustees, etc., of Town of East Hampton v. Kirk, 84 N. Y. 218, 38 Am. Rep. 505.

The proprietor of the bank increased by alluvion is entitled to the addition, this being regarded as the equivalent for the loss he may sustain from the encroachment of the waters upon his land; Chapman v. Hoskins, 2 Md. Ch. Dec. 485; Ingraham v. Wilkinson, 4 Pick. (Mass.) 273, 16 Am. Dec. 342; Murry v. Sermon, 8 N. C. 56; Lamb v. Rickets, 11 Ohio, 311; Municipality No. 2 v. Cotton Press, 18 La. 122, 36 Am. Dec. 624; Handly v. Anthony, 5 Wheat. (U. S.) 380, 5 L. Ed.

113; Gerrish v. Clough, 48 N. H. 9, 97 Am. Dec. 551, 2 Am. Rep. 165; Lovingston v. County of St. Clair, 64 Ill. 56, 16 Am. Rep. 516; Niehaus v. Shepherd, 26 Ohio St. 40; Cook v. McClure, 58 N. Y. 437, 17 Am. Rep. 270; Kraut v. Crawford, 18 Ia. 549, 87 Am. Dec. 414; Jefferis v. Land Co., 134 U. S. 178, 10 Sup. Ct. 518, 33 L. Ed. 872; Freeland v. R. R. Co., 197 Pa. 529, 47 Atl. 745, 58 L. R. A. 206, 80 Am. St. Rep. 850; Rutz v. Seeger, 35 Fed. 188; Goodsell v. Lawson, 42 Md. 348. The increase is to be divided among riparian proprietors by the following rule: measure the whole extent of their ancient line on the river, and ascertain how many feet each proprietor owned on this line; divide the newly-formed river-line into equal parts, and appropriate to each proprietor as many of these parts as he owned feet on the old line, and then draw lines from the points at which the proprietors respectively bounded on the old to the points thus determined as the points of division on the newly-formed shore. In applying this rule, allowance must be made for projections and indentations in the old line; Inhabitants of Deerfield v. Pling Arms, 17 Pick. (Mass.) 41, 28 Am. Dec. 276; Emerson v. Taylor, 9 Greenl. (Me.) 44, 23 Am. Dec. 531; Batchelder v. Kenniston, 51 N. H. 496, 12 Am Rep. 143; Woodbury v. Short, 17 Vt. 387, 44 Am. Dec. 344; see Clark v. Campau, 19 Mich. 325; Johnston v. Jones, 1 Black. (U. S.) 209, 17 L. Ed 117; Kehr v. Snyder, 114 Ill 313, 2 N. E. 68, 55 Am. Rep. 866. Where the increase is instantaneous, it belongs to the sovereign, upon the ground that it was a part of the bed of the river of which he was proprietor; Hagen v. Campbell, 8 Port. (Ala.) 9, 33 Am. Dec. 267; 2 Bla. Com. 269; the character of *allurion* depends upon the addition being imperceptible; 3 B. & C. 91; County of St. Clair v. Lovingston, 23 Wall. (U. S.) 46, 23 L. Ed. 59; Municipality No. 2 v. Cotton Press, 18 La. 122, 36 Am. Dec. 624.

Sea-weed thrown upon a beach, as partaking of the nature of alluvion, belongs to the owner of the beach; Phillips v. Rhodes, 7 Mete. (Mass.) 322; Emans v. Turnbull, 2 Johns. (N. Y.) 322, 3 Am. Dec. 427; 3 B. & Ad. 967; Mather v. Chapman, 40 Conn. 382, 16 Am. Rep. 46; Clement v. Burns, 43 N. H. 609; Trustees of East Hampton v. Kirk, 68 N. Y. 459; *id.*, 84 N. Y. 215, 38 Am. Rep. 505. But sea-weed below low-water mark on the bed of a navigable river belongs to the public; Chapman v. Kimball, 9 Conn. 38, 21 Am. Dec. 707; Mather v. Chapman, 40 Conn. 382, 16 Am. Rep. 46; Nudd v. Hobbs, 17 N. H. 527; Peck v. Lockwood, 5 Day (Conn.) 22.

The doctrine as to alluvion is equally applicable to tide-waters, non-tidal rivers and lakes; Gould, Waters § 155; Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224; County of St. Clair v. Lovingston, 23 Wall. (U. S.) 46, 23 L. Ed. 59; Lovingston v. County, 64 Ill. 56, 16 Am. Rep. 516; Benson v. Morrow, 61 Mo. 345; Ridgway v. Ludlow, 58 Ind. 248; 4 C. P. D. 438; 7 H. & N. 151.

Alluvion differs from avulsion in this, that the latter is sudden and perceptible; County of St. Clair v. Lovingston, 23 Wall. (U. S.) 46, 23 L. Ed. 59. See AVULSION. And see 2 Ld. Raym. 737; Cooper, Inst. l. 2, t. 1; Ang. Waterc. § 53; Phill. Int. Law 255; Ang. Tide Waters 249; Inst. 2. 1. 20; Dig. 41. 1. 7; *id.* 39. 2. 9; *id.* 6. 1. 23; *id.* 41. 1. 5. For an interesting English case involving the *jus alluvion*, see address of M. Crackanthorpe before Am. Bar Assn. Report 1896. See ACCRETION; RIPARIAN PROPRIETORS.

ALLY. A nation which has entered into an alliance with another nation. 1 Kent 69.

A citizen or subject of one of two or more allied nations. 4 C. Rob. Adm. 251; 6 *id.* 205; Miller v. The Resolution, 2 Dall. (U. S.) 15, 1 L. Ed. 263; Dane, Abr. Index

ALMANAC. A book or table containing a calendar of days, weeks, and months, to which various statistics are often added, such as the times of the rising and setting of the sun and moon, etc. Whewell.

The court will take judicial notice of an almanac; 3 Bla. Com. 333; State v. Morris, 47 Conn. 179; Munshower v. State, 55 Md. 11, 39 Am. Rep. 414; Reed v. Wilson, 41 N. J. L. 29; People v. Chee Kee, 61 Cal. 404.

ALMARIA. The archives, or, as they are sometimes styled, muniments of a church or library.

ALMOIN. Alms. See FRANKALMOIN.

ALMONER. One charged with the distribution of alms. The office was first instituted in religious houses and although formerly one of importance is now in England almost a sinecure. See LORD HIGH ALMONER.

ALMS. Any species of relief bestowed upon the poor.

That which is given by public authority for the relief of the poor. Shelf. Mortm. 802, note (X); Hayw. Elect. 263; 1 Dougl. El. Cas. 370; 2 *id.* 107. As to its meaning historically, see 1 Poll. & Maitl. 219.

ALMS FEE. Peter's pence, which see.

ALMSHOUSE. A house for the publicly supported paupers of a city or county. People v. City of New York, 36 Hun (N. Y.) 311. In England an almshouse is not synonymous with a workhouse or poorhouse, being supported by private endowment.

ALNAGER (spelled also *Ulnager*). A public sworn officer of the king, who, by himself or his deputy, looks to the assize of woollen cloth made throughout the land, and to the putting on the seals for that purpose ordained. Statute 17 Ric. II. c. 2; Cowell; Blount; Termes de la Ley.

ALOD, ALODIUM. It is a term used in opposition to *feodum* or *fief*, which means property, the use of which was bestowed up-

on another by the proprietor, on condition that the grantee should perform certain services for the grantor, and upon the failure of which the property should revert to the original possessor. See 1 Poll. & Maitl. 45.

A kind of tenure in England, not infrequently mentioned in Domesday Book. It is a French term and, in Continental law, is opposed to *feudum*. But no such opposition can be traced in the English common law after the Conquest. All ownership of land in England resolved itself into *tenure*, derived from a royal grant in consideration of *service*. There was no independent property in English feudal law like the *dominium* of Roman law, or like the *alleu* of Southern France. Vinogradoff, Engl. Soc. in Eleventh Cent. 236. Maitland (Domesday Book and Beyond 154) takes the same view: "Such sparse evidence as we can obtain from Normandy strengthens our belief that the wide, the almost insuperable gulf that modern theorists have found or set between 'alodial ownership' and 'feudal tenure' was not perceptible in the 11th Century."

These writers express the result of modern research on *alod* in early English institutions. But a different meaning has been given it from Coke down to recent times and, in that sense, has become fixed, as a mode of expression, in our law. This will appear from the following (from the last edition of this work):

An estate held by absolute ownership, without recognizing any superior to whom any duty is due on account thereof. 1 Washb. R. P. (5th ed.) *16.

In the United States the title to land is essentially allodial, and every tenant in fee-simple has an absolute and unqualified dominion over it; yet in technical language his estate is said to be in fee, a word which implies a feudal relation, although such a relation has ceased to exist in any form, while in several of the states the lands have been declared to be allodial; Wallace v. Harmstad, 44 Pa. 492, Matthews v. Ward, 10 Gill & J. (Md.) 443; but see Com. v. Alger, 7 Cush. (Mass.) 92; 2 Sharsw. Bla. Com. 77, n.; 1 Washb. R. P. (5th ed.) *41, *42; Sharsw. Lect. on Feudal Law (1870). In some states, the statutes have declared lands to be allodial. See also Barker v. Dayton, 28 Wis. 367.

In England there is no allodial tenure, for all land is held mediately or immediately of the king; but the words *tenancy in fee-simple* are there properly used to express the most absolute dominion which a man can have over his property; 3 Kent Com. *487; Cruise, Prelim. Dis. c. 1, § 13; 2 Bla. Com. 105.

ALODIAN. Sometimes used for alodial, but not well authorized. Cowell.

ALODIARII. Those who own alodial lands. Those who have as large an estate as a subject can have. Co. Litt.; Bac. Abr. *Tenure* A. But see ALOD.

ALONE. Apart from others; singly; sole. Salem Capital Flour Mills Co. v. Water-Ditch & Canal Co., 33 Fed. 154.

ALONG. By, on, up to or over, according to the subject-matter and context. Church v. Meeker, 34 Conn. 425; Walton v. R. Co., 67 Mo. 58; 1 B. & Adol. 448; Benton v. Horsley, 71 Ga. 619; Stevens v. R. Co., 34 N. J. L. 532, 3 Am. Rep. 269; *id.*, 21 N. J. Eq. 259; but not necessarily touching at all points; Com. v. Franklin, 133 Mass. 569.

ALSO. The word imports no more than "item" and may mean the same as "moreover"; but not the same as "in like manner"; Evans v. Knorr, 4 Rawle (Pa.) 68. It may be (1) the beginning of an entirely different sentence, or (2) a copulative carrying on the sense of the immediately preceding words into those immediately succeeding. Stroud, Jud. Dict., citing 1 Jarm. 497 n.; 1 Salk. 239.

ALTA PRODITIO. High treason.

ALTA VIA. The highway.

ALTARAGE. Offerings made on the altar; all profits which accrue to the priest by means of the altar. Ayliffe, Par. 61.

ALTERATION. A change in the terms of a contract or other written instrument by a party entitled under it, without the consent of the other party, by which its meaning or language is changed.

The term is properly applied to the change in the language of instruments, and is not used of changes in the contract itself. And it is in strictness to be distinguished from the act of a stranger in changing the form or language of the instrument, which is called a *spoliation*. This latter distinction is not always observed in practice, however

Also sometimes applied to a change made in a written instrument, by agreement of the parties, but this use of the word is rather colloquial than technical Such an alteration becomes a new agreement, superseding the original one; Leake, Cont 430.

An alteration avoids the instrument; 11 Coke 27; 5 C. B. 181; Lewis v. Payn, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; Wright v. Wright, 7 N. J. L. 175, 11 Am. Dec. 546, Wegner v. State, 28 Tex. App. 419, 13 S. W. 608; Palmer v. Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; but not, it seems, if the alteration be not material; Bowers v. Jewell, 2 N. H. 543; Nichols v. Johnson, 10 Conn. 192; Smith v. Crooker, 5 Mass. 540; Langdon v. Paul, 20 Vt. 217; Huntington v. Finch, 3 Ohio St. 445; Palmer v. Largent, 5 Neb. 223, 25 Am. Rep. 479; Oliver v. Hawley, 5 Neb. 439; Morrill v. Otis, 12 N. H. 466; King v. Rea, 13 Colo. 69, 21 Pac. 1084; Harper v. Reaves, 132 Ala. 625, 32 South. 721 (a deed); Warder, Bushnell & Glessner Co. v. Stewart, 2 Marv. (Del.) 275, 36 Atl. 88; Crowe v. Beem, 36 Ind. App. 207, 75 N. E. 302. The insertion of such words as the law supplies is said to be not material; Granite Ry. Co. v.

Bacon, 15 Pick. (Mass.) 239; Thornton v. Appleton, 29 Me. 298. As to whether tearing and putting on a seal is material, see Powers v. Ware, 2 Pick. (Mass.) 451; Truett v. Wainwright, 4 Gilm. (Ill.) 411; 11 M. & W. 778. The question of materiality is one of law for the court; Martendale v. Follet, 1 N. H. 95; Brackett Ex'r v. Mountfort, 11 Me. 115; Wheelock v. Freeman, 13 Pick. (Mass.) 165, 23 Am. Dec. 674; Hill v. Calvin, 4 How. (Miss.) 231; Pritchard v. Smith, 77 Ga. 463; and depends upon the facts of each case; L. R. 1 Ex. D. 176. The principle seems to be that a party "is discharged from his liability, if the altered instrument, supposed to be genuine, would operate differently to the original instrument, whether it be or be not to his prejudice;" Anson, Contr. (2d Am. Ed.) *327; 5 E. & B. 89. For instances, see Schwarz v. Oppold, 74 N. Y. 307; Leonard v. Phillips, 39 Mich. 182, 33 Am. Rep. 370; Toomer v. Rutland, 57 Ala. 379, 29 Am. Rep. 722; Robinson v. State, 66 Ind. 331; Moore v. Hutchinson, 69 Mo. 429; Express Pub. Co. v. Aldine Press, 126 Pa. 347, 17 Atl. 608; Warder v. Willyard, 46 Minn. 531, 49 N. W. 300, 24 Am. St. Rep. 250. Alteration of a deed will not defeat a vested estate or interest acquired under the deed; 11 M. & W. 800; 2 H. Bla. 259; Chessman v. Whittemore, 23 Pick. (Mass.) 231; Barrett v. Thorndike, 1 Greenl. (Me.) 73; Withers v. Atkinson, 1 Watts (Pa.) 236; Smith v. McGowan, 3 Barb. (N. Y.) 404; see Bliss v. McIntyre, 18 Vt. 466, 46 Am. Dec. 165; but as to an action upon covenants, has the same effect as alteration of an unsealed writing; 11 M. & W. 800; Chessman v. Whittemore, 23 Pick. (Mass.) 231; Waring v. Smyth, 2 Barb. Ch. (N. Y.) 119, 47 Am. Dec. 299. As to filling blanks, see BLANK.

The same rule as to alterations applies to negotiable promissory notes as to other instruments; Wilson v. Hayes, 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196, 12 Am. St. Rep. 754. The unauthorized insertion of "or bearer" in a note, if made innocently, will not make the note void; Croswell v. Labree, 81 Me. 44, 16 Atl. 331, 10 Am. St. Rep. 238; but the insertion of "or order" will avoid; Taylor v. Moore (Tex.) 20 S. W. 53.

Where the alteration of a promissory note, though made by the holder, is prompted by honest motives, the instrument retains its legal validity and a bill in equity will lie to recover thereon; Wallace v. Tice, 32 Or. 283, 51 Pac. 733; the fraudulent detaching a stub containing conditions favorable to maker, from a note, avoids the note; Stephens v. Davis, 85 Tenn. 271, 2 S. W. 382.

A spoliation by a third party without the knowledge or consent of a party to the instrument will not avoid an instrument even if material, if the original words can be restored with certainty; 1 Greenl. Ev. § 566; Andrews v. Calloway, 50 Ark. 358, 7 S. W. 449; but the material alteration of an instrument by a stranger, *while it is in the custody of the promisee*, avoids his rights under it; 11 Coke 27 *b*; L. R. 10 Ex. 330; because one who "has the custody of an instrument made for his benefit, is bound to preserve it in its original state;" 13 M. & W. 352; 3 E. & B. 687; Leake, Cont. 425; but see Clapp v. Shephard, 23 Pick. (Mass.) 231.

When a note was given by a corporation payable to its manager's wife for his salary, an alteration making it payable to the manager himself is material; Sneed v. Milling Co., 73 Fed. 925, 20 C. C. A. 230.

Where there has been manifestly an alteration of a parol instrument, the party claiming under it is bound to explain the alteration; Wilde v. Armsby, 6 Cush. (Mass.) 314; Simpson v. Stackhouse, 9 Pa. 186, 49 Am. Dec. 554; Hills v. Barnes, 11 N. H. 395; McMicken v. Beauchamp, 2 La. 290; Warren v. Layton, 3 Har. (Del.) 404; Commercial & R. Bank of Vicksburg v. Lum, 7 How. (Miss.) 414; Tillou v. Ins. Co., 7 Barb. (N. Y.) 564; 6 C. & P. 273. As to the rule in case of deeds, see Co. Litt. 225 *b*; 1 Kebl. 22; 5 Eng. L. & Eq. 349; Den v. Farlee, 21 N. J. L. 280.

Under the common law erasures and alterations of written instruments were presumed to have been made at the time of, or anterior to, their execution, the law presuming the honesty of purpose and action until the contrary is shown; Paramore v. Lindsey, 63 Mo. 66; Gooch v. Bryant, 13 Me. 386; Herrick v. Malin, 22 Wend. (N. Y.) 388; North River Meadow Co. v. Christ Church, 22 N. J. L. 424, 53 Am. Rep. 258.

See INTERLINEATION; SPOLIATION.

ALTERNAT. A usage among diplomatists by which the rank and places of different powers, who have the same right and pretensions to procedence, are changed from time to time, either in a certain regular order, or one determined by lot. In drawing up treaties and conventions, for example, it is the usage of certain powers to alternate, both in the preamble and the signatures, so that each power occupies, in the copy intended to be delivered to it, the first place. Wheat. Int. Law § 157.

ALTERNATIVE. Allowing a choice between two or more things or acts to be done.

In contracts, a party has often the choice which of several things to perform. A writ is in the alternative which commands the defendant to do the thing required, or show the reason wherefore he has not done it; Finch 257; 3 Bla. Com. 273. Under the common-law practice, the first *mandamus* is an alternative writ; 3 Bla. Com. 111; but in modern practice this writ is often dispensed with and its place is taken by a rule to show cause. See MANDAMUS.

ALTIUS NON TOLLENDI. In Civil Law. A serviture by which the owner of a house is restrained from building beyond a certain height.

ALTIUS TOLLENDI. In Civil Law. A servitude which consists in the right, to him who is entitled to it, to build his house as high as he may think proper. In general, every one enjoys this privilege, unless he is restrained by some contrary title.

ALTO ET BASSO. High and low.

This phrase is applied to an agreement made between two contending parties to submit all matters in dispute, alto et basso to arbitration. Cowell.

ALTUM MERE. The high sea.

ALUMNUS. A foster-child.

Also a graduate from a school, college, or other institution of learning.

ALVEUS (Lat.). The bed or channel through which the stream flows when it runs within its ordinary channel. Calvinus, Lex. *Alveus derelictus*, a deserted channel. 1 Mackeldey, Civ. Law 280.

AMALGAMATION. Union of different races, or diverse elements, societies, or corporations, so as to form a homogeneous whole or new body; interfusion; intermarriage; consolidation; coalescence; as the amalgamation of stock. Stand. Dict.

In England it is used in the case of the merger of two incorporated companies.

The word has no definite meaning; it involves the blending of two concerns into one; [1904] 2 Ch. 268.

See MERGER; SHAREHOLDER.

AMALPHITAN TABLE. A code of sea laws compiled for the free and trading republic of Amalphi toward the end of the eleventh century. 3 Kent 9.

It consists of the laws on maritime subjects which were or had been in force in countries bordering on the Mediterranean; and, on account of its collecting them into one regular system, it was for a long time received as authority in those countries. 1 Azuni, Mar. Law 376. It became a part of the law of the sea; The Scotia, 14 Wall. (U. S.) 170, 20 L. Ed 822. See CODE.

AMBACTUS (Lat. *ambire*, to go about). A servant sent about; one whose services his master hired out. Spelman, Gloss.

AMBASSADOR IN INTERNATIONAL LAW. Ambassadors formed the first class of the public ministers (q. v.) who were sent abroad by sovereign states with authority to represent their government and to transact business with the government to which they were sent.

A distinction was formerly made between Ambassadors *Extraordinary*, who were sent to conduct special business or to remain for an indeterminate period, and Ambassadors *Ordinary*, who were sent on permanent missions; but this distinction is no longer observed.

Ambassadors are regarded as the personal representatives of the head of the state which sends them, and in consequence they are entitled to special honors, and have special privileges, chiefly that of negotiating personally with the head of the state, though this privilege is of little value at the present day, owing to the general adoption of constitutional forms of government. Only Empires, Kingdoms, Grand Duchies, and great Republics are entitled to send and receive Ambassadors. Until recently the United States was represented by Ministers Plenipotentiary, never having sent persons of the rank of Ambassador in the diplomatic sense. On March 3, 1893, a law was passed authorizing the President to designate as Ambassadors the representatives of the United States to such countries as he might be advised were so represented or about to be represented in the United States. In consequence of this law the United States is now represented by Ambassadors in Great Britain, Germany, Austria-Hungary, France, Italy, Mexico, Brazil, Russia, Japan, Turkey, and Spain.

Before an Ambassador is sent to a foreign country, it is the custom to inquire if the designated person will be a *persona grata* to the government of that country. No reasons need be given by the foreign government for refusing to receive a given individual. After an appointment the Ambassador is provided with a *letter of credence* (q. v.) which identifies him at the foreign court.

The duties of an Ambassador are varied; he is the mouthpiece of communications from his state to the foreign country; he must keep his government informed upon all questions of interest to it; he must see to the protection of citizens of his country resident in the foreign state; and he may negotiate treaties when his government specially empowers him to do so by giving him a document called *Full Powers* (q. v.).

The person of an Ambassador is inviolable. He is exempt from both the criminal and civil jurisdiction of the country to which he is sent. As early as 1708 an act was passed by the British Parliament confirming the immunity of Ambassadors from arrest and imposing heavy penalties upon any persons who should serve a writ or process upon them. They can not be arrested for debt, nor for violation of the law, except in cases where it may be necessary to prevent them from committing acts of violence. If, however, they should be so regardless of their duty and of the object of their immunity as to injure or openly attack the laws of the foreign government, their functions may be suspended by a refusal to treat with them, or application can be made to their own sovereign for their recall, or they may be dismissed or required to depart within a reasonable time.

By what is called the *fiction of ex-territoriality*, the exemption of an ambassador from the jurisdiction of the country in which he resides has been extended to his house and his suite. His house cannot be entered by officers of police, nor can his servants be arrested by the ordinary writ or process. In

consequence, the Ambassador's house has sometimes been used as an asylum (q. v.) for criminals. Much diplomatic controversy has taken place upon this point, and at present asylum is not given, except occasionally, in times of revolution, to political refugees.

An ambassador's children born abroad retain the citizenship of their father; Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642; Moore, IV, §§ 623–695.

AMBIDEXTER (Lat.). Skilful with both hands.

Applied anciently to an attorney who took pay from both sides, and subsequently to a juror guilty of the same offence; Cowell.

AMBIGUITY. Duplicity, indistinctness or uncertainty of meaning of an expression used in a written instrument.

The word "uncertainty" in a suit refers to the uncertainty defined in pleading and does not include ambiguity; Kraner v. Halsey, 82 Cal. 209, 22 Pac. 1137.

Latent is that which arises from some collateral circumstance or extrinsic matter in cases where the instrument itself is sufficiently certain and intelligible. Inhabitants of Jay v. Inhabitants of East Livermore, 56 Me. 107; Tilton v. Bible Society, 60 N. H. 377, 49 Am. Rep. 321; Simpson v. Dix, 131 Mass. 179; Clark v. Woodruff, 83 N. Y. 518.

Patent is that which appears on the face of the instrument; that which occurs when the expression of an instrument is so defective that a court which is obliged to place a construction upon it, cannot, placing itself in the situation of the parties, ascertain therefrom the parties' intention. Williams v. Hichborn, 4 Mass. 205; U. S. v. Cantril, 4 Cra. (U S.) 167, 2 L. Ed. 584; 1 Greenl. Ev. § 292; Ans. Contr. 248; Peisch v. Dickson, 1 Mas. 9, Fed. Cas. No. 10,911; Chambers v. Ringstaff, 69 Ala. 140; Palmer v. Albee, 50 Ia. 429; Nashville Life Ins. Co. v. Mathews, 8 Lea (Tenn.) 499.

The term does not include mere *inaccuracy*, or such uncertainty as arises from the use of peculiar words, or of common words in a peculiar sense; Wigr. Wills 174; 3 Sim. 24; 3 M. & G. 452; Brown v. Brown, 8 Metc. (Mass.) 576; Farmers' & Mechanics' Bank v. Day, 13 Vt. 36; see Fish v. Hubbard's Admr's, 21 Wend. (N. Y.) 651; 8 Bing. 244; and intends such expressions as would be found of uncertain meaning by persons of competent skill and information; 1 Greenl. Ev. § 298.

Latent ambiguities are subjects for the consideration of a jury, and may be explained by parol evidence; 1 Greenl. Ev. § 301; and see Wigr. Wills 48; 5 Ad. & E. 302; 3 B. & Ad. 728; Brown v. Brown, 8 Metc. (Mass.) 576; Astor v. Ins. Co., 7 Cow. (N. Y.) 202; Peisch v. Dickson, 1 Mas. 9, Fed. Cas. No. 10,911. *Patent* ambiguity cannot be explained by parol evidence, and renders the instrument as far as it extends inoperative; Williams v. Hichborn, 4 Mass. 205; New Jersey v. Wilson, 7 Cra. (U. S.) 167, 3 L. Ed. 303; Jarm. Wills (6th Am. Ed) *400. See Neal v. Reams, 88 Ga. 298, 14 S. E. 617; Whaley v. Neill, 44 Mo. App. 320; Horner v. Stillwell, 35 N. J. L. 307; Hollen v. Davis, 59 Ia. 444, 13 N. W. 413, 44 Am. Rep. 688; Pickering v. Pickering, 50 N. H. 349; Hyatt v. Pugsley, 23 Barb. (N. Y.) 285; Crooks v. Whitford, 47 Mich. 283, 11 N. W. 159; Marshall v. Gridley, 46 Ill. 247.

See LATENT AMBIGUITY; PATENT AMBIGUITY.

AMBIT. A boundary line. Ellicott v. Pearl, 10 Pet. (U. S.) 412, 442, 9 L. Ed. 475.

AMBITUS (Lat.). A space beside a building two and a half feet in width, and of the same length as the building; a space two and a half feet in width between two adjacent buildings; the circuit, or distance around. Cicero; Calvinus, Lex.

AMBULANCE. A vehicle for the conveyance of the sick or wounded. In time of war they are considered neutral and must be respected by the belligerents. Oppenheim, Int. L. 126.

AMBULATORY (Lat. *ambulare*, to walk about). Movable; changeable; that which is not fixed.

Ambulatoria voluntas (a changeable will) denotes the power which a testator possesses of altering his will during his lifetime.

AMBUSH. The act of attacking an enemy unexpectedly from a concealed station; a concealed station, where troops or enemies lie in wait to attack by surprise; an ambuscade; troops posted in a concealed place, for attacking by surprise. To lie in wait, to surprise, to place in ambush.

AMELIORATIONS. Betterments. 6 Low. Can. 294; 9 *id.* 503.

AMENABLE. Responsible; subject to answer in a court of justice; liable to punishment.

AMENDE HONORABLE. A penalty imposed upon a person by way of disgrace or infamy, as a punishment for any offence, or for the purpose of making reparation for any injury done to another, as the walking into church in a white sheet, with a rope about the neck and a torch in the hand, and begging the pardon of God, or the king, or any private individual, for some delinquency.

In French Law. A punishment somewhat similar to this, which bore the same name, was common in France; it was abolished by the law of the 25th of September, 1791; Merlin, *Répert.* In 1826 it was re-introduced in cases of sacrilege and was finally abolished in 1830.

For the form of a sentence of Amende Honorable, see D'Agueseau, Œuvres, 43e *Plaidoyer*, tom. 4, p. 246.

In modern usage, an apology.

AMENDMENT. In Legislation. An alteration or change of something proposed in a bill or established as law.

Thus the senate of the United States may amend money-bills passed by the house of representatives, but cannot originate such bills. The constitution of the United States contains a provision for its amendment; U. S. Const. art. 5.

In Practice. The correction, by allowance of the court, of an error committed in the progress of a cause.

Amendments, at common law, independently of any statutory provision on the subject, are in all cases in the discretion of the court, for the furtherance of justice. Under statutes in modern practice, they are very liberally allowed in all formal and most substantial matters, either without costs to the party amending, or upon such terms as the court think proper to order. See JEOFAILLE.

An amendment, where there is something to amend by, may be made in a criminal as in a civil case; 12 Ad. & E. 217; Com. v. Parker, 2 Pick. (Mass.) 550. But an indictment, which is a finding upon the oaths of the grand jury, can only be amended with their consent before they are discharged; 2 Hawk. Pl. Cr. c. 25, §§ 97, 98; Com. v. Child, 13 Pick. (Mass.) 200; State v. McCarthy, 17 R. I. 370, 22 Atl. 282; but see Miller v. State, 68 Miss. 221, 8 South. 273. In many states there are statutory provisions relative to the amendment of indictments; State v. Curtis, 44 La. Ann. 320, 10 South. 784. A bill of exceptions when signed and filed becomes a part of the record and may be amended like any other record; Martin v. R. Co., 53 Ark. 250, 13 S. W. 765; Lefferts v. State, 49 N. J. Law 26, 6 Atl. 521; Pollard v. Rutter, 35 Ill. App. 370; Burdoin v. Town of Trenton, 116 Mo. 358, 22 S. W. 728.

An information may be amended after demurrer; 4 Term 457; 4 Burr. 2568. At common law a mistake in an information may be amended at any time; State v. White, 64 Vt. 372, 24 Atl. 250.

Where a verdict is supported by evidence, a pleading will be considered as amended; Haley v. Kilpatrick, 104 Fed. 647, 44 C. C. A. 102.

Where, in the course of a trial, it appears that the pleadings should be amended, the usual practice is to move that "the declaration (or other pleading) be amended to conform to the facts." Ordinarily no further action is required.

An amended pleading speaks as of the time of the original; Baltimore & O. R. Co. v. McLaughlin, 73 Fed. 519, 19 C. C. A. 551.

It is not permitted by amendment to make an entirely new case; In re Sims, 9 Fed. 440.

AMENDS. A satisfaction given by a wrong-doer to the party injured, for a wrong committed. 1 Lilly, Reg. 81.

By statute 24 Geo. II, c. 44, in England, and by similar statutes in some of the United States, justices of the peace, upon being notified of an intended suit against them, may tender amends for the wrong alleged as done by them in their official character, and, if found sufficient, the tender bars the action; Lake v. Shaw, 5 S. & R. (Pa.) 517.

AMERCEMENT. A pecuniary penalty imposed upon an offender by a judicial tribunal.

The judgment of the court is, that the party be at the mercy of the court (*sit in misericordia*), upon which the *affeerors*—or, in the superior courts, the coroner—liquidate the penalty. As distinguished from a fine, at the old law an *amercement* was for a lesser offence, might be imposed by a court not of record, and was for an uncertain amount until it had been affeered. Either party to a suit who failed was to be amerced *pro clamore falso* (for his false claim); but these amercements have been long since disused; 4 Bla. Com. 379; Bacon, Abr. *Fines* and *Amercements*

The officers of the court, and any person who committed a contempt of court, was also liable to be amerced.

Formerly, if the sheriff failed in obeying the writs, rules, or orders of the court, he might be amerced; but this practice has been generally superseded by attachment. In some of the United States, however, the sheriff may, by statutory provision, be amerced for making a return contrary to the provision of the statute; Coxe 136, 169; Stephens v. Clark, 8 N. J. L. 270; Wright v. Green, 11 N. J. L. 334; President, etc., of Paterson Bank v. Hamilton, 13 N. J. L. 159; Le Roy v. Blauvelt, 13 N. J. L. 341; Dawson v. Holcomb, 1 Ohio, 275, 13 Am. Dec 618; McLin v. Hardie, 25 N. C. 407; Cam. & N. 477; or if he fails to make a return within the proper time; Sharp v. Ross, 7 Ohio Cir. Ct. 55.

AMERCEMENT ROYAL. In Great Britain a penalty imposed on an officer for a misdemeanor in his office.

AMERICAN. Pertaining to the western hemisphere or in a more restricted sense to the United States. See Beardsley v. Selectmen of Bridgeport, 53 Conn. 493, 3 Atl. 557, 55 Am. Rep. 152.

AMEUBLISSEMENT. A species of agreement which by a fiction gives to immovable goods the quality of movable. Merl. Rép.; 1 Low. Can. 25, 58.

AMI (Fr.). A friend. See PROCHEIN AMY.

AMICABLE ACTION. An action entered by agreement of parties.

This practice prevails in Pennsylvania. When entered, such action is considered as if it had been adversely commenced and the defendant had been regularly summoned.

It presupposes that there is a real dispute between the parties, an actual controversy and adverse interests. The parties, to save needless expense and trouble, agree to conduct the suit in an amicable manner; Lord v. Veazie, 8 How. (U. S.) 255, 12 L. Ed.

1067; Adams v. R. Co., 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 275; Ex parte Steele, 162 Fed. 694. It differs entirely from a "Moot" Case (*q. v.*).

An agreement between a county and a proposed buyer of its bonds to prosecute a made-up case to settle the question of the validity of the bonds, prior to issue, at the expense of the county, is void; Van Horn v. Kittitas County, 112 Fed. 1.

See CASE STATED.

AMICUS CURIÆ (Lat. a friend of the court). **In Practice.** A friend of the court.

One who, for the assistance of the court, gives information of some matter of law in regard to which the court is doubtful or mistaken; such as a case not reported or which the judge has not seen or does not, at the moment, recollect; 2 Co. Inst. 178; 2 Viner, Abr. 475.

This custom cannot be traced to its origin, but is immemorial in the English law. It is recognized in the Year Books, and it was enacted in 4 Hen. IV. (1403) that any stranger as "*amicus curiæ*" might move the court, etc. Under the Roman system the *Judex*, "especially if there was but one, called some lawyer to assist him with their counsel" "*sibi advocavit ut in consilio adessent*," Cic. Quint. 2 Gell. xiv. 2; Suet. Lib 33. There was in that day also the "*amicus consiliari*," who was ready to make suggestions to the advocate, and this "*amicus*" was called a "*ministrator;*" Cic. de Orat. II. 75. This custom became incorporated in the English system, and it was recognized throughout the earlier as well as the later periods of the common law. At first suggestions could come only from the barristers or counsellors, although by the statute of Hen. IV. a "bystander" had the privilege. The custom included *instructing, warning, informing,* and *moving* the court. The information so communicated may extend to any matter of which the court takes judicial cognizance; 8 Coke 15.

It is not the function of *amicus curiæ* to take upon himself the management of a cause; Taft v. Transp. Co., 56 N. H. 416; In re Pina's Estate, 112 Cal. 14, 44 Pac. 332; Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; or to proceed by error or appeal; Martin v. Tapley, 119 Mass. 116; or demurrer; Ex parte Henderson, 84 Ala. 36, 4 South. 284; or for a rehearing; People v. Loan Ass'n, 127 Cal. 400, 58 Pac. 822, 59 Pac. 692.

Any one as *amicus curiæ* may make application to the court in favor of an infant, though he be no relation; 1 Ves. Sen. 313; and see Williams v. Blunt, 2 Mass. 215; In re Green's Estate, 3 Brewst. (Pa.) 427; In re Guernsey's Estate, 21 Ill. 443. Any attorney as *amicus curiæ* may move the dismissal of a fictitious suit; Haley v. Bank, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815; Birmingham Loan & Auction Co. v. Bank, 100 Ala. 249, 13 South. 945, 46 Am. St. Rep. 45; Judson v. Jockey Club, 14 Misc. Rep. 562, 36 N. Y. Supp. 128; In re Guernsey's Estate, 21 Ill. 443; or one in which there is no jurisdiction; Williams v. Blunt, 2 Mass. 215; In re Columbia Real Estate Co., 101 Fed. 965; Jones v. City of Jefferson, 66 Tex. 576, 1 S. W. 903; 2 Show. 596; or move to quash a vicious indictment, for in case of trial and verdict, judgment must be arrested; Comberb. 13; or suggest an error which would prevent judgment when the absence of the party prevented a motion in arrest; 2 Show. 297. He may be allowed a reasonable compensation to be taxed by the court; In re St. Louis Institute of Christian Science, 27 Mo. App. 633.

The intervention may be by affidavit; Ex parte Guernsey's Estate, 21 Ill. 443; motion; Haley v. Bank, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815; or oral statement; Olsen v. Ins. Co., 11 Tex. Civ. App. 371, 32 S. W. 446; or it may be requested by the court; Ex parte Randolph, 2 Brock. 447, Fed. Cas. No. 11,558.

The term is sometimes applied to counsel heard in a cause because interested in a similar one; Ex parte Yeager, 11 Grat. (Va.) 656; State v. Rost, 49 La. Ann. 1451, 22 South. 421; and occasionably to strangers suggesting the correction of errors in the proceedings; Year Books 4 Hen. VI. 16; 11 Mod. 137; U. S. v. Gale, 109 U. S. 68, 3 Sup. Ct. 1, 27 L. Ed. 857.

Leave to file briefs as *amicus curiæ* will be denied when it does not appear that the applicant is interested in any other case that will be affected by the decision and the parties are represented by competent counsel, whose consent has not been secured; Northern Securities Co. v. U. S., 191 U. S. 555, 24 Sup. Ct. 119, 48 L. Ed. 299; where many cases are cited in the argument.

The Attorney General of the United States has appeared in the Supreme Court in The Income Tax Cases, 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108; The Corporation Tax Cases, 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; The Safety Appliance Case, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, and the Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. In cases where the United States is not a party, but is substantially interested, it is the practice to ask leave to intervene, or to be heard as *amicus curiæ*, or he is heard by leave of court.

In the Reading Receivership (U. S. C. C. E. D. of Pa., 1893, Dallas, C. J.) certain Union employees petitioned the Court for an order restraining the receivers from discharging the petitioners unless they would dissolve their connections with their Union. The Attorney General, Mr. Olney, sent the Court an argument on behalf of the petitioners. The Court said at bar that, if counsel for the petitioners saw proper to offer it as part of their argument, it would be received. Opposing counsel did not object to it if so offered.

Where the question of the constitutionality of the Employers' Liability Act of 1906 was involved the court permitted an Assistant Attorney General to intervene and to be

heard, though considering that such a practice in a litigation strictly *inter partes* with which the United States had no concern, ought not to be encouraged, in the absence of any statute or law authorizing or directing the Attorney General to support by argument in the courts generally the legislation of Congress where the United States is not a party nor its interests involved in any tangible way; Brooks v. Southern Pac. Co., 148 Fed. 986.

In Mason v. Ry., 197 Mass. 349, 83 N. E. 876, 16 L. R. A. (N. S.) 276, 125 Am. St. Rep. 371, 14 Ann. Cas. 574, on motion of a member of the bar suggesting that the action be dismissed as being virtually brought against the King of England, accompanied by an affidavit establishing that fact, it was held that the action could not be maintained. There was no appearance for defendant.

AMITA (Lat.). An aunt on the father's side.

Amita magna. A great-aunt on the father's side.

Amita major. A great-great-aunt on the father's side.

Amita maxima. A great-great-great-aunt, or a great-great-grandfather's sister. Calvinus, Lex.

AMITINUS. The child of a brother or sister; a cousin; one who has the same grandfather, but different father and mother. Calvinus, Lex.

AMITTERE CURIAM (Lat. to lose court). To be excluded from the right to attend court. Stat. Westm. 2, c. 44.

AMITTERE LIBERAM LEGEM. To lose the privilege of giving evidence under oath in any court; to become infamous, and incapable of giving evidence. Glanville 2.

If either party in a wager of battle cried "craven" he was condemned *amittere liberam legem;* 3 Bla. Com. 340.

AMNESTY. An act of oblivion of past offences, granted by the government to those who have been guilty of any neglect or crime, usually upon condition that they return to their duty within a certain period.

Express amnesty is one granted in direct terms.

Implied amnesty is one which results when a treaty of peace is made between contending parties. Vattel, 1, 4, c. 2, § 20.

Amnesty and pardon are very different. The former is an act of the sovereign power, the object of which is to efface and to cause to be forgotten a crime or misdemeanor; the latter is an act of the same authority, which exempts the individual on whom it is bestowed from the punishment the law inflicts for the crime he has committed; U. S. v. Wilson, 7 Pet. (U. S.) 160, 8 L. Ed. 640 Amnesty is the abolition and forgetfulness of the offence; pardon is forgiveness. A pardon is given to one who is certainly guilty, or has been convicted; amnesty, to those who may have been so; State v. Blalock, 61 N. C. 242.

Their *effects* are also different. That of pardon is the remission of the whole or a part of the punishment awarded by the law,—the conviction remaining unaffected when only a partial pardon is granted; an amnesty, on the contrary, has the effect of destroying the criminal act, so that it is as if it had not been committed, as far as the public interests are concerned.

Their *application* also differs. Pardon is always given to individuals, and properly only after judgment or conviction; amnesty may be granted either before judgment or afterwards, and it is in general given to whole classes of criminals, or supposed criminals, for the purpose of restoring tranquility in the state. But sometimes amnesties are limited, and certain classes are excluded from their operation.

The term *amnesty* belongs to international law, and is applied to rebellions which, by their magnitude, are brought within the rules of international law, but has no technical meaning in the common law, but is a synonym of *oblivion,* which, in the English law, is the synonym of *pardon;* Knote v. U. S., 10 Ct. Cl. 397.

The distinction here taken between pardon and amnesty was formerly drawn rather in a philosophical than legal sense, and it doubtless has its origin in the civil law. It is, however, not recognized in American law, and it is thus referred to: "Some distinction has been made, or attempted to be made, between pardon and amnesty. * * * This distinction is not, however, recognized in our law. The constitution does not use the word 'amnesty', and, except that the term is generally employed where pardon is extended to whole classes or communities instead of individuals, the distinction between them is one rather of philological interest than of legal importance." Knote v. U. S., 95 U S. 149, 24 L. Ed. 442. Amnesty, therefore, may be rather characterized as a general pardon granted to a class of persons by law or proclamation. The act in such case is as properly a pardon as if simply granted to an individual. Indeed, it seems to be generally conceded in the United States that the word "pardon" includes the word "amnesty"; Davies v. McKeeby, 5 Nev. 369, 373.

As to the amnesty proclamation of 29th May, 1865, see Hamilton's Case, 7 Ct. Cl. 444.

The general amnesty granted by President Johnson on Dec. 25, 1868, did not entitle one receiving its benefits to the proceeds of his property previously condemned and sold under the act of 17th July, 1862, the proceeds having been paid into the treasury; Knote v. U. S., 95 U. S. 149, 24 L. Ed. 442. As to amnesty in cases arising out of the War of Secession, see Armstrong's Foundry, 6 Wall. (U. S.) 766, 18 L. Ed. 882; Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. Ed. 366; U. S. v. Klein, 13 Wall. (U. S.) 128, 20 L. Ed. 519; Armstrong v. U. S., 13 Wall. (U. S.) 154, 20 L. Ed. 614; Carlisle v. U. S., 16 Wall. (U. S.) 147, 21 L. Ed. 426; Witkowski's Case, 7 Ct. Cl. 398; Haym's Case, 7 Ct. Cl. 443; Waring's Case, 7 Ct. Cl. 501; Meldrim's Case, 7 Ct. Cl. 595; Scott's Case, 8 Ct. Cl. 457.

As to the power of the president to grant a general amnesty, and whether there is any legislative power to grant pardon and amnesty, see EXECUTIVE POWER; PARDON; CONSTITUTION OF THE UNITED STATES; 34 L. R. A. 251, note.

AMONG. Mingled with or in the same group or class.

As used in the commercial clause of the federal constitution C. J. Marshall defines

it as "intermingled with"; Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 194, 6 L. Ed. 23; and it is sometimes held to be equivalent to between; Hick's Estate, 134 Pa. 507, 19 Atl. 705; Records v. Fields, 155 Mo. 314, 55 S. W. 1021; Senger v. Senger's Ex'r, 81 Va. 687.

AMORTISE. To alien lands in mortmain.

AMORTISSEMENT (Fr.). The redemption of a debt by a sinking fund.

AMORTIZATION. An alienation of lands or tenements in mortmain.

It is used colloquially in reference to paying off a mortgage or other debt by installments, or by a sinking fund.

AMOTION (Lat. *amovere*, to remove; to take away).

An unlawful taking of personal chattels out of the possession of the owner, or of one who has a special authority in them.

A turning out of the proprietor of an estate in realty before the termination of his estate. 3 Bla. Com. 198. See OUSTER.

In Corporations. A removal of an official agent of a corporation from the station assigned to him, before the expiration of the term for which he was appointed. 8 Term 356; 1 East 562; Fuller v. Trustees, 6 Conn. 532; Dill. Mun. Corp. (4th ed.) § 238.

The term is distinguished from *disfranchisement*, which deprives a *member* of a public corporation of all rights as a corporator, while amotion applies only to officers; Richards v. Clarksburg, 30 W. Va. 491, 4 S. E. 774; White v. Brownell, 4 Abb. Pr. N. S. (N. Y.) 162, 192. In Bagg's Case, recognized as a leading one, the distinction between amotion and disfranchisement was not quite clearly noted, 11 Co. 93; and see the observations upon it in Willcock, Mun. Corp. 270. See 24 Cent. L. J. 99, as to the difference between amotion and disfranchisement.

Expulsion is the usual phrase in reference to loss of membership of private corporations. The term seems in strictness not to apply properly to cases where officers are appointed merely during the will of the corporation, and are superseded by the choice of a successor, but, as commonly used, includes such cases.

See DISFRANCHISEMENT; EXPULSION; ASSOCIATION.

The right of amotion of an officer *for just cause* is a common-law incident of all corporations; 1 Burr. 517; 2 Kent 297; 1 Dill. Mun. Corp. (4th ed.) § 251; Richards v. Clarksburg, 30 W. Va. 491, 4 S. E. 774; State v. Judges, 35 La. Ann. 1075; and the power is inherent; Fawcett v. Charles, 13 Wend. (N. Y.) 473; Evans v. Philadelphia Club, 50 Pa. 107, 127; T. Raym. 435; Burr's Ex'r v. McDonald, 3 Gratt. (Va.) 215 (and see 2 Ld. Raym. 1564, where the contrary was asserted, though it may be considered settled as above stated); and in case of mere ministerial officers appointed *durante bene placito*, at the mere pleasure of those appointing him, without notice: Primm v. City of Carondelet, 23 Mo. 22; see 1 Ventr. 77; 2 Show. 70; 11 Mod. 403; Field v. Field, 9 Wend. (N. Y.) 394; O'Dowd v. City of Boston, 149 Mass. 443, 21 N. E. 949. Power to remove is necessarily incidental to the power of appointment and the trustees may remove without assigning any specific cause whenever it is in their judgment in the interest of the corporation; People v. Higgins, 15 Ill. 110. Notice and an opportunity to be heard are requisite where the appointment is *during good behavior*, or the removal is for a specified cause; Field v. Com., 32 Pa. 478; Page v. Hardin, 8 B. Monr. (Ky.) 648; City of Hoboken v. Gear, 27 N. J. L. 265; City of Madison v. Korbly, 32 Ind. 74; Stadler v. City of Detroit, 13 Mich. 346; 10 H. L. Cas. 404.

Before amotion the officer is entitled to notice of hearing, an accusation to be answered, reasonable time for answer, representation by counsel and an adjudication after hearing; Murdock v. Trustees, 12 Pick. (Mass.) 244. Mere acts, which are a cause for amotion, do not create a vacancy till the amotion takes place; State v. Trustees, 5 Ind. 77; Murdock v. Trustees, 12 Pick. (Mass.) 244.

Directors themselves have no implied power to remove one of their own number from office even for cause; nor to exclude him from taking part in their proceedings; Com. v. Detwiller, 131 Pa. 614, 18 Atl. 990, 992, 7 L. R. A. 357. In the absence of a statute authorizing amotion by the directors of one of their number, the power can only be exercised by the stockholders; Scott v. Detroit Young Men's Society's Lessee, 1 Dougl. (Mich.) 149; Fuller v. Trustees, 6 Conn. 532; and see Com. v. Detwiller, 131 Pa. 614, 18 Atl. 990, 992, 7 L. R. A. 357, 360; State v. Trustees, 5 Ind. 77.

The causes for amotion are said by Lord Mansfield (1 Burr. 538) to be:—"*first*, such as have no immediate relation to the office, but are in themselves of so infamous a nature as to render the offender unfit to execute any public franchise (but indictment and conviction must precede amotion for such causes, except where he has left the country before conviction; 1 B. & Ad. 936); *second*, such as are only against his oath and the duty of his office as a corporator, and amount to breaches of the tacit condition annexed to his office; *third*, such as are offences not only against the duty of his office, but also matter indictable at common law." See Com. v. Society, 2 Binn. (Pa.) 448, 4 Am. Dec. 453; Evans v. Philadelphia Club, 50 Pa. 107; 11 Mod. 379.

Sufficient grounds of removal: *Poverty* and inability to pay taxes; 3 Salk. 229; *total desertion of duty;* Bull. N. P. 206; 1 Burr. 541; as to *neglect* of duty, see 1 B. & Ad. 936; 4 Burr. 2004; 2 Stra. 819; 1 Vent. 146; *habitual drunkenness;* 3 Salk. 231; 3 Bulst. 190; *official misconduct* in

the office; 4 Burr. 1999; habitual but not mere casual non-attendance; Murdock v. Trustees, 12 Pick. (Mass.) 244; Fuller v. Trustees, 6 Conn. 532.

Insufficient grounds of removal: *Bankruptcy;* 2 Burr. 723; Atlas Nat. Bank v. Gardner, 8 Biss. 537, Fed. Cas. No. 635; *casual intoxication;* 3 Salk. 231; 1 Rolle 409; *old age;* 2 Rolle 11; *threats, insulting language,* or *libel upon the mayor or officers;* 11 Coke 93; 1 C. & P. 257; 10 Ad. & E. 374.

The K. B. in England will see that a right of amotion of an officer is lawfully exercised; but it will not control the discretion of the corporation, if so exercised; L. R. 5 H. L. 636.

AMOUNT IN CONTROVERSY. See JURISDICTION.

AMOUNT COVERED. The amount that is insured, and for which underwriters are liable for loss under a policy of insurance.

It is limited by that specified in the policy to be insured, and this limit may be applied to an identical subject only, as a ship, a building, or a life; or to successive subjects, as successive cargoes on the same ship, or successive parcels of goods transmitted on a certain canal or railroad during a specified period; and it may also be limited by the terms of the contract to a certain proportion, as a quarter, half, etc., of the value of the subject or interest on which the insurance is made; Jackson v. Ins. Co., 16 B. Monr. (Ky.) 242; Estabrook v. Smith, 6 Gray (Mass.) 574, 66 Am. Dec. 443; Louisiana Mut. Ins. Co. v. Ins. Co., 13 La. Ann. 246; Cushman v. Ins. Co., 34 Me. 487; 39 Eng. L. & Eq. 228.

AMOUNT OF LOSS. The diminution, destruction, or defeat of the value of, or of the charge upon, the insured subject to the assured, by the direct consequence of the operation of the risk insured against, according to its value in the policy, or in contribution for loss, so far as its value is covered by the insurance. 2 Phill. Ins. c. xv., xvi., xvii.; Forbes v. Ins. Co., 1 Gray, (Mass.) 371; Crombie v. Portsmouth Ins. Co., 26 N. H. 389; Flanagan v. Ins. Co., 25 N. J. L. 506; Cincinnati v. Duffield, 6 Ohio St. 200, 67 Am. Dec. 339; Eddy St. Foundry v. Ins. Co., 5 R. I. 426; Merchants' Mut. Ins. Co. v. Wilson, 2 Md. 217; 7 Ell. & B. 172. See Loss.

AMOVEAS MANUS (Lat. that you remove your hands). After office found, the king was entitled to the things forfeited, either lands or personal property; the remedy for a person aggrieved was by "petition," or *"monstrans de droit,"* or *"traverses,"* to establish his superior right. Thereupon a writ issued, *quod manus domini regis amoveantur;* 3 Bla. Com. 260.

AMPARO (Span.). A document protecting the claimant of land till properly authorized papers can be issued. Trimble v. Smithers' Adm'r, 1 Tex. 790.

AMPLIATION. In Civil Law. A deferring of judgment until the cause is further examined.

In this case, the judges pronounced the word *amplius,* or by writing the letters N L. for *non liquet* (*q. v.*), signifying that the cause was not clear. It is very similar to the common-law practice of entering *cur. adv. vult* in similar cases.

In French Law. A duplicate of an acquittance or other instrument.

A notary's copy of acts passed before him, delivered to the parties.

AMUSEMENT. Pastime; diversion; enjoyment. See ENTERTAINMENT; PLACE OF AMUSEMENT; THEATRE.

AMY (Fr.). Friend. See PROCHEIN AMY; NEXT FRIEND.

AN, JOUR ET WASTE. Year, day and waste. See that title.

ANALOGY. The similitude of relations which exist between things compared. See Smith v. State, 63 Ala. 58.

Analogy has been declared to be an argument or guide in forming legal judgments, and is very commonly a ground of such judgments; 3 Bingh. 265; 4 Burr. 1962, 2022, 2068; 6 Ves. 675; 3 Swanst. 561; 3 P. Will. 391; 3 Bro. C. C. 639, n.

ANALYTICAL JURISPRUDENCE. A theory and system of jurisprudence wrought out neither by inquiring for ethical principles or the dictates of the sentiments of justice nor by the rules which may be actually in force, but by analyzing, classifying and comparing various legal conceptions

See JURISPRUDENCE.

ANARCHY. The absence of all political government; by extension, Confusion in government.

The absence of government; a state of society where there is no law or supreme power. Spies v. People, 122 Ill. 253, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

A social theory which regards the union of order with the absence of all direct government of man by man as the political ideal; absolute individual liberty. Cent. Dict.

Taken in its proper sense, the word has nothing to do with disorder or crime, but in the Act of Congress of March 3, 1903, the word "anarchists" is used synonymously with "persons who believe in or advocate the overthrow by force or violence of the government of the United States or of all government or of all forms of law or the assassination of public officials," and this would seem to be the popular sense attaching to the word. In the address of U. M. Rose, President of the American Bar Association in

1902, *criminal* anarchy is defined as the doctrine that organized government should be overthrown by force and violence, or by assassination of the executive head or of any of the executive officials of the government, by any unlawful means. 15 Rep. Am. Bar Assn. 210.

In U. S. v. Williams, 194 U. S. 294, 24 Sup. Ct. 719, 48 L. Ed. 979, it was held that even though an alien anarchist only regarded the absence of government as a political ideal, yet when he sought to attain it by advocating a universal strike and discoursing upon "the legal murder of 1887" (Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320) there was a justifiable inference that he contemplated the ultimate realization of his ideal by the use of force, or that his speeches were incitements to that end. And further, that even if "anarchists" should be interpreted to mean political philosophers innocent of evil intent, yet the tendency of the general exploitation of such views is so dangerous to the public weal that aliens who hold and advocate them would be undesirable additions to the population and their exclusion infringes none of the constitutional guaranties respecting freedom of speech, etc. See ALIEN.

ANATHEMA. A punishment by which a person is separated from the body of the church, and forbidden all intercourse with the faithful.

It differs from excommunication, which simply forbids the person excommunicated from going into the church and taking the communion with the faithful.

ANATOCISM. In Civil Law. Taking interest on interest; receiving compound interest.

ANCESTOR. One who has preceded another in a direct line of descent; an ascendant.

A former possessor; the person last seised. Termes de la Ley; 2 Bla. Com. 201.

In the common law, the word is understood as well of the immediate parents as of those that are higher; as may appear by the statute 25 Edw. III., *De natis ultra mare*, and by the statute 6 Ric II. c. 6, and by many others. But the civilians' relations in the ascending line, up to the great-grandfather's *parents*, and those above them, they term *majores*, which common lawyers aptly expound *antecessors* or ancestors, for in the descendants of like degree they are called *posteriores;* Cary, Litt. 45. The term *ancestor* is applied to natural persons. The words predecessors and successors are used in respect to the persons composing a body corporate. See 2 Bla. Com. 209; Bacon, Abr.; Ayliffe, Pand. 58.

It designates the ascendants of one in the right line, as father and mother, grandfather and grandmother, and does not include collateral relatives as brothers and sisters; Valentine v. Wetherill, 31 Barb. (N. Y.) 659.

ANCESTRAL. What relates to or has been done by one's ancestors; as homage ancestral (see HOMAGE) and the like.

That which belonged to one's ancestors.

Ancestral estates are such as come to the possessor by descent. 3 Washb. R. P. (5th Ed.) 411, 412.

ANCESTRAL ACTIONS. See ABATEMENT.

ANCHOR. A measure containing ten gallons.

The instrument used by which a vessel or other body is held. See The Lady Franklin, 2 Low. 220, Fed. Cas. No. 7,984; Walsh v. Dock Co., 77 N. Y. 448; Reid v. Ins. Co., 19 Hun (N. Y.) 284.

An *Anchor Watch* is one kept by a reduced number of men on a vessel in port or at anchor; The Lady Franklin, 2 Low. 220, Fed. Cas. No. 7,984; it may consist of one man on deck; The Rival, 1 Sprague 128, Fed. Cas. No. 11,867.

ANCHORAGE. A toll paid for every anchor cast from a ship in a port.

Such a toll is said to be incident to almost every port; 1 W. Bla. 413; 4 Term 260; and is sometimes payable though no anchor is cast; 2 Chit. Com. Law 16.

ANCIENT DEEDS. See ANCIENT WRITINGS.

ANCIENT DEMESNE. Manors which in the time of William the Conqueror were in the hands of the crown and are so recorded in the Domesday Book. Fitzh. Nat. Brev. 14, 56.

Tenure in *ancient desmesne* may be pleaded in abatement to an action of ejectment; 2 Burr. 1046.

Tenants of this class had many privileges; 2 Bla. Com. 99.

ANCIENT DOCUMENTS. See ANCIENT WRITINGS.

ANCIENT HOUSE. One which has stood long enough to acquire an easement of support. 3 Kent 437; 2 Washb. R. P. (5th ed.) *74, *76. See EASEMENT; LATERAL SUPPORT.

ANCIENT LIGHTS. Windows or openings which have remained in the same place and condition twenty years or more. Wright v. Freeman, 5 Harr. & J. (Md.) 477; Story v. Odin, 12 Mass. 157, 7 Am. Dec. 46; Thurston v. Hancock, 12 Mass. 220, 7 Am. Dec. 57.

In England, a right to unobstructed light and air through such openings is secured by mere user for that length of time under the same title.

Until the last forty years there was no right of action merely because there was less light than formerly, but only where material inconvenience was caused in ordinary occupations; 1 Dick. 163; 2 C. & P. 465; 5 *id.* 438. This rule was followed in L. R. 4 Eq. 421; [1897] 2 Ch. 214; Ir. Rep. 11 Eq. 541. It is held that one is entitled to as much light as his building may ordinarily require for habitation or business; [1900] 2 K. B. 722. In L. R. [1904] A. C. 179, it is said: "To constitute actionable deprivation

of light, it is not enough that there be less light than before; there must be a substantial deprivation of light,—enough to render occupation uncomfortable according to ordinary notions of mankind." This has been said to be the leading case; 23 L. Q. R. 254. In [1902] 1 K. B. 15, the plaintiffs had an easement of light and needed an extraordinary amount in their business; a newly erected building cut off a substantial amount of it, but enough was left for all ordinary purposes of habitation or business; it was held they were entitled to relief. This case was approved; L. R. 6 Ch. 809; and disapproved; L. R. 4 Eq. 21; 28 L. T. 186. In [1907] A. C. 1, there had been a large obstruction of light by the erection of the defendant's house, and a large interference with the cheerfulness of a room in the plaintiff's house, so that the character of such room had been altered, and it had lost one of its chief advantages, causing a substantial depreciation in the rental value. It was held that an actionable nuisance had been committed. It is said the decision of the House of Lords in [1904] A. C. 179, has left the obstruction of ancient lights still, as it always has been, a question of nuisance or no nuisance, but has readjusted the law in respect to the test of nuisance, and that the test now is, not how much light has been taken, and whether that is enough materially to lessen the enjoyment and use of the house which the owner previously had, but how much light is left, and whether that is enough for the comfortable use and enjoyment of the house according to the ordinary requirements of mankind; 74 L. J. Ch. 621; [1905] 2 Ch. 210.

In the United States, such right is not acquired without an express grant, in most of the states; 2 Washb. R. P. (5th ed.) 62, 63; 3 Kent 446, n. See Cherry v. Stein, 11 Md. 1; Hulley v. Safe Deposit Co., 5 Del. Ch. 578; Parker v. Foote, 19 Wend. (N. Y.) 309; Ward v. Neal, 37 Ala. 501; Pierre v. Fernald, 26 Me. 436, 46 Am. Dec. 573; Keats v. Hugo, 115 Mass. 204, 15 Am. Rep. 80; and cases under AIR. This same doctrine has been upheld in Illinois and Louisiana; Gerber v. Grabel, 16 Ill. 217; Taylor v. Boulware, 35 La. Ann. 469. It is said not to be suited to the conditions of a growing country and that it never became part of our common law; Myers v. Gemmel, 10 Barb. (N. Y.) 537. Other courts decline to adopt the English doctrine; Keats v. Hugo, 115 Mass. 204, 15 Am. Rep. 80; Randall v. Sanderson, 111 Mass. 119; Hoy v. Sterrett, 2 Watts (Pa.) 327, 27 Am. Dec. 313; Doyle v. Lord, 64 N. Y. 439, 21 Am. Rep. 629; Powell v. Sims, 5 W. Va. 1, 13 Am. Rep. 629; Ingraham v. Hutchinson, 2 Conn. 597; Gerber v. Grabel, 16 Ill. 217; and even where it is accepted, its application should be limited to cases where the easement is strictly necessary to the beneficial user of the property granted; Turner v. Thompson, 58 Ga. 268, 24 Am. Rep. 497; 15 Harv. L. Rev. 305.

One who claims that the land adjoining his shall remain unimproved should show an express grant or covenant; Morrison v. Marquardt, 24 Ia. 35, 92 Am. Dec. 444. There can be no such easement by implication over adjoining unimproved land of the grantor; *id.*; Stein v. Hauck, 56 Ind. 68, 26 Am. Rep. 10; Keating v. Springer, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175; Mullen v. Stricker, 19 Ohio St. 135, 2 Am. Rep. 379; Rennyson's Appeal, 94 Pa. 147, 39 Am. Rep. 777; Wilmurt v. McGrane, 16 App. Div. 412, 45 N. Y. Supp. 32. But it has been held that a grantee of land has an easement of light by implied grant over the adjoining unimproved land of his grantor; Sutphen v. Therkelson, 38 N. J. Eq. 318; Knoxville Water Co. v. Knoxville, 200 U. S. 25, 26 Sup. Ct. 224, 50 L. Ed. 353; Janes v. Jenkins, 34 Md. 1, 6 Am. Rep. 300. In 15 L. Q. R. 317, it is said that American courts, in declining to follow the English doctrine, have assumed that it was unknown prior to Independence. It was so said by Bronson, J., in Parker v. Foote, 19 Wend. (N. Y.) 309. But this is said to be incorrect. There is a dictum of Wray, C. J., in Mosely v. Bland (1611), cited in 9 Rep. 58 *b.*, and a reference to it as an established doctrine in 1443 Y. B., 32 Hen. VI, f. 15, and in 4 Del. Ch. 643, it was held that the doctrine was part of the common law of England and of the colonies at the time of American Independence, and as such continued to be the law of Delaware under the constitution adopted in 1776. See AIR.

As between landlord and tenant it is held that a lease of a tenement carries with it an implied grant of the right to light and air from the adjoining land of the landlord where the situation and habitual use of the demised tenement are such that the right is essential to its beneficial enjoyment; Darnell v. Show-Case Co., 129 Ga. 62, 58 S. E. 631, 13 L. R. A. (N. S.) 333, 121 Am. St. Rep. 206; Ware v. Chew, 43 N. J. Eq. 493, 11 Atl. 746; Case v. Minot, 158 Mass. 577, 33 N. E. 700, 22 L. R. A. 536 (where the tenant of an upper floor was held entitled to light and air from a well); Doyle v. Lord, 64 N. Y. 432, 21 Am. Rep. 629; Hazlett v. Powell, 30 Pa. 293; *contra*, Keating v. Springer, 146 Ill. 484, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175; Myers v. Gemmel, 10 Barb. (N. Y.) 537.

As to the right of an abutting owner to light and air over the highway, see AIR.

ANCIENT READINGS. Essays on the early English statutes. Co. Litt. 280.

ANCIENT RECORDS. See ANCIENT WRITINGS.

ANCIENT RENT. The rent reserved at

the time the lease was made, if the building was not then under lease. 2 Vern. 542.

ANCIENT WRITINGS. Deeds, wills, and other writings, more than thirty years old.

They may, in general, be read in evidence without any other proof of their execution than that they have been in the possession of those claiming rights under them; 1 Greenl. Ev. § 141; 12 M. & W. 205; 8 Q. B. 158; 7 Beav. 93; Barr v. Gratz, 4 Wheat. (U. S.) 213, 4 L. Ed. 553; Lessee of Clarke v. Courtney, 5 Pet. (U. S.) 319, 8 L. Ed. 140; Winn v. Patterson, 9 Pet. (U. S.) 663, 9 L. Ed. 266; Jackson v. Blanshan, 3 Johns. (N. Y.) 292, 3 Am. Dec. 485; Middleton v. Mass, 2 Nott. & McC. (S. C.) 55; Duncan v. Beard, *id.* 400; Tolman v. Emerson, 4 Pick. (Mass.) 160; Crane v. Marshall, 16 Me. 27, 33 Am. Dec. 631; Dodge v. Briggs, 27 Fed. 170; O'Donnell v. Johns & Co., 76 Tex. 362, 13 S. W. 376; Pettingell v. Boynton, 139 Mass. 244, 29 N. E. 655; McClaskey v. Barr, 47 Fed. 154; King v. Sears, 91 Ga. 577, 18 S. E. 830; Whitman v. Heneberry, 73 Ill. 109. As to the admission of duplicate copies, see National Commercial Bank v. Gray, 71 Hun 295, 24 N. Y. Supp. 997. See DECLARATION; EVIDENCE.

The rule is broad enough to admit ancient deeds purporting to have been signed by an agent without production of the power of attorney; Wilson v. Snow, 228 U. S. 217, 33 Sup. Ct. 487, 57 L. Ed. —.

Spanish documents produced to and inspected by the court, coming from official custody and bearing on their face every evidence of age and authenticity, and otherwise entitled to admissibility as ancient documents, will not be excluded because subjected to various changes of possession during the transition of the government of Florida from Spain to the United States and during the Civil War, it not appearing that they were ever out of the custody of a proper custodian, that the originals were lost, or that there had been any fraudulent substitution; McGuire v. Blount, 199 U. S. 142, 26 Sup. Ct. 1, 50 L. Ed. 125.

Ancient documents are not admissible in evidence as "public documents" where they were not intended to be so, but to serve temporary purposes only. Also where the records were made by a deceased official, there being nothing to show that they were made contemporaneously with the doing of something which it was the duty of the deceased official to record. In this case it was attempted to prove that certain land, within legal memory, had been covered by the sea. A survey made in 1616 by the Lord Warden of the Cinque Ports and an estimate by the King's engineer for the reparation of certain castles were rejected for the above reasons; [1905] 2 Ch. 538.

Where an instrument itself would be admissible without proof of execution, being over thirty years old, and its absence is satisfactorily accounted for, held that evidence of its contents was likewise admissible without proof of execution; Walker v. Peterson (Tex.) 33 S. W. 269, Dec. 18, 1895.

A deed signed by the grantor by his mark and not witnessed or acknowledged, and therefore insufficient on its face, is inadmissible as an ancient deed without proof of execution; O'Neal v. Railroad Co., 140 Ala. 378, 37 South. 275, 1 Ann. Cas. 319. As a general rule in the case of ancient writings, proof of execution is not necessary; Fulkerson v. Holmes, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. Ed. 915; Whitman v. Heneberry, 73 Ill. 109; such documents when admitted are to be construed as duly executed; Brown v. Wood, 6 Rich. Eq. (S. C.) 155; and the genuineness must be established; McCleskey's Adm'rs v. Leadbetter, 1 Ga. 551; mere antiquity is not enough if the paper appears defective upon its face; Reaume v. Chambers, 22 Mo. 36; Williams v. Bass, 22 Vt. 352; mere production is not sufficient; Fogal v. Pirro, 23 N. Y. Super. Ct. 100; when no consideration is expressed and the words "this indenture" are omitted, it is insufficient; Gitting's Lessee v. Hall, 1 Har. & J. (Md.) 14, 2 Am. Dec. 502. Deeds were admitted, though defective in form and execution, in Hoge v. Hubb, 94 Mo. 489, 7 S. W. 443; Hill v. Lord, 48 Me. 83; White v. Hutchings, 40 Ala. 253, 88 Am. Dec. 766.

ANCIENTS. Gentlemen in the Inns of Courts who are of a certain standing.

In the Middle Temple, all who have passed their readings are termed ancients. In Gray's Inn, the ancients are the oldest barristers; besides which, the society consists of benchers, barristers, and students; in the Inns of Chancery, it consists of ancients and students or clerks.

The *Council of Ancients* was the upper Chamber of the French legislature under the constitution of 1795, consisting of 250, each required to be at least forty years old.

ANCIENTY. Eldership; seniority. Used in the statute of Ireland, 14 Hen. VIII; Cowel.

ANCILLARY (Lat. *ancilla*, a handmaid). Auxiliary, subordinate.

As it is beneath the dignity of the king's courts to be merely ancillary to other inferior jurisdictions, the cause, when once brought there, receives its final determination; 3 Bla. Com. 98.

Used of deeds, and also of an administration of an estate taken out in the place where assets are situated, which is subordinate to the principal administration, which is that of the domicil; 1 Story, Eq. Jur. 13th ed. § 583. See ADMINISTRATION. And in the same way in the case of receiverships. See RECEIVER.

ANCIPITIS USUS (Lat.). Of use for various purposes.

As it is impossible to ascertain the final use of an article *ancipitis usus*, it is not an injurious rule which deduces the final use from its immediate destination; 1 Kent 140.

AND. A conjunction connecting words or phrases expressing the idea that the latter is to be added to or taken along with the first.

It is said to be equivalent to "as well as"; Porter v. Moores, 4 Heisk. (Tenn.) 16.

It is sometimes construed as meaning "or," and has been so treated in the construction of statutes; Bay State Iron Co. v. Goodall, 39 N. H. 223, 75 Am. Dec. 219; U. S. v. Fisk, 3 Wall. (U. S.) 445, 18 L. Ed. 243; 1 U. C. Q. B. 357, deeds; Jackson v. Topping, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515; resolutions of a corporate board of directors; Brown v. Furniture Co., 58 Fed. 286, 7 C. C. A. 225, 22 L. R. A. 817 (per Taft, C. J.); and wills; Sayward v. Sayward, 7 Greenl. (Me.) 210, 22 Am. Dec. 191; 1 Ves. 217; 7 *id.* 453; 4 Bligh U. R. 321; Jackson v. Blanshan, 6 Johns. (N. Y.) 54, 5 Am. Dec. 188 (per Kent, C. J.); Janney v. Sprigg, 7 Gill (Md.) 197, 48 Am. Dec. 557, where the cases are reviewed, as also in a note thereto in 48 Am. Dec. 565.

That the power to change the words is not arbitrary, but only to effectuate the intention, see Armstrong v. Moran, 1 Bradf. Surr. (N. Y.) 314.

The character & has been recognized as "sanctioned by age and good use for perhaps centuries, and is used even at this day in written instruments, in daily transactions, and with such frequency that it may be said to be a part of our language"; Brown v. State, 16 Tex. App. 245. So the abbreviation &c. is said to have "been naturalized in English for ages," and was constantly used by Lord Coke without a suggestion from any quarter that it is not English; Berry v. Osborn, 28 N. H. 279.

See OR.

ANDROLEPSY. The taking by one nation of the citizens or subjects of another in order to compel the latter to do justice to the former. Wolffius, § 1164; Molloy, *de Jure Mar.* 26.

ANECIUS (Lat. Spelled also *æsnecius, enitius, æneas, eneyus* Fr. *aisne*). The eldest-born; the first-born; senior, as contrasted with the *puis-ne* (younger); Burrill, Law Dict. 99; Spelman, Gloss. *Æsnecia.*

ANGARIA. In Roman and Feudal Law. A service exacted by the government for public purposes; in particular, the right of a public officer to require the service of vehicles or ships; personal service exacted from a villein by his lord. Dig. 50, 4, 18, § 29; Spelman, Gloss.

ANGARY, RIGHT OF. In International Law. Formerly the right (*jus angariæ*) claimed by a belligerent to seize merchant vessels in the harbors of the belligerent and to compel them, on payment of freight, to transport troops and supplies to a designated port. It was frequently exercised by Louis XIV. of France, but as a result of specific treaties entered into by states not to exercise the right, it has now come to be abandoned. 2 Opp. 446.

At the present day, the right of a belligerent to appropriate, either for use, or for destruction in case of necessity, neutral property temporarily located in his own territory or in that of the other belligerent. The property may be of any description whatever, provided the appropriation of it be for military or naval purposes.

Requisition of neutral property is justified by military necessity, and accordingly the right of angary is a belligerent right, although the claim of the neutral owner to indemnity properly comes under the law of neutrality (*q. v.*).

An indirect recognition, *a fortiori*, of the duty of the belligerent to pay indemnity may be found in Arts. 52–53 of IV Hague Conf. 1907, which requires the payment of such indemnity when private *enemy* property is requisitioned. Art. 19 of V Hague Conf. 1907, provides that railway material coming from the territory of neutral powers shall not be requisitioned, except in case of absolute necessity, and neutral powers may, under similar necessity, retain railway material coming from the territory of the belligerent, due compensation being made by both sides.

ANGEL. An ancient English coin, of the value of ten shillings sterling. Jacobs, Law Dict.; Cunningham.

ANGILD (Sax.). The bare, single valuation or estimation of a man or thing, according to the legal estimates.

When a crime was committed, before the Conquest, the angild was the money compensation that the person who had been wronged was entitled to receive. Maitl. Domesday Book & Beyond 274.

The terms *twigild, trigild,* denote twice, thrice, etc. *angild. Leges Inœ,* c. 20; Cowell.

ANHLOTE (Sax.). A single tribute or tax. Cunningham. The sense is, that every one should pay, according to the custom of the country, his respective part and share. Spelman, Gloss.

ANIENS. Void; of no force. Fitzherbert, Nat. Brev. 214.

ANIENT (Fr. *anéantir*). Abrogated, or made null. Littleton, § 741.

ANIMAL. Any animate being which is not human, endowed with the power of voluntary motion.

Domitæ are those which have been tamed by man; domestic.

Ferœ naturæ are those which still retain their wild nature.

A man may have an absolute property in animals of a domestic nature; 2 Mod. 319; 2 Bla. Com. 390; but not so in animals *ferœ naturæ*, which belong to him only while in his possession; Wallis v. Mease, 3 Binn. (Pa.) 546; Pierson v. Post, 3 Caines (N. Y.) 175, 2 Am. Dec. 264; Gillet v. Mason, 7 Johns. (N. Y.) 16; State v. Murphy, 8 Blackf. (Ind.)

498; 2 B. & C. 934. Yet animals which are sometimes *feræ naturæ* may be tamed so as to become subjects of property; as an otter; State v. House, 65 N. C. 315, 6 Am. Rep. 744; pigeons which return to their house; 2 Den. Cr. Cas. 362; 4 C. & P. 131; Com. v. Chace, 9 Pick. (Mass.) 15, 19 Am. Dec. 348; or pheasants hatched under a hen; 1 Post. & F. 350. And the flesh of animals *feræ naturæ* may be the subject of larceny; 3 Cox, Cr. Cas. 572; 1 Den. Cr. Cas. 501; 2 C. & K. 981; State v. House, 65 N. C. 315, 6 Am. Rep. 744.

Animals *feræ naturæ* were considered by the Roman law as belonging in common to all the citizens of the state; Geer v. Connecticut, 161 U. S. 319, 16 Sup. Ct. 600, 40 L. Ed. 793; and by the common law the property in game was based on common ownership and subject to governmental authority; 2 Bla. Com. 14. One may have the privilege of hunting wild animals to the exclusion of other persons; 7 Co. 18 *a;* but only by grant of the king or of his officers or by prescription; *id.* (the case of the swans). In the United States the ownership of such animals is vested in the state, not as proprietor, but in its sovereign capacity, as representing the people and for their benefit; Ex parte Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129; State v. Repp, 104 Ia. 305, 73 N. W. 829, 40 L. R. A. 687, 65 Am. St. Rep. 463. It alone has power to control the killing and ownership of wild game; Geer v. Connecticut, 161 U. S. 532, 16 Sup. Ct. 600, 40 L. Ed. 793. Animals wild by nature are subjects of ownership while living only when on the land of the person claiming them; Cal. Civ. Code § 656. Under this provision it was held that one has a right in wild game birds within his game preserves, which entitles him to protect them against trespassers; Kellogg v. King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 66. Deer, when reclaimed and enclosed, are property, Dietrich v. Fargo, 194 N. Y. 359, 87 N. E. 518, 22 L. R. A. (N. S.) 696.

Bees are *feræ naturæ;* Goff v. Kilts, 15 Wend. (N. Y.) 550; but when hived or reclaimed one may have a qualified property in them; Goff v. Kilts, 15 Wend. (N. Y.) 550; Rexroth v. Coon, 15 R. I. 35, 23 Atl. 37, 2 Am. St. Rep. 863; because they "have a local habitation, more often in a tree than elsewhere, and while there they may be said to be within control, because the tree may at any time be felled. But the right to cut it down is in the owner of the soil, and therefore such property as the bees are susceptible of is in him also"; Cooley on Torts 435; State v. Repp, 104 Ia. 305, 73 N. W. 829, 40 L. R. A. 687, 65 Am. St. Rep. 463. The mere finder of them on the land of another acquires no title to the tree or the bees; State v. Repp, 104 Ia. 305, 73 N. W. 829, 40 L. R. A. 687, 65 Am. St. Rep. 463; Gillet v. Mason, 7 Johns. (N. Y.) 16; Merrils v. Goodwin, 1 Root (Conn.) 209. In a suit against the owner of bees for injuries caused by them to horses, it was held that however it might have been anciently, in modern days the bee has become almost as completely domesticated as the ox or the cow; Earl v. Van Alstine, 8 Barb. (N. Y.) 630.

But the ancient rule that animals *feræ naturæ* can only be the subject of property while in actual possession, and that loss of possession without intention to return on the part of the animal carries with it the loss of property by the owner; Mullett v. Bradley, 24 Misc. Rep. (N. Y.) 695, 53 N. Y. Supp. 781; seems inconsistent with the related law governing the responsibility of owners for injuries done by such animals; 12 Harv. L. Rev. 346; as where a bear slipped his collar and in his escape to the woods injured a man, the owner was held liable; Vredenburg v. Behan, 33 La. Ann. 627; but where a sea lion escaped from the possession of its owner and was abandoned by him and recaptured a year afterwards seventy miles from the place of its escape, the owner was held to have lost his property, expressly on the ground of loss of possession; Mullett v. Bradley, 24 Misc. 695, 53 N. Y. Supp. 781; 12 Harv. L. Rev. 346. In Manning v. Mitcherson, 69 Ga. 447, 47 Am. Rep. 764, it was said that to hold that wild animals of a menagerie, should they escape from their owner's immediate possession, would belong to the first person who should subject them to his dominion, would be an injustice.

The common law recognized a property in dogs; State v. Sumner, 2 Ind. 377; Chapman v. Decrow, 93 Me. 378, 45 Atl. 295, 74 Am. St. Rep. 357; Uhlein v. Connack, 109 Mass. 273; and in the United States it is generally recognized by the law; Fisher v. Badger, 95 Mo. App. 289, 69 S. W. 26; Harrington v. Hall, 6 Pennewill (Del.) 72, 63 Atl. 875; Jones v. R. Co., 75 Miss. 970, 23 South. 358; Reed v. Goldneck, 112 Mo. App. 310, 86 S. W. 1104. Such property, however, is held to be of a peculiar character; Chunot v. Larson, 43 Wis. 536, 28 Am. Rep. 567; and of a qualified nature; Woolf v. Chalker, 31 Conn. 121, 81 Am. Dec. 175; City of Hagerstown v. Witmer, 86 Md. 293, 37 Atl. 965, 39 L. R. A. 649. The owner may recover for its wrongful injury; Louisville & N. R. Co. v. Fitzpatrick, 129 Ala. 322, 29 South. 859, 87 Am. St. Rep. 64; Chapman v. Decrow, 93 Me. 378, 45 Atl. 295, 74 Am. St. Rep. 357; Moore v. Electric Co., 136 N. C. 554, 48 S. E. 822, 67 L. R. A. 470; or its conversion; Graham v. Smith, 100 Ga. 434, 28 S. E. 225, 40 L. R. A. 503, 62 Am. St. Rep. 323; or unlawful killing; Wheatley v. Harris, 4 Sneed (Tenn.) 468, 70 Am. Dec. 258; Smith v. Ry. Co., 79 Minn. 254, 82 N. W. 577; State v. Coleman, 29 Utah, 417, 82 Pac. 465; Harrington v. Hall, 6 Pennewill (Del.) 72, 63 Atl. 875. At common law it was not larceny to steal a dog; 4 Bla. Com. 235; Mullaly v. People, 86 N. Y. 365;

State v. Jenkins, 78 N. C. 481; Jenkins v. Ballantyne, 8 Utah, 245, 30 Pac. 760, 16 L. R. A. 689 (see note in 15 Am. Rep. 356); because larceny was a crime punishable by death, and it was thought not fit that a man should die for a dog; Brainard v. Knapp, 9 Misc. 207, 29 N. Y. Supp. 678; but by statute in many of the states it is now made larceny; Com. v. Depuy, 148 Pa. 201, 23 Atl. 896; Patton v. State, 93 Ga. 111, 19 S. E. 734, 24 L. R. A. 732; Johnson v. McConnell, 80 Cal. 545, 22 Pac. 219; Harrington v. Miles, 11 Kan. 481, 15 Am. Rep. 355; City of Carthage v. Rhodes, 101 Mo. 175, 14 S. W. 181, 9 L. R. A. 352; State v. Mease, 69 Mo. App. 581; Harris v. Eaton, 20 R. I. 84, 37 Atl. 308. There is a conflict of opinion as to whether statutes against taking goods or other property shall be construed to include dogs. In subjecting them to taxation they are thereby made the subject of larceny under the generic term personal property or chattel; Com. v. Hazelwood, 84 Ky. 681, 2 S. W. 489; and see Hurley v. State, 30 Tex. App. 335, 17 S. W. 455, 28 Am. St. Rep. 916; Mullaly v. People, 86 N. Y. 365; but by other courts it is held that taxes are not imposed on the theory that they are property, but as police regulations; State v. Doe, 79 Ind. 9, 41 Am. Rep. 599; State v. Lymus, 26 Ohio St. 400, 20 Am. Rep. 772.

A statute requiring dogs to be put on the assessment rolls, and limiting any recovery by the owner to the value fixed by himself for the purpose of taxation, is constitutional; Sentell v. Railroad Co., 166 U. S. 698, 17 Sup. Ct. 693, 41 L. Ed. 1169. In this case the animal was a valuable Newfoundland bitch kept by the owner for breeding purposes and was killed by an electric car. The court held that the statute put a premium upon valuable dogs by giving them a recognized position and permitting the owner to put his own valuation upon them.

They are embraced in the term "all brute creatures"; State v. Giles, 125 Ind. 124, 25 N. E. 159; or "animals"; Warner v. Perry, 14 Hun (N. Y.) 337; State v. Coleman, 29 Utah, 417, 82 Pac. 465; or "domestic animal"; Shaw v. Craft, 37 Fed. 317 (*contra*, State v. Harriman, 75 Me. 562, 46 Am. Rep. 423); and have been held to be included in the term "chattel"; Com. v. Hazelwood, 84 Ky. 681, 2 S. W. 489; see 40 L. R. A. 503 n.; not within the term "other beasts"; U. S. v. Gideon, 1 Minn. 292 (Gil. 226).

They are not considered as being upon the same plane with horses, cattle, sheep and other domesticated animals (see State v. Harriman, 75 Me. 562), but rather in the category of cats, monkeys, parrots, singing birds, etc., kept for pleasure. They are peculiar in that they differ among themselves more widely than any other class of animals, and can hardly be said to have a characteristic common to the entire race. They stand between animals *ferœ naturæ*, in which, until killed, there is no property, and domestic animals, in which the right of property is complete; Sentell v. R. Co., 166 U. S. 698, 17 Sup. Ct. 693, 41 L. Ed. 1169.

A dog cannot lawfully be killed merely for trespassing; Marshall v. Blackshire, 44 Ia. 475; Brent v. Kimball, 60 Ill. 211, 14 Am. Rep. 35; Dinwiddie v. State, 103 Ind. 101, 2 N. E. 290; Bowers v. Horen, 93 Mich. 420, 53 N. W. 535, 17 L. R. A. 773, 32 Am. St. Rep. 513; Fenton v. Bisel, 80 Mo. App. 135; but killing a trespassing dog is justifiable if it be necessary to protect one's property; King v. Kline, 6 Pa. 318; Fisher v. Badger, 95 Mo. App. 289, 69 S. W. 26; and where dogs congregated on one's premises at night and by their noise interfered with the rest of a family, shooting among them was justified, as a reasonable and necessary means to protect the family from a nuisance; Hubbard v. Preston, 90 Mich. 221, 51 N. W. 209, 15 L. R. A. 249, 30 Am. St. Rep. 426.

The owner of any animal, tame or wild, is liable for the exercise of such dangerous tendencies as generally belong to its nature, but not of any not in accordance with its nature, unless the owner or keeper knew, or ought to have known, of the existence of such dangerous tendency; Whart. Negl. § 923. To recover for damages inflicted by a ferocious dog, it is not necessary actually to prove that it has bitten a person before; L. R. 2 C. P. 1; Linnehan v. Sampson, 126 Mass. 511, 30 Am. Rep. 692; Rider v. White, 65 N. Y. 54, 22 Am. Rep. 600; Rowe v. Ehrmanntraut, 92 Minn. 17, 99 N. W. 211; Barclay v. Hartman, 2 Marv. (Del.) 351, 43 Atl. 174; McConnell v. Lloyd, 9 Pa. Super. Ct. 25.

The owner of a mischievous animal, known to him to be so, is responsible, when he permits him to go at large, for the damage he may do; Spring Co. v. Edgar, 99 U. S. 645, 25 L. Ed. 487; Lyons v. Merrick, 105 Mass. 71; Partlow v. Haggarty, 35 Ind. 178; Kightlinger v. Egan, 75 Ill. 141; Meibus v. Dodge, 38 Wis. 300, 20 Am. Rep. 6; Snyder v. Patterson, 161 Pa. 98, 28 Atl. 1006; Shaw v. Craft, 37 Fed. 317; Harvey v. Buchanan, 121 Ga. 384, 49 S. E. 281; Burleigh & Jackson v. Hines, 124 Ia. 199, 99 N. W. 723; he is liable, though not negligent, in the matter of his escape from a close; Hammond v. Melton, 42 Ill. App. 186; Vredenburg v. Behan, 33 La. Ann. 627; Manger v. Shipman, 30 Neb. 352, 46 N. W. 527; 19 Ont. Rep. 39. In Muller v. McKesson, 73 N. Y. 195, 29 Am. Rep. 123, it is said that though it may be, in a certain sense, that the action for injury by vicious animals is based upon negligence, such negligence consists not in the manner of keeping the animal, or the care exercised in respect to confining him, but in the fact that he is ferocious and the owner knows it. The negligence consists in keeping such an animal. See Speckmann v. Kreig, 79 Mo. App. 376. This rule is old: "If an ox gore a man or woman, that they die; then the ox shall

be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit. But if the ox were wont to push with his horn in time past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman; the ox shall be stoned, and his owner also shall be put to death." Exodus xxi, 28, 29.

One knowingly harboring a vicious and dangerous dog is liable for damages sustained by others from its bite; McGurn v. Grubnau, 37 Pa. Super. Ct. 454, 459. In [1908] 2 K. B. Div. 352, Channel, J., said that keeping a dog known to be savage stands on the same footing as keeping a wild beast. It is enough if he occasionally attacks human beings without provocation; Merritt v. Matchett, 135 Mo. App. 176, 115 S. W. 1066; the owner must have had actual knowledge; Muller v. Shufeldt, 114 N. Y. Supp. 1012; Alexander v. Crosby, 143 Ia. 50, 119 N. W. 717; but constructive knowledge has been held sufficient; Merritt v. Matchett, 135 Mo. App. 176, 115 S. W. 1066; the mere fact of the attack does not raise a presumption that the dog was vicious, but it can be established by proof that on previous occasions it had attacked people without provocation; *id.*; and one who has long harbored a vicious dog is presumed to know its propensities; *id.* Running out and barking at horses and persons passing is not, as a matter of law, evidence of viciousness; Muller v. Shufeldt, 114 N. Y. Supp. 1012. Where one kept dogs of the same family and appearance, a person bitten by one of them is not required to prove which one, nor to prove that previous attacks on others were made by the same dog; McGurn v. Grubnau, 37 Super. Ct. Pa. 454, 459.

On the other hand it has been held, that when wild animals are kept for a purpose recognized as not censurable, all that can be demanded of their keeper is that he shall take that superior precaution to prevent their doing mischief which their propensities in that direction justly demand of him; Cooley, Torts (3d ed.) 707, n.; 11 L. R. A. (N. S.) 748, n. One who knowingly, voluntarily and unnecessarily places himself within reach of a ferocious animal which is chained up cannot recover for injuries received; Ervin v. Woodruff, 119 App. Div. 603, 103 N. Y. Supp. 1051; Molloy v. Starin, 113 App. Div. 852, 99 N. Y. Supp. 603. An injunction will lie against keeping a vicious dog without appropriate restraint; it is a nuisance; Rider v. Clarkson, 77 N. J. Eq. 469, 78 Atl. 676, 140 Am. St. Rep. 614.

Any person may justify the killing of ferocious animals; Leonard v. Wilkins, 9 Johns. (N. Y.) 233; Putnam v. Payne, 13 Johns. (N. Y.) 312; Nehr v. State, 35 Neb. 638, 53 N. W. 589, 17 L. R. A. 771.

Running at large is defined as strolling about without restraint or confinement. Morgan v. People, 103 Ill. App. 257.

An animal untethered and unattended in the street in front of its owner's premises was held to be running at large; Decker v. McSorley, 111 Wis. 91, 86 N. W. 554; or trespassing upon the premises of another and not under the immediate control of the owner; Gilbert v. Stephens, 6 Okl. 673, 55 Pac. 1070; but a domestic animal which has escaped from its inclosure without the fault of the owner; Briscoe v. Alfrey, 61 Ark. 196, 32 S. W. 505, 30 L. R. A. 607, 54 Am. St. Rep. 203; Myers v. Lape, 101 Ill. App. 182; and to recover which such owner is making reasonable efforts, is not running at large; Myers v. Lape, 101 Ill. App. 182.

It is unlawful to kill a dog because he is in the street outside of a poultry yard, inclosed by an impassable fence, though the dog had harassed the poultry before, or because of his predatory habits; State v. Smith, 156 N. C. 628, 72 S. E. 321, 36 L. R. A. (N. S.) 910.

It is the duty of the owner of domestic animals to keep them upon his own premises; Klenberg v. Russell, 125 Ind. 531, 25 N. E. 596; Robinson v. R. Co., 79 Mich. 323, 44 N. W. 779, 19 Am. St. Rep. 174. It is the nature of cattle and other animals to stray and to do damage, and the owner is bound to keep them from straying at his peril; Haigh v. Bell, 41 W. Va. 19, 23 S. E. 666, 31 L. R. A. 131. The common law doctrine is that the owner of cattle must fence them in; Taber v. Cruthers, 59 Hun 619, 13 N. Y. Supp. 446; Bulpit v. Matthews, 145 Ill. 345, 34 N. E. 525, 22 L. R. A. 55. He is not compelled to fence the cattle of others out. Owing to change of circumstances, due in part to the settlement of a new country, in many states a different rule prevails. The owner of land must fence out the cattle of others. He need not fence in his own. He takes the risk of loss of or injury to them from their running at large and wandering into danger; Haigh v. Bell, 41 W. Va. 19, 23 S. E. 666, 31 L. R. A. 131; Sprague v. R. Co., 6 Dak. 86, 50 N. W. 617; Buford v. Houtz, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618; Kerwhaker v. R. Co., 3 Ohio St. 179, 62 Am. Dec. 246; Muir v. Thixton, 119 Ky. 753, 78 S. W. 466. To leave uncultivated lands uninclosed is an implied license to cattle to graze on them; Kerwhaker v. R. Co., 3 Ohio St. 179, 62 Am. Dec. 246; Seeley v. Peters, 5 Gilman (Ill.) 142; Comerford v. Dupuy, 17 Cal. 308; Chase v. Chase, 15 Nev. 259; Delaney v. Errickson, 10 Neb. 492, 6 N. W. 600, 35 Am. Rep. 487; Burgwyn v. Whitfield, 81 N. C. 261; Moore v. White, 45 Mo. 206; Little Rock & F. S. Ry. Co. v. Finley, 37 Ark. 562; Lee County v. Yarbrough, 85 Ala. 590, 5 South. 341; Frazier v. Nortinus, 34 Ia. 82; Faut v. Lyman, 9 Mont. 61, 22 Pac. 120; Meyers v. Menter, 63 Neb. 427, 88 N. W. 662. The keeping of live stock is usually under police regulation; Reser v. Umatilla County, 48 Or. 326, 86 Pac. 595, 120 Am. St. Rep. 815; and in many states stat-

utes forbidding animals to run at large, or restricting them or limiting such rights, are in force. By statute in Illinois the common law liability is now restored; Fredrick v. White, 73 Ill. 590; as it is in Pennsylvania; Barber v. Mensch, 157 Pa. 390, 27 Atl. 708. A statute in Idaho prohibits sheep from grazing on the public domain within two miles of a dwelling house. This was held not an unreasonable discrimination against the sheep industry, but rather as a matter of protection to the owners of other grazing cattle, as cattle will not graze and will not thrive upon lands where sheep are grazed to any extent; Bacon v. Walker, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. Ed. 499; and the act was held to be a valid exercise of the police power; Sifers v. Johnson, 7 Ida. 798, 65 Pac. 709, 54 L. R. A. 785, 97 Am. St. Rep. 271; Sweet v. Ballentyne, 8 Ida. 431, 69 Pac. 995. See FENCE.

In the western states cattle are required to be branded. Such marks and brands are evidence of ownership and are a matter of statutory regulation, and the court will take judicial notice that in some states cattle run at large in great stretches of country with no other means of determining their separate ownership than by the marks and brands upon them; New Mexico v. R. Co., 203 U. S. 51, 27 Sup. Ct. 1, 51 L. Ed. 78.

As to the right to impound estrays, see ESTRAY; POUND.

Acts of congress have established a bureau of animal industry, and the Secretary of Agriculture is authorized to use such means as he may deem necessary for the prevention of the spread of pleuro-pneumonia and other diseases of animals. Carriers are forbidden to receive for transportation any live stock affected by any contagious or infectious disease. A state statute for the protection of domestic animals from contagious diseases is not a regulation of commerce between the states simply because it may incidentally or indirectly affect such commerce; Missouri, K. & T. Ry. v. Haber, 169 U. S. 627, 18 Sup. Ct. 488, 42 L. Ed. 878, citing Hennington v. Georgia, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; New York, N. H. & H. R. R. v. New York, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853; and where a statute provides a right of action for injuries arising from disease communicated to domestic cattle by cattle of a particular kind brought into a state, it does not conflict with any regulation established under the authority of congress to prevent the spread of contagious or infectious diseases from one state to another; Missouri, K. & T. Ry. v. Haber, 169 U. S. 627, 18 Sup. Ct. 488, 42 L. Ed. 878. See COMMERCE; INSPECTION LAWS; COMMON CARRIERS.

See AGISTOR; ACCESSION; CRUELTY.

Animals of a base nature are those animals which, though they may be reclaimed, are not such that at common law a larceny may be committed of them, by reason of the baseness of their nature.

Some animals which are now usually tamed come within this class, as dogs and cats; and others which, though wild by nature and often reclaimed by art and industry, clearly fall within the same rule, as bears, foxes, apes, monkeys, ferrets, and the like; Coke, 3d Inst. 109; 1 Hale, Pl. Cr. 511, 512; 1 Hawk. Pl. Cr. 33, § 36; 4 Bla. Com. 236; 2 East, Pl. Cr. 614. See 1 Wms. Saund. 84, note 2.

ANIMAL INDUSTRY, BUREAU OF. See HEALTH.

ANIMO (Lat.). With intention. See ANIMUS, used with various other words.

ANIMUS (Lat., mind). The intention with which an act is done. See INTENT.

ANIMUS CANCELLANDI. An intention to destroy or cancel. See CANCELLATION.

ANIMUS CAPIENDI. The intention to take. 4 C. Rob. Adm. 126, 155.

ANIMUS FURANDI. The intention to steal.

In order to constitute larceny, the thief must take the property *animo furandi;* but this is expressed in the definition of larceny by the word felonious; Coke, 3d Inst. 107; Hale, Pl. Cr. 503; 4 Bla. Com. 229. See 2 Russell, Crimes 96; Rapalje, Larceny, § 18. When the taking of property is lawful, although it may afterwards be converted *animo furandi* to the taker's use, it is not larceny; Bacon, Abr. *Felony*, C; People v. Anderson, 14 Johns. (N. Y.) 294, 7 Am. Dec. 462; Ry. & M. 160, 137; State v. Shermer, 55 Mo. 83; [1895] 2 Ir. 709. See LARCENY; MENS REA; MOTIVE; INTENT.

ANIMUS LUCRANDI. The intention to gain or profit. 3 Kent 357.

ANIMUS MANENDI. The intention of remaining.

To acquire a domicil, the party must have his abode in one place, with the intention of remaining there; for without such intention no new domicil can be gained, and the old will not be lost. See DOMICIL.

ANIMUS MORANDI. The intention to remain or delay.

ANIMUS RECIPIENDI. The intention of receiving.

ANIMUS REPUBLICANDI. The intention of republishing (as a will).

ANIMUS RESTITUENDI. An intention of restoring. Fleta, lib. 3, c. 2, § 3.

ANIMUS REVERTENDI. The intention of returning.

A man retains his domicil if he leaves it *animo revertendi;* In re Miller's Estate, 3 Rawle (Pa.) 312, 24 Am. Dec. 345; 4 Bla. Com. 225; 2 Russ. Cr. 23; Poph. 42, 52; 4 Coke 40. See DOMICIL.

ANIMUS REVOCANDI. An intention to revoke. 1 Powell, Dev. 595.

ANIMUS TESTANDI. An intention to make a testament or will.

This is required to make a valid will; for, whatever form may have been adopted, if there was no *animus testandi*, there can be no will. An idiot, for example, can make no will, because he can have no intention; Beach, Wills 77.

ANNALES. A title given to the Year Books. Burrill, Law Dict. Young cattle; yearlings. Cowell.

ANNALS. Masses said in the Romish church for the space of a year or for any other time, either for the soul of a person deceased, or for the benefit of a person living, or for both. Aylif. Parerg.

ANNATES. First-fruits paid out of spiritual benefices to the pope, being the value of one year's profit. Cowell.

ANNEXATION. The union of one thing to another.

It conveys the idea, properly, of fastening a smaller thing to a larger; an incident to a principal. It has been applied to denote the union of Texas to the United States.

Actual annexation includes every movement by which a chattel can be joined or united to the freehold. Mere juxtaposition, or the laying on of an object, however heavy, does not amount to annexation; Merritt v. Judd, 14 Cal. 64.

Constructive annexation is the union of such things as have been holden parcel of the realty, but which are not actually annexed, fixed, or fastened to the freehold. Sheppard, Touchst. 469; Amos & F. Fixt. 3d ed. See FIXTURES.

ANNI NUBILES (Lat. marriageable years). The age at which a girl becomes by law fit for marriage; the age of twelve.

ANNICULUS (Lat.). A child of a year old. Calvinus, Lex.

ANNO DOMINI (Lat. in the year of our Lord; abbreviated A. D.). The computation of time from the birth of Christ.

In a complaint, the year of the alleged offence may be stated by "A. D.," followed by words expressing the year; Com. v. Clark, 4 Cush. (Mass.) 596. But an indictment or complaint which states the year of the commission of the offence in figures only, without prefixing the letters "A. D.," is insufficient; Com. v. McLoon, 5 Gray (Mass.) 91, 66 Am. Dec. 354. The letters "A. D.," followed by figures expressing the year, have been held sufficient; State v. Hodgeden, 3 Vt. 481; State v. Seamons, 1 G. Greene (Ia.) 418; State v. Reed, 35 Me. 489, 58 Am. Dec. 727; 1 Bennett & H. Lead. Cr. Cas. 512; but the phrase, or its equivalents, may be dispensed with; 12 Q. B. 834; Engleman v. State, 2 Ind. 91, 52 Am. Dec. 494; State v. Munch, 22 Minn. 67; but see Whitesides v. People, Breese (Ill.) 21. See Whart. Prec. 4th ed. (2) n. g.; YEAR OF OUR LORD; INDICTION.

ANNONA. Barley; corn; grain; a yearly contribution of food, of various kinds, for support.

Annona porcum, acorns; *annona frumentum hordeo admixtum*, corn and barley mixed; *annona panis*, bread without reference to the amount. Du Cange; Spelman, Gloss.; Cowell.

The term is used in the old English law, and also in the civil law quite generally, to denote anything contributed by one person towards the support of another; as, *si quis mancipio annonam dederit* (if any shall have given food to a slave); Du Cange.

ANNONÆ CIVILES. Yearly rents issuing out of certain lands and payable to monasteries.

ANNOTATION. In Civil Law. The answers of the prince to questions put to him by private persons respecting some doubtful point of law. See RESCRIPT.

Summoning an absentee; Dig. 1. 5.

The designation of a place of deportation. Dig. 32. 1. 3.

ANNOYANCE. Discomfort; vexation. It is held to mean something less than nuisance. 25 S. J. 30. See NUISANCE.

ANNUAL ASSAY. An annual trial of the gold and silver coins of the United States, to ascertain whether the standard fineness and weight of the coinage is maintained.

At every delivery of coins made by the coiner to a superintendent, it is made the duty of the superintendent, in the presence of the assayer, to take indiscriminately a certain number of pieces of each variety for the annual trial of coins, the number for gold coins being not less than one piece for each one thousand pieces, or any fractional part of one thousand pieces delivered; and for silver coins, one piece for each two thousand pieces, or any fractional part of two thousand pieces delivered. The pieces so taken shall be carefully sealed up in an envelope, properly labelled, stating the date of the delivery, the number and denominations of the pieces enclosed, and the amount of the delivery from which they were taken. These sealed parcels containing the reserved pieces shall be deposited in a pyx, designated for the purpose at each mint, which shall be under the joint care of the superintendent and assayer, and be so secured that neither can have access to its contents without the presence of the other, and the reserved pieces in their envelopes from the coinage of each mint shall be transmitted quarterly to the mint at Philadelphia. A record shall also be kept of the number and denomination of the pieces so delivered, a copy of which shall be transmitted quarterly to the director of the mint; Sect. 40, Act of Feb. 12, 1873; U. S. R. S. § 3539.

To secure a due conformity in the gold and silver coins to their respective standards and weights, it is provided by law that an annual trial shall be made of the pieces reserved for this purpose at the mint and its branches, before the judge of the district court of the United States for the eastern district of Pennsylvania, the comptroller of the currency, the assayer of the assay office at New York, and such other persons as the president shall from time to time designate for that purpose, who shall meet as assay commissioners, on the second Wednesday in February annually, at the mint in Philadelphia, to examine and test, in the presence of the director of the mint, the fineness and weight of the coins reserved by the several mints for this purpose, and may continue their meetings by adjournment, if necessary; and if a majority of the commissioners shall fail to attend at any time appointed for their meeting, then the director of the mint shall call a meeting of the commissioners at such other time as he may deem convenient, and if it shall appear that these pieces do not differ from the standard fineness and weight by a greater quantity than is allowed by law, the trial shall be considered and reported as satisfactory; but if any greater deviation from the legal standard or weight shall appear, this fact shall be certified to the president

of the United States, and if, on a view of the circumstances of the case, he shall so decide, the officer or officers implicated in the error shall be thenceforward disqualified from holding their respective offices; § 48, Act of Feb. 12, 1873 (U. S. R. S. § 3547); *id.* §§ 49, 50 (R. S. §§ 3548, 3549). As to the standard weight and fineness of the gold and silver coins of the United States, see sections of the last-cited act. The limit of allowance for wastage is fixed; § 43, Act of Feb. 12, 1873; R. S. § 3542.

For the purpose of securing a due conformity in the weight of the coins of the United States, the brass troy pound weight procured by the minister of the United States (Mr. Gallatin) at London, in the year 18:7, for the use of the mint, and now in the custody of the director thereof, shall be the standard troy pound of the mint, of the United States, conformably to which the coinage thereof shall be regulated; and it is made the duty of the director of the mint to procure and safely keep a series of standard weights corresponding to the aforesaid troy pound, and the weights ordinarily employed in the transactions of the mint shall be regulated according to such standards at least once in every year under his inspection, and their accuracy tested annually in the presence of the assay commissioners on the day of the annual assay; Act of Feb. 12, 1873; R. S. § 3548.

In England, the accuracy of the coinage is reviewed once in about every four years; no specific period being fixed by law. It is an ancient custom or ceremony, and is called the *Trial of the Pyx;* which name it takes from the pyx or chest in which the specimen-coins are deposited. These specimen-pieces are taken to be a fair representation of the whole money coined within a certain period. It having been notified to the government that a trial of the pyx is called for, the lord chancellor issues his warrant to summon a jury of goldsmiths who, on the appointed day, proceed to the Exchange Office, Whitehall, and there, in the presence of several privy councillors and the officers of the mint, receive the charge of the lord chancellor as to their important functions, who requests them to deliver to him a verdict of their finding. The jury proceed to Goldsmiths' Hall, London, where assaying apparatus and all other necessary appliances are provided, and, the sealed packages of the specimen-coins being delivered to them by the officers of the mint, they are tried by weight, and then a certain number are taken from the whole and melted into a bar, from which the assay trials are made, and a verdict is rendered according to the results which have been ascertained; Encyc. Brit. titles Coinage, Mint, Money, Numismatics.

ANNUAL INCOME. The annual receipts from property. See INCOME; TAX.

ANNUAL RENT. In Scotch Law. Interest.

To avoid the law against taking interest, a yearly rent was purchased; hence the term came to signify interest; Bell, Dict.; Paterson, Comp. §§ 19, 265.

ANNUALLY. Yearly; returning every year.

As applied to interest it is not an undertaking to pay interest at the end of one year only, but to pay interest at the end of each and every year during a period of time, either fixed or contingent; Sparhawk v. Wills, 6 Gray (Mass.) 164.

ANNUITY (Lat. *annuus*, yearly). A yearly sum stipulated to be paid to another in fee, or for life or years, and chargeable only on the person of the grantor. Co. Litt. 144 *b;* 2 Bla. Com. 40; Lumley, Ann. 1; Mayor, etc., of City of New Orleans v. Duplessis, 5 Mart. O. S. (La.) 312; Dav. Ir. 14; Stephens' Ex'rs v. Milnor, 24 N. J. Eq. 358; Wagstaff v. Lowerre, 23 Barb. (N. Y.) 216.

An annuity is different from a rent-charge, with which it is sometimes confounded,—the annuity being chargeable on the person merely, and so far personalty; while a rent-charge is something reserved out of realty, or fixed as a burden upon the estate in land; 2 Bla. Com. 40; Rolle, Abr. 226; Horton v. Cook, 10 Watts (Pa.) 127, 36 Am. Dec. 151. An annuity in fee is said to be a personal fee; for, though transmissible, as is real estate of inheritance; Ambl. Ch. 782; Challis, R. P. 46; liable to forfeiture as a hereditament; 7 Coke, 34 *a;* and not constituting assets in the hands of an executor, it lacks some other characteristics of realty. The husband is not entitled to curtesy, nor the wife to dower, in an annuity; Co. Litt. 32 *a.* It cannot be conveyed by way of use; 2 Wils. 224; is not within the statute of frauds, and may be bequeathed and assigned as personal estate; 2 Ves. Sen. 70; 4 B. & Ald. 59; Roscoe, Real Act. 68, 35; 3 Kent 460.

To enforce the payment of an annuity, an action of annuity lay at common law, but when brought for arrears must be before the annuity determines; Co. Litt. 285. In case of the insolvency or bankruptcy of the debtor, the capital of the constituted annuity becomes exigible; La. Civ. Code, art. 2769; stat. 6 Geo. IV. c. 16, §§ 54, 108; 5 Ves. 708; 4 *id.* 763; 1 Belt, Supp. Ves. 308, 431.

Land charged with an annuity, having descended to heirs at law of which the annuitant is one, is relieved of the annuity only *pro tanto;* but *quære* if the annuitant had acquired the same right by purchase; Addams v. Heffernan, 9 Watts (Pa.) 529.

See CHARGE; LIFE TABLES.

ANNUL. To abrogate, nullify, or abolish; to make void.

It is not a technical word and there is nothing which prevents the idea from being expressed in equivalent words; Woodson v. Skinner, 22 Mo. 24.

ANNULUS ET BACULUS (Lat. ring and staff). The investiture of a bishop was *per annulum et baculum* by the prince's delivering to the prelate a ring and pastoral staff, or crozier. 1 Sharsw. Bla. Com. 378.

ANNUM, DIEM ET VASTUM. See YEAR, DAY AND WASTE.

ANNUS LUCTUS (Lat.). The year of mourning. Code, 5. 9. 2.

It was a rule among the Romans, and also the Danes and Saxons, that the widows should not marry *infra annum luctus* (within the year of mourning); 1 Bla. Com. 457.

In the Transvaal a widower may not remarry within three months and a widow within 300 days, unless by dispensation. In the Orange River Colony the period for a widow is 280 days.

ANNUS UTILIS. A year made up of available or serviceable days. Brissonius; Calvinus, Lex. In prescription, the period of incapacity of a minor, etc., was not counted; it was no part of the *anni utiles*.

ANNUUS REDITUS. A yearly rent; annuity. 2 Sharsw. Bla. Com. 41; Reg. Orig. 158 *b*.

ANONYMOUS. Without name.

Books published without the name of the author are said to be anonymous. Cases in the reports of which the names of the parties are not given are said to be anonymous.

An anonymous society in the Mexican code is one which has no firm name and is designated by the particular designation of the object of the undertaking. The shareholders are liable for debts only to the extent of their shares.

ANSWER. A defence in writing, made by a defendant to the charges contained in a bill or information filed by the plaintiff against him in a court of equity.

In case relief is sought by the bill, the answer contains both the defendant's defence to the case made by the bill, and the examination of the defendant, on oath, as to the facts charged in the bill, of which discovery is sought; Gresley, Eq. Ev. 19; Jeremy's Mitf. Eq. Pl. 15, 16. These parts were kept distinct from each other in the civil law; their union, in chancery, has caused much confusion, in equity pleading; Langd. Eq. Pl. 41; Story, Eq Pl. § 850; Dan. Ch. Pl. & Pr. *711.

As to the *form* of the answer, it usually contains, in the following order: *the title*, specifying which of the defendants it is the answer of, and the names of the plaintiffs in the cause in which it is filed as answer; 8 Ves. 79; 11 *id.* 62; 1 Russ. 441; see McLure v. Colclough, 17 Ala. 89; *a reservation* to the defendant of all the advantages which might be taken by exception to the bill, which is mainly effectual in regard to other suits; Beames, Eq. Pl. 46; Surget v. Byers, 1 Hempst. 715, Fed. Cas. No. 13,629; O'Niell v. Cole, 4 Md. 107; *the substance* of the answer, according to the defendant's knowledge, remembrance, information, and belief, in which the matter of the bill, with the interrogatories founded thereon, are answered, one after the other, together with such additional matter as the defendant thinks necessary to bring forward in his defence, either for the purpose of qualifying or adding to the case made by the bill, or to state a new case on his own behalf; *a general traverse* or denial of all unlawful combinations charged in the bill, and of all other matters therein contained not expressly answered.

The answer must be upon oath of the defendant, or, if of a corporation, under its seal; Langd. Eq. Pl. § 78; Bisp. Eq. 9; Royston v. Royston, 21 Ga. 161; Lahens v. Fielden, 1 Barb. (N. Y.) 22; see Maryland & N. Y. Coal & Iron Co. v. Wingert, 8 Gill (Md.) 170; 1 Dan. Ch. Pl. & Pr. *734; Van Valtenburg v. Alberry, 10 Ia. 264; unless the plaintiff waives an oath; Story, Eq. Pl. § 824; Bingham v. Yeomans, 10 Cush. (Mass.) 58; Chace v. Holmes, 2 Gray (Mass.) 431; Clements v. Moore, 6 Wall. (U. S.) 299, 18 L. Ed. 786; Brown v. Bulkley, 14 N. J. Eq. 306; Wallwork v. Derby, 40 Ill. 527; in which case it must generally be signed by the defendant; 6 Ves. 171, 285; Cooper, Eq. Pl. 326; Van Valtenburg v. Alberry, 10 Ia. 264; and must be signed by counsel; Story, Eq. Pl. § 876; unless taken by commissioners; Davis v. Davidson, 4 McL. 136, Fed. Cas. No. 3,631; 1 Dan. Ch. Pl. & Pr. *732. It is held that a corporation cannot be compelled to answer under oath; Colgate v. Compagnie Française du Telegraphe De Paris à N. Y., 23 Fed. 82; Coca-Cola Co. v. Gay-Ola Co., 200 Fed. 720, 119 C. C. A. 164. Where the bill waives an answer under oath, the waiver is ineffectual unless accepted; Heath v. Ry. Co., Fed. Cas. No. 6,306; and if the defendant, notwithstanding the waiver, answers under oath, the answer has the same effect as if there had been no waiver; Conley v. Nailor, 118 U. S. 127, 6 Sup. Ct. 1001, 30 L. Ed. 112; Woodruff v. R. Co., 30 Fed. 91; but it is held that even if its answer when sworn to is evidence under the equity rule, it cannot prove an affirmative defence; Coca-Cola Co. v. Gay-Ola Co., 200 Fed. 720, 119 C. C. A. 164 (C. C. A. 6 Circ.).

Where bill waives answer under oath, the bill ceases to be a bill of discovery, and the defendant need not answer interrogatories therein; McFarland v. Bank, 132 Fed. 399. An averment that "defendant has no knowledge or belief" as to defendant's corporate capacity is sufficient to put plaintiff on proof thereof; W. L. Wells Co. v. Mfg. Co., 198 U. S. 177, 25 Sup. Ct. 640, 49 L. Ed. 1003.

As to substance, the answer must be full and perfect to all the material allegations of the bill, confessing and avoiding, denying or traversing, all the material parts; Comyns. Dig. *Chauncery*, K, 2; Mayer v. Galluchat, 6 Rich. Eq. (S. C.) 1; Beall v. Blake, 10 Ga. 449; Shotwell's Adm'r v. Struble, 21 N. J. Eq. 31; 24 Beav. 421; not literally merely, but answering the substance of the charge; Mitf. Eq. Pl. 309; Grady v. Robinson, 28 Ala. 289; Pitts v. Hooper, 16 Ga. 442; Smith v. Loomis, 5 N. J. Eq. 60; and see Hogencamp v. Ackerman, 10 N. J. Eq. 267; must be responsive; Howell v. Robb, 7 N. J. Eq. 17; Chambers v. Warren, 13 Ill. 318; Mann v. Betterly, 21 Vt. 326; and must state facts, and not arguments, directly and without evasion; Story, Eq. Pl. § 852; Spivey v. Frazee, 7 Ind. 661; Gates v. Adams, 24 Vt. 70; Thompson v. Mills, 39 N. C. 390; Gamble & Johnston v. Johnson, 9 Mo. 605; without scandal; Langdon v. Pickering, 19 Me. 214; Burr v. Burton, 18 Ark. 215; or impertinence; Langdon v. Goddard,

3 Sto. 13, Fed. Cas. No. 8,061; 6 Beav. 558; Gier v. Gregg, 4 McL. 202, Fed. Cas. No. 5,406; Conwell v. Claypool, 8 Blackf. (Ind.) 124. See 10 Sim. 345; 17 Eng. L. & Eq. 509; Saltmarsh v. Bower & Co., 22 Ala. 221; McIntyre v. Trustees of Union College, 6 Paige (N. Y.) 239; U. S. v. McLaughlin, 24 Fed. 823; Crammer v. Water Co., 39 N. J. Eq. 76; 6 Ves. 456.

Under the modern English practice the form of the answer has been much simplified; 15 & 16 Vict. c. 86, § 17. Under the General Orders of 1852 a form was adopted, though scarcely necessary in view of the absence of all technicality; 2 Dan. Ch. Pr. 724; 3 *id.* 2139. In the United States generally the answer has been simplified, but the variations from the old practice consist mainly in dividing the answer into numbered paragraphs, adjusting its general form to the bill as now drawn (see BILL), and in omitting the clause reserving exceptions (though in practice this is very frequently retained), and the clause denying combination, retaining merely, to form an issue on them, a general traverse of all allegations not expressly answered.

A material allegation in a bill, which is neither expressly admitted or denied, is deemed to be controverted; Glos v. Randolph, 133 Ill. 197, 24 N. E. 426; Yates v. Thompson, 44 Ill. App. 145.

Insufficiency of answer is a ground for exception when some material allegation, charge, or interrogatory is unanswered or not fully answered; West v. Williams, 1 Md. Ch. Dec. 358; Hardeman v. Harris, 7 How. (U. S.) 726, 12 L. Ed. 889; Lea v. Vanbibber, 6 Humphr. (Tenn.) 18. See Lanum v. Steel, 10 Humphr. (Tenn.) 280; McCormick v. Chamberlin, 11 Paige (N. Y.) 543; American Loan & Trust Co. v. R. Co., 40 Fed. 384; 1 Dan. Ch. Pl. & Pr. 760; Blaisdell v. Stevens, 16 Vt. 179.

Where the defendant in equity suffers a default he does not admit facts not alleged in the bill nor conclusions of the pleader from the facts stated; Cramer v. Bode, 24 Ill. App. 219.

An answer may, in some cases, be amended; 2 Bro. C. C. 143; 2 Ves. 85; to correct a mistake of fact; Ambl. 292; 1 P. Wms. 297; but not of law; Ambl. 65; nor any mistake in a material matter except upon evidence of surprise; Howe v. Russell, 36 Me. 124; Smith v. Babcock, 3 Sumn. 583, Fed. Cas. No. 13,008; 1 Bro. C. C. 319; and not, it seems, to the injury of others; Story, Eq. Pl. § 904; Bell's Adm'r v. Hall, 5 N. J. Eq. 49. The court may permit an answer to be amended even after the announcement of the decision of the cause; Arnett v. Welch's Ex'rs, 46 N. J. Eq. 543, 20 Atl. 48. A supplemental answer may be filed to introduce new matter; Suydam v. Truesdale, 6 McL. 459, Fed. Cas. No. 13,656; U. S. v. Morris, 7 Mackey (D. C.) 8; or correct mistakes; 2 Coll. 133; Graham v. Tankersley, 15 Ala. 634; Carey v. Ector, 7 Ga. 99; Coquillard v. Suydam, 8 Blackf. (Ind.) 24; which is considered as forming a part of the original answer. See DISCOVERY; Mitf. Eq. Pl. 244, 254.

The effect of an answer must be overcome by two witnesses or by one witness and corroborating evidence; but the answer of a corporation is not entitled to the same probative force as that of an individual; Langd. Eq. Pl. § 87, citing Union Bank v. Geary, 5 Pet. (U. S.) 111, 8 L. Ed. 60; and the rule does not apply where there is a mere denial made for want of knowledge; Blair v. Silver Peak Mines, 93 Fed. 332.

For an historical account, see 2 Brown, Civ. Law 371, n.; Barton, Suit in Eq.; Langdell's Summary of Equity 41.

By the Equity Rules of the Supreme Court of the United States, in effect February 1, 1913 (198 Fed. xix; 226 U. S. appendix) every defence to a bill in point of law, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or by answer. Defences formerly presentable by plea in bar or abatement shall be made in the answer. It shall in short and simple terms set out the defence to each claim in the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless defendant is without knowledge, in which case he shall so state, such statement operating as a denial. It may state as many defences in the alternative, regardless of consistency, as the defendant deems essential. Counter-claims arising out of the transaction must be stated. Any set-off or counter-claim, which might be the subject of any independent equity suit, may be set up without cross-bill.

In Practice. The declaration of a fact by a witness after a question has been put, asking for it.

ANTAPOCHA (Lat.). An instrument by which the debtor acknowledges the debt due the creditor, and binds himself. A copy of the *apocha* signed by the debtor and delivered to the creditor. Calvinus, Lex.

ANTE JURAMENTUM (Lat.; called also *Juramentum Calumniæ*). The oath formerly required of the parties previous to a suit, —of the plaintiff that he would prosecute, and of the defendant that he was innocent. Jacobs, Dict.; Whishaw.

ANTE LITEM MOTAM. Before suit brought.

ANTE-NUPTIAL. Before marriage; before marriage, with a view to entering into marriage. See CONTEMPLATION OF MARRIAGE.

ANTE-NUPTIAL CONTRACT. A contract made before marriage.

The term is most generally applied to a

contract entered into between a man and woman in contemplation of their future marriage, and in that case it is called a marriage contract.

A wife may waive all right to any portion of the estate of her husband by an ante-nuptial contract, and this is binding on her unless fraud, advantage or collusion can be shown; Edwards v. Martin, 39 Ill. App. 145. An ante-nuptial agreement that the wife shall claim no right of dower does not deprive her of her distributive share in the husband's personal property; Pitkin v. Peet, 87 Ia. 268, 54 N. W. 215. A contract by which each agreed to make no claim to the property of the one dying first is void so far as dower is concerned, as it makes no provision in lieu thereof; Brandon v. Dawson, 51 Mo. App. 237.

Conveyances made by one of two persons about to be married, usually called marriage settlements.

They are usually made in contemplation of marriage, for the benefit of the married pair, or one of them, or for the benefit of some other persons; as their children. They may be of either personal or real estate. Such settlements vest the property in trustees upon specified terms, usually, for the benefit of the husband and wife during their joint lives, and then for the benefit of the survivor for life, and afterwards for the benefit of children.

Ante-nuptial agreements of this kind will be enforced in equity by a specific performance of them, provided they are fair and valid and the intention of the parties is consistent with the principles and policy of law; Barnett v. Goings, 8 Blackf. (Ind.) 284, 44 Am. Dec. 766; Eaton v. Tillinghast, 4 R. I. 276; Whichcote v. Lyle's Ex'rs, 28 Pa. 73; Magniac v. Thompson, 7 Pet. (U. S.) 348, 8 L. Ed. 709; Neves v. Scott, 9 How. (U. S.) 196, 13 L. Ed. 102. Settlements after marriage, if made in pursuance of an agreement in writing entered into prior to the marriage, are valid both against creditors and purchasers; Reinhart v. Miller, 22 Ga. 402, 68 Am. Dec. 506.

A conveyance by the husband or wife prior to marriage, which, if permitted, would deprive the other of his or her marital rights in the property conveyed.

In Chandler v. Hollingsworth, 3 Del. Ch. 99, considering equitable relief against ante-nuptial agreements, Bates, Ch., held that the husband will be protected against a voluntary conveyance or settlement, by his intended wife, of all her estate, to the exclusion of the husband, made pending an engagement of marriage, without his knowledge, even in the absence of express misrepresentation or deceit, and whether the husband knew of the existence of the property or not; and that the wife's dower will be protected against the voluntary conveyance of the husband, under like circumstances. A settlement after marriage conveying property in execution of an oral ante-nuptial agreement is void as against creditors; 2 De G. & J. 76. But they have been allowed; Hussey v. Castle, 41 Cal. 239; Brown v. Lunt, 37 Me. 423. By an oral ante-nuptial agreement a husband agreed to convey to trustees, when it should come into possession, a reversion belonging to his wife to be held on certain trusts, which under voluntary settlements would not be valid as against creditors. In a post-nuptial writing the husband covenanted to perform the oral agreement. He afterwards became bankrupt. It was held that, the one agreement being oral and the other gratuitous, the trustee in bankruptcy would not be ordered to perform; [1901] 2 Ch. 145. It has been held that marriage is sufficient part performance to make the contract binding; Nowack v. Berger, 133 Mo. 24, 34 S. W. 489, 31 L. R. A. 810, 54 Am. St. Rep. 663; Chandler v. Hollingsworth, 3 Del. Ch. 99.

See MARRIAGE SETTLEMENT.

ANTEDATE. To put a date to an instrument of a time before the time it was written.

ANTENATI (Lat. born before). Those born in a country before a change in its political condition such as to affect their allegiance.

The term is ordinarily applied by American writers to denote those born in this country prior to the Declaration of Independence. It is distinguished from *postnati*, those born after the event.

As to the rights of British *antenati* in the United States, see Apthorp v. Backus, Kirby (Conn.) 413, 1 Am. Dec. 26; Miller v. English, 6 N. J. Eq. 305; Adams v. Ryerson, 6 N. J. Eq. 337; Kilham v. Ward, 2 Mass. 236, 244; Jackson v. Wright, 4 Johns. (N. Y.) 75; Hunter v. Fairfax's Devisee, 1 Munf. (Va.) 218; Com. v. Bristow, 6 Call (Va.) 60; Jackson's Lessee v. Burns, 3 Binn. (Pa.) 75; Dawson v. Godfrey, 4 Cra. (U. S.) 321, 2 L. Ed. 634; Inglis v. Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 7 L. Ed. 617. As to the use of the term in England, see 7 Coke 1, 27; 2 B. & C. 779; 5 *id.* 771; 1 Wood. Lect. 382; POSTNATI.

ANTHROPOMETRY. A word given by a French savant, Alphonse Bertillon, to a system of identification depending on the unchanging character of certain measurements of parts of the human frame. It was largely adopted after its introduction in France in 1883, but fell into disfavor as being costly and as liable to error. It has given place to the "finger print" system devised by Francis Galton, which was adopted in Bengal by the Indian government in 1897 and in England three years later. Encycl. Br. *Anthropometry.* This method is in use also in Ger-

many and Italy; in other countries both systems are used; 4 Towns. Cr. Law 301.

See report of United States Commissioner of Education, 1895–6, vol. 2, c. 28, where the Bertillon system is fully described and statutes of Massachusetts, New York Pennsylvania, etc., are collected. See also Wigmore, Jud. Proof 79.

The Bertillon system was based upon: (1) The almost absolute immutability of the human frame after the twentieth year of age; the growth thereafter, being only of the thigh bone, is so little that it is easy to make allowance for it. (2) The diversity of dimension of the human skeleton of different subjects is so great that it is difficult, if not impossible, to find two individuals whose bony structure is even sufficiently alike to make confusion between them possible. (3) The facility and comparative precision with which certain dimensions of the skeleton may be measured in the living subject by calipers of simple construction. The measurements which, as the result of minute criticism, have been preferred, are as follows: (1) Height (man standing); (2) reach (finger tip to finger tip); (3) trunk (man sitting); (4) length; (5) width; (6) length of right ear; (7) width of right ear; (8) length of left foot; (9) length of left middle finger; (10) length of left little finger; (11) length of left forearm.

See ROGUES' GALLERY.

ANTI-MANIFESTO. The declaration of the reasons which one of the belligerents publishes, to show that the war as to him is defensive. Wolffius § 1187.

ANTI-TRUST ACTS. Federal and state statutes to protect trade and commerce from unlawful restraints and monopolies. See U. S. v. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; RESTRAINT OF TRADE.

ANTICHRESIS. In Civil Law. An agreement by which the debtor gives to the creditor the income from the property which he has pledged, in lieu of the interest on his debt. Guyot, *Répert.*; Story Bailm. § 344.

It is analogous to the Welsh mortgage of the common law. In the French law, if the income was more than the interest, the debtor was entitled to demand an account of the income, and might claim any excess; La Civ. Code, 2085. See Dig. 20. 1. 11; *id.* 13. 7. 1; Code, 8. 28 1, Livingston's Ex'x v Story, 11 Pet. (U S) 351, 9 L. Ed. 746; 1 Kent 137; Calderwood v. Calderwood, 23 La. Ann. 658.

ANTICIPATION (Lat. *ante*, before, *capere*, to take). The act of doing or taking a thing before its proper time.

In deeds of trust there is frequently a provision that the income of the estate shall be paid by the trustee as it shall accrue, and not by way of anticipation. A payment made contrary to such provision would not be considered as a discharge of the trustee; Bisp. Eq. 104.

As to the use of the term in patent law, see PATENT.

ANTICIPATORY BREACH OF CONTRACT. See BREACH.

ANTINOMIA. In Roman Law. A real or apparent contradiction or inconsistency in the laws. Merlin, *Répert.*

It is sometimes used as an English word, and spelled Antinomy.

ANTIQUA CUSTUMA (L. Lat. ancient custom). The duty due upon wool, woolfells, and leather under the statute 3 Edw. I.

The distinction between *antiqua* and *nova custuma* arose upon the imposition of an increased duty upon the same articles, in the twenty-second year of his reign; Bacon, Abr. *Smuggling*, C. 1.

ANTIQUA STATUTA. Also called *Vetera Statuta*. English statutes from the time of Richard First to Edward Third. Reeves, Hist. Eng. Law 227. See NOVA STATUTA.

ANTIQUARE. In Roman Law. To resolve a former law or practice; to reject or vote against a new law; to prefer the old law. Those who voted against a proposed law wrote on their ballots the letter "A," the initial of *antiquo*, I am for the old law; Calvin; Black, Dict.

ANTIQUITIES. The act of June 8, 1906, provides for the punishment of any person who shall injure or destroy, etc., any historic or prehistoric ruin, or object of antiquity, on any government lands. See LANDMARKS.

ANTITHETARIUS. In Old English Law. A man who endeavors to discharge himself of the crime of which he is accused, by retorting the charge on the accuser. He differs from an approver in this, that the latter does not charge the accuser, but others; Jacobs, Law Dict.

ANY. Some; one out of many; an indefinite number.

It is synonymous with "either;" State v. Antonio, 3 Brev. (S. C) 562, 3 Wheel. Crim. Law Cas. 508; and is given the full force of "every" or "all"; Logan v. Small, 43 Mo. 254; 4 Q. B. D. 409, McMurray v. Brown, 91 U. S. 265, 23 L. Ed. 321; L. R. 5 H. L. 134; but its generality may be restricted by the context; 6 Q. B. D. 607.

ANY TERM OF YEARS. In Massachusetts, this term, in the statutes relating to additional punishment, means not less than two years. Ex parte Seymour, 14 Pick. (Mass.) 40; Ex parte Dick, *id.* 86; Ex parte White, *id.* 90; Ex parte Stevens, *id.* 94.

APANAGE. In French Law. A portion set apart for the use and support of the younger ones, upon condition, however, that it should revert, upon failure of male issue, to his original donor and his heirs. Spelman, Gloss.

APARTMENT. A part of a house occupied by a person, while the rest is occupied by another or others. 7 M. & G. 95; 6 Mod. 214; Woodf. L. & T. (1st Am. ed.) 660. "Apartments is a proper description of the premises so occupied:" 7 M. & G. 95.

The occupier of part of a house, where the

landlord resides on the premises and retains the key of the outer door, is held a mere lodger, and is not a person occupying "as owner or tenant;" 7 M. & G. 85.

If a house, originally entire, be divided into several apartments, with an outer door to each apartment, and no communication with each other, the several apartments shall be rated as distinct mansion houses; but if the owner live therein, all the untenanted apartments shall be considered as parts of his house; 6 Mod. 214.

A flat or flat house is a building consisting of more than one story in which there are one or more suites of rooms on each floor equipped for private house-keeping purposes. An apartment house is either a building otherwise termed a flat or it is a building divided into separate suites of rooms intended for residence, but commonly without facilities for cooking; Lignot v. Jaekle, 72 N. J. Eq. 233, 65 Atl. 221.

By the lease of apartments in a building, in a town, for the purpose of trade, the lessee takes only such interests in the subjacent lands as is dependent upon the enjoyment of the apartments rented and necessary thereto; and if they are totally destroyed by fire, this interest ceases; McMillan v. Solomon, 42 Ala. 356, 94 Am. Dec. 654. See Cunningham v. Entrekin, 34 W. N. C. (Pa.) 353.

In an indictment for "entering a *room* or *apartment*, with the intention to commit larceny," it is right to charge the ownership of the room to be his who rented it from one who had the general supervision and control of the whole house, and occupied the same as a lodger; People v. St. Clair, 38 Cal. 137.

See FLAT.

APERTA BREVIA. Open, unsealed writs. Rap. & Lawr. Law Dict.

APEX JURIS (Lat. the summit of the law). A term used to indicate a rule of law of extreme refinement. A term used to denote a stricter application of the rules of law than is indicated by the phrase *summum jus*. Dennis v. Ludlow, 2 Caines (N. Y.) 117; Ex parte Foster, 2 Sto. 143, Fed. Cas. No. 4,960; Hinsdale v. Miles, 5 Conn. 334; 1 Burr. 341; 14 East 522. See Co. Litt. 304b; Wing. Max. 19; MAXIMS, *apices juris, etc.*

APHASIA. Loss of the power of using words properly, of comprehending them when spoken or written or of remembering the nature and uses of familiar objects. *Sensory aphasia* or *apraxia* is an inability to recognize the use or import of objects or the meaning of words, and includes *word blindness* and *word deafness*, visual and auditory asphasia. *Motor asphasia* is a loss of memory of the efforts necessary to pronounce words, and often includes *agraphia*, or the inability to write words of the desired meaning.

APICES LITIGANDI. Extremely fine points or subtleties of litigation nearly equivalent to the modern phrase "sharp practice." Rap. & Lawr. Law Dict., citing 3 Burr. 1243.

APOCA (Lat.). A writing acknowledging payments; acquittance.

It differs from acceptilation in this, that acceptilation imports a complete discharge of the former obligation whether payment be made or not; *apoca* discharge only upon payment being made. Calvinus, Lex.

APOCRISARIUS (Lat.). **In Civil Law.** A messenger; an ambassador.

Applied to legatees or messengers, as they carried the messages (*ἀπόκριαεις*) of their principals. They performed several duties distinct in character, but generally pertaining to ecclesiastical affairs.

A messenger sent to transact ecclesiastical business and report to his superior; an officer who had charge of the treasury of a monastic edifice; an officer who took charge of opening and closing the doors. Du Cange; Spelman, Gloss.; Calvinus, Lex.

Apocrisarius Cancellarius. An officer who took charge of the royal seal and signed royal despatches.

Called, also, *secretarius, consiliarius* (from his giving advice); *referendarius; a consiliis* (from his acting as counsellor); *a responsis*, or *responsalis*.

APOGRAPHIA. **In Civil Law.** An examination and enumeration of things possessed; an inventory. Calvinus, Lex.

APOPLEXY. **In Medical Jurisprudence.** The group of symptoms arising from rupture of a minute artery and consequent hemorrhage into the substance of the brain or from the lodgment of a minute clot in one of the cerebral arteries.

The symptoms consist usually of sudden loss of consciousness, muscular relaxation, lividity of the face and slow stertorous respiration, lasting from a few hours to several days. Death frequently ensues. If consciousness returns, there is found paralysis of some of the voluntary muscles, very frequently of the muscles of the face, arm, and leg upon one side, giving the symptom of hemiplegia. There is usually more or less mental impairment.

The mental impairment presents no uniform characters, but varies indefinitely, in extent and severity, from a little failure of memory, to an entire abolition of all the intellectual faculties. The power of speech is usually more or less affected; it may be a slight difficulty of utterance, or an inability to remember certain words or parts of words, or an entire loss of the power of articulation. This feature may arise from two different causes—either from a loss of the power of language, or a loss of power in the muscles of the larynx. This fact must be borne in mind by the medical jurist, and there can be little difficulty in distinguishing between them. In the latter, the patient is as capable as ever of reading, writing, or understanding spoken language. In the former, he is unable to communicate his thoughts by writing, because they are disconnected from their articulate signs. He recognizes their meaning when he sees them, but cannot recall them by any effort of the

perceptive powers. This affection of the faculty of language is manifested in various ways. One person loses all recollection of the names of persons and things, while other parts of speech are still at command. Another forgets everything but substantives, and only those which express some mental quality or abstract idea. Another loses the memory of all words but yes or no. In these cases the patient is able to repeat the words on hearing them pronounced, but, after a second or third repetition, loses them altogether.

See APHASIA.

Wills and contracts are not unfrequently made in that equivocal condition of mind which sometimes follows an attack of apoplexy or paralysis; and their validity is contested on the score of mental incompetency. In cases of this kind there are, generally, two questions at issue, viz., the absolute amount of mental impairment, and the degree of foreign influence exerted upon the party. They cannot be considered independently of each other. Neither of them alone might be sufficient to invalidate an act, while together, even in a much smaller degree, they would have this effect.

In testing the mental capacity of paralytics, reference should be had to the nature of the act in question. The question is not, had the testator sufficient capacity to make *a* will? but, had he sufficient capacity to make *the* will in dispute? A capacity which might be quite adequate to a distribution of a little personal property among a few near relatives would be just as clearly inadequate to the disposition of a large estate among a host of relatives and friends possessing very unequal claims upon the testator's bounty. Here, as in other mental conditions, all that is required is mind sufficient for the purpose, neither more nor less. See DEMENTIA; DELIRIUM; IMBECILITY; MANIA. In order to arrive at correct conclusions on this point, we must be careful, among other things, not to confound the power to appreciate the terms of a proposition with the power to discern its relations and consequences.

In testing the mental capacity of one who has lost the power of speech, it is always difficult, and often impossible, to arrive at correct results. If the person is able and willing to communicate his thoughts in writing, his mental capacity may be clearly revealed. If not disposed to write, he may communicate by constructing words and sentences by the help of a dictionary or block letters. Failing in this, the only other intellectual manifestation possible is the expression of assent or dissent by signs to propositions made by others. Any of these means of communication, other than that of writing, must leave us much in the dark respecting the amount of intellect possessed by the party. If the act in question is complicated in its relations, if it is unreasonable in its dispositions, if it bears the slightest trace of foreign influence, it cannot but be regarded with suspicion. If the party has only the power of assenting or dissenting, it must always be impossible to decide whether this does not refer to the terms rather than the merits of the proposition; and, therefore, an act which bears no other evidence than this of the will of the person certainly ought not to be established. Besides, it must be considered that a will drawn up in this manner is, actually, not the will of the testator, since every disposition has originated in the minds of others; Ray, Med. Jur. 363. The phenomena and legal consequences of paralytic affections are extensively discussed in Clark v. Fisher, 1 Paige (N. Y.) 171, 19 Am. Dec. 402; 1 Hagg. Eccl. 502, 577; 2 *id.* 84; 1 Curt. Eccl. 782; Parish Will Case, 4 vols. N. Y. 1858. And see DEATH; INSANITY.

APOSTASY. A total renunciation of Christianity by embracing either a false religion or having no religion at all. 4 Bla. Com. 43. See BLASPHEMY; CHRISTIANITY.

APOSTLES. Brief letters of dismissal granted to a party who takes an appeal from the decision of an English court of admiralty, stating the case, and declaring that the record will be transmitted. 2 Brown, Civ. and Adm. Law 438; Dig. 49. 6. It is used in Adm. Rule 6, of the 2d Circ. 90 Fed. lxix.

This term was used in the civil law. It is derived from *apostolos*, a Greek word, which signifies *one sent*, because the judge from whose sentence an appeal was made, sent to the superior judge these letters of dismission, or apostles; Merlin, *Répert.* mot *Apôtres;* 1 Pars. Marit. Law 745.

APOSTOLI. In Civil Law. Certificates of the inferior judge from whom a cause is removed, directed to the superior. Dig. 49. 6. See APOSTLES.

Those sent as messengers. Spelman, Gloss.

APOTHECARY. "Any person who keeps a shop or building where medicines are compounded or prepared according to prescriptions of physicians, or where medicines are sold, shall be regarded as an apothecary." 14 Stat. L. 119, § 23.

In England and Ireland an apothecary is a member of an inferior branch of the medical profession and is licensed by the Apothecaries Company to practice medicine as well as to sell drugs.

See DRUGGIST.

APPARATOR (Lat.). A furnisher; a provider.

The sheriff of Bucks had formerly a considerable allowance as *apparator comitatus* (apparator for the county); Cowell.

APPARENT. That which appears; that which is manifest; what is proved. It is required that all things upon which a court must pass should be made to appear, if matter in pais, under oath; if matter of record, by the record. It is a rule that those things which do not appear are to be considered as not existing: *de non apparentibus et non existentibus eadem est ratio;* Broom,

Max. 20. What does not appear does not exist: *quod non apparet, non est;* La Frombois v. Jackson, 8 Cow. (N. Y.) 600, 18 Am. Dec. 463; 1 Term 404; 12 M. & W. 316.

In case of homicide when the term "apparent danger" is used it means such overt actual demonstration, by conduct and acts, of a design to take life or do some great personal injury as would make the killing apparently necessary for self-preservation; Evans v. State, 44 Miss. 762.

APPARITOR. An officer or messenger employed to serve the process of the spiritual courts in England and summon offenders. Cowell.

APPARURA. In Old English Law. Furniture or implements.

Carucariæ apparura, plough-tackle. Cowell; Jacob, Dict.

APPEAL. In Criminal Practice. A formal accusation made by one private person against another of having committed some heinous crime. 4 Bla. Com. 312.

Anciently, appeals lay for treason as well as felonies; but appeals for treason were abolished by statutes 5 Edw. III. c. 9, 25 Edw. III. c. 24, and 1 Hen. IV. c. 14, and for all other crimes by the statute 59 Geo. III. c. 46.

An appeal lay for the heir male for the death of his ancestors; for the widow while unmarried for the death of her husband; and by the party injured, for certain crimes, as robbery, rape, mayhem, etc.; Co. Litt. 287 *b;* 2 Bish Cr. Law 1001, note, par. 4.

It might be brought at any time within a year and a day, even though an indictment had been found. If the appellee was found innocent, the appellor was liable to imprisonment for a year, a fine, and damages to the appellee.

The appellee might claim *wager of battel.* This claim was last made in the year 1818 in England; 1 B. & Ald. 405. And see 2 W. Bla. 713; 5 Burr. 2643, 2793; 4 Sharsw. Bla. Com. 312–318, and notes.

In the 12th and 13th centuries and for some time thereafter, the Crown relied as much upon the Appeal of the private accuser as upon the presentment of a jury. The indictment came to take its place and at the end of the 13th century the action of trespass was an efficient substitute for the appeal, and it gradually decayed as a mode of criminal prosecution. It lived long in the law because it came to be forgotten. Appeals of treason brought in Parliament were abolished in 1400. Other appeals were gradually abolished. It was considered that certain appeals alleging felony were good in Coke's day; Co. Litt. 127; 2 Hawk. P. C. 157. The appeal of murder had the longest history and was only abolished by 59 Geo. III. c. 46. 2 Holdsw. Hist. E. L. 155.

In Legislation. The act by which a member of a legislative body who questions the correctness of a decision of the presiding officer, procures a vote of the body upon the decision. In the House of Representatives of the United States the question on an appeal is put to the House in this form: "Shall the decision of the chair stand as the judgment of the House?" Rob. R. of O. 14, 66.

If the appeal relates to an alleged breach of decorum, or transgression of the rules of order, the question is taken without debate. If it relates to the admissibility or relevancy of a proposition, debate is permitted, except when a motion for the previous question is pending.

As to Appeal, in practice, as one of the methods of appellate jurisdiction, see APPEAL AND ERROR.

APPEAL AND ERROR. The methods of exercising appellate jurisdiction for "the review by a superior court of the final judgment, order, or decree of some inferior court." Ex parte Batesville & Brinkley R. Co., 39 Ark. 82.

"The most usual modes of exercising appellate jurisdiction * * * are by a writ of error, or by an appeal, or by some process of removal of a suit from an inferior tribunal. An appeal is a process of civil law origin, and removes a cause, entirely subjecting the facts as well as the law to a review and a retrial. A writ of error is a process of common law origin, and it removes nothing for re-examination but the law. The former mode is usually adopted in cases of equity and admiralty jurisdiction; the latter in suits at common law tried by a jury." Sto. Const. § 1762; Behn v. Campbell, 205 U. S. 403, 27 Sup. Ct. 502, 51 L. Ed. 857; U. S. v. Goodwin, 7 Cra. (U. S.) 108, 3 L. Ed. 284.

The appellate jurisdiction "is exercised by revising the action of the inferior court, and remanding the cause for the rendition and execution of the proper judgment"; Dodds v. Duncan, 12 Lea (Tenn.) 731, 734. It "implies a resort from an inferior tribunal of justice, to a superior, for the purpose of revising the judgments" of the former; Smith v. Carr, Hard. (Ky.) 305; and it was said in Marbury v. Madison, that its essential criterion is "that it revises and corrects the proceedings in a cause already instituted, and does not create that cause"; 1 Cra. (U. S.) 137, 175, 2 L. Ed. 60. Auditor of State v. R. Co., 6 Kan. 500, 505, 7 Am. Rep. 575; Sto. Const. Sec. 1761; Tierney v. Dodge, 9 Minn. 166 (Gil. 153).

The methods of obtaining a review are different in law and equity. In the latter the legal process by which it is obtained is termed an *appeal,* which is the removal of a cause from a court of inferior to one of superior jurisdiction, for the purpose of obtaining a review and retrial; Wiscart v. Dauchy, 3 Dall. (U. S.) 321, 1 L. Ed. 619; U. S. v. Good-

win, 7 Cra. (U. S.) 110, 3 L. Ed. 284; Boone v. Chiles, 10 Pet. (U. S.) 205, 9 L. Ed. 388; Wetherbee v. Johnson, 14 Mass. 414; King v. Sloan, 1 S. & R. (Pa.) 78. When taken in open court it does not need the formalities of ancient law to indicate that it is taken against all adverse interests; Taylor v. Leesnitzer, 220 U. S. 93, 31 Sup. Ct. 371, 55 L. Ed. 382.

An appeal generally supersedes the judgment of the inferior court so far that no action can be taken upon it until after the final decision of the cause; Archer v. Hart, 5 Fla. 234; Danforth, Davis & Co. v. Carter, 4 Ia. 230; Waterman v. Raymond, 5 Wis. 185; Frederick v. Bank, 106 Ill. 147; Lamphear v. Lamprey, 4 Mass. 107; Walker v. Spencer, 86 N. Y. 162. A decree is final for the purposes of an appeal when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce what has been determined; St. Louis, I. M. & S. R. R. Co. v. Southern Co., 108 U. S. 24, 2 Sup. Ct. 6, 27 L. Ed. 638; Bostwick v. Brinkerhoff, 106 U. S. 3, 1 Sup. Ct. 15, 27 L. Ed. 73; Grant v. Ins. Co., 106 U. S. 429, 1 Sup. Ct. 414, 27 L. Ed. 237. Before an appeal can be prosecuted by one of several defendants, the case should be determined as to all; Meagher v. Mfg. Co., 145 U. S. 611, 12 Sup. Ct. 876, 36 L. Ed. 834. In equity cases all parties against whom a joint decree is rendered must join in an appeal, if any be taken; and when only one takes an appeal, and there is nothing in the record to show that the others were applied to and refused to appeal, and no order is entered by court, on notice, granting him a separate appeal, his appeal cannot be sustained; Beardsley v. R. Co., 158 U. S. 123, 15 Sup. Ct. 786, 39 L. Ed. 919.

A writ of error is the means of bringing under review by an appellate court, for revision and correction, the judgment in an action at law of an inferior court of record, when the proceedings are according to the course of the common law. See WRIT OF ERROR. In cases in which the proceedings are summary or different from the course of the common law they are reviewed by *Certiorari*. See that title. And in England the judgments of inferior courts not of record were brought up for review by writ of false judgment. See FALSE JUDGMENT. 4 Archb. Pr. 4, quoted in Ex parte Henderson, 6 Fla. 279.

A writ of error is considered, generally, as a new action; Gregg v. Bethea, 6 Porter (Ala.) 9. It does not vacate the judgment of the court below; that continues in force until reversed; Railway Co. v. Twombly, 100 U. S. 81, 25 L. Ed. 550. If such writ can ever be issued *nunc pro tunc* after the lapse of time allowed by law for bringing suits in error, the default must be attributable solely to official delinquency; Knight & Knight v. Towles, 32 Fla. 473, 14 South. 91.

If the common law is adopted in a state, the writ of error is introduced as part of that system; Moore v. Harris, 1 Tex. 36; but it is said that it is not a new action, but a continuation of the same one transferred to the appellate court for review; Corbett v. Territory, 1 Wash. T. 434; the allowance of such a writ is a matter of judicial determination on consideration of the sufficiency of the grounds for it stated in the petition and assignment of errors; Simpson v. Bank, 129 Fed. 257, 63 C. C. A. 371; an appeal is a matter of right; Lockman v. Lang, 132 Fed. 1, 65 C. C. A. 621; Simpson v. Bank, 129 Fed. 257, 63 C. C. A. 371; where it was said, in reference to the rule requiring filing of an assignment of error, "no court or judge has any jurisdiction or power to condition allowance of an appeal upon his consideration or determination of the question whether or not the applicant presents alleged errors, which form reasonable grounds for the review of the decision below. That question is reserved for the consideration of the appellate court exclusively"; and it was held that, notwithstanding the rule, the assignment of errors need not be filed before an allowance of appeal.

Where one court administers law and equity, an appeal and writ of error are sometimes taken in a case, because of doubt whether it is strictly legal or equitable. An appeal and writ of error to review the same adjudications is not only proper, but commendable, where there is just reason to doubt which is the proper proceeding to give jurisdiction to the appellate court and that one will be dismissed which is ineffective, and the case will be reviewed according to the rules of the method applicable to it; Lockman v. Lang, 132 Fed. 1, 65 C. C. A. 621; but some courts hold that the two remedies cannot be pursued simultaneously, but that an appeal must be dismissed before a writ of error is taken; State v. Thompson, 30 Mo. App. 503.

While the word *appeal* has a strict technical definition, it is frequently used as embracing all kinds of proceedings for the review of causes; City of Rockford v. Compton, 115 Ill. App. 406; but in states adhering to common law forms an appeal will not lie from a judgment at law; Files v. Brown, 124 Fed. 133, 59 C. C. A. 403; Roberts v. Ry. Co., 138 Fed. 711, 71 C. C. A. 127; Trabue v. Williams, 46 Fla. 228, 35 South. 872; Ewings v. Hoffine, 67 Neb. 26, 93 N. W. 186; and in jurisdictions where the same courts administer both law and equity appeals and proceedings for review for errors of law are frequently governed by like rules; Traders' Ins. Co. v. Carpenter, 85 Ind. 350. A writ of error is the proper method of reviewing a judgment of the supreme court of a territory in an action at law tried without a jury; National Live Stock Bank of Chicago v.

Bank, 203 U. S. 296, 27 Sup. Ct. 79, 51 L. Ed. 192.

Where a common law form of reviewing statutory proceedings does not exist or is not resorted to, the conditions and form of appeal depend entirely upon statute and cannot be changed or aided by judicial action; People's Ice Co. v. The Excelsior, 43 Mich. 336, 5 N. W. 398. An appeal is a continuation of a suit, whereas a writ of error is considered a new action; Macklin v. Allenberg, 100 Mo. 337, 13 S. W. 350; the right of appeal in civil actions being unknown to the common law and of statutory origin, it is necessary that the requirements of the statute be strictly complied with to confer jurisdiction on the appellate courts; Arkansas & O. R. Co. v. Powell, 104 Mo. App. 362, 80 S. W. 336.

A writ of error is a writ of right which is grantable *ex debito justitiæ;* Skipwith v. Hill, 2 Mass. 35. The right to an appeal or writ of error cannot be refused, however indifferent or baseless the demand on the merits may be; People v. Knickerbocker, 114 Ill. 539, 2 N. E. 507, 55 Am. Rep. 879; State v. Judge of Superior District Court, 28 La. Ann. 547; McCreary v. Rogers, 35 Ark. 298; Ridgely v. Bennett, 13 Lea (Tenn.) 206. It is the constitutional right of every citizen to have his case reviewed in one form or another by a court of error; 1 Bland. 5; but in another state it is said not to be a constitutional right but subject to legislative control; Messenger v. Teagan, 106 Mich. 654, 64 N. W. 499. A suit at law can be reviewed only on writ of error; Behn, M. & Co. v. Campbell, 205 U. S. 403, 27 Sup. Ct. 502, 51 L. Ed. 857; and an equity cause cannot be reviewed on writ of error; Files v. Brown, 124 Fed. 133, 59 C. C. A. 403; Nelson v. Lowndes County, 93 Fed. 538, 35 C. C. A. 419; Grooms v. Wood, 43 Fla. 50, 29 South. 445; Ex parte Sanford, 5 Ala. 562; Delaplaine v. City of Madison, 7 Wis. 407; Evans v. Hamlin, 164 Mass. 239, 41 N. E. 267; Hayes v. Fischer, 102 U. S. 121, 26 L. Ed. 95. But see *contra*, Woodard v. Glos, 113 Ill. App. 353; but the error of a chancellor in refusing to grant an appeal on dismissal of injunction bill should be corrected by writ of error; Boyd v. Knox (Tenn.) 53 S. W. 972. A writ of error will not lie in a divorce case, an appeal is the only remedy; Miller v. Miller, 3 Binn. (Pa.) 30; Parmenter v. Parmenter, 3 Head (Tenn.) 225. But this does not apply to a decree for alimony, which is subject to revision by writ of error; McBee v. McBee, 1 Heisk. (Tenn.) 558; an appeal and not a writ of error is the proper proceeding to review probate orders; Horner v. Goe, 54 Ill. 285; Peckham v. Hoag, 92 Mich. 423, 52 N. W. 734; Shay v. Henk, 49 Pa. 79; but a writ of error lies to revise probate proceedings which are strictly according to the course of the common law; Fitzgerald v. Com., 5 Allen (Mass.) 509; or a proceeding for the probate of a will in which the parties have a right to a jury trial; Ormsby v. Webb, 134 U. S. 47, 10 Sup. Ct. 478, 33 L. Ed. 805; or where a case had been appealed from the probate court to a law court and the decree affirmed; Brunson v. Burnett, 1 Chand. (Wis.) 9. A writ of error will lie in cases where an appeal is not allowed; Ex parte Thistleton, 52 Cal. 220; Haines v. People, 97 Ill. 161; or if the aggrieved party cannot avail himself of an appeal; Valler v. Hart, 11 Mass. 300.

In an appellate court it is the general rule that findings of fact in the trial court are conclusive; E. Bement & Son v. Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; American Bridge Co. v. R. Co., 135 Fed. 323, 68 C. C. A. 131; Smith v. City of Buffalo, 159 N. Y. 427, 54 N. E. 62; Fitchburg R. Co. v. Freeman, 12 Gray (Mass.) 401, 74 Am. Dec. 600; Hoffman v. Silverthorn, 137 Mich. 60, 100 N. W. 183; Jersey City v. Tallman, 60 N. J. L. 239, 37 Atl. 1026; Appeal of Melony, 78 Conn. 334, 62 Atl. 151; and when the case is tried by the court, without a jury, the findings of the trial judge are as conclusive as the verdict of a jury; York v. Washburn, 129 Fed. 564, 64 C. C. A. 132; Bell v. Wood, 87 Ky. 56, 7 S. W. 550; Rademacher v. Greenwood, 114 Ill. App. 542; Rauen v. Ins. Co., 129 Ia. 725, 106 N. W. 198; but when the appellate court is convinced that the premise upon which the lower court acted is without any support in the evidence, and that its finding is clearly erroneous, it may be disregarded; Darlington v. Turner, 202 U. S. 195, 26 Sup. Ct. 630, 50 L. Ed. 992; U. S. v. Puleston, 106 Fed. 294, 45 C. C. A. 297; Petition of Barr, 188 Pa. 122, 41 Atl. 303; Brown v. Brown, 174 Mass. 197, 54 N. E. 532, 75 Am. St. Rep. 292; Menz v. Beebe, 102 Wis. 342, 77 N. W. 913, 78 N. W. 601.

Cross appeals in equity must be prosecuted like other appeals; Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246. Where defendant appeals from part of the decree, which is affirmed, and the plaintiff thereafter appeals from the other part of the decree, a motion to dismiss will be denied; State v. R. Co., 99 Minn. 280, 109 N. W. 238, 110 N. W. 975.

A federal appellate court in reversing a judgment for the plaintiff cannot direct a judgment for defendant, notwithstanding a verdict for the plaintiff, since under the VIIth Amendment of the Constitution the only course is to order a new trial, and this is true notwithstanding the state statute and practice authorizes such action; Slocum v. Ins. Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. ——; Pederson v. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. ——; but this amendment is not applicable to the state courts; Slocum v. Ins. Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. ——; and the reversal of a cause upon the facts and rendition of final judgment by the appellate court is generally held not to be an infringement of the

right of trial by jury secured by the state constitutions; Borg v. R. Co., 162 Ill. 348, 44 N. E. 722; Gunn v. R. Co., 27 R. I. 320, 62 Atl. 118, 2 L. R. A. (N. S.) 362; *id.*, 27 R. I. 432, 63 Atl. 239, 2 L. R. A. (N. S.) 883; nor is the constitutional guaranty infringed by a statute authorizing the appellate court to make findings of facts "which shall be final and conclusive as to all matters of fact in controversy in such cause"; Larkins v. R. Ass'n, 221 Ill. 428, 77 N. E. 678; nor does it imply that a verdict on an issue of fact is beyond the controlling power of the trial or appellate court, to be exercised to prevent injustice; Chitty v. Ry. Co., 148 Mo. 64, 49 S. W. 868; nor does a statute authorizing the appellate court to reverse for excessive damages; Smith v. Pub. Co., 178 Pa. 481, 36 Atl. 296, 35 L. R. A. 819; nor an act authorizing such court to affirm, reverse, amend or modify a judgment without returning the record to the court below; or to order a verdict and judgment to be set aside and a new trial had; Nugent v. Traction Co., 183 Pa. 142, 38 Atl. 587; where the damages are excessive the appellate court may require the plaintiff to remit the excess as a condition of affirmance without depriving either party of his right to trial by jury; Burdict v. Ry. Co., 123 Mo. 221, 27 S. W. 453, 26 L. R. A. 384, 45 Am. St. Rep. 528; Texas & N. O. R. Co. v. Syfan, 91 Tex. 562, 44 S. W. 1064; but where the jury finds the charge of negligence not sustained by the facts, the court cannot disturb the verdict, though it be of a different opinion; Gibson v. City of Huntington, 38 W. Va. 177, 18 S. E. 447, 22 L. R. A. 561, 45 Am. St. Rep. 853.

Harmless error is no cause for reversal; Townsend v. Bell, 167 N. Y. 462, 60 N. E. 757; Springer v. Lipsis, 209 Ill. 264, 70 N. E. 641; O'Donnell v. Ins. Co., 73 Mich. 1, 41 N. W. 95; nor intermediate error where the ultimate judgment is right; Orr v. Leathers, 27 Ind. App. 572, 61 N. E. 941; Inhabitants of Winslow v. Troy, 97 Me. 130, 53 Atl. 1008; nor, when the losing party is not entitled to recover in any event, can he be heard to complain of error at the trial; Wood v. Wyeth, 106 App. Div. 21, 94 N. Y. Supp. 360; nor where, if the error did not prejudice the party against whom it was committed; Armour & Co. v. Russell, 144 Fed. 614, 75 C. C. A. 416, 6 L. R. A. (N. S.) 602; Strever v. Ry. Co., 106 Ia. 137, 76 N. W. 513.

Judgments will be reversed where the court below erred in failing to sustain a demurrer to one of several paragraphs of the declaration or complaint, and it cannot be determined on which paragraph or count the verdict was based; Gendron v. St. Pierre, 72 N. H. 400, 56 Atl. 915; Bohler v. Hicks, 120 Ga. 800, 48 S. E. 306; or where evidence was improperly admitted, prejudice being presumed; National Biscuit Co. v. Nolan, 138 Fed. 6, 70 C. C. A. 436; Inhabitants of Wayland v. Inhabitants of Ware, 109 Mass. 248; or on the exclusion of evidence, the same presumption applying; Westall v. Osborne, 115 Fed. 282, 53 C. C. A. 74; Hanlon v. Ehrich, 178 N. Y. 474, 71 N. E. 12; so also an erroneous instruction on a material point (unless it clearly appears to have been harmless); Podhaisky v. City of Cedar Rapids, 106 Ia. 543, 76 N. W. 847; Ward v. Ward, 47 W. Va. 766, 35 S. E. 873; Neal v. Brandon, 70 Ark. 79, 66 S. W. 200.

A party cannot complain of error in his own favor; Copeland v. Dairy Co., 189 Mass. 342, 75 N. E. 704; Drown v. Hamilton, 68 N. H. 23, 44 Atl. 79; Fredrick Mfg. Co. v. Devlin, 127 Fed. 71, 62 C. C. A. 53; Lowenthal v. Lowenthal, 157 N. Y. 236, 51 N. E. 995. Questions not presented by the record cannot be considered on appeal; Inhabitants of New Marlborough v. Brewer, 170 Mass. 162, 48 N. E. 1089; Huff v. Cole's Estate, 127 Mich. 351, 86 N. W. 835; Lewis v. Lewis, 66 N. J. L. 251, 49 Atl. 453; Morgan v. Olvey, 50 Ind. 396; otherwise, sometimes, in criminal cases; Crawford v. U. S., 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392.

When a cause comes before the court on a second appeal all matters passed on in the former decision are *res judicata;* Chapman v. Ry. Co., 146 Mo. 481, 48 S. W. 646; a rehearing will be denied; Pretzfelder v. Ins. Co., 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424; the law as determined in the former decision whether right or wrong binds the court on a subsequent appeal; Hopkins v. Grocery Co., 105 Ky. 357, 49 S. W. 18; Mead v. Tzschuck, 57 Neb. 615, 78 N. W. 262. See LAW OF THE CASE.

Where the supreme court affirms the decree in all respects but one, on subsequent appeal only this one particular point can be reviewed; Illinois v. R. Co., 184 U. S. 77, 22 Sup. Ct. 300, 46 L. Ed. 440. Ordinarily when the court is equally divided on appeal, the decree of the lower court is affirmed. But see 39 Nova Scotia 1, where the appeal was allowed.

It is a general rule of the law that all the judgments, decrees, or orders, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and may then be set aside, vacated, modified, or annulled by that court; Bronson v. Schulten, 104 U. S. 415, 26 L. Ed. 797.

The Supreme Court disapproves the practice in an appellate court of reserving a judgment on one of a number of assigned errors without passing on the others, as likely to involve duplicate appeals; Bierce v. Waterhouse, 219 U. S. 320, 21 Sup. Ct. 241, 55 L. Ed. 237.

As to the practice when the appellant is deprived of his bill of exceptions by the death of the judge, etc., see NEW TRIAL.

See BILL OF EXCEPTIONS; JURISDICTION WRIT OF ERROR; UNITED STATES COURTS.

In the United States Supreme Court a defendant in error or appellee may file a confession of error, and thereupon the judgment will be reversed and the cause remanded, with proper directions.

APPEARANCE. A coming into court as party to a suit, whether as plaintiff or defendant.

The former proceeding by which a defendant submits himself to the jurisdiction of the court. Tr. & H. Prac. 226, 271.

Appearance anciently meant an actual coming into court, either in person or by attorney. It is so used both in the civil and the common law. It is indicated by the word "comes," "and the said C. D *comes* and *defends*," and, in modern practice, is accomplished by the entry of the name of the attorney of the party in the proper place on the record, or by filing bail where that is required. It was a formal matter, but necessary to give the court jurisdiction over the person of the defendant.

A time is generally fixed within which the defendant must enter his appearance; formerly in England and elsewhere, the *quarto die post (q. v.)* If the defendant failed to appear within this period, the remedy in ancient practice was by distress infinite when the injuries were committed without force, and by capias or attachment when the injuries were committed against the peace, that is, were technical trespasses. But, until appearance, the courts could go no further than apply this process to secure appearance. See PROCESS.

In modern practice, a failure to appear generally entitles the plaintiff to judgment against the defendant by default, if, of course, the court has jurisdiction of the cause.

It may be of the following kinds:—

Compulsory.—That which takes place in consequence of the service of process.

Conditional.—One which is coupled with conditions as to its becoming general.

De bene esse.—One which is to remain an appearance, except in a certain event. See DE BENE ESSE.

General.—A simple and absolute submission to the jurisdiction of the court. See *infra.*

Gratis.—One made before the party has been legally notified to appear.

Optional.—One made where the party is not under any obligation to appear, but does so to save his rights. It occurs in chancery practice, especially in England.

Special.—That which is made for certain purposes only, and does not extend to all the purposes of the suit; as to contest the jurisdiction, or the sufficiency of the service. See *infra.*

Subsequent.—An appearance by the defendant after one has already been entered for him by the plaintiff. See Dan. Ch. Pr.

Voluntary.—That which is made in answer to a subpœna or summons, without process; 1 Barb. Ch. Pr. 77.

How to be made.—On the part of the plaintiff no formality is required. On the part of the defendant it may be effected by making certain formal entries in the proper office of the court, expressing his appearance; Zion Church v. Church, 5 W. & S. (Pa.) 215; Easton v. Altum, 1 Scam. (Ill.) 250; Griffin v. Samuel, 6 Mo. 50; Bennett v. Stickney, 17 Vt. 531; Rose v. Ford, 2 Ark. 26, Scott v. Hull, 14 Ind. 136; or in case of arrest, is effected by giving bail; or by putting in an answer; Livingston v. Gibbons, 4 Johns. Ch. (N. Y.) 94; Hayes v. Shattuck, 21 Cal. 51; President, etc., of Insurance Co. of North America v. Swineford, 28 Wis. 257; or a demurrer; State v. People, 6 Pet. (U. S.) 323, 8 L. Ed. 414; Kegg v. Welden, 10 Ind. 550; or notice to the other side; Livingston v. Gibbons, 4 Johns. Ch. (N. Y.) 94; or motion for continuance; Shaffer v. Trimble, 2 Greene (Ia.) 464; or taking an appeal; Weaver v. Stone, 2 Grant (Pa.) 422; appearance and offer to file answer; Tennison v. Tennison, 49 Mo. 110; or motion to have an interlocutory order set aside; Tallman v. McCarty, 11 Wis. 401.

A general appearance waives all question as to the service of process and is equivalent to a personal service; Platt v. Manning, 34 Fed. 817; Continental Casualty Co. v. Spradlin, 170 Fed. 322, 95 C. C. A. 112; Moulton v. Baer, 78 Ga. 215, 2 S. E. 471; Birmingham Flooring Mills v. Wilder, 85 Ala. 593, 5 South. 307; but it does not cure want of jurisdiction of subject matter; Wheelock v. Lee, 74 N. Y. 495; St. Louis & S. F. R. Co. v. Loughmiller, 193 Fed. 689; a general appearance in a federal court waives the defence that the defendant was not served in the district of which he was an inhabitant; Foote v. Ben. Ass'n, 39 Fed. 23; Betzoldt v. Ins. Co., 47 Fed. 705. A general appearance may be amended so as to make it special; Hohorst v. Packet Co., 38 Fed. 273.

It is not a general appearance where the question of jurisdiction of the person is raised by motion to quash for want of jurisdiction; McGillin v. Claflin, 52 Fed. 657; or petition to quash the writ; Turner v. Larkin, 12 Pa. Sup. Ct. 284. In general, however, when that objection is raised, the appearances should be specially restricted; Nicholes v. People, 165 Ill. 502, 46 N. E. 237; Reed v. Chilson, 142 N. Y. 152, 36 N. E. 884; if by motion or otherwise he seeks to bring into action the powers of the court, he will be deemed to have appeared generally; Newlove v. Woodward, 9 Neb. 502, 4 N. W. 237. If a special appearance is entered to contest jurisdiction, it becomes general if a defense is made to the merits; Sanderson v. Bishop, 171 Fed. 769.

A special appearance to raise the question of judicial action does not amount to a general appearance; Commercial Mut. Accident Co. v. Davis, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782. A special appearance entered to contest the jurisdiction will not operate to waive objection to illegal or insufficient service; Lathrop-Shea & Henwood Co. v. Const. Co., 150 Fed. 666 (citing many Supreme Court cases where such appearance is recognized); Remington v. Ry. Co., 198 U. S. 95, 25 Sup. Ct. 577, 49 L. Ed. 959; Powers v. Ry. Co., 169 U. S. 92, 18 Sup. Ct. 264, 42

L. Ed. 673; Courtney v. Pradt, 196 U. S. 89, 25 Sup. Ct. 208, 49 L. Ed. 398; and the effect of such appearance is not enlarged by discussion of the merits in connection with the plea; Citizens' Savings & Trust Co. v. R. Co., 205 U. S. 46, 27 Sup. Ct. 425, 51 L. Ed. 703; nor by the removal of the cause; Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; even if the petition for removal does not specify or restrict the purpose of the appearance and is not accompanied by a plea in abatement; National Accident Society v. Spiro, 164 U. S. 281, 17 Sup. Ct. 996, 41 L. Ed. 435. Filing a petition to remove is not a general appearance; Spreen v. Delsignore, 94 Fed. 71.

Where defendant files a formal appearance and simultaneously an exception to the jurisdiction, the two papers should be considered together and cannot be regarded as consent to the jurisdiction where consent is necessary; Wood v. Lumber Co., 226 U. S. 384, 33 Sup. Ct. 125, 57 L. Ed. —.

It does not amount to a general appearance that a defendant not served is examined as a witness; Nixon v. Downey, 42 Ia. 78; Schroeder v. Lahrman, 26 Minn. 87, 1 N. W. 801; or is present when depositions are taken; Bentz v. Eubanks, 32 Kan. 321, 4 Pac. 269; Anderson v. Anderson, 55 Mo. App. 268; Scott v. Hull, 14 Ind. 136; or in the court room during the trial; Tiffany v. Gilbert, 4 Barb. (N. Y.) 320; Newlove v. Woodward, 9 Neb. 502, 4 N. W. 237; Crary v. Barber, 1 Colo. 172.

Actual or formal appearance is now unnecessary; Gardiner v. McDowell's Adm'r, Wright (Ohio) 762; Byrne v. Jeffries, 38 Miss. 533; and a formal entry of one is unknown in Louisiana; Stoker v. Leavenworth, 7 La. 390. It need not be by any formal act or words in court; Harrison v. Morton, 87 Md. 671, 40 Atl. 897; Salina Nat. Bank v. Prescott, 60 Kan. 490, 57 Pac. 121; Rhoades v. Delaney, 50 Ind. 468. It is generally done by entry of the attorney's name on the docket opposite the party's name; Romaine v. Ins. Co., 28 Fed. 625 (where the practice is examined at large); Scott v. Israel, 2 Binn. (Pa.) 145 (where the entry of the attorney's name on the docket opposite the names of two defendants, is good as to both, though one was not served); or the initials merely; Kennedy v. Fairman, 2 N. C. 405; or by endorsement on the declaration; Byrne, Vance & Co. v. Jeffries, 38 Miss. 533; or on the writ waiving service; Harrison v. Morton, 87 Md. 671, 40 Atl. 897; or any action in court in the case except to object to the jurisdiction; Audretsch v. Hurst, 126 Mich. 301, 85 N. W. 746; Warren v. Cook, 116 Ill. 199, 5 N. E. 538; Tippack v. Briant, 63 Mo. 580; People v. Cowan, 146 N. Y. 348, 41 N. E. 26, and see a variety of cases collected in 3 Cyc. 504, n. 28.

By whom to be made.—In civil cases it may in general be made either by the party or his attorney; and in those cases where it is said that the party must appear in person, it is sufficient if it is so entered on the record; although, in fact, the appearance is by attorney; Mockey v. Grey, 2 Johns. (N. Y.) 192; Arnold v. Sandford, 14 Johns. (N. Y.) 417. The unauthorized appearance of an attorney will not give the court jurisdiction; Great West Min. Co. v. Min Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; McNamara v. Carr, 84 Me. 299, 24 Atl. 856.

An appearance by attorney is, in strictness, improper where a party wishes to plead to the jurisdiction of the court, because the appointment of an attorney of the court admits its jurisdiction; 1 Chit. Pl. 398; 2 Wms. Saund. 209 *b;* and is insufficient in those cases where the party has not sufficient capacity to appoint an attorney. Thus *an idiot* can appear only in person, and as a plaintiff he may sue in person or by his next friend.

An infant cannot appoint an attorney; he must, therefore, appear by guardian or *prochein ami.*

A lunatic, if of full age, may appear by attorney; if under age, by guardian only. 2 Wms. Saund. 335; *id.* 232 (*a*), n. (4); but if so insane as to be incapable of knowing his mental state he cannot authorize appearance by an attorney; Chase v. Chase, 163 Ind. 178, 71 N. E. 485. Process should be served on defendant and the appearance for him should be entered by the guardian or committee; Stoner v. Riggs, 128 Mich. 129, 87 N. W. 109; Rutherford's Lessee v. Folger, 20 N. J. L. 115.

A married woman, when sued without her husband, should defend in person; 1 Wms. Saund. 209 *b.* When sued jointly with him under a statute providing for such suit on their joint contract and that she may defend separately or jointly, an appearance by counsel employed by her husband to defend does not bind her; Taylor v. Welslager, 90 Md. 414, 45 Atl. 478.

The effect of an appearance by the defendant is, that both parties are considered to be in court.

In criminal cases the personal appearance of the accused in court is often necessary. See 2 Burr. 931; *id.* 1786; 1 W. Bla. 198. The verdict of the jury must, in all cases of treason and felony, be delivered in open court, in the presence of the defendant. In cases of misdemeanor, the presence of the defendant during the trial is not essential; Bacon, Abr. *Verdict,* B; Arch. Cr. Pl. (14th ed.) 149.

No motion for a new trial is allowed unless the defendant, or, if more than one, the defendants, who have been convicted, are present in court when the motion is made; 3 M. & S. 10, note; 17 Q. B. 503; 2 Den. Cr. Cas. 372, note. But this rule does not apply where the offence of which the defendant has been convicted is punishable by a fine

only; 2 Den. Cr. Cas. 459; or where the defendant is in custody on criminal process; 4 B. & C. 329. On a charge of felony, a party suing out a writ of error must appear in person to assign errors; and it is said that if the party is in custody in the prison of the county or city in which the trial has taken place, he must be brought up by *habeas corpus*, for the purpose of this formality, which writ must be moved for on affidavit. This course was followed in 2 Den. Cr. Cas. 287; 17 Q. B. 317; 8 E. & B. 54; 1 D. & B. 375.

Where a defendant is not liable to personal punishment, but to a fine, sentence may be pronounced against him in his absence; 1 Chit. Cr. L. 695; 2 Burr. 931; 3 *id.* 1780.

APPELLANT. He who makes an appeal from one court to another.

APPELLATE JURISDICTION. The jurisdiction which a superior court has to rehear causes which have been tried in inferior courts. See APPEAL AND ERROR.

APPELLATIO. In Civil Law. An appeal.

APPELLEE. In Practice. The party in a cause against whom an appeal has been taken.

APPELLOR. A criminal who accuses his accomplices; one who challenges a jury.

APPENDAGE. Something added as an accessory to or the subordinate part of another thing. State Treasurer v. R. Co., 28 N. J. L. 26; School Dist. No. 29, Bourbon County v. Perkins, 21 Kans. 536, 30 Am. Rep. 447.

APPENDANT. Annexed or belonging to something superior; an incorporeal inheritance belonging to another inheritance. Cowell; Termes de la Ley.

Appendant in deeds includes nothing which is substantial corporeal property, capable of passing by feoffment and livery of seisin. Co. Litt. 121; 4 Coke 86; 8 B. & C. 150; 6 Bingh. 150. A matter *appendant* must arise by prescription; while a matter appurtenant may be created at any time; 2 Viner, Abr. 594; 3 Kent 404.

APPENDITIA (Lat. *appendere*, to hang to or on). The appendages or pertinances of an estate; the appurtenances to a dwelling, etc.; thus, *pent-houses* are the *appenditia domus*.

APPERTAINING. Connected with in use or occupancy. Miller v. Mann, 55 Vt. 475, 479. It does not necessarily import contiguity, as does "adjoining," and is therefore not synonymous with it; *id.*

Peculiar to. Herndon v. Moore, 18 S. C. 339, where business "appertaining to minors" is defined as meaning peculiar to minors.

APPLICATION. The act of making a request for something. It need not be in writing; State v. Stiles, 12 N. J. L. 296.

A written request to have a certain quantity of land at or near a certain specified place, under a statute for location of public land of the state. Duncan's Lessee v. Curry, 3 Binn. (Pa.) 14; Biddle's Lessee v. Dougal, 5 Binn. (Pa.) 142.

A petition. Scott v. Strobach, 49 Ala. 477, 489.

The use or disposition made of a thing.

In Insurance. The preliminary statement made by a party applying for an insurance on life, or against fire. It usually consists of written answers to interrogatories proposed by the company applied to, respecting the proposed subject. It corresponds to the "representations" preliminary to maritime insurance. It is usually referred to expressly in the policy as being the basis or a part of the contract, and this reference creates in effect a warranty of the truth of the statements. In an action on a policy, the application and policy must be construed as one instrument; Studwell v. Association, 19 N. Y. Supp. 709. If the policy does not make the answers a part of the contract, this will have only the effect of representation; May, Ins. § 159; Columbia Ins. Co. v. Cooper, 50 Pa. 331. To constitute a warranty it must be made a part of the policy; Goddard v. Insurance Co., 67 Tex. 69, 1 S. W. 906, 60 Am. Rep. 1. A mere reference in the policy to the application does not make its answers warranties; it is a question of intention; Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567; Sheldon & Co. v. Insurance Co., 22 Conn. 235, 58 Am. Dec. 420; Commonwealth's Ins. Co. v. Monninger, 18 Ind. 352; the courts tend to consider the answers representations, rather than warranties, except in a clear case; Campbell v. Insurance Co., 98 Mass. 381; Miller v. Insurance Co., 31 Ia. 216, 7 Am. Rep. 122; Wilson v. Insurance Co., 4 R. I. 141. An oral misrepresentation of a material fact will defeat a policy on life or against fire, no less than in maritime insurance, on the ground of fraud; 1 Phill. Ins. § 650. Misrepresentation as to one of several buildings all being in one policy cannot defeat a recovery on another; Rogers v. Insurance Co., 121 Ind. 570, 23 N. E. 498. See REPRESENTATION; MISREPRESENTATION; INSURANCE.

Of Purchase-Money. The disposition made of the funds received by a trustee on a sale of real estate held under the trust.

Where there is a general power to sell for the payment of debts, or debts and legacies, the purchaser need not look to the application of the purchase-money; Bruch v. Lantz, 2 Rawle (Pa.) 392, 21 Am. Dec. 458; Andrews v. Sparhawk, 13 Pick. (Mass.) 393; 1 Beas. 69; Hauser v. Shore, 40 N. C. 357; Gardner v. Gardner, 3 Mas. 178, Fed. Cas. No. 5,227; or so as to legacies where there is a trust for reinvestment; Wormley v. Wormley, 8 Wheat. (U. S.) 421, 5 L. Ed. 651; Grosvenor & Co. v. Austin's Adm'rs, 6 Ohio 114, 25 Am. Dec. 743; where the trust is to pay specified debts, the purchaser must see to the application of the purchase-money; Gardner v. Gardner, 3 Mas. 178, Fed. Cas. No. 5,227;

Cadbury v. Duval, 10 Pa. 267; 1 Pars. Eq. 57; Duffy v. Calvert, 6 Gill (Md.) 487. See note to Elliot v. Merryman, 1 Lead. Cas. Eq. 74; Perry, Trusts; Adams, Eq. *155. The doctrine is abolished in England by 23 & 24 Vict. c. 145, § 29, and is of little importance in the United States; Bisp. Eq. 278.

Of Payments. See APPROPRIATION.

APPOINT. To designate, ordain, prescribe, nominate; People v. Fitzsimmons, 68 N. Y. 519.

APPOINTEE. A person who is appointed or selected for a particular purpose; as, the appointee under a power is the person who is to receive the benefit of the power.

APPOINTMENT. The designation of a person, by the person or persons having authority therefor, to discharge the duties of some office or trust.

The making out a commission is conclusive evidence of an appointment to an office for holding which a commission is required; Marbury v. Madison, 1 Cr. (U. S.) 137, 2 L. Ed. 60; U. S. v. Bradley, 10 Pet. (U. S.) 343, 9 L. Ed. 448. For a discussion of constitutional and statutory limitations of executive and legislative functions in respect to appointments to office, see 30 Amer. & Eng. Corp. Cas. 321, note.

The governor cannot make a valid appointment to an office which at the time is rightfully held by an incumbent whose term has not expired; State v. Peelle, 124 Ind. 515, 24 N. E. 440, 8 L. R. A. 228.

As distinguished from an election, it seems that an appointment is generally made by one person, or a limited number acting with delegated powers, while an election is made by all of a class.

The word is sometimes used in a sense quite akin to this, and apparently derived from it as denoting the right or privilege conferred by an appointment. thus, the act of authorizing a man to print the laws of the United States by authority, and the right thereby conferred, are considered such an appointment, but the right is not an office; Com. v. Binns, 17 S. & R. (Pa.) 219, 233. And see Com. v. Sutherland, 3 S. & R. (Pa.) 157; Cooper, Justin. 599, 604.

In Chancery Practice. The exercise of a right to designate the person or persons who are to take the use of real estate. 2 Washb. R. P. 302.

By whom to be made.—It must be made by the person authorized; 2 Bouv. Inst. § 1922; who may be any person competent to dispose of an estate of his own in the same manner; 4 Kent 324; including a married woman; 1 Sugd. Pow. 182; 3 C. B. 578; 5 *id.* 741; Ladd v. Ladd, 8 How. (U. S.) 27, 12 L. Ed. 967; even though her husband be the appointee; Rush v. Lewis, 21 Pa. 72; or an infant, if the power be simply collateral; 2 Washb. R. P. (5th ed.) *317. Where two or more are named as donees, all must in general join; Franklin v. Osgood, 14 Johns. (N. Y.) 553; but where given to several who act in a trust capacity, as a class, it may be by the survivors; Peter v. Beverly, 10 Pet. (U. S.) 564, 9 L. Ed. 522; Tainter v. Clark, 13 Metc. (Mass.) 220. When such a right is devolved upon two executors and two others are named as successors in case of their death, no others can execute the trust so long as any one of the four is living and has not declined the trust, and an administrator c. t. a. will be liable to suit by the succeeding trustee for trust property with which he intermeddles; Hayes v. Pratt, 147 U. S. 557, 13 Sup. Ct. 503, 37 L. Ed. 279.

How to be made.—A very precise compliance with the directions of the donor is necessary; 1 P. Will. 740; 6 Mann. & G. 386; Ladd v. Ladd, 8 How. (U. S.) 30, 12 L. Ed. 967; having regard to the intention, especially in substantial matters; Tudor, Lead. Cas. 306; 3 Ves. Ch. 421. It may be a partial execution of the power only, and yet be valid; 4 Cruise, Dig. 205; or, if excessive, may be good to the extent of the power; 2 Ves. Sen. 640; 3 Dru. & W. 339. It must come within the spirit of the power; thus, if the appointment is to be *to* and *amongst* several, a fair allotment must be made to each; 4 Ves. Ch. 771; 2 Vern. Ch. 513; otherwise, where it is to be made to such as the donee may select; 5 Ves. Ch. 857.

The effect of an appointment is to vest the estate in the appointee, as if conveyed by the original donor; 2 Washb. R. P. (5th ed.) *320; 2 Crabb. R. P. 726, 741; 2 Sugd. Pow. 22; Jackson v. Veeder, 11 Johns. (N. Y.) 169. Thus where the appointment, after an estate for life, is to a lineal descendant of the testator, but who is a collateral relation of the party exercising the power, the gift is not subject to a collateral inheritance tax; Com. v. Williams' Ex'rs, 13 Pa. 29.

See ILLUSORY APPOINTMENT; POWER. Consult 2 Washb. R. P. (5th ed.) *298, 337; Tudor, Lead. Cas.; Chance, Pow.; 4 Greenl. Cruise, Dig.

APPOINTOR. One authorized by the *donor*, under the statute of uses, to execute a power. 2 Bouv. Inst. n. 1923.

APPORTIONMENT. The division or distribution of a subject-matter in proportionate parts. Co. Litt. 147; 1 Swanst. 37, n.; 1 Story, Eq. Jur. (13th ed.) § 475 *a*.

Of Contracts. The allowance, in case of the partial performance of a contract, of a proportionate part of what the party would have received as a recompense for the entire performance of the contract. See generally Ans. Contr. 291.

Where the contract is to do an entire thing for a certain specified compensation, there can be no apportionment; 9 B. & C. 92; Quigley v. De Haas, 82 Pa. 267; Cox v. R. Co., 44 Cal. 18; Coburn v. Hartford, 38 Conn. 290; Barker v. Reagan, 4 Heisk. (Tenn.) 590; 1 Washb. R. P. 133, 549, 555; 2 *id.* 302; but see *contra*, Hollis v. Chapman, 36 Tex. 1. A contract for the sale of goods is entire; 9 B. & C. 386; Shinn v. Bodine, 60 Pa. 182,

100 Am. Dec. 560; but where there has been a part delivery of the goods, the buyer is liable on a *quantum valebant* if he retain the part delivered. 9 B. & C. 386; 10 *id.* 441; Bowker v. Hoyt, 18 Pick. (Mass.) 555 (but *contra* in New York and Ohio; Champlin v. Rowley, 13 Wend. (N. Y.) 258; Witherow v. Witherow, 16 Ohio, 238); though he may return the part delivered and escape liabilities. A contract consisting of several distinct items, and founded on a consideration apportioned to each item, is several; Lucesco Oil Co. v. Brewer, 66 Pa. 351. The question of entirety is one of intention, to be gathered from the contract. 2 Pars. Contr. (8th ed.) *517. Where no compensation is fixed, the contract is usually apportionable; 3 B. & Ad. 404; Cutter v. Powell, 2 Sm. Lead. Cas. 22, note (*q. v.* on this whole subject).

Of Annuities. Annuities, at common law, are not apportionable; Wiggin v. Swett, 6 Metc. (Mass.) 194, 39 Am. Dec. 716; 2 P. W. 501; so that if the annuitant died before the day of payment, his representative is entitled to no proportionate share of the annuity for the time which has elapsed since last payment; 16 Q. B. 357; 12 Ves. 484; Heizer v. Heizer, 71 Ind. 526, 36 Am. Rep. 202; Nading v. Elliott, 137 Ind. 261, 36 N. E. 695; 5 U. C. C. P. 364; Mower v. Sanford, 76 Conn. 504, 57 Atl. 119, 63 L. R. A. 625, 100 Am. St. Rep. 1008; Henry v. Henderson, 81 Miss. 743, 33 South. 960, 63 L. R. A. 616; Irving v. Rankine, 13 Hun (N. Y.) 147; Stewart v. Swaim, 13 Phila. (Pa.) 185; but by statute 11 Geo. II. it was enacted that annuities, rents, dividends, etc., and all other payments of every description made payable at fixed periods, should be apportioned; 2 P. Wms. 501; Gheen v. Osborn, 17 S. & R. (Pa.) 173; 3 Kent 471. This has been adopted by statute or decision in many of the states. Equity introduced some exceptions to the general rule that annuities are not apportionable, as in the case of those created for maintenance of infants and married women living apart from their husbands; Fisher v. Fisher, 5 Clark (Pa.) 178; Clapp v. Astor, 2 Edw. Ch. (N. Y.) 379; Kearney v. Cruikshank, 117 N. Y. 95, 22 N. E. 580; Chase v. Darby, 110 Mich. 314, 68 N. W. 159, 64 Am. St. Rep. 347; 2 P. Wms. 501; the reason being that by reason of legal disabilities the annuitants might be unable to get credit for necessaries; Tracy v. Strong, 2 Conn. 659; and the exception has been extended to eleemosynary establishments; 16 Beav. 385. Another exception is of an annuity accepted in lieu of dower; Gheen v. Osborn, 17 S. & R. (Pa.) 171; In re Lackawanna Iron & Coal Co., 37 N. J. Eq. 26; but not when payable at the termination of the yearly periods commencing with the death of testator; Mower v. Sanford, 76 Conn. 504, 57 Atl. 119, 63 L. R. A. 625, 100 Am. St. Rep. 1008. See 63 L. R. A. 616, note.

Of Wages. Wages are not apportionable where the hiring takes place for a definite period; 5 B. & P. 651; 11 Q. B. 755; Olmstead v. Beale, 19 Pick. (Mass.) 528; Hansell v. Erickson, 28 Ill. 257; Miller v. Goddard, 34 Me. 102, 56 Am. Dec. 638; Sickels v. Pattison, 14 Wend. (N. Y.) 257, 28 Am. Dec. 527; Hawkins v. Gilbert, 19 Ala. 54; *contra*, Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713.

Of Incumbrances. The ascertainment of the amounts which each of several parties interested in an estate shall pay towards the removal or in support of the burden of an incumbrance.

As between a tenant for life and the remainderman, the tenant's share is limited to keeping down the interest; but not beyond the amount of rent accruing; Doane's Ex'r v. Doane, 46 Vt. 485; 31 E. L. & E. 345; if the principal is paid, the tenant for life must pay a gross sum equivalent to the amount of all the interest he would pay, making a proper estimate of his chances of life; 1 Washb. R. P. (5th ed.) *96; 1 Story, Eq. Jur. (13th ed.) § 487. See Jones v. Sherrard, 22 N. C. 179; Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; Houghton v. Hapgood, 13 Pick. (Mass.) 158.

Of Rent. The allotment of their shares in a rent to each of several parties owning it.

The determination of the amount of rent to be paid when the tenancy is terminated at some period other than one of the regular intervals for the payment of rent.

An apportionment of rent follows upon every transfer of a part of the reversion; Montague v. Gay, 17 Mass. 439; Nellis v. Lathrop, 22 Wend. (N. Y.) 121, 34 Am. Dec. 285; Reed v. Ward, 22 Pa. 144; see Blair v. Claxton, 18 N. Y. 529; or where there are several assignees, as in case of a descent to several heirs; Bank of Pennsylvania v. Wise, 3 Watts (Pa.) 394; Crosby v. Loop, 13 Ill. 625; Cole v. Patterson, 25 Wend. (N. Y.) 456; 10 Coke 128; Comyn, Land. & Ten. 422; where a levy for debt is made on a part of the reversion, or it is set off to a widow for dower; 1 Rolle, Abr. 237; but whoever owns at the time the rent falls due is entitled to the whole; Martin v. Martin, 7 Md. 368, 61 Am. Dec. 364; Burden of Thayer, 3 Metc. (Mass.) 76, 37 Am. Dec. 117. See Williams, Ex. (7th Am. ed.) *730. If a tenancy at will is terminated between two rent days by a conveyance of the premises from the landlord to a third person, the tenant is not liable and the rent cannot be apportioned; Emmes v. Feeley, 132 Mass. 346.

Rent is not, at common law, apportionable as to time; Smith, Land. & T. 134; 3 Kent 470; Menough's Appeal, 5 W. & S. (Pa.) 432; Perry v. Aldrich, 13 N. H. 343, 38 Am. Dec. 493; Stilwell v. Doughty, 3 Bradf. Surr. (N. Y.) 359. It is apportionable by statute 11 Geo. II. c. 19, § 15; and similar statutes have been adopted in this country to some extent; 2 Washb. R. P. (5th ed.)

*289; Perry v. Aldrich, 13 N. H. 343, 38 Am. Dec. 493; Codman v. Jenkins, 14 Mass. 94; 1 Hill, Abr. c. 16, § 50. In the absence of express statute or agreement, it is not; Dexter v. Phillips, 121 Mass. 178, 23 Am. Rep. 261. See LANDLORD AND TENANT. As to apportionment of dividends on stock as between life tenant and remainderman, see DIVIDEND.

Of Representatives. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced to the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state; Art. 14, § 2, U. S. Const.; Story, Const. 1963.

The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every 30,000; but each state shall have at least one representative; U. S. Const. Art. 1, § 2.

The Revised Statutes of the United States provide that from and after March 3, 1893, the house of representatives shall be composed of 356 members, and provide the number to which each state is entitled. Upon the admission of a new state, the representatives to be assigned to it are in addition to the above 356.

The first house of representatives consisted of 65 members, or one for every 30,000 of the representative population. By the census of 1790, it consisted of 106 representatives, or one for every 33,000; by the census of 1800, 142 representatives, or one for every 33,000; by the census of 1810, 183 representatives, or one for every 35,000; by the census of 1820, 213 representatives, one for every 40,000; by the census of 1830, 242 representatives, or one for every 47,700; by the census of 1840, 223 representatives, or one for every 70,680; by the census of 1850, and under the act of May 23, 1850, the number of representatives was increased to 233, or one for every 93,423 of the representative population.

Under the census of 1860, the ratio was ascertained to be for 124,183, upon the basis of 233 members; but by the act of 4th March, 1862, the number of representatives was increased to 241. This, by the act of 1872, Feb. 2, Rev. Stat. U. S. 1878, §§ 20, 21, was increased to 292 members, and by act of 1891, Feb. 7, the number was increased to 356. By act of Jan. 16, 1901, the number was increased to 386; and by Act of August 8, 1911, to 433.

See REPRESENTATIVE.

APPOSAL OF SHERIFFS. The charging them with money received upon account of the Exchequer. 22 & 23 Car. II.; Cowell.

APPOSER. An officer of the Exchequer, whose duty it was to examine the sheriffs in regard to their accounts handed in to the exchequer. He was also called the foreign apposer. The office is now abolished.

APPOSTILLE. In French Law. An addition, or annotation, made in the margin of a writing. Merlin, *Répert.*

APPRAISE. To value property at what it is worth. In a statute directing certain officers to "appraise all taxable property *at its full and true value in money*," the words italicized are superfluous and add no meaning which the statute would not have had without them; Cocheco Mfg. Co. v. Strafford, 51 N. H. 455, 482.

APPRAISEMENT. A just valuation of property.

Appraisements are required to be made of the property of decedents, of insolvents, and others; an inventory (*q. v.*) of the goods ought to be made, and a just valuation put upon them.

APPRAISER. A person appointed by competent authority to value goods or real estate. An importer is entitled to have a merchant appraiser who is familiar with the character and value of the goods in question, and in a suit brought to recover an excess of duties he may raise the question of want of qualification of the appraiser; Oelbermann v. Merritt, 123 U. S. 356, 8 Sup. Ct. 151, 31 L. Ed. 164. As to Board of General Appraisers, see CUSTOMS DUTIES. As early as Edw. I. the judges were ordered to make provision for appraisers.

APPRECIATE. To estimate justly. The ability of a testator to *appreciate* his relation to those who had a claim upon his bounty is said to be an element of testamentary capacity; Brace v. Black, 125 Ill. 33, 17 N. E. 66.

APPREHEND. To understand, conceive, believe. Golden v. State, 25 Ga. 527, 531.

APPREHENSION. The capture or arrest of a person on a criminal charge.

The word strictly construed means the seizing or taking hold of a man and detaining him with a view to his ultimate surrender. It may be used when he is already in custody; L. R. 9 Q. B. D. 701, 705.

The term apprehension is more often applied to criminal cases, and arrest to civil cases; as, one having authority may *arrest* on *civil* process, and *apprehend* on a *criminal* warrant. See ARREST.

APPRENTICE. A person bound in the form of law to a master, to learn from him his art, trade, or business, and to serve him during the time of his apprenticeship. 1

Bla. Com. 426; 2 Kent 211; Altemus v. Ely, 3 Rawle (Pa.) 307.

Formerly the name of *apprentice en la ley* was given indiscriminately to all students of law. In the reign of Edward IV. they were sometimes called *apprenticii ad barras*. And in some of the ancient law-writers the terms apprentice and barrister are synonymous; Co. 2d Inst. 214; Eunomus, Dial. 2, § 53, p. 155; 21 L. Q. R. 353. See BARRISTER.

APPRENTICESHIP. A contract by which one person who understands some art, trade, or business, and is called the master, undertakes to teach the same to another person, commonly a minor, and called the apprentice, who, on his part, is bound to serve the master, during a definite period of time, in such art, trade, or business.

The term during which an apprentice is to serve. Pardessus, *Droit Comm.* n. 34.

A contract of apprenticeship is not invalid because the master to whom the apprentice is bound is a corporation; [1891] 1 Q. B. 75

At common law, an infant may bind himself apprentice by indenture, because it is for his benefit; 5 M. & S. 257; 5 D. & R. 339. But this contract, both in England and in the United States, on account of its liability to abuse, has been regulated by statute, and is not binding upon the infant unless entered into by him with the consent of the parent or guardian (the father, if both parents be alive, being the proper party to such consent; Com. v. Crommie, 8 W. & S. [Pa.] 339), or by the parent and guardian for him, with his consent, such consent to be made a part of the contract; 2 Kent 261; Matter of M'Dowle, 8 Johns. (N. Y.) 328; Whitmore v. Whitcomb, 43 Me. 458; Balch v. State, 12 N. H. 437; Pierce v. Massenburg, 4 Leigh (Va.) 493, 26 Am. Dec. 333; Harney v. Owen, 4 Blackf. (Ind.) 337, 30 Am. Dec. 662; or, if the infant be a pauper, by the proper authorities without his consent; Com. v. Jones, 3 S. & R. (Pa.) 158; Vinalhaven v. Ames, 32 Me. 299; Baker v. Winfrey, 15 B. Monr. (Ky.) 499; Glidden v. Town of Unity, 30 N. H. 104; Brewer v. Harris, 5 Gratt. (Va.) 285. The contract need not specify the particular trade to be taught, but is sufficient if it be a contract to teach such manual occupation or branch of business as shall be found best suited to the genius or capacity of the apprentice; Fowler v. Hollenbeck, 9 Barb. (N. Y.) 309; People v. Pillow, 1 Sandf. (N. Y.) 672. Where the apprentice is bound to accept employment only from the master, but there is no covenant by the latter to provide employment, and the contract may be terminated only by him, it is invalid as being unreasonable and not for the benefit of the infant; 45 Ch. Div. 430. In a common indenture of apprenticeship the father is bound for the performance of the covenants by the son; 3 B. & Ald. 59. But to an action of covenant against the father for the desertion of the son, it is a sufficient answer that the master has abandoned the trade which the son was apprenticed to learn, or that he has driven the son away by cruel treatment; 4 Eng. L. & Eq. 412; Coffin v. Bassett, 2 Pick. (Mass.) 357.

This contract must generally be entered into by indenture or deed; 4 M. & S. 383; Com. v. Wilbank, 10 S. & R. (Pa.) 416; Squire v. Whipple, 1 Vt. 69; and is to continue, if the apprentice be a male, only during minority, and if a female, only until she arrives at the age of eighteen; 2 Kent 264; 5 Term 715. An apprenticeship other than one entered into by indenture in conformity with the statute is not binding; Lally v. Cantwell, 40 Mo. App. 44. The English statute law has been generally adopted in the United States, with some variations; 2 Kent 264.

An infant's deed of apprenticeship under the English Employers and Workmen Act of 1875, will not bind him unless reasonable and for his benefit; but this does not mean as to all its terms, since provision for suspension of wages during a lockout, due solely to the master, is bad; [1893] 1 Q. B. 310; but one confined to stoppage by reason of accident beyond control of master is good; [1899] 2 Q. B. 1.

The duties of the master are to instruct the apprentice by teaching him the knowledge of the art which he has undertaken to teach him, though he will be excused for not making a good workman if the apprentice is incapable of learning the trade, the burden of proving which is on the master; Barger v. Caldwell, 2 Dana (Ky.) 131; Clancy v. Overman, 18 N. C. 402. He ought to watch over the conduct of the apprentice, giving him prudent advice and showing him a good example, and fulfilling towards him the duties of a father, as in his character of master he stands *in loco parentis*. He is also required to fulfil all the covenants he has entered into by the indenture. He must not abuse his authority, either by bad treatment or by employing his apprentice in menial employments wholly unconnected with the business he has to learn, or in any service which is immoral or contrary to law; 4 Clark & F. 234; Hall v. Gardner, 1 Mass. 172; but may correct him with moderation for negligence and misbehavior; Com. v. Baird, 1 Ashm. (Pa.) 267; 4 Keb. 661, pl. 50; People v. Sniffen, 1 Wheel. Cr. Cas. (N. Y.) 502. He cannot dismiss his apprentice except by consent of all the parties to the indenture; Graham v. Graham, 1 S. & R. (Pa.) 330; Nickerson v. Easton, 12 Pick. (Mass.) 110; 2 Burr. 766, 801; or with the sanction of some competent tribunal; Powers v. Ware, 2 Pick. (Mass.) 451; Warner v. Smith, 8 Conn. 14; Carmand v. Wall, 1 Bail. (S. C.) 209; even though the apprentice should steal his master's property, or by reason of incurable illness become incapable of service, the

covenants of the master and apprentice being independent; Powers v. Ware, 2 Pick. (Mass.) 451; 2 Dowl. & R. 465; 1 B. & C. 460; 5 Q. B. 447. If the apprentice proves to be an habitual thief, he may be properly dismissed; [1891] 1 Q. B. 431. The master cannot remove the apprentice out of the state under the laws of which he was apprenticed, unless such removal is provided for in the contract or may be implied from its nature; and if he do so remove him, the contract ceases to be obligatory; Com. v. Edwards, 6 Binn. (Pa.) 202; Com. v. Deacon, 6 S. & R. (Pa.) 526; Coffin v. Bassett, 2 Pick. (Mass.) 357; Vickere v. Pierce, 12 Me. 315; Walters v. Morrow, 1 Houst. (Del.) 527. An infant apprentice is not capable in law of consenting to his own discharge; 3 B. & C. 484; nor can the justices order money to be returned on the discharge of an apprentice; Stra. 69; *contra*, Salk. 67, 68, 490; 11 Mod. 110; 12 *id.* 498, 553. After the apprenticeship is at an end, the master cannot retain the apprentice on the ground that he has not fulfilled his contract, unless specially authorized by statute.

An apprentice is bound to obey his master in all his lawful commands, take care of his property, and promote his interest, endeavor to learn his trade or business, and perform all the covenants in his indenture not contrary to law. He must not leave his master's service during the terms of his apprenticeship; James v. Le Roy, 6 Johns. (N. Y.) 274; Coffin v. Bassett, 2 Pick. (Mass.) 357. The apprentice is entitled to payment for extraordinary services when promised by the master; Ex parte Steiner, 1 Penn. L. Jour. Rep. 368; see Bailey v. King, 1 Whart. (Pa.) 113, 29 Am. Dec. 42; and even when no express promise has been made, under peculiar circumstances; Mason v. The Blaireau, 2 Cra. (U. S.) 240, 270, 2 L. Ed. 266; 3 C. Rob. Adm. 237; but see Bailey v. King, 1 Whart. (Pa.) 113, 29 Am. Dec. 42. Upon the death of the master, the apprenticeship, being a personal relation, is dissolved; Strange 284; Eastman v. Chapman, 1 Day (Conn.) 30.

To be binding on the apprentice, the contract must be made as prescribed by statute; Harper v. Gilbert, 5 Cush. (Mass.) 417; but if not so made, it can only be avoided by the apprentice himself; Fowler v. Hollenbeck, 9 Barb. (N. Y.) 309; In re McDowle, 8 Johns. (N. Y.) 328; Austin v. McCluney, 5 Strobh. (S. C.) 104; and if the apprentice do elect to avoid it, he will not be allowed to recover wages for his services, the relation being sufficient to rebut any promise to pay which might otherwise be implied; Maltby v. Harwood, 12 Barb. (N. Y.) 473; Williams v. Finch, 2 *id.* 208; but see Himes v. Howes, 13 Metc. (Mass.) 80. The master will be bound by his covenants, though additional to those required by statute; Davis v. Bratton, 10 Humphr. (Tenn.) 179.

Where an apprentice is employed by a third person without the knowledge or consent of the master, the master is entitled to his earnings, whether the person who employed him did or did not know that he was an apprentice; James v. Le Roy, 6 Johns. (N. Y.) 274; Bowes v. Tibbets, 7 Greenl. (Me.) 457; but in an action for harboring or enticing away an apprentice, a knowledge of the apprenticeship by the defendant is a prerequisite to recovery; Ferguson v. Tucker, 2 Harr. & G. (Md.) 182; Stuart v. Simpson, 1 Wend. (N. Y.) 376; McKay v. Bryson, 27 N. C. 216. A master is not entitled to the extraordinary earnings which do not interfere with his services; an apprentice is therefore entitled to salvage, in opposition to his master's claim; Mason v. The Blaireau, 2 Cra. (U. S.) 270, 2 L. Ed. 266.

The master has a right of action against any one injuring his apprentice causing a loss of his service; Ames v. Ry. Co., 117 Mass. 541, 19 Am. Rep. 426; 11 Ad. & El. 301.

Apprenticeship is a relation which cannot be assigned at common law; Com. v. Barker, 5 Binn. (Pa.) 423; Dougl. 70; Tucker v. Magee, 18 Ala. 99; 1 Ld. Raym. 683; though, if under such an assignment the apprentice continue with his new master, with the consent of all the parties and his own, it will be construed as a continuation of the old apprenticeship; Dougl. 70; Town of Guilderland v. Town of Knox, 5 Cow. (N. Y.) 363; Shoppard's Adm'r v. Kelly, 2 Bail. (S. C.) 93. But in some states the assignment of indentures of apprenticeship is authorized by statute; Com. v. Vanlear, 1 S. & R. (Pa.) 249; Com. v. Jones, 3 S. & R. (Pa.) 161; Phelps v. Culver, 6 Vt. 430. See, generally, 2 Kent 261; Bacon, Abr. *Master and Servant;* 1 Saund. 313. The law of France is very similar to our own; Pardessus, *Droit Comm.* nn. 518, 522.

See BINDING OUT.

APPROACH, RIGHT OF. **In International Law.** The right to draw near to a vessel in order to ascertain the nationality of its flag. In The Marianna Flora, 11 Wheat. (U. S.) 43, 44, 6 L. Ed. 405, it was held that the right of approach in time of peace was indispensable for the exercise by public vessels of their authority to arrest pirates and other offenders. Kent understood it to be equivalent to the right of visit (*q. v.*). 1 Kent 153. At present the right of approach has no existence apart from the right of visit. See VISIT; SEARCH.

APPROBATE AND REPROBATE. **In Scotch Law.** To approve and reject. To attempt to take advantage of one part of a deed and to reject the rest.

The doctrine of *approbate and reprobate* is the English doctrine of election. A party cannot both *approbate and reprobate* the

same deed; 4 Wils. & S. Hou. L. 460; 1 Ross, Lead. Cas. 617; Pat. Comp. 710; 1 Bell, Comm. 146.

APPROPRIATION. The perpetual annexation of an ecclesiastical benefice which is the general property of the church, to the use of some spiritual corporation, either sole or aggregate. See IMPROPRIATION.

It corresponds with impropriation, which is setting apart a benefice to the use of a lay corporation. The name came from the custom of monks in England to retain the churches in their gift and all the profits of them *in proprio usu* to their own immediate benefit. 1 Burns, Eccl. Law 71.

To effect a good appropriation, the king's license and the bishop's consent must first be obtained. When the corporation having the benefice is dissolved, the parsonage becomes disappropriate at common law; Co. Litt. 46; 1 Bla. Com. 385; 1 Hagg. Eccl. 162. There have been no appropriations since the dissolution of monasteries. For the form of an appropriation, see Jacob, Introd. 411.

APPROPRIATION OF PAYMENTS. The application of a payment made to a creditor by his debtor, to one or more of several debts.

The debtor has the first right of appropriation; 2 B. & C. 72. No precise declaration is required of him, his *intention* (Terhune v. Colton, 12 N. J. Eq. 233; *id.* 312), when made known, being sufficient; Bayley v. Wynkoop, 5 Gilman (Ill.) 449; Randall v. Parramore, 1 Fla. 409; 7 Beav. 10; King v. Andrews, 30 Ind. 429; Jones v. Williams, 39 Wis. 300; Hansen v. Rounsavell, 74 Ill. 238; Levystein v. Whitman, 59 Ala. 345; Adams Exp. Co. v. Black, 62 Ind. 128; Bean v. Brown, 54 N. H. 395. Still, such facts must be proved as will lead a jury to infer that the debtor did purpose the specific appropriation claimed; 4 Ad. & E. 840; Selfridge v. Bank, 8 W. & S. (Pa.) 320; Pindall's Ex'r v. Bank, 10 Leigh (Va.) 481; Rackley v. Pearce, 1 Ga. 241; Hall v. Marston, 17 Mass. 575; Runyon v. Latham, 27 N. C. 551; Miller v. Trevillian, 2 Rob. (Va.) 2, 27; Boutell v. Mason, 12 Vt. 608; Franklin Bank v. Cooper, 36 Me. 222; Bosley v. Porter, 4 J. J. Marsh. (Ky.) 621; Mitchell v. Dall, 4 Gill & J. (Md.) 361. An entry made by the debtor in his own book at the time of payment is an appropriation, if made known to the creditor; but otherwise, if not made known to him. The same rule applies to a creditor's entry communicated to his debtor; 2 B. & C. 65; Van Rensselaer's Ex'rs v. Roberts, 5 Denio (N. Y.) 470; Seymour v. Marvin, 11 Barb. (N. Y.) 80. The appropriation must be made by the debtor at or before the time of payment; suit fixes the appropriation; Haynes v. Waite, 14 Cal. 446; Frazer v. Miller, 7 Wash. 521, 35 Pac. 427. The intention to appropriate may be referred to the jury on the facts of the transaction; West Branch Bank v. Moorehead, 5 W. & S. (Pa.) 542.

The creditor may apply the payment, as a general rule, if the debtor does not; Jones v. U. S., 7 How. 681, 12 L. Ed. 870; President, etc., of Washington Bank v. Prescott, 20 Pick. (Mass.) 339; Watt v. Hoch, 25 Pa. 411; Forretier v. Guerrineau's Creditors, 1 McCord (N. C.) 308; Blinn v. Chester, 5 Day (Conn.) 166; Brady's Adm'r v. Hill, 1 Mo. 315, 13 Am. Dec. 503; Arnold v. Johnson, 1 Scam. (Ill.) 196; Whitaker v. Groover, 54 Ga. 174; Jones v. Williams, 39 Wis. 300; Bell v. Radcliff, 32 Ark. 645; Burbank v. McCluer, 54 N. H. 345; Frazer v. Miller, 7 Wash. 521, 35 Pac. 427; Farren v. McDonnell, 74 Hun 176, 26 N. Y. Supp. 619; Northern Nat. Bank v. Lewis, 78 Wis. 475, 47 N. W. 834; Green v. Ford, 79 Ga. 130, 3 S. E. 624. In the absence of directions, the creditor may apply credits to the least secure items of his claim; Hildreth v. Davis, 6 Kulp (Pa.) 336. But there are some restrictions upon this right. The debtor must have known and waived his right to appropriate. Hence an agent cannot always apply his principal's payment. He cannot, on receipt of money due his principal, apply the funds to debts due himself as agent, selecting those barred by the statute of limitations; 1 Mann. & G. 54; Colby v. Cressy, 5 N. H. 237. A prior *legal* debt the creditor must prefer to a posterior equitable debt. Where only one of several debts is valid, all the payments must be applied to this, irrespective of its order in the account; Backman v. Wright, 27 Vt. 187, 65 Am. Dec. 187. Whether, if the equitable be prior, it must first be paid, see Baker v. Stackpoole, 9 Cow. (N. Y.) 420, 18 Am. Dec. 508; 1 C. & M. 33.

If the creditor is also *trustee* for another creditor of his own debtor, he must apply the unappropriated funds *pro rata* to his own claims and those of his *cestui que trust;* Scott v. Ray, 18 Pick. (Mass.) 361. But if the debtor, besides the debts in his own right, owe also debts as executor or administrator, the unappropriated funds should first be applied to his personal debt, and not to his debts as executor; Fowke v. Bowie, 4 Harr. & J. (Md.) 566; Sawyer v. Toppan, 14 N. H. 352; 2 Dowl. Parl. Cas. 477. A creditor cannot apply unappropriated funds to such of his claims as are *illegal* and not recoverable at law; 3 B. & C. 165; 4 M. & G. 860; 4 Dowl. & R. 783; 2 Deac. & C. 534; Rohan v. Hanson, 11 Cush. (Mass.) 44; Caldwell v. Wentworth, 14 N. H. 431. But in the case of some debts illegal by statute—namely, those contracted by sales of spirituous liquors—an appropriation to them has been adjudged good; 2 Ad. & E. 41; Treadwell v. Moore, 34 Me. 112. And the debtor may always elect to have his payment applied to an illegal debt.

If some of the debts are barred by the

statute of limitations the creditor cannot first apply the unappropriated funds to them, and thus revive them; 2 Cr. M. & R. 723; 2 C. B. 476; Washington v. State, 13 Ark. 754; Pond v. Williams, 1 Gray (Mass.) 630. Still, a debtor may waive the bar of the statute, just as he may apply his funds to an illegal debt; and the creditor may insist, in the silence of the debtor, unless other facts controvert it, that the money was paid on the barred debts; 5 M. & W. 300; Livermore v. Rand, 26 N. H. 85; Watt v. Hoch, 25 Pa. 411. See Beck v. Haas, 31 Mo. App. 180. Proof of such intent on the debtor's part may be deduced from a mutual adjustment of accounts before the money is sent, or from his paying interest on the barred debt. But, in general, the creditor cannot insist that a part-payment revives the rest of the debt. He can only retain such partial payment as has been made; Pond v. Williams, 1 Gray (Mass.) 630. It has been held that the creditor may first apply a general payment to discharging any one of several accounts all barred, and by so doing he will revive the balance of that particular account, but he is not allowed to distribute the funds upon all the barred notes, so as to revive all; Ayer v. Hawkins, 19 Vt. 26.

Wherever the payment is not *voluntary*, the creditor has not the option in appropriation, but he must apply the funds received ratably to all the notes or accounts. This is the rule wherever proceeds are obtained by judicial proceedings. So, in cases of assignment by an insolvent debtor, the share received by a creditor, a party to the assignment, must be applied *pro rata* to all his claims, and not to such debts only as are not otherwise secured; Blackstone Bank v. Hill, 10 Pick. (Mass.) 129; 1 M. & G. 54; Stamps v. Brown, Walk. (Miss.) 526; Merrimack County Bank v. Brown, 12 N. H. 320; Bank of Portland v. Brown, 22 Me. 295; Cowperthwaite v. Sheffield, 1 Sandf. (N. Y.) 416.

A creditor having several demands may apply the payments to a debt not secured by sureties, where other rules do not prohibit it; Upham v. Lefavour, 11 Metc. (Mass.) 185. Where appropriations are made by a receipt, *prima facie* the creditor has made them, because the language of the receipt is his; U. S. v. Bradbury, Dav. Dist. Ct. 146, Fed. Cas. No. 14,635.

It is sufficiently evident from the foregoing rules that the principle of the civil law which required the creditor to act for his debtor's interest in appropriation more than for his own, is not a part of the common law; Logan v. Mason, 6 W. & S. (Pa.) 9. The nearest approach to the civil-law rule is the doctrine that when the right of appropriation falls to the creditor he must make such an application as his debtor could not *reasonably* have objected to; Bancroft v. Dumas, 21 Vt. 456; Parchman v. McKinney, 12 Smedes & M. (Miss.) 631. See IMPUTATION OF PAYMENTS.

The law will apply part-payments in accordance with the justice and equity of the case; U. S. v. Kirkpatrick, 9 Wheat. (U. S.) 720, 6 L. Ed. 199; Harker v. Conrad, 12 S. & R. (Pa.) 301, 14 Am. Dec. 691; Field v. Holland, 6 Cra. (U. S.) 28, 3 L. Ed. 136; Sheehy v. Mandeville, 6 Cra. (U. S.) 253, 264, 3 L. Ed. 215; U. S. v. Wardwell, 5 Mas. 82, Fed. Cas. No. 16,640; Campbell v. Vedder, 1 Abb. App. Dec. (N. Y.) 295; Pickering v. Day, 2 Del. Ch. 333; Leef v. Goodwin, Taney 460, Fed. Cas. No. 8,207.

Unappropriated funds are always applied to a *debt due* at the time of payment, rather than to one not then due; 2 Esp. 666; Baker v. Stackpoole, 9 Cow. (N. Y.) 420, 18 Am. Dec. 508; Harrison & Robinson v. Johnston, 27 Ala. 445; Seymour v. Sexton, 10 Watts (Pa.) 255; Stone v. Talbot, 4 Wisc. 442; Kline v. Ragland, 47 Ark. 111, 14 S. W. 474. But an express agreement with the debtor will make good an appropriation to debts not due; Shaw v. Pratt, 22 Pick. (Mass.) 305. The creditor should refuse a payment on an account not yet due, if he be unwilling to receive it; but if he do receive it he must apply it as the debtor directs; Wetherell v. Joy, 40 Me. 325; Levystein & Simon v. Whitman, 59 Ala. 345. A payment is applied to a *certain* rather than to a *contingent* debt, and, therefore, to a debt on which the payer is bound directly, rather than to one which binds him collaterally; President, etc., of Bank of Portland v. Brown, 22 Me. 295. And where the amount paid is precisely equal to one of several debts, a jury is authorized to infer its intended application to that debt; Seymour & Bouck v. Van Slyck, 8 Wend. (N. Y.) 403; Moody v. U. S., 1 Woodb. & M. 150, Fed. Cas. No. 1,636. Where one holds two notes, one of which is secured, and he receives further security with express agreement that he may apply proceeds thereof to either note, he may make such application to the unsecured note notwithstanding the objection of second mortgagee; Case v. Fant, 53 Fed. 41, 3 C. C. A. 418. Where a creditor is secured by both chattel and real estate mortgages, he may apply proceeds of sale of chattels first to the chattel mortgage and then to payment of debts otherwise secured; Schloss v. Solomon, 97 Mich. 526, 56 N. W. 753.

The law, as a general rule, will apply a payment in the way most beneficial to the *debtor* at the time of payment; Neal v. Allison, 50 Miss. 175; Moore v. Kiff, 78 Pa. 96. This rule seems to be similar to the civil-law doctrine. Thus, *e. g.*, courts will apply money to a mortgage debt rather than to a simple contract debt; see 12 Mod. 559; Dorsey v. Gassaway, 2 Harr. & J. (Md.) 402, 3

Am. Dec. 557; Bussey v. Gant's Adm'r, 10 Humphr. (Tenn.) 238; Robinson v. Doolittle, 12 Vt. 246; Pattison v. Hull, 9 Cow. (N. Y.) 747, 765; McTavish v. Carroll, 1 Md. Ch. Dec. 160; Hamer v. Kirkwood, 25 Miss. 95. In the absence of specific appropriation, the law will apply payments to unsecured indebtedness in preference to the secured; Gardner v. Leck, 52 Minn. 522, 54 N. W. 746. Yet, on the other hand, in the pursuit of equity, courts will sometimes assist the *creditor*. Hence, of two sets of debts, courts allow the creditor to apply unappropriated funds to the debts least strongly secured; Planters' Bank v. Stockman, 1 Freem. Ch. (Miss.) 502; Baine v. Williams, 10 Smedes & M. (Miss.) 113; Stamford Bank v. Benedict, 15 Conn. 438; Ramsour v. Thomas, 32 N. C. 165; Jones v. Kilgore, 2 Rich. Eq. (S. C.) 63; Emery v. Tichout, 13 Vt. 15; Field v. Holland, 6 Cr. (U. S.) 8, 3 L. Ed. 136; Smith v. Loyd, 11 Leigh (Va.) 512, 37 Am. Dec. 621; Byer v. Fowler, 14 Ark. 86; Hargroves v. Cooke, 15 Ga. 321; Pattison v. Hull, 9 Cow. (N. Y.) 747, 765; The D. B. Steelman, 48 Fed. 580.

Interest. Payments made on account are first to be applied to the interest which has accrued thereon. And if the payment exceed the amount of interest, the residue goes to extinguish the principal; Peebles v. Gee, 12 N. C. 341; Jencks v. Alexander, 11 Paige, Ch. (N. Y.) 619; Bond v. Jones, 8 Smedes & M. (Miss.) 368; Hearn v. Cutberth, 10 Tex. 216; Righter v. Stall, 3 Sandf. Ch. (N. Y.) 608; Miami Exporting Co. v. Bank, 5 Ohio 280; Hart v. Dorman, 2 Fla. 445, 50 Am. Dec. 285; Spires v. Hamot, 8 W. & S. (Pa.) 17; Mills v. Saunders, 4 Neb. 190; Jacobs v. Ballenger, 130 Ind. 231, 29 N. E. 782, 15 L. R. A. 169. Funds must be applied by the creditor to a judgment bearing interest, and not to an unliquidated account; Scott v. Fisher, 4 T. B. Monr. (Ky.) 389; nor to usurious interest; Duncan v. Helm, 22 La. Ann. 418; Bank of Cadiz v. Slemmons, 34 Ohio St. 142, 32 Am. Rep. 364.

Priority. When no other rules of appropriation intervene, the law applies part-payments to debts in the order of time, discharging the oldest first; Whetmore v. Murdock, 3 Woodb. & M. 390, Fed. Cas. No. 17,510; Huger's Ex'rs v. Bocquet, 1 Bay (S. C.) 497; Thurlow v. Gilmore, 40 Me. 378; Dows v. Morewood, 10 Barb. (N. Y.) 183; Allstan's Adm'r v. Contee's Ex'r, 4 Harr. & J. (Md.) 351; Ross's Ex'r v. McLauchlan's Adm'r, 7 Gratt. (Va.) 86; Shedd v. Wilson, 27 Vt. 478; Berghaus v. Alter, 9 Watts (Pa.) 386; Harrison v. Johnston, 27 Ala. 445; Town of St. Albans v. Failey, 46 Vt. 448; Allen v. Brown, 39 Ia. 330; Worthley v. Emerson, 116 Mass. 374; The Barges 2 and 4, 58 Fed. 425. Where the payment is upon an account, the law will apply it to the oldest items; The Tom Lysle, 48 Fed. 690. So strong is this priority rule that it has been said that equity will apply payments to the earliest items, even where the creditor has security for these items and none for later ones; Truscott v. King, 6 N. Y. 147. But this is opposed to the prevailing rule.

Sureties. The general rule is that neither debtor nor creditor can so apply a payment as to affect the liabilities of sureties, without their consent; Merrimack County Bank v. Brown, 12 N. H. 320; Myers v. U. S., 1 McLean 493, Fed. Cas. No. 9,996; Brander v. Phillips, 16 Pet. (U. S.) 121, 10 L. Ed. 909; Postmaster General v. Norvell, Gilp. 106, Fed. Cas. No. 11,310. Where a principal makes general payments, the law presumes them, *prima facie*, to be made upon debts guaranteed by a surety, rather than upon others; though circumstances and intent will control this rule of surety, as they do other rules of appropriation; 1 C. & P. 600; 8 Ad. & E. 855; 10 J. B. Moore 362; Mitchell v. Dall, 4 Gill & J. (Md.) 361; Donally v. Wilson, 5 Leigh (Va.) 329.

Continuous accounts. In these, payments are applied to the earliest items of account, unless a different intent can be inferred; 4 B. & Ad. 766; 4 Q. B. 792; U. S. v. Kirkpatrick, 9 Wheat. (U. S.) 720, 6 L. Ed. 199; Gass v. Stinson, 3 Sumn. 98, Fed. Cas. No. 5,262; Miller v. Miller, 23 Me. 24, 39 Am. Dec. 597; Morgan v. Tarbell, 28 Vt. 498; Dulles v. De Forest, 19 Conn. 191; Harrison v. Johnston, 27 Ala. 445; Horne v. Bank, 32 Ga. 1; Shuford v. Chinski (Tex.) 26 S. W. 141; Winnebago Paper Mills v. Travis, 56 Minn. 480, 58 N. W. 36. Where one is indebted on two different accounts and money is paid without directions, the creditor may apply it to the later account; Henry Bill Pub. Co. v. Utley, 155 Mass. 366, 29 N. E. 635; Perot v. Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258; or he may apply half the amount paid on each of two debts, where neither is barred by the statute of limitations; Beck v. Haas, 111 Mo. 264, 20 S. W. 19, 33 Am. St. Rep. 516.

Partners. Where a creditor of the old firm continues his account with the new firm, payments by the latter will be applied to the old debt, *prima facie*, the preceding rule of continuous accounts guiding the appropriations. As above, however, a different intent, clearly proved, will prevail; 5 B. & Ad. 925; 2 B. & Ald. 39; Logan v. Mason, 6 W. & S. (Pa.) 9. When a creditor of the firm is also the creditor of one partner, a payment by the latter of partnership funds must be applied to the partnership debts. Yet circumstances may allow a different application; 1 Mood. & M. 40; Fairchild v. Holly, 10 Conn. 175; McKee v. Stroup, 1 Rice (S. C.) 291; Sneed v. Wiester, 2 A. K. Marsh. (Ky.) 277; Codman v. Armstrong, 28 Me. 91; Johnson v.

Boone's Adm'r, 2 Harr. (Del.) 172. See Tootle v. Jenkins, 82 Tex. 29, 17 S. W. 519. And so, unappropriated payments made by a party indebted severally and also jointly with another to the same creditor, for items of book-charges, are to be applied upon the several debts; Livermore v. Claridge, 33 Me. 428.

The rules of appropriation, it has now been seen, apply equally well whether the debts are of the same or of different orders, and though some are specialties while others are simple contracts; Town of Alexandria v. Patten, 4 Cra. (U. S.) 317, 2 L. Ed. 633; Bennett v. Woolfolk, 15 Ga. 221; Pennypacker v. Umberger, 22 Pa. 492; Hamilton v. Benbury, 3 N. C. 385.

As to the *time* during which the application must be made in order to be valid, there is much discrepancy among the authorities, but perhaps a correct rule is that any time will be good as between debtor and creditor, but a *reasonable* time only when third parties are affected; 6 Taunt. 597; Combs v. Little, 4 N. J. Eq. 314, 40 Am. Dec. 207; Starrett v. Barber, 20 Me. 457; Heilbron v. Bissell, Bail. Eq. (S. C.) 430; Reynolds v. McFarlane, 1 Overt. (Tenn.) 488; Moss v. Adams, 39 N. C. 42; Robinson v. Doolittle, 12 Vt. 249; Fairchild v. Holly, 10 Conn. 184.

When once made, the appropriation cannot be changed but by consent; and rendering an account, or bringing suit and declaring in a particular way, is evidence of an appropriation; Hill v. Southerland's Ex'rs, 1 Wash. (Va.) 128; Hopkins v. Conrad, 2 Rawle (Pa.) 316; Bank of North America v. Meredith, 2 Wash. C. C. 47, Fed. Cas. No. 893; Jackson v. Bailey, 12 Ill. 159; Codman v. Armstrong, 28 Me. 91; Pearce v. Walker, 103 Ala. 250, 15 South. 568. If the debtor receives without objection an account rendered, he cannot afterward question the imputation; Flower v. O'Bannon, 43 La. Ann. 1042, 10 South. 376; Sawyer v. Harrison, 43 Minn. 298, 45 N. W. 434.

Of Government. No money can be drawn from the treasury of the United States but in consequence of appropriations made by law; Const. art. 1, s. 9. Under this clause it is necessary for congress to appropriate money for the support of the federal government; this is done annually by acts of appropriation, some of which are for the general purposes of government, and others special and private in their nature. These general appropriation bills, as they are commonly termed, extend to the 30th of June in the following year, and usually originate in the house of representatives, being prepared by the committee of ways and means; but they are distinct from the bills for raising revenue, which the constitution declares shall originate in the house of representatives. A rule of the house gives appropriation bills precedence over all other business, and requires them to be first discussed in committee of the whole. Where money once appropriated remains unexpended for more than two years after the expiration of the fiscal year in which the act shall have been passed, such appropriations are deemed to have ceased, and the moneys so unexpended are immediately thereafter carried to the "surplus fund," and it is not lawful thereafter to pay them out for any purpose without further and specific appropriations by law. Certain appropriations, however, are excepted from the operation of this law, viz.: moneys appropriated for payment of the interest on the funded debt, or the payment of interest and reimbursement according to contract of any loan or loans made on account of the United States; as likewise moneys appropriated for a purpose in respect to which a longer duration is specially assigned by law. No expenditure is allowed in any department in any year in excess of the appropriation for that year; R. S. §§ 3660–3692, 7 O. A. G. 1.

The term "appropriation" was also used in 13 Stat. at L. 381, to include all taking and use of property by the army and navy in the course of the war not authorized by contract with the government; Filor v. U. S., 9 Wall. (U. S.) 45, 19 L. Ed. 549; U. S. v. Russell, 13 Wall. (U. S.) 623, 20 L. Ed. 474; Waters v. U. S., 4 Ct. Cl. 389.

It is also used in reference to taking property under eminent domain (*q. v.*) and particularly to taking water in connection with irrigation (*q. v.*).

APPROVE. To increase the profits upon a thing.

Used of common or waste lands which were enclosed and devoted to husbandry; 3 Kent 406; Old Nat. Brev. 79.

While confessing crime one's self, to accuse another of the same crime.

It is so called because the accuser must prove what he asserts; Staundf. Pl. Cr. 142; Crompton, Jus. Peace 250.

To vouch. To appropriate. To improve. Kelham.

To commend; be satisfied with.

APPROVED ENDORSED NOTES. Notes endorsed by another person than the maker, for additional security, the endorser being satisfactory to the payee.

Public sales are sometimes made on approved endorsed notes. The meaning of the term is that the purchaser shall give his promissory note for the amount of his purchases, endorsed by another, which, if approved of by the seller, shall be received in payment. If the party approve of the notes, he consents to ratify the sale; Mills v. Hunt, 20 Wend. (N. Y.) 431.

APPROVER. One confessing himself guilty of felony, and accusing others of the same crime to save himself. Crompton, Inst. 250; Co. 3d Inst. 129; Myers v. People, 26 Ill. 173; Gray v. People, 26 *id.* 344; 1 Cowper 331. See ANTITHETARIUS.

Such an one was obliged to maintain the truth of his charge, by the old law; Cowell. If he failed

to convict those he accused he was at once hung. Lea, Force & Superstition 243. It is said that they usually failed. 1 Pike, Hist. of Cr. 286. The approvement must have taken place before plea pleaded; 4 Bla. Com. 330.

Certain men sent into the several counties to increase the farms (rents) of hundreds and *wapentakes*, which formerly were let at a certain value to the sheriffs. Cowell.

Sheriffs are called the king's approvers. Termes de la Ley.

Approvers in the Marches were those who had license to sell and purchase beasts there.

APPURTENANCES. Things belonging to another thing as principal, and which pass as incident to the principal thing. Harris v. Elliott, 10 Pet. (U. S.) 25, 9 L. Ed. 333; Blaine's Lessee v. Chambers, 1 S. & R. (Pa.) 169; Cro. Jac. 121, 526; 1 P. Wms. 603; 2 Coke 32; Co. Litt. 5 *b*, 56 *a*, *b*; 2 Saund. 401, n. 2; 1 B. & P. 371; Grubb v. Grubb, 74 Pa. 25. See 13 Am. Dec. 657, note.

The word has a technical signification, and, when strictly considered, is employed in leases for the purpose of including any easements or servitudes used or enjoyed with the demised premises. When thus used, to constitute an appurtenance there must exist a propriety of relation between the principal or dominant subject and the accessory or adjunct, which is to be ascertained by considering whether they so agree in nature or quality as to be capable of union without incongruity; Riddle v. Littlefield, 53 N. H. 508, 16 Am. Rep. 388; Humphreys v. McKissock, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. Ed. 473.

Thus, if a house and land be conveyed, everything passes which is necessary to the full enjoyment thereof and which is in use as incident or appurtenant thereto; U. S. v. Appleton, 1 Sumn. 492, Fed. Cas. No. 14,463. Under this term are included the curtilage; 2 Bla. Com. 17; a right of way; 4 Ad. & E. 749; water-courses and secondary easements, under some circumstances; Angell, Wat. C. (7th ed.) § 153 *a*; a turbary; 3 Salk. 40; and generally, anything necessary to the enjoyment of a thing; 4 Kent 468, n.; Simmons v. Cloonan, 81 N. Y. 557; but it is the general rule that land cannot pass as appurtenant to land; Harris v. Elliott, 10 Pet. (U. S.) 25, 9 L. Ed. 333; Helme v. Guy, 6 N. C. 341; Woodhull v. Rosenthal, 61 N. Y. 390; but it may pass, in order to give effect to the intent of a will; Otis v. Smith, 9 Pick. (Mass.) 293; and in Pennsylvania where first purchasers of 5000 acres from William Penn, the Proprietary, obtained city lots as an incident to their purchase, it was held that the lots passed as appurtenant to a grant of 5000 acres; Hill's Lessee v. West, 4 Yeates (Pa.) 142; also flats pass as appurtenant to the fast land on a river front; Risdon v. City of Philadelphia, 18 W. N. C. (Pa.) 73; and the land covered by the water used for water power will pass as appurtenant to a saw-mill; Grubb v. Grubb, 74 Pa. 25. See also Scheetz v. Fitzwater, 5 Pa. 126; Ott v. Kreiter, 110 Pa. 370, 1 Atl. 724.

The mere use of the term "appurtenances," without more, will not pass a right of way established over one portion of land merely for convenience of the owner, it not being a way of necessity; Parsons v. Johnson, 68 N. Y. 62, 23 Am. Rep. 149.

An elevator is not a common appurtenance to the railroads of the several companies having the stock of the elevator company; a certificate of stock in an independent corporation cannot be an appurtenance to a railroad; Humphreys v. McKissock, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. Ed. 473, where, under a mortgage made by a railroad company, the term "appurtenances" was held to mean only such property as is indispensable to the use and enjoyment of the franchises of the company.

If a house is blown down, a new one erected there shall have the old appurtenances; 4 Coke 86. The word appurtenances in a deed will not usually pass any corporeal real property, but only incorporeal easements, or rights and privileges; Co. Litt. 121; 8 B. & C. 150; 2 Washb. R. P. 317, 327; 3 *id.* 418. See APPENDANT.

Appurtenances of a ship include whatever is on board a ship for the objects of the voyage and adventure in which she is engaged, belonging to her owner. Ballast was held no appurtenance; 1 Leon. 46. Boats and cable are such; Briggs v. Strange, 17 Mass. 405; also, a rudder and cordage; 5 B. & Ald. 942; 1 Dods. Adm. 278; fishing-stores; 1 Hagg. Adm. 109; chronometers; 6 Jur. 910; see Richardson v. Clark, 15 Me. 421. For a full discussion, see 1 Pars. Marit. Law 71. See In re Bailey, 2 Sawy. 201, Fed. Cas. No. 728.

APPURTENANT. Belonging to; pertaining to.

The thing appurtenant must be of an inferior nature to the thing to which it is appurtenant; 2 Bla. Com. 19; U. S. v. Harris, 1 Sumn. 21, Fed. Cas. No. 15,315; Williams v. Baker, 41 Md. 523. A right of common may be appurtenant, as when it is annexed to lands in other lordships, or is of beasts not generally commonable; 2 Bla. Com. 33. Such can be claimed only by immemorial usage and prescription. See APPURTENANCES.

APUD ACTA (Lat.). Among the recorded acts. This was one of the verbal appeals (so called by the French commentators), and was obtained by simply saying, *appello*.

AQUA (Lat.). Water. It is a rule that water belongs to the land which it covers when it is stationary. *Aqua cedit solo* (water follows the soil); 2 Bla. Com. 18. But the owner of running water cannot obstruct the flow to the injury of an inheritance below him. *Aqua currit et currere debet* (water runs, and ought to run); 3 Kent 439;

Kauffman v. Griesemer, 26 Pa. 413, 67 Am. Dec. 437; 2 Washb. R. P. 340. See RIPARIAN PROPRIETORS.

AQUÆ DUCTUS. In Civil Law. A servitude which consists in the right to carry water by means of conduits over or through the estate of another. Dig. 8. 3. 1; Inst. 2. 3; Lalaure, *Des Serv.* c. 5, p. 23.

AQUÆ HAUSTUS. In Civil Law. A servitude which consists in the right to draw water from the fountain, pool, or spring of another. Inst. 2. 3. 2; Dig. 8. 3. 1. 1.

AQUÆ IMMITTENDÆ. In Civil Law. A servitude which frequently occurs among neighbors.

It was the right which the owner of a house, built in such a manner as to be surrounded with other buildings, so that it has no outlet for its waters, had to cast water out of his windows on his neighbor's roof, court, or soil. Lalaure, *Des Serv.* 23. It is recognized in the common law as an easement of drip; Wadsworth v. Hydraulic Ass'n, 15 Barb. (N. Y.) 95; Gale & Whatley, Easements. See EASEMENTS; DRIP.

AQUAGIUM (Lat.). A water-course. Cowell. Canals or ditches through marshes. Spelman. A signal placed in the *aquagium* to indicate the height of water therein. Spelman.

AQUATIC RIGHTS. Rights which individuals have in water.

ARALIA. Land fit for the plough. Denoting the character of land, rather than its condition. Spelman. Kindred in meaning *arare*, to plough; *arator*, a ploughman; *aratrum terræ*, as much land as could be cultivated by a single *arator; araturia*, land fit for cultivation.

ARBITER. A person bound to decide according to the rules of law and equity, as distinguished from an arbitrator, who may proceed wholly at his own discretion, so that it be according to the judgment of a sound man. Cowell.

This distinction between arbiters and arbitrators is not observed in modern law. Russell, Arbitrator 112. See ARBITRATOR.

One appointed by the Roman prætor to decide by the equity of the case, as distinguished from the *judex*, who followed the law. Calvinus, Lex.

One chosen by the parties to decide the dispute; an arbitrator. Bell, Dict.

ARBITRAGE. Transactions of bankers and mercantile houses by which stocks or bills are bought in one market and sold in another for the sake of the profit arising from a difference in price in the two markets.

ARBITRAMENT AND AWARD. A plea to an action brought for the same cause which had been submitted to arbitration and on which an award had been made. Watson, Arb. 256.

ARBITRARY PUNISHMENT. That punishment which is left to the decision of the judge, in distinction from those defined by statute. See DISCRETION.

ARBITRATION AND AWARD. Arbitration is the investigation and determination of a matter or matters of difference between contending parties, by one or more unofficial persons, chosen by the parties, and called arbitrators, or referees.

1. CHARACTER OF THE PROCEEDING. Arbitration is the hearing and determination of a cause between the parties in controversy by a tribunal selected by them. Duren v. Getchell, 55 Me. 241. At common law it is entirely voluntary, and depends upon the agreement of the parties, to waive the right of trial in court by a jury.

"An arbitration is a domestic tribunal created by the will and consent of the parties litigant, and resorted to to avoid expense, delay and ill feeling consequent upon litigating in courts of justice." Reily v. Russell, 34 Mo. 524.

"Arbitration is where the parties injuring and injured submit all matters in dispute concerning any personal chattels or personal wrong to the judgment of two or more arbitrators, who are to decide the controversy; and if they do not agree it is usual to add that another person be called in as umpire (*imperator* or *impar*) to whose sole judgment it is then referred; or frequently there is only one arbitrator originally appointed. The decision in any of these cases is called an award, and thereby the question is as fully determined and the right transferred or settled as it could have been by the agreement of the parties or a judgment of a court of justice." 3 Bla. Com. 16, adopted in Fargo v. Reighard, 13 Ind. App. 39, 39 N. E. 888, 41 N. E. 74; Germania Fire Ins. Co. of City of New York v. Warner, 13 Ind. App. 466, 41 N. E. 969.

"Arbitration is a substitution by consent of the parties of another tribunal for those provided by the ordinary processes of law; but that such a substitution should be established, the consent of the parties thereto should be proved in the usual way." Boyden v. Lamb, 152 Mass. 416, 25 N. E. 609.

"An arbitration at common law was but a judicial investigation out of court," and as such it required notice of hearing and examination of the witnesses under oath, unless expressly waived. People v. Board of Sup'rs, 15 N. Y. Supp. 748.

"Arbitration is an arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to the established tribunals of justice, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation. When the submission is

made a rule of court, the arbitrators are not officers of the court, but are the appointees of the parties, as in cases where there is no rule of court." In re Curtis-Castle Arbitration, 64 Conn. 501, 30 Atl. 769, 42 Am. St. Rep. 200.

To constitute an arbitration, the matter submitted must be one in dispute between the parties and not some matter which it is expected may arise between them or a matter of accounting or appraisal. Toledo S. S. Co. v. Zenith Transp. Co., 184 Fed. 391, 106 C. C. A. 501.

Compulsory arbitration is when the consent of one of the parties is enforced by statutory provisions. Wood v. City of Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369.

Voluntary arbitration is by mutual and free consent of the parties. It usually takes place in pursuance of an agreement (commonly in writing) between the parties, termed a submission; the person to whom the reference is made is an arbitrator; and the determination of the arbitrators is called an award; Garr v. Gomez, 9 Wend. (N. Y.) 649; but a parol submission is good at common law; Cady v. Walker, 62 Mich. 157, 28 N. W. 805, 4 Am. St. Rep. 834.

A submission to arbitration made pending an action thereon, operates as a discontinuance of the suit; Draghicevich v. Vulicevich, 76 Cal. 378, 18 Pac. 406; and it is a bar to any future action thereon; Baltes v. Machine Works, 129 Ind. 185, 28 N. E. 319. If the submission is not made under an order of court, the award cannot be made a judgment of the court unless it be by consent; Long v. Fitzgerald, 97 N. C. 39, 1 S. E. 844.

At common law it was either *in pais*,—that is, by simple agreement of the parties, —or by the intervention of a court of law or equity. The latter was called arbitration by rule of court; 3 Bla. Com. 16.

Besides arbitration at common law, there exists arbitration, in England as well as the United States, under various statutes.

Most of them are founded on the 9 & 10 Will. III. c. 15, and 3 & 4 Will. IV. ch. 42, § 49, by which it is allowed to refer a matter in dispute, not then in court, to arbitrators, and agree that the submission be made a rule of court. This agreement, being proved on the oath of one of the witnesses thereto, is enforced as if it had been made at first under a rule of court; 3 Bla. Com. 18; Kyd, Aw. 22. Some of the state statutes, however, provide for compulsory arbitration.

This is somewhat similar to the arbitrations of the Romans. There the prætor selected, from a list of citizens made for the purpose, one or more persons, who were authorized to decide all suits submitted to them, and which had been brought before him. The authority which the prætor gave them conferred on them a public character, and their judgments were without appeal. Toullier, *Droit Civ. Fr.* liv. 3, t. 3, c. 4, n. 820.

Although at common law arbitrators were unofficial persons selected by the parties, it is in the power of a state legislature to provide for statutory arbitrators to be selected from a class learned in the law, and that, in their proceedings, they shall be governed by certain rules and regulations. Such a commission is not an arbitrary one to which litigants are forced to submit their differences, but can only act by the express consent of the parties, which gives validity and vitality to the statute, and a judgment entered thereon is like other consent judgments; Henderson v. Beaton, 52 Tex. 29.

It is a general rule that in an arbitration as to matters of "public concern" a majority is sufficient to make an award; this rule was laid down by Eyre, C. J., in 1 Bos. & Pul. 229, and applied in Omaha Water Co. v. Omaha, 162 Fed. 225, 89 C. C. A. 205, 15 Ann. Cas. 498, where the appraisal of a water works, preparatory to their being taken over by a city, was held to be a matter of "public concern," and the decision of a majority binding; in Colombia v. Cauca Co., 190 U. S. 524, 23 Sup. Ct. 704, 47 L. Ed. 1159, where there had been an arbitration between the Republic of Colombia and a railroad company, and after the three arbitrators had heard and discussed the case, the Colombia representative withdrew, and there not being time under the treaty for proceedings to supply his place, the remaining arbitrators signed the award and it was held binding, among other reasons, because it was of "public concern"; in People v. Nichols, 52 N. Y. 478, 11 Am. Rep. 734, where an appropriation having been made (of $20,000, or so much thereof as might be necessary) for the purchase of relics of George Washington to be paid only on a certificate of genuineness and value of three named persons, it was held that a matter between a state and an individual is a matter of "public concern" and that a certificate signed by two was *sufficient*, the third having refused to sign. The rule was also applied in Morgan v. Ins. Ass'n, 52 App. Div. 61, 64 N. Y. Supp. 873.

2. SUBMISSION. The *submission* is an agreement, parol (oral or written) or sealed, by which parties agree to submit their differences to the decision of a referee or arbitrators. It is sometimes termed a reference; Kyd, Arb. 11; 3 M. & W. 816; McManus v. McCulloch, 6 Watts (Pa.) 357; Stewart v. Cass, 16 Vt. 663, 42 Am. Dec. 534; Howard v. Sexton, 4 N. Y. 157.

It is the authority given by the parties to the arbitrators, empowering them to inquire into and determine the matters in dispute.

It may be *in pais*, or by rule of court, or under the various statutes; Williams v. Wood, 12 N. C. 82.

It may be oral, but this is inconvenient, because open to disputes; by written agreement not under seal (in some states the submission must be in writing; De Armas v.

City of New Orleans, 5 La. 133; Smith v. Pollock, 2 Cal. 92); by indenture, with mutual covenants to abide by the decision of the arbitrator; by deed-poll, or by bond, each party executing an obligation to the other conditioned to be void respectively upon the performance of the award; Caldw. Arb. 16; McManus v. McCulloch, 6 Watts (Pa.) 357. A parol submission followed by a valid award, though not in writing, may be binding and conclusive upon the parties, if the arbitrators act fairly, but before a party is so bound, the agreement to arbitrate must be duly established; Childs v. State, 97 Ala. 52, 12 South. 441.

An offer to arbitrate not accepted by the other party cannot affect his right to sue; Funsten v. Commission Co., 67 Mo. App. 559; where a submission was provided for in a lease, and by failure of the parties to agree upon arbitrators, nothing had been done and suit was brought, the action could be defeated by an offer at the trial to proceed with the arbitration; Van Beuren v. Wotherspoon, 12 App. Div. 421, 42 N. Y. Supp. 404. A statutory provision for arbitration has been held not to be exclusive of the common-law right to arbitrate; Burkland v. Johnson, 50 Neb. 858, 70 N. W. 388. See also, as to the effect of statutory provisions upon common-law arbitration, New York Lumber & Wood Working Co. v. Schneider, 119 N. Y. 475, 24 N. E. 4; Ehrman v. Stanfield, 80 Ala. 118.

When to be made. A submission may be made at any time of causes not in court, and at common law, where a cause was depending, submission might be made by rule of court before the trial, or by order of *nisi prius* after it had commenced, which was afterwards made a rule of court; 2 B. & Ald. 395; Craig v. Craig, 9 N. J. L. 198.

Who may make. Any one capable of making a disposition of his property or release of his right, or capable of suing or being sued, or of making a valid and binding contract with regard to the subject, may, in general, be a party to a reference or arbitration; but one under civil or natural incapacity cannot be bound by his submission; 2 P. Wms. 45; Furbish v. Hall, 8 Greenl. (Me.) 315; Eastman v. Burleigh, 2 N. H. 484; Schoff v. Bloomfield, 8 Vt. 472; Inhabitants of Buckland v. Inhabitants, 16 Mass. 396; Inhabitants of Griswold v. North-Stonington, 5 Conn. 367; Brady v. Brooklyn, 1 Barb. (N. Y.) 584; Street v. St. Clair, 6 Munf. (Va.) 458; Alexandria Canal Co. v. Swann, 5 How. (U. S.) 83, 12 L. Ed. 60; Lathers v. Fish, 4 Lans. (N. Y.) 213. Every one is so far, and only so far, bound by the award as he would be by an agreement of the same kind made directly by him. For example, the submission of a minor is not void, but voidable; Millsaps v. Estes, 137 N. C. 535, 50 S. E. 227, 70 L. R. A. 170, 107 Am. St. Rep. 496, where on motion for rehearing (after holding it void; *id.*, 134 N. C. 486, 46 S. E. 988) the court said that there was a conflict of authority, in which they were "inclined to concur with those courts and the text-writers who maintain the proposition that such contracts are voidable only" and that there is no reason to take it out of the general rule as to contracts of infants. See INFANT.

In general, in cases of incapacity of the real owner of property, as well as in many cases of agency, the person who has the legal control of the property may make submission, including a *husband* for his wife; 5 Ves. 846 (before the Married Women's Acts); a *parent* or *guardian* for an infant; Weston v. Stuart, 11 Me. 326; Hutchins v. Johnson, 12 Conn. 376, 30 Am. Dec. 622; Weed v. Ellis, 3 Caines (N. Y.) 253 (but not a *guardian ad litem*; Hannum's Heirs v. Wallace, 9 Humphr. (Tenn.) 129); a *trustee* for his *cestui que trust*; 3 Esp. 101; an *attorney* for his client; 1 Ld. Raym. 246; Scarborough v. Reynolds, 12 Ala. 252; Wilson v. Young, 9 Pa. 101; Diedrick v. Richley, 2 Hill (N. Y.) 271; Talbot v. McGee, 4 T. B. Monr. (Ky.) 375; Holker v. Parker, 7 Cra. (U. S.) 436, 3 L. Ed. 396 (but see 6 Weekl. Rep. 10); an *agent* duly authorized for his principal; 8 B. & C. 16; Schoff v. Bloomfield, 8 Vt. 472; Inhabitants of Boston v. Brazer, 11 Mass. 449; Furber v. Chamberlain, 29 N. H. 405; Wood v. R. Co., 8 N. Y. 160; an *executor* or *administrator* at his own peril, but not thereby necessarily admitting assets; Wheatley v. Martin's Adm'r, 6 Leigh (Va.) 62; Lea v. Colston, 5 T. B. Monr. (Ky.) 240; Ireland v. Smith, 1 Barb. (N. Y.) 419; McKeen v. Oliphant, 18 N. J. L. 442; *assignees* under bankruptcy and insolvency laws, under the statutory restrictions, stat. 6 Geo. IV. c. 16, and state statutes; the right being limited in all cases to that which the person acting can control and legally dispose of; Baker v. Lovett, 6 Mass. 78, 4 Am. Dec. 88; Britton v. Williams's Devisees, 6 Munf. (Va.) 453; Milner v. Turner's Heirs, 4 T. B. Monr. (Ky.) 240; Fort v. Battle, 13 Smedes & M. (Miss.) 133; but not including a *partner*, for a partnership; 1 Cr. M. & R. 681; Karthaus v. Ferrer, 1 Pet. (U. S.) 222, 7 L. Ed. 121; Buchanan v. Curry, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200; Pillsbury v. Cammett, 2 N. H. 284; Armstrong v. Robinson, 5 Gill & J. (Md.) 412; Taylor v. Coryell, 12 S. & R. (Pa.) 243; Lind. Partn. 129, 272; 3 Kent 49; the *administratrix* of a public contractor may join in a submission to arbitration of a controversy arising out of the contract; Bailey v. District of Columbia, 9 App. (D. C.) 360.

What may be included in a submission. Generally, any matter which the parties might adjust by agreement, or which may be the subject of an action or suit at law, except perhaps actions (*qui tam*) on penal statutes by common informers; for crimes cannot be made the subject of adjustment and composition by arbitration, this being

against the most obvious policy of the law; McMullen v. Mayo, 8 Smedes & M. (Miss.) 208; Akely v. Akely, 16 Vt. 450; Caton v. MacTavish, 10 Gill & J. (Md.) 192; Ligon v. Ford, 5 Munf. (Va.) 10; Partridge v. Hood, 120 Mass. 403, 21 Am. Rep. 524; Stanwood v. Mitchell, 59 Me. 121; Davenport v. Fulkerson, 70 Mo. 417; including a debt certain on a specialty, any question of law, the construction of a will or other instrument, any personal injury on which a suit will lie for damages, although it may be also indictable; 9 Ves. 367; Smith v. Thorndike, 8 Greenl. (Me.) 119; Walker v. Sanborn, 8 Greenl. (Me.) 288; Jones v. Mill Corp., 6 Pick. (Mass.) 148. All controversies of a civil nature, including disputes concerning real estate, may be the subject of a submission for arbitration; Finley v. Funk, 35 Kan. 668, 12 Pac. 15; "and in all cases of injury, either to the person or property, where damages would be recoverable by action, the arrangement of the matter may be left to arbitration;" Miller v. Brumbaugh, 7 Kan. 343, 349.

An agreement to refer future disputes will not be enforced by a decree of specific performance, nor will an action lie for refusing to appoint an arbitrator in accordance with such an agreement; 2 B. & P. 135; Tobey v. County of Bristol, 3 Sto. 800, Fed. Cas. No. 14,065; Leonard v. House, 15 Ga. 473. It is considered against public policy to exclude from the tribunals of the state disputes the nature of which cannot be foreseen; 4 Bro. C. C. 312, 315. See Lauman v. Young, 31 Pa. 306.

An agreement to arbitrate any dispute which may arise is ineffectual, under the settled rules of law, to oust the jurisdiction of the courts or debar either party from resorting thereto; The Excelsior, 123 U. S. 40, 8 Sup. Ct. 33, 31 L. Ed. 75; Seward v. City of Rochester, 109 N. Y. 164, 16 N. E. 348; Mentz v. Ins. Co., 79 Pa. 478, 21 Am. Rep. 80; Supreme Council of Order of Chosen Friends v. Forsinger, 125 Ind. 52, 25 N. E. 129, 9 L. R. A. 501, 21 Am. St. Rep. 196; Randel v. Canal Co., 1 Harr. (Del.) 233; Chippewa Lumber Co. v. Ins. Co., 80 Mich. 116, 44 N. W. 1055; Hager v. Shuck, 120 Ky. 574, 87 S. W. 300, 27 Ky. L. Rep. 957; 5 H. L. Cas. 811; 8 Term 139; Straits of Dover S. S. Co. v. Munson, 100 Fed. 1005, 41 C. C. A. 156, affirming *id.*, 99 Fed. 787, where it is said that "such agreements ever since Lord Coke's time, and even before, have been held to be no defense to an action in the courts." Such an agreement does not oust the courts of jurisdiction, and if such is its intent, it is invalid; White v. R. Co., 135 Mass. 216; Chamberlain v. R. Co., 54 Conn. 472, 9 Atl. 244; Dugan v. Thomas, 79 Me. 221, 9 Atl. 354; Hurst v. Litchfield, 39 N. Y. 377. Agreements to submit questions of fact to arbitration have been sustained; 5 H. L. Cas. 811; President, etc., Delaware & Hudson Canal Co. v. Coal Co., 50 N. Y. 250, where it was held that the general rule stated should be applied to contracts only when coming strictly within the letter and spirit of decisions already made, and that it is contrary to the spirit of later times and not to be extended. Where, however, the agreement covers a case of mixed law and fact and its effect is to oust the jurisdiction of a court, it falls within the general rule and is void; Ison v. Wright, 55 S. W. 202, 21 Ky. L. Rep. 1368; Vass v. Wales, 129 Mass. 38; 1 Exch. Div. 257. A provision in articles of an association, that any dispute between it and any member should be decided by arbitration in lieu of legal proceedings, was held not to oust the primary jurisdiction of the courts; McMahon v. Ben. Ass'n, 17 Phila. (Pa.) 216; nor did a provision providing for submission of disputes, not to a particular person or tribunal, but to one or more persons to be mutually chosen; Home Fire Ins. Co. of Omaha v. Kennedy, 47 Neb. 138, 66 N. W. 278, 53 Am. St. Rep. 521.

Revocation. The general principle with respect to voluntary arbitrations is that a submission is subject to revocation by either party; Chippewa Lumber Co. v. Ins. Co., 80 Mich. 116, 44 N. W. 1055; People v. Nash, 13 Civ. Pro. (N. Y.) 301; before the making and publication of the award; Paulsen v. Manske, 126 Ill. 72, 18 N. E. 275, 9 Am. St. Rep. 532; Oregon & W. M. Sav. Bank v. Mtg. Co., 35 Fed. 22; Williams v. Mfg. Co., 153 N. C. 7, 68 S. E. 902, 31 L. R. A. (N. S.) 679, 138 Am. St. Rep. 637, 21 Ann. Cas. 954; Mead's Adm'x v. Owen, 83 Vt. 132, 74 Atl. 1058; Memphis Trust Co. v. Iron Works, 166 Fed. 398, 93 C. C. A. 162; Boston & L. R. Co. v. R. Corp., 139 Mass. 463, 31 N. E. 751; Sidlinger v. Kerkow, 82 Cal. 42, 22 Pac. 932; Levy v. Ins. Co., 58 W. Va. 546, 52 S. E. 449; but not under a clause in a lease; Atterbury v. Trustees, 66 Misc. 273, 123 N. Y. Supp. 25; nor (under a statute) after final submission to the arbitrators; *id.*; People v. Nash, 111 N. Y. 310, 18 N. E. 630, 2 L. R. A. 180, 7 Am. St. Rep. 747; Thomas W. Finucane Co. v. Board of Education, 190 N. Y. 76, 82 N. E. 737; but the "final submission" is held to be when the allegations and proofs of both parties are closed and the matter finally submitted to the arbitrators for their decision; In re Gitt, 140 App. Div. 382, 125 N. Y. Supp. 369; Atterbury v. Trustees of Columbia College, 66 Misc. 273, 123 N. Y. Supp. 25.

Revocation of a submission may take place at any time previous to the award, though it be expressed in the agreement to be irrevocable. See *infra.* The remedy of the injured party is by an action for breach of the agreement; Morse, Arb. & Aw. 230; 4 B. & C. 103; Rowley v. Young, 3 Day (Conn.) 118; Oregon & W. Mortg. Sav. Bank v. Mortgage Co., 35 Fed. 22.

A submission under rule of court or a statutory submission in a pending suit is

generally irrevocable, both in England and the United States; 5 Burr. 497; Haskell v. Whitney, 12 Mass. 47; Inhabitants of Cumberland v. North Yarmouth, 4 Greenl. (Me.) 459; Hunt v. Wilson, 6 N. H. 36; Bloomer v. Sherman, 5 Paige (N. Y.) 575; Tyson v. Robinson, 25 N. C. 333; Carey v. County Com'rs, 19 Ohio, 245; Poppers v. Knight, 69 Ill. App. 578; Zehner v. Nav. Co., 187 Pa. 487, 41 Atl. 464, 67 Am. St. Rep. 586; without leave of the court. But "the mere fact that the controversies agreed to be submitted were the subject of a pending action would not make it a submission by rule of court"; Minneapolis & St. L. R. Co. v. Cooper, 59 Minn. 290, 61 N. W. 143.

There are cases, apparently only in Pennsylvania, which hold that where the submission assumes the form of a contract, upon a sufficient consideration, it becomes irrevocable; McCune v. Lytle, 197 Pa. 404, 412, 47 Atl. 190, where Brown, J., says of this statement, "So well is it settled * * * that reference is hardly necessary to the * * * authorities," and then quotes from several cases, all of that state.

A right of revocation must be exercised before the publication of the award; Butler v. Greene, 49 Neb. 280, 68 N. W. 496; and before the party seeking to revoke has notice that the award is made; Coon v. Allen, 156 Mass. 113, 30 N. E. 83; but where the submission provides for a written award, it may be revoked after the arbitrators have communicated to strangers their views, but before they have signed an award; Butler v. Greene, 49 Neb. 280, 68 N. W. 496; but not after the award is made and published; Levy v. Ins. Co., 58 W. Va. 546, 52 S. E. 449.

A submission is revocable even if it provides that it shall be irrevocable; 8 Coke, 81 *b*, where the reason is given that "a man cannot by his act make such authority, power or warrant not countermandable, which is by the law and of its own nature countermandable"; 5 B. & Ald. 507; People v. Nash, 111 N. Y. 310, 18 N. E. 630, 2 L. R. A. 180, 7 Am. St. Rep. 747; Power v. Power, 7 Watts (Pa.) 205; Sartwell v. Sowles, 72 Vt. 270, 48 Atl. 11, 82 Am. St. Rep. 943; Tobey v. Bristol County, 3 Sto. 800, Fed. Cas. No. 14,065; Heritage v. State, 43 Ind. App. 595, 88 N. E. 114.

The formality of the revocation must follow and conform to that of the submission, so a submission under seal can only be revoked by writing under seal; Horne v. Welsh, 35 Pa. Super. Ct. 569; Mullins v. Arnold, 4 Sneed (Tenn.) 262; Van Antwerp v. Stewart, 8 Johns. (N. Y.) 125; Jacoby v. Johnston, 1 Hun (N. Y.) 242; Wallis v. Carpenter, 13 Allen (Mass.) 19; McFarlane v. Cushman, 21 Wis. 401; Brown v. Leavitt, 26 Me. 251; one in writing only by writing; New York Lumber & Wood-Working Co. v. Schneider, 1 N. Y. Supp. 441 (so, by statute, of any revocation); Shisler v. Keavy, 75 Pa. 79; Keyes v. Fulton, 42 Vt. 159; Mand v. Patterson, 19 Ind. App. 619, 49 N. E. 974; so if it be oral it may be in like manner revoked; Sutton v. Tyrrell, 10 Vt. 91; Dexter v. Young, 40 N. H. 130.

The question whether a revocation was made before the award is for the jury; Hunt's Lessee v. Guilford, 4 Ohio 310. The institution of a suit by one party, before award, generally revokes by implication the submission; State v. Jenkins, 40 N. J. L. 288, 29 Am. Rep. 237; Commercial Union Assurance Co. of London v. Hocking, 115 Pa. 407, 8 Atl. 589, 2 Am. St. Rep. 562; Peters' Adm'r v. Craig, 6 Dana (Ky.) 307; Kimball v. Gilman, 60 N. H. 54; Paulsen v. Manske, 126 Ill. 72, 18 N. E. 275, 9 Am. St. Rep. 532.

A submission is, however, not revoked by the commencement of an action unless the suit covers the whole subject matter submitted, and until a complaint is filed by a party to the submission the adverse party has no legal notice of the cause of action, and the arbitrators may proceed with the arbitration and render an award though a summons has been issued; Williams v. Mfg. Co., 153 N. C. 7, 68 S. E. 902, 31 L. R. A. (N. S.) 679, 138 Am. St. Rep. 637, 21 Ann. Cas. 954.

Though counsel may submit his client's cause to arbitration, the latter may revoke it before action upon it; Coleman v. Grubb, 23 Pa. 393.

As to arbitration as a condition precedent, see 11 Harv. L. Rev. 234.

A submission at common law is generally revoked by the death of either party (unless it be stipulated otherwise), or of the arbitrator, or his refusal to act; 2 B. & Ald. 394; Dexter v. Young, 40 N. H. 130; Gregory v. Pike, 94 Me. 27, 46 Atl. 793; but see Bacon v. Crandon, 15 Pick. (Mass.) 79; Freeborn v. Denman, 8 N. J. L. 116; Price's Adm'r v. Tyson's Adm'rs, 2 Gill & J. (Md.) 479; Leonard v. House, 15 Ga. 473; by the death of the umpire, or the setting aside of the award by a decree of a court; Parsons v. Ambos, 121 Ga. 98, 48 S. E. 696; so also by *marriage* of a *feme sole*, and the husband and wife may then be sued on her arbitration bond; 5 East 266. It is not revoked by the bankruptcy of the party or by the death of the arbitrator after publication of the award; 4 B. & Ald. 250; Cartledge v. Cutliff, 21 Ga. 1. A submission in a pending action at law falls where the award fails for misconduct of the arbitrators; Rand v. Peel, 74 Miss. 305, 21 South. 10.

Where the submission makes no provision for filling a vacancy, if one occurs by the death of an arbitrator or refusal to act, it is a revocation; Wolf v. Augustine, 181 Pa. 576, 37 Atl. 574.

A revocation may be good at law but bad in equity, and revocation of a submission

which has been made a rule of court is a contempt; 1 Jac. & W. 485.

Effect of. A submission of a case in court works a discontinuance and a waiver of defects in the process; Camp v. Root, 18 Johns. (N. Y.) 22; Bigelow v. Goss, 5 Wis. 421; Crooker v. Buck, 41 Me. 355; and the bail or sureties on a replevin bond are discharged; Hill v. Hunnewell, 1 Pick. (Mass.) 192; Cunningham v. Howell, 23 N. C. 9; 2 B. & Ad. 774. But see 6 Taunt. 379; 10 Bingh. 118. But this rule has been modified in England by stat. 17 & 18 Vict. c. 125, § 11; 8 Exch. 327.

The submission which defines and limits, as well as confers and imposes, the duty of the arbitrator must be followed by him in his conduct and award; but a fair and liberal construction is allowed in its interpretation; 1 Wms. Saund. 65; Hume v. Hume, 3 Pa. 144; Cheshire Bank v. Robinson, 2 N. H. 126; Karthaus v. Ferrer, 1 Pet. (U. S.) 222, 7 L. Ed. 121. If general, it submits both law and fact; Indiana Cent. R. Co. v. Bradley, 7 Ind. 49; if limited, the arbitrator cannot exceed his authority; Barrows v. Copen, 11 Cush. (Mass.) 37.

The statutes of many of the states of the United States provide for submissions by the parties before a justice of the peace, in which case the award will be enforced as if it had been made under rule of court; and statutes also regulate submissions made under rule of court.

3. The Arbitrators. A private extraordinary judge chosen by the parties who have a matter in dispute, invested with power to decide the same. Adopted from Bouv. L. Dict. in Gordon v. U. S., 7 Wall. 188, 194, 19 L. Ed. 35; also in Miller v. Canal Co., 53 Barb. (N. Y.) 590, 595, with this additional sentence from the same work: "Arbitrators are so called because they have generally an arbitrary power, there being, in common, no appeal from their sentences, which are called awards."

A private extraordinary judge, to whose decision matters in controversy are referred by consent of the parties.

"Referee" is of frequent modern use as a synonym of "arbitrator," but it is in its origin of broader significance and it is less accurate than arbitrator.

An arbitrator at common law "is to be considered as a judge or tribunal of the parties' own choosing, and his decision or judgment cannot be set aside unless for partiality or corruption, which will not be presumed on slight grounds, but must be clearly shown;" McManus v. McCulloch, 6 Watts (Pa.) 357.

Arbitrators are judges chosen by the parties to decide matters submitted to them, finally and without appeal; Burchell v. Marsh, 17 How. (U. S.) 344, 15 L. Ed. 96; Miller v. Canal Co., 53 Barb. (N. Y.) 590; and they must be taken as they are with their weaknesses and frailties, and their action if honest and fair, is binding; Silver v. Lumber Co., 40 Fed. 192; but the power to appoint them is not judicial, but executive; Kean v. Ridgway, 16 S. & R. (Pa.) 65.

They are sometimes considered as the substitutes and sometimes as the judges of the parties; they can do what the parties can and more than the courts, and their power is revocable as a power of attorney; Dixon v. Morehead, Add. (Pa.) 216.

Arbitrators have the powers of a court and jury; Kennedy v. Luhman, 13 Montg. Co. L. Rep. (Pa.) 131. They are judges, not agents of the parties appointing them; 1 Ves. 226; 9 Ves. 69; and their duties are more judicial than fiduciary; Collins v. Oliver, 4 Humph. (Tenn.) 439; quasi-judicial officers; Hoosac Tunnel, Dock & Elevator Co. v. O'Brien, 137 Mass. 424, 50 Am. Rep. 323; *per contra*, it is said that they are the agents of both parties and their acts are to be considered as the acts of the parties themselves; Hays v. Hays, 23 Wend. (N. Y.) 363; Strong v. Strong, 9 Cush. (Mass.) 560.

An arbitrator must be a disinterested person to whom a matter in dispute is submitted for decision; Garr v. Gomez, 9 Wend. (N. Y.) 649; Miller v. Canal Co., 53 Barb. (N. Y.) 590; State v. Appleby, 25 S. C. 100, 104; Perry v. Cobb, 88 Me. 435, 34 Atl. 278, 49 L. R. A. 389. "In order to clothe a person with the authority of an arbitrator, the parties must mutually agree to be bound by the decision of the person chosen to determine the matter in controversy;" Gordon v. U. S., 7 Wall. 188, 194, 19 L. Ed. 35. Like jurors impannelled for the trial of a cause, arbitrators are invested *pro hac vice* with judicial functions, the rightful discharge of which calls for and presupposes the most absolute impartiality;" Strong v. Strong, 9 Cush. (Mass.) 560; Grosvenor v. Flint, 20 R. I. 21, 37 Atl. 304; where an appraiser under an insurance policy was not disinterested, and that fact was concealed, a suit was held maintainable to set aside the appraisement; Bradshaw v. Ins. Co., 137 N. Y. 137, 32 N. E. 1055, where it was held unnecessary to decide whether it was an arbitration.

Appointment and Qualifications. Usually a single arbitrator is agreed upon, or the parties each appoint one, with a stipulation that, if they do not agree, another person, called an umpire, named, or to be selected by the arbitrators, shall be called in, to whom the matter is to be referred; Cald. Arb. ch. IV; Smith v. Morse, 9 Wall. (U. S.) 76, 19 L. Ed. 597.

In general, any objection to the appointment of an arbitrator; Estice v. Cockerell, 26 Miss. 127; Indiana Ins. Co. v. Brehm, 88 Ind. 578; Robb v. Brachman, 38 Ohio St. 423; or umpire will be waived by attending before him; 9 Ad. & E. 679; Anderson v.

Burchett & Farley, 48 Kan. 153, 29 Pac. 315; and an objection should be made at the trial; Cones v. Vanosdol, 4 Ind. 248; Madison Ins. Co. v. Griffin, 3 Ind. 277; Graham v. Graham, 9 Pa. 254, 49 Am. Dec. 557; Christman v. Moran, 9 Pa. 487; one who goes to trial before a referee without requiring an oath waives the oath; Newcomb v. Wood, 97 U. S. 581, 24 L. Ed. 1085; Maynard v. Frederick, 7 Cush. (Mass.) 247. It is said that any person may be chosen as an arbitrator; Morse, Arb. & Aw. 99; and it is no objection that one has been formerly counsel for the party in whose favor he found, that fact not being known to the other party; Goodrich v. Hulbert, 123 Mass. 190, 25 Am. Rep. 60; or that one had been intimate with the party and had heard his version of the dispute before; Morville v. Tract Soc., 123 Mass. 129; an employé of one party; Howard v. R. Co., 24 Fla. 560, 5 South. 356; a stockholder of a corporation party; Williams v. Ry. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. Rep. 403; Inhabitants of Leominster v. R. Co., 7 Allen (Mass.) 38; a woman, married or single; Evans v. Ives, 15 Phila. (Pa.) 635; or a judge, if named by the parties; Hopkins v. Sodouskie, 1 Bibb (Ky.) 148; Galloway's Heirs v. Webb, Hard. (Ky.) 318 (but not under the civil law; Dom. Civ. L. sec. 1113); or one who has acted as an arbitrator before in the same capacity; Stemmer v. Ins. Co., 33 Ore. 65, 49 Pac. 588, 53 Pac. 498; Van Winkle v. Ins. Co., 55 W. Va. 286, 47 S. E. 82. The relation of landlord and tenant subsisting between an arbitrator and one of the parties does not disqualify him; Fisher v. Towner, 14 Conn. 26; nor does the fact that the referee and the attorney for one of the parties had an office together and were in daily and friendly intercourse; Perry v. Moore, 2 E. D. Smith (N. Y.) 32.

Whether natural or legal disabilities are a disqualification appears not to be authoritatively settled. It is said that they do not so operate; Viner, Abr. *Arbitrement* (A. 2); Russ. Arb. & Aw. (9th Ed.) 92 (citing only Viner); Morse, Arb. & Aw. 99 (citing only Russell); *contra*, Com. Dig. *Arbitrament* (C), who says that persons of nonsane memory, lunatics, infants, persons not *sui juris* as a villein, persons dead in law, as a monk, one attainted of treason or felony, cannot be arbitrators (citing no case but only West, Symb. 163 *b*.). There appears to be no decided case on the subject and no definite or modern authority to indicate that a person who is not *sui juris* for any other purpose would be qualified to act in this capacity. The rule of the civil law seems to be definite to the effect that all persons may be arbitrators except such as are under some incapacity or infirmity which renders them unfit for that function; Dom. Civ. L. sec. 1112. The only case cited to support the right of parties to appoint any one without qualification is simply a decision that it is immaterial whether the arbitrator be a professional man or not; 8 Dowl. 879.

There are certain facts which, as in the case of judges or jurors, will render a person incapable of being an arbitrator, if they are unknown to the party objecting, as, for example, interest in the subject matter; Connor v. Simpson, 4 Sadler (Pa.) 105, 7 Atl. 161; Pearson v. Barringer, 109 N. C. 398, 13 S. E. 942; Strong v. Strong, 12 Cush. (Mass.) 135 (where the question of the arbitrator's impartiality was submitted to the jury in an action on a bond to abide the award); kinship to either party; Brown v. Leavitt, 20 Me. 251 (but not equal relationship to both parties; McGregor v. Sprott, 59 Hun, 617, 13 N. Y. 191); a transfer to an arbitrator's son pending arbitration; Spearman v. Wilson, 44 Ga. 473; free judgment of the case; Beattie v. Hilliard, 55 N. H. 428 (but not an opinion expressed five years before; Brush v. Fisher, 70 Mich. 469, 38 N. W. 446, 14 Am. St. Rep. 510); previous conviction of perjury; Colles, P. C. 257; strong bias and prejudice; Bash v. Christian, 77 Ind. 290.

Proceedings. Arbitrators should give notice of the time and place of hearing to the parties interested; Lutz v. Linthicum, 8 Pet. (U. S.) 165, 178, 8 L. Ed. 904; Elmendorf v. Harris, 23 Wend. (N. Y.) 628, 35 Am. Dec. 587; Bushey v. Culler, 26 Md. 534; Crowell v. Davis, 12 Metc. (Mass.) 293; Vessel Owners' Towing Co. v. Taylor, 126 Ill. 250, 18 N. E. 603; Curtis v. City of Sacramento, 64 Cal. 102, 28 Pac. 108; an award made without such notice of the hearing is a nullity; Peters v. Newkirk, 6 Cow. (N. Y.) 103; it is not binding on the party having no notice; Cobb v. Wood, 32 Me. 455; McKinney v. Page, 32 Me. 513; Dormoy v. Knower, 55 Ia. 722, 8 N. W. 670; but where the submission is by written agreement a surety in the agreement need not be notified of the hearing; Farmer v. Stewart, 2 N. H. 97; and where the respective attorneys of the parties were arbitrators and notice was unnecessary; Hill v. Hill, 11 Smedes & M. (Miss.) 616; and where notice was given and the party sought to set aside the award on the ground that he was unavoidably prevented from attending by the obstruction of roads caused by high water, it was not error to refuse the motion; Shroyer v. Barkley, 24 Mo. 346. Where one party had ineffectually attempted to revoke his submission and refused to attend, the arbitrator may proceed *ex parte*, without giving him notice; 1 Jac. & W. 485, 492; and the refusal of a party to attend or concern himself with the matter is a waiver of notice; Vincent v. Ins. Co., 120 Ia. 272, 94 N. W. 458. In England the practice seems to be that the arbitrators are not required to give notice, but that the party obtaining an appointment of the time for hearing should serve it on the solicitors of the other party;

Russ. Arb. & Aw. 132; Morse Arb. & Aw. 117; and in one case Lord Hardwicke held that no notice from the arbitrators was required; 3 P. Wms. 529. The power of the arbitrators is not determined by their neglect to attend at the time designated and they may appoint another session within any reasonable time; Harrington v. Rich, 6 Vt. 666.

They should all conduct the investigation together, and should sign the award in each other's presence; Smith v. Smith, 28 Ill. 56; Thompson v. Mitchell, 35 Me. 281; Hills v. Ins. Co., 129 Mass. 345; but a majority is held sufficient; Parker v. Ins. Co., 3 R. I. 192; Robinson v. Bickley, 30 Pa. 384; Hoffman v. Hoffman, 26 N. J. L. 175; Kile v. Chapin, 9 Ind. 150; Henderson v. Buckley, 14 B. Monr. (Ky.) 292; Cartledge v. Cutliff, 21 Ga. 1; Doherty v. Doherty, 148 Mass. 367, 19 N. E. 352. An award by two of three arbitrators is binding; Doyle v. Patterson, 84 Va. 800, 6 S. E. 138; Hewitt v. Craig, 86 Ky. 23, 5 S. W. 280; *contra*, Kent v. French, 76 Ia. 187, 40 N. W. 713. See *supra* as to matters of "public concern."

In investigating matters in dispute, they are allowed the greatest latitude; 1 B. & P. 91; Langley v. Hickman, 1 Sandf. (N. Y.) 681; Hollingsworth v. Leiper, 1 Dall. (U. S.) 161, 1 L. Ed. 82; Jones v. Boston Mill Corp., 6 Pick. (Mass.) 148; Mulder v. Cravat, 2 Bay (S. C.) 370; Askew v. Kennedy, 1 Bail (S. C.) 46. But see Fennimore v. Childs, 6 N. J. L. 386; McAlister v. McAlister, 1 Wash. (Va.) 193; Fowler v. Thayer, 4 Cush. (Mass.) 111; Forbes v. Frary, 2 Johns. Cas. (N. Y.) 224; Latimer v. Ridge, 1 Binn. (Pa.) 458. They are judges both of law and of fact, and are not bound by the rules of practice adopted by the courts; 1 Ves. Ch. 369; Burchell v. Marsh, 17 How. (U. S.) 344, 15 L. Ed. 96; Skeels v. Chickering, 7 Metc. (Mass.) 316; Ward v. Bank, 7 Metc. (Mass.) 486; Kendall v. Power Co., 36 Me. 19; Long v. Rhodes, 36 Me. 108; Ebert v. Ebert, 5 Md. 353; In re Riddle's Estate, 19 Pa. 431; Sargeant v. Butts, 21 Vt. 99; White v. White, 21 Vt. 250; Bennett v. Bennett, 25 Conn. 66; Smith v. Douglass, 16 Ill. 34; Ross v. Watt, 16 Ill. 99; Lunsford v. Smith, 12 Gratt. (Va.) 554; Indiana Cent. Ry. Co. v. Bradley, 7 Ind. 49; Hotaling v. Cronise, 2 Cal. 61; Tyson v. Wells, *id.* 122; Sessions v. Bacon, 23 Miss. 272; Price v. Brown, 98 N. Y. 388; King v. Mfg. Co., 79 N. C. 360; Adams' Adm'r v. Ringo, 79 Ky. 211. Thus, the witnesses were not sworn in Bergh v. Pfeiffer, Lalor's Supp. (N. Y.) 110; Woodrow v. O'Conner, 28 Vt. 776. They may decide *ex æquo et bono*, and need not follow the law; the award will be set aside only when it appears that they meant to be governed by the law but have mistaken it; 2 C. B. 705; Kleine v. Catara, 2 Gall. 61, Fed. Cas. No. 7,869; Pringle v. McClenachan, 1 Dall. (U. S.) 486, 1 L. Ed. 235; Jones v. Corp., 6 Pick. (Mass.) 148; White v. White, 21 Vt. 250; Greenough v. Rolfe, 4 N. H. 357; but if they decide a matter honestly and fairly according to their judgment, the award will not be set aside because they decide the facts erroneously, or were mistaken in the law they applied to them, or decide on an erroneous theory; Goddard v. King, 40 Minn. 164, 41 N. W. 659; Hall v. Ins. Co., 57 Conn. 105, 17 Atl. 356; Baltimore & O. R. Co. v. Canton Co., 70 Md. 405, 17 Atl. 394; Thornton v. McCormick, 75 Ia. 285, 39 N. W. 502; Burchell v. Marsh, 17 How. (U. S.) 344, 15 L. Ed. 96.

Under submissions *in pais*, the attendance of witnesses and the production of papers was entirely voluntary at common law; 2 Sim. & S. 418; 2 C. & P. 550. It was otherwise when made under a rule of court.

Duties and powers of. Arbitrators cannot delegate their authority; Cro. Eliz. 726; 6 C. B. 258; Sutton v. Horn, 7 S. & R. (Pa.) 228; Kingston v. Kincaid, 1 Wash. C. C. 448, Fed. Cas. No. 7,821; Shipman v. Fletcher, 82 Va. 601; Hicks v. McDonnell, 99 Mass. 459. The power ceases with the publication of the award; Newman v. Labeaume, 9 Mo. 30; and death after publication and before delivery does not vitiate it; Cartledge v. Cutliff, 21 Ga. 1. They cannot be compelled to make an award; in which respect the common law differs from the Roman; Story, Eq. Jur. § 1457; or to disclose the grounds of their judgment; 3 Atk. 644; Ebert v. Ebert, 5 Md. 353; State v. Peticrew's Ex'r, 19 Mo. 373.

An arbitrator may retain the award till paid for his services, but cannot maintain assumpsit in England without an express promise; 2 M. & G. 847, 870; 3 Q. B. 466, 928. But see 1 Gow. 7; 1 B. & P. 93. In the United States he may; Hinman v. Hapgood, 1 Den. (N. Y.) 188, 43 Am. Dec. 663; Goodall v. Cooley, 29 N. H. 48.

A submission to arbitration by one of several parties without the consent of the others, whether by rule of court or otherwise, is void; Gregory v. Trust Co., 36 Fed. 408.

4. The Umpire. Sometimes a submission provides for the appointment of one arbitrator by each party with authority, if they disagree, to call in a third person, usually designated as the *umpire*. This term "denotes one who is to decide the controversy in case the others cannot agree;" Keans v. Rankin, 2 Bibb (Ky.) 88. The jurisdiction of the umpire and arbitrators cannot be concurrent; Morse, Arb. & Aw. 241; if the arbitrators make an award, it is binding; if not, the award of the umpire is binding; T. Jones 167. If the umpire sign the award of the arbitrators, it is still their award, and *vice versa;* Rigden v. Martin, 6 Harr. & J. (Md.) 403. He determines the issue submitted to the arbitrators on which they have failed to agree, which is his sole award; and neither of the original arbitrators is required to

join in the award; Haven v. Winnisimmet Co., 11 Allen (Mass.) 384, 87 Am. Dec. 723; Ingraham v. Whitmore, 75 Ill. 30. Sometimes the third person called in so to decide is called a "special arbitrator." The distinction is that, when the special or third arbitrator is called in, the authority to make an award is vested in the three jointly, and even if an award by two is good, it must be the result of deliberations, but when, upon a disagreement between arbitrators, an umpire is called in, the powers of the former are *functus officio*, and the latter has exclusive authority to make a decision; Day v. Hammond, 57 N. Y. 479, 15 Am. Rep. 522, quoting Lyon v. Blossom, 4 Duer (N. Y.) 318; Chandos v. Ins. Co., 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321; Hartford Fire Ins. Co. v. Mercantile Co., 56 Fed. 378, 5 C. C. A. 524.

The power to appoint an umpire "must be given in express words" and is not to be implied even from "power given to two arbitrators in the event of their disagreement to select a third person," as in such case the latter "is a joint arbitrator and not an umpire"; Gaffy v. Bridge Co., 42 Conn. 143, quoting Lyon v. Blossom, 4 Duer. (N. Y.) 328.

A third or special arbitrator must be appointed before the hearing unless the appointment of one is waived either expressly or tacitly by appearance of the parties before the two; Badders v. Davis, 88 Ala. 367, 6 South. 834; Phipps v. Tompkins, 50 Ga. 641; 14 U. C. Q. B. 495; but an umpire may be appointed either before; Peck v. Wakely, 2 McCord (S. C.) 279; Van Cortlandt v. Underhill, 17 Johns. (N. Y.) 405; Rigden v. Martin, 6 Harr. & J. (Md.) 403; or after a disagreement between the arbitrators; Rogers v. Corrothers, 26 W. Va. 238; Chandos v. Ins. Co., 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321; unless otherwise provided by statute; In re Grening, 74 Hun 62, 26 N. Y. S. 117.

Arbitrators may appoint an umpire after their term of service has expired, if the time is not gone within which the umpire was to make his award; McKinstry v. Solomons, 2 Johns. (N. Y.) 57. Subsequent dissent of the parties, without just cause, will have no effect upon the appointment; but they should have notice; Crowell v. Davis, 12 Metc. (Mass.) 293. If an umpire refuses to act, another may be appointed *toties quoties;* 11 East 367. If the arbitrators and umpire act together and make a joint award, it will be good; Rison v. Berry, 4 Rand. (Va.) 275; Bulstr. 184.

Under an agreement to arbitrate, the subsequent proceeding of one arbitrator and the umpire to make an award without the presence of the other arbitrator is unauthorized and illegal; Cravens v. Estes, 144 Ky. 511, 139 S. W. 761; and so is the choice of an umpire by lot, and the award will be set aside; 9 B. & C. 624; 9 Ad. & El. 699.

The umpire is called into the arbitration to act only after a disagreement between the arbitrators, and his opinion and judgment must control the award; Mullins v. Arnold, 4 Sneed (Tenn.) 262; but he cannot, in the absence of one of the parties and one of the arbitrators, act on information from the other party and arbitrator; Cravens v. Estes, 144 Ky. 511, 139 S. W. 761.

Where the agreement permits a majority decision, the withdrawal of one arbitrator and his refusal to act, after one party has attempted to withdraw, will not affect an award made the same day by the other arbitrators; Atterbury v. Trustees of Columbia College, 66 Misc. Rep. 273, 123 N. Y. S. 25.

At common law all the arbitrators must agree unless the submission provides to the contrary; Washburn v. White, 197 Mass. 510, 84 N. E. 106; Tennessee Lumber Mfg. Co. v. Clark Bros. Co., 182 Fed. 618, 105 C. C. A. 156; even where by statute or under a contract a majority may make a report, all the proceedings must be participated in by all the members; Heritage v. State, 43 Ind. App. 595, 88 N. E. 114; but where the agreement provided for an award by two of three, the fact that one refused to sign the award, or to participate in a further ascertainment of damages which the settlement required, did not invalidate a subsequent proceeding for ascertainmg damages; Toledo S. S. Co. v. Transp. Co., 184 Fed. 391, 106 C. C. A. 501. And where the contract provided that one arbitrator should be selected by each party and they two have power to select a third, it was held that by clear implication two were authorized to make a binding and final award; Clark Bros. Co. v. Mfg. Co., 176 Fed. 929; but this case was reversed in Tennessee Lumber Mfg. Co. v. Clark Bros. Co., 182 Fed. 618, 105 C. C. A. 156, where the distinction is well put between cases where the power given to two to appoint a third is conditioned upon their disagreement or no; in the former case, the third is an umpire, and a majority award would be valid, but in the latter case, "the three constituted the board, * * * (and) their award, to be valid, must be unanimous;" and to the same effect is Weaver v. Powel, 148 Pa. 372, 23 Atl. 1070. Both courts cite Hobson v. McArthur, 16 Pet. (U. S.) 182, 10 L. Ed. 930, where the agreement was that "if the two could not agree on the value of the land or any part thereof, they should choose a third person, who should agree on the value of the land," and it was held "a more reasonable construction to consider the third man in the character of an umpire, to decide between the two that should disagree," and the award of two was held good. This case is contrary to the apparently well settled rule that, when there is an umpire, he alone decides and the arbitrators do not participate. But there are

other cases "on all fours" with that in Hobson v. McArthur, 16 Pet. (U. S.) 182, 10 L. Ed. 930, as Quay v. Westcott, 60 Pa. 163. See *supra*.

5. THE AWARD. The *award* is the judgment or decision of arbitrators or referees on a matter submitted to them. It is also the writing containing such judgment. Cowell; *Termes de la Ley;* Jenk. 137; Watson, Arb. 174; Russell, Arb. 234.

The word is derived from the Latin, *awarda, awardum,* Old French, *agarda* from *à garder,* to keep, preserve, to be guarded, or kept: so called because it is imposed on the parties to be observed or kept by them. Spelman, Gloss.

Requisites of. To be conclusive, the award should be consonant with and follow the submission, and affect only the parties to the submission; otherwise, it is an assumption of power, and not binding; Lutw. 530 (Onyons v. Cheese); 24 E. L. & Eq. 346; 8 Beav. 361; Martin v. Williams, 13 Johns. (N. Y.) 268; Howard v. Edgell, 17 Vt. 9; Barrows v. Capen, 11 Cush. (Mass.) 37; McNear v. Bailey, 18 Me. 251; Gates v. Treat, 25 Conn. 71; Fountain v. Harrington, 3 Harr. (Del.) 22; State v. Stewart, 12 Gill & J. (Md.) 456; Jessee v. Cater, 25 Ala. 351; Thornton v. Carson, 7 Cra. (U. S.) 599, 3 L. Ed. 451. See Humphreys v. Gardner, 11 Johns. (N. Y.) 61; Scott v. Barnes, 7 Pa. 134; Leslie v. Leslie, 50 N. J. Eq. 103, 24 Atl. 319; Buntain v. Curtis, 27 Ill. 374. Where it exceeds the terms of the submission, it is not void, where the judge on confirmation excludes as much as is incompetent; McCall v. McCall, 36 S. C. 80, 15 S. E. 348; but it is so where damages are allowed in a lump sum, in which are included matters not submitted to them; Dodds v. Hakes, 114 N. Y. 260, 21 N. E. 398.

It must be final and certain; Morse, Arb. 383; 5 Ad. & E. 147; Barnet v. Gilson, 3 S. & R. (Pa.) 340; Nichols v. Ins. Co., 22 Wend. (N. Y.) 125; Whitcomb v. Preston, 13 Vt. 53; Hanson v. Webber, 40 Me. 194; Hazen v. Addis, 14 N. J. L. 333; Carter v. Calvert, 4 Md. Ch. Dec. 199; Bannister v. Read, 1 Gilm. (Ill.) 92; Thomas v. Moller, 3 Ohio 266; Parker v. Eggleston, 5 Blackf. (Ind.) 128; Montiflori v. Engels, 3 Cal. 431; Lee v. Onstott, 1 Ark. 206; Ingraham v. Whitmore, 75 Ill. 24; Rhodes v. Hardy, 53 Miss. 587; Peck v. Wakely, 2 McCord (S. C.) 279; Lyle v. Rodgers, 5 Wheat. (U. S.) 394, 5 L. Ed. 117; Perkins v. Giles, 50 N. Y. 228; Carson v. Carter, 64 N. C. 332; Parker v. Parker, 103 Mass. 167; Burns v. Hendrix, 54 Ala. 78; and see Patterson v. Leavitt, 4 Conn. 50, 10 Am. Dec. 98; Green v. Miller, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184; Towne v. Jaquith, 6 Mass. 46, 4 Am. Dec. 84; conclusively adjudicating *all* the matters submitted; Calvert v. Carter, 6 Md. 135; Cox v. Gent, 1 McMull. (S. C.) 302; Pierson v. Norman, 2 Cal. 599; De Groot v. U. S., 5 Wall. (U. S.) 419, 18 L. Ed. 700; Frison v. De Peiffer, 83 Me. 71, 21 Atl. 746; and stating the decision in such language as to leave no doubt of the arbitrator's intention, or the nature and extent of the duties imposed by it on the parties; Pierson v. Norman, 2 Cal. 599, and cases above. An award reserving the determination of future disputes; Calvert v. Carter, 6 Md. 135; an award directing a bond without naming a penalty; 5 Co. 77; Rolle, Abr. *Arbitration* 2, 4; an award that one shall give security for the performance of some act or payment of money, without specifying the kind of security, is invalid; Viner, Abr. *Arbit.* 2, 12; Bacon, Abr. *Arbit.* E. 11, and cases above. So is one that finds that a party is entitled to receive his final payment and fails to ascertain the amount; Flannery v. Sahagian, 134 N. Y. 85, 31 N. E. 319.

It must be possible to be performed, and must not direct anything to be done which is contrary to law; 2 B. & Ald. 528; Yeamans v. Yeamans, 99 Mass. 585. It will be void if it direct a party to pay a sum of money at a day past, or direct him to commit a trespass, felony, or an act which would subject him to an action; 1 M. & W. 572; or if it be of things nugatory and offering no advantage to either of the parties; 6 J. B. Moore 713.

It must be without palpable or apparent mistake; Kleine v. Catara, 2 Gall. 61, Fed. Cas. No. 7,869; 3 B. & P. 371; Pringle v. McClenachan, 1 Dall. (U. S.) 487, 1 L. Ed. 235; Boston Water Power Co. v. Gray, 6 Metc. (Mass.) 131. For if the arbitrator acknowledges that he made a mistake, or if an error (in computation, for instance) is apparent on the face of the award, it will not be good; Taylor v. Sayre, 24 N. J. L. 647; Goodell v. Raymond, 27 Vt. 241; Roloson v. Carson, 8 Md. 208; Goodrich v. City of Marysville, 5 Cal. 430; Spoor v. Tyzzer, 115 Mass. 40; Eisenmeyer v. Sauter, 77 Ill. 515; American Screw Co. v. Sheldon, 12 R. I. 324; for, although an arbitrator may decide contrary to law, yet if the award attempts to follow the law, but fails to do so from the mistake of the arbitrator, it will be void; Kendrick v. Tarbell, 26 Vt. 416; Ennos v. Pratt, *id.* 630; Burchell v. Marsh, 17 How. (U. S.) 344, 15 L. Ed. 96.

A parol award is sufficient notwithstanding the submission is in writing, if the submission does not in terms require an award in writing; Marsh v. Packer, 20 Vt. 198; an award determined by lot is vitiated thereby; Luther v. Medbury, 18 R. I. 141, 26 Atl. 37, 49 Am. St. Rep. 753; and where the umpire was chosen by lot a rule to set it aside was made absolute; 9 B. & Cr. 624; 9 Ad. & El. 699.

An award may be in part good and in part void, in which case it will be enforced so far as valid, if the good part is separable from

the bad; 10 Mod. 204; Cro. Jac. 664; Martin v. Williams, 13 Johns. (N. Y.) 264; Orcutt v. Butler, 42 Me. 83; Barrows v. Capen, 11 Cush. (Mass.) 37; Richards v. Brockenbrough's Adm'r, 1 Rand. (Va.) 449; Taylor v. Nicolson, 1 Hen. & M. (Va.) 67; Brown v. Warnock, 5 Dana (Ky.) 492; Dalrymple v. Whitingham, 26 Vt. 345; Cones v. Vanosdol, 4 Ind. 248; Cromwell v. Owings, 6 Harr. & J. (Md.) 10; Lyle v. Rodgers, 5 Wheat. (U. S.) 394, 5 L. Ed. 117.

As to *form*, the award should, in general, follow the terms of the submission, which frequently provides the time and manner of making and publishing the award. It may be by parol (oral or written), or by deed; 3 Bulstr. 311; Marsh v. Packer, 20 Vt. 198. It should be signed by *all* the arbitrators in the presence of each other; Leavitt v. Inv. Co., 54 Fed. 439, 4 C. C. A. 425; Kent. v. French, 76 Ia. 187, 40 N. W. 713. See Godfrey v. Knodle, 44 Ill. App. 638; Barr v. Chandler, 47 N. J. Eq. 532, 20 Atl. 733; *contra*, Doyle v. Patterson, 84 Va. 800, 6 S. E. 138; Hewitt v. Craig, 86 Ky. 23, 5 S. W. 280. Where the submission requires the concurrence of the three arbitrators, recovery cannot be had where but two sign, though the third says it is right, but refuses to sign; Weaver v. Powel, 148 Pa. 372, 23 Atl. 1070. See ARBITRATOR.

An award will be sustained by a liberal construction, *ut res magis valeat quam pereat;* Dolph v. Clemens, 4 Wis. 181; Roloson v. Carson, 8 Md. 208; Allen v. Hiller, 8 Ind. 310; Haywood v. Harmon, 17 Ill. 477; Bemus v. Clark, 29 Pa. 251; Reed Aw. 170.

Effect of. An award is a final and conclusive judgment between the parties on all the matters referred by the submission; Reizenstein v. Hahn, 107 N. C. 156, 12 S. E. 43; Leonard v. Reservoir Co., 113 Mass. 235; Spencer v. Curtis, 57 Ind. 221; Ford v. Burleigh, 60 N. H. 278; Evars v. Kamphaus, 59 Pa. 379. It transfers property as much as the verdict of a jury, and will prevent the operation of the statute of limitations; 3 Bla. Com. 16; Hunt's Lessee v. Guilford, 4 Ohio 310; Jackson v. Gager, 5 Cow. (N. Y.) 383; Davis v. Havard, 15 S. & R. (Pa.) 166, 16 Am. Dec. 537. See Gray v. Reed, 65 Vt. 178, 26 Atl. 526. A parol award following a parol submission will have the same effect as an agreement of the same form directly between the parties; Houghton v. Houghton, 37 Me. 72; Wells v. Lain, 15 Wend. (N. Y.) 99; Goodell v. Raymond, 27 Vt. 241; Smith v. Douglass, 16 Ill. 34; Smith v. Stewart, 5 Ind. 220; Martin v. Chapman, 1 Ala. 278; 2 Coxe 369; Davy v. Faw, 7 Cra. (U. S.) 171, 3 L. Ed. 305.

The right of real property cannot thus pass by mere award; but no doubt an arbitrator may award a conveyance or release of land and require deeds, and it will be a breach of agreement and arbitration bond to refuse compliance; and a court of equity will sometimes enforce this specifically; 3 East 15; Jones v. Mill Corp., 6 Pick. (Mass.) 148; Calhoun's Lessee v. Dunning, 4 Dall. (Pa.) 120, 1 L. Ed. 767; Akely v. Akely, 16 Vt. 450; Smith v. Bullock, *id.* 592; Sellick v. Addams, 15 Johns (N. Y.) 197; Gratz v. Gratz, 4 Rawle (Pa.) 411, 430; Shelton v. Alcox, 11 Conn. 240; McNear v. Bailey, 18 Me. 251; Jesse v. Cater, 28 Ala. 475; Murray v. Blackledge, 71 N. C. 492; Girdler v. Carter, 47 N. H. 305. Where there is a controversy as to the claims embraced within a mortgage, and the award merely fixes the amount due, it does not vest the legal title to the mortgaged property in the mortgagor; Collier v. White, 97 Ala. 615, 12 South. 385.

Arbitrament and award may be regularly pleaded at common law or equity to an action concerning the same subject-matter, and will bar the action; Brazill v. Isham, 12 N. Y. 9; Crooker v. Buck, 41 Me. 355. To an action on the award at common law, in general, nothing can be pleaded *dehors* the award; not even fraud; Owen v. Boerum, 23 Barb. (N. Y.) 187; Shepherd v. Briggs, 28 Vt. 81; Woodrow v. O'Conner, *id.* 776; *contra*, Strong v. Strong, 9 Cush. (Mass.) 560. Where an action has been referred under rule of court and the reference fails, the action proceeds.

Enforcement of. An award may be enforced by an action at law, which is the only remedy for disobedience when the submission is not made a rule of court, and no statute provides a special mode of enforcement; 5 B. & Ald. 507; 4 B. & C. 103; 3 C. B. 745. Assumpsit lies when the submission is not under seal; Piersons v. Hobbes, 33 N. H. 27; and *debt* on an award of money and on an arbitration bond; Nolte v. Lowe, 18 Ill. 437; *covenant* where the submission is by deed for breach of any part of the award, and *case* for the non-performance of the duty awarded. *Equity* will enforce specific performance when all remedy fails at common law; Com. Dig. *Chancery*, 2 K; Story, Eq. Jur. § 1458; 2 Hare 198; Bouck v. Wilber, 4 Johns. Ch. (N. Y.) 405; Ballance v. Underhill, 3 Scam. (Ill.) 453; 3 P. Wms. 137. But see 1 T. & R. 187; 5 Ves. 846. An award must be sued upon only because the arbitrator is not vested with power to enforce his decrees by execution, which is the end of the law; Collins v. Oliver, 4 Humph. (Tenn.) 439.

An award under a rule of court may be enforced by the court issuing execution upon it as if it were a verdict of a jury, or by attachment for contempt; 7 East 607. By the various state statutes regulating arbitrations, awards, where submission is made before a magistrate, may be enforced and judgment rendered thereon.

Amendment and setting aside. A court has no power to alter or amend an award; Jackson v. Todd, 25 N. J. L. 130; Jarvis v.

Water Co., 5 Cal. 179; Brazill v. Isham, 12 N. Y. 9; Crooker v. Buck, 41 Me. 355; Smith v. Kron, 109 N. C. 103, 13 S. E. 839; but may recommit to the referee in some cases; Swift v. Faris, 11 Tex. 18; 18 Can. S. C. R. 338. The court has no general supervisory power over an award and, if arbitrators keep within their jurisdiction, it will not be set aside for error of judgment either of law or facts, but it may for palpable error of fact or miscalculation of figures or of law when it appears on its face; Fudickar v. Ins. Co., 62 N. Y. 392.

"An arbitration partakes of judicial proceedings," and the award is regarded with great respect by the courts as the decision of persons chosen by the parties to settle their differences; but it can hardly be considered of equal dignity with the judgment of a court, which speaks by force and power of the law; while an award speaks by consent and contract of the parties; Shively v. Knoblock, 8 Ind. App. 433, 35 N. E. 1028. A court will not revise an award for mere errors of judgment; Offut v. Proctor, 4 Bibb (Ky.) 252; Vaughn v. Graham, 11 Mo. 576; Chesley v. Chesley, 10 N. H. 327; and misconduct or misbehavior of arbitrators in a statutory arbitration must be to do an intentional wrong; Smith v. Cutler, 10 Wend. (N. Y.) 589, 25 Am. Dec. 580; Vaughn v. Graham, 11 Mo. 576.

It is not essential to an arbitration that it should adjust all matters in controversy; an award determining a single one of several may be conclusive so far; Pearce v. McIntyre, 29 Mo. 423.

An award will not be disturbed except for very cogent reasons. It will be set aside for *misconduct*, corruption, or irregularity of the arbitrator, which has or may have injured one of the parties; 5 B. & Ad. 488; Jenkins v. Liston, 13 Gratt. (Va.) 535; Payne v. Metz, 14 Tex. 56; Walls v. Wilson, 28 Pa. 514; Cutting v. Carter, 29 Vt. 72; it will not be set aside because one of the arbitrators was a relative; McGregor v. Sprott, 59 Hun 617, 13 N. Y. Supp. 191; so where one, after publishing his award, admits that it had been improperly obtained from him; [1891] 1 Ch. 558; it will be set aside for *error* in fact, or in attempting to follow the law, apparent on the face of the award; see *supra;* ARBITRATOR; for *uncertainty* or inconsistency; for an *exceeding* of his authority by the arbitrator; Shearer v. Handy, 22 Pick. (Mass.) 417; Stewart v. Ahrenfeldt, 4 Denio (N. Y.) 191; where it is made solely at the direction of one of the parties and not upon the arbitrator's own judgment; Hartford Fire Ins. Co. v. Mercantile Co., 44 Fed. 151, 11 L. R. A. 623; when it is *not final* and conclusive, without reserve; when it is a *nullity;* when a party or witness has *been at fault*, or has made a mistake; or when the arbitrator acknowledges that he has made a mistake or error in his decision.

Where arbitrators have once made an award they are *functus officio* and cannot afterwards make a second award, though the first was void because of defects; Flannery v. Sahagian, 134 N. Y. 85, 31 N. E. 319; Herbst v. Hagenaers, 137 N. Y. 290, 33 N. E. 315.

Equity has jurisdiction to set aside an award, on any of the enumerated grounds, when the submission cannot be made a rule of a common-law court. As to the circumstances under which awards may be examined in equity, see 1 Raithby's Vernon 158, note (1), where many English cases are collected.

In general, in awards under statutory provisions, as well as in those under rules of court, questions of law may be reserved for the opinion of the court, and facts and evidence reported for their opinion and decision.

ARBITRIUM (Lat.). Decision; award; judgment.

For some cases the law does not prescribe an exact rule, but leaves them to the judgment of sound men; or in the language of Grotius, *lex non exacte definit, sed arbitrio boni viri permittit;* 1 Bla. Com. 61. The decision of an arbiter is *arbitrium*, as the etymology indicates; and the word denotes, in the passage cited, the decision of a man of good judgment who is not controlled by technical rules of law, but is at liberty to adapt the general principles of justice to the peculiar circumstances of the case.

ARBOR (Lat.). A tree; a plant; something larger than an herb; a general term including vines, osiers, and even reeds. The mast of a ship. Brissonius. Timber. Ainsworth; Calvinus, Lex.

Arbor civilis. A genealogical tree. Coke, Inst.

A common form of showing genealogies is by means of a tree representing the different *branches* of the family. Many of the terms in the law of descent are figurative, and derived hence. Such a tree is called, also, *arbor consanguinitatis.*

ARCARIUS (Lat. *arca*). A treasurer; one who keeps the public money. Spelman, Gloss.

ARCHAIONOMIA. The name of a collection of Saxon laws published during the reign of Queen Elizabeth, in the Saxon language, with a Latin version by Lambard. Dr. Wilkins enlarged this collection in his work entitled Leges Anglo-Saxonicæ, containing all the Saxon laws extant, together with those ascribed to Edward the Confessor, in Latin; those of William the Conqueror, in Norman and Latin, and of Henry I., Stephen, and Henry II., in Latin.

ARCHBISHOP. The chief of the clergy of a whole province.

He has the inspection of the bishops of that province, as well as of the inferior clergy, and may deprive them on notorious cause. The archbishop has also his own diocese, in which he exercises episcopal jurisdiction, as in his province he exercises archiepiscopal authority; 1 Bla. Com. 380; 1 Ld. Raym. 541. In England he is addressed as *Most Reverend.*

ARCHDEACON. A ministerial officer subordinate to the bishop.

In the primitive church, the archdeacons were employed by the bishop in the more servile duties of collecting and distributing alms and offerings. Afterwards they became, in effect, "eyes to the overseers of the Church;" Cowell.

His jurisdiction is ecclesiastical, and immediately subordinate to that of the bishop throughout the whole or a part of the diocese. He is a ministerial officer; 1 Bla. Com. 383. He is addressed as *Venerable.*

ARCHDEACON'S COURT. The lowest court of ecclesiastical jurisdiction in England. Originally the archdeacon held a court as deputy of the bishop. Early in the 12th century the archdeacons possessed themselves of a customary jurisdiction. An appeal lay to the Consistory Court. Rept. Eccl. Com. (1883) 25.

ARCHES COURT. See COURT OF ARCHES.

ARCHIVES. The Rolls; any place where ancient records, charters, and evidences are kept. In libraries, the private depositary. Cowell; Spelman, Gloss.

The records need not be ancient to constitute the place of keeping them the Archives.

ARCHIVIST. One to whose care the archives have been confided.

ARCTA ET SALVA CUSTODIA (Lat.). In safe and close custody or keeping.

When a defendant is arrested on a *capias ad satisfaciendum (ca. sa.),* he is to be kept *in arcta et salva custodia;* 3 Bla. Com. 415.

AREA. An enclosed yard or opening in a house; an open place adjoining to a house. 1 Chit. Pr. 176.

ARENTARE (Lat.). To rent; to let out at a certain rent. Cowell.

Arentatio. A renting.

ARGENTARII (Lat. *argentum*). Moneylenders.

Called, also, *nummularii* (from *nummus,* coin) *mensarii* (lenders by the month). They were so called whether living in Rome or in the country towns, and had their shops or tables in the forum. *Argentarius* is the singular. *Argentarium* denotes the instrument of the loan, approaching in sense to our *note* or *bond.*

Argentarius miles was the porter who carried the money from the lower to the upper treasury to be tested. Spelman, Gloss.

ARGENTUM ALBUM (Lat.). Unstamped silver; bullion. Spelman, Gloss.; Cowell.

ARGENTUM DEI (Lat.). God's money; God's penny; money given as earnest in making a bargain. Cowell.

ARGUMENT. An effort to establish belief by a course of reasoning.

See 33 Amer. L. Rev. 476; State v. Burns, 119 Iowa, 663, 94 N. W. 239; Hopkins v. Hopkins, 132 N. C. 25, 43 S. E. 506.

ARGUMENTATIVE. By way of reasoning.

A plea must be (among other things) direct and positive, and not argumentative; 3 Bla. Com. 308; Steph. Pl. Andrew's ed. § 201.

ARGUMENTUM AB INCONVENIENTI. An argument arising from the inconvenience which the opposite construction of the law would create.

It is to have effect only in a case where the law is doubtful: where the law is certain, such an argument is of no force. Bacon, Abr. *Baron and feme H.*

ARIBANNUM. A fine for not setting out to join the army in obedience to the summons of the king.

ARIMANNI (Lat.). The possessors of lands holden or derived from their lords. Clients joined to some lord for protection. By some, said to be soldiers holding lands from a lord; but the term is also applied to women and slaves. Spelman, Gloss.

ARISE. To come into existence or action. A case arising in the land or naval forces is a case proceeding, issuing or springing from acts, in violation of the laws and regulations, committed while in the forces or service. In re Bogart, 2 Sawy. 396, Fed. Cas. No. 1,596.

ARISTOCRACY. A government in which a class of men rules supreme.

Aristotle classified governments according to the person or persons in whom the supreme power is vested: in monarchies or kingdoms, in which one rules supreme; in aristocracies, in which a class of men rules supreme, and in democracies, in which the people at large, the multitude, rule. The term aristocracy is derived from the Greek word ἄριστος, which, although finally treated as the superlative of ἀγαθός, good, originally meant the strongest, the most powerful; and in the compound term aristocracy it meant those who wielded the greatest power and had the greatest influence,—the privileged ones. The aristocracies in ancient Greece were, in many cases, governments arrogated by violence. If the number of ruling aristocrats was very small, the government was called an oligarchy. Aristotle says that in democracies the "demagogues lead the people to place themselves above the laws, and divide the people, by constantly speaking against the rich; and in oligarchies the rulers always speak in the interest of the rich. At present," he says, "the rulers, in some oligarchies, take an oath, 'And I will be hostile to the people, and advise, as much as is in my power, what may be injurious to them.'" (Politics, v. ch. 9.) There are circumstances which may make an aristocracy unavoidable; but it has always this inherent deficiency, that the body of aristocrats, being set apart from the people indeed, yet not sufficiently so, as the monarch is (who, besides, being but one, must needs rely on the classes beneath him), shows itself severe and harsh so soon as the people become a substantial portion of the community. The struggle between the aristocratic and the democratic element is a prominent feature of the middle ages; and at a later period it is equally remarkable that the crown, in almost every country of the European continent, waged war, generally with the assistance of the commonalty, with the privileged class, or aristocracy. The real aristocracy is that type of government which has nearly entirely vanished from our cis-Caucasian race; although the aristocratic element is found, like the democratic element, in various degrees, in most of the existing governments. The term aristocracy is at present frequently used for the body of privileged persons in the government of any institution,—for instance, in the church. In the first French Revolution, Aristocrat came to mean any person not belonging to the levellers, and whom the latter desired to pull down. The modern French communists use the slang term Aristo for aristocrat. The most complete and consistently developed aristocracy in history was the

Republic of Venice,—a government considered by many early publicists as a model: it illustrated, however, in an eminent degree, the fear and consequent severity inherent in aristocracies. See GOVERNMENT; ABSOLUTISM; MONARCHY.

ARISTO-DEMOCRACY. A form of government where the power is divided between the more powerful men of the nation and the people.

ARIZONA. One of the states of the American Union.

This region was first visited by the Spanish in 1526, and was afterwards explored under the direction of the viceroy of Mexico in 1540; nothing was done, however, towards settling the country until the year 1580, when a military post was established by the Spanish on the site of the present city of Tucson. Under the untiring efforts of the Jesuits, an unbroken line of settlements sprung up from Tucson to the Sonora line, the northern boundary of Mexico, a distance of about one hundred miles; but owing to the frequent attacks of the Indians, and the Mexican revolution of 1821, these settlements were abandoned. The first United States settlers were persons on their way to California in 1849 The United States acquired, by the treaty of Guadalupe Hidalgo, Feb. 2, 1848, a large extent of country from Mexico, including California and the adjacent territories, and by the Gadsden purchase, Dec. 30, 1853, another large tract south of the former. Until 1863, the territory of New Mexico included Arizona and also about 12,225 acres, which were detached and included in Nevada. Arizona was organized as a separate territory by the act of congress of Feb. 24, 1863, U. S Stat. at Large, 664. By this act, the territory embraced "all that part of the territory of New Mexico situated west of a line running due south, from the point where the southwest corner of the territory of Colorado joins the northern boundary of the territory of New Mexico, to the southern boundary of the territory of New Mexico." The frame of government was substantially the same as that of New Mexico, and the laws of New Mexico were substantially extended to Arizona

The Enabling Act for its admission to the Union was passed by Congress June 20, 1910. On August 21, 1911, the joint resolution of Congress for its admission was passed, to take effect upon Proclamation by the President that certain conditions had been complied with. The Proclamation was made February 14, 1912. Arizona became a state and adopted the constitution proposed for it by the constitutional convention held in the fall of 1910. The constitution was amended in 1912 by providing for the recall of public officers and granting to each municipal corporation within the state the right to engage in industrial pursuits, and providing for woman suffrage.

ARKANSAS. One of the United States of America; being the twelfth admitted to the Union.

It was formed of a part of the Louisiana Territory, purchased of France by the United States, by treaty of April 30, 1803, and from that time until 1812 it formed part of the Louisiana Territory; from 1812 to 1819 it was part of the Missouri Territory. By act of congress of March 2, 1819, a separate territorial government was established for Arkansas; 3 Stat. L. 493. It was admitted to the Union by act of congress of June, 1836, and the first constitution of the state was adopted on the 30th January, 1836. Section 16, article 5, amended February 10, 1913, which provides for a sixty day session of Legislature; section 1, article 5, amended, providing for the initiative and referendum, February 19, 1909.

ARLES. Earnest.

Used in Yorkshire in the phrase *Arles-penny*. Cowell. In Scotland it has the same signification. Bell, Dict. See EARNEST.

ARM OF THE SEA. A portion of the sea projecting inland, in which the tide ebbs and flows.

It includes bays, roads, creeks, coves, ports, and rivers where the water flows and reflows. An arm of the sea is considered as extending as far into the interior of a country as the water of fresh rivers is propelled backward by the tide. Ang. Tide Wat. (2d ed.) 73; Peyroux v. Howard, 7 Pet. (U. S.) 324, 8 L. Ed. 700; 2 Dougl. 441; 6 Cl. & F. 628; Tinicum Fishing Co. v. Cart, 61 Pa. 21, 100 Am. Dec. 597; Olc. Adm. 18. Arms of the sea, so closely embraced by land that a man standing on one shore can reasonably discern with the naked eye objects and what is done on the opposite shore, are within county limits; Bish. Cr. L. § 146; 2 East, P. C. 805; Russ. & R. 243. Lord Coke said (Owen 122) that the admiral has no jurisdiction when a man may see from one side to another. This was followed by Cockburn, C. J., in L. R. 2 Ex. 164, 168. See CREEK; NAVIGABLE WATERS; RIVER; SEA; FAUCES TERRÆ; TERRITORIAL WATERS; ADMIRALTY.

ARMED. Furnished with weapons of offence or defence; furnished with the means of security or protection. Webster's Dict.

The fact that there was on board a vessel but one musket, a few ounces of powder, and a few balls, would not make her an armed vessel; Murray v. The Charming Betsy, 2 Cra. (U. S.) 121, 2 L. Ed. 208.

ARMED NEUTRALITY. An attitude of neutrality between belligerents which the neutral state is prepared to maintain by armed force if necessary.

ARMED PEACE. A situation in which two or more nations, while actually at peace with each other, are armed for possible or probable hostilities.

ARMIGER (Lat.). An armor-bearer; an esquire. A title of dignity belonging to gentlemen authorized to bear arms. Kennett, Paroch. Antiq.; Cowell.

In its earlier meaning, a servant who carried the arms of a knight. Spelman, Gloss.

A tenant by scutage; a servant or valet; applied, also to the higher servants in convents. Spelman, Gloss; Wishaw.

ARMISTICE. An agreement between belligerent forces for a temporary cessation of hostilities. The condition of war between the parties continues in all other respects and produces its usual legal effects.

An armistice differs from a mere "suspension of arms" (*q. v.*) in that the latter is concluded for very brief periods and for local military purposes only, whereas an armistice not only covers a longer period, but is agreed upon for political purposes. It is said to be *general* if it relates to the whole area of the war, and *partial* if it relates to only a portion of that area. Partial armistices are sometimes called truces (*q. v.*) but

there is no hard and fast distinction between armistices and truces. Arts. 36–41 of IV Hague Conf. 1907 lay down certain international rules on the subject of armistices, their duration, their general or local character, the necessary notification, and the consequences of a violation of the armistice. As these rules do not cover the whole field, they need to be supplemented by customary law. 2 Opp. 290–299.

ARMS. Anything that a man wears for his defence, or takes in his hands, or uses in his anger, to cast at or strike at another. Co. Litt. 161 *b*, 162 *a*; Cromp. Just. P. 65; Cunning, Dict.

The constitution of the United States, Amend. art. 2, declares that, "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." This is said to be not a right granted by the constitution, and not dependent upon that instrument for its existence. The amendment means no more than that this right shall not be infringed by congress; it restricts the powers of the national government, leaving all matters of police regulations, for the protection of the people, to the states; U. S. v. Cruikshank, 92 U. S. 553, 23 L. Ed. 588.

An act forbidding the carrying of pistols, dirks, etc., is not repugnant to this article; the "arms" referred to are the arms of a soldier, etc.; English v. State, 35 Tex. 473, 14 Am. Rep. 374. A statute prohibiting the wearing of concealed deadly weapons is constitutional; Wright v. Com., 77 Pa. 470; Andrews v. State, 3 Heisk. (Tenn.) 165, 8 Am. Rep. 8; Hill v. State, 53 Ga. 472; Fife v. State, 31 Ark. 455, 25 Am. Rep. 556; Walls v. State, 7 Blackf. (Ind.) 572; Owen v. State, 31 Ala. 387; *contra*, Bliss v. Com., 2 Litt. (Ky.) 90, 13 Am. Dec. 251. See Story, Const. 5th ed. § 1895; Rawle, Const. 125.

A provision in a state bill of rights that "the people have a right to bear arms for their defense and security" is a limitation on legislative power to enact laws prohibiting the bearing of arms in the militia, or any other military organization provided for by law, but it is not a limitation on legislative power to prohibit and punish the promiscuous carrying of arms or other deadly weapons; City of Salina v. Blaksley, 72 Kan. 230, 83 Pac. 619, 3 L. R. A. (N. S.) 168, 115 Am. St. Rep. 196. This right is not violated by a statute prohibiting unauthorized bodies of men to associate together as a military organization, or to drill and parade with arms in cities and towns; Com. v. Murphy, 166 Mass. 171, 44 N. E. 138, 32 L. R. A. 606.

One who carries a pistol concealed in a satchel supported and carried by a strap over his shoulder, is guilty of carrying a concealed weapon about his person, although the satchel is locked and the key is in his pocket; Warren v. State, 94 Ala. 79, 10 South. 838; Boles v. State, 86 Ga. 255, 12 S. E. 361. The fact that one carries a concealed weapon for the purpose of selling it does not excuse his act; State v. Dixon, 114 N. C. 850, 19 S. E. 364; nor does the fact that he has repaired it and is returning it in his pocket; Strahan v. State, 68 Miss. 347, 8 South. 844; *contra*, State v. Roberts, 39 Mo. App. 47. The carrying of a pistol in the pocket for target practice does not constitute the offence of carrying a concealed weapon; State v. Murray, 39 Mo. App. 127. See DANGEROUS WEAPON; WEAPON.

Signs of arms, or drawings, painted on shields, banners, and the like. Heraldic bearings.

The arms of the United States are described in the resolution of congress of June 20, 1782.

ARMY. A large force of armed men designed and organized for military service on land.

The term "army" or "armies" has never been used by congress to include the navy or marines; In re Bailey, 2 Sawy. 205, Fed. Cas. No. 728.

See ARTICLES OF WAR; MILITARY LAW; MARTIAL LAW; COURTS-MARTIAL; RANK; REGULATIONS.

ARPENNUS. A measure of land of uncertain amount. It was called arpent also. Spelman, Gloss.; Cowell.

In French Law. A measure of different amount in each of the sixty-four provinces. Guyot, Répert. *Arpenteur.*

The measure was adopted in Louisiana; Strother v. Lucas, 6 Pet. (U. S.) 763, 8 L. Ed. 573.

ARPENT. A quantity of land containing a French acre. 4 Hall, L. J. 518.

ARPENTATOR. A measurer or surveyor of land.

ARRA. See ARRHÆ.

ARRAIGN. To call a prisoner to the bar of the court to answer the matter charged in the indictment. 2 Hale, Pl. Cr. 216. To set in order. An assize may be arraigned. Littleton, § 242; 3 Mod. 273; *Termes de la Ley*; Cowell.

ARRAIGNMENT. Calling the defendant to the bar of the court, to answer the accusation contained in the indictment.

The *first* step in the proceeding consists in calling the defendant to the bar by his name, and commanding him to hold up his hand.

This is done for the purpose of completely identifying the prisoner as the person named in the indictment. The holding up his hand is not, however, indispensable; for if the prisoner should refuse to do so, he may be identified by any admission that he is the person intended; 1 W. Bla. 33. See Archb. Cr. Pl. 128.

The *second* step is the reading the indictment to the accused person.

This is done to enable him fully to understand the charge to be produced against him. The mode in which it is read is, after saying, "A B, hold up your hand," to proceed, "you stand indicted by the name of A B, late of, etc., for that you, on, etc.," and then go through the whole of the indictment.

The *third* step is to ask the prisoner, "How say you (A B), are you guilty, or not guilty?"

Upon this, if the prisoner confesses the charge, and it appears to the satisfaction of the judge that he rightly comprehends the effect of his plea, the confession is recorded, and nothing further is done till judgment. If, on the contrary, he answers, "Not guilty," that plea is entered for him, and the clerk or attorney-general replies that he is guilty; when an issue is formed; Com. v. Battis, 1 Mass. 95; see 4 Bla. Com. c. xxv. The holding up of the hand is no longer obligatory in England, though still maintained in some of the United States with the qualification that if the defendant refuses to hold up his hand, but confesses that he is the person named, it is enough, Whart. Cr. Pl. & Pr. (9th ed.) § 699. In cases where arraignment of the defendant is required, a failure to arraign is fatal; Graeter v. State, 54 Ind. 159; Grigg v. People, 31 Mich. 471; Anderson v. State, 3 Pinn. (Wis.) 367; Smith v. State, 1 Tex. App. 408; People v. Gaines, 52 Cal. 480. See, *contra*, State v. Cassady, 12 Kan. 550. In cases of a mistrial (Hayes v. State, 58 Ga. 35), or removal to another court (Davis v. State, 39 Md. 355), there need not be a fresh arraignment.

If the defendant, when called upon, makes no answer, and it is a matter of doubt whether or not he is mute of malice, the court may direct a jury to be forthwith impanelled and sworn, to try whether the prisoner is mute of malice or *ex visitatione Dei;* and such jury may consist of any twelve men who may happen to be present. If a person is found to be mute *ex visitatione Dei,* the court in its discretion will use such means as may be sufficient to enable the defendant to understand the charge and make his answer; and if this is found impracticable, a plea of not guilty will be entered, and the trial proceed. But if the jury return a verdict that he is mute fraudulently and willfully, the court will pass sentence as upon a conviction; Ellenwood v. Com., 10 Metc. (Mass.) 222; Archb. Cr. Pl. 129; 3 C. & K. 121; Rosc. Cr. Ev. (8th ed.) 199. See the case of a deaf person who could not be induced to plead; 1 Leach, Cr. Cas. 451; of a person deaf and dumb; *id.* 102; Com. v. Hill, 14 Mass. 207; 7 C. & P. 503; 6 Cox, Cr. Cas. 386, 3 C. & K. 328; State v. Draper, 1 Houst. Del. Cr. Cas. 291. See DEAF AND DUMB; GUILTY; GOD AND MY COUNTRY; MUTE; PEINE FORTE ET DURE.

ARRAMEUR. An ancient officer of a port, whose business was to load and unload vessels.

There were formerly, in several ports of Guyenne, certain officers, called *arrameurs,* or stowers, who were master-carpenters and were paid by the merchants, who loaded the ship. Their business was to dispose properly, and stow closely, all goods in casks, bales, boxes, bundles, or otherwise; to balance both sides, to fill up the vacant spaces, and arrange everything to the best advantage. It was not but that the greatest part of the ship's crew understood this as well as these stowers, but they would not meddle with it, nor undertake it, to avoid falling under the merchant's displeasure, or being accountable for any ill accident that might happen by that means. There were also *sacquiers,* who were very ancient officers, as may be seen in the Theodosian code, *Unica de Scaccariis Portus Romæ,* lib. 14. Their business was to load and unload vessels loaded with salt, corn, or fish, to prevent the ship's crew defrauding the merchant by false tale, or cheating him of his merchandise otherwise; Laws of Oleron, in 1 Pet. Adm. App. xxv. See STEVEDORE.

ARRANGEMENT. The natural meaning of the word is "setting in order." 1 El. & Bl. 540.

ARRANGEMENT, DEED OF. A term used in England to express an assignment for the benefit of creditors.

ARRAS. In Spanish Law. The donation which the husband makes to his wife, by reason or on account of marriage, and in consideration of the *dote,* or portion, which he receives from her. Aso & Man. Inst. b. 1, t. 7, c. 3.

The property contributed by the husband *ad sustinenda onera matrimonii* (for bearing the expenses).

The husband is under no obligation to give arras; but it is a donation purely voluntary. He is not permitted to give in *arras* more than a tenth of his property. The *arras* is the exclusive property of the wife, subject to the husband's usufruct during his life; Burge, Confl. Laws 417.

ARRAY. The whole body of jurors summoned to attend a court, as they are *arrayed* or arranged on the panel. See CHALLENGES; Dane, Abr. Index; 1 Chit. Cr. Law 536; Comyns, Dig. *Challenge,* B.

ARRAYER. An English military officer in the early part of the fifteenth century. His duties were similar to those of the modern Lord Lieutenant of a county.

ARREARAGES. Arrears.

ARREARS. The remainder of an account or sum of money in the hands of an accountant. Any money due and unpaid at a given time. Cowell; Spelman, Gloss.

"In arrear" means overdue and unpaid. Hollingsworth v. Willis, 64 Miss. 157, 8 South. 170.

ARREST. To deprive a person of his liberty by legal authority.

The taking, seizing or detaining the person of another, touching or putting hands upon him in the execution of process, or any act indicating an intention to arrest. U. S. v. Benner, Bald. 234, 239, Fed. Cas. No. 14,568.

"A restraint of the person, a restriction of the right of locomotion which cannot be implied in the mere notification, or summons on petition, or any other service of such process, by which no bail is required nor restraint of personal liberty." Hart v. Flynn's Ex'r, 8 Dana (Ky.) 190. "An arrest is an imprisonment." Blight v. Meeker, 7 N. J. L. 97. The term implies restraint of liberty by an officer of the law, but touching the person is not necessary unless required to acquire control of the person of the one arrested. State v. Buxton, 102 N. C. 129, 8 S. E. 774; McAleer v. Good, 216 Pa. 473, 65 Atl. 934, 10 L. R. A. (N. S.) 303, 116 Am. St. Rep. 782; Butler v. Washburn, 25 N. H. 251; Bissell v. Gold, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480; 5 U. C. Q. B. 341; Strout v. Gooch, 8 Me. 126; 4 C. B. N. S. 180, 205, where the subject is examined by Willes, J., who expressly dissents from Sir James

Mansfield in 2 B. & P. N. R. 211, the authority usually relied upon *contra*. What is actually required is more tersely expressed in Lawson v. Buzines, 3 Harr. (Del.) 416, when he says that the officer "must make him his prisoner in an unequivocal form."

As ordinarily used, the terms arrest and attachment coincide in meaning to some extent; though in strictness, as a distinction, an arrest may be said to be the act resulting from the service of an attachment. And in the more extended sense which is sometimes given to attachment, including the act of taking, it would seem to differ from arrest in that it is more peculiarly applicable to a taking of property, while *arrest* is more commonly used in speaking of persons.

The terms are, however, often interchanged when speaking of the taking a man by virtue of legal authority. Arrest is also applied in some instances to a seizure and detention of personal chattels, especially of ships and vessels; but this use of the term is not common in modern law.

In Civil Practice. The apprehension of a person by virtue of a lawful authority to answer the demand against him in a civil action. Gentry v. Griffith, 27 Tex. 462.

One of the means which the law gives the creditor to secure the person of his debtor while the suit is pending, or to compel him to give security for his appearance after judgment. La. Civ. Code art. 211.

Acts which amount to a taking into custody are necessary to constitute an arrest; but there need be no actual force or manual touching the body: it is enough if the party be within the power of the officer and submit to the arrest; Cas. *temp.* Hardw. 301; 5 B. & P. 211; Huntington v. Blaisdell, 2 N. H. 318; Hart v. Flynn's Ex'r, 8 Dana (Ky.) 190; Strout v. Gooch, 8 Me. 127; Bissel v. Gold, 1 Wend. (N. Y.) 215, 19 Am. Dec. 480; Field v. Ireland, 21 Ala. 240; Courtoy v. Dozier, 20 Ga. 369; Cooper v. Adams, 2 Blackf. (Ind.) 294; but mere words without submission are not sufficient; 2 Hale, Pl. Cr. 129; Jones v. Jones, 35 N. C. 448; State v. Buxton, 102 N. C. 129, 8 S. E. 774.

Whom to be made by. It must be made by an officer having proper authority. This is, in the United States, the sheriff, or one of his deputies, general or special, or by a mere assistant of the officer, if he be so near as to be considered as acting, though he do not actually make the arrest; Cowp. 65.

The process of the United States courts is executed by a marshal. As to the power of the sergeant-at-arms of a legislative body to arrest for contempt or other cause, see 1 Kent 236. An order of the United States House of Representatives declaring a witness before one of its committees in contempt for not answering certain questions, and ordering his arrest and imprisonment is void and affords no defence to the sergeant-at-arms in an action for false imprisonment against him; Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377, where there is a full review of the cases.

Who is liable to. All persons found within the jurisdiction are liable to arrest, excepting certain specified classes, including *ambassadors* and their servants; 1 B. & C. 554; 3 D. & R. 25, 833; Holbrook, Nelson & Co. v. Henderson, 4 Sandf. (N. Y.) 619; *attorneys at law; barristers* attending court or on circuit; 1 H. Bla. 636; see Elam v. Lewis, 19 Ga. 608; 8 Sim. 377; 16 Ves. 412; Secor v. Bell, 18 Johns. (N. Y.) 52; *bail* attending court as such; 1 H. Bla. 636; 1 Maule & S. 638; *bankrupts* until the time for surrender is passed, and under some other circumstances; 8 Term 475, 534; In re Kimball, 2 Ben. 38, Fed. Cas. No. 7,767; *bishops* (but not in U. S.); *consuls-general;* 9 East 447; though doubtful, and the privilege does not extend to consuls; 1 Taunt. 106; 3 Maule & S. 284; McKay v. Garcia, 6 Ben. 556, Fed. Cas. No. 8,844; *clergymen* in England while performing divine service; Bacon. Abr. *Trespass;* 24 & 25 Vict. c. 100 (which extended the provisions of 9 Geo. IV. c. 31, § 23, so as to include ministers not of the Established Church); *electors* attending a public election; Swift v. Chamberlain, 3 Conn. 537; *executors* sued on the testator's liability; *heirs* sued as such; *hundredors* sued as such; *insolvent debtors* lawfully discharged; 3 Maule & S. 595; and see 4 Taunt. 631; Duncan v. Klinefelter, 5 Watts (Pa.) 141, 30 Am. Dec. 295; Wilmarth v. Burt, 7 Metc. (Mass.) 257; not when sued on subsequent liabilities or promises, 6 Taunt. 563; see Glazier v. Stafford, 4 Harr. (Del.) 240; *Irish peers;* stat. 39 & 40 Geo. III. c. 67, § 4; *judges* on process from their own court; Tracy v. Whipple, 8 Johns. (N. Y.) 381; Gratz v. Wilson, 6 N. J. L. 419; *marshal* of the King's Bench; *members* of congress and state legislatures while attending the respective assemblies to which they belong; U. S. v. Cooper, 4 Dall. (Pa.) 341, Fed. Cas. No. 14,861, 1 L. Ed. 859; King v. Coit, 4 Day (Conn.) 133; Gibbes v. Mitchell, 2 Bay (S. C.) 406; McPherson v. Nesmith, 3 Gratt. (Va.) 237; Lewis v. Elmendorf, 2 Johns. Cas. (N. Y.) 222; Hoppin v. Jenckes, 8 R. I. 453, 5 Am. Rep. 597 (but the exemption does not apply while a member of Congress is in his state on private business with leave of absence; Worth v. Norton, 56 S. C. 56, 33 S. E. 792, 45 L. R. A. 563, 76 Am. St. Rep. 524; nor does it give a privilege from service of summons in a civil action; Rhodes v. Walsh, 55 Minn. 542, 57 N. W. 212, 23 L. R. A. 632; Gentry v. Griffith, 27 Tex. 461); *militiamen* while engaged in the performance of military duty; *officers* of the army and militia, to some extent; 4 Taunt. 557; but see 8 Term 105; Morgan v. Eckart, 1 Dall. (U. S.) 295, 1 L. Ed. 144; White v. Lowther, 3 Ga. 397; Ex parte McRoberts, 16 Ia. 600; People v. Campbell, 40 N. Y. 133; *parties* to a suit attending court; 11 East 439; Coxe 142; Richards v. Goodson, 2 Va. Cas. 381; Hurst's Case, 4 Dall. (U. S.) 387, 1 L. Ed. 878; Ex parte McNeil, 6 Mass. 245; *id.*, 264; Wilson

v. Nettleton, 12 Ill. 61; Sadler v. Ray, 5 Rich. (S. C.) 523; including a court of insolvency; 2 Marsh. 57; 6 Taunt. 336; 1 V. & B. 316; Wood v. Neale, 5 Gray (Mass.) 538; or a reference; Vincent v. Watson, 1 Rich. (S. C.) 194; the *former president* of a foreign republic while residing in one of the U. S.; Hatch v. Baez, 7 Hun (N. Y.) 596; but a party arrested on a criminal charge, and discharged on bail, may be arrested on civil process before he leaves the court room; Moore v. Green, 73 N. C. 394, 21 Am. Rep. 470; *soldiers;* White v. Lowther, 3 Ga. 397; *sovereigns*, including, undoubtedly, governors of the states; *the Warden of the Fleet; witnesses* attending a judicial tribunal; 3 B. & Ald. 252; Bowes v. Tuckerman, 7 Johns. (N. Y.) 538; In re Dickenson, 3 Harr. (Del.) 517; by legal compulsion; Ex parte McNeil, 6 Mass. 264; U. S. v. Edme, 9 S. & R. (Pa.) 147; Page v. Randall, 6 Cal. 32; Sanford v. Chase, 3 Cow. (N. Y.) 381; *women;* O'Boyle v. Brown, Wright (Ohio) 465; Wheeler v. Hartwell, 17 N. Y. Super. Ct. 684; but see Eypert v. Bolenius, 2 Abb. N. C. 193; Blight v. Meeker, 7 N. J. L. 97; and perhaps other classes, under local statutes; *married women*, on suits arising from contracts; 1 Term 486; 6 *id.* 451; 7 Taunt. 55; but the privilege may be forfeited by her conduct; 1 B. & P. 8; 5 *id.* 380; and the grounds of these early decisions are necessarily affected by the modern statutes permitting married women to contract and sue and be sued as if *sole*, but although the Pennsylvania act of 1887 in section 2 authorizes her so to be sued on her contract and for all torts, it has been held that a married woman is notwithstanding that section privileged from arrest under a *capias;* Lorenz v. Betz, 2 W. N. C. (Pa.) 274. Reference must be had in many of the above cases to statutes for modifications of the privilege. In all cases where the privilege attaches in consideration of an attendance at a specified place in a certain character, it includes the stay and a reasonable time for going and returning; 2 W. Bla. 1113; Smythe v. Banks, 4 Dall. (Pa.) 329, 1 L. Ed. 854; Lewis v. Elmendorf, 2 Johns. Cas. (N. Y.) 222; Crocker v. Duncan, 6 Blackf. (Ind.) 278; In re Dickenson, 3 Harr. (Del.) 517; but not including delays in the way; 3 B. & Ald. 252; Smythe v. Banks, 4 Dall. (Pa.) 329, 1 L. Ed. 854; or deviations; Chaffee v. Jones, 19 Pick. (Mass.) 260. A person brought from one state into another under federal process in an extradition proceeding, and discharged therefrom, cannot be arrested under civil process until he has reasonable time to return to the state from which he came; In re Baruch, 41 Fed. 472.

Where and when it may be made. An arrest may be made in any place, except in the actual or constructive presence of a court, where the defendant is necessarily in attendance on business, the privilege extending to going thereto and returning; 3 Bla. Com. 289; but this privilege does not avail one brought into court on criminal process and discharged on bail; Moore v. Green, 73 N. C. 394, 21 Am. Rep. 470. An officer may not break open an outer door to arrest one whose domicile is there; Oystead v. Shed, 13 Mass. 520, 7 Am. Dec. 172; Gordon v. Clifford, 28 N. H. 402; *aliter*, under statute; Hawkins v. Com., 14 B. Mon. (Ky.) 395, 61 Am. Dec. 147; Phillips v. Ronald, 3 Bush (Ky.) 244, 96 Am. Dec. 216; but he may break inner doors to find the defendant when the outer door is open; Williams v. Spencer, 5 Johns. (N. Y.) 352; 8 Taunt. 250; Cowp. 1; and this includes the door of the room of a lodger; *id.*; but not the inner door of the house of a stranger upon suspicion that the defendant is there; 6 Taunt. 246. He may break the outer door of the house of defendant, who has escaped after arrest and taken refuge there; Allen v. Martin, 10 Wend. (N. Y.) 300, 25 Am. Dec. 564. It could not be made on Sunday or any public holiday; Stat. 29 Car. II. c. 7; *contra* (under a statute), King v. Strain, 6 Blackf. (Ind.) 447.

An officer with a proper writ may stop a train to arrest the railroad engineer running it; 20 Ohio L. J. 464; St. Johnsbury & L. C. R. Co. v. Hunt, 60 Vt. 588, 15 Atl. 186, 1 L. R. A. 189, 6 Am. Rep. 138.

Discharge from arrest on mesne process may be obtained by giving sufficient bail, which the officer is bound to take; 3 Maule & S. 283; 6 Term 355; 15 East 320; but when the arrest is on final process, giving bail does not authorize a discharge.

If the defendant otherwise withdraw himself from arrest, or if the officer discharge him, without authority, it is an *escape;* and the sheriff is liable to the plaintiff. See ESCAPE. If the party is withdrawn forcibly from the custody of the officer by third persons, it is a *rescue.* See RESCUE.

Extended facilities are offered to poor debtors to obtain a discharge under the statutes of most if not all of the states of the United States. In consequence, except in cases of apprehended fraud, as in the concealment of property or an intention to abscond, arrests are infrequently made. See, as to excepted cases, Armstrong v. Ayres, 19 Conn. 540; Bramhall v. Seavey, 28 Me. 45.

Generally. An unauthorized arrest, as under process materially irregular or informal; Russell v. Hubbard, 6 Barb. (N. Y.) 654; Welch v. Scott, 27 N. C. 72; Somervell v. Hunt, 3 H. & McH. (Md.) 113; Tackett v. State, 3 Yerg. (Tenn.) 392, 24 Am. Dec. 582; Lough v. Millard, 2 R. I. 436; Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200; or process issuing from a court which has no general jurisdiction of the subject-matter; 10 Co. 68; 10 B. & C. 28; Fisher v. McGirr, 1 Gray (Mass.) 1, 61 Am. Dec. 381; Tracy v. Williams, 4 Conn. 107, 10 Am. Dec. 102; Flack v. Ankeny, Breese (Ill.) 187; Duckworth v. Johnston,

7 Ala. 581; Camp v. Moseley, 2 Fla. 171; State v. McDonald, 14 N. C. 471; Rodman v. Harcourt, 4 B. Monr. (Ky.) 230; State v. Weed, 21 N. H. 262, 53 Am. Dec. 188; Brady v. Davis, 9 Ga. 73; Gurney v. Tufts, 37 Me. 130, 58 Am. Dec. 777; Ex parte Burford, 3 Cra. (U. S.) 448, 2 L. Ed. 495; Greene v. Briggs, 1 Curt. C. C. 311, Fed. Cas. No. 5,764; is void; but if the failure of jurisdiction be as to person, place, or process, it must appear on the warrant, to have this effect; Bull. N. P. 83; Savacool v. Boughton, 5 Wend. (N. Y.) 175, 21 Am. Dec. 181; Churchill v. Churchill, 12 Vt. 661; Barnes v. Barber, 1 Gilman (Ill.) 401; Miller v. Grice, 1 Rich. (S. C.) 147; Reed v. Rice, 2 J. J. Marsh. (Ky.) 44, 19 Am. Dec. 122; Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200; Tuell v. Wrink, 6 Blackf. (Ind.) 249; State v. Tuell, *id.* 344; Wells v. Jackson, 3 Munf. (Va.) 458; Halsted v. Brice, 13 Mo. 171; Conner v. Com., 3 Binn. (Pa.) 38; Donahoe v. Shed, 8 Metc. (Mass.) 326; Humes v. Taber, 1 R. I. 464; 3 Burr. 1766; 1 W. Bla. 555. The arrest of the wrong person; 2 Scott N. S. 86; 1 M. & G. 775; Melvin v. Fisher, 8 N. H. 406; Scott v. Ely, 4 Wend. (N. Y.) 555; Gurnsey v. Lovell, 9 *id.* 319; renders the officer liable for a trespass to the party arrested. See 1 Bennett & H. Lead. Crim. Cas. 180–184.

In Criminal Cases. The apprehending or detaining of the person in order to be forthcoming to answer an alleged or suspected crime. Quoted and adopted, as is also the distinction which follows, in County of Montgomery v. Robinson, 85 Ill. 174; Hogan v. Stophlet, 179 Ill. 150, 53 N. E. 604, 44 L. R. A. 809; Ex parte Sherwood, 29 Tex. App. 334, 15 S. W. 812.

The word *arrest* is said to be more properly used in civil cases, and *apprehension* in criminal. Thus, a man is arrested under a *capias ad respondendum*, and apprehended under a warrant charging him with larceny.

Who may make. The person to whom the warrant is addressed is the proper person in case a warrant has been issued, whether he be described by name; Salk. 176; Frost v. Thomas, 24 Wend. (N. Y.) 418; State v. Kirby, 24 N. C. 201; or by his office; 1 B. & C. 288; Russell v. Hubbard, 6 Barb. (N. Y.) 654. But, if the authority of the warrant is insufficient, he may be liable as a trespasser. See *supra.* A known officer need not show a warrant in making an arrest, but a special officer must if demanded; State v. Dula, 100 N. C. 423, 6 S. E. 89.

Any peace officer, as a justice of the peace; 1 Hale, Pl. Cr. 86; sheriff; 1 Saund. 77; 1 Taunt. 46; coroner; 4 Bla. Com. 292; constable; 32 Eng. L. & Eq. 783; Danovan v. Jones, 36 N. H. 246; or watchman; 3 Taunt. 14; 3 Campb. 420; may without a warrant arrest any person committing a felony in his presence; Wakely v. Hart, 6 Binn. (Pa.) 318; 3 Hawkins, Pl. Cr. 164; Shanley v. Wells, 71 Ill. 78; State v. Underwood, 75 Mo. 231; Boyd v. State, 17 Ga. 194; or committing a breach of the peace, during its continuance or immediately afterwards; 1 C. & P. 40; Taylor v. Strong, 3 Wend. (N. Y.) 384; Knot v. Gay, 1 Root (Conn.) 66; City Council v. Payne, 2 Nott. & M'C. (S. C.) 475; U. S. v. Hart, Pet. C. C. 390, Fed. Cas. No. 15,316; or if he is sufficiently near to hear what is said and the sound of the blows, although he cannot see for the darkness; State v. McAfee, 107 N. C. 812, 12 S. E. 435, 10 L. R. A. 607; Johnson v. State, 30 Ga. 430; White v. Kent, 11 Ohio St. 550; Brooks v. Com., 61 Pa. 352, 100 Am. Dec. 645; or even to prevent the commission; and such officer may arrest any one whom he reasonably suspects of having committed a felony, whether a felony has actually been committed or not; 3 Campb. 420; Rohan v. Sawin, 5 Cush. (Mass.) 281; Eanes v. State, 6 Humphr. (Tenn.) 53, 44 Am. Dec. 289; Wakely v. Hart, 6 Binn. (Pa.) 316; Holley v. Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; whether acting on his own knowledge or facts communicated by others; 6 B. & C. 635; but not unless the offence amount to a felony; 5 Exch. 378; Rohan v. Sawin, 5 Cush. (Mass.) 281; Com. v. Carey, 12 *id.* 246; Com. v. McLaughlin, 12 *id.* 615. See Russ. & R. 329; Wright v. Com., 85 Ky. 123, 2 S. W. 904. But a constable cannot arrest for an ordinary misdemeanor without a warrant, unless present at the time of the offence; Winn v. Hobson, 54 N. Y. Super. Ct. 330; North v. People, 139 Ill. 81, 28 N. E. 966; Ross v. Leggett, 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 608; Scott v. Eldridge, 154 Mass. 25, 27 N. E. 677, 12 L. R. A. 379; State v. Davidson, 44 Mo. App. 513.

A police constable may arrest for a breach of the peace committed in his sight; 4 H. & N. 265. If upon probable suspicion or a reasonable charge made by a third person, he believes that a felony (but not a misdemeanor; 5 Exch. 378) has been committed he may arrest the person whom he believes to have committed the felony; 3 H. & N. 417. To do this he may break open doors. Blackstone (4 Com. 492) says he may kill the felon if necessary.

Mere impudence or abusive language to an officer does not justify arrest without a warrant; Pinkerton v. Verberg, 78 Mich. 573, 44 N. W. 579, 7 L. R. A. 507, 18 Am. St. Rep. 473; Jenkins v. State, 3 Ga. App. 146, 59 S. E. 435; or threats of injury to another officer; Giroux v. State, 40 Tex. 98; otherwise if there is interference with the performance of his duty; Montgomery v. Sutton, 67 Ia. 497, 25 N. W. 748; Myers v. Dunn, 126 Ky. 548, 104 S. W. 352, 13 L. R. A. (N. S.) 881, and note; or if the language amounts to a breach of the peace on a public street; State v. Appleton, 70 Kan. 217, 78 Pac. 445; Davis v. Burgess, 54 Mich. 514, 20 N. W. 540, 52 Am.

Rep. 828. Threats alone, unaccompanied by any effort or apparent intention to execute them, do not constitute the offence of resisting an officer in the execution of lawful process; Statham v. State, 41 Ga. 507; nor do mere derogatory remarks addressed by a bystander to a policeman; City of Chicago v. Brod, 141 Ill. App. 500; nor is it resistance to step in front of a policeman making an arrest, demand his number and remonstrate with him for ill treating the prisoner; Com. v. Sheriff, 3 Brewst. (Pa.) 343. A mere statement by one about to be arrested that he will die first is not within a statute making it a crime to oppose arrest; State v. Scott, 123 La. 1085, 49 South. 715, 24 L. R. A. (N. S.) 199, 17 Ann. Cas. 400.

An officer may arrest without warrant for the violation of a municipal ordinance committed in his presence; Village of Oran v. Bles, 52 Mo. App. 509; but in such case the offender must have a speedy trial or hearing; State v. Freeman, 86 N. C. 683; Judson v. Reardon, 16 Minn. 431 (Gil. 387); and the right exists whether such arrest is authorized by ordinance or not; Scircle v. Neeves, 47 Ind. 289; or if the charter confers on the officer the powers of a constable; State v. Castieny, 34 Minn. 1, 24 N. W. 458; and a municipal ordinance authorizing such arrests is valid; White v. Kent, 11 Ohio St. 550; as is also a charter or general statute; Mayo v. Wilson, 1 N. H. 53; Burroughs v. Eastman, 101 Mich. 419, 59 N. W. 817, 24 L. R. A. 859, 45 Am. St. Rep. 419; Jones v. Root, 6 Gray (Mass.) 435; but such arrest is not authorized if the offense is not committed in the presence of the officer; Pesterfield v. Vickers, 3 Coldw. (Tenn.) 205; State v. Belk, 76 N. C. 10, where it was also said that the right to arrest in such cases does not necessarily exist. But an ordinance authorizing arrest at the will of the officer without providing an opportunity for trial or preliminary examination is void and will not protect the officer even if acting in good faith; State v. Hunter, 106 N. C. 796, 11 S. E. 366, 8 L. R. A. 529.

As to the power to make arrest without a warrant, see Porter v. State, 124 Ga. 297, 52 S. E. 283, 2 L. R. A. (N. S.) 730 and note.

A private person who is present when a felony is committed; 1 Mood. 93; Holley v. Mix, 3 Wend. (N. Y.) 353, 20 Am. Dec. 702; Long v. State, 12 Ga. 293; or during the commission of a breach of the peace; 10 C. & F. 28; In re Powers, 25 Vt. 261; or sees another in the act of carrying away property he has stolen; Hershey v. O'Neill, 36 Fed. 168; may and should arrest the felon, and may upon reasonable suspicion that the person arrested is the felon, if a felony has been committed; 1 Price, Exch. 525; United States v. Boyd, 45 Fed. 851; but in defence to an action he must allege and prove the offence to have been committed; 6 C. & P. 684, 723; Holley v. Mix, 3 Wend. (N. Y.) 353; Rohan v. Sawin, 5 Cush. (Mass.) 281; and also that he had reasonable grounds for suspecting the person arrested; 3 Campb. 35; 2 Q. B. 169; Hall v. Suydam, 6 Barb. (N. Y.) 84; Winebiddle v. Porterfield, 9 Pa. 137; Wasson v. Canfield, 6 Blackf. (Ind.) 406; Hall v. Hawkins, 5 Humphr. (Tenn.) 357; Wills v. Noyes, 12 Pick. (Mass.) 324; Wilmarth v. Mountford, 4 Wash. C. C. 82, Fed. Cas. No. 17,774. If a felony has been committed and there is reasonable cause to believe that A. committed it, a private person is justified in arresting A., though it turns out that B. was guilty; 8 C. & P. 522. See Russel v. Shuster, 8 W. & S. (Pa.) 308; 2 C. & P. 361, 565; 1 Benn. & H. L. Cas. 143; a private person may arrest if there be a breach of the peace, or if he has reasonable ground to believe that a breach of the peace that has been committed will be renewed; 10 Cl. & F. 28.

As to arrest to prevent the commission of crimes, see 2 B. & P. 260; 9 C. P. 262.

Where a private party attempts to make an arrest for riot on the order of a justice after offenders have dispersed, he becomes a trespasser and may be resisted; State v. Campbell, 107 N. C. 948, 12 S. E. 441. Any person may arrest an affrayer and detain him till his passion has cooled and then deliver him to an officer; 1 Cr. M. & R. 762; but not after the affray has ceased; 2 Q. B. 375.

A private detective, in pursuit of a fugitive from justice in another state, cannot arrest without a warrant by merely procuring a policeman to make the arrest; Harris v. R. Co., 35 Fed. 116; nor can such detective forcibly detain the defendant to await a legal order of arrest; Harland v. Howard, 57 Hun 113, 587, 10 N. Y. Supp. 449. As to arrest by hue and cry, see HUE AND CRY. As to arrest by military officers, see Luther v. Borden, 7 How. (U. S.) 1, 12 L. Ed. 581.

Who liable to. Any person is liable to arrest for crime, except ambassadors and their servants; Cooke v. Gibbs, 3 Mass. 197; Scott v. Curtis, 27 Vt. 762; U. S. v. Kirby, 7 Wall. (U. S.) 483, 19 L. Ed. 278.

It has been held that no legal arrest of a voter can be made on election day for cause relating to his suffrage; U. S. v. Small, 38 Fed. 103.

When and where it may be made. An arrest may be made at night as well as by day; and, for treason, felony, breach of the peace, or generally for an indictable offence, on Sunday as well as on other days; 16 M. & W. 172; Pearce v. Atwood, 13 Mass. 347; Wright v. Keith, 24 Me. 158. And the officer may break open doors even of the criminal's own house; Barnard v. Bartlett, 10 Cush. (Mass.) 501, 57 Am. Dec. 123; Hawkins v. Com., 14 B. Monr. (Ky.) 395, 61 Am. Dec. 147 (even to arrest a person therein, not the owner; Com. v. Reynolds, 120 Mass. 190, 21 Am. Rep. 510); although he must first demand admission and be refused after

giving notice of his business; Russ. Cr. 840; McLennon v. Richardson, 15 Gray (Mass.) 74, 77 Am. Dec. 353; State v. Shaw, 1 Root (Conn.) 134; as may a private person in fresh pursuit, under circumstances which authorize him to make an arrest; 4 Bla. Com. 293.

It must be made within the jurisdiction of the court under whose authority the officer acts; People v. McLeod, 1 Hill (N. Y.) 377, 37 Am. Dec. 328; Church v. Hubbart, 2 Cra. (U. S.) 187, 2 L. Ed. 249; Bromley v. Hutchins, 8 Vt. 194, 30 Am. Dec. 465; Lawson v. Buzines, 3 Harr. (Del.) 416; and jurisdiction for this purpose can be extended to foreign countries only by virtue of treaties or express laws of those countries; 1 Bish. Cr. Law § 598; Wheat. Int. Law (3d Eng. ed.) § 113; Com. v. Deacon, 10 S. & R. (Pa.) 125; Ex parte Holmes, 12 Vt. 631; In re Sheazle, 1 W. & M. 66, Fed. Cas. No. 12,734; In re Metzger, 1 Barb. (N. Y.) 248. And see, as between the states of the United States, Jones v. Van Zandt, 5 How. (U. S.) 215, 12 L. Ed. 122; Com. v. Tracy, 5 Metc. (Mass.) 536; State v. Howell, R. M. Charlt. (Ga.) 120; State v. Allen, 2 Humphr. (Tenn.) 258; as to arrest in a different county; Sturm v. Potter, 41 Ind. 181.

Manner of making. An officer authorized to make an arrest, whether by warrant or from the circumstances, may use necessary force; 2 Bish. Cr. Law 37; Findlay v. Pruitt, 9 Port. (Ala.) 195; State v. Mahon, 3 Harr. (Del.) 568; Wright v. Keith, 24 Me. 158; Henry v. Lowell, 16 Barb. (N. Y.) 268; State v. Stalcup, 24 N. C. 52; 4 B. & C. 596; Skidmore v. State, 43 Tex. 93 (but he may not strike except in self-defence); he may kill the felon if he cannot otherwise be taken; 1 Russ. Cr. 665-7 (7th Eng. ed.) 813; 1 Bish. N. Cr. L. § 647; Starr v. U. S., 153 U. S. 614, 14 Sup. Ct. 919, 38 L. Ed. 844; North Carolina v. Gosnell, 74 Fed. 734; U. S. v. Jailer, 2 Abb. (U. S.) 265, Fed. Cas. No. 15,463; State v. Anderson, 1 Hill (S. C.) 327; State v. Rhodes, Houst. Cr. Cas. (Del.) 476; Cousins v. State, 50 Ala. 117, 20 Am. Rep. 290 (but not "in any case where, with diligence and caution, the prisoner could be otherwise held"; Reneau v. State, 2 Lea (Tenn.) 720, 31 Am. Rep. 628; State v. Coleman, 186 Mo. 151, 84 S. W. 978, 69 L. R. A. 381; nor if the original difficulty is caused by the officer; Johnson v. State, 58 Ark. 57, 23 S. W. 7); and so may a private person in making an arrest which he is *enjoined* to make; 4 Bla. Com. 293; and if the officer or a private person is killed, in such case it is murder. In making an arrest for misdemeanor, an officer can kill or inflict bodily harm upon the person only when he is placed in like danger; Dilger v. Com., 88 Ky. 550, 11 S. W. 651, 11 Ky. Law Rep. 67; Thomas v. Kinkead, 55 Ark. 502, 18 S. W. 854, 15 L. R. A. 558, 29 Am. St. Rep. 68.

When an offender is not resisting but fleeing, an officer in making an arrest for a misdemeanor has no right to kill or shoot, although he may do so in case of felony; Head v. Martin, 85 Ky. 480, 3 S. W. 622. He cannot kill a fleeing misdemeanant to prevent escape; Thomas v. Kinkead, 55 Ark. 502, 18 S. W. 854, 15 L. R. A. 558, 29 Am. St. Rep. 68; Brown v. Weaver, 76 Miss. 7, 23 South. 388, 42 L. R. A. 423, 71 Am. St. Rep. 512 (where the sheriff's official bondsmen were held liable for the shooting by his deputy); *contra*, 1 Bish. Cr. Proc. § 161, which is criticised by the Arkansas court (which in its turn is reviewed in a later edition of the same work) and also by the Mississippi court. See also 12 Harv. L. Rev. 211, which approves the cases cited *supra* and strongly criticises Mr. Bishop. If the officer kill his prisoner in such case he is guilty of manslaughter; Reneau v. State, 2 Lea (Tenn.) 720, 31 Am. Rep. 626. If a person kill an officer in resisting an illegal arrest, without warrant, it is reduced from murder, which it would have been if the officer had a right to arrest, to manslaughter, or it may be no offence, if the person arrested had the right to use such force as was necessary in resisting; John Bad Elk v. U. S., 177 U. S. 529, 20 Sup. Ct. 729, 44 L. Ed. 874; Jenkins v. State, 3 Ga. App. 146, 59 S. E. 435. For unnecessarily rough treatment in making an arrest an officer has been held liable in exemplary damages; McConathy v. Deck, 34 Colo. 461, 83 Pac. 135, 4 L. R. A. (N. S.) 358, 7 Ann. Cas. 896.

Reading a warrant and directing defendant to appear, is not an arrest; Baldwin v. Murphy, 82 Ill. 485; but see Shannon v. Jones, 76 Tex. 141, 13 S. W. 477. Arresting the body and exhibiting the process is enough; McNeice v. Weed, 50 Vt. 728.

See JUSTIFIABLE HOMICIDE; HOMICIDE; REWARD; full notes in 19 Am. Dec. 485; 61 *id.* 151.

ARREST OF JUDGMENT. The act of a court by which the judges refuse to give judgment for the plaintiff, because upon the face of the record it appears that the plaintiff is not entitled to it.

A motion for arrest of judgment must be grounded on some objection arising on the face of the record itself; State v. Casey, 44 La. Ann. 969, 11 South. 583; McGill v. Rothgeb, 45 Ill. App. 511; and no defect in the evidence or irregularity at the trial can be urged in this stage of the proceedings. But any want of sufficient certainty in the indictment, as in the statement of time or place (where material), of the person against whom the offence was committed, or of the facts and circumstances constituting the offence, or otherwise, which is not aided by the verdict, is a ground for arresting the judgment. In criminal cases, an arrest of judgment is founded on exceptions to the indictment. In civil cases whatever is alleged in arrest of judgment must be such

matter as would on demurrer have been sufficient to overturn the action or plea. In the applicability of the rule there is no difference between civil and criminal cases; Delaware Division Canal Co. v. Com., 60 Pa. 367, 100 Am. Dec. 570. Although the defendant himself omits to make any motion in arrest of judgment, the court, if, on a review of the case, it is satisfied that the defendant has not been found guilty of any offence in law, will of itself arrest the judgment; 1 East 146. Where a statute upon which an indictment is founded was repealed after the finding of the indictment, but before plea pleaded, the court arrested the judgment; 18 Q. B. 761; Dearsl. 3. See also 8 Ad. & E. 496; 1 Russ. & R. 429; Com. v. Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 377; Com. v. Pattee, 12 Cush. (Mass.) 501. If the judgment is arrested, all the proceedings are set aside, and judgment of acquittal is given; but this will be no bar to a new indictment; Comyns. Dig. *Indictment*, N.; 1 Bish. Cr. Law 998.

Where a judgment rendered has been reversed, and a new trial granted, which is had upon the same indictment in the same court, a motion in arrest of judgment on the ground of a former acquittal of a higher offence charged in the indictment, is good where such facts appear in the record; Golding v. State, 31 Fla. 262, 12 South. 525.

ARRESTANDIS BONIS NE DISSIPENTUR. A writ for him whose cattle or goods, being taken during a controversy, are likely to be wasted and consumed.

ARRESTEE. In Scotch Law. He in whose hands a debt, or property in his possession, has been arrested by a regular arrestment.

If, in contempt of the arrestment, he make payment of the sum or deliver the goods arrested to the common debtor, he is not only liable criminally for breach of the arrestment, but he must pay the debt again to the arrester; Erskine, Inst. 3. 6. 6.

ARRESTER. In Scotch Law. One who sues out and obtains an arrestment of his debtor's goods or movable obligations. Erskine, Inst. 3. 6. 1.

ARRESTMENT. In Scotch Law. Securing a criminal's person till trial, or that of a debtor till he give security *judicio sisti*. The order of a judge, by which he who is debtor in a movable obligation to the arrester's debtor is prohibited to make payment or delivery till the debt due to the arrester be paid or secured. Erskine, Inst. 3. 6. 1; 1. 2. 12.

This word is used interchangeably with attachment in the act for the protection of seaman's wages; U. S. R. S. § 4536; which it is said must be liberally construed; Wilder v. Navigation Co., 211 U. S. 239, 29 Sup. Ct. 58, 53 L. Ed. 164, 15 Ann. Cas. 127. The court, after quoting the above definition, held that, though not literally so, the prohibition against "attachment or arrestment" must apply to execution after judgment as well as attachment before it.

ARRÊT (Fr.). A judgment, sentence, or decree of a court of competent jurisdiction.

The term is derived from the French law, and is used in Canada and Louisiana.

Saisie arrêt is an attachment of property in the hands of a third person. La. Code Pr. art. 209; 2 Low. C. 77; 5 *id.* 198, 218.

ARRETTED (*arrectatus*, i. e. *ad rectum vocatus*).

Convened before a judge and charged with a crime.

Ad rectum malefactorem is, according to Bracton, to have a malefactor forthcoming to be put on his trial.

Imputed or laid to one's charge; as, no folly may be *arretted* to any one under age. Bracton, l. 3, tr. 2, c. 10; Cunningham, Dict.

ARRHÆ. Money or other valuable things given by the buyer to the seller, for the purpose of evidencing the contract; earnest.

There are two kinds of arrhæ: one kind given when a contract has only been proposed; the other when a sale has actually taken place. Those which are given when a bargain has been merely proposed, before it has been concluded, form the matter of the contract, by which he who gives the arrhæ consents and agrees to lose them, and to transfer the title to them in the opposite party, in case he should refuse to complete the proposed bargain; and the receiver of arrhæ is obliged on his part to return double the amount to the giver of them in case he should fail to complete his part of the contract; Pothier, *Contr. de Vente*, n. 498. After the contract of sale has been completed, the purchaser usually gives arrhæ as evidence that the contract has been perfected. Arrhæ are therefore defined *quod ante pretium datur, et fidem fecit contractus, facti totiusque pecuniæ solvendæ Id.* n. 506; Cod. 4. 45. 2. 3 Sand. Just. xxiii. See EARNEST.

Arrhæ sponsalitiæ were the earnest or present given by one betrothed to the other at the betrothal.

ARRIER BAN. A second summons to join the lord, addressed to those who had neglected the first. A summons of the inferiors or vassals of the lord. Spelman, Gloss.

ARRIERE FIEF (Fr.). An inferior fee granted out of a superior.

ARRIVE. To come to a particular place; to reach a particular or certain place. See cases in Leake, Contr., and in Abb. Dict.; Thompson v. U. S., 1 Brock. 411, Fed. Cas. No. 13,985; Meigs v. Ins. Co., 2 Cush. (Mass.) 439; 8 B. & C. 119; U. S. v. Open Boat, 5 Mas. 132, Fed. Cas. No. 15,967; Harrison v. Vose, 9 How. (U. S.) 372, 13 L. Ed. 179.

ARROGATION. The adoption of a person *sui juris*. 1 Brown, Civ. Law 119; Dig. 1. 7. 5; Inst. 1. 11. 3.

ARSER IN LE MAIN (Fr. Burning in the hand). The punishment inflicted on those who received the benefit of clergy. *Termes de la Ley.*

ARSON (Lat. *ardere*, to burn). The malicious burning of the house of another. Co. 3d Inst. 66; Bish. Cr. L. § 415; 4 Bla. Com.

220; Curran's Case, 7 Gratt. (Va.) 619; Ritchey v. State, 7 Blackf. (Ind.) 168; Mary v. State, 24 Ark. 44, 81 Am. Dec. 60; 1 Leach, Cr. Cas. 218; People v. Fisher, 51 Cal. 319; Young v. Com., 12 Bush (Ky.) 243; but it is not arson to demolish the house first and then burn the material; Mulligan v. State, 25 Tex. App. 199, 7 S. W. 664, 8 Am. St. Rep. 435.

In some states by statute there are degrees of arson. The house, or some part of it, however small, must be consumed by fire; 9 C. & P. 45; Com. v. Van Schaack, 16 Mass. 105; State v. Mitchell, 27 N. C. 350. Where the house is simply scorched or smoked and the fire is not communicated to the building; Woolsey v. State, 30 Tex. App. 346, 17 S. W. 546; or where parts of a house already detached are burned; Mulligan v. State, 25 Tex. App. 199, 7 S. W. 664, 8 Am. St. Rep. 435; it is not arson; nor where a house was blown up by dynamite and splinters were torn from the roof and fired by the explosion; Landers v. State, 39 Tex. Cr. R. 671, 47 S. W. 1008; 12 Harv. L. Rev. 433. The question of burning is one of fact for the jury; 1 Mood. Cr. Cas. 398; Com. v. Betton, 5 Cush. (Mass.) 427.

It must be *another's* house; 1 Bish. Cr. Law § 389; but *aliter* under the N. H. statute; State v. Hurd, 51 N. H. 176; but if a man set fire to his own house with a view to burn his neighbor's, and does so, it is, at least, a great misdemeanor; 1 Hale, Pl. Cr. 568; W. Jones 351; Bloss v. Tobey, 2 Pick. (Mass.) 325; Erskine v. Com., 8 Gratt. (Va.) 624. See People v. Henderson, 1 Park. Cr. Cas. (N. Y.) 560; People v. Van Blarcum, 2 Johns. (N. Y.) 105; Ritchey v. State, 7 Blackf. (Ind.) 168; and under statutes in some states a tenant who sets fire to a house occupied by himself is guilty of the crime; State v. Moore, 61 Mo. 276; People v. Simpson, 50 Cal. 304. If one sets fire to a schoolhouse with the intention of burning an adjoining dwelling, which actually happens, he is guilty of arson; Combs v. Com., 93 Ky. 313, 20 S. W. 221.

The *house* of another must be burned, to constitute arson at common law; but the term "house" comprehends not only the very mansion-house, but all out-houses which are parcel thereof, though not contiguous to it, nor under the same roof, such as the barn, stable, cow-house, sheep-house, dairy-house, mill-house, and the like, being within the curtilage, or same common fence, as the mansion itself; 4 C. & P. 245; State v. McGowan, 20 Conn. 245, 52 Am. Dec. 336; People v. Butler, 16 Johns. (N. Y.) 203; State v. Sandy, 25 N. C. 570; Chapman v. Com., 5 Whart. (Pa.) 427, 34 Am. Dec. 565; Stevens v. Com., 4 Leigh (Va.) 683; Com. v. Posey, 4 Call (Va.) 109, 2 Am. Dec. 560; State v. Roper, 88 N. C. 656; Quinn v. People, 71 N. Y. 561, 27 Am. Rep. 87; Ratekin v. State, 26 Ohio St. 420. And it has also been said that the burning of a barn, though no part of the mansion, if it has corn or hay in it, is felony at common law; 1 Hale, P. C. 567; 4 C. & P. 245; Sampson v. Com., 5 W. & S. (Pa.) 385; *contra*, Creed v. People, 81 Ill. 565. In Massachusetts, the statute refers to the dwelling-house strictly; Com. v. Barney, 10 Cush. (Mass.) 478. Where a prisoner set fire to his cell, in order to effect an escape, held, not arson; People v. Cotteral, 18 Johns. (N. Y.) 115; but see 1 Whart. Cr. L. (9th ed.) § 829; Luke v. State, 49 Ala. 30, 20 Am. Rep. 269; Willis v. State, 32 Tex. Cr. R. 534, 25 S. W. 123. The burning must have been both malicious and wilful; 1 Bishop, Cr. L. § 259; Maxwell v. State, 68 Miss. 339, 8 South. 546. And generally, if the act is proved to have been done wilfully, it may be inferred to have been done maliciously, unless the contrary is proved; 1 Russ. & R. Cr. Cas. 26. On a charge of arson for setting fire to a mill, an intent to injure or defraud the mill-owners will be conclusively inferred from the wilful act of firing; 2 B. & C. 264. But this doctrine can only arise where the act is wilful, and therefore, if the fire appears to be the result of accident, the party who is the cause of it will not be liable; Jenkins v. State, 53 Ga. 33, 31 Am. Rep. 255; McDonald v. People, 47 Ill. 533.

In some states by statute a wife may be guilty of arson by burning a husband's property; Emig v. Daum, 1 Ind. App. 146, 27 N. E. 322.

It is a felony at common law, and originally punishable with death; Co. 3d Inst. 66; 2 East Pl. Cr. 1015; Sampson v. Com., 5 W. & S. (Pa.) 385; State v. Seaborn, 15 N. C. 305; but this is otherwise by statute; State v. Bosse, 8 Rich. (S. C.) 276; Com. v. Posey, 4 Call (Va.) 109, 2 Am. Dec. 560; U. S. v. White, 5 Cra. C. C. 73, Fed. Cas. No. 16,676. If homicide result, the act is murder; State v. Cooper, 13 N. J. L. 361, 25 Am. Dec. 490; 1 Bish. Cr. Law 361.

It is not an indictable offence at common law to burn one's own house to defraud insurers; 1 Whart. Cr. L. (9th ed.) § 843; otherwise in most states by statute; State v. Hurd, 51 N. H. 176; Shepherd v. People, 19 N. Y. 537; People v. Schwartz, 32 Cal. 160. See CRIMES.

ARSURA. The trial of money by heating it after it was coined. Now obsolete.

ART. In Patent Law. A principle put in practice and applied to some art, machine, manufacture, or composition of matter. Earle v. Sawyer, 4 Mas. 1, Fed. Cas. No. 4,247. See COPYRIGHT; PATENT.

Under the tariff laws an artist's copies of antique masterpieces are works of art of as high a grade as those executed by the same hand from original models of modern sculptors; Tutton v. Viti, 108 U. S. 312, 2 Sup. Ct. 687, 27 L. Ed. 737.

The word statuary as used in the import

laws includes professional productions of statuary or of a sculptor only; U. S. R. S. 478. This definition is held to embrace such works of art as are the result of the artist's own creation or are copies of them made under his supervision, as distinguished from the productions of the manufacturer or mechanic.

For most practical purposes works of art may be divided into four classes: 1. The fine arts properly so called, intended solely for ornamental purposes and including paintings in oil and water, upon canvas, plaster or other material, and original statuary of marble, bronze, or stone. 2. Minor objects of art intended also for ornamental purposes, such as statuettes, vases, drawings, etchings and articles which pass under the general name of bric-a-brac, and are susceptible of an indefinite number of reproductions from the original. 3. Objects of art which serve primarily an ornamental, and incidentally a useful purpose, such as painted or stained glass windows, tapestry, paper hangings, etc. 4. Objects primarily designed for a useful purpose, but made ornamental to gratify the taste, such as ornamented clocks, the higher grade of carpets, curtains, gas fixtures and household and table furniture; U. S. v. Perry, 146 U. S. 74, 13 Sup. Ct. 26, 36 L. Ed. 890. No special favor is extended by congress to any of these classes except the first, which is alone recognized as belonging to the domain of high art; *id.*, where stained glass windows were held not to be exempt from duty as paintings imported for the use of a religious society and not intended for sale.

Under the tariff act of 1897, plaster casts of clay models, though gilded and painted and produced in unlimited quantities, are "casts of sculpture" and entitled to free entry when specially imported in good faith for the use and by the order of any society established solely for religious, philosophical, scientific, educational or literary purposes; Benziger v. U. S., 192 U. S. 38, 24 Sup. Ct. 189, 48 L. Ed. 331.

ARTICLED CLERK. A person bound by indenture to a solicitor that he may acquire a knowledge pertaining to that business.

ARTICLES (Lat. *articulus*, a joint). Divisions of a written or printed document or agreement.

A specification of distinct matters agreed upon or established by authority or requiring judicial action.

The fundamental idea of an article is that of an object comprising some integral part of a complex whole. See Worcester, Dict. The term may be applied, for example, to a single complete question in a series of interrogatories; the statement of the undertakings and liabilities of the various parties to an agreement in any given event, where several contingencies are provided for in the same agreement; a statement of a variety of powers secured to a branch of government by a constitution; a statement of particular regulations in reference to one general subject of legislation in a system of laws; and in many other instances resembling these in principle. It is also used in the plural of the subject made up of these separate and related articles as articles of agreement, articles of war, the different divisions generally having, however, some relation to each other, though not necessarily a dependence upon each other.

In Chancery Practice. A formal written statement of objections to the credibility of witnesses in a cause in chancery, filed by a party to the proceedings after the depositions have been taken and published.

The object of articles is to enable the party filing them to introduce evidence to discredit the witnesses to whom the objections apply, where it is too late to do so in any other manner; 1 Dan. Ch. Pr. (6th Am. ed.) *957; and to apprize the party whose witnesses are objected to of the nature of the objections, that he may be prepared to meet them; 1 Dan. Ch. Pr. (6th Am. ed.) *958.

Upon filing the articles, a special order is obtained to take evidence; 2 Dick. Ch. 532; which is sparingly granted; 1 Beam. Ord. 187.

The interrogatories must be so shaped as not to call for evidence which applies directly to facts in issue; Wood v. Mann, 2 Sumn. 316, Fed. Cas. No. 17,953; Gass v. Stinson, 2 Sumn. 605, Fed. Cas. No. 5,261; Troup v. Sherwood, 3 Johns. Ch. (N. Y.) 558; 10 Ves. Ch. 49. The objections can be taken only to the credit and not to the competency of the witnesses; 3 Atk. 643; Troup v. Sherwood, 3 Johns. Ch. (N. Y.) 558; and the court are to hear all the evidence read and judge of its value; 2 Ves. Ch. 219. See, generally, 10 Ves. Ch. 49; 2 Ves. & B. 267; 1 Sim. & S. 467.

In Ecclesiastical Law. A complaint in the form of a libel exhibited to an ecclesiastical court.

ARTICLES OF AGREEMENT. A written memorandum of the terms of an agreement.

They may relate either to real or personal estate, or both, and if in proper form will create an equitable estate or trust such that a specific performance may be had in equity.

The instrument should contain a clear and explicit statement of the *names of the parties*, with their additions for purposes of distinction, as well as a designation as parties of the first, second, etc., part; *the subject-matter* of the contract, including the time, place, and more important details of the manner of performance; *the promises* to be performed by each party; *the date*, which should be truly stated. It should be signed by the parties or their agents. When signed by an agent, the proper form is, A B, by his agent [or attorney in fact], C D.

ARTICLES OF ASSOCIATION, OR OF INCORPORATION. The certificate filed in conformity with a general law, by persons who desire to become a corporation, setting forth the rules and conditions upon which the association or corporation is founded. Cent. Dict.

ARTICLES OF CONFEDERATION. The title of the compact which was made by the thirteen original states of the United States of America. Story, Const. 215, 223.

The full title was "Articles of Confederation and perpetual union between the states of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia." It was adopted and went into force on the first day of March, 1781, and remained as the supreme law until the first Wednesday of March, 1789; Owings v. Speed, 5 Wheat. (U. S.) 420, 5 L. Ed. 124.

The accompanying analysis of this important instrument is from Judge Story's Commentaries on the Constitution of the United States.

The style of the confederacy was, by the first article, declared to be, "The United States of America." The second article declared that each state retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right which was not by this confederation *expressly* delegated to the United States, in congress assembled. The third article declared that the states severally entered into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare; binding themselves to assist each other against all force offered to or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever. The fourth article declared that the free inhabitants of each of the states (vagabonds and fugitives from justice excepted) should be entitled to all the privileges of free citizens in the several states; that the people of each state should have free ingress and regress to and from any other state, and should enjoy all the privileges of trade and commerce, subject to the same duties and restrictions as the inhabitants; that fugitives from justice should, upon the demand of the executive of the state from which they fled, be delivered up; and that full faith and credit should be given, in each of the states, to the records, acts, and judicial proceedings of the courts and magistrates of every other state.

Having thus provided for the security and intercourse of the states, the next article (5th) provided for the organization of a general congress, declaring that delegates should be chosen in such manner as the legislature of each state should direct; to meet in congress on the first Monday in every year, with a power, reserved to each state, to recall any or all of the delegates, and to send others in their stead. No state was to be represented in congress by less than two nor more than seven members. No delegate was eligible for more than three in any term of six years; and no delegate was capable of holding office of emolument under the United States. Each state was to maintain its own delegates, and, in determining questions in congress, was to have one vote. Freedom of speech and debate in congress was not to be impeached or questioned in any other place; and the members were to be protected from arrest and imprisonment during the time of their going to and from and attendance on congress, except for treason, felony, or breach of the peace.

By subsequent articles, congress was invested with the sole and exclusive right and power of determining on peace and war, unless in case of an invasion of a state by enemies, or an imminent danger of an invasion by Indians; of sending and receiving ambassadors; entering into treaties and alliances, under certain limitations as to treaties of commerce; of establishing rules for deciding all cases of capture on land and water, and for the division and appropriation of prizes taken by the land or naval forces, in the service of the United States; of granting letters of marque and reprisal in times of peace; of appointing courts for the trial of piracies and felonies committed on the high seas; and of establishing courts for receiving and finally determining appeals in all cases of captures.

Congress was also invested with power to decide in the last resort, on appeal, all disputes and differences between two or more states concerning boundary, jurisdiction, or any other cause whatsoever; and the mode of exercising that authority was specially prescribed. And all controversies concerning the private right of soil, claimed under different grants of two or more states before the settlement of their jurisdiction, were to be finally determined in the same manner, upon the petition of either of the grantees. But no state was to be deprived of territory for the benefit of the United States.

Congress was also invested with the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or that of the United States; of fixing the standard of weights and measures throughout the United States; of regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits should not be infringed or violated, of establishing and regulating post-offices from one state to another, and exacting postage to defray the expenses; of appointing all officers of the land forces in the service of the United States, except regimental officers; of appointing all officers of the naval forces, and commissioning all officers whatsoever in the service of the United States; and of making rules for the government and regulation of the land and naval forces, and directing their operations.

Congress was also invested with authority to appoint a committee of the states to sit in the recess of congress, and to consist of one delegate from each state, and other committees and civil officers, to manage the general affairs under their direction; to appoint one of their number to preside, but no person was to serve in the office of president more than one year in the term of three years; to ascertain the necessary sums for the public service, and to appropriate the same for defraying the public expenses; to borrow money and emit bills on credit of the United States, to build and equip a navy; to agree upon the number of land forces, and make requisitions upon each state for its quota, in proportion to the number of white inhabitants in such state. The legislatures of each state were to appoint the regimental officers, raise the men, and clothe, arm, and equip them at the expense of the United States.

Congress was also invested with power to adjourn for any time not exceeding six months, and to any place within the United States; and provision was made for the publication of its journal, and for entering the yeas and nays thereon when desired by any delegate.

Such were the powers confided in congress. But even these were greatly restricted in their exercise; for it was expressly provided that congress should never engage in a war; nor grant letters of marque or reprisal in time of peace; nor enter into any treaties or alliances; nor coin money or regulate the value thereof; nor ascertain the sums or expenses necessary for the defence and welfare of the United States; nor emit bills; nor borrow money on the credit of the United States; nor appropriate money; nor agree upon the number of vessels of war to be built, or purchased, or the number of land or sea forces to be raised; nor appoint a commander-in-chief of the army or navy; unless nine states should assent to the same. And no question on any other point, except for adjourning from day to day, was to be determined, except by vote of the majority of the states.

The committee of the states, or any nine of them, were authorized in the recess of congress to exercise such powers as congress, with the assent of nine states, should think it expedient to vest them with, except powers for the exercise of which, by the

articles of confederation, the assent of nine states was required, which could not be thus delegated.

It was further provided that all bills of credit, moneys borrowed, and debts contracted by or under the authority of congress before the confederation, should be a charge against the United States; that when land forces were raised by any state for the common defence, all officers of or under the rank of colonel should be appointed by the legislature of the state, or in such manner as the state should direct; and all vacancies should be filled up in the same manner; that all charges of war, and all other expenses for the common defence or general welfare, should be defrayed out of a common treasury, which should be supplied by the several states, in proportion to the value of the land within each state granted or surveyed, and the buildings and improvements thereon, to be estimated according to the mode prescribed by congress, and the taxes for that proportion were to be laid and levied by the legislatures of the states within the time agreed upon by congress.

Certain prohibitions were laid upon the exercise of powers by the respective states. No state, without the consent of the United States, could send an embassy to, or receive an embassy from, or enter into any treaty with any king, prince, or state; nor could any person holding any office under the United States, or any of them, accept any present, emolument, office, or title from any foreign king, prince, or state; nor could congress itself grant any title of nobility. No two states could enter into any treaty, confederation, or alliance with each other, without the consent of congress. No state could lay any imposts or duties which might interfere with any proposed treaties. No vessels of war were to be kept up by any state in time of peace, except deemed necessary by congress for its defence or trade; nor any body of forces, except as should be deemed requisite by congress to garrison its forts and necessary for its defence But every state was required always to keep up a well-regulated and disciplined militia, sufficiently armed and accoutred, and to be provided with suitable field-pieces, and tents, and arms, and ammunition, and camp equipage. No state could engage in war without the consent of congress, unless actually invaded by enemies or in danger of invasion by the Indians Nor could any state grant commissions to any ships of war, nor letters of marque and reprisal except after a declaration of war by congress, unless such state were infested by pirates, and then subject to the determination of congress. No state could prevent the removal of any property imported into any state to any other state, of which the owner was an inhabitant. And no imposition, duties, or restriction could be laid by any state on the property of the United States or of either of them.

There was also provision made for the admission of Canada into the Union, and of other colonies, with the assent of nine states. And it was finally declared that every state should abide by the determinations of congress on all questions submitted to it by the confederation; that the articles should be inviolably observed by every state; that the union should be perpetual; and that no alterations should be made in any of the articles, unless agreed to by congress and confirmed by the legislatures of every state.

ARTICLES OF IMPEACHMENT. Accusations in writing which form the basis of a trial by impeachment.

They are called by Blackstone a kind of bills of indictment, and perform the same office which an indictment does in a common criminal case. They do not usually pursue the strict form and accuracy of an indictment, but are sometimes quite general in the form of the allegations. Woodd. Lect. 605; Sto. Const. 5th ed. § 807; Com. Dig. *Parliament*, L. 21; Foster, Cr. L. 239. They should, however, contain so much certainty as to enable a party to put himself on the proper defence, and in case of an acquittal to avail himself of it as a bar to another impeachment. Additional articles may perhaps be exhibited at any stage of the proceedings; Rawle, Const. 216.

The answer to articles of impeachment need not observe great strictness of form; and it may contain arguments as well as facts. It is usual to give a full and particular answer to each article of the accusation; Story, Const. 5th ed. § 810; Jeff. Man. § 53. See IMPEACHMENT.

ARTICLES OF PARTNERSHIP. A written agreement by which the parties enter into a partnership upon the conditions therein mentioned.

These are to be distinguished from agreements to enter into a partnership at a future time. By articles of partnership a partnership is actually established; while an agreement for a partnership is merely a contract, which may be taken advantage of in a manner similar to other contracts. Where an agreement to enter into a partnership is broken, an action lies *at law* to recover damages; and *equity*, in some cases, to prevent frauds or manifestly mischievous consequences, will enforce specific performance; Story, Partn. § 109, 3 Atk. 383, 1 Swanst. 513, n; Lindl. Partn. *475; 17 Beav. 294; but not when the partnership may be immediately dissolved; 9 Ves. Ch. 360 Specific performance was decreed in Whitworth v. Harris, 40 Miss. 483; Birchett v. Bolling, 5 Munf. (Va.) 442, and refused in Wadsworth v. Manning, 4 Md. 60. See 8 Beav. 129; 30 *id* 376.

The instrument should contain *the names* of the contracting parties severally set out; the *agreement* that the parties do by the instrument enter into a partnership, expressed in such terms as to distinguish it from a covenant to enter into partnership at a subsequent time; the *date*, and necessary *stipulations*, some of the more common of which follow.

The *commencement* of the partnership should be expressly provided for. The date of the articles is the time, when no other time is fixed by them; 5 B. & C. 108; Lindl. Part. (2d Am. Ed.) *201, *412; Ingraham v. Foster, 31 Ala. 123; Beaman v. Whitney, 20 Me. 413; Everit v. Watts, 10 Paige (N. Y.) 82; if not dated, parol evidence is admissible to show that they were not intended to take effect at the time of their execution; 17 C. B. 625.

The *duration* of the partnership should be stated. It may be for life, for a limited period of time, or for a limited number of adventures. When a term is fixed, it endures until that period has elapsed; when no term or limitation is fixed, the partnership may be dissolved at the will of either partner; 17 Ves. 298; Carlton v. Cummins, 51 Ind. 478; McElvey v. Lewis, 76 N. Y. 373; Lindl. Partn. *121, *413; see Williams v. Ins. Co., 150 Pa. 20, 24 Atl. 346. Dissolution follows immediately and inevitably on the death of a partner; Hoard v. Clum, 31 Minn. 186, 17 N. W. 275; but provision may be made for the succession of the executors or administrators or a child or children of a deceased partner to his place and rights; Burwell v. Cawood, 2 How. (U. S.) 560, 11 L. Ed. 378; Powell v. Hopson, 13 La. Ann. 626; 9 Ves. Ch. 500. Where a provision is made for a succession by appointment, and the partner

dies without appointing, his executors or administrators may continue the partnership or not, at their option; 1 McClel. & Y. 579; Coll. Ch. 157. A continuance of the partnership beyond the period fixed for its termination will, in the absence of circumstances showing intent, be implied to be upon the basis of the old articles; U. S. Bank v. Binney, 5 Mas. 176, 185, Fed. Cas. No. 16,791; 15 Ves. Ch. 218; 1 Moll. Ch. 466; but it will be considered as at will, and not as renewed for a further definite period; 17 Ves. 307.

Persons dealing with a partnership are not bound by any stipulation as to its dissolution or continuance, unless they have actual notice before making contracts with the firm; St. Louis Electric Lamp Co. v. Marshall, 78 Ga. 168, 1 S. E. 430; Central Nat. Bank v. Frye, 148 Mass. 498, 20 N. E. 325.

The *nature* of the business and the *place* of carrying it on should be very carefully and exactly specified. Courts of equity will grant an injunction when one or more of the partners attempt, against the wishes of one or more of them, to extend such business beyond the provision contained in the articles; Story, Partn. § 193; Abbot v. Johnson, 32 N. H. 9; Livingston v. Lynch, 4 Johns. Ch. (N. Y.) 573.

The *name* of the firm should be expressed. The members of the partnership are required to use the name thus agreed upon, and a departure from it will make them individually liable to third persons or to their partners, in particular cases; Lindl. Partn. *413; 2 Jac. & W. 266; 9 Ad. & E. 314; Story, Partn. §§ 102, 136, 142, 202; Crawford v. Collins, 45 Barb. (N. Y.) 269.

The *management* of the business, or of some particular branch of it, is frequently intrusted by stipulation to one partner, and such partner will be protected in his rights by equity; Story, Partn. §§ 172, 182, 193, 202; and see La. Civ. Code art. 2838; Pothier, *Société*, n. 71; Dig. 14, 1, 1, 13; Pothier, Pand. 14, 1, 4; or it may be to a majority of the partners, and should be where they are numerous. See PARTNERS.

The *manner* of furnishing capital and stock should be provided for. When a partner is required to furnish his proportion of the stock at stated periods, or pay by instalments, he will, where there are no stipulations to the contrary, be considered a debtor to the firm; Story, Partn. § 203; 1 Swanst. 89. As to the fulfillment of some conditions precedent by a partner, such as the payment of so much capital, etc., see Lindl. Partn. *416; 1 Wms. Saund. 320 *a*. Sometimes a provision is inserted that real estate and fixtures belonging to the firm shall be considered, as between the partners, not as partnership but as several property; 1 App. Cas. 181; Rushing v. People, 42 Ark. 390; Stumph v. Bauer, 76 Ind. 157; Clements v. Jessup, 36 N. J. Eq. 569. In cases of bankruptcy, this property will be treated as the separate property of the partners; Collyer, Partn. §§ 905, 909; 5 Ves. 189; 3 Madd. 63.

The *apportionment* of profits and losses should be provided for. The law distributes these equally, in the absence of controlling circumstances, without regard to the capital furnished by each; Story, Partn. 24; 3 Kent 28; Gould v. Gould, 6 Wend. (N. Y.) 263. But see 7 Bligh 432; 5 Wils. & S. 16; 20 Beav. 98; Hyatt v. Robinson, 15 Ohio, 390.

Very frequently the articles provide for the division of profits and determine the proportion in which each partner takes his share. There is nothing to prevent their making any bargain on this subject that they see fit to make; Pars. Partn. § 172.

Periodical accounts of the property of the partnership may be stipulated for. These, when settled, are at least *primâ facie* evidence of the facts they contain; 7 Sim. 239. It is proper to stipulate that an account settled shall be conclusive; Lindl. Partn. *420.

The *expulsion* of a partner for gross misconduct, bankruptcy, or other specified causes may be provided for; and the provision will govern, when the case occurs. See 10 Hare 493; L. R. 9 Ex. 190; Pars. Partn. 169, n; Patterson v. Silliman, 28 Pa. 304.

A *settlement* of the affairs of the partnership should always be provided for. It is generally accomplished in one of the three following ways: *first*, by turning all the assets into cash, and, after paying all the liabilities of the partnership, dividing such money in proportion to the several interests of the parties; or, *second*, by providing that one or more of the partners shall be entitled to purchase the shares of the others at a valuation; 20 Beav. 442; or, *third*, that all the property of the partnership shall be appraised, and that after paying the partnership debts it shall be divided in the proper proportions. The first of these modes is adopted by courts of equity in the absence of express stipulations; Lindl. Partn. 2d Am. ed. (Ewell) *429; Story, Partn. § 207; 8 Sim. 529; but see 6 Madd. 146; 3 Hare 581. Where partnership accounts have been fully settled, an express promise by one to pay the balance due to another is not necessary; Sears v. Starbird, 78 Cal. 225, 20 Pac. 547.

Submission of disputes to arbitration is provided for frequently, but such a clause is nugatory, as no action will lie for a breach; Story, Partn. § 215; and (except in England, under Com. L. Proc. Act, 1854) it is no defence to an action relative to the matter to be referred; Pars. Partn. 170; see Lindl. Partn. 2d Am. ed. (Ewell) *451. Where the settlement of partnership accounts is made by arbitrators without fraud, it will not be disturbed; Abell's Adm'r v. Phillips (Ky.) 13 S. W. 109.

The articles should be executed by the

parties, but need not be under seal. See PARTIES; PARTNERS; PARTNERSHIP.

ARTICLES OF THE PEACE. A complaint made before a court of competent jurisdiction by one who has just cause to fear that an injury to his person or property is about to be committed or caused by the party complained of, alleging the causes of his belief, and asking the protection of the court.

The object of articles is to compel the party complained of to find sureties of the peace. This will be granted when the articles are on oath; 12 Mod. 243; 12 Ad. & E. 599; unless the articles on their face are false; 2 Burr. 806; 3 *id.* 1922; or are offered under suspicious circumstances; 2 Str. 835; 1 W. Bla. 233. Their truth cannot be controverted by affidavit or otherwise; but exception may be taken to their sufficiency, or affidavits for reduction of the amount of bail tendered; 2 Str. 1202; 13 East 171. See GOOD BEHAVIOR; PEACE.

ARTICLES OF SEPARATION. See SEPARATION.

ARTICLES OF WAR. The code of laws established for the government of the army.

The term is used in this sense both in England and the United States. The term also includes the code established for the government of the navy. See R. S. U. S. § 1342, as to the army, and § 1624, as to the navy.

The constitution, art. 1, § 8, provides that Congress shall have power "to make rules for the government and regulation of the land and naval forces."

See MILITARY LAW; MARTIAL LAW; COURTS-MARTIAL; REGULATIONS OF THE ARMY; RANK.

ARTICULI CLERI. These articles (Edw. II.) were an attempt to delimit accurately the spheres of the lay and ecclesiastical jurisdictions, and were the basis of all subsequent legislation upon this subject during the mediæval period. 2 Holdsw. Hist. E. L. 253. See CIRCUMSPECTE AGATIS.

ARTIFICER. One who buys goods in order to reduce them by his own art, or industry, into other forms, and then to sell them. Lansdale v. Brashear, 3 T. B. Mon. (Ky.) 335.

The term applies to those who are actually and personally engaged or employed to do mechanical work or the like, and not to those taking contracts for labor to be done by others; 7 El. & Bl. 135.

ARTIFICIAL. Having its existence in the given manner by virtue of or in consideration only of the law.

Artificial person. A subject of duties and rights which is represented by one or more natural persons (generally, not necessarily, by more than one) but does not coincide with them. It has a continuous legal existence not necessarily depending on any natural life; this legal continuity answers to some real continuity of public functions or of special purpose recognized as having public utility or of some lawful common interest of the natural persons concerned. Pollock, First Book of Jurispr. 112. See CORPORATION.

A body, company, or corporation considered in law as an individual. Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. Ed. 629.

AS (Lat.). A pound.

It was composed of twelve ounces. The parts were reckoned (as may be seen in the law, *Servum de hæredibus*, Inst. lib. xiii. *Pandect*) as follows: *uncia*, 1 ounce; *sextans*, 2 ounces; *triens*, 3 ounces; *quadrans*, 4 ounces; *quincunx*, 5 ounces; *semis*, 6 ounces; *septunx*, 7 ounces; *bes*, 8 ounces; *dodrans*, 9 ounces; *dextans*, 10 ounces; *deunx*, 11 ounces.

The whole of a thing; *solidum quid.*

Thus, *as* signified the whole of an inheritance: so that an heir *ex asse* was an heir of the whole inheritance. An heir *ex triente, ex semisse, ex besse, ex deunce*, was an heir of *one-third, one-half, two-thirds*, or *eleven-twelfths*.

ASCENDANTS. Those from whom a person is descended, or from whom he derives his birth, however remote they may be. See CONSANGUINITY.

Every one has two ascendants at the first degree, his father and mother; four at the second degree, his paternal grandfather and grandmother, and his maternal grandfather and grandmother; eight at the third. Thus, in going up we ascend by various lines, which fork at every generation. By this progress sixteen ascendants are found at the fourth degree; thirty-two, at the fifth, sixty-four, at the sixth; one hundred and twenty-eighth, at the seventh, and so on. By this progressive increase, a person has at the twenty-fifth generation thirty-three million five hundred and fifty-four thousand four hundred and thirty-two ascendants. But, as many of the ascendants of a person have descended from the same ancestor the lines which were forked reunite to the first common ancestor, from whom the other descends; and this multiplication, thus frequently interrupted by the common ancestors, may be reduced to a less number.

ASCERTAIN. To make certain by examination; to find out. The word *ascertained* is held to have two meanings: (1) known; (2) made certain. L. R. 2 P. & D. 365.

ASCRIPTICIUS. One enrolled; foreigners who have been enrolled. Among the Romans, ascripticii were foreigners who had been naturalized, and who had in general the same rights as natives. Nov. 22, c. 17; Cod. 11, 47.

A man bound to the soil but not a slave. 2 Holdsw. Hist. E. L. 217. See ADSCRIPTICII.

ASEXUALIZATION. See VASECTOMY.

ASIDE. On one side; apart. *To set aside.* To annul; to make void. State v. Primm, 61 Mo. 171.

ASPHYXIA. In Medical Jurisprudence. Suspended animation and death produced by non-conversion of the venous blood of the lungs into arterial.

This term applies to the situation of persons who have been asphyxiated by submersion or drowning;

by breathing mephitic gas; by suspension or strangulation. In a legal point of view, it is always proper to ascertain whether the person who has thus been deprived of his senses is the victim of another, whether the injury has been caused by accident, or whether it is the act of the sufferer himself. See 1 Hamilton, Leg. Med. 113, 120; 1 Wh. & St. Med. Jur. 534; DEATH.

ASPORTATION (Lat. *asportatio*). The act of carrying a thing away; the removing a thing from one place to another.

The carrying away of a chattel which one is accused of stealing. See LARCENY.

ASSART, ESSART. A piece of forest land converted into arable land by grubbing up the trees and brushwood. New Dict.

ASSART RENTS. Rents paid to the Crown for assarted lands. New Dict.

ASSASSINATION. Murder committed for hire, without provocation or cause of resentment given to the murderer by the person upon whom the crime is committed. Erskine, Inst. b. 4, t. 4, n. 45.

A murder committed treacherously, with advantage of time, place, or other circumstances.

ASSAULT. An unlawful offer or attempt with force or violence to do a corporeal hurt to another.

Force unlawfully directed or applied to the person of another under such circumstances as to cause a well-founded apprehension of immediate peril. Bish. Cr. Law 548.

Aggravated assault is one committed with the intention of committing some additional crime. *Simple assault* is one committed with no intention to do any other injury.

Assault is generally coupled with battery, and for the excellent practical reason that they generally go together; but the result is rather the initiation or offer to commit the act of which the battery is the consummation. An assault is included in every battery; 1 Hawk. Pl. Cr. c. 62, § 1.

Where a person is only *assaulted*, still the form of the declaration is the same as where there has been a *battery*, "that the defendant assaulted, and beat, bruised, and wounded the plaintiff;" 1 Saund. 6th ed. 14 *a*. The word "ill-treated" is frequently inserted: and if the assaulting and ill-treating are justified in the plea, although the beating, bruising, and wounding are not, yet it is held that the plea amounts to a justification of the battery; 7 Taunt. 689; 1 J. B. Moore 420. So where the plaintiff declared, in trespass, for assaulting him, seizing and laying hold of him, and imprisoning him, and the defendant pleaded a justification under a writ of capias, it was held, that the plea admitted a battery; 3 M. & W. 28. But where in trespass for assaulting the plaintiff, and throwing water upon him, and also wetting and damaging his clothes, the defendant pleaded a justification as to assaulting the plaintiff and wetting and damaging his clothes, it was held, that, though the declaration alleged a battery, yet the matter justified by the plea did not amount to a battery; 8 Ad. & E. 602.

Any act causing a well-founded apprehension of immediate peril from a force already partially or fully put in motion is an assault; 4 C. & P. 349; 9 *id.* 483, 626; Com. v. White, 110 Mass. 407; State v. Davis, 23 N. C. 125, 35 Am. Dec. 735; State v. Crow, 23 N. C. 375; Com. v. Eyre, 1 S. & R. (Pa.) 347; State v. Sims, 3 Strobh. (S. C.) 137; State v. Blackwell, 9 Ala. 79; United States v. Hand, 2 Wash. C. C. 435, Fed. Cas. No. 15,297; unless justifiable. But if justifiable, then it is not necessarily either a battery or an assault. Whether the act, therefore, in any particular case is an assault and battery, or a gentle imposition of hands, or application of force, depends upon the question whether there was justifiable cause. If, therefore, the evidence fails to show the act to have been unjustifiable, or leaves that question in doubt, the criminal act is not proved; Com. v. McKie, 1 Gray (Mass.) 63, 64, 61 Am. Dec. 410. Any threatening gesture, showing in itself, or by words accompanying it, an immediate intention coupled with ability to commit a battery, is an assault; Flournoy v. State, 25 Tex. App. 244, 7 S. W. 865; Lane v. State, 85 Ala. 11, 4 South. 730; 13 C. B. 860; People v. Lilley, 43 Mich. 527, 5 N. W. 982; but an approach with gesticulations and menaces was held not an assault; Berkeley v. Com., 88 Va. 1017, 14 S. E. 916; words are not legal provocation to justify an assault and battery; State v. Workman, 39 S. C. 151, 17 S. E. 694; Willey v. Carpenter, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853. It is an assault where one strikes at another with a stick without hitting him; 1 Hawk. Pl. Cr. 110. Shooting into a crowd is an assault upon each member of the crowd; Scott v. State, 49 Ark. 156, 4 S. W. 750; an officer is guilty of an assault in shooting at a fleeing prisoner, who had been arrested for misdemeanor, whether he intended to hit the prisoner or not; State v. Sigman, 106 N. C. 728, 11 S. E. 520.

Generally speaking "consent to an assault is no justification," and "an injury, even in sport, would be an assault if it went beyond what was admissible in sports of the sort, and was intentional"; McNeil v. Mullin, 70 Kan. 634, 79 Pac. 168, quoting Cooley, Torts 163; Willey v. Carpenter, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853, and note; Poll. Torts 157; Grotton v. Glidden, 84 Me. 589, 24 Atl. 1008, 30 Am. St. Rep. 413. But there are exceptions, as where the essence of the offense is its being against the consent, as in rape (*q. v.*). And consent to vaccination may be implied from conduct so that no assault is committed; O'Brien v. S. S. Co., 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329.

It is not an assault for a beadle to turn out of church a man who is disturbing the service, if without unnecessary violence; [1893] 1 Q. B. 142; or for the master of a house to expel one who comes into his house and disturbs the peace of the family; 3 C. & K. 25.

If a teacher take indecent liberties with a female scholar, without her consent, though she does not resist, it is an assault; 6 Cox, Cr. Cas. 64; 9 C. & P. 722; Ridout v. State,

6 Tex. App. 249. So, if a medical practitioner unnecessarily strips a female patient naked, under the pretence that he cannot otherwise judge of her illness, it is an assault, if he assisted to take off her clothes; 1 Moody 19; 1 Lew. 11. Where a medical man had connection with a girl fourteen years of age, under the pretence that he was thereby treating her professionally, she making no resistance solely from the belief that such was the case, it was held that he was properly convicted of an assault; 1 Den. Cr. Cas. 580; 4 Cox, Cr. Cas. 220; Templ. & M. 218. But an attempt to commit the misdemeanor of having carnal knowledge of a girl between ten and twelve years old, is not an assault, by reason of the consent of the girl; 8 C. & P. 574, 589; 7 Cox, Cr. Cas. 145. And see 1 Den. Cr. Cas. 377; 2 C. & K. 957; 3 Cox, Cr. Cas. 266. But it has been held that one may be convicted of an assault upon the person of a girl under ten years of age with intent to commit a rape, whether she consented or resisted; People v. Gordon, 70 Cal. 467, 11 Pac. 762. One is not guilty of an assault if he takes hold of a woman's hand and puts his arm around her shoulder, unless he does so without her consent or with an intent to injure her; Crawford v. State, 21 Tex. App. 454, 1 S. W. 446. One is guilty of assault and battery who delivers to another a thing to be eaten, knowing that it contains a foreign substance and concealing the fact, if the other, in ignorance, eats it and is injured; Com. v. Stratton, 114 Mass. 303, 19 Am. Rep. 350; but see 2 C. & K. 912; 1 Cox, Cr. Cas. 281; People v. Quin, 50 Barb. (N. Y.) 128. An unlawful imprisonment is also an assault; 1 Hawk. Pl. Cr. c. 62, § 1. A negligent attack may be an assault; Whart. Cr. L. § 603. See Steph. Dig. Cr. L. § 243.

A teacher has a right to punish a pupil for misbehavior; but this punishment must be reasonable and proportioned to the gravity of the pupil's misconduct; and must be inflicted in the honest performance of the teacher's duty, not with the mere intent of gratifying his ill-will or malice. If it is unreasonable and excessive, is inflicted with an improper weapon, or is disproportioned to the offence for which it is inflicted, it is an assault; Vanvactor v. State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645; State v. Stafford, 113 N. C. 635, 18 S. E. 256; Spear v. State (Tex.) 25 S. W. 125. The punishment must be for some specific offence which the pupil has committed, and which he knows he is punished for; State v. Mizner, 50 Ia. 145, 32 Am. Rep. 128. If a person over the age of 21 voluntarily attends school, he thereby waives any privilege which his age confers, and may be punished for misbehavior as any other pupils; State v. Mizner, 45 Ia. 248, 24 Am. Rep. 769. A teacher has no right, however, to punish a child for neglecting or refusing to study certain branches from which the parents of the child have requested that it might be excused, or which they have forbidden it to pursue, if those facts are known to the teacher. The proper remedy in such a case is to exclude the pupil from the school; State v. Mizner, 50 Ia. 145, 32 Am. Rep. 128; Morrow v. Wood, 35 Wis. 59, 17 Am. Rep. 471.

The teacher has in his favor the presumption that he has only done his duty, in addition to the general presumption of innocence; Vanvactor v. State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645; State v. Mizner, 50 Ia. 145, 32 Am. Rep. 128; and in determining the reasonableness of the punishment, the judgment of the teacher as to what was required by the situation should have weight; Vanvactor v. State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645. When a proper instrument has been used, the character of the chastisement, as regards its cruelty or excess, must be determined by considering the nature of the offence for which it was inflicted, the age, physical and mental condition, as well as the personal attributes of the pupil, and the deportment of the teacher; Vanvactor v. State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645; Dowlen v. State, 14 Tex. App. 61; and since the legitimate object of chastisement is to inflict punishment by the pain which it causes, as well as the degradation it implies, it does not follow that chastisement was cruel or excessive because pain was caused or abrasions of the skin resulted from the use of a switch by the teacher; Vanvactor v. State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645.

A teacher will be liable for prosecution, if he inflict such punishment as produces or threatens lasting mischief, or if he inflict punishment, not in the honest performance of duty, but under the pretext of duty to gratify malice; State v. Pendergrass, 19 N. C. 365, 31 Am. Dec. 416; State v. Long, 117 N. C. 791, 23 S. E. 431. But a charge to the jury that "malice means bad temper, high temper, quick temper; and if the injury was inflicted from malice, as above defined, then they should convict the defendant," is erroneous; for malice may exist without temper, and may not exist although the act be done while under the influence of temper, bad, high or quick. General malice, or malice against all mankind, "is wickedness, a disposition to do wrong, a black and diabolical heart, regardless of social duty, and fatally bent on mischief." Particular malice is "ill-will, grudge, a desire to be revenged on a particular person." This distinction should be explained to the jury, and the term "malice" should be accurately defined; State v. Long, 117 N. C. 791, 23 S. E. 431. See BATTERY; MENTAL SUFFERING; CORRECTION; SCHOOL; WHIPPING.

ASSAY. See ANNUAL ASSAY.

ASSAY OFFICE. An establishment, or department, in which the manipulations attending the assay of bullion and coins are conducted.

Assay offices are from time to time established by law at various points throughout the country, usually in connection with the branch mints, though the main assay office is in New York. R. S. § 3553 provides that the business of the assay office at New York shall be in all respects similar to that of the mints, except that bars only, and not coin, shall be manufactured therein; and no metals shall be purchased for minor coinage. All bullion intended by the depositor to be converted into coins of the United States, and silver bullion purchased for coinage, when assayed, parted, and refined, and its net value certified, shall be transferred to the mint at Philadelphia, under such directions as shall be made by the Secretary of the Treasury, at the expense of the contingent fund of the mint, and shall be there coined, and the proceeds returned to the assay office.

Sec. 3558 provides that the business of the mint at Denver, while conducted as an assay office, that of the assay office at Boise City, and that of any other assay offices hereafter established, shall be confined to the receipt of gold and silver bullion, for melting and assaying, to be returned to depositors of the same, in bars, with the weight and fineness stamped thereon.

The assay office is also subject to the laws and regulations applied to the mint; R. S. § 3562.

ASSECURATION. In European Law. Assurance; insurance of a vessel, freight, or cargo. Opposition to the decree of Grenoble. Ferrière.

ASSECURATOR. An insurer.

ASSEMBLY. The meeting of a number of persons in the same place. An assembly of persons would seem to mean three or more. 40 S. J. 481.

Political assemblies are those required by the constitution and laws: for example, the general assembly, which includes the senate and house of representatives. The meeting of the electors of the president and vice-president of the United States may also be called an assembly.

Popular assemblies are those where the people meet to deliberate upon their rights; these are guaranteed by the constitution. U. S. Const. Amend. art. 1.

Unlawful assembly is the meeting of three or more persons to do an unlawful act, although they may not carry their purpose into execution. Cl. Cr. Law. 341.

It differs from a riot or rout, because in each of the latter cases there is some act done besides the simple meeting. See State v. Stalcup, 23 N. C. 30, 35 Am. Dec. 732; 9 C. & P. 91, 431; 1 Bish. Cr. L. § 535; 2 id. § 1256; MEETING.

ASSENT. Approval of something done. An undertaking to do something in compliance with a request.

In strictness, *assent* is to be distinguished from *consent*, which denotes a willingness that something about to be done, be done; *acceptance*, compliance with, or receipt of, something offered; *ratification*, rendering valid something done without authority; and *approval*, an expression of satisfaction with some act done for the benefit of another beside the party approving. But in practice the term is often used in the sense of acceptance and approval. Thus, an offer is said to be assented to, although properly an offer and acceptance complete an agreement. It is apprehended that this confusion has arisen from the fact that a request, assent, and concurrence of the party requesting complete a contract as fully as an offer and acceptance. Thus, it is said there must be a request on one side, and assent on the other, in every contract; 5 Bingh. N. C. 75; and this assent becomes a promise enforceable by the party requesting, when he has done anything to entitle him to the right. Assent thus becomes in reality (so far as it is *assent* merely, and not *acceptance*) an offer made in response to a request. Assent and approval, as applied to acts of parliament and of congress, have become confounded from the fact that the bills of parliament were originally requests from parliament to the king. See 1 Bla. Com. 183.

Express assent is that which is openly declared. *Implied assent* is that which is presumed by law.

Unless express dissent is shown, acceptance of what it is for a person's benefit to take, is presumed, as in the case of a conveyance of land; 3 B. & Ald. 31; Harrison v. Trustees, 12 Mass. 461; Pearse v. Owens, 3 N. C. 234; Treadwell v. Bulkley, 4 Day (Conn.) 395, 4 Am. Dec. 225; Jackson v. Bodle, 20 Johns. (N. Y.) 184; Church v. Gilman, 15 Wend. (N. Y.) 656, 30 Am. Dec. 82; the assent (or acceptance) of the grantee to the delivery of a deed by a person other than the grantor, vests the title in him from the time of the delivery by the grantor to that third person; O'Kelly v. O'Kelly, 8 Metc. (Mass.) 436; Hulick v. Scoril, 4 Gilm. (Ill.) 176; Buffum v. Green, 5 N. H. 71, 20 Am. Dec. 562; Belden v. Carter, 4 Day (Conn.) 66, 4 Am. Dec. 185; Jackson v. Bodle, 20 Johns. (N. Y.) 187; Wesson v. Stephens, 37 N. C. 557; 5 B. & C. 671; a devise which draws after it no charge or risk of loss, is presumed to have been accepted by the devisee; Brown v. Wood, 17 Mass. 73; Hannah v. Swarner, 8 Watts (Pa.) 9, 34 Am. Dec. 442.

Assent must be to the same thing done or offered in the same sense; Matlock v. Thompson, 18 Ala. 605; Keller v. Ybarru, 3 Cal. 147; Eliason v. Henshaw, 4 Wheat. (U. S.) 225, 4 L. Ed. 556; 5 M. & W. 575; it must comprehend the whole of the proposition, must be exactly equal to its extent and provisions, and must not qualify them by any new matter; 5 M. & W. 535; Slaymaker v. Irwin, 4 Whart. (Pa.) 369; Vassar v. Camp, 11 N. Y. 441.

In general, when an assignment is made to one for the benefit of creditors, the assent of the assignee will be presumed; Skipwith's

Ex'r v. Cunningham, 8 Leigh (Va.) 272, 281, 31 Am. Dec. 642. But see Crosby v. Hillyer, 24 Wend. (N. Y.) 280; Welch v. Sackett, 12 Wis. 243. See ACCEPTANCE; ACCORD; AGREEMENT; CONTRACT.

ASSERT. To state as true; declare; maintain. To assert against another has probably a *prima facie* meaning of a contradiction of him, but the context or circumstances may show that it connotes a criminatory charge; 7 L. J. Ex. 268.

ASSERTORY OATH. See OATH.

ASSESS. To rate or fix the proportion which every person has to pay of any particular tax. To tax. To adjust the shares of a contribution by several towards a common beneficial object according to the benefit received. To fix the value of; to fix the amount of.

As used in a covenant to pay rates, etc., "assessed" means "reckoned on the value." 66 L. J. Ch. 353; [1897] 1 Ch. 633.

ASSESSMENT. Determining the value of a person's property or occupation for the purpose of levying a tax.

Determining the share of a tax to be paid by each individual.

Laying a tax.

Adjusting the shares of a contribution by several towards a common beneficial object according to the benefit received.

An assessment is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district. It does not of itself lay the charge upon either person or property, but is a step preliminary thereto, and which is essential to the apportionment; Evansville & I. R. Co. v. Hays, 118 Ind. 214, 20 N. E. 736. As the word is more commonly employed, an assessment consists in the two processes of listing the persons, property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them; City of Chicago v. Fishburn, 189 Ill. 367, 59 N. E. 791; Pomeroy Coal Co. v. Emlen, 44 Kan. 123, 24 Pac. 340; State v. R. Co., 54 S. C. 564, 32 S. E. 691. To assess a tax is to determine what a taxpayer shall contribute to the public; and to levy a tax is to make a record of this determination and to extend the same against his property; Chicago, B. & Q. R. Co. v. Klein, 52 Neb. 258, 71 N. W. 1069.

A local assessment can only be levied upon land. It cannot, as a tax can, be made a personal liability of the taxpayer. A tax is levied over a whole state, or a political subdivision. A local assessment is levied on property situated in a district created for the express purpose of the levy, and possessing no other existence than to be the thing on which the levy is made. A tax is a continuing burden; a local assessment is exceptional both as to time and locality; it is brought into being to accomplish a particular purpose. A tax is levied, collected, and administered by a public agency; a local assessment is made by an authority *ab extra*. Yet it is like a tax in that it is imposed under an authority derived from the legislature. It is like a tax in that it must be levied for a public purpose, and must be apportioned by some reasonable rule. It is unlike a tax in that the proceeds must be expended in an improvement from which a benefit, clearly exceptive and plainly perceived, must enure to the property upon which it is imposed; Town of Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 451 (a leading case).

Though local assessments are laid under the taxing power, and are, in a certain sense, taxes, yet they are a peculiar class of taxes, and not within the meaning of that term as it is usually employed; Mayor, etc., of Birmingham v. Klein, 89 Ala. 461, 7 South. 386, 8 L. R. A. 369; Holley v. County of Orange, 106 Cal. 420, 39 Pac. 790; Nichols v. City of Bridgeport, 23 Conn. 189, 60 Am. Dec. 636; City Council of Augusta v. Murphey, 79 Ga. 101, 3 S. E. 326; Dempster v. Chicago, 175 Ill. 278, 51 N. E. 710; Board of Com'rs of Monroe County v. Harrell, 147 Ind. 500, 46 N. E. 124; Gosnell v. City of Louisville, 104 Ky. 201, 46 S. W. 722; Jones v. City of Boston, 104 Mass. 461; Kansas City v. Bacon, 147 Mo. 259, 48 S. W. 860; Mann v. Jersey City, 24 N. J. L. 662; City of Raleigh v. Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330; Raymond v. City of Cleveland, 42 Ohio St. 522; Beaumont v. Wilkes-Barre City, 142 Pa. 198, 21 Atl. 888; Heller v. City of Milwaukee, 96 Wis. 134, 70 N. W. 1111; as where a mining lease required a lessee to pay taxes, duties and imposts on coal mined, the mining improvements, and the surface and coal land itself, it was held not to require him to pay municipal assessments for paving a street or constructing a sewer; Pettibone v. Smith, 150 Pa. 118, 24 Atl. 693, 17 L. R. A. 423; and a devise requiring the life tenant to pay all necessary taxes on the property was held not to include assessments for sewers and curbing; Chambers v. Chambers, 20 R. I. 370, 39 Atl. 243; Chamberlin v. Gleason, 163 N. Y. 214, 57 N. E. 487. But "taxes" was held to include a sewer assessment in an agreement to convey a good title to land free from all mortgage encumbrances, taxes and mechanic's liens; Williams v. Monk, 179 Mass. 22, 60 N. E. 394.

The power to make special assessments for public improvements is within the taxing power of the state; People v. Mayor, etc., of Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266, note; People v. Pitt, 169 N. Y. 521, 62 N. E. 662, 58 L. R. A. 372. The authority may be exercised directly, or it may be left to local boards or bodies; In re Piper, 32 Cal. 530; Kelly

v. Chadwick, 104 La. 719, 29 South. 295; People v. Buffalo, 147 N. Y. 675, 42 N. E. 344 (where assessors and not common council were authorized to fix the district of assessment for river dredging); but in the latter case the determination will be by a body possessing, for the purpose, legislative power, and whose action must be as conclusive as if taken by the legislature itself; Cooley, Taxation [3d ed.] 1207), where it is said the two methods of apportionment between which a choice is usually made are: 1. An assessment made by assessors or commissioners, appointed for the purpose under legislative authority, who are to view the estates and levy the expense in proportion to the benefits which, in their opinion, the estates respectively will receive from the work proposed. 2. An assessment by some definite standard fixed upon by the legislature itself, which is applied to estates by a measurement of length, quantity, or value.

An assessment will be upheld wherever it is not obvious from the nature and location of the property involved, the district prescribed, the condition and character of the improvement, or the cost and relative value of the property to the assessment, that the method adopted has resulted in imposing a burden in substantial excess of the benefits, or disproportionate, within the district, as between owners; King v. Portland, 184 U. S. 69, 22 Sup. Ct. 290, 46 L. Ed. 431, affirming *id.*, 38 Or. 402, 63 Pac. 2, 55 L. R. A. 812; Weber v. Reinhard, 73 Pa. 373, 13 Am. Rep. 747; Jones v. City of Boston, 104 Mass. 461; Ahern v. Board of Improvement Dist. No. 3, 69 Ark. 68, 61 S. W. 575; Simpson v. Kansas City, 46 Kan. 438, 26 Pac. 721; City of Chicago v. Baer, 41 Ill. 306; State v. Fuller, 34 N. J. L. 227.

A principle of assessment is void if it is not based upon benefits to the property assessed, and the assessment limited to the benefits; Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443; Lee v. Ruggles, 62 Ill. 427; In re Application for Drainage of Lands between Lower Chatham and Little Falls, 35 N. J. L. 497; In re City of New York, 3 Wend. (N. Y.) 452; Gilmore v. Hentig, 33 Kan. 174, 5 Pac. 781; Thomas v. Gain, 35 Mich. 155, 24 Am. Rep. 535; Allegheny City v. R. Co., 138 Pa. 375, 21 Atl. 763; Hutcheson v. Storrie, 92 Tex. 688, 51 S. W. 848, 45 L. R. A. 289, 71 Am. St. Rep. 884; Adams v. City of Shelbyville, 154 Ind. 467, 57 N. E. 114, 49 L. R. A. 797, 77 Am. St. Rep. 484; Cowley v. City of Spokane, 99 Fed. 840. That the cost of a local improvement may be assessed without regard to benefit is held in some jurisdictions; In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; Weeks v. City of Milwaukee, 10 Wis. 242, where the power to impose such burdens is placed upon a constitutional recognition of the power to make assessments as distinguished from taxation. It was held in In re Kingman, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417, that assessments for public improvement need not be in proportion to the benefits. In Iowa all local assessments are based on the simple ground that the object is public, and that the system of taxing abutting lots secures such a just distribution of burdens as to be within the rule requiring uniformity of taxation; Morrison v. Hershire, 32 Ia. 271.

Front Foot Rule. The apportionment of the entire cost of a pavement upon abutting lots according to frontage, without any preliminary hearing as to benefits, may be authorized by the legislature, and this will not constitute a taking without due process of law; French v. Pav. Co., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879. This case and the other cases reported in the same volume all involved the constitutionality of acts creating special taxing districts and providing for assessing the costs of local improvements upon abutting property, in proportion to their frontage. The opinions were delivered in all of them by Mr. Justice Shiras; Harlan, White and McKenna, JJ., dissenting.

In Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616, an assessment of certain real estate in New Orleans for draining swamps was resisted in the state courts, and the case came into the Supreme Court of the United States on the ground that the proceeding deprived the owner of his property without due process of law. The origin and history of this provision of the constitution as found in Magna Carta and in the 5th and the 14th amendments were considered; the cases of Murray v. Imp. Co., 18 How. 272, 15 L. Ed. 372, and McMillen v. Anderson, 95 U. S. 37, 24 L. Ed. 335, were approved; and it was held that "neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the state authorities are controlled by the federal constitution." And to the same effect, French v. Pav. Co., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879, where the question involved was the constitutionality of the apportionment of the cost of a street pavement upon the lots of abutters.

There is a wide difference between a tax or assessment prescribed by a legislative body, and one imposed by a municipal corporation. And the difference is still wider between an act making the assessment, and the action of mere functionaries acting under municipal ordinances; Parsons v. District of Columbia, 170 U. S. 52, 18 Sup. Ct.

521, 42 L. Ed. 943, where the legislation in question was that of Congress, and was considered in the light of the conclusion that the United States possesses complete jurisdiction both of a political and municipal character. There a comprehensive system regulating the supply of water and the erection and maintenance of reservoirs and water mains was established, and of it every property owner of the District of Columbia was presumed to have notice. Accordingly, it was held that, when Congress enacted that thereafter assessments for laying water mains be levied on a front foot basis against all abutting lots, such act must be deemed conclusive alike of the question of the necessity of the work and of its benefits to abutting property, and that a property owner could not be heard to complain that he was not notified of the creation of such a system, or consulted as to the probable cost thereof.

The question of special benefit and the property to which it extends is a question of fact, and when the legislature determines it in a case within its general power, its decision is final; Spencer v. Merchant, 100 N. Y. 585, 3 N. E. 682. The courts cannot review its discretion. Where a tax or assessment is imposed by a direct exercise of the legislative power, calling for no inquiry into the weight of evidence, nor for anything in the nature of judicial examination, no notice to the owner is required; Hagar v. Dist. No. 108, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569. But where an assessment is imposed upon property according to its value to be ascertained by assessors upon evidence, such officers act judicially; Williams v. Weaver, 100 U. S. 547, 25 L. Ed. 708; and notice and opportunity to be heard are necessary; *id.*

Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, was not intended, it is said, to overrule Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270, or Parsons v. District of Columbia, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943, both of these cases being cited in the opinion in the former case, and declared not to be inconsistent with the conclusion there reached. Special facts showing an abuse or disregard of the law, resulting in an actual deprivation of property, may be ground for applying to a court of equity; and this was thought by a majority of the Supreme Court to have been the case in Norwood v. Baker, supra, per Shiras, J., in Wight v. Davidson, 181 U. S. 371, 385, 21 Sup. Ct. 616, 45 L. Ed. 900.

The legislative authority in respect to assessment districts is sometimes exercised by making several districts for a single work, as in case of street improvements, a statute may make each street or part of a street a taxing district; Hilliard v. City of Asheville, 118 N. C. 845, 24 S. E. 738. Where unconnected sections of a street were opened, such sections were held separate streets, and the cost of each chargeable on the property benefited; In re Opening One Hundred and Sixty-Seventh St., 68 Hun 158, 22 N. Y. Supp. 604; Bacon v. City of Savannah, 86 Ga. 301, 12 S. E. 580. Where a street is of different widths, it may be divided into as many sections as there are different widths, and the property on each section be assessed for the cost thereof; Findlay v. Frey, 51 Ohio St. 390, 38 N. E. 114. The improvement of several streets may be treated as one work for the purposes of a special assessment and the whole work apportioned by uniform rule throughout one district; Parker v. Challiss, 9 Kan. 155; Arnold v. Cambridge, 106 Mass. 352; Litchfield v. Vernon, 41 N. Y. 123. The legislature may create a city boundary, or designate any other boundary, for a local taxing district, without reference to existing civil or political districts; and a city, as such a district, may tax property within its limits which it would not be able to tax for municipal purposes only; Henderson Bridge Co. v. City of Henderson, 90 Ky. 498, 14 S. W. 493; or it may create tax districts for road purposes without regard to the boundaries of counties, townships, or municipalities; Board of Com'rs of Monroe County v. Harrell, 147 Ind. 500, 46 N. E. 124; Street Lighting Dist. No. 1 v. Drummond, 63 N. J. L. 493, 43 Atl. 1061; for the construction and maintenance of a bridge across a river, several towns may be created a bridge and highway district; State v. Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465. See Cooley, Taxation (3d ed.) 238. Taxing districts may be as numerous as the purposes for which the taxes are levied; Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 151, 36 S. W. 1041, 34 L. R. A. 725.

Of Damages. Fixing the amount of damages to which the prevailing party in a suit is entitled.

It may be done by the court through its proper officer, the clerk or prothonotary, where the assessment is a mere matter of calculation, but must be by a jury in other cases. See DAMAGES; MEASURE OF DAMAGES.

In Insurance. An apportionment made in general average upon the various articles and interests at risk, according to their value at the time and place of being in safety, for contribution for damages and sacrifices purposely made, and expenses incurred for escape from impending common peril. 2 Phill. Ins. c. xv.

It is also made upon premium notes given by the members of mutual fire insurance companies, constituting their capital, and being a substitute for the investment of the paid up stock of a stock company; the liability to such assessments being regulated by the charter and the by-laws; May, Ins. § 549; Herkimer County Mut. Ins. Co. v. Full-

er, 14 Barb. (N. Y.) 374; New England Mut. Fire Ins. Co. v. Belknap, 9 Cush. (Mass.) 140; Atlantic Mut. Fire Ins. Co. v. Sanders, 36 N. H. 252; Susquehanna Mut. Fire Ins. Co. v. Leavy, 136 Pa. 499, 20 Atl. 502, 505. A member of a mutual insurance company, who has paid something on a premium note, can be assessed for further losses to the face of the note only; Davis v. Parcher & Stewart Co., 82 Wis. 488, 52 N. W. 771. The right to assess is strictly construed, the notes being merely conditional promises to pay; Tesson v. Ins. Co., 40 Mo. 39, 93 Am. Dec. 293; American Ins. Co. v. Schmidt, 19 Ia. 502; Devendorf v. Beardsley, 23 Barb. (N. Y.) 656; May, Ins. § 557. As to assessments on corporate stock, see STOCK.

ASSESSMENT DISTRICTS. See ASSESSMENT.

ASSESSORS. In Civil and Scotch Law. Persons skilled in law, selected to advise the judges of the inferior courts. Bell, Dict.; Dig. 1. 22; Cod. 1. 51.

As to admiralty practice, see NAUTICAL ASSESSORS.

ASSETS. All the stock in trade, cash, and all available property belonging to a merchant or company.

The property in the hands of an heir, executor, administrator, or trustee, which is legally or equitably chargeable with the obligations which such heir, executor, administrator, or other trustee is, as such, required to discharge.

Assets enter mains. Assets in hand. Such property as at once comes to the executor or other trustee, for the purpose of satisfying claims against him as such. *Termes de la Ley.*

Equitable assets. Such as can be reached only by the aid of a court of equity, and which are to be divided, *pari passu*, among all the creditors; 2 Fonblanque 401; Willis, Trust. 118.

Legal assets. Such as constitute the fund for the payment of debts according to their legal priority.

Assets per descent. That portion of the ancestor's estate which descends to the heir, and which is sufficient to charge him, as far as it goes, with the specialty debts of his ancestors; 2 Williams, Ex. (7th Am. ed.) *1553.

Personal assets. Goods and personal chattels to which the executor or administrator is entitled.

Real assets. Such as descend to the heir, as an estate in fee-simple.

In the United States, generally, by statute, all the property of a decedent, real and personal, is liable for his debts, and is to be applied as follows, when no statute prescribes a different order of application, exhausting all the assets of each class before proceeding to the next: *First*, the personal estate not specifically bequeathed; *second*, real estate devised or ordered to be sold for the payment of debts; *third*, real estate descended but not charged with debts; *fourth*, real estate devised, charged generally with the payment of debts; *fifth*, general pecuniary legacies *pro rata*; *sixth*, real estate devised, not charged with debts; 4 Kent 421; 2 Wh. & T. Lead. Cas. 72.

With regard to the distinction between realty and personalty in this respect, growing crops go to the administrator; Penhallow v. Dwight, 7 Mass. 34, 5 Am. Dec. 21; Kain v. Fisher, 6 N. Y. 597; Cheney v. Roodhouse, 135 Ill. 257, 25 N. E. 1019; he is entitled to a crop of cotton, the cultivation of which was practically completed at intestate's death, although it was harvested and sold by the heirs; Marx v. Nelms, 95 Ala. 304, 10 South. 551. See Wright v. Watson, 96 Ala. 536, 11 South. 634; so do nurseries, though not trees in general; Chapman v. City of Lowell, 4 Cush. (Mass.) 380; as do bricks in a kiln; Taunton Copper Co. v. Ins. Co., 22 Pick. (Mass.) 110; so do chattels real, as interests for years and mortgages; and hence the administrator must bring the action if the mortgagor die before foreclosing; Lewis' Heirs v. Ringo, 3 A. K. Marsh. (Ky.) 249; so does rent, provided the intestate dies before it is due; oil produced after testator's death and accruing as royalty, being the consideration for the lease, is not of the corpus but a part of the income of the estate; In re Woodburn's Estate, 138 Pa. 606, 21 Atl. 16, 21 Am. St. Rep. 932. Fixtures go to the heir; 2 Smith, Lead. Cas. 99; Jackson v. Twentyman, 2 Pet. (U. S.) 137, 7 L. Ed. 374; Swift v. Thompson, 9 Conn. 67, 21 Am. Dec. 718. In copyrights and patents the administrator has right enough to get them extended and beyond the customary time; Wilson v. Rousseau, 4 How. (U. S.) 646, 11 L. Ed. 1141. Where land is sold in partition, and one dies before the proceeds are distributed, his share passes as personalty to his administrator; State v. Harper, 54 Mo. App. 286. Land which an executor is directed to sell is personalty; 6 Ves. 520; 8 Ves. 547; Thomman's Estate, 161 Pa. 444, 29 Atl. 84; but a naked discretionary power of sale will not work a conversion until it is exercised; Sheridan v. Sheridan, 136 Pa. 14, 19 Atl. 1068; Darlington v. Darlington, 160 Pa. 65, 28 Atl. 503; In re Pyott's Estate, 160 Pa. 441, 28 Atl. 915, 921. Where the right of eminent domain has been exercised it converts the land into personalty in Pennsylvania; Hough's Estate, 3 D. R. Pa. 187; but not in New Jersey; Wetherill v. Hough, 52 N. J. Eq. 683, 29 Atl. 592. The wife's paraphernalia cannot be taken from her, in England, for the benefit of the children and heirs, but may be for creditors. In the United States, generally, the wearing apparel of widows and minors is retained by them, and

is not assets. So among things reserved is the widow's quarantine, *i. e.* forty days of food and clothing; Griswold v. Chandler, 5 N. H. 495; Washburn v. Hale, 10 Pick. (Mass.) 430.

A claim against the United States is not a local asset in the District of Columbia; King v. U. S., 27 Ct. Cl. 529. See Woerner, Am. L. of Admn.

See MARSHALLING OF ASSETS.

ASSEVERATION. The proof which a man gives of the truth of what he says, by appealing to his conscience as a witness.

It differs from an oath in this, that by the latter he appeals to God as a witness of the truth of what he says, and invokes him, as the avenger of falsehood and perfidy, to punish him if he speak not the truth. See AFFIRMATION; OATH.

ASSIGN. To make or set over to another. 2 Bla. Com. 326; Watkinson v. Inglesby, 5 Johns. (N. Y.) 391.

To appoint; to select; to allot. 3 Bla. Com. 58.

To set forth; to point out; as, to assign errors. Fitzherbert, Nat. Brev. 19.

ASSIGNATION. In French Law, a writ of summons.

ASSIGNEE. One to whom an assignment has been made.

Assignee in fact is one to whom an assignment has been made in fact by the party having the right.

Assignee in law is one in whom the law vests the right: as, an executor or administrator. See ASSIGNMENT.

ASSIGNMENT (Law Lat. *assignatio*, from *assigno*,—*ad* and *signum*,—to mark for; to appoint to one; to appropriate to).

A transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein.

A transfer by writing, as distinguished from one by delivery.

The transfer of the interest one has in *lands* and *tenements*, and more particularly applied to the unexpired residue of a term or estate for life or years; Cruise, Dig. tit. xxxii. (Deed) c. vii, § 15; 1 Steph. Com. 507. The deed by which the transfer is made is also called an assignment; Comyns, Dig.; Bacon, Abr.; La. Civ. Code, art. 2612; Angell, Assign.; 1 Am. Lead. Cas. 78, 85; 4 Cruise, Dig. 160.

What may be assigned. Every demand connected with a right of property, real or personal, is assignable. Every estate and interest in lands and tenements may be assigned, as also every present and certain estate or interest in incorporeal hereditaments, even though the interest be future, including *a term of years* to commence at a subsequent period; for the interest is vested *in præsenti*, though only to take effect *in futuro*; Co. Litt. 46 *b*; *rent* to grow due (but not that in arrear, Demarest v. Willard, 8 Cow. [N. Y.] 206); *a right of entry* where the breach of the condition *ipso facto* terminates the estate; Gwynn v. Jones' Lessee, 2 G. & J. (Md.) 173; Ensign v. Kellogg, 4 Pick. (Mass.) 1; *a right to betterments;* Lombard v. Ruggles, 9 Greenl. (Me.) 62; the *right to cut trees*, which have been sold on the grantor's land; Olmstead v. Niles, 7 N. H. 522; Pease v. Gibson, 6 Greenl. (Me.) 81; Emerson v. Fisk, 6 Greenl. (Me.) 200, 19 Am. Dec. 206; Kent v. Kent, 18 Pick. (Mass.) 569; McCoy v. Herbert, 9 Leigh (Va.) 548, 33 Am. Dec. 256; 11 Ad. & E. 34; a cause of action for cutting timber on another's land; Webber v. Quaw, 46 Wis. 118, 49 N. W. 830; *a right in lands* which may be perfected by *occupation;* Smith v. Rankin, 4 Yerg. (Tenn.) 1, 26 Am. Dec. 213; Cook v. Shute, Cooke (Tenn.) 67. But no right of entry or re-entry can be assigned; Eskridge v. McClure, 2 Yerg. (Tenn.) 84; Littleton § 347; Greenby v. Wilcocks, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379; Gwyn v. Wellborn, 18 N. C. 319; nor *a naked power;* though it is otherwise where it is coupled with an interest; 2 Mod. 317.

To make an assignment valid at law, the subject of it must have an existence, actual or potential, at the time of the assignment; Needles v. Needles, 7 Ohio St. 432, 70 Am. Dec. 85; 15 Mees. & W. 110; Moody v. Wright, 13 Metc. (Mass.) 17, 46 Am. Dec. 706; Skipper v. Stokes, 42 Ala. 255, 94 Am. Dec. 646. But courts of equity will support an assignment not only of interests in action and contingency, but of things which have no present, actual, or potential existence, but rest in mere possibility only; 2 Story, Eq. Jur. (13th ed.) §§ 1040 *b*, 1055; Fearne, Cont. Rem. 527; Smedes v. Bank, 20 Johns. (N. Y.) 380; as an heir's possibility of inheritance; Fitzgerald v. Vestal, 4 Sneed (Tenn.) 258; see 1 Ch. Rep. 29; Bacon v. Bonham, 33 N. J. Eq. 614; East Lewisburg Lumber & Mfg. Co. v. Marsh, 91 Pa. 96; Mandeville v. Welch, 5 Wheat. 283, 5 L. Ed. 87. "An assignment cannot at law pass future property, but it may be made effectual against future property on the ground that a court of equity will in a suitable case enforce it as a contract." 36 Ch. D. 348, 351. "It has long been settled that future property, possibilities and expectancies are assignable in equity for value. The mode * * * is absolutely immaterial provided the intention of the parties is clear;" 13 A. C. 523.

The assignment of personal property is chiefly interesting in regard to choses in action and as to its effect in cases of insolvency and bankruptcy.

A chose in action cannot be transferred at common law; 10 Co. 48; Litt. 266 *a*; Thallhimer v. Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; Greenby v. Wilcocks, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379; 1 Cra. (U. S.) 367; Pillsbury v. Mitchell, 5 Wis. 17; Chapman v. Holmes' Ex'rs, 10 N. J. L.

20. But the assignee may sue in the assignor's name, and the assignment will be considered valid in equity. See *infra.*

In equity, as well as at law, some choses in action are not assignable on the ground that they are against public policy, as *an officer's pay,* or commission; 2 Anstr. 533; 1 Ball & B. Ch. 387; 1 Swanst. 74; Schwenk v. Wyckoff, 46 N. J. Eq. 560, 20 Atl. 259, 9 L. R. A. 221, 19 Am. St. Rep. 438; or *the salary of a judge;* Morrison v. Deaderick, 10 Humphr. (Tenn.) 342; 5 Moore, P. C. C. 219; *contra,* State v. Hastings, 15 Wis. 78; or of unearned pay of public officers generally; Bliss v. Lawrence, 58 N. Y. 442, 17 Am. Rep. 273; Bowery Nat. Bank of New York v. Wilson, 122 N. Y. 478, 25 N. E. 855, 9 L. R. A. 706, 19 Am. St. Rep. 507; Inhabitants of Wayne Township v. Cahill, 49 N. J. L. 144, 6 Atl. 621; Schloss v. Hewlett, 81 Ala. 266, 1 South. 263 (but see *contra,* Johnson v. Pace, 78 Ill. 143; Manly v. Bitzer, 91 Ky. 596, 16 S. W. 464, 34 Am. St. Rep. 242; Brackett v. Blake, 7 Metc. [Mass.] 335, 41 Am. Dec. 442; and also August v. Crane, 28 Misc. Rep. 549, 59 N. Y. Supp. 583; and Ciples v. Blair, Rice Eq. [S. C.] 60, where costs and fees were distinguished from salary and held assignable); or *claims for fishing* or other bounties from the government; or *rights of action for fraud* or tort as a right of action for *assault;* or in *trover;* Gardner v. Adams, 12 Wend. (N. Y.) 297 (*aliter* of a right of action in *replevin;* Foy v. R. Co., 24 Barb. [N. Y.] 382); or *of the sale of fish not yet caught;* Low v. Pew, 108 Mass. 350, 11 Am. Rep. 357; *assignment by a prosecuting attorney;* Holt v. Thurman, 111 Ky. 84, 63 S. W. 280, 98 Am. St. Rep. 399; or *by a sheriff to secure a promissory note;* Bowery Nat. Bank v. Wilson, 122 N. Y. 478, 25 N. E. 855, 9 L. R. A. 706, 19 Am. St. Rep. 507; *a cause of action for deceit is assignable;* Dean v. Chandler, 44 Mo. App. 338; and it seems that all rights of action which *would survive* to the personal representatives, may be assigned; Butler v. R. Co., 22 Barb. (N. Y.) 110; Patten v. Wilson, 34 Pa. 299; Jordan v. Gillen, 44 N. H. 424; Walton v. Rafel, 7 Misc. 663, 28 N. Y. Supp. 10; so of a right of action against a common carrier for not delivering goods; Jordan v. Gillen, 44 N. H. 424; or for injury to goods; Norfolk & W. R. Co. v. Read, 87 Va. 185, 12 S. E. 395. It is well settled that a mere expectancy or possibility is not assignable at law, consequently wages to be earned in the future, not under an existing engagement, but under engagements subsequently to be made, are not assignable; Herbert v. Bronson, 125 Mass. 475; Bell v. Mulholland, 90 Mo. App. 612; Lehigh Valley R. Co. v. Woodring, 116 Pa. 513, 9 Atl. 58. If there is an existing employment under which it may reasonably be expected that the wages will be earned, then the possibility is coupled with an interest and the wages may be assigned; Rodijkeit v. Andrews, 74 Ohio St. 104, 77 N. E. 747, 5 L. R. A. (N. S.) 564, 6 Ann. Cas. 761; Mallin v. Wenham, 209 Ill. 252, 70 N. E. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233; Edwards v. Peterson, 80 Me. 367, 14 Atl. 936, 6 Am. St. Rep. 207; Metcalf v. Kincaid, 87 Ia. 443, 54 N. W. 867, 43 Am. St. Rep. 391; Peterson v. Ball, 121 Ia. 544, 97 N. W. 79; Bell v. Mulholland, 90 Mo. App. 612; Kane v. Clough, 36 Mich. 436, 24 Am. Rep. 599; Manly v. Bitzer, 91 Ky. 596, 16 S. W. 464, 34 Am. St. Rep. 242; Schilling v. Mullen, 55 Minn. 122, 56 N. W. 586, 43 Am. St. Rep. 475; Augur v. Packing Co., 39 Conn. 536; Garland v. Harrington, 51 N. H. 409; Mulhall v. Quinn, 1 Gray (Mass.) 105, 61 Am. Dec. 414; and this is true though the employment is for no definite period and may be terminated at any time by either party; Thayer v. Kelley, 28 Vt. 19, 65 Am. Dec. 220. The distinction between the two classes of cases is well illustrated where a workman assigned all the wages he would earn in a year from his then employer, and having left that employment for two months and afterwards returned to it, the wages of the second employment did not pass, being considered as a mere possibility; O'Keefe v. Allen, 20 R. I. 414, 39 Atl. 752, 78 Am. St. Rep. 884. It has been suggested that to prevent the assignment of future earnings is in accordance with public policy; Woodring v. R. Co., 2 Pa. Co. Ct. 465; but while that is approved, it is suggested that such a policy must be a matter of legislative intervention; 14 Harv. L. Rev. 379. The assignment by a master in chancery of his unearned fees is void; Shannon v. Bruner, 36 Fed. 147; as is the assignment by an executor of his fees before they are ascertained and fixed; In re Worthington, 141 N. Y. 9, 35 N. E. 929, 23 L. R. A. 97. A cause of action for *malicious prosecution* is not assignable even after verdict; Lawrence v. Martin, 22 Cal. 174; Butler v. R. Co., 22 Barb. (N. Y.) 110; North v. Turner, 9 S. & R. (Pa.) 244; 6 Madd. 59; 2 M. & K. 592; nor is a right to recover damages for false imprisonment; Hunt v. Conrad, 47 Minn. 557, 50 N. W. 614, 14 L. R. A. 512; nor any *rights pendente lite.* Nor can *personal trusts* be assigned; Arkansas Valley Smelting Co. v. Min. Co., 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246; as the *right of a master* in his apprentice; Graham v. Kinder, 11 B. Monr. (Ky.) 60; Davis v. Coburn, 8 Mass. 299; or *the duties of a testamentary guardian;* Balch v. Smith, 12 N. H. 437; nor a *contract* for the performance of *personal services;* Halbert v. Deering, 4 Litt. (Ky.) 9; or one involving a relation of personal confidence; Burck v. Taylor, 152 U. S. 634, 14 Sup. Ct. 696, 38 L. Ed. 578; or one which couples the delegation of a duty with the transfer of a right. This was substantially the ground of the case of Boston

Ice Co. v. Potter, in 123 Mass. 28, 25 Am. Rep. 9, where a contract to supply merchandize was held not assignable since "a man has the right to determine with whom he shall contract," which case has been much discussed, and its name coupled with the doctrine declared by it; see 7 Columbia L. Rev. 32; 20 Harv. L. Rev. 424. In England courts have gone farther, holding that a contract was not assignable when the result would be to impose on one party a greater liability than he intended to assume; [1901] 2 K. B. 811, where a contract to supply a small company was held not assignable to a powerful company with larger capital which would require much larger supplies, the court expressly declining to "accept the contention that only those contracts in which personal confidence or ability is involved cannot be assigned." An invention may be transferred by parol; Jones v. Reynolds, 120 N. Y. 213, 24 N. E. 279; every patent or interest therein is assignable; R. S. U. S. § 4898; an assignment of a contingent remainder for a valuable consideration, while void in law, is enforceable in equity; Watson v. Smith, 110 N. C. 6, 14 S. E. 640, 28 Am. St. Rep. 665. An assignment of the proceeds of sale of merchandize to be delivered in the future, where no contract exists requiring such delivery by the assignor, is not valid, even though notice of it was accepted by the assignee, and the amount actually due was not secured from garnishment by a creditor of the assignor; O'Niel v. Kerr Co., 124 Wis. 234, 102 N. W. 573, 70 L. R. A. 338. But a valid assignment may be made of a portion of the contract price of a building contracted to be erected by the assignor, but not yet erected, and such assignment need not be in writing nor accompanied by any transfer of the contract itself; Lanigan's Adm'r v. Currier Co., 50 N. J. Eq. 201, 24 Atl. 505.

In the assignment of a chose in action it is essential that it be delivered; Lewis v. Mason's Adm'r, 84 Va. 731, 10 S. E. 529; Hodenpuhl v. Hines, 160 Pa. 466, 28 Atl. 825; a partial assignment of choses in action is good in equity, although the legal title remains in the assignor; Texas Western Ry. Co. v. Gentry, 69 Tex. 625, 8 S. W. 98; the assignment of a fractional part of a claim is good, where the party who is to pay does not object; Kingsbury v. Burrill, 151 Mass. 199, 24 N. E. 36.

It is "a rule of general jurisprudence that if a person enters into a contract, and, without notice of any assignment, fulfills it to the person with whom he made the contract, he is discharged from his obligation;" L. R. 5 C. P. 594, per Willes, J.

Whether a prior assignment of a chose in action will be protected when no notice of it is given to the subsequent assignee or to the trustee or debtor, is a question somewhat complicated by the adherence of the English courts to a doctrine known as the rule of Dearle v. Hall, 3 Russ. 1, adopted also in Loveridge v. Cooper, *id.* 30. This rule is that an assignment of an equitable interest, or of a chose in action, without notice to the person having legal dominion of the subject matter, will be postponed to one made subsequently, of which notice is given. In applying this rule the English courts have held that inquiry by the later assignee is immaterial; 3 Cl. & Fin. 456; and that it is also immaterial that there was no trustee or person having dominion of the fund to whom the first assignee could give notice; [1904] 2 Ch. 385 (where it was said that "Dearle v. Hall is indisputable law, although many judges have said that they will not extend it"); that knowledge of the first assignment accidentally acquired by the trustee would protect it where there had been no formal notice; L. R. 3 Ch. App. 488; and that, in case of inquiry by the subsequent assignee, the trustee is not bound to answer; [1891] 3 Ch. 82; that notice to one of several trustees was sufficient, he not being the assignor; 4 De G., F. & J. 147; but knowledge of the assignor, being one of the trustees, did not avail in default of notice to the other two; 4 Drew. 635; [1901] 1 Ch. 365, where Cozens-Hardy, J., said: "I do not profess to be able to discover any definite principle upon which the rule in Dearle v. Hall is founded. Nevertheless it must now be recognized as a positive rule, though it is not one to be extended." This rule was recognized as law in [1893] A. C. 369, but it was critically examined and discussed by both L. Ch. Herschell and Lord Macnaghten and it is manifest that nothing short of the rigor of the English observance of the doctrine of *stare decisis* has maintained its authority.

The rule of the English courts was applied to an assignment of an interest in an English trust, made by one domiciled in New York; [1905] 2 Ch. 117, where the court admitted the validity of the assignment under the *lex loci contractus*, but considered that the law of the court administering a trust fund should settle the order of payment as between claimants.

The English rule requiring notice to the holder of the legal title or trustee of an assignment of the equitable interest or chose in action, has been followed in Judson v. Corcoran, 17 How. (U. S.) 614, 15 L. Ed. 231; Methven v. Power Co., 66 Fed. 113, 13 C. C. A. 362; Spain v. Hamilton's Adm'r, 1 Wall. (U. S.) 604, 17 L. Ed. 619; Burck v. Taylor, 152 U. S. 634, 14 Sup. Ct. 696, 38 L. Ed. 578; Vanbuskirk v. Ins. Co., 14 Conn. 141, 36 Am. Dec. 473; Phillips' Estate, 205 Pa. 515, 55 Atl. 213, 66 L. R. A. 760, 97 Am. St. Rep. 746; Murdoch v. Finney, 21 Mo. 138 (and see Thomas v. Liebke, 13 Mo. App. 389); Merchants' and Mechanics' Bank of Chicago v. Hewitt, 3 Ia. 93, 66 Am. Dec. 49; Graham Paper Co. v. Pembroke, 124 Cal. 120,

56 Pac 627, 44 L. R. A. 634, 71 Am. St. Rep. 26; Meier v. Hess, 23 Or. 602, 32 Pac. 755. In other cases the assignment is held to be effectual without notice even against a subsequent assignment of which notice was given; Putnam v. Story, 132 Mass. 205; Gooding v. Riley, 50 N. H. 408; Garland v. Harrington, 51 N. H. 409; Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572; Central Trust Co. of New York v. Imp. Co., 169 N. Y. 314, 62 N. E. 387. The cases are collected in 1 Perry Trusts, § 438, note. In Clodfelter v. Cox, 1 Sneed (Tenn.) 339, 60 Am. Dec. 157, it is said that there is an irreconcilable conflict in the American cases, and though the weight of authority seems to be against the English rule, the latter is considered more reasonable and safe and therefore followed. In a note to 14 Conn. 141, the view of the Tennessee court in that case as to the weight of authority is questioned and it is suggested as more correct to say that "by the preponderance of authority," an assignee of a chose in action without notice is protected against creditors of the assignor but not as against a subsequent assignee for value and in good faith, and this is said to be the English rule properly stated; 36 Am. Dec. 476 note.

The assignment of bills of exchange and promissory notes by general or special endorsement constitutes an exception to the law of transfer of choses in action. When negotiable (*i. e.*, made payable to order), they are transferable by the statute of 3 & 4 Anne; they may then be transferred by endorsement; the holder can sue in his own name, and the equitable defences which might have existed between the promisor and the original promisee are cut out; Bump v. Van Orsdale, 11 Barb. (N. Y.) 637, 639; Andrews v. Carr, 26 Miss. 577; Neyfong v. Wells, Hard. (Ky.) 502; where a payee endorses a note to third party adding a guaranty of payment, the contract and guaranty are assignable; Harbord v. Cooper, 43 Minn. 466, 45 N. W. 860. The assignee of a bill of lading has only such rights as the consignee would have had; Haas v. R. Co., 81 Ga. 792, 7 S. E. 629.

An assignee stands in the place of his assignor and takes simply his assignor's rights; Taliaferro v. Bank, 71 Md. 200, 17 Atl. 1036.

The most extensive class of assignments are the general assignments in trust made by insolvent and other debtors for the payment of their debts. These are usually regulated by state statutes.

The right of an insolvent debtor to make an assignment for the benefit of his creditors exists at common law, and when good in the state where executed is good in every state; Welder v. Maddox, 66 Tex. 372, 1 S. W. 168, 59 Am. Rep. 617. Where the assignment is valid under the laws of one state it will pass a debt to the assignor due under contract made there with a citizen of another state, though the assignment is void in such other state; O'Neill v. Nagle, 19 Abb. N. C. (N. Y.) 399.

Voluntary or common law assignments of property in other states will be respected except so far as they come into conflict with the rights of local creditors or with the laws or public policy of the state in which the assignment is sought to be enforced; Barnett v. Kinney, 147 U. S. 476, 13 Sup. Ct. 403, 37 L. Ed. 247. With respect to statutory assignments, the prevailing doctrine is that a conveyance under a state insolvent law operates only upon property within that state and that with respect to property in other states it is given only such effect as the law of such other state would permit; and that in general it must give way to the claims of creditors pursuing their remedies there. It passes no title to real estate in another state. Nor as to personal property will the title acquired by it prevail against the garnishment of a debt due by the resident of another state or the seizure of tangible property therein under the laws of the state where the property is; Barth v. Backus, 140 N. Y. 240, 35 N. E. 425, 23 L. R. A. 47, 37 Am. St. Rep. 545; Rhawn v. Pearce, 110 Ill. 350, 51 Am. Rep. 691; Catlin v. Silver-Plate Co., 123 Ind. 477, 24 N. E. 250, 8 L. R. A. 62, 18 Am. St. Rep. 338; Security Trust Co. v. Dodd, 173 U. S. 624, 19 Sup. Ct. 545, 43 L. Ed. 845; King v. Cross, 175 U. S. 396, 20 Sup. Ct. 131, 44 L. Ed. 211.

A debtor making an assignment for creditors may legally choose his own trustee, and the title passes out of him to them; Nichols v. McEwen, 21 Barb. (N. Y.) 65; Wilt v. Franklin, 1 Binn. (Pa.) 514, 2 Am. Dec. 474; Hannah v. Carrington, 18 Ark. 85; Hempstead v. Johnston, 18 Ark. 123, 65 Am. Dec. 458; Vansands v. Miller, 24 Conn. 180. The assent of creditors will ordinarily be presumed; Ashley's Adm'r v. Robinson, 29 Ala. 112, 65 Am. Dec. 387; Eager v. Com., 4 Mass. 183; Sebor v. Armstrong, 4 Mass. 206; De Forest v. Bacon, 2 Conn. 633; North v. Turner, 9 S. & R. (Pa.) 244; Copeland v. Wild, 8 Greenl. (Me.) 411.

In some states the statutes provide that the assignment shall be for the benefit of all creditors equally, in others preferences are legal. Independently of bankrupt and insolvent laws, or laws forbidding preferences, priorities and preferences in favor of particular creditors are allowed. Such preference is not considered inequitable, nor is a stipulation that the creditors taking under it shall release the debtor from all further claims; Sebor v. Armstrong, 4 Mass. 206; Doe v. Scribner, 41 Me. 277; Nutter v. Harris, 9 Ind. 88; Pearpoint v. Graham, 4 Wash. C. C. 232, Fed. Cas. No. 10,877; Cameron v. Montgomery, 13 S. & R. (Pa.) 132; Frazier v. Fredericks, 24 N. J. L. 162; Billings v. Billings, 2 Cal. 107, 56 Am. Dec. 319; Cooper v. McClun, 16 Ill. 435; Miller v. Conklin, 17 Ga.

430, 63 Am. Dec. 248; U. S. v. Lenox, 2 Paine, 180, Fed. Cas. No. 15,592; Murray v. Riggs, 15 Johns. (N. Y.) 571; Union Bank of Maryland v. Kerr, 7 Md. 88; American Exchange Bank v. Inloes, *id.* 381; Hatton's Adm'rs v. Jordan, 29 Ala. 266; Haven v. Richardson, 5 N. H. 113; Brooks v. Marbury, 11 Wheat. (U. S.) 78, 6 L. Ed. 423; Savings Bank of New Haven v. Bates, 8 Conn. 505; Hicks v. Harris, 26 Miss. 423; Bellamy v. Sheriff, 6 Fla. 62; Nightingale v. Harris, 6 R. I. 328; Lake Shore Banking Co. v. Fuller, 110 Pa. 156, 1 Atl. 731; Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696; Nordlinger v. Anderson, 123 N. Y. 544, 25 N. E. 992; Van Wyck v. Read, 43 Fed. 716. See PREFERENCES.

How made. It used to be held that the instrument of assignment must be of as high a character and nature as the instrument transferred; but now a parol (usually written) assignment may transfer a deed, if the deed be at the same time delivered; Cannaday v. Shepard, 55 N. C. 224; Jones v. Witter, 13 Mass. 304; Porter v. Bullard, 26 Me. 448; Jackson v. Housel, 17 Johns. (N. Y.) 284; Prescott v. Hull, *id.* 292; Morange v. Edwards, 1 E. D. Smith (N. Y.) 414; Onion v. Paul, 1 Harr. & J. (Md.) 114; Lessee of Bentley's Heirs v. Deforest, 2 Ohio 221; Durst v. Swift, 11 Tex. 273; 5 Ad. & E. 107; 1 Madd. Ch. 53. When the transfer of personal chattels is made by an instrument as formal as that required in the assignment of an interest in lands, it is commonly called a *bill of sale* (which see). See as to the distinction, Blank v. German, 5 W. & S. (Pa.) 36. In most cases, however, personal chattels are transferred by mere note or memorandum, or, as in the case of negotiable paper, by mere endorsement; Ball v. Larkin, 3 E. D. Smith (N. Y.) 555; Ryan v. Maddux, 6 Cal. 247; Field v. Weir, 28 Miss. 56; Worthington v. Curd, 15 Ark. 491. "To constitute an assignment of a chose in action, in equity, no particular form is necessary;" Spain v. Hamilton's Adm'r, 1 Wall. (U. S.) 604, 624, 17 L. Ed. 619. Any binding appropriation of money or property to a particular use is a transfer of ownership; Watson v. Bagaley, 12 Pa. 167, 51 Am. Dec. 595; Fourth Street Nat. Bank v. Yardley, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855; Clark v. Iron Co., 81 Fed. 310, 26 C. C. A. 423. An assignment of a chose in action by parol as security is valid; Union Trust Co. v. Bulkeley, 150 Fed. 510, 80 C. C. A. 328, and so of book accounts to be thereafter earned by the assignor; L. R. 13 App. Cas. 523.

In France an assignment of a debt must be in writing; the registration duty must be paid thereon and formal notice in writing must be served after registration by an officer of the court, called a *"huissier."* Notice can be replaced by the debtor's formal acknowledgment in a notarial French deed. This passes a legal title to the debt; [1900] 1 Ch. 602.

The *proper technical* and *operative* words in assignment are "assign, transfer, and set over;" but "give, grant, bargain, and sell," or any other words which show the intent of the parties to make a complete transfer, will work an assignment; 13 Sim. 469; 31 Beav. 351; Kimball v. Donald, 20 Mo. 577, 64 Am. Dec. 209.

No consideration is necessary to support the assignment of a term; 1 Mod. 263; McClenahan v. Gwynn, 3 Munf. (Va.) 556. Now, by the statute of frauds, all assignments of chattels *real* must be made by deed or note in writing, signed by the assigning party or his agent thereunto lawfully authorized by writing; 1 B. & P. 270. If a tenant assigns the whole or a part of an estate for a part of the term, it is a sub-lease, and not an assignment; Patten v. Deshon, 1 Gray (Mass.) 325; Astor v. Miller, 2 Paige, Ch. (N. Y.) 68; Buckingham v. Granville Alexandria Soc., 2 Ohio 369; 1 Washb. R. P. *327.

Effect of. During the continuance of the assignment, the assignee is liable on all covenants running with the land, but may rid himself of such continuing liability by transfer to a mere beggar; 5 Coke 16; Ans. Contr. 232; 1 B. & P. 21; 1 Sch. & L. 310; 1 Ball & B. 238; Dougl. 56, 183; (but a conveyance to an irresponsible person to avoid paying a ground-rent accruing on the land conveyed was held not to release the original covenantor; American Academy of Music v. Smith, 54 Pa. 130). By the assignment of a right, all its accessories pass with it: for example, the collateral security, or a lien on property, which the assignor of a bond had, will pass with it when assigned; Potts v. Water Power Co., 9 N. J. Eq. 592; Waller v. Tate, 4 B. Monr. (Ky.) 529; Pattison v. Hull, 9 Cow. (N. Y.) 747; Eskridge v. McClure, 2 Yerg. (Tenn.) 84; Boardman v. Hayne, 29 Ia. 339; Willis v. Twambly, 13 Mass. 204; Craig v. Parkis, 40 N. Y. 181, 100 Am. Dec. 469; Coffing v. Taylor, 16 Ill. 457. So, also, what belongs to the thing by the right of accession is assigned with it; Hodges v. Harris, 6 Pick. (Mass.) 360; Horn v. Thompson, 31 N. H. 562.

An assignee for the benefit of creditors takes the property assigned subject to all existing valid liens and equities against the assignor; Helm v. Gilroy, 20 Or. 517, 26 Pac. 851.

The assignee of a chose in action in a court of law must bring the action in the name of the assignor; and everything which might have been shown in defence against the assignor may be used against the assignee; 18 Eng. L. & Eq. 82; Pollard v. Ins. Co., 42 Me. 221; Guerry v. Perryman, 6 Ga. 119; Commercial Bank of Rochester v. Colt, 15 Barb. (N. Y.) 506; Sanborn v. Little, 3 N.

H. 539; Norton v. Rose, 2 Wash. (Va.) 233; Pitts v. Holmes, 10 Cush. (Mass.) 92; McJilton v. Love, 13 Ill. 486, 54 Am. Dec. 449; Lyon v. Summers, 7 Conn. 399; Welch v. Mandeville, 1 Wheat. (U. S.) 236, 4 L. Ed. 79; In re Brown's Estate, 2 Pa. 463; Hamilton v. Greenwood, 1 Bay (S. C.) 173, 1 Am. Dec. 607; Matheson v. Crain, 1 McCord (S. C.) 219; U. S. v. Sturges, 1 Paine, 525, Fed. Cas. No. 16,414; Patterson v. Atherton, 3 McLean, 147, Fed. Cas. No. 10,822; Robinson v. Marshall, 11 Md. 251; 1 Bisph. Eq. 226; but in many states the assignee of a chose in action may sue in his own name; Smith v. Ry. Co., 23 Wis. 267; Hooker v. Bank, 30 N. Y. 83, 86 Am. Dec. 351; Long v. Heinrich, 46 Mo. 603; it is no objection to suit by an assignee of an account in his name that no consideration for the assignment is shown; Young v. Hudson, 99 Mo. 102, 12 S. W. 632; and where a party assigns her interest in a suit for negligence to her attorneys by way of security, there is no reason why suit should be carried on in her name; Rajnowski v. R. Co., 78 Mich. 681, 44 N. W. 335. In equity the assignee may sue in his own name, but he can only go into equity when his remedy at law fails; 1 Yo. & C. 481; Bigelow v. Willson, 1 Pick. (Mass.) 485; Moseley v. Boush, 4 Rand. (Va.) 392; Haskell v. Hilton, 30 Me. 419; Murray v. Lylburn, 2 Johns. Ch. (N. Y.) 441; Spring v. Ins. Co., 8 Wheat. (U. S.) 268, 5 L. Ed. 614. Such an assignment is considered as a declaration of trust; Morrison v. Deaderick, 10 Humphr. (Tenn.) 342; 3 P. Will. 199; Welch v. Mandeville, 1 Wheat. (U. S.) 235, 4 L. Ed. 79; but all the equitable defences exist; Rousset v. Ins. Co., 1 Binn. (Pa.) 429; Spring v. Ins. Co., 8 Wheat. (U. S.) 268, 5 L. Ed. 614. It has been held that the assignee of a chose in action does not take it subject to equities of third persons of which he had no notice; Hinrod v. Bolton, 44 Ill. App. 516.

A valid assignment of a policy of insurance in the broadest legal sense, by consent of the underwriters, by statute, or otherwise, vests in the assignee all the rights of the assignor, legal and equitable, including that of action; but the instrument, not being negotiable in its character, is assignable only in equity, and not even so, if it has, as it sometimes has, a condition to the contrary; Field v. Ins. Co., 3 Md. 244; New York Life Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742; Kingsley v. Ins. Co., 8 Cush. (Mass.) 393; Grosvenor v. Ins. Co., 17 N. Y. 391; Simonton v. McLane's Adm'r, 25 Ala. 353; Folsom v. Ins. Co., 30 N. H. 231; Rison v. Wilkerson, 3 Sneed (Tenn.) 565; Pollard v. Ins. Co., 42 Me. 221; Birdsey v. Ins. Co., 26 Conn. 165; State Mut. Fire Ins. Co. v. Roberts, 31 Pa. 438; 18 Eng. L. & Eq. 427; Hall v. Ins. Co., 93 Mich. 184, 53 N. W. 727, 18 L. R. A. 135, 32 Am. St. Rep. 497. Where the policy does not provide that an assignment without the consent of the company renders it void, a parol assignment is valid; O'Brien v. Ins. Co., 57 Hun 589, 11 N. Y. Supp. 125. Upon transfer of a policy, in case of loss, the assignee may in some states sue in his own name; Southern Fertilizer Co. v. Reams, 105 N. C. 283, 11 S. E. 467, but this is usually when there is a statutory provision; and if there be none, suit must be in the name of the assignor; 3 Kent 261; Rousset v. Ins. Co., 1 Binn. (Pa.) 429. In marine policies, custom seems to have established a rule different from that of the common law, and to have made policies transferable with the subject matter of insurance; May, Ins. § 377.

Assignments are peculiarly the objects of equity jurisdiction; 9 B. & C. 300; Marbury v. Brooks, 7 Wheat. (U. S.) 556, 5 L. Ed. 522; Nicoll v. Mumford, 4 Johns. Ch. (N. Y.) 529; Phillips v. Prevost, *id.* 205; Howell v. Baker, *id.* 119; Hays v. Ward, *id.* 129, 8 Am. Dec. 554; and *bona fide* assignments will in most cases be upheld in equity courts; Davenport v. Woodbridge, 8 Greenl. (Me.) 17; Corser v. Craig, 1 Wash. C. C. 424, Fed. Cas. No. 3,255; Kellogg v. Krauser, 14 S. & R. (Pa.) 137, 16 Am. Dec. 480; Sheftall's Adm'rs v. Clay's Adm'rs, T. U. P. Charlt. (Ga.) 230; Anderson v. Van Alen, 12 Johns. (N. Y.) 343; but champerty and maintenance, and the purchase of lawsuits, are inquired into and restrained in equity as in law, and fraud will defeat an assignment. By some of the state statutes regulating assignments, the assignee may bring an action in his own name in a court of law, but the equities in defence are not excluded. See Johns v. Johns, 6 Ohio 271; Sirlott v. Tandy, 3 Dana (Ky.) 142; Harper v. Butler, 2 Pet. (U. S.) 239, 7 L. Ed. 410; Defrance v. Davis, Walk. (Miss.) 69.

All assignments and transfers of any claim upon the United States, or of any part or share thereof, or interests therein, whatever may be the consideration therefor, are null and void, unless made after the allowance of such claim, the ascertainment of the amount due, and the issuance of a warrant for the payment thereof; § 3477 R. S. See 24 Am. L. Rev. 442. But this does not apply to the passing of such claims to heirs, devisees, or assignees in bankruptcy; Erwin v. U. S., 97 U. S. 392, 24 L. Ed. 1065.

Notice is not necessary as against the creditor or his assignee in bankruptcy, but the claims of competing assignees or encumbrancers rank as between themselves according to the dates at which they have respectively given notice to the debtor; Pollock, Contr. 232, citing 3 Cl. & F. 456. This applies to rights created by trust; *id.* 233.

In this country it has also been held that notice of the assignment of a chose in action is effective without notice or acceptance by the debtor; Quigley v. Welter, 95 Minn. 383, 104 N. W. 236; Kingman v. Perkins,

105 Mass. 111; Columbia Finance & Trust Co. v. Bank, 116 Ky. 364, 76 S. W. 156; Young v. Upson, 115 Fed. 192; Tingle v. Fisher, 20 W. Va. 497.

The only purpose or necessity of notice is for the protection of the assignee against subsequent assignees or creditors or payments made by the debtor in ignorance of the assignment; Succession of Patrick, Mann. Unrep. Cas. (La.) 72; Chemical Co. v. McNair, 139 N. C. 326, 51 S. E. 919.

A party to an executory contract cannot assign it to a third party; but it is held in Taylor v. Palmer, 31 Cal. 240, that a public building contract is distinguished from a private building contract on the theory that the public generally were invited to bid for and take public contracts regardless of the professions, trades, or occupations; and that, aside from the discretion vested in the board of supervisors to reject all bids when they deemed it for the public good, or the bid of any party who had proved delinquent in a previous contract, there was no restriction upon the capacity of the contractor. Ernst v. Kunkle, 5 Ohio St. 520; City of St. Louis v. Clemens, 42 Mo. 69; Anderson v. De Urioste, 96 Cal. 404, 31 Pac. 266. But in the construction of a complex plant, owners having no knowledge themselves as to how such a plant should be constructed, have a right to select the party with whom they would deal, and when the selection is made and the contract executed, there could be no substitution of contractors without the assent of the owners; and such a contract is not assignable by the contractor; Arkansas Valley Smelting Co. v. Min. Co., 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246; Putnam v. Ins. Co., 123 Mass. 328, 25 Am. Rep. 93; Swarts v. Lighting Co., 26 R. I. 388, 59 Atl. 77; Campbell v. County Com'rs, 64 Kan. 376, 67 Pac. 866; Edison v. Babka, 111 Mich. 235, 69 N. W. 499; Winchester v. Pyrites Co., 67 Fed. 45, 14 C. C. A. 300; Worden v. R. Co., 82 Ia. 735, 48 N. W. 71; Johnson v. Vickers, 139 Wis. 145, 120 N. W. 837, 131 Am. St. Rep. 1046.

See FUTURE ACQUIRED PROPERTY; INSOLVENCY; EQUITABLE ASSIGNMENT; CHOSE IN ACTION.

ASSIGNMENT OF DOWER. The act by which the share of a widow in her deceased husband's real estate is ascertained and set apart to her.

The assignment may be made *in pais* by the heir or his guardian, or the devisee or other persons seized of the lands subject to dower; Pierce v. Williams, 3 N. J. Law, 709; Meserve v. Meserve, 19 N. H. 240; Blood v. Blood, 23 Pick. (Mass.) 80; Shattuck v. Gragg, *id.* 88; McRae v. Pegues, 4 Ala. 160; Baker v. Baker, 4 Greenl. (Me.) 67; Boyers v. Newbanks, 2 Ind. 388; Tudor, Lead. Cas. 51; or it may be made after a course of judicial proceedings, where a voluntary assignment is refused. In this case the assignment will be made by the sheriff, who will set off her share by metes and bounds; 2 Bla. Com. 136; 1 Washb. R. P. 229. The assignment should be made within forty days after the death of the husband, during which time the widow may remain in the mansion-house. See Pharis v. Leachman, 20 Ala. 662; Chaplin v. Simmons' Heirs, 7 T. B. Monr. (Ky.) 337; Stedman v. Fortune, 5 Conn. 462; 1 Washb. R. P. 222, n. 227; QUARANTINE. The share of the widow is usually one-third of all the real estate of which the husband has been seized during coverture; and no writing or livery is necessary in a valid assignment, the dowress being *in*, according to the view of the law, of the seisin of her husband.

The assignment of dower in a house may be of so many rooms, instead of a third part of the house; Parrish v. Parrish, 88 Va. 529, 14 S. E. 325. The remedy of the widow, when the heir refuses to assign dower, is by a writ of dower *unde nihil habet;* 4 Kent 63. A conveyance by a widow of her right of dower before it has been allotted does not vest the legal title in the grantee, and she is a necessary party to enforce the allotment; Parton v. Allison, 111 N. C. 429, 16 S. E. 416; see *id.*, 109 N. C. 674, 14 S. E. 107. If the guardian of a minor heir assign more than he ought, the heir on coming of age may have the writ of admeasurement of dower; McCormick v. Taylor, 2 Ind. 336; Jones v. Brewer, 1 Pick. (Mass.) 314; Co. Litt. 34, 35; Fitzh. Nat. Br. 148; Stat. Westm. 2 (13 Edw. I.) c. 7; 1 Washb. R. P. 222; 1 Kent 63, 69.

ASSIGNMENT OF ERRORS. The statement of the case of the plaintiff in error, on a writ of error, setting forth the errors complained of.

It corresponds with the declaration in an ordinary action; 2 Tidd, Pr. 1168; 3 Steph. Com. (11th ed.) 623. All the errors of which the plaintiff complains should be set forth and assigned in distinct terms, so that the defendant may plead to them; Newnan v. Pryor, 18 Ala. 186; Reynolds v. Reynolds, 15 Conn. 83; Adams v. Munson, 3 How. (Miss.) 77.

It is an essential part of the pleadings and as such should be so complete in itself as to show the basis of the judgment or decree of the appellate court, since after the cause is disposed of and the record remitted to the court below, the precipe, assignment of errors and pleas thereto are all that usually remain of record; In re Cessna's Estate, 192 Pa. 14, 43 Atl. 376.

The ruling of a trial court must be specified in the assignment, in order to question it on appeal; Line v. State, 131 Ind. 468, 30 N. E. 703; as where no errors are assigned in the record, no question is presented for the appellate court for review; Wilcox v. Moore, 44 Ill. App. 293; Fullerton's Estate,

146 Pa. 61, 23 Atl. 321; Patrick Red Sandstone Co. v. Skoman, 1 Colo. App. 323, 29 Pac. 21; Hawkins v. McDougal, 126 Ind. 544, 25 N. E. 708. Errors not assigned will not usually be considered by an appellate court. But the United States Circuit Court of Appeals will notice plain error though not assigned; City of Memphis v. R. Co., 183 Fed. 529, 106 C. C. A. 75. Alleged errors of law will not be considered unless contained in the assignment of errors, where on the whole the facts justify the judgment; Behn, M. & Co. v. Campbell, 205 U. S. 403, 27 Sup. Ct. 502, 51 L. Ed. 857.

The term is commonly used in connection with appeals in cases in equity Under the federal appellate practice, it is necessary to file an assignment of error with the petition for an appeal.

ASSIGNOR. One who makes an assignment; one who transfers property to another. See ASSIGNMENT.

ASSIGNS. Assignees; those to whom property shall have been transferred. Now seldom used except in the phrase, in deeds, "heirs, administrators and assigns." Grant v. Carpenter, 8 R. I. 36.

ASSISA (Lat. *assidere*). Originally an assembly or court; then the enactments of such a court. 1 Holdsw. H. E. L. 116.

A kind of jury or inquest. For the difference between *assisa* and *jurata*, see JURATA.

A writ; as, an assize of *novel disseisin*, assize of common pasture.

An ordinance; as, *assisa panis*. Littleton § 234; 3 Sharsw. Bla. Com. 402.

A fixed specific time, sum, or quantity. A tribute; tax fixed by law; a fine. Spelman, Gloss.

Assisa armorum. A statute defining the arms which all freemen must carry.

Assisa cadere. To be nonsuited. Cowell; 3 Bla. Com. 402.

Assisa continuanda. A writ for the continuation of the assize to allow the production of papers. Reg. Orig. 217.

Assisa de foresta. Assize of the forest.

Assisa mortis d'ancestoris. Assize of *mort d'ancestre*.

Assisa panis et cervisiæ. Assize of bread and ale; a statute (1266) regulating the weight and measure of these articles. Abolished in London in 1815 and in the rest of England in 1836.

Assisa proroganda. A writ to stay proceedings where one of the parties is engaged in a suit of the king. Reg. Orig. 208.

Assisa ultimæ præsentationis. Assize of *darrein presentment*, which see.

Assisa venalium. Statutes regulating the sale of certain articles. Spelman, Gloss.

Assisa cadit (or *vertitur*) *in juratam*. Where a matter is so doubtful that it must necessarily be tried before a jury. Jacob, L. Dict.

ASSISORS. In Scotch Law. Jurors.

ASSISTANCE, WRIT OF. See WRIT OF ASSISTANCE.

ASSITHMENT. A wergild or compensation by a pecuniary mulct. Blount.

ASSIZE, ASSIZA (Lat. *assidere*, to sit by or near, through the Fr. *assisa*, a session). A writ directed to the sheriff for the recovery of immovable property, corporeal or incorporeal. Littleton § 234.

The action or proceedings in court based upon such a writ. Magna Carta c. 12; Stat. 13 Edw. I. (Westm. 2) c. 25; 3 Bla. Com. 57, 252; Sellon, Pract. Introd. xii.

Such actions were to be tried by special courts, of which the judicial officers were justices of assize See COURTS OF ASSIZE AND NISI PRIUS This form of remedy is said to have been introduced by the parliament of Northampton (or Nottingham) A. D. 1176, for the purpose of trying titles to land in a more certain and expeditious manner before commissioners appointed by the crown than before the suitors in the county court of the king's justiciars in the Aula Regis. The action is properly a mixed action, whereby the plaintiff recovers his land and damages for the injury sustained by the disseisin. The value of the action as a means for the recovery of land led to its general adoption for that purpose, those who had suffered injury not really amounting to a disseisin alleging a disseisin to entitle themselves to the remedy. The scope of the remedy was also extended so as to allow the recovery of incorporeal hereditaments, as franchises, estovers, etc. It gave place to the action of ejectment, and is now abolished, having been previously almost, if not quite, entirely disused. Stat. 3 & 4 Will. IV. c. 27, § 36. Stearns, Real Act. 187.

A jury summoned by virtue of a writ of assize.

Such juries were said to be either *magna* (grand), consisting of sixteen members and serving to determine the right of property, or *parva* (petit), consisting of twelve and serving to determine the right to possession Mirror of Just. lib 2

This sense is said by Littleton and Blackstone to be the original meaning of the word; Littleton § 234, 3 Bla. Com. 185. Coke explains it as denoting originally a *session* of justices, and this explanation is sanctioned by the etymology of the word. Co. Litt 153 *b* It seems, however, to have been early used in all the senses here given. The recognitors of assize (the jurors) had the power of deciding, upon their own knowledge, without the examination of witnesses, where the issue was joined on the very point of the assize; but collateral matters were tried either by a jury or by the recognitors acting as a jury, in which latter case it was said to be turned into a jury *(assisa vertitur in juratam)* Booth, Real Act 213; Stearns, Real Act 187; 3 Bla Com 402. The term is no longer used in England to denote a jury.

The assizes are: The Grand Assize which provides a machinery for trying disputed claims to property; and possessory assizes for trying disputed claims to seisin or possession. 1 Holdsw. Hist. E. L. 149. See GRAND ASSIZE.

The verdict or judgment of the jurors or recognitors of assize; 3 Bla. Com. 57, 59.

A court composed of an assembly of knights and other substantial men, with the baron or justice, in a certain place, at an appointed time. Grand Coutum, c. 24. See COURT OF ASSIZE.

An ordinance or statute. Littleton § 234; Reg. Orig. 239. Anything reduced to a certainty in respect to number, quantity, quality, weight, measure, etc. 2 Bla. Com. 42; Cowell; Spelman, Gloss. *Assisa.*

As to this use of the term, see PROVISIONS.

See the title immediately following.

In Scotch Law. The jury, consisting of fifteen men, in criminal cases tried in the court of justiciary. Paterson, Comp.

ASSIZE OF CLARENDON. A set of instructions (1166) to the itinerant justices and sheriffs with reference to their duties and jurisdiction. 1 Holdsw. Hist. E. L. 21.

ASSIZE OF DARREIN PRESENTMENT. A writ of assize which formerly lay when a man or his ancestors under whom he claimed presented a clerk to a benefice, who was instituted, and afterwards upon the next avoidance, a stranger presented a clerk and thereby disturbed the real patron. 3 Sharsw. Bla. Com. 245; Stat. 13 Edw. I. (Westm. 2) c. 5. It has given way to the remedy by *quare impedit.*

ASSIZE OF FRESH FORCE. A writ of assize which lay where the disseisin had been committed within forty days. Fitzh. N. B. 7.

W. C. Bolland in Year Books of Edward II, Vol. VII, p. xxxvi (Selden Society), after referring to "a cryptic remark of Glanvill," and saying that "the history of this writ cannot be written yet," concludes that where the inhabitant of a town that has the franchise of having actions touching its own citizens heard and determined within the town is disseised of a tenement, then if he take action to recover it within a certain time of such disseisin (variously stated to be forty days or forty weeks) he must take that action by means of an assize of fresh force, otherwise he can avail himself only of a writ of right.

ASSIZE, GRAND. See GRAND ASSIZE.

ASSIZE OF MORTDANCESTOR. A writ of assize which lay to recover possession of lands against an abator or his alienee. It lay where the ancestor from whom the claimant derived title died seised. Cowell; 3 Bla. Com. 185.

ASSIZE OF NORTHHAMPTON. A re-enactment and enlargement (1176) of the Assize of Clarendon. 1 Holdsw. Hist. E. L. 21.

ASSIZE OF NOVEL DISSEISIN. A writ of assize which lay where the claimant had been lately disseised. The action must have been brought subsequently to the next preceding session of the eyre or circuit of justices, which took place once in seven years; Co. Litt. 153.

The assizes of darrein presentment, mort d'ancestre, novel disseisin, and *utrum* were possessory. They were tried before a jury. Abolished in 1834. 1 Holdsw. Hist. E. L. 151. The forms are given in *id.* 423.

ASSIZE OF NUISANCE. A writ of assize which lay where a nuisance had been committed to the complainant's freehold.

The complainant alleged some particular fact done which worked an injury to his freehold (*ad nocumentum liberi tenementi sui*), and, if successful, recovered judgment for the abatement of the nuisance and also for damages; Fitzh. N. B. 183; 3 Bla. Com. 221; 9 Co. 55; Tr. & Ha. Pr. 1776.

ASSIZE OF UTRUM. A writ of assize which lay for a parson to recover lands which his predecessor had improperly allowed the church to be deprived of. 3 Bla. Com. 257.

An assize for the trial of the question of whether land is a lay fee, or held in frankalmoigne. 1 Holdsw. Hist. E. L. 21.

ASSIZES. Sessions of the justices or commissioners of assize.

These assizes are held twice in each year in each of the various shires of England, with some exceptions, by virtue of several commissions, for the trial of matters of fact in issue in both civil and criminal cases. They still retain the ancient name in popular language, though the commission of assize is no longer issued. 3 Steph. Com. (11th ed.) 373. See ASSIZE; NISI PRIUS; COMMISSION OF ASSIZE; COURTS OF ASSIZE AND NISI PRIUS.

ASSIZES DE JERUSALEM. A code of feudal law prepared at a general assembly of lords after the conquest of Jerusalem, A. D. 1099.

It was compiled principally from the laws and customs of France. It was reduced to form by Jean d'Iblin, *Comte de Japhe et Ascalon*, about the year 1290. 1 Fournel, *Hist. des Av.* 49; 2 Dupin, *Prof. des Av.* 674; Steph. Pl. Andr. ed. App. xi.

ASSOCIATE. A partner in interest.

An officer in each of the superior courts of common law in England whose duty it was to keep the records of his court, to attend its *nisi prius* sittings, and to enter the verdict, make up the *postea*, and deliver the record to the party entitled thereto. Abbott, Law Dict.

A person associated with the judges and clerk of assize in commission of general jail delivery. Mozley & W. Dict.

The term is frequently used of the judges of appellate courts, other than the presiding judge or chief justice.

ASSOCIATED PRESS. An association to buy, gather and accumulate information and news; to vend, supply, distribute and publish the same.

It is an association affected with a public interest, and must submit to control by the public for the common good. It must sell

its news without discrimination to all newspaper publishers who desire to purchase the same; Inter-Ocean Pub. Co. v. Associated Press, 184 Ill. 438, 56 N. E. 822, 48 L. R. A. 568, 75 Am. St. Rep. 184, and a by-law forbidding the furnishing news to or receiving news from an antagonistic person or corporation is void as creating a monopoly; *id.*

ASSOCIATION. The act of a number of persons in uniting together for some purpose. The persons so joining.

An organized union of persons for a common purpose; a body of persons acting together for the promotion of some object of mutual interest or advantage. Cent. Dict.

Any combination of persons whether the same be known by a distinctive name or not. Stroud, Jud. Dict.

An unincorporated company is fundamentally a large partnership, from which it differs mainly in the following particulars: That it is not bound by the acts of the individual partners, but only by those of its managers; that shares in it are transferable; and that it is not dissolved by the retirement, death, bankruptcy, etc., of its individual members; Dicey, Parties 149.

In the United States this term is used to signify a body of persons united without a charter but upon the methods and forms used by incorporated bodies for the prosecution of some enterprise. Abbott, L. Dict.

Apart from a statute, no action lies by or against an unincorporated association as such; Karges Furniture Co. v. Woodworkers Local Union, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788, 6 Ann. Cas. 829; Dicey, Parties 148; especially when it is not organized to carry on some business; St. Paul Typothetæ v. Bookbinders' Union, 94 Minn. 351, 102 N. W. 725, 3 Ann. Cas. 695; Cleland v. Anderson, 66 Neb. 252, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 5 L. R. A. (N. S.) 136. Actions must be brought in the names of all the members. The inconvenience of this doctrine has led to much legislation. Some statutes provide for suits against associations (or partnerships) in the associate names, service of process on officers or other associates, and judgments binding the associate property, but only those members individually who have been personally served; see 20 Harv. L. Rev. 58. Judgments may bind individually even those members not personally served; Patch Mfg. Co. v. Capeless, 79 Vt. 1, 63 Atl. 938. Such association may sue and be sued by its name; Whitney v. Backus, 149 Pa. 29, 24 Atl. 51; Davison v. Holden, 55 Conn. 103, 10 Atl. 515, 3 Am. St. Rep. 40. In New York actions may be brought against such association of seven or more persons in the name of the president or treasurer; Curran v. Galen, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496. One or more members may sue for the benefit of all, where the members are so numerous that it is impracticable to bring them all in; Liggett v. Ladd, 17 Or. 89, 21 Pac. 133. In England it has been held that an association of employés might be sued in its name, upon the ground that such associations are expressly recognized by parliament, and such right arises by necessary implication from the legislative recognition, and the right to own property; [1901] A. C. 426. See 20 Harv. L. Rev. 58; Dicey, Parties.

See PARTNERSHIP; PARTIES; JOINT STOCK COMPANIES; BUILDING ASSOCIATIONS; BENEFICIAL ASSOCIATIONS; CHARITABLE USES; EXPULSION.

In English Law. A writ directing certain persons (usually the clerk and his subordinate officers) to associate themselves with the justices and sergeants for the purpose of taking the assizes. 3 Bla. Com. 59.

ASSOIL (spelled also *assoile, absoile, assoilyie*). To set free; to deliver from excommunication. Stat. 1 Hen. IV. c. 7; Cowell. See ABSOIL.

ASSUME. To take to or upon one's self. See Cincinnati, S. & C. R. Co. v. Ry. Co., 44 Ohio St. 314, 7 N. E. 139.

ASSUMPSIT (Lat. *assumpsit*, he has undertaken). **In Contracts.** An undertaking, either express or implied, to perform a parol agreement. 1 Lilly, Reg. 132.

Express assumpsit is an undertaking made orally, by writing not under seal, or by matter of record, to perform an act or to pay a sum of money to another.

Implied assumpsit is an undertaking presumed in law to have been made by a party, from his conduct, although he has not made any express promise.

The law presumes such an undertaking to have been made, on the ground that everybody is supposed to have undertaken to do what is, in point of law, just and right; 2 Burr. 1008; 8 C. B. 545; Leake, Contr. 75; Huffman v. Wyrick, 5 Ind. App. 183, 31 N. E. 823. Such an undertaking is never implied where the party has made an express promise; 2 Term 100; Kimball v. Tucker, 10 Mass. 192; nor ordinarily against the express declaration of the party to be charged, Jewett v. Inhabitants of Somerset, 1 Greenl. (Me.) 125; Wheelock v. Freeman, 13 Pick. (Mass.) 165, 23 Am. Dec. 674; nor will it be implied unless there be a request or assent by the defendant shown; Webb v. Cole, 20 N. H. 490; though such request or assent may be inferred from the nature of the transaction; 1 Dowl. & L. 984; Hawley v. Sage, 15 Conn. 52; Hall v. R. Co., 28 Vt. 401; Treasurer of City of Camden v. Mulford, 26 N. J. Law 49; or from the silent acquiescence of the defendant; Doty v. Wilson, 14 Johns. (N. Y.) 378; Bradley v. Richardson, 2 Blatchf. 343, Fed. Cas. No. 1,786; or even contrary to fact on the ground of legal obligation; 1 H. Bla. 90; Inhabitants of Hanover v. Turner, 14 Mass. 227, 7 Am. Dec. 203;

Inhabitants of Alna v. Plummer, 4 Greenl. (Me.) 258; Van Valkinburgh v. Watson, 13 Johns. (N. Y.) 480, 7 Am. Dec. 395; no promise to pay is implied from a mere use of personal property with the permission of the owner; Davis v. Breon, 1 Ariz. 240, 25 Pac. 537.

In Practice. A form of action which lies for the recovery of damages for the non-performance of a parol or simple contract. 7 Term 351; Ballard v. Walker, 3 Johns. Cas. (N. Y.) 60.

It differs from *debt*, since the amount claimed need not be liquidated (see DEBT), and from *covenant*, since it does not require a contract under seal to support it. See COVENANT. See 4 Coke 91; 4 Burr. 1008. Carter v. Carter, 14 Pick (Mass.) 428, Newell v. Hill, 2 Metc. (Mass.) 181. Assumpsit is one of the class of actions called actions upon the case, and in the older books is called action upon the case upon assumpsit. Comyns, Dig.

It was a new variety of action on the case, framed, as it seems, as often on the writ of deceit as on that of trespass. Failure to perform one's agreements did not create a *debt*, but it was found to be a wrong in the nature of *deceit* for which there must be a remedy in damages. The first recorded case was Y. B. 2 Hen. IV, 3 pl. 9. It was only in 1596 (4 Co. Rep. 91 *a*) that it was conclusively decided that *assumpsit* was admissible at the plaintiff's choice where *debt* would also lie; and it was still later before it was admitted that the substantial cause of action was the contract; Poll. Contr. 148. See Prof. James Barr Ames in 2 Harv. L. Rev. 1, 53 (3 Sel. Essays, Anglo-Amer. L. H. 259); Holmes, Com. L. 284; 3 Holdsw. Hist. E. L. 329.

Special assumpsit is an action of assumpsit brought upon an express contract or promise.

General assumpsit is an action of assumpsit brought upon the promise or contract implied by law in certain cases. See 2 Sm. Lead. Cas. 14; Tr. & Ha. Pr. 1490.

The action should be brought by the party from whom the consideration moved; 3 B. & P. 149, n; 4 B. & C. 664; Cabot v. Haskins, 3 Pick. (Mass.) 83, 92; or by the person for whose benefit it was paid; Hinkley v. Fowler, 15 Me. 285; against the party who made the undertaking. It lies for a corporation; 1 Campb. 466; and against it; Bank of United States v. Dandridge, 12 Wheat. (U. S.) 68, 6 L. Ed. 552; City of San Antonio v. Lewis, 9 Tex. 69; Waring v. Catawba Co., 2 Bay (S. C.) 109; Overseers of Poor of North Whitehall Tp. v. Overseers of Poor of South Whitehall Tp., 3 S. & R. (Pa.) 117; but not in England formerly (because a corporation could not contract except under its seal), unless by express authority of some legislative act, or in actions on negotiable paper; 1 Chit. Pl. *119; 4 Bingh. 77; but now corporations are liable in many cases on contracts not under seal, and generally upon executed contracts, up to the extent of the benefit received; 6 A. & E. 846; L. R. 10 C. P. 409; Brice, Ultra Vires (3d ed.) 693.

Assumpsit will lie at the suit of a third party on a contract made in his favor; Hendrick v. Lindsay, 93 U. S. 143, 23 L. Ed. 855; Kountz v. Holthouse, 85 Pa. 235 (but see Ramsdale v. Horton, 3 Pa. 330); Lawrence v. Fox, 20 N. Y. 268 (but see Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195); Snell v. Ives, 85 Ill. 279; Bassett v. Hughes, 43 Wis. 319. Contra, Warren v. Batchelder, 15 N. H. 129. See discussion in 15 Am. L. Rev. 231, and 4 N. J. L. J. 197.

A promise or undertaking on the part of the defendant, either expressly made by him or implied by the law from his actions, constitutes the gist of the action. A sufficient consideration for the promise must be averred and shown; 21 Am. Jur. 258, 283; though it may be implied by the law; Jackson v. Teele, 7 Johns. (N. Y.) 29; Jerome v. Whitney, *id.* 321; Parish v. Stone, 14 Pick. (Mass.) 210, 25 Am. Dec. 378; as in case of negotiable promissory notes and bills, where a consideration is presumed to exist till its absence is shown; Middlebury v. Case, 6 Vt. 165.

The action lies for—

Money had and received to the plaintiff's use, including all cases where one has money, or that which the parties have agreed to treat as money; Willie v. Green, 2 N. H. 333; Clark v. Pinney, 6 Cow. (N. Y.) 297; Marshall v. McPherson, 8 Gill & J. (Md.) 333; Barfield v. McCombs, 89 Ga. 799, 15 S. E. 666; Colt v. Clapp, 127 Mass. 476; Harper v. Claxton, 62 Ala. 46; McFadden v. Wilson, 96 Ind. 253; in his hands which in equity and good conscience he is bound to pay over, including bank-notes; 13 East 20, 130; Mason v. Waite, 17 Mass. 560; Ainslie v. Wilson, 7 Cow. (N. Y.) 662, 17 Am. Dec. 532; Hill's Adm'r v. Kennedy, 32 Ala. 523; promissory notes; Tebbetts v. Haskins, 16 Me. 285; Tuttle v. Mayo, 7 Johns. (N. Y.) 132; Edgerton v. Brackett, 11 N. H. 218; Indianapolis Ins. Co. v. Brown, 6 Blackf. (Ind.) 378; notes payable in specific articles; Crandal v. Bradley, 7 Wend. (N. Y.) 311; and some kinds of evidences of debt; 3 Campb. 199; Gilchrist v. Cunningham, 8 Wend. (N. Y.) 641; Mason v. Waite, 17 Mass. 560; but not goods, except under special agreement; Morrison v. Berkey, 7 S. & R. (Pa.) 246; 3 B. & P. 559; 1 Y. & J. 380; whether delivered to the defendant for a particular purpose to which he refuses to apply it; 3 Price 68; Wales v. Wetmore, 3 Day (Conn.) 252; McNeilly v. Richardson, 4 Cow. (N. Y.) 607; Eastman v. Hodges, 1 D. Chip. (Vt.) 101; Gutherie v. Hyatt, 1 Harr. (Del.) 446; see 2 Bingh. 7; Hall v. Marston, 17 Mass. 575; or obtained by him through fraud; 1 Salk. 28; Bliss v. Thompson, 4 Mass. 488; Lyon v. Annable, 4 Conn. 350; Phelps v. Conant, 30 Vt. 277; Reynolds v. Rochester, 4 Ind. 43; or by tortious seizure and conversion of the plaintiff's property; Bigelow v. Jones, 10 Pick. (Mass.) 161; and see Cowp. 414; 1

Campb. 285; or by duress, imposition, or undue advantage or other involuntary and wrongful payment; 6 Q. B. 276; Richardson v. Duncan, 3 N. H. 508; Wheaton v. Hibbard, 20 Johns. (N. Y.) 290, 11 Am. Dec. 284; Chase v. Dwinal, 7 Greenl. (Me.) 135, 20 Am. Dec. 352; Perry v. Inhabitants of Dover, 12 Pick. (Mass.) 206; Central Bank v. Dressing Co., 26 Barb. (N. Y.) 23; Reynolds v. Rochester, 4 Ind. 43; Sheldon v. South School Dist., 24 Conn. 88; Elliott v. Swartwout, 10 Pet. (U. S.) 137, 9 L. Ed. 373; Sartwell v. Horton, 28 Vt. 370; or for a security which turns out to be a forgery, under some circumstances; 3 B. & C. 428; Terry v. Bissell, 26 Conn. 23; Rick v. Kelly, 30 Pa. 527; Ellis v. Trust Co., 4 Ohio St. 628, 64 Am. Dec. 610; or paid under a mistake of fact; 9 Bingh. 647; Mowatt v. Wright, 1 Wend. (N. Y.) 355, 19 Am. Dec. 508; Dickens v. Jones, 6 Yerg. (Tenn.) 483, 27 Am. Dec. 488; Norton v. Marden, 15 Me. 45, 32 Am. Dec. 132; Wheadon v. Olds, 20 Wend (N. Y.) 174; Tyler v. Smith, 18 B. Monr. (Ky.) 793; or upon a consideration which has failed; 3 B. & P. 181; President, etc., of Salem Bank v. Bank, 17 Mass. 1, 9 Am. Dec. 111; Reynolds v. Harris, 9 Cal 338; Keene v. Thompson, 4 Gill & J. (Md.) 463; Lyon v. Annable, 4 Conn. 350; Pennington v. Clifton, 10 Ind. 172; Burch v. Smith, 15 Tex. 224, 65 Am. Dec. 154; see Kitty v. Com., 18 B. Monr. (Ky.) 523; or under an agreement which has been rescinded without partial performance; 2 C. & P. 514; Holbrook v. Holbrook, 30 Vt. 432; M. E. Church v. Wood, 5 Ohio, 286; Dearborn v. Dearborn, 15 Mass. 319; Gillet v. Maynard, 5 Johns. (N. Y.) 85, 4 Am. Dec. 329; Dickson v. Cunningham, Mart. & Y. (Tenn.) 203; Wharton v. O'Hara, 2 N. & McC. (S. C.) 65; Randlet v. Herren, 20 N. H. 102; or on common counts for breach of warranty upon the ground that the money was paid without consideration; Murphy v. McGraw, 74 Mich. 318, 41 N. W. 917; or the owner of stolen money may recover the amount against one with whom it was deposited by the thief, who, after notice, pays it to a third person; Hindmarch v. Hoffman, 127 Pa. 284, 18 Atl. 14, 4 L. R. A. 368, 14 Am. St. Rep. 842; interest paid by mistake on a judgment which did not bear interest is recoverable back; McMurtry v. R. Co., 84 Ky. 462, 1 S. W. 815; or where a factor disobeys instructions and sells grain, deposits made by principal may be recovered; Larminie v. Carley, 114 Ill. 196, 29 N. E. 382; or to recover purchase money under void contract for sale of lands; Gwin v. Smur, 49 Mo. App. 361; or to recover money advanced as prepayment of services to be rendered under contract, where contract is not performed; Trope v. Ass'n, 58 Hun 611, 12 N. Y. Supp. 519; or where one receives money for a specific purpose, but to which he does not apply it, keeping it for himself; Barrow v. Barrow, 55 Hun 505, 8 N. Y. Supp. 783.

Money paid for the use of another, including negotiable securities; Merchants' Bank v. Cook, 4 Pick. (Mass.) 414; Pearson v. Parker, 3 N. H. 366; Mason v. Franklin, 3 Johns. (N. Y.) 206; Craig v. Craig, 5 Rawle (Pa.) 91; Lapham v. Barnes, 2 Vt. 213; McLellan v. Crofton, 6 Greenl. (Me.) 331; where the plaintiff can show a previous request; Webb v. Cole, 20 N. H. 490; or subsequent assent; Packard v. Lienow, 12 Mass. 11; Tuttle v. Armstead, 53 Conn. 175, 22 Atl. 677; Wolff v. Matthews, 39 Mo. App. 376; or that he paid it for a reasonable cause, and not officiously; 3 M. & W. 607; Skillin v. Merrill, 16 Mass. 40; Ebel v. Chandler, 93 Cal. 372, 28 Pac. 934; Lovejoy v. Chandler, 93 Cal. 376, 28 Pac. 935; Graham v. Dunigan, 2 Bosw. (N. Y.) 516; 14 Q. B. D. 811; L. R. 3 C. P. 38; Keener Quasi Cont 388; but a mere voluntary payment of another's debt will not make the person paying his creditor; Vanderheyden v. Mallory, 1 N. Y. 472; Turner v. Egerton, 1 Gill & J. (Md.) 433, 19 Am. Dec. 235; Mayor, etc., of Baltimore v. Hughes' Adm'r, 1 Gill & J. (Md.) 497, 19 Am. Dec. 243; Rensselaer Glass Factory v. Reid, 5 Cow. (N. Y.) 603; Calhoun v. Cozens, 3 Ala. 500; Webb v. Cole, 20 N. H. 490.

Money lent, including negotiable securities of such a character as to be essentially money; 11 Jur. 157, 289; Payson v. Whitcomb, 15 Pick. (Mass.) 212; Crandal v. Bradley, 7 Wend. (N. Y.) 311; Penn v. Flack, 3 Gill & J. (Md.) 369; Edgerton v. Brackett, 11 N. H. 218; Fairbanks v. Stanley, 18 Me. 296; Peniston v. Wall's Adm'x, 3 J. J. Marsh. (Ky.) 37; Hart v. Connor, 21 Ga. 384; actually loaned by the plaintiff to the defendant himself; 1 Dane, Abr. 196.

Money found to be due upon an account stated, called an *insimul computassent*, for the balance so found to be due, without regard to the nature of the evidences of the original debt; 3 B. & C. 196; Danforth v. Turnpike Road, 12 Johns. (N. Y.) 227; Greenwood v. Curtis, 6 Mass. 358, 4 Am. Dec. 145; Fitch v. Leitch, 11 Leigh (Va.) 471; Burnham v. Spooner, 10 N. H. 532; Richey v. Hathaway, 149 Pa. 207, 24 Atl. 191.

Goods sold and delivered either in accordance with a previous request; 9 Conn. 379; Lyles v. Lyles' Ex'rs, 6 Harr. & J. (Md.) 273; Rogers v. Verona, 1 Bosw. (N. Y.) 417; Keyser v. Dist. No. 8, 35 N. H. 477; Abbott v. Coburn, 28 Vt. 666, 67 Am. Dec. 735; Philadelphia Co. v. Park Bros. & Co., 138 Pa. 346, 22 Atl. 86; or where the defendant receives and uses them; Jenkins v. Richardson, 6 J. J. Marsh. (Ky.) 441, 22 Am. Dec. 82; Kupfer v. Inhabitants of South Parish in Augusta, 12 Mass. 185; Emerson v. McNamara, 41 Me. 565; although tortiously; Hill v. Davis, 3 N. H. 384; Floyd v. Wiley, 1 Mo. 430; Floyde v. Wiley, *id.* 643. See Jones v. Hoar, 5 Pick. (Mass.) 285; TROVER.

Work performed; James v. Bixby, 11 Mass. 37; McDaniel v. Parks, 19 Ark. 671; James

v. Buzzard, 1 Hempst. 240, Fed. Cas. No. 7,206a; Trammell v. Lee County, 94 Ala. 194, 10 South. 213; Blakeslee v. Holt, 42 Conn. 226; Whelan v. Clock Co., 97 N. Y. 293; and materials furnished; Hayward v. Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; with the knowledge of the defendant; Bartholomew v. Jackson, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237; Hort v. Norton, 1 McCord (S. C.) 22; McDaniel v. Parks, 19 Ark. 671; so that he derives benefit therefrom; Lowe v. Sinklear, 27 Mo. 308; Felton v. Simpson, 33 N. C. 84; whether there be an express contract or not. Also, where there is an express promise to pay for extra work, although the contract requires that the estimate should be in writing; Hughes v. Torgerson, 96 Ala. 348, 11 South. 209, 16 L. R. A. 600, 38 Am. St. Rep. 105. As to whether anything can be recovered where the contract is to work a specified time and the labor is performed during a portion of that time only, see Provost v. Harwood, 29 Vt. 219; Ryan v. Dayton, 25 Conn. 188, 65 Am. Dec. 560; Allen v. Curles, 6 Ohio St. 505; Hughes v. Cannon, 1 Sneed (Tenn.) 622; Wolfe v. Howes, 24 Barb. (N. Y.) 174; Downey v. Burke, 23 Mo. 228. Services performed by relatives for one in his lifetime, but in the absence of an express or implied contract for payment, cannot be recovered for after his death; Patterson v. Collar, 31 Ill. App. 340. One may recover for work and material on an implied assumpsit although the work is destroyed before its completion; Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654.

Use and occupation of the plaintiff's premises under a parol contract express or implied; Logan v. Lewis, 7 J. J. Marsh. (Ky.) 6; Osgood v. Dewey, 13 Johns. (N. Y.) 240; Eppes' Ex'rs v. Cole, 4 Hen. & M. (Va.) 161, 4 Am. Dec. 512; Brewer v. Craig, 18 N. J. L. 214; Lloyd v. Hough, 1 How. (U. S.) 153, 11 L. Ed. 83; Phelps v. Conant, 30 Vt. 277; Crommelin v. Thiess, 31 Ala. 412, 70 Am. Dec. 499; Howe v. Russell, 41 Me. 446; Sampson v. Shaeffer, 3 Cal. 196; Theological Institute of Connecticut v. Barbour, 4 Gray (Mass.) 329; but not if it be tortious; Ryan v. Marsh's Adm'r, 2 N. & McC. (S. C.) 156; Henwood v. Cheeseman, 3 S. & R. (Pa.) 500; De Young v. Buchanan, 10 Gill & J. (Md.) 149, 32 Am. Dec. 156; Wiggin v. Wiggin, 6 N. H. 298; Strong v. Garfield, 10 Vt. 502; or where defendant enters under a contract for a deed; Smith v. Stewart, 6 Johns. (N. Y.) 46, 5 Am. Dec. 186; Vandenheuvel v. Storrs, 3 Conn. 203; Jones v. Tipton, 2 Dana (Ky.) 295. The relation of landlord and tenant must exist expressly or impliedly; Chambers v. Ross, 25 N. J. L. 293; Newby v. Vestal, 6 Ind. 412; Williams v. Hollis, 19 Ga. 313.

And in many other cases, as for a breach of promise of marriage; Conn v. Wilson, 2 Overt. (Tenn.) 233, 5 Am. Dec. 663; to recover the purchase-money for land sold; Velie v. Myers, 14 Johns. (N. Y.) 162; Shephard v. Little, *id.* 210; Wood v. Gee, 3 McCord (S. C.) 421; and, specially, upon wagers; 2 Chit. Pl. 114; feigned issues; 2 Chit. Pl. 116; upon foreign judgments; 3 Term 493; Oysted v. Shed, 8 Mass. 273; Hubbell v. Coudrey, 5 Johns. (N. Y.) 132; but not on a judgment obtained in a sister state; Garland v. Tucker, 1 Bibb (Ky.) 361; Andrews v. Montgomery, 19 Johns. (N. Y.) 162, 10 Am. Dec. 213; Boston India Rubber Factory v. Holt, 14 Vt. 92; money due under an award; Kingsley v. Bill, 9 Mass. 198; where the defendant has obtained possession of the plaintiff's property by a tort for which trespass or case would lie; Bigelow v. Jones, 10 Pick. (Mass.) 161; Budd v. Hiler, 27 N. J. L. 43; Hutton v. Wetherald, 5 Harr. (Del.) 38; Cooper v. Berry, 21 Ga. 526, 68 Am. Dec. 468; or, having rightful possession, has tortiously sold the property; Foster v. Mfg. Co., 12 Pick. (Mass.) 452; Gilmore v. Wilbur, 12 Pick. (Mass.) 120, 22 Am. Dec. 410; Pritchard v. Ford, 1 J. J. Marsh. (Ky.) 543; Willet v. Willet, 3 Watts (Pa.) 277; Sanders v. Hamilton, 3 Dana (Ky.) 552; Chauncy v. Yeaton, 1 N. H. 151; King v. McDaniel, 4 Call (Va.) 451; Stockett v. Watkins' Adm'rs, 2 Gill & J. (Md.) 326, 20 Am. Dec. 438; or converted it to his own use; 3 M. & S. 191; Miller v. Miller, 7 Pick. (Mass.) 133, 19 Am. Dec. 264; Pike v. Bright, 29 Ala. 332; Emerson v. McNamara, 41 Me. 565; Janes v. Buzzard, 1 Hempst. 240, Fed. Cas. No. 7,206a; Alsbrock v. Hathaway, 3 Sneed (Tenn.) 454; Goodenow v. Snyder, 3 G. Greene (Ia.) 599; or, at the suit of an attaching creditor, where a sheriff pays money to subsequent lienor by order of court, which order is subsequently reversed; Haebler v. Myers, 132 N. Y. 363, 30 N. E. 963, 15 L. R. A. 588, 28 Am. St. Rep. 589; or where one purchases a bond relying on the seller's recommendation that it is good, when in fact it is worthless; Ripley v. Case, 86 Mich. 261, 49 N. W. 46.

The action may be brought for a sum specified in the promise of the defendant, or for the definite amount of money ascertained by computation to be due, or for as much as the services, etc., were worth (called a *quantum meruit*), or for the value of the goods, etc. (called a *quantum valebant*). The value of services performed under a contract void by the statute of frauds is recoverable on *quantum meruit;* Lapham v. Osborne, 20 Nev. 168, 18 Pac. 881; Wonsettler v. Lee, 40 Kan. 367, 19 Pac. 862; a city is liable for water supplied after termination of the contract; Wilson v. City of Charlotte, 110 N. C. 449, 14 S. E. 961; one hired to do work, but who is wrongfully stopped, may recover on *quantum meruit* what the labor is worth, regardless of its value to the other party; Mooney v. Iron Co., 82 Mich. 263, 46 N. W. 376.

The *form* of the action, whether general

or special, depends upon the nature of the undertaking of the parties, whether it be express or implied, and upon other circumstances. In many cases where there has been an express agreement between the parties, the plaintiff may neglect the special contract and sue in general assumpsit. He may do this: *first*, where the contract is executed; 5 B. & C. 628; Robertson v. Lynch, 18 Johns. (N. Y.) 451; Baker v. Corey, 19 Pick. (Mass.) 496; Perkins v. Hart, 11 Wheat. (U. S.) 237, 6 L. Ed. 463; Cochran v. Tatum, 3 T. B. Monr. (Ky.) 405; Coursey v. Covington, 5 Harr. & J. (Md.) 45; Wood v. Gee, 3 McCord (S. C.) 421; Hancock v. Ross, 18 Ga. 364; and is for the payment of money; Brooks v. Scott's Ex'r, 2 Munf. (Va.) 344; Cochran v. Tatum, 1 J. J. Marsh. (Ky.) 394; Cochran v. Tatum, 3 T. B. Monr. (Ky.) 405; Morse v. Potter, 4 Gray (Mass.) 292; though if a time be fixed for its payment, not until the expiration of that time; 1 Stark. 229; *second*, where the contract, though only partially executed, has been abandoned by mutual consent; 7 Term 181; Mead v. Degloyer, 16 Wend. (N. Y.) 632; Tebbetts v. Haskins, 16 Me. 283; Adams v. Pugh, 7 Cal. 150; or extinguished and rescinded by some act of the defendant; Hoagland v. Moore, 2 Blackf. (Ind.) 167; Jenkins v. Thompson, 20 N. H. 457; *third*, where that which the plaintiff has done has been performed under a special agreement, but not in the time or manner agreed, but yet has been beneficial to the defendant and has been accepted and enjoyed by him; 1 Bingh. 34; Taft v. Inhabitants of Montague, 14 Mass. 282, 7 Am. Dec. 215; Watchman v. Crook, 5 Gill & J. (Md.) 240; McKinney v. Springer, 3 Ind. 59, 54 Am. Dec. 470; Epperly v. Bailey, 3 Ind. 72; Allen v. McKibbin, 5 Mich. 449; Cole v. Clarke, 8 Wis. 323; see 2 Sm. Lead. Cas. 14; Miller v. Phillips, 31 Pa. 218.

A surety who has paid money for his principal may recover upon the common counts, though he holds a special agreement of indemnity from the principal; Gibbs v. Bryant, 1 Pick. (Mass.) 118. But in general, except as herein stated, if there be a special agreement, special assumpsit must be brought thereon; Sherman v. R. Co., 22 Barb. (N. Y.) 239; Maynard v. Tidball, 2 Wis. 34.

The declaration should state the contract in terms, in case of a special assumpsit; but, in general, assumpsit contains only a general recital of consideration, promise, and breach. Several of the common counts are frequently used to describe the same cause of action. Damages should be laid in a sufficient amount to cover the amount of the claim; see 2 Const. S. C. 339; Beverley v. Holmes, 4 Munf. (Va.) 95; Benden v. Manning, 2 N. H. 289; Bailey v. Freeman, 4 Johns. (N. Y.) 280; Hendrick v. Seely, 6 Conn. 176; People's Bank v. Adams, 43 Vt. 195; Davisson v. Ford, 23 W. Va. 617.

Non assumpsit is the usual plea, under which the defendant may give in evidence most matters of defence; Com. Dig. *Pleader* (2 G, 1). Under that plea it may be shown that no such promise as alleged was made or is implied, or that the promise if made was void; but defences which from their nature admit a promise and set up a subsequent performance or avoidance as, e. g. payment, set off, statute of limitations, should be pleaded specially, in the absence of a statutory definition of the effect of the general plea, which exists in many states. Where there are several defendants, they cannot plead the general issue severally; Meagher v. Bachelder, 6 Mass. 444; nor the same plea in bar severally; Ward v. Johnson, 13 Mass. 152. The plea of not guilty is defective, but is cured by verdict; King v. McDaniel, 4 Call (Va.) 451.

See, generally, Bacon, Abr.; Comyns, Dig., *Action upon the case upon assumpsit;* Dane, Abr.; Viner, Abr.; 1 Chit. Pl.; Lawes, Assump.; 1 Greenl. Ev.; Lawson, Encyc. of Pl. & Pr.; 1 Sm. Lead. Cas. 282, note to Lampleigh v. Braithwaite; Select Essays in Anglo-American Leg. Hist. vol. 3; COVENANT; DEBT; JUDGMENT.

ASSUMPTION OF RISK. See NEGLIGENCE; MASTER AND SERVANT; EMPLOYERS' LIABILITY.

ASSURANCE. Any instrument which confirms the title to an estate. Legal evidence of the transfer of property. 2 Bla. Com. 294; [1896] 1 Ch. 468.

The term *assurances* includes, in an enlarged sense, all instruments which dispose of property, whether they be the grants of private persons, or not; such are fines and recoveries, and private acts of the legislature. Eunom. Dial. 2, s. 5.

In Commercial Law. Insurance.

ASSURED. A person who has been insured by some insurance company or underwriter, against the losses or perils mentioned in the policy of insurance.

The party whom the underwriters agree to indemnify in case of loss. 1 Phill. Ins. § 2. He is sometimes designated in maritime insurance by description, and not by name, as in a policy "for whom it may concern;" Haynes v. Rowe, 40 Me. 181; Cobb v. Ins. Co., 6 Gray (Mass.) 192; Myers v. Ins. Co., 27 Pa. 268, 67 Am. Dec. 462; Blanchard v. Ins. Co., 33 N. H. 9; Augusta Ins. & Banking Co. of Georgia v. Abbott, 12 Md. 348. See INSURANCE.

ASSURER. An insurer; an underwriter.

ASTRARIUS HÆRES (from *astre*, the hearth of a chimney). Where the ancestor by conveyance hath set his heir apparent and his family in a house in his lifetime. Cunningham, L. Dict.

ASTRIHILTET. In Saxon Law. A penalty for a wrong done by one in the king's

peace. The offender was required to replace the damage twofold. Spelman, Gloss.

ASYLUM. A refuge; a place of retreat and security. An establishment for the detention and cure of persons suffering from mental disease—and also a place for the reception and bringing up of desolate orphans. That some of its inmates are to be orphans will not impart to the institution generally the character of an orphan asylum; [1899] A. C. 107. It is not an educational institution; State v. Bacon, 6 Neb. 286.

In International Law. 1. A place of refuge for fugitive offenders. Every sovereign state has the right to offer an asylum to fugitives from other countries, but there is no corresponding right on the part of the alien to claim asylum. In recent years this right of asylum has been voluntarily limited by most states by treaties providing for the extradition (*q. v.*) of fugitive criminals.

Owing to the privilege of ex-territoriality (*q. v.*) possessed by ambassadors, their residences were in former times frequently made an asylum for fugitive criminals. Although claimed by, and often conceded to, ambassadors, this right of asylum was not definitely recognized, and Grotius, in 1625, does not admit it as part of the law of nations (II, c. 18, § 8). In 1726, when the Spanish Government arrested the Duke of Ripperda, who had taken refuge in the residence of the British Embassy, the British Government complained of the act as a violation of international law (Causes Célèbres, 1, 178). Within the past century the right of asylum has been rarely exercised, except in Central and South American countries and in the Orient, where it has been frequently granted to political refugees. Even in those countries the United States has discouraged its ministers from granting asylum, though it has not absolutely prohibited it.

The qualified privilege of ex-territoriality possessed by public vessels of a state in foreign waters has led them at times to exercise the right of asylum, but international comity requires that this privilege be not abused; and it can, in no case, be exercised by merchant vessels. II, Moore, §§ 291–307.

2. In time of war, a place of refuge in neutral territory for belligerent war-ships. See NEUTRALITY.

AT. Expresses position attained by motion to, and hence contact, contiguity or coincidence, actual or approximate, in space or time. Being less restricted as to relative position than other prepositions, it may in different constructions assume their office, and so become equivalent according to the context to in, on, near, by, about, under, over, through, from, to, toward, etc. Cent. Dict.

AT LARGE. Open to discussion or controversy; not precluded.

A congressman at large is one who is elected by electors of an entire state.

See POUND; RUNNING AT LARGE; ANIMAL.

AT LAW. According to the course of the common law. In the law.

ATAMITA. In Civil Law. A great-great-great-grandfather's sister.

ATAVUNCULUS. In Civil Law. A great-great-great-grandfather's brother.

ATAVUS. In Civil Law. The male ascendant in the fifth degree.

ATHA. In Saxon Law. (Spelled also *Atta, Athe, Atte.*) An oath. Cowell; Spelman, Gloss.

Athes, or *Athaa*, a power or privilege of exacting and administering an oath in certain cases. Cowell; Blount.

ATHEIST. One who denies or does not believe in the existence of a God.

Such persons are, at common law, incapable of giving testimony under oath, and are therefore, incompetent witnesses; but the disability is now largely removed. See WITNESS.

ATILIUM. Tackle; the rigging of a ship; plough-tackle. Spelman, Gloss.

ATMATERTERA (Lat.). **In Civil Law.** A great-great-great-grandmother's sister.

ATTACHÉ. One attached to an embassy or a legation at a foreign court.

ATTACHMENT. Taking into the custody of the law the person or property of one already before the court, or of one whom it is sought to bring before it.

A writ for the accomplishment of this purpose. This is the more common sense of the word.

It is in its nature, but not strictly, a proceeding *in rem;* since that only is a proceeding *in rem* in which the process is to be served on the thing itself, and the mere possession of the thing, by the service of process and making proclamation, authorizes the court to decide upon it without notice to any individual whatever; Drake, Att. § 4 *a;* Megee v. Beirne, 39 Pa. 50; Bray v. McClury, 55 Mo. 128.

Of Persons. A writ issued by a court of record, commanding the sheriff to bring before it a person who has been guilty of contempt of court, either in neglect or abuse of its process or of subordinate powers; 3 Bla. Com. 280; 4 *id.* 283; or disregard of its authority in refusing to do what is enjoined; 1 Term 266; or by openly insulting the court; 4 Bla. Com. 283; 3 *id.* 17. It is to some extent in the nature of a criminal process; Stra. 441. See State v. McDermott, 10 N. J. L. 63; Bacon v. Wilber, 1 Cow. (N. Y.) 121, n.; 1 Term 266.

See ARREST.

Of Property. A writ issued at the institution or during the progress of an action, com

manding the sheriff or other proper officer to attach the property, rights, credits, or effects of the defendant to satisfy the demands of the plaintiff.

It is a process which secures jurisdiction of the defendant, not by personal service, but by the seizure of his property. It may be either a foreign attachment, which is founded upon the absence or nonresidence of the defendant, or a domestic attachment, which, under various state statutes, is provided for, either as the beginning, or in the course of a suit. The proceedings in both classes of cases are usually, in substance, the same.

The origin of the law of attachment, as administered in the United States, is found in one of the customs of London, "which is agreed by all authorities to have a very ancient existence." Drake, Att. § 1. With other customs of London, it has, from time to time, been confirmed by Royal Charter and Acts of Parliament, and is declared "never to become obsolete by non-user or abuser"; *id.* The authority cited notes the curious fact respecting the customs of London that they were certified and recorded by word of mouth, and that the mayor and aldermen should declare whether the things under dispute were a custom or not, and that having been once recorded, they were afterwards to be judicially noticed. Locke, in his treatise on Attachment, according to the custom of London, attributes its origin to the Roman Law, quoting from Wilson's Adams, Rom. Antiq. 194, in support of his theory and passage, which is reproduced in a note to the section of Drake cited. In that and the subsequent sections will be found what is known of the remedy thus derived, which, as is there suggested, was found peculiarly adapted to our circumstances in the United States growing out of the division of the country into states, each sovereign, the unrestrained opportunity of transit from one to another and the expansion of credit and abolition of imprisonment for debt. All of these causes contributed to the adoption of a system of remedies for acting directly upon the property of debtors. The proceeding appears to be devoid of almost every feature of a common law proceeding, there being no service of process on the defendant, the seizure of his property *in limine*, and not under execution, and the appropriation of debts due to the defendant for the payment of his own debt, as well as the provision for the protection of the defendant by pledges to refund the amount so collected, if, within a specified time, there be an appearance and the debt be disproved; *id.* § 4. See CUSTOMS OF LONDON.

The original design of this writ was to secure the appearance of one who had disregarded the original summons, by taking possession of his property as a pledge; 3 Bla. Com. 280.

By an extension of this principle, in the New England states, property attached remains in the custody of the law after an appearance, until final judgment in the suit. See Bond v. Ward, 7 Mass. 127, 5 Am. Dec. 28.

In some states attachments are distinguished as foreign and domestic,—the former issued against a non-resident of the state, the latter against a resident. Where this distinction is preserved, the foreign attachment enures solely to the benefit of the party suing it out; while the avails of the domestic attachment may be shared by other creditors, who come into court and present their claims for that purpose.

It is a distinct characteristic of the whole system of remedy by attachment, that it is—except in some states where it is authorized in chancery—a special remedy at *law*, belonging exclusively to a court of law, and to be resorted to and pursued in conformity with the terms of the law conferring it; and where from any cause the remedy by attachment is not full and complete, a court of equity has no power to pass any order to aid or perfect it; Drake, Att. § 4.

In the New England states the attachment of the defendant's property, rights, and credits is an incident of the summons in all actions *ex contractu*. This is called Trustee Process, *q. v.* Elsewhere throughout the country the writ issues only upon cause shown by affidavit. And in most of the states its issue must be preceded by the execution by or on behalf of the plaintiff of a cautionary bond to pay the defendant all damage he may sustain by reason of the attachment. The grounds upon which the writ may be obtained vary in the different states. Wherever an affidavit is required as the basis of the attachment, it must verify the plaintiff's cause of action, and also the existence of some one or more of the grounds of attachment prescribed by the local statute as authorizing the issue of the writ.

Among the grounds upon which attachments are usually permitted by statute, the most frequent and universal is non-residence in the state, which is the primary basis for the issue of a foreign attachment; with respect to this ground, however, a man may have two residences in different states; Barron v. Burke, 82 Ill. App. 116; Rosenzweig v. Wood, 30 Misc. 297, 63 N. Y. Supp. 447. Then again, in most jurisdictions, attachments may be levied against the property of absconding debtors, either actual; Stewart v. Lyman, 62 App. Div. 182, 70 N. Y. Supp. 936; or intentional; Stock v. Reynolds, 121 Mich. 356, 80 N. W. 289; Stouffer v. Niple, 40 Md. 477; and this intention must be shown; Hanson v. Tompkins, 2 Wash. 508, 27 Pac. 73; one has been held to be an absconding debtor who conceals himself; Stafford v. Mills, 57 N. J. L. 574, 32 Atl. 7; or absents himself so as to prevent the service of ordinary process upon him; Ellington v. Moore, 17 Mo. 424.

Other grounds upon which attachment is permitted in some states are: The fraudulent incurring of a debt under contract; Merchants' Bank of Cleveland v. Ins. & Trust Co., 12 Ohio Dec. (Rep.) 738; fraudulently removing or disposing of property; Bullene v. Smith, 73 Mo. 151; Howard v. Caperon, 3 Willson, Civ. Cas. Ct. App. § 313; or transferring it; Culbertson v. Cabeen, 29 Tex. 247; though in the ordinary course of business; Farris v. Gross, 75 Ark. 391, 87 S. W. 633, 5 Ann. Cas. 616; but the removal must be fraudulent; Dunn v. Claunch, 13 Okl. 577, 76 Pac. 143; and it must be actually, not constructively, fraudulent; Wadsworth v. Laurie, 164 Ill. 42, 45 N. E. 435; the death of a non-resident debtor owning property in the state; Bacchus v. Peters, 85 Tenn. 678, 4 S. W. 833; failing to pay on delivery the price or value of goods delivered where there was a contract so to pay; Harlow v. Sass, 38 Mo. 34; Miller v. Godfrey, 1 Colo. App. 177, 27 Pac. 1016; the fact that a demand is not otherwise secured, or that security given has become worthless; Williams v. Hahn, 113 Cal. 475, 45 Pac. 815 (but not if the security was originally worthless; Barbieri v. Ramelli, 84 Cal. 154, 23 Pac. 1086); the failure to pay for labor performed when it should have been paid at the time; De Lappe v. Sullivan, 7 Colo. 182, 2 Pac. 926.

The remedy by attachment is allowed in general only to a *creditor*. In some states, under special statutory provisions, damages arising *ex delicto* may be sued for by attachment; but the almost universal rule is otherwise. The claim of an attaching creditor, however, need not be so certain as to fall within the technical definition of a debt, or as to be susceptible of liquidation without the intervention of a jury. It is sufficient if the demand arise on contract, and that the contract furnish a standard by which the amount due could be so clearly ascertained as to enable the plaintiff to aver it in his affidavit, or the jury by their verdict to find it; Van Winkle v. Ketcham, 3 Cal. (N. Y.) 323; Fisher v. Consequa, 2 Wash. C. C. 382, Fed. Cas. No. 4,816; Wilson v. Wilson, 8 Gill (Md.) 192, 50 Am. Dec. 685; Weaver v. Puryear, 11 Ala. 941; Jones v. Buzzard, 2 Ark. 415; Templin v. Krahn, 3 Ind. 374; Roelofson v. Hatch, 3 Mich. 277.

Some of the causes of action in tort upon which, in the absence of a statute, attachments have not been permitted are: Trover; Hynson v. Taylor, 3 Ark. 552; breach of promise of marriage; Phillips 527; a steamboat collision; Griswold v. Sharpe, 2 Cal. 17; trespass; Ferris v. Ferris, 25 Vt. 100; assault and battery; Thompson v. Carper, 11 Humph. (Tenn.) 542; Minga v. Zollicoffer, 23 N. C. 278; loss of profits resulting from the failure of the defendant to dispose properly of a return cargo; Warwick v. Chase, 23 Md. 154; malicious prosecution; Tarbell v. Bradley, 27 Vt. 535; Stanly v. Ogden, 2 Root (Conn.) 259; damage for loss of property by a common carrier declared on in tort; Piscataqua Bank v. Turnley, 1 Miles (Pa.) 312; money embezzled and lost in gambling; Babcock v. Briggs, 52 Cal. 502; misbehavior in office, where there was no bond and the action is in tort; Dunlop v. Keith, 1 Leigh (Va.) 430, 19 Am. Dec. 755; expense and loss of time caused by a wound inflicted by defendant; Prewitt v. Carmichael, 2 La. Ann. 943; breaking open a letter entrusted to the care of defendant; Raver v. Webster, 3 Ia. 502, 66 Am. Dec. 96; slander; Sargeant v. Helmbold, Harper (S. C.) 219; Baune v. Thomassin, 6 Mart. N. S. (La.) 563; destruction by fire of plaintiff's property caused by the negligence of the defendant; Handy v. Brong, 4 Neb. 60. If the plaintiff alleged a cause of action on a contract and it appears from the pleadings or the evidence not to be such, it should be dismissed; Elliott v. Jackson, 3 Wis. 649.

In some states an attachment may, under peculiar circumstances, issue upon a debt not yet due and payable; but in such cases the debt must possess an actual character to become due *in futuro*, and not be merely possible and dependent on a contingency, which may never happen; Smead v. Chrisfield, 1 Handy (Ohio) 442. An attachment can be sued out in equity against an absconding debtor by the accommodation maker of a negotiable note not yet due; Altmeyer v. Caulfield, 37 W. Va. 847, 17 S. E. 409.

Corporations, like natural persons, may be proceeded against by attachment; Libbey v. Hodgdon, 9 N. H. 394; Bushel v. Ins. Co., 15 S. & R. (Pa.) 173; Bank of United States v. Bank, 1 Rob. (Va.) 573; Wilson v. Danforth, 47 Ga. 676; St. Louis Perpetual Ins. Co. v. Cohen, 9 Mo. 421; Planters' & Merchants' Bank of Mobile v. Andrews, 8 Porter (Ala.) 404; Mineral Point R. Co. v. Keep, 22 Ill. 9, 74 Am. Dec. 124. It will lie against a corporation for the conversion of its own stock; Condouris v. Cigarette Co., 3 Misc. 66, 22 N. Y. Supp. 695.

Representative persons, such as heirs, executors, administrators, trustees, and others, claiming merely by right of representation, are not liable to be proceeded against, as such, by attachment; Jackson v. Walsworth, 1 Johns. Cas. (N. Y.) 372; Peacock v. Wildes, 8 N. J. Law 179; McCoombe v. Dunch, 2 Dall. (U. S.) 73, 1 L. Ed. 294; Taliaferro v. Lane, 23 Ala. 369; Patterson v. McLaughlin, 1 Cra. 352, Fed. Cas. No. 10,828; Metcalf v. Clark, 41 Barb. (N. Y.) 45; Smith v. Riley, 32 Ga. 356; Levy v. Succession of Lehman, 38 La. Ann. 9; Bryant v. Fussel, 11 R. I. 286.

Goods in the hands of a common carrier are not exempt from attachment, and, when it is pending, the carrier is not justified in giving them up to the consignor, as the right of the officer to hold them is to be determined by the court out of which the attachment issued; Stiles v. Davis, 1 Black (U. S.) 101, 17

L. Ed. 33; but goods in transit to another state cannot be attached, whether without the state, when the seizure was made (the carriers being within the jurisdiction); Bates v. R. Co., 60 Wis. 296, 19 N. W. 72, 50 Am. Rep. 369; Western R. R. v. Thornton, 60 Ga. 300; Sutherland v. Bank, 78 Ky. 250; Stevenot v. R. Co., 61 Minn. 104, 63 N. W. 256, 28 L. R. A. 600; or still within the state, and not moved from the starting point, but loaded for movement; Baldwin v. R. Co., 81 Minn. 247, 83 N. W. 986, 51 L. R. A. 640, 83 Am. St. Rep. 370. Obedience to attachment process does not deprive the carrier of his right to his charges for services to the shipper, and he may retain possession of the goods until the charges are paid; Rucker v. Donovan, 13 Kan. 251, 19 Am. Rep. 84; Wolfe v. Crawford, 54 Miss. 514.

It is a question whether the personal baggage of a traveller can be reached or affected by attachment; Western R. R. v. Thornton, 60 Ga. 300.

Property in the hands of officers of court cannot be attached, as receivers; Martin v. Davis, 21 Ia. 537; Wiswall v. Sampson, 14 How. (U. S.) 52, 14 L. Ed. 322; Columbian Book Co. v. De Golyer, 115 Mass. 69; Glenn v. Gill, 2 Md. 1; Taylor v. Gillean, 23 Tex. 508; Field v. Jones, 11 Ga. 413; Nelson v. Conner, 6 Rob. (La.) 339; Langdon v. Lockett, 6 Ala. 727, 41 Am. Dec. 78; Farmers' Bank of Delaware v. Beaston, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226; Gouverneur v. Warner, 2 Sandf. (N. Y.) 624; Yuba County v. Adams, 7 Cal. 35; Bentley v. Shrieve, 4 Md. Ch. 412; Robinson v. R. Co., 66 Pa. 160; an assignee in bankruptcy; In re Cunningham, 19 N. B. R. 276, Fed. Cas. No. 3478; or a sheriff; Bradley v. Kesee, 5 Cold. (Tenn.) 223, 94 Am. Dec. 246.

The levy of an attachment does not change the estate of the defendant in the property attached; Bigelow v. Willson, 1 Pick. (Mass.) 485; Starr v. Moore, 3 McLean 354, Fed. Cas. No. 13,315; Perkins' Heirs v. Norvell, 6 Humphr. (Tenn.) 151; Snell v. Allen, 1 Swan. (Tenn.) 208; Oldham v. Scrivener, 3 B. Monr. (Ky.) 579; Sammis v. Sly, 54 Ohio St. 511, 44 N. E. 508, 56 Am. St. Rep. 731. Nor does the attaching plaintiff acquire any property thereby; Bigelow v. Willson, 1 Pick. (Mass.) 485; Crocker v. Radcliffe, 3 Brev. (S. C.) 23; Willing v. Bleeker, 2 S. & R. (Pa.) 221; Owings v. Norwood's Lessee, 2 Harr. & J. (Md.) 96; Goddard v. Perkins, 9 N. H. 488. Nor can he acquire through his attachment any higher or better rights to the property attached than the defendant had when the attachment was levied, unless he can show some fraud or collusion by which his rights are impaired; Crocker v. Pierce, 31 Me. 177; Kentucky Refining Co. v. Bank, 89 S. W. 492, 28 Ky. Law Rep. 486.

The levy of an attachment constitutes a lien on the property or credits attached; Goore v. McDaniel, 1 McCord (S. C.) 480; Peck v. Webber, 7 How. (Miss.) 658; Van Loan v. Kline, 10 Johns. (N. Y.) 129; Davenport v. Lacon, 17 Conn. 278; Erskine v. Staley, 12 Leigh (Va.) 406; Moore v. Holt, 10 Gratt. (Va.) 284; Grigg v. Banks, 59 Ala. 311; Hervey v. Champion, 11 Humphr. (Tenn.) 569; Ziegenhager v. Doe, 1 Ind. 296; People v. Cameron, 2 Gilman (Ill.) 468; President, etc., of Franklin Bank v. Bachelder, 23 Me. 60, 39 Am. Dec. 601; Kittredge v. Warren, 14 N. H. 509; Vreeland v. Bruen, 21 N. J. L. 214; Downer v. Brackett, 21 Vt. 599, Fed. Cas. No. 4,043; In re Rowell, 21 Vt. 620, Fed. Cas. No. 12,095; Ingraham v. Phillips, 1 Day (Conn.) 117; Lackey v. Seibert, 23 Mo. 85; Hannahs v. Felt, 15 Ia. 141; Emery v. Hunt, 7 Colo. 107, 1 Pac. 686; Ward v. McKenzie, 33 Tex. 297, 7 Am. Rep. 261; Davis Mill Co. v. Bangs, 6 Kan. App. 38, 49 Pac. 628; Beardslee v. Ingraham, 183 N. Y. 411, 76 N. E. 476, 3 L. R. A. (N. S.) 1073; Perry v. Griefen, 99 Me. 420, 59 Atl. 601. But, as the whole office of an attachment is to seize and hold property until it can be subjected to execution, this lien is of no value unless the plaintiff obtain judgment against the defendant and proceed to subject the property to execution.

Where two or more separate attachments are levied simultaneously on the same property, they will be entitled each to an aliquot part of the proceeds of the property; Durant v. Johnson, 19 Pick. (Mass.) 544; Campbell v. Ruger, 1 Cow. (N. Y.) 215; Nutter v. Connet, 3 B. Monr. (Ky.) 201; True v. Emery, 67 Me. 28; Wilson v. Blake, 53 Vt. 305; Thurston v. Huntington, 17 N. H. 438; see Love v. Harper, 4 Humphr. (Tenn.) 113; Yelverton v. Burton, 26 Pa. 351. Where several attachments are levied successively on the same property, they have priority in the order in which they are sued out; Lutter & Voss v. Grosse, 82 S. W. 278, 26 Ky. L. Rep. 585; and a junior attaching creditor may impeach a senior attachment, or judgment thereon, for fraud; Pike v. Pike, 24 N. H. 384; Walker v. Roberts, 4 Rich. (S. C.) 561; McCluny v. Jackson, 6 Gratt. (Va.) 96; Smith v. Gettinger, 3 Ga. 140; Reed v. Ennis, 4 Abb. Pr. (N. Y.) 393; Hale v. Chandler, 3 Mich. 531; but not on account of irregularities; Kincaid v. Neall, 3 McCord (S. C.) 201; Camberford v. Hall, 3 McCord (S. C.) 345; Walker v. Roberts, 4 Rich. (S. C.) 561; In re Griswold, 13 Barb. (N. Y.) 412.

By the levy of an attachment upon personalty, the officer acquires a special property therein, which continues so long as he remains liable therefor, either to have it forthcoming to satisfy the plaintiff's demand, or to return it to the owner upon the attachment being dissolved, but no longer; Barker v. Miller, 6 Johns. (N. Y.) 195; Gates v. Gates, 15 Mass. 310; Poole v. Symonds, 1 N. H. 289, 8 Am. Dec. 71; Nichols v. Valentine, 36 Me. 322; Braley v. French, 28 Vt. 546; Foulks v. Pegg, 6 Nev. 136; Stiles v.

Davis, 1 Black (U. S.) 101, 17 L. Ed. 33; Holt v. Burbank, 47 N. H. 164; Wentworth v. Sawyer, 76 Me. 434; Rochester Lumber Co. v. Locke, 72 N. H. 22, 54 Atl. 705. For any violation of his possession, while his liability for the property continues, he may maintain trover, trespass, and replevin; Ludden v. Leavitt, 9 Mass. 104, 6 Am. Dec. 45; Lathrop v. Blake, 23 N. H. 46; Walker v. Foxcroft, 2 Greenl. (Me.) 270; 3 Foster 46; Carroll v. Frank, 28 Mo. App. 69; Whitney v. Ladd, 10 Vt. 165.

As it would often subject an officer to great inconvenience to keep attached property in his possession, he is allowed in the New England states and New York to deliver it over, during the pendency of the suit, to some responsible person, who will give an accountable receipt for it, and who is usually styled a receipter or bailee, and whose possession is regarded as that of the officer, and, therefore, as not discharging the lien of the attachment. This practice is not authorized by statute, but has been so long in vogue in the states where it prevails as to have become a part of their systems; Drake, Att. § 344.

In many states provisions exist, authorizing the defendant to retain possession of the attached property by executing a bond with sureties for the delivery thereof, either to satisfy the execution which the plaintiff may obtain in the cause, or when and where the court may direct. This bond, like the bailment of attached property, does not discharge the lien of the attachment; Gray v. Perkins, 12 Smedes & M. (Miss.) 622; Rives v. Wilborne, 6 Ala. 45; Evans v. King, 7 Mo. 411; People v. Cameron, 2 Gilman (Ill.) 468; Hagan v. Lucas, 10 Pet. (U. S.) 400, 9 L. Ed. 470; Boyd v. Buckingham, 10 Humphr. (Tenn.) 434. Property thus bonded cannot be seized under another attachment, or under a junior execution; Rives v. Wilborne, 6 Ala. 45; Kane v. Pilcher, 7 B. Monr. (Ky.) 651; Gordon v. Johnston, 4 La. 304.

Provisions also exist in many states for the dissolution of an attachment by the defendant's giving bond and security for the payment of such judgment as the plaintiff may recover. This is, in effect, merely Special Bail. From the time it is given, the cause ceases to be one of attachment, and proceeds as if it had been instituted by summons; Harper v. Bell, 2 Bibb (Ky.) 221; People v. Cameron, 2 Gilman (Ill.) 468; Fife v. Clarke, 3 McCord (S. C.) 347; Reynolds v. Jordan, 19 Ga. 436; Drake, Att. § 312.

One holding property by virtue of a forthcoming bond may sue for its destruction; Louisville & N. R. Co. v. Brinkerhoff, 119 Ala. 606, 24 South. 892. The execution of the bond does not discharge the attachment or levy, but the property is still in contemplation of law in the possession of the court; Hobson & Co. v. Hall, 10 Ky. L. Rep. 635.

An attachment is dissolved by a final judgment for the defendant; Suydam v. Huggeford, 23 Pick. (Mass.) 465; Johnson v. Edson, 2 Aik. (Vt.) 299; Brown v. Harris, 2 G. Greene (Ia.) 505, 52 Am. Dec. 535; it may be dissolved, on motion, on account of defects in the plaintiff's proceedings, apparent on their face; but not for defects which are not so apparent; Baldwin v. Conger, 9 Smedes & M. (Miss.) 516. Every such motion must precede a plea to the merits; Garmon v. Barringer, 19 N. C. 502; Young v. Gray, Harp. (S. C.) 38; Stoney v. McNeill, Harp. (S. C.) 156; Watson v. McAllister, 7 Mart. O. S. (La.) 368; Symons v. Northern, 49 N. C. 241; Drakford v. Turk, 75 Ala. 339; Memphis, C. & L. R. Co. v. Wilcox, 48 Pa. 161. The death of the defendant *pendente lite* is held in some states to dissolve the attachment; Sweringen v. Eberlus' Adm'r, 7 Mo. 421, 38 Am. Dec 463; Vaughn v. Sturtevant, 7 R. I. 372; Phillips v. Ash's Heirs and Adm'rs, 63 Ala. 414 (but not after judgment; Fitch v. Ross, 4 S. & R. [Pa.] 557). And so the civil death of a corporation; Farmers' & Mechanics' Bank v. Little, 8 W. & S. (Pa.) 207, 42 Am. Dec. 293; Paschall v. Whitsett, 11 Ala. 472. Not so, however, the bankruptcy of the defendant; Downer v. Brackett, 21 Vt. 599, Fed. Cas. No. 4,043; President, etc., of Franklin Bank v. Bachelder, 23 Me. 60, 39 Am. Dec. 601; Kittredge v. Warren, 14 N. H. 509; Davenport v. Tilton, 10 Metc. (Mass.) 320; Vreeland v. Bruen, 21 N. J. L. 214; Wells' v. Brander, 10 Smedes & M. (Miss.) 348; Hill v. Harding, 93 Ill. 77.

In those states where under a summons property may be attached if the plaintiff so directs, the defendant has no means of defeating the attachment except by defeating the action; but in some states, where an attachment does not issue except upon stated grounds, provision is made for the defendant's contesting the validity of the alleged grounds; while in other states it is held that he may do so, as a matter of right, without statutory authority; Morgan v. Avery, 7 Barb. (N. Y.) 656; Campbell v. Morris, 3 Harr. & McH. (Md.) 535; Havis v. Trapp, 2 Nott & McC. (S. C.) 130; Harris v. Taylor, 3 Sneed (Tenn.) 536, 67 Am. Dec. 576; Voorhees v. Hoagland, 6 Blackf. (Ind.) 232.

As to the attachment of property or indebtedness held by or owing from a third person, see GARNISHMENT.

ATTACHMENT OF THE FOREST. See COURT OF ATTACHMENT.

ATTACHMENT OF PRIVILEGE. A process by which a man, by virtue of his privilege, calls another to litigate in that court to which he himself belongs, and who has the privilege to answer there.

A writ issued to apprehend a person in a privileged place. *Termes de la Ley.*

ATTAINDER. That extinction of civil rights and capacities which takes place

whenever a person who has committed treason or felony receives sentence of death for his crime. 1 Steph. Com. 408; 1 Bish. Cr. L. § 641.

Attainder by confession is either by pleading guilty at the bar before the judges, and not putting one's self on one's trial by a jury, or before the coroner in sanctuary, when, in ancient times, the offender was obliged to abjure the realm.

Attainder by verdict is when the prisoner at the bar pleads not guilty to the indictment, and is pronounced guilty by the verdict of the jury.

Attainder by process or *outlawry* is when the party flies, and is subsequently outlawed. Coke, Litt. 391.

The effect of attainder upon a felon is, in general terms, that all his estate, real and personal, is forfeited; that his blood is corrupted, so that nothing passes by inheritance to, from, or through him; 1 Wms. Saund. 361, n.; 6 Coke 63 *a*, 68 *b*; 2 Rob. Eccl. 547; 22 Eng. L. & Eq. 598; that he cannot sue in a court of justice; Co. Litt. 130 *a*. See 1 Bish. Cr. Law, § 641.

In England, by statute 33 & 34 Vict. c. 23, attainder upon conviction, with consequent corruption of blood, forfeiture, or escheat, is abolished.

In the United States, the doctrine of attainder is now scarcely known, although during and shortly after the Revolution acts of attainder were passed by several of the states. The passage of such bills is expressly forbidden by the constitution.

Under the Confiscation Act of July 17, 1862, which imposed the penalty of confiscation of property as a punishment for treason and rebellion, all that could be sold was a right to the property seized, terminating with the life of the person for whose offence it was seized; Bigelow v. Forrest, 9 Wall. (U. S.) 339, 19 L. Ed. 696.

ATTAINT. Attainted, stained, or blackened.

A writ which lies to inquire whether a jury of twelve men gave a false verdict. Bracton, l. 4, tr. 1, c. 134; Fleta, l. 5, c. 22, § 8.

Formerly the jury were rather witnesses than judges; a false verdict would be perjury. The aggrieved party procured a writ of attaint. The case was tried before 24 jurors, usually knights. The penalty on conviction was one year's imprisonment, forfeiture of goods, etc. Its origin is uncertain; it appears on the record of the King's Court in 1202. It was limited to the possessory assizes (see ASSIZE OF NOVEL DISSEISIN), but by 1360 it had been extended to all classes of cases. It came to be the rule that the attaint jury must have before it the evidence on which the first jury founded its verdict, but the first jury could produce new evidence. Before 1565 it was seldom in use; it was abolished in 1825. 1 Holdsw. Hist. E. L. 161.

ATTEMPT. An endeavor to accomplish a crime carried beyond mere preparation, but falling short of execution of the ultimate design in any part of it. Com. v. McDonald, 5 Cush. (Mass.) 367; Griffin v. State, 26 Ga. 493.

An intent to do a particular criminal thing combined with an act which falls short of the thing intended. 1 Bish. Cr. Law § 728; Johnson v. State, 14 Ga. 55; State v. Marshall, 14 Ala. 411; People v. Lawton, 56 Barb. (N. Y.) 126; Cunningham v. State, 49 Miss. 685.

"An attempt, in general, is an overt act done in pursuance of an intent to do a specific thing, tending to the end, but falling short of complete accomplishment of it."

"In law, the definition must have this further qualification, that the overt act must be sufficiently proximate to the intended crime to form one of the natural series of acts which the intent requires for its full execution." Mitchell, J., in Com. v. Eagan, 190 Pa. 10, 21, 42 Atl. 374, 377.

To constitute an attempt, there must be an intent to commit some act which would be indictable, if done, either from its own character of that of its natural and probable consequences; State v. Jefferson, 3 Harr. (Del.) 571; Moore v. State, 18 Ala. 532, People v. Shaw, 1 Park. Cr. Cas. (N. Y.) 327; Davidson v. State, 9 Humphr. (Tenn.) 455; 9 C. & P. 518; 1 Crawf. & D. 156, 186; 1 Bish. Cr. Law § 731; an act apparently adapted to produce the result intended; Whart. Cr. L. § 182; State v. Clarissa, 11 Ala. 57; Com. v. Manley, 12 Pick. (Mass.) 173; Dunbar v. Harrison, 18 Ohio St. 32; State v. Rawles, 65 N. C. 334; Kunkle v. State, 32 Ind. 220; U. S. v. Morrow, 4 Wash. C. C. 733, Fed. Cas. No. 15,819; Rasnick v. Com., 2 Va. Cas. 356; 6 C. & P. 403; 1 Leach 19 (though some cases require a complete adaptation; 1 Bish. Cr. L. 749); an act immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution; 1 F. & F. 511; including solicitations of another; 2 East 5; People v. Bush, 4 Hill (N. Y.) 133; State v. Avery, 7 Conn. 266, 18 Am. Dec. 105; Com. v. Harrington, 3 Pick. (Mass.) 26; U. S. v. Worrall, 2 Dall. (U. S.) 384, 1 L. Ed. 426; but mere solicitation, not directed to the procurement of some specific crime, is not an attempt; Whart. Cr. L. 179; see SOLICITATION; and the crime intended must be at least a misdemeanor; 1 C. & M. 661, n.; Respublica v. Roberts, 1 Dall. (U. S.) 39, 1 L. Ed. 27. An abandoned attempt, there being no outside cause prompting the abandonment, is not indictable; Whart. Cr. L. § 137.

It has been held that an attempt to commit a crime, which could not, under the circumstances, be consummated, is not a criminal attempt; Dears. & B. C. C. 197; 9 Cox C. C. 497; People v. Moran, 123 N. Y. 254, 25 N. E. 412, 10 L. R. A. 109, 20 Am. St. Rep. 732; *contra*, 38 W. R. 95 (where in a remark which seems both *obiter* and casual,

the Court of Cr. Cas. Res. disapproves the earlier English cases); Com. v. McDonald, 5 Cush. (Mass.) 365; People v. Jones, 46 Mich. 441, 9 N. W. 486; State v. Wilson, 30 Conn. 500; Rogers v. Com., 5 S. & R. (Pa.) 463; Hamilton v. State, 36 Ind. 280, 10 Am. Rep. 22. These are commonly known as the "pickpocket cases," but the doctrine that one may be guilty of an attempt to commit a crime, when it was for some reason unknown to the perpetrator, impossible, has been applied in cases of other crimes, as homicide; People v. Lee Kong, 95 Cal. 666, 30 Pac. 800, 17 L. R. A. 626, 29 Am. St. Rep. 165; bribery; Ex parte Bozeman, 42 Kan. 451, 22 Pac. 628; State v. Mitchell, 170 Mo. 633, 71 S. W. 175, 94 Am. St. Rep. 763; obtaining by false pretense; 11 Cox C. C. 570; extortion; People v. Gardner, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. Rep. 741; burglary, where there was no property on the premises which could be stolen; State v. Beal, 37 Ohio St. 108, 41 Am. Rep. 490; abortion, where the woman was not pregnant; 2 Cox C. C. 41; but not where the woman was not quick with child when that was required to constitute the offence of procuring an abortion; State v. Cooper, 22 N. J. L. 52, 51 Am. Dec. 248; or where the charge was of an attempt to commit rape where the circumstances were such that if the object had been obtained it would not have been rape; State v. Brooks, 76 N. C. 1; People v. Quin, 50 Barb. (N. Y.) 128; *contra*, 24 Q. B. D. 357; Com. v. Shaw, 134 Mass. 221; Rhodes v. State, 1 Coldw. (Tenn.) 351. The cases on this subject are collected in an article on "Criminal Attempts" by J. H. Beale, Jr., in 16 Harv. L. Rev. 491. See, also, 9 L. R. A. (N. S.) 263, note. The offense may exist though the act may be impossible of accomplishment by the methods employed; Com. v. Kennedy, 170 Mass. 18, 48 N. E. 770.

Mere preparations, though made with criminal intent, do not constitute an attempt; [1903] T. S. 868 (So. Afr.).

An indictment has been upheld upon a criminal intent coupled with an act (procuring dies for counterfeiting) which fell short of an attempt under their statute; 33 E. L. & E. 533. See 1 Bish. Cr. L. § 724.

An attempt to commit a crime was not in itself a crime, in the early common law, but it is now generally made such by statute; and in some cases attempts are specially provided against with reference to particular crimes, as arson. See 4 L. R. A. (N. S.) 417, note, where cases under some state statutes are found. See RAPE; SUICIDE.

ATTENDANT. One who owes a duty or service to another, or in some sort depends upon him. Termes de la Ley.

ATTENDANT TERMS. Long leases or mortgages so arranged as to protect the title of the owner.

To raise a portion for younger children, it was quite common to make a mortgage to trustees. The powers of these trustees were generally to take possession of the estate, or to sell a part of the term if the portions were not duly paid. If the deed did not become *ipso facto* void upon payment of the portion, a release was necessary from the trustees to discharge the mortgage. If this was not given, the term became an outstanding satisfied term. The purchaser from the heir then procured an assignment of the term to trustees for his benefit, which then became a satisfied term to attend the inheritance, or an attendant term. These terms were held attendant by the courts, without any assignment, and operated to defeat intermediate alienations to some extent. There were other ways of creating outstanding terms besides the method by mortgage; but the effect and general operation of all these were essentially the same. By reason of the want of notice, by means of registration, of the making of charges, mortgages, and conveyances of lands, this mode of protecting an innocent purchaser by means of an outstanding term to attend the inheritance came to be very general prior to the 8 & 9 Vict. c. 112, which abolished all such terms as soon as satisfied. 1 Washb. R. P. 311; 4 Kent. 86.

ATTENTAT. Any thing whatsoever wrongfully innovated or attempted in the suit by the judge *a quo*, pending an appeal. Used in the civil and canon law; 1 Add. Eccl. 22, note; Ayliffe, Parerg. 100.

ATTENTION. Consideration; notice. The phrase "your bill shall have attention" was held to be ambiguous and not to amount to an acceptance of the bill; 2 B. & Ald. 113.

ATTERMINARE. To put off to a succeeding term; to prolong the time of payment of a debt. Stat. Westm. 2, c. 4; Cowell; Blount.

ATTERMINING. The granting a time or term for the payment of a debt.

ATTERMOIEMENT. In Canon Law. A making terms; a composition, as with creditors. 7 Low. C. 272, 306.

ATTESTATION. The act of witnessing an instrument in writing, at the request of the party making the same, and subscribing it as a witness. 3 P. Wms. 254; Shanks v. Christopher, 3 A. K. Marsh. (Ky.) 146; Hall v. Hall, 17 Pick. (Mass.) 373.

Deeds, at common law, do not require attestation; 2 Bla. Com. 307; 3 Dane, Abr. 354; Thacher v. Phinney, 7 Allen (Mass.) 149; and there are several states where at common law it was not necessary; Ingram v. Hall, 2 N. C. 205; Dole v. Thurlow, 12 Metc. (Mass.) 157. In many of the states there are statutory requirements on the subject, and where such exist they must be strictly complied with. It is generally safe to have two witnesses, one of whom may be and usually is the officer taking the acknowledgment. See Coit v. Starkweather, 8 Conn. 289, 20 Am. Dec. 110; Stone v. Ashley, 13 N. H. 38; Shults v. Moore, 1 McLean 520, Fed. Cas. No. 12,824; Ross v. Worthington, 11 Minn. 443 (Gil. 323), 88 Am. Dec. 95; 2 Greenl. Ev. § 275, n.; 4 Kent 457. The requisites are not the same in all cases as against the grantor and as against purchasers. See French v. French, 3 N. H. 234.

The attesting witness need not see the grantor write his name: if he sign in the

presence of the grantor, and at his request, it is sufficient; Jar. Wills 87-91; 2 B. & P. 217.

Wills must usually be attested by *competent* or *credible* witnesses; 2 Greenl. Ev. § 691; Hawes v. Humphrey, 9 Pick. (Mass.) 350, 20 Am. Dec. 481; 1 Burr. 414; who must subscribe their names attesting in the presence of the testator; Edelen v. Hardey's Lessee, 7 Harr. & J. (Md.) 61, 16 Am. Dec. 292; Neil v. Neil, 1 Leigh (Va.) 6; 1 Maule & S. 294; 2 Curt. Eccl. 320; 3 *id.* 118; 2 Greenl. Ev. § 678; Snider v. Burks, 84 Ala. 53, 4 South. 225; Mays v. Mays, 114 Mo. 536, 21 S. W. 921. And see Nickerson v. Buck, 12 Cush. (Mass.) 342; 1 Ves. Ch. 11; 2 Washb. R. P. 682; but he need not sign in their presence; Stirling v. Stirling, 64 Md. 138, 21 Atl. 273; Simmons v. Leonard, 91 Tenn. 183, 18 S. W. 280, 30 Am. St. Rep. 875. The term "presence" in a statute requiring the subscription of witnesses to a will to be made in the presence of the testator, means "conscious presence;" Tucker v. Sandidge, 85 Va. 546, 8 S. E. 650.

In some states three witnesses are required to wills devising lands; in the majority of states only two. In Pennsylvania no *attesting* witnesses are required except in wills making gifts to charity, where two credible witnesses, not interested in the charity, are required.

A person may attest a will by making his mark, although the person who writes his name fails to sign his own name as a witness to the mark; Davis v. Semmes, 51 Ark. 48, 9 S. W. 434. Persons signing as witnesses must do so after the testator has signed the will; Brooks v. Woodson, 87 Ga. 379, 13 S. E. 712, 14 L. R. A. 160. If a will is signed by only two witnesses where three are required as to realty, it is inoperative as to the realty but valid as to the personalty; Hays v. Ernest, 32 Fla. 18, 13 South. 451.

ATTESTATION CLAUSE. That clause wherein the witnesses certify that the instrument has been executed before them, and the manner of the execution of the same.

The usual attestation clause to a will is in the following formula, to-wit: "Signed, sealed, published, and declared by the above-named A B, as and for his last will and testament, in the presence of us, who have hereunto subscribed our names as the witnesses thereto, in the presence of the said testator and of each other." That of deeds is generally in these words: "Sealed and delivered in the presence of us."

ATTESTING WITNESS. One who, upon being required by the parties to an instrument, signs his name to it to prove it, and for the purpose of identification. 3 Campb. 232; Jenkins v. Dawes, 115 Mass. 599.

ATTESTOR. One who attests or vouches for.

ATTILE. The rigging or furniture of a ship. Jacob, L. Dict.

ATTORN. To turn over; to transfer to another money or goods; to assign to some particular use or service. Kennet, Paroch. Antiq. 283.

Used of the part taken by the tenant in a transfer of lands; 2 Bla. Com. 288; Littleton § 551. Now used of assent to such a transfer; 1 Washb. R. P. 28 The lord could not alien his land without the consent of the tenant, nor could the tenant assign without the consent of his lord; 2 Bla. Com. 27; 1 Spence, Eq. Jur. 137; 1 Washb. R P. 28, n. Attornment is abolished by various statutes; 1 Washb. R. P. 336; Wms. R. P. 288, 366.

Attornment is the acknowledgment by a tenant of a new landlord on the alienation of the land and an agreement to become the tenant of the purchaser; Lindley v. Dakin, 13 Ind. 388.

The attornment of a tenant to a stranger without consent of the landlord is void; Terry v. Terry, 66 S. W. 1024, 23 Ky. L. Rep. 2242; Blanchard v. Tyler, 12 Mich. 339, 86 Am. Dec. 57; Perkins v. Potts, 53 Neb. 444, 73 N. W. 936.

The doctrine of attornment grew out of the peculiar relations existing between the landlord and his tenant under the feudal law, and the reasons for the rule never had any existence in this country, and is inconsistent with our laws, customs and institutions. Beyond its application to estop a tenant from denying the title of his landlord, it can serve but little, if any, useful purpose; Perrin v. Lepper, 34 Mich. 292.

Recognition by the tenant of the assignee of the landlord and payment of rent to him are a sufficient attornment; Bradley & Co. v. Coal Co., 99 Ill. App. 427; Cummings v. Smith, 114 Ill. App. 35; and so is taking a lease from the landlord's grantee, good from the beginning of accumulations of rent in arrear; Pelton v. Place, 71 Vt. 430, 46 Atl. 63.

A conveyance of the leased land passes to the purchaser the right to collect the rent, and the tenant cannot prevent it by refusing to attorn to him; Edwards v. Clark, 83 Mich. 246, 47 N. W. 112, 10 L. R. A. 659; nor can the tenant dispute his landlord's title and attorn to another while in possession under the lease, and if he desires, after his term expires, to contest his landlord's title, he must first surrender the possession to him; McDowell v. Sutlive, 78 Ga. 142, 2 S. E. 937; Grizzard v. Roberts, 110 Ga. 41, 35 S. E. 291; Stover v. Davis, 57 W. Va. 196, 49 S. E. 1023.

Attornment is not necessary to entitle an assignee of the landlord to demand payment of the rent and to dispossess the tenant; Wetterer v. Soubirous, 22 Misc. 739, 49 N. Y. Supp. 1043; Willis v. Harrell, 118 Ga. 906, 45 S. E. 794. Where there is a statute authorizing summary proceedings by the assignee, etc., of the landlord, the latter cannot maintain them after a conveyance of the demised premises; Boyd v. Sametz, 17 Misc. 728, 40 N. Y. Supp. 1070; but such proceed-

ings may be instituted against the tenant of his grantor by the grantee of the landlord; Doner v. Ingram, 119 Mo. App. 156, 95 S. W. 983; Small v. Clark, 97 Me. 304, 54 Atl. 758; or by an assignee of the lease; Drew v. Mosbarger, 104 Ill. App. 635. It has been held that the action in such cases could not be brought by the purchaser in his own name, but in the name of the vendor for his use; Cooper v. Gambill, 146 Ala. 184, 40 South. 827; and also that a tenant may resist a warrant for forcible detainer brought by one under whom he did not enter; Gray v. Gray, 3 Litt. (Ky.) 468.

To transfer services or homage.

Used of a lord's transferring the homage and service of his tenant to a new lord. Bract. 81, 82; 1 Sullivan, Lect 227.

ATTORNATO FACIENDO VEL RECIPIENDO. A writ to command a sheriff or steward of a county court or hundred court to receive and admit an attorney to appear for the person that owes suit of court. Fitz. N. B. 349.

ATTORNEY. One put in the place, turn, or stead of another, to manage his affairs; one who manages the affairs of another by direction of his principal. Spelman, Gloss.; *Termes de la Ley.*

One who acts for another by virtue of an appointment by the latter. Attorneys are of various kinds.

Attorney in fact. A person to whom the authority of another, who is called the constituent, is by him lawfully delegated.

This term is employed to designate persons who act under a special agency, or a special letter of attorney, so that they are appointed *in factum*, for the deed, or special act to be performed; but in a more extended sense it includes all other agents employed in any business, or to do any act or acts *in pais* for another. Bacon, Abr. *Attorney;* Story, Ag. § 25.

All persons who are capable of acting for themselves, and even those who are disqualified from acting in their own capacity, if they have sufficient understanding, as infants of a proper age, and femes coverts, may act as attorneys of others; Co. Litt. 52 *a*; 1 Esp. 142; 2 *id.* 511.

Attorney-at-law. An officer in a court of justice who is employed by a party in a cause to manage the same for him.

Appearance by an attorney, on behalf of his client, has been allowed in England from the time of the earliest records of the courts of that country. They are mentioned in Glanville, Bracton, Fleta, and Britton; and a case turning upon the party's right to appear by attorney is reported; Y. B. 17 Edw. III. p. 8, case 23. In France such appearances were first allowed by letters patent of Philip le Bel. A. D. 1290; 1 Fournel, *Hist. des. avocats*, 42, 92; 2 Loizel. *Coutumes* 14. It results from the nature of their functions, and of their duties, as well to the court as to the client, that no one can, even by consent, be the attorney of both the litigating parties in the same controversy; Farr. 47. The name of attorney has commonly been applied in this country to those who practise in courts of common law; solicitors, in courts of equity; and proctors, in courts of admiralty.

The two branches of the legal profession were distinguished by Lord Brougham in The Serjeant's Case in 1839: "If you appear by attorney, he represents you, but where you have the assistance of an advocate you are present. . . . . Appearance by an attorney is one thing, but admitting advocates to plead the cause of another is a totally different proceeding." The case is reported in Manning's *Serviens ad Legem.*

As a general rule the eligibility of persons to hold the office of attorney-at-law is settled by local legislation or by rule of court.

The admission of attorneys to practise and their powers, duties and privileges are proper subjects of legislative control to the same extent and subject to the same limitations, as in the case of any other profession or business; Cook v. De La Guerra, 24 Cal. 241; In re Cooper, 22 N. Y. 67. In Robinson's Case, 131 Mass. 376, 41 Am. Rep. 239, this was recognized where a woman applied for admission and was rejected because the statute had not so provided, and it was said that the duty of the courts is limited to declaring the law as it is; and whether any change would be expedient is a legislative question. In In re Applicants for License, 143 N. C. 1, 55 S. E. 635, 10 L. R. A. (N. S.) 288, 10 Ann. Cas. 187, a statute provided that persons possessing certain qualifications should be admitted to the practise of the law. One of these was that such applicant should file with the clerk of the court a certificate of good moral character signed by two attorneys of the court. Protests against the admission of three applicants were filed on the ground that they were not of good moral character, and it was held that when a statute has prescribed the qualifications for admission, and an applicant is shown to possess these qualifications, the courts must admit him. It was urged that this statute impaired the inherent right of the court to control its officers, but the court, quoting from a dissenting opinion in an Illinois case *infra*, said that if this is one of the inherent powers of a court, it is just as inherent in one court as another, and so it might come about that the judges of the supreme court and each of the judges of the superior courts might require widely different qualifications.

The Illinois case is directly opposed to this, and holds that the function of determining whether an applicant is sufficiently acquainted with the law pertains to the courts themselves. An act providing that persons having certificates of graduation from law schools of a certain specified standard should be admitted to practise law was held to be an unconstitutional encroachment upon the judicial branch of the government; In re Day, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519; and to the same effect, In re Branch, 70 N. J. L. 537, 57 Atl. 431; In re Mosness, 39 Wis. 509, 20 Am. Rep. 55, where a stat-

ute was held invalid which authorized the admission of a non-resident. See 13 Harv. L. Rev. 233, where it is said, "The legislature certainly has no positive power to compel the courts to admit persons to practice before them," although admitting a limited control to prevent the admission of unsuitable persons. And a Pennsylvania case commenting on an act providing that the court shall admit attorneys in specified cases says, "We are clearly of the opinion that the Act of 1887, though probably not so intended, is an encroachment upon the judiciary department of the government;" Petition of Splane, 123 Pa. 527, 16 Atl. 481.

It has been held that, excepting where permitted by special statute, women cannot act as attorneys-at-law in the various states; In re Bradwell, 55 Ill. 535; Bradwell v. Illinois, 16 Wall. (U. S.) 130, 21 L. Ed. 442; and the supreme court of the United States will not issue a mandamus to compel a state court to admit a woman to practise law before such court, upon the ground that she has been denied a privilege or immunity belonging to her as a citizen of the United States, in contravention of the constitution; In re Lockwood, 154 U. S. 116, 14 Sup. Ct. 1082, 38 L. Ed. 929; the right to practise law in a state court not being such privilege or immunity; Bradwell v. Illinois, 16 Wall. (U. S.) 130, 21 L. Ed. 442; but the general trend of authority now is that women may be admitted to practise as attorneys; In re Leach, 134 Ind. 665, 34 N. E. 641, 21 L. R. A. 701; Ricker's Petition, 66 N. H. 207, 29 Atl. 559, 24 L. R. A. 740; Richardson's Case, 3 D. R. (Pa.) 299. Any woman of good standing at the bar of the supreme court of any state or territory or of the District of Columbia for three years, and of good moral character, may become a member of the bar of the supreme court of the U. S.; Act Feb. 15, 1879. In North Carolina, unnaturalized foreigners cannot be licensed as attorneys; Ex parte Thompson, 10 N. C. 355; Weeks, Att. at Law, 79, note.

The business of attorneys is to carry on the practical and formal parts of the suit; 1 Kent 307. See, as to their powers, 2 Supp. to Ves. Jr. 241, 254; 3 Chit. Bla. Com. 23, 338; Bacon, Abr. *Attorney*; Lynch v. Com., 16 S. & R. (Pa.) 368, 16 Am. Dec. 582; Huston v. Mitchell, 14 S. & R. (Pa.) 307, 16 Am. Dec. 506; Holker v. Parker, 7 Cra. (U. S.) 452, 3 L. Ed. 396.

The presumption is that an attorney has authority to appear; if the person he appears for does not disclaim his authority, he is bound; Bacon v. Mitchell, 14 N. D. 454, 106 N. W. 129, 4 L. R. A. (N. S.) 244; International Harvester Co. of America v. Champlin, 155 App. Div. 847, 140 N. Y. Supp. 842.

The authority of an attorney commences with his retainer; Stone v. Bank, 174 U. S. 413, 19 Sup. Ct. 747, 43 L. Ed. 1028; while acting generally for a client he cannot accept service without authority; Reed v. Reed, 19 S. C. 548. After he has been retained in a case, he has certain implied powers therein; Stone v. Bank, 174 U. S. 413, 19 Sup. Ct. 747, 43 L. Ed. 1028. In suits actually pending, he may agree that one suit shall abide the event of another suit; Ohlquest v. Farwell, 71 Ia. 231, 32 N. W. 277; Gilmore v. Ins. Co., 67 Cal. 366, 7 Pac. 781. He may discontinue an action; Barrett v. R. Co., 45 N. Y. 628; Simpson v. Brown, 1 Wash. Terr. 248. In Rhutasel v. Rule, 97 Ia. 20, 65 N. W. 1013, it was held that the authority to dismiss must be specially conferred; *contra*, Bacon v. Mitchell, 14 N. D. 454, 106 N. W. 129, 4 L. R. A. (N. S.) 244. He may, where a pending case has been referred to arbitrators, agree to the submission of all matters in controversy, including those not embraced in the case; Bingham's Trustees v. Guthrie, 19 Pa. 418.

In general, the agreement of an attorney-at-law, within the scope of his employment, binds his client; 1 Salk. 86; as, to amend the record; Johnson v. Chaffant, 1 Binn. (Pa.) 75; to refer a cause; Holker v. Parker, 7 Cra. (U. S.) 436, 3 L. Ed. 396; 3 Taunt. 486; not to sue out a writ of error; 1 H. Bla. 21, 23; 2 Saund. 71 *a*, *b*; 1 Term 388; to strike off a *non pros.*; Reinholdt v. Alberti, 1 Binn. (Pa.) 469; to waive a judgment by default; 1 Archb. Pr. 26; or waive a jury trial; Stevenson v. Felton, 99 N. C. 58, 5 S. E. 399. But the act must be within the scope of his authority. He cannot, for example, without special authority, purchase lands for the client at sheriff's sale; Pearson v. Morrison, 2 S. & R. (Pa.) 21; Beardsley v. Root, 11 Johns. (N. Y.) 464, 6 Am. Dec. 386; or extend the time for payment of money to release a judgment in ejectment, entered by consent; Beatty v. Hamilton, 127 Pa. 71, 17 Atl. 755; or compromise a claim; Brockley v. Brockley, 122 Pa. 1, 15 Atl. 646; Willard v. Gas-Fixture Co., 47 Mo. App. 1; U. S. v. Beebe, 180 U. S. 343, 21 Sup. Ct. 371, 45 L. Ed. 563; *contra*, Beliveau v. Mfg. Co., 68 N. H. 225, 40 Atl. 734, 44 L. R. A. 167, 73 Am. St. Rep. 577; or satisfy a judgment for less than is due; Peters v. Lawson, 66 Tex. 336, 17 S. W. 734.

In the absence of fraud, the client is concluded by the acts, and even by the omissions, of his attorney; Rogers v. Greenwood, 14 Minn. 333 (Gil. 256); Sampson v. Ohleyer, 22 Cal. 200; Weeks, Att. at Law 375.

The mistake or unskillfulness of the attorney is not enough to authorize an injunction to restrain the enforcement of a judgment; Donovan v. Miller, 12 Idaho 600, 88 Pac. 82, 9 L. R. A. (N. S.) 524, 10 Ann. Cas. 444; Hambrick v. Crawford, 55 Ga. 335; Lowe v. Hamilton, 132 Ind. 406, 31 N. E. 1117; Payton v. McQuown, 97 Ky. 757, 31 S. W. 874, 53 Am. St. Rep. 437, and 31 L. R. A. 33, where the cases are collected in a note. Nor is the mistake of counsel upon a point of

law ground for a new trial; Patterson v. Matthews, 3 Bibb (Ky.) 80. Relief, however, has been granted on this ground, notably in Sharp v. New York, 31 Barb. (N. Y.) 578, which with an early case in Tennessee is criticized as deciding "with a spirit of humanity but with little regard for the settled principles of law"; Black, Judg. sec. 375.

In general, he has all the powers exercised by the usages of the court in which the suit is pending; Weeks, Att. at Law 374.

The principal duties of an attorney are —to be true to the court and to his client; to manage the business of his client with care, skill, and integrity; 4 Burr. 2061; 1 B. & Ald. 202; 2 Wils. 325; 1 Bingh. 347; Mech. Ag. 824; to keep his client informed as to the state of his business; to keep his secrets confided to him as such. And he is privileged from disclosing such secrets when called as a witness; Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321; Sibley v. Waffle, 16 N. Y. 180; Martin v. Anderson, 21 Ga. 301; 40 E. L. & Eq. 353; Sargent v. Inhabitants of Hampden, 38 Me. 581. See CLIENT; CONFIDENTIAL COMMUNICATIONS. His first duty is the administration of justice, and his duty to his client is subordinate to that; In re Thomas, 36 Fed. 242. If an attorney while employed by one side secretly seeks employment on the other side, promising to give information acquired during such employment, he will be disbarred; U. S. v. Costen, 38 Fed. 24; but an attorney who learns from his client, in a professional consultation, or in any other manner, that the latter intends to commit a crime, it seems is bound by a higher duty to society and to the party to be affected to disclose it; State v. Barrows, 52 Conn. 323.

In estimating the value of services rendered by an attorney it is proper to take into account the time necessarily employed in and the success of the litigation; Berry v. Davis, 34 Ia. 594; the amount of values involved; Smith v. R. Co., 60 Ia. 515, 15 N. W. 303; and recovered; Parsons v. Hawley, 92 Ia. 175, 60 N. W. 520; the ability, learning and experience of the attorney and his standing in the profession; Clark v. Ellsworth, 104 Ia. 442, 73 N. W. 1023; the character of the claim and the amount of the services to be rendered; Morehouse v. R. Co., 185 N. Y. 520, 78 N. E. 179, 7 Ann. Cas. 377.

An attorney's contract with his client for a fifty per cent. contingent fee is not necessarily unenforceable on the ground of being unconscionable; In re Fitzsimons, 174 N. Y. 15, 66 N. E. 554, but see to the contrary, 48 Ohio L. Bul. 238, discussing Hermon v. R. Co., 121 Fed. 184; Muller v. Kelly, 125 Fed. 212, 60 C. C. A. 170. These cases were not decided on the ground of champerty, but of taking improper advantage of the fiduciary relation. Fifty per cent. of the claim was held not to be extortionate in a difficult and complicated case, where the attorney exercised no influence in adjusting the amount, but it was voluntarily offered, and where he had paid out of it large amounts to other counsel; Taylor v. Bemiss, 110 U. S. 42, 3 Sup. Ct. 441, 28 L. Ed. 64.

Where an attorney had agreed to prosecute an action for a contingent fee of one-half the amount recovered, it was held that the client could maintain an action against the attorney for the whole amount so recovered less the costs paid by the attorney; Ackert v. Barker, 131 Mass. 436. See CHAMPERTY.

A contract for a contingent fee does not deprive the client of the right to substitute another attorney; Johnson v. Ravitch, 113 App. Div. 810, 99 N. Y. Supp. 1059.

Any agreement conditioned on obtaining a divorce or intended or calculated to facilitate its obtainment is void; Barngrover v. Pettigrew, 128 Ia. 533, 104 N. W. 904, 2 L. R. A. (N. S.) 260, 111 Am. St. Rep. 206, where the contract was to procure evidence to obtain a divorce. The parties to the divorce suit compromised and settled their differences and the attorney sued to recover on the contract. It was held that he could not recover on a *quantum meruit* because the services rendered were in themselves illegal.

A provision of a trust mortgage deed that in case of its sale an attorney's fee of five per cent. should be paid out of the proceeds was held void as against public policy though the fee was reasonable; Turner v. Boger, 126 N. C. 300, 35 S. E. 592, 49 L. R. A. 590.

A contract between a wife and her solicitor providing that for his services in procuring an allowance of alimony and enforcing its payment he shall receive a share of the alimony recovered is void, not only because the claim for alimony is incapable of assignment, but also because the contract is against public policy; Lynde v. Lynde, 64 N. J. Eq. 736, 52 Atl. 604, 58 L. R. A. 471, 97 Am. St. Rep. 692. Here the Court of Chancery took jurisdiction over the solicitor as an officer of the court, in order to require him to do justice to his client.

Any contract whereby a client is prevented from settling or discontinuing a suit is void, as such an agreement would encourage litigation; Kansas City Elevated R. Co. v. Service, 74 Kan. 316, 94 Pac. 262, 14 L. R. A. (N. S.) 1105; Huber v. Johnson, 68 Minn. 74, 70 N. W. 806, 64 Am. St. Rep. 456; Boardman v. Thompson, 25 Ia. 487; Weller v. R. Co., 68 N. J. Eq. 659, 61 Atl. 459, 6 Ann. Cas. 442; Davis v. Chase, 159 Ind. 242, 64 N. E. 88, 853, 95 Am. St. Rep. 294; North Chicago St. R. Co. v. Ackley, 171 Ill. 100, 49 N. E. 222, 44 L. R. A. 177; Davis v. Webber, 66 Ark. 190, 49 S. W. 822, 45 L. R. A. 196, 74 Am. St. Rep. 81; In re Snyder, 190 N. Y. 66, 82 N. E. 742, 14 L. R. A. (N. S.) 1101, 123 Am. St. Rep. 533, 13 Ann. Cas. 441; Davy v. Ins. Co., 78 Ohio St. 256, 85 N. E. 504, 17 L. R. A. (N. S.) 443, 125 Am. St. Rep. 694.

But courts have an inherent power to pro-

tect attorneys against settlements consummated with the express purpose of depriving them of their compensation; Potter v. Min. Co., 19 Utah 421, 57 Pac. 270; Jones v. Morgan, 39 Ga. 310, 99 Am. Dec. 458; Jackson v. Stearns, 48 Or. 25, 84 Pac. 798, 5 L. R. A. (N. S.) 390. The attorney may proceed in the original suit in the name of his client notwithstanding the settlement; Randall v. Van Wagenen, 115 N. Y. 527, 22 N. E. 361, 12 Am. St. Rep. 828. But this rule applies only when the attorney has acquired a lien; Welcher v. Cargill, 86 Minn. 271, 90 N. W. 402; and it is said that there are serious practical difficulties in the way of such a procedure when the action is to recover unliquidated damages. The power to arrest or rescind the effect of a settlement is cautiously exercised in respect to suits for debts actually owing; and the power would be more cautiously applied to actions for torts, where it would be impracticable for the court, upon the opposing representations of the parties and without hearing the proof, to ascertain whether there was a just cause of action or whether there was ground to distrust the justice of the settlement. The whole case would have to be tried before the court could pronounce that the suit was properly instituted, and that it afforded prima facie ground for the award of costs; Boogren v. R. Co., 97 Minn. 51, 106 N. W. 104, 3 L. R. A. (N. S.) 379, 114 Am. St. Rep. 691, where the court adopting the language of Betts, J., in Peterson v. Watson, 1 Blatchf. & H. 487, Fed. Cas. No. 11,037, concludes: "That manifestly could never be done without serious inconvenience and expense; and the better practical rule will doubtless be to leave the proctor to look to the responsibility of his client alone. Ordinarily he will take the precaution to secure himself against the mischances of suits of this character; and if he does not, no urgent equity is thereby created for an extraordinary interference on his behalf by the court." This practice may occasionally work a hardship to the attorneys, but it is nevertheless a salutary rule.

As to the right of the attorney to recover under statutes giving him a lien, where his client has settled without his knowledge, see LIEN.

For a violation of his duties an action will, in general, lie; Cavillaud v. Yale, 3 Cal. 108, 58 Am. Dec. 388; 2 Greenl. Ev. §§ 145, 146; and in some cases he may be punished by attachment. Official misconduct may be inquired into in a summary manner, and the name of the offender stricken from the roll; Rice v. Com., 18 B. Monr. (Ky.) 472; Bradley v. Fisher, 13 Wall. (U. S.) 335, 20 L. Ed. 646; 17 Am. Dec. 194 note. See Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. Ed. 366; DISBAR.

It is held that to solicit causes of action tends to promote litigation and to degrade the profession and that a contract so obtained is invalid; Ingersoll v. Coal Co., 117 Tenn. 263, 98 S. W. 178, 9 L. R. A. (N. S.) 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829, where the plaintiffs, a firm of attorneys, solicited a large number of claims for personal injuries and brought suit thereon. The defendants compromised with the claimants without the consent of the attorneys, and the latter sued the defendants for the fees promised by the claimants.

An attorney who enters into a barratrous contract to bring suits cannot recover upon an implied contract for services rendered in a suit brought pursuant to such contract, though the services are not, in themselves and apart from the barratrous contract, improper or illegal; Gammons v. Johnson, 76 Minn. 76, 78 N. W. 1035; Gammons v. Gulbranson, 78 Minn. 21, 80 N. W. 779. A contract whereby an attorney agrees to pay for business brought to him is void; Alpers v. Hunt, 86 Cal. 78, 24 Pac. 846, 9 L. R. A. 483, 21 Am. St. Rep. 17; but this decision was under a statute providing for the disbarment of attorneys who lent their names to be used in legal proceedings by persons who were not attorneys. That case was followed in Langdon v. Conlin, 67 Neb. 243, 93 N. W. 389, 60 L. R. A. 429, 108 Am. St. Rep. 643, 2 Ann. Cas. 834, where the facts were similar and the statute declared the rights and duties of attorneys. That such contracts are void as against public policy and good morals is held in Lyon v. Hussey, 82 Hun 15, 31 N. Y. Supp. 281; Burt v. Place, 6 Cow. (N. Y.) 431, where a statute prohibits the promise of a valuable consideration to any person as an inducement to placing a claim in the hands of an attorney. An attorney was held to be prohibited from paying or agreeing to pay a layman for inducing a client to place his claim in the attorney's hands; In re Clark, 184 N. Y. 222, 77 N. E. 1, affirming 108 App. Div. 150, 95 N. Y. Supp. 388. But see to the contrary; Vocke v. Peters, 58 Ill. App. 338, where an agreement by attorneys to pay a commission for all business brought to them was held not contrary to public policy; and to the same effect, Dunne v. Herrick, 37 Ill. App. 180, where an attorney's clerk solicited business for him and a contract between attorney and client to pay the attorney one-half the amount recovered in a suit for personal injuries was held valid and binding on the client.

The execution and delivery by an attorney at law of a power of attorney to sign his name to any and all letters of collection and other business of the corporation as long as the attorney in fact should remain in the employ of the corporation, is unprofessional conduct requiring discipline; In re Rothschild, 140 App. Div. 583, 125 N. Y. Supp. 629, where, as the offence had never been passed upon by the court, the attorney was suspend-

ed from practice for one year with leave to apply for reinstatement on satisfactory proof of his conduct meanwhile.

An attorney is not an insurer of the result in a case in which he is employed, and only ordinary care and diligence can be required of him; Babbitt v. Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585. The authority of an attorney is revoked by the death of the client, and he cannot proceed further in the cause without a new retainer from the proper representative; Prior v. Kiso, 96 Mo. 303, 9 S. W. 898; Moyle v. Landers, 78 Cal. 99, 20 Pac. 241, 12 Am. St. Rep. 22.

An attorney is entitled to two kinds of liens for his fees, one upon the papers of his client in his possession, called a retaining lien, and the other upon a judgment or fund recovered, called a charging lien; Goodrich v. McDonald, 112 N. Y. 157, 19 N. E. 649; Sanders v. Seelye, 128 Ill. 631, 21 N. E. 601; Strohecker v. Irvine, 76 Ga. 639, 2 Am. St. Rep. 62. See Blackburn v. Clarke, 85 Tenn. 506, 3 S. W. 505; Taylor Iron & Steel Co. v. Higgins, 66 Hun 626, 20 N. Y. Supp. 746.

"A corporation cannot practice law, directly or indirectly;" In re Co-operative Law Co., 198 N. Y. 479, 92 N. E. 15, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879.

In all United States courts parties may plead and manage their cases personally or by counsel as the rules of such courts provide. R. S. § 747.

See Lien; Champerty; Retainer; Ethics, Legal; Barrister; Disbar; Solicitor; Advocati.

ATTORNEY'S CERTIFICATE. A certificate of the commissioners of stamps that the attorney therein named has paid the annual duty. This must be renewed yearly; and the penalty for practising without such certificate is fifty pounds; Stat. 37 Geo. III. c. 90, §§ 26, 28, 30. See also 7 & 8 Vict. c. 73, §§ 21-26; 16 & 17 Vict. c. 63.

ATTORNEY-GENERAL. A great officer, under the king, created by letters patent, whose office is to exhibit informations and prosecute for the crown in matters criminal; to file bills in the exchequer in any matter concerning the king's revenue. Others may bring bills against the king's attorney; 3 Bla. Com. 27; *Termes de la Ley.* He is usually addressed as "Mr. Attorney."

In each state there is an attorney-general, or similar officer, who appears for the state or people, as in England the attorney-general appears for the crown.

"The office is a public trust, which involves the exercise of an almost boundless discretion by an officer who ought to stand as impartial as a judge." Com. v. Burrell, 7 Pa. 39, per Gibson, C. J.

ATTORNEY-GENERAL OF THE UNITED STATES. An officer appointed by the president. His duties are to prosecute and conduct all suits in the supreme court in which the United States shall be concerned, and give his advice upon questions of law when required by the president, or when requested by the heads of any of the departments, touching matters that concern their departments; Act of 24th Sept. 1789. He is a member of the cabinet and under the act of congress of Jan. 19, 1886, U. S. Rev. Stat. 1 Supp. 487, is the fourth in succession, after the vice-president, to the office of president in case of a vacancy. See Department of Justice; Cabinet.

ATTORNEY, LETTER OF. See Power of Attorney.

ATTORNEY, WARRANT OF. See Warrant of Attorney.

ATTORNMENT. See Attorn.

AU BESOIN. (Fr. in case of need. "*Au besoin chez Messieurs —— à ——.*" "In case of need, apply to Messrs. —— at ——").

A phrase used in the direction of a bill of exchange, pointing out the person to whom application may be made for payment in case of failure or refusal of the drawee to pay; Story, Bills § 65.

AUBAINE. See Droit d'Aubaine.

AUCTION. A public sale of property to the highest bidder. See 19 Cent. L. J. 247; Bateman, Auct.

The manner of conducting an auction is immaterial, whether it be by public outcry or by any other manner. The essential part is the selection of a purchaser from a number of bidders In a case where a woman continued silent during the whole time of the sale, but when any one bid she gave him a glass of brandy, and, when the sale broke up, the person who received the last glass of brandy was taken into a private room and he was declared to be the purchaser, this was adjudged to be an auction, 1 Dowl. Bailm. 115.

Auctions are generally conducted by persons licensed for that purpose. A bidder may be employed by the owner, if it be done *bonâ fide* and to prevent a sacrifice of the property under a given price; National Fire Ins. Co. v. Loomis, 11 Paige Ch. (N. Y.) 431; Venzie v. Williams, 3 Sto. 622, Fed. Cas. No. 16,907; The Raleigh, 37 Fed. 125. It has been held that the owner should give fair notice of this so that no one should be misled or deceived; Miller v. Baynard, 2 Houst. (Del.) 559, 83 Am. Dec. 168; but where bidding is fictitious, and by combination with the owner to mislead the judgment and inflame the zeal of others, it would be a fraudulent and void sale; Poll. Contr. 539; Veazie v. Williams, 8 How. (U. S.) 134, 12 L. Ed. 1018; *id.*, 3 Sto. 611, Fed. Cas. No. 16,907; Webster v. French, 11 Ill. 254; Smith v. Greenlee, 13 N. C. 126, 18 Am. Dec. 564; Phippen v. Stickney, 3 Metc. (Mass.) 384; Switzer v. Skiles, 3 Gilm. (Ill.) 529, 44 Am. Dec. 723. But see 2 Kent 539, where this subject is considered. And see 6 J. B. Moore 316; 15 M. & W. 367; Baham v. Bach, 13 La.

287, 33 Am. Dec. 561; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; McDowell v. Simms, 41 N. C. 278; Tomlinson v. Savage, *id.*, 430; Pennock's Appeal, 14 Pa. 446, 53 Am. Dec. 561. Unfair conduct on the part of the purchaser will avoid the sale; 6 J. B. Moore 216; 3 B. & B. 116; Veazie v. Williams, 3 Sto. 623, Fed. Cas. No. 16,907; Wooton v. Hinkle, 20 Mo. 290; Smith v. Greenlee, 13 N. C. 126, 18 Am. Dec. 564. Where a buyer addressed the company assembled at an auction and persuaded them that they ought not to bid against him, the purchase by such buyer was held void; 3 B. & B. 116.

Where a sale is "without reserve" neither the vendor nor any one on his behalf can bid, and the property must go to the highest bidder; see Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195. An auctioneer who offers his property for sale without reserve pledges himself that the sale shall be without reserve, or contracts that the property shall go to the highest *bona fide* bidder, and in case the owner overbid, the highest *bona fide* bidder may sue the auctioneer as upon a contract; 1 El. & El. 309; such a case is not affected by the Statute of Frauds, § 17, which relates only to direct sales; *id.* This rule was approved in [1899] 2 Ch. 73; and see [1904] 41 Sc. L. Rep. 688.

In the United States the influence of the leading English case (1 El. & El. 309) is less plainly shown and the rule is even less clearly defined; Tillman v. Dunman, 114 Ga. 406, 40 S. E. 244, 57 L. R. A. 787, 88 Am. St. Rep. 28.

In New York it is said there is no case in that state which is directly in point upon the proposition that as a matter of law, where an auctioneer advertises a sale at public auction, and in response to this invitation bidders attend, an implied contract arises between them that the property will be knocked down to the highest bidder; Taylor v. Harnett, 26 Misc. 362, 55 N. Y. Supp. 988. In this case the auctioneer refused to accept the highest bid because of its inadequacy; to the same effect, Newman v. Vonderheide, 9 Ohio Dec. Reprint 164; but see Hartwell v. Gurney, 16 R. I. 78, 13 Atl. 113, where it is said *obiter* that the stricter rule seems to be the just and honest one and ought to prevail, for an offer to sell at auction is an offer to sell to the highest bidder, and every bid is an inchoate acceptance entitling the bidder to the property offered, if it turns out to be the highest and there is no retraction on either side before the hammer falls. But it has been held that an announcement that a certain property will be sold to the highest bidder is a mere declaration of an intent to hold an auction; Anderson v. R. Co., 107 Minn. 296, 120 N. W. 39, 20 L. R. A. (N. S.) 1133, 131 Am. St. Rep. 462, 16 Ann. Cas. 379.

A bid may be retracted by the bidder or the property withdrawn before acceptance has been signified; 3 Term 148; 4 Bingh. 653; 6 Hare 443; Benj. Sales § 270; [1904] 41 Sc. L. Rep. 688. The making the bid is the offer and it is accepted and made a binding unilateral contract by the fall of the hammer; 13 Harv. L. Rev. 58, citing 3 Term 148; 6 B. & S. 720; Blossom v. R. Co., 3 Wall. (U. S.) 196, 18 L. Ed. 43; Coker v. Dawkins, 20 Fla. 141.

Sales at auction are within the Statute of Frauds; 2 B. & C. 945; 7 East 558; O'Donnell v. Leeman, 43 Me. 158, 69 Am. Dec. 54; People v. White, 6 Cal. 75; Talman v. Franklin, 3 Duer (N. Y.) 395.

In Louisiana a bid made at an auction sale, although formally accepted, is not a complete sale, but only a promise of sale, which gives a right of action for breach or a claim for specific performance; Collins v. Desmaret, 45 La. Ann. 108, 12 South. 121. In California and Dakota the codes provide that if the auctioneer, having authority to do so, announces that the sale will be without reserve, the highest *bona fide* bidder has an absolute right to the completion of the sale to him, and that bids by the seller or any agent for him are void. But they also enact that the bidder may withdraw at any time before the hammer falls. Cal. Civ. Code § 1796; Dak. Civ. Code § 1026. Elsewhere, it is complete, at common law. See Bateman, Auctions 180. Error in description of real estate sold will avoid the sale if it be material; 4 Bingh. N. C. 463; 8 C. & P. 469; 1 Y. & C. 658; but an immaterial variation merely gives a case for deduction from the amount of purchase-money; 2 Kent 437; Judson v. Wass, 11 Johns. (N. Y.) 525, 6 Am. Dec. 392; State v. Gaillard, 2 Bay (S. C.) 11, 1 Am. Dec. 628; McFerran v. Taylor, 3 Cra. (U. S.) 270, 2 L. Ed. 436.

See BY-BIDDING.

AUCTIONARIUS (Lat.). A seller; a regrator; a retailer; one who bought and sold; an auctioneer, in the modern sense. Spelman, Gloss. One who buys poor, old, worn-out things to sell again at a greater price. Du Cange.

AUCTIONEER. A person authorized by law to sell the goods of others at public sale; one who conducts a public sale or auction; Com. v. Harnden, 19 Pick. (Mass.) 482. He is the agent of the seller; Ans. Contr. 346; 3 Term 148; Boinest v. Leignez, 2 Rich. (S. C.) 464; and of the buyer, for some purposes at least; 4 Ad. & E. 792; 3 Ves. & B. 57; McComb v. Wright, 4 Johns. Ch. (N. Y.) 659; Trustees of First Baptist Church of Ithaca v. Bigelow, 16 Wend. (N. Y.) 28; Cleaves v. Foss, 4 Greenl. (Me.) 1; Inhabitants of Alna v. Plummer, *id.* 258; Brent v. Green, 6 Leigh (Va.) 16; 2 Kent 539; Walker v. Herring, 21 Gratt. (Va.) 678, 8 Am. Rep. 616; Harvey v. Stevens, 43 Vt. 653;

White v. Watkins, 23 Mo. 423; [1902] 2 Ch. 266; up to the moment of sale he is agent for the vendor exclusively; it is only when the bidder becomes the purchaser that the agency for the buyer begins; Benj. Sales § 270. He is the agent of both parties at a public sale within the Statute of Frauds; 7 East 558; Pugh v. Chesseldine, 11 Ohio 109, 37 Am. Dec. 414; Harvey v. Stevens, 43 Vt. 655; Benj. Sales § 268. And see 16 Harv. L. Rev. 220, where it is remarked that the case where an agent acts for both parties at a sale is in itself anomalous; but not if he sells goods at a private sale; 1 H. & C. 484. The memorandum must be made at the time of the sale; Horton v. McCarty, 53 Me. 394; Smith v. Arnold, 5 Mas. 414, Fed. Cas. No. 13,004. An auctioneer employed to sell goods in his possession ordinarily has authority to receive payment for them, but if he acts as a mere crier or broker for a principal who retains possession, he would not have such authority; Benj. Sales § 741. He has a special property in the goods, and may bring an action for the price; 7 Taunt. 237; Beller v. Block, 19 Ark. 566; Hulse v. Young, 16 Johns. (N. Y.) 1; see 5 M. & W. 645; 5 B. & Ad. 568; and has a lien upon them for the charges of the sale, his commission, and the auction-duty; Harlow v. Sparr, 15 Mo. 184; 2 Kent 536.

Where auctioneers were employed to sell goods upon the terms that they were to be paid a lump sum by way of commission and were further to be paid all expenses, they were not entitled to charge the owner with the gross amounts of printing and advertising bills (where they had received discounts from printers and proprietors, in the honest belief that they were entitled to have such discounts allowed them); L. R. [1905] 1 K. B. 1.

He must obtain the best price he fairly can, and is responsible for damages arising from a failure to pursue the regular course of business, or from a want of skill; 3 B. & Ald. 616; and where he sells goods as the property of one not the owner, is liable for their value to the real owner; 7 Taunt. 237; Hoffman v. Carow, 20 Wend. (N. Y.) 21; Allen v. Brown, 5 Mo. 323; and if he sells goods with notice that they were obtained by fraud of another, he is liable to the real owner; Morrow Shoe Mfg. Co. v. Shoe Co., 57 Fed. 685, 6 C. C. A. 508, 24 L. R. A. 417. See Hutchinson v. Gordon, 2 Harr. (Del.) 179. For false representation or breach of contract, the vendee of land sold at auction has a right of action against the vendor as well as the auctioneer to recover a deposit paid at the time of sale; Mahon v. Liscomb, 19 N. Y. Supp. 224. See AGENT; AUCTION; BIDDER.

AUCTOR. In Roman Law. An auctioneer. In auction sales, a spear was fixed upright in the forum, beside which the seller took his stand; hence goods thus sold were said to be sold *sub hasta* (under the spear). The catalogue of goods was on tablets called *auctionaria*.

AUDIENCE. A hearing.

It is usual for the executive of a country to whom a minister has been sent, to give such minister an audience. And after a minister has been recalled, an *audience of leave* usually takes place.

As to the right of audience in court, see BARRISTER; DISBAR.

AUDIENCE COURT. See COURT OF AUDIENCE.

AUDITA QUERELA (Lat.). A form of action which lies for a defendant to recall or prevent an execution, on account of some matter occurring after judgment amounting to a discharge, and which could not have been, and cannot be, taken advantage of otherwise. Thatcher v. Gammon, 12 Mass. 268. If in a justice's suit the defendant is out of the state at the time of the service of the writ and remains away until after the return day and has no notice of suit, judgment by default may be set aside by *audita querela;* Sawyer v. Cross, 65 Vt. 158, 26 Atl. 528; but not unless the action was on its face appealable; Sawyer v. Cross, 66 Vt. 616, 30 Atl. 5.

It is a regular suit in which the parties appear and plead; Brooks v. Hunt, 17 Johns. (N. Y.) 484; Gleason v. Peck, 12 Vt. 56, 36 Am. Dec. 329; Clark v. Hydraulic Co., 12 Vt. 435; Melton v. Howard, 7 How. (Miss.) 103; Avery v. U. S., 12 Wall. (U. S.) 305, 20 L. Ed. 405; and in which damages may be recovered if execution was issued improperly; Brooke, Abr. *Damages* 38; but the writ must be allowed in open court, and is not of itself a *supersedeas;* Emery v. Patton, 9 Phila. (Pa.) 125.

It is a remedial process, equitable in its nature, based upon facts, and not upon the erroneous judgments or acts of the court; 2 Wms. Saund. 148, n.; Lovejoy v. Webber, 10 Mass. 103; Brackett v. Winslow, 17 Mass. 159; Little v. Cook, 1 Alk. (Vt.) 363, 15 Am. Dec. 698; Porter v. Vaughn, 24 Vt. 211.

It lies where an execution against A has been taken out on a judgment acknowledged by B. without authority, in A's name; Fitzh. N. B. 233; and see Cro. Eliz. 233; and generally for any matters which work a discharge occurring after judgment entered; Cro. Car. 443; Pettit v. Seaman, 2 Root (Conn.) 178; Com. v. Whitney, 10 Pick. (Mass.) 439; see 5 Co. 86 *b*; and for matters occurring before judgment which the defendant could not plead through want of notice or through collusion or fraud of the plaintiff; Johnson v. Harvey, 4 Mass. 485; Smock v. Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780; Wardell v. Eden, 2 Johns. Cas. 258; Williams v. Butcher, 1 W. N. C. (Pa.) 304.

It may be brought after the day on which judgment might have been entered, al-

though it has not been; 1 Rolle, Abr. 306, 431, pl. 10; 1 Mod. 111; either before or after execution has issued; Lothrop v. Bennet, Kirb. (Conn.) 187.

It does not lie for matter which might have been, or which may be, taken advantage of by a writ of error; Sutton v. Tyrrell, 10 Vt. 87; in answer to a *scire facias* of the plaintiff; 1 Salk. 264; nor where there is or has been a remedy by plea or otherwise; T. Raym. 89; Thatcher v. Gammon, 12 Mass. 270; Barrett v. Vaughan, 6 Vt. 243; Avery v. U. S., 12 Wall. (U. S.) 305, 20 L. Ed. 405; nor where there has been an agreement to accept a smaller sum in payment of a larger debt, while any part of the agreement continues executory; Keen v. Vaughan's Ex'x, 48 Pa. 477; nor to show that a confessed judgment was to be collateral security only; Emery v. Patton, 9 Phila. (Pa.) 125; nor where a judgment is erroneous in part without a tender of the legal part of the judgment; Rickard v. Fisk, 66 Vt. 675, 30 Atl. 93; nor against the commonwealth; Com. v. Berger, 8 Phila. (Pa.) 237.

In modern practice it is usual to grant the same relief upon motion which might be obtained by *audita querela;* Baker v. Judges, 4 Johns. (N. Y.) 191; Witherow v. Keller, 11 S. & R. (Pa.) 274; and in some of the states the remedy by motion has entirely superseded the ancient remedy; Smock v. Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780; Longworth v. Screven, 2 Hill (S. C.) 298, 27 Am. Dec. 381; Marsh v. Haywood, 6 Humphr. (Tenn.) 210; Dunlap v. Clements, 18 Ala. 778; Chambers v. Neal, 13 B. Monr. (Ky.) 256; while in others *audita querela* is of frequent use as a remedy recognized by statute; Sawyer v. Cross, 66 Vt. 616, 30 Atl. 5; Rickard v. Fisk, 66 Vt. 675, 30 Atl. 93; Stone v. Chamberlain, 7 Gray (Mass.) 206; Foss v. Witham, 9 Allen (Mass.) 572.

"*Audita querela* was given quite recently, that is to say in the tenth year of the reign, in Parliament, . . . and it was never given before." Y. B. 18 Edw. III, Rolls Series, p. 308. See Jac. L. Dict.; Fitzh. N. B. 102; Register of Writs, vol. 1, pp. 149, 150 (for the writ itself).

AUDITOR. An officer of the government, whose duty it is to examine the accounts of officers who have received and disbursed public moneys by lawful authority.

"The name *auditor* seems to have been originally applied to one whose duties were judicial rather than fiscal." McIlwain, High Court of Parl. 251.

An officer of the court, assigned to state the items of an account between the parties in a suit where accounts are in question, and exhibit the balance. Whitwell v. Willard, 1 Metc. (Mass.) 218.

They may be appointed by courts either of law or equity. They are appointed at common law in actions of account; Bacon, Abr. *Accompt*, F; and in many of the states in other actions, under statute regulations; Pierce v. Thompson, 6 Pick. (Mass.) 193; Bartlett v. Trefethen, 14 N. H. 427; Campbell v. Crout, 3 R. I. 60. An order of reference is proper where an accounting is necessary and the questions of law involved have been disposed of; Brown v. Finch, 63 Hun 633, 18 N. Y. Supp. 551. Where a trial has been commenced before a jury and the defendant consents to an accounting and the discharge of the jury, he cannot afterwards object to the order of reference because it requires the auditor to pass on disputed questions of law and fact; Garrity v. Hamburger Co. (Ill.) 28 N. E. 743.

Appearing before an auditor and examining witnesses without objection constitutes a waiver of the auditor's taking an oath before entering on his duties; Pardridge v. Ryan, 134 Ill. 247, 25 N. E. 627; Newcomb v. Wood, 97 U. S. 581, 24 L. Ed. 1085; Kelsey v. Darrow, 22 Hun (N. Y.) 125.

They have authority to hear testimony; Shearman v. Akins, 4 Pick. (Mass.) 283; Leach v. Shepard, 5 Vt. 363; Townshend v. Duncan, 2 Bland, Ch. (Md.) 45; Callender v. Colegrove, 17 Conn. 1; Paine v. Ins. Co., 69 Me. 568; in their discretion; Smith v. Smith, 27 N. H. 244; in some states, to examine witnesses under oath; Palmer v. Palmer, 38 N. H. 418; Dorsey v. Hammond, 1 Bland, Ch. (Md.) 463; to examine books; Lazarus v. Ins. Co., 19 Pick. (Mass.) 81; Callender v. Colegrove, 17 Conn. 1; and other vouchers of accounts; Barnard v. Stevens, 11 Metc. (Mass.) 297.

The auditor's report must state a special account; Finney's Adm'r v. Harbeson, 4 Yeates (Pa.) 514; Thomas v. Alsop, 2 Root (Conn.) 12; Tutton v. Addams, 45 Pa. 67; Hill v. Hogaboom, 13 Vt. 141; Bartlett v. Trefethen, 14 N. H. 427; giving items allowed and disallowed; Macks v. Brush, 5 Vt. 70; Whitehead v. Perie, 15 Tex. 7; but it is sufficient if it refer to the account; Demund v. Gowen, 5 N. J. L. 687; but see Herrick v. Belknap's Estate, 27 Vt. 673; and are to report exceptions to their decision of questions taken before them to the court; Thompson v. Arms, 5 Vt. 546; Crousillat v. McCall, 5 Binn. (Pa.) 433; and exceptions must be taken before them; Chappedelaine v. Dechenaux, 4 Cra. (U. S.) 308, 2 L. Ed. 629; Thompson v. Arms, 5 Vt. 546; Davis' Heirs v. Foley, Walk. (Miss.) 43; Whitehead v. Perie, 15 Tex. 7; Benoit v. Brill, 24 Miss. 83; Anderson v. Usher, 59 Ga. 567; unless apparent on the face of the report; Himely v. Rose, 5 Cra. (U. S.) 313, 3 L. Ed. 111. See Mengas' Appeal, 19 Pa. 221.

In some jurisdictions, the report of auditors is final as to facts; Parker v. Avery, Kirb. (Conn.) 353; Wood v. Barney, 2 Vt. 369; Davis' Heirs v. Foley, Walk. (Miss.) 43; In re Ludlam's Estate, 13 Pa. 188; Bradford v. Wright, 5 R. I. 338; Whitehead v.

Perle, 15 Tex. 7; Closson v. Means, 40 Me. 337; unless impeached for fraud, misconduct, or very evident error; Appeal of Stehman, 5 Pa. 413; Appeal of Speakman, 71 Pa. 25; Closson v. Means, 40 Me. 337; but subject to any examination of the principles of law in which they proceeded; Spencer v. Usher, 2 Day (Conn.) 116. In others it is held *prima facie* correct; Lyman v. Warren, 12 Mass. 412; Washington County Mutual Ins. Co. v. Dawes, 6 Gray (Mass.) 376; Tourne v. Riviere, 1 La. Ann. 380; Bartlett v. Trefethen, 14 N. H. 427; Mathes v. Bennett, 21 N. H. 188; and evidence may be introduced to show its incorrectness; Tourne v. Riviere, 1 La. Ann. 380; Benoit v. Brill, 24 Miss. 83; see Appeal of Thompson, 103 Pa. 603; Colgrove v. Rockwell, 24 Conn. 584; and in others it is held to be of no effect till sanctioned by the court; Dorsey v. Hammond, 1 Bland, Ch. (Md.) 463; Lee v. Abrams, 12 Ill. 111.

When the auditor's report is set aside in whole or in part, it may be referred back; Moore's Ex'r v. Beauchamp, 4 B. Monr. (Ky.) 71; Shearman v. Akins, 4 Pick. (Mass.) 283; Leach v. Shepard, 5 Vt. 363; Mason v. Potter, 26 Vt. 722; Bolware v. Bolware, 1 Litt. (Ky.) 124; Lee v. Abrams, 12 Ill. 111; Hoyt v. French, 24 N. H. 198; Turner v. Haughton, 71 N. C. 370; Mast v. Lockwood, 59 Wis. 48, 17 N. W. 543; Gardiner v. Schwab, 34 Hun (N. Y.) 582; or may be rectified by the court; Swisher v. Fitch, 1 Smedes & M. (Miss.) 543; Dorr v. Hammond, 7 Colo. 79, 1 Pac. 693; or accepted if the party in favor of whom the wrong decision was made remits the item.

Where the report is referred back to the auditor, the whole case is reopened, and all parties are bound to take notice; In re Thomas' Estate, 76 Pa. 30; see Mason v. Potter, 26 Vt. 722; O'Neill v. Capelle, 62 Mo. 202.

Where two or more are appointed, all must act; Crone v. Daniels, 20 Conn. 331; unless the parties consent that a part act for all; Booth v. Tousey, 1 Tyl. (Vt.) 407.

An accountant appointed for the purpose of verifying and stating the true financial condition of a corporation, firm or individual. Lindley, L. J., in [1895] 2 Ch. 673, defining his duties to be in substance: To ascertain and state the true financial condition of the company and his duty is confined to that. He must take reasonable care to ascertain that the books show the company's true financial position. But he does not guarantee that the books do correctly show the true position of the company's affairs; or that his balance sheet is accurate according to the books. He must use reasonable care and skill, under the circumstances, before he believes that what he certifies is true; where suspicion is aroused more care is necessary.

AUDITORS OF THE IMPREST. Officers in the exchequer who formerly had the charge of auditing the great accounts of the king's customs, naval and military expenses, etc., but who are now superseded by the commissioners for auditing the public accounts. Jacob.

AUGMENTATION. The increase arising to the crown's revenues from the suppression of monasteries and religious houses and the appropriation of their lands and revenues.

A court of augmentations erected by Henry VIII., which was invested with the power of determining suits and controversies relating to monasteries and abbey lands.

The court was dissolved in the reign of Mary, but the office of augmentations remained long after. Cowell.

A share of the great tithes temporarily granted to the vicars by the appropriators, and made perpetual by statute 29 Car. II. c. 8.

The word is used in a similar sense in the Canadian law.

See COURT OF AUGMENTATION.

AULA. This was employed in mediæval England along with *curia*, and meant an enclosure or hall; it was used of the meetings of the lord's men held there exactly in the same way that the word *court* was used. McIlwain, High Court of Parl. 30. See COURT; CURIA; CURIA REGIS.

AULA REGIA. (Called frequently *Aula Regis*). The King's hall or palace. See CURIA REGIS.

AULIC COUNCIL. Pertaining to a royal court. In the old German empire, the Aulic Council was the personal council of the emperor, and one of the two supreme courts of the empire which decided without appeal. It was instituted about 1502, and organized under a definite constitution in 1559, modified in 1654. It finally consisted of a president, a vice-president, and eighteen councillors, six of whom were Protestants; the unanimous vote of the latter could not be set aside by the others. The Aulic Council ceased to exist on the extinction of the German Empire in 1806. The title is now given to the Council of State of the Emperor of Austria. Cent. Dict.

AUNCEL WEIGHT. An ancient manner of weighing by means of a beam held in the hand. *Termes de la Ley;* Cowell.

AUNT. The sister of one's father or mother: she is a relation in the third degree. See 2 Comyn, Dig. 474; Dane, Abr. c. 126, a. 3, § 4.

AUSTRALIAN BALLOT. See ELECTION.

AUSTRIA-HUNGARY. An empire in the southern central portion of Europe.

Since 1867 it has consisted of Austria and Hungary united under one hereditary sovereign, a common army and navy and diplomacy controlled by the Delegations, a body of 120 members, one-half representing the legislature of Austria and one-half that of Hungary, the upper house of each country returning 20 and the lower house 40 delegates. Ordinarily the delegates sit and vote in two chambers, their jurisdiction being limited to foreign affairs, common finances, and war. The legislature of Aus-

tria consists of the Provincial Diets representing the provinces and the Reichsrath, which consists of an upper house composed of princes of the imperial family, nobles, ecclesiastics, and 120 life members nominated by the Emperor; also a lower house of 353 members, elected. There is a ministry of nine members.

The legislature of Hungary is conjointly in the King and the Diet or Reichstag. This consists of an upper house or house of magnates, including hereditary peers, ecclesiastics and fifty life peers appointed by the Crown and other special representatives, and the lower house elected by the people to the number of 453. There is a ministry of nine, including a president. The supreme court of Austria sits at Vienna, that of Hungary at Buda-Pesth. An administrative court, a high court of justice, and a court of *cassation* also sit at Vienna. There are courts of second instance in the larger cities and circuit courts at most of the principal towns throughout the Empire.

AUTER. Another. See AUTRE.

AUTER ACTION PENDANT (L. Fr. another action pending). A plea that another action is already pending. It may be made either at law or in equity; Story, Eq. Pl. § 736. The second suit must be for the same cause; 2 Dick. 611; Russell v. Alvarez, 5 Cal. 48; Hixon v. Schooley, 26 N. J. L. 461; Clark v. Tuggle, 18 Ga. 604; Ballou v. Ballou, 26 Vt. 673; Merritt v. Richey, 100 Ind. 416; but a writ of error may abate a suit on the judgment; Jenkins v. Pepoon, 2 Johns. Cas. (N. Y.) 312; and if in equity, for the same purpose; 2 M. & C. Ch. 602; see Hart v. Granger, 1 Conn. 154; and in the same right; Story, Eq. Pl. § 739. The criterion by which to decide whether two suits are for the same cause of action is, whether the evidence, properly admissible in the one, will support the other; Steam Packet Co. v. Bradley, 5 Cr. C. C. 393, Fed. Cas. No. 13,333. See Watson v. Jones, 13 Wall. (U. S.) 679, 20 L. Ed. 666.

The suits must be such that the same judgment may be rendered in both; Buffum v. Tilton, 17 Pick. (Mass.) 510. They must be between the same parties; Hall v. Holcombe, 26 Ala. 720; Adams v. Gardiner, 13 B. Monr. (Ky.) 197; Langham v. Thomason, 5 Tex. 127; in person or interest; Bennett v. Chase, 21 N. H. 570; Hartz v. Com., 1 Grant, Cas. (Pa.) 359; Anderson v. Barry, 2 J. J. Marsh. (Ky.) 281. The parties need not be precisely the same; Rowley v. Williams, 5 Wis. 151.

A suit for labor is not abated by a subsequent proceeding *in rem* to enforce a lien; Delahay v. Clement, 3 Scam. (Ill.) 201. A suit in trespass is temporarily barred by a previous proceeding *in rem* to enforce a forfeiture under laws of United States; Gelston v. Hoyt, 3 Wheat. (U. S.) 314, 4 L. Ed. 381.

The prior action must have been in a domestic court; 4 Ves. Ch. 357; Bowne v. Joy, 9 Johns. (N. Y.) 221; Lyman v. Brown, 2 Curt. C. C. 559, Fed. Cas. No. 8,627; Hatch v. Spofford, 22 Conn. 485, 58 Am. Dec. 433; Drake v. Brander, 8 Tex. 351; U. S. v. Cruikshank, 92 U. S. 548, 23 L. Ed. 588; Allen v. Watt, 69 Ill. 655; Yelverton v. Conant, 18 N. H. 123; see Newell v. Newton, 10 Pick. (Mass.) 470; Smith v. Lathrop, 44 Pa. 326, 84 Am. Dec. 448; Salmon v. Wootton, 9 Dana (Ky.) 422; Chattanooga, R. & C. R. Co. v. Jackson, 86 Ga. 676, 13 S. E. 109; but a foreign attachment against the same subject-matter may be shown; Embree v. Hanna, 5 Johns. (N. Y.) 101; see Winthrop v. Carlton, 8 Mass. 456; Morton v. Webb, 7 Vt. 124; Sargent v. Granite Co., 3 Misc. 325, 23 N. Y. Supp. 886; Harvey v. R. Co., 50 Minn. 405, 52 N. W. 905, 17 L. R. A. 84; but it will not avail where there was no appearance in the attachment suit or no personal service on the party attached; Douglass v. Ins. Co., 138 N. Y. 209, 33 N. E. 938, 20 L. R. A. 118, 34 Am. St. Rep. 448; and of the same character; 22 Eng. L. & Eq. 62; Story, Eq. Pl. 736; thus a suit at law is no bar to one in equity; Peak v. Bull & Co., 8 B. Monr. (Ky.) 428; Bolton v. Landers, 27 Cal. 104; nor is the pendency of a bill in equity a bar to an action at law; Mattel v. Conant, 156 Mass. 418, 31 N. E. 487; Blanchard v. Stone, 16 Vt. 234; unless there be concurrent jurisdiction; 22 Law Rep. 74; but the plaintiff may elect, and equity will enjoin him from proceeding at law if he elect to proceed in equity; 2 Dan. Ch. Pr. § 4; Bisp. Eq. § 363; but he will not be required to elect in such case, unless the suit at law is for the same cause, and the remedy at law is co-extensive, and equally beneficial with the remedy in equity. A suit in the circuit court having jurisdiction will abate a suit in the state court, if in the same state; Walsh v. Durkin, 12 Johns. (N. Y.) 99; Smith v. Ins. Co., 22 N. H. 21; and so will a suit in a state court abate one in a United States circuit court; Earl v. Raymond, 4 McLean, 233, Fed. Cas. No. 4,243; but not unless jurisdiction is shown; White v. Whitman, 1 Curt. C. C. 494, Fed. Cas. No. 17,561; Ex parte Balch, 3 McLean, 221, Fed. Cas. No. 790; Wadleigh v. Veazie, 3 Sumn. 165, Fed. Cas. No. 17,031; and not unless the suit is pending for the same cause, and between the same parties, in the same state in which the circuit court is sitting; Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983; Brooks v. Mills County, 4 Dill. 524, Fed. Cas. No. 1,955.

The pendency of another suit for the same equitable relief, in another court of co-ordinate jurisdiction, is a bar to a motion for an injunction; Cleveland, P. & A. R. Co. v. City of Erie, 27 Pa. 380; and may be pleaded in abatement of an action at law for the same cause; Pittsburg & C. R. Co. v. R. Co., 76 Pa. 481.

In general, the plea must be in abatement; Hartz v. Com., 1 Grant, Cas. (Pa.) 359; Carr v. Casey, 20 Ill. 637; Rowley v. Williams, 5 Wis. 151; Ex parte Balch, 3 McLean, 221, Fed. Cas. No. 790; Danforth v. R. Co., 93 Ala. 614, 11 South. 60; Central R. & Banking Co. v. Coleman, 88 Ga. 294, 14 S. E. 382; Mattel v. Conant, 156 Mass. 418, 31 N. E.

487; Rogers v. Hoskins, 15 Ga. 276; but in a penal action at the suit of a common informer, the priority of a former suit for the same penalty in the name of a third person may be pleaded in bar, because the party who first sued is entitled to the penalty; Anderson v. Barry, 2 J. J. Marsh. (Ky.) 281.

It must be pleaded in abatement of the subsequent action in order of time; Renner v. Marshall, 1 Wheat. (U. S.) 215, 4 L. Ed. 74; Carr v. Casey, 20 Ill. 637; Rowley v. Williams, 5 Wis. 151; Greenwood v. Rector, 1 Hempst. 708, Fed. Cas. No. 5,792; Hailman v. Buckmaster, 3 Gilm. (Ill.) 498; Buffum v. Tilton, 17 Pick. (Mass.) 510; Nicholl v. Mason, 21 Wend. (N. Y.) 339.

It must show an action pending or judgment obtained at the time of the plea; Hixon v. Schooley, 26 N. J. L. 461; Hope v. Alley, 11 Tex. 259; but it is sufficient to show it pending when the second suit was commenced; Parker v. Colcord, 2 N. H. 36; Toland v. Tichenor, 3 Rawle (Pa.) 320; the court first acquiring concurrent jurisdiction retains it to the exclusion of the other; Griffin v. Birkhead, 84 Va. 612, 5 S. E. 685; when both suits are commenced at the same time, the pendency of each may be pleaded in abatement of the other, and both be defeated; Davis v. Dunklee, 9 N. H. 545; Beach v. Norton, 8 Conn. 71; Harris v. Linnard, 9 N. J. L. 58; Morton v. Webb, 7 Vt. 124; Middlebrook v. Travis, 68 Hun 155, 22 N. Y. Supp. 672; and the plaintiff cannot avoid such a plea by discontinuing the first action subsequently to the plea; 2 Ld. Raym. 1014; Com. v. Churchill, 5 Mass. 174; Frogg's Ex'rs v. Long's Adm'r, 3 Dana (Ky.) 157, 28 Am. Dec. 69; *contra*, Marston v. Lawrance, 1 Johns. Cas. (N. Y.) 397; Ballou v. Ballou, 26 Vt. 673; Rogers v. Hoskins, 15 Ga. 270; Rush v. Frost, 49 Ia. 183; Findlay v. Kelm, 62 Pa. 112; Warder v. Henry, 117 Mo. 530, 23 S. W. 776. And a prior suit discontinued before plea pleaded in the subsequent one will not abate such suit; Adams v. Gardiner, 13 B. Monr. (Ky.) 197; Dean v. Massey, 7 Ala. 601; Nichols v. Bank, 45 Minn. 102, 47 N. W. 462; nor will it if a nonsuit is entered *nunc pro tunc*, to make it of a date before the commencement of the second action; Wilson v. Pearson, 102 N. C. 290, 9 S. E. 707. It may be pleaded in abatement of the action in the inferior court, and must aver appearance, or at least service of process; 1 Vern. 318. Suing out a writ is said to be sufficient at common law; Bentley v. Joslin, 1 Hempst. 218, Fed. Cas. No. 18,232. See LIS PENDENS.

It must be shown that the court entertaining the first suit has jurisdiction; Rood v. Eslava, 17 Ala. 430; White v. Whitman, 1 Curt. 494, Fed. Cas. No. 17,561. It is a sufficient defence that the plaintiff has pleaded the identical claim on which the action was brought as a set-off in a pending suit by the defendant; Pennsylvania R. Co. v. Davenport, 154 Pa. 111, 25 Atl. 890.

It must be proved by the defendant by record evidence; Fowler v. Byrd, Hempst. 213, Fed. Cas. No. 4,999 *a*; Com. v. Churchill, 5 Mass. 174; Riddle v. Potter, 1 Cra. C. C. 288, Fed. Cas. No. 11,811. It is said that if the first suit be so defective that no recovery can be had, it will not abate the second; Rogers v. Hoskins, 15 Ga. 270; Langham v. Thomason, 5 Tex. 127; Quinebaug Bank v. Tarbox, 20 Conn. 510; Downer v. Garland, 21 Vt. 362; Cornelius v. Vanarsdallen's Adm'r, 3 Pa. 434.

A prior indictment pending does not abate a second for the same offence; Dutton v. State, 5 Ind. 533; Com. v. Drew, 3 Cush. (Mass.) 279; Com. v. Dunham, Thach. Cr. Cas. (Mass.) 513.

When a defendant is arrested pending a former suit or action in which he was held to bail, he will not, in general, be held to bail if the second suit be for the same cause of action; Clark v. Weldo, 4 Yeates (Pa.) 206; under special circumstances, in the discretion of the court, a second arrest will be allowed; Peck v. Hozier, 14 Johns. (N. Y.) 347. Pendency of one attachment will abate a second in the same county; James v. Dowell, 7 Smedes & M. (Miss.) 333.

See, generally, Gould, Stephen, and Chitty on Pleading; Story, Mitford, and Beames on Equity Pleading; Bacon, Abr. *Abatement, Bail in Civil Cases.*

AUTER DROIT. In right of another.

AUTER VIE. See ESTATE PUR AUTRE VIE.

AUTHENTIC ACT. **In Civil Law.** An act which has been executed before a notary or other public officer authorized to execute such functions, or which is testified by a public seal, or has been rendered public by the authority of a competent magistrate, or which is certified as being a copy of a public register. Nov. 73, c. 2; Cod. 752, 6. 4. 21; Dig. 22. 4.

An act which has been executed before a notary public or other officer authorized to execute such functions, in presence of two witnesses, free, male, and aged at least fourteen years; or of three witnesses, if the party be blind. La. Civ. Code, art. 2231. If the party does not know how to sign, the notary must cause him to affix his mark to the instrument. La. Civ. Code, art. 2231. The authentic act is full proof of the agreement contained in it, against the contracting parties and their heirs or assigns, unless it be declared and proved to be a forgery. *id.* art. 2233. See Merlin, *Répert.*

AUTHENTICATION. A proper or legal attestation.

Acts done with a view of causing an instrument to be known and identified.

Under the constitution of the U. S., congress has power to provide a method of au-

thenticating copies of the records of a state with a view to their production as evidence in other states. See FOREIGN JUDGMENT; FULL FAITH AND CREDIT; RECORDS.

AUTHENTICS. A collection of the Novels of Justinian, made by an unknown person.

They are *entire*, and are distinguished by their name from the epitome made by Julian. See 1 Mackeldey, Civ. Law § 72.

A collection of extracts made from the Novels by a lawyer named Irnier, and which he inserted in the code at the places to which they refer. These extracts have the reputation of not being correct. Merlin, *Répert. Authentique.*

AUTHOR (Lat. *auctor*, from *augere*, to increase, to produce).

One who produces, by his own intellectual labor applied to the materials of his composition, an arrangement or compilation new in itself. Atwill v. Ferrett, 2 Blatchf. 39, Fed. Cas. No. 640.

When a person has conceived the design of a work, and has employed others to execute it, the creation of the work may be so far due to his mind as to make him the author; 7 C. B. N. S. 268; but he is not an author who merely suggests the subject, and has no share in the design or execution of the work; 17 C. B. 432; Drone, Copyright 236. The reporter of a speech verbatim is the author of the report; [1900] A. C. 539. The adopter of a foreign drama, who introduces into his version material alterations, is an author of a dramatic piece; 74 C. T. 77; within the Fine Arts Copyright Act, the operator who takes (or superintends the taking of) the negative is the author of a photograph and not the actual proprietor of the business; 52 L. J. Q. B. 750.

See COPYRIGHT.

AUTHORITIES. Enactments and opinions relied upon as establishing or declaring the rule of law which is to be applied in any case.

The opinion of a court, or of counsel, or of a text-writer upon any question, is usually fortified by a citation of authorities. In respect to their general relative weight, authorities are entitled to precedence in the order in which they are here treated.

The authority of the constitution and of the statutes and municipal ordinances are paramount; and if there is any conflict among these, the constitution controls, and courts declare a statute or ordinance which conflicts with the former to be so far forth of no authority. See CONSTITUTIONAL LAW.

The decisions of courts of justice upon similar cases are the authorities to which most frequent resort is to be had; and although in theory these are subordinate to the first class, in practice they do continually explain, enlarge, or limit the provisions of enactments, and thus in effect largely modify them. The word *authorities* is frequently used in a restricted sense to designate citations of this class. See 23 A. & E. Encyc. of Law 19; Chamberlain, *Stare Decisis.* See PRECEDENTS.

As to American decisions as authorities in English courts, see PRECEDENTS.

The opinions of legal writers. Of the vast number of treatises and commentaries which we have, comparatively few are esteemed as authorities. A very large number are in reality but little more than digests of the adjudged cases arranged in treatise form, and find their chief utility as manuals of reference. Hence it has been remarked that when we find an opinion in a text-writer upon any particular point, we must consider it not merely as the opinion of the author, but as the supposed result of the authorities to which he refers; and if on examination of those authorities they are found not to establish it, his opinion is disregarded; 3 B. & P. 301. Where, however, the writer declares his own opinion as founded upon principle, the learning and ability of the writer, together with the extent to which the reasons he assigns commend themselves to the reader, determine the weight of his opinion. A distinction has been made between writers who have and who have not held judicial station; Ram, Judgments 93. But this, though it may be borne in mind in estimating the learning and ability of an author, is not a just test of his authority. See 3 Term 64, 241. Early text-books have a footing of their own and are considered authorities. Pollock, First Book 236. "In England and America, not only is there no line between the careers of judges and advocates, but there is no line between the judges and advocates and the jurists. Indeed, a large proportion of those text-writers who could be properly cited as authority have either filled high judicial positions, or have been actively engaged in some branch of practice. Omitting the names of living writers, we have, in England, Bracton, Littleton, Coke, Hale, Doderidge, Gilbert, Foster, Blackstone, Fearne, Hargrave, Butler, Preston, Wigram, Abbott, Sugden, Stephen, Byles, Williams, Blackburn, Benjamin; and in the United States, Kent, Story, Redfield, Washburn, Rawle [Covenants for Title]." John C. Gray (Nature and Sources of Law 255). Foster's Crown Law (1762) is said to be the latest book to which authority in the exact sense can be ascribed. Pollock, First Book of Jurispr. 246. Five books are said to stand out pre-eminently in the history of English law—Glanvil, Bracton, Littleton, Coke and Blackstone. 2 Holdsw. Hist. E. L. 484.

"It is to my mind much to be regretted, and it is a regret which I believe every judge on the bench shares, that text-books are more and more quoted in court—I mean, of course, text-books by living authors—and some judges have gone so far as to say that they shall not be quoted." Kekewich, J., in [1887] L. R. 37 C. D. 54.

In complicated questions of real estate law,

in the absence of cases, weight is given to text-books of recognized authority; 18 C. B. N. S. 90, 107 (Erle, C. J.); and to the settled practice of conveyancers; 2 Brod. & Bing. 473, 600, per Eldon, L. C., in the House of Lords; Turn. & R. 81, 87, when the same judge puts his decision on that ground, saying, that "after the abuse which I have heard at the bar of the House of Lords and elsewhere upon that subject, I am not sorry to have this opportunity of stating my opinion that great weight should be given to that practice." The practice of conveyancers was considered by Jessel, M. C., worthy of consideration though not decisive; 16 Ch. D. 211, 223.

As to the value and effect of the opinions of the Attorney-Generals of the United States, see In re District Attorney of United States, 2 Cadwalader's Cases 138, Fed. Cas. No. 3,924, 7 Am. L. Reg. (N. S.) 801, per Cadwalader, J. Devens, Atty.-Gen., in 16 Op. 522, referred to this opinion as being that of a subordinate judge, and therefore less weighty than those of the Attorney-Generals. See EXECUTIVE POWER.

The opinions of writers on moral science, and the codes and laws of ancient and foreign nations, are resorted to in the absence of more immediate authority, by way of ascertaining those principles which have commended themselves to legislators and philosophers in all ages. See CODE. Lord Coke's saying that common opinion is good authority in law, Co. Litt. 186 *a*, is not understood as referring to a mere speculative opinion in the community as to what the law upon a particular subject is; but to an opinion which has been frequently acted upon, and for a great length of time, by those whose duty it is to administer the law, and upon which course of action important individual rights have been acquired or depend; Bank of Utica v. Mersereau, 3 Barb. Ch. (N. Y.) 528, 577, 49 Am. Dec. 189.

As to the mode of citing authorities, see CITATION OF AUTHORITIES.

See JUDGE-MADE LAW; LAW.

AUTHORITY. The lawful delegation of power by one person to another.

Authority coupled with an interest is an authority given to an agent for a valuable consideration, or which forms part of a security.

Express authority is that given explicitly, either in writing or verbally.

General authority is that which authorizes the agent to do everything connected with a particular business. Story, Ag. § 17.

It empowers him to bind his principal by all acts within the scope of his employment; and it cannot be limited by any private direction not known to the party dealing with him. Paley, Ag. 199.

Limited authority is that where the agent is bound by precise instructions.

Special authority is that which is confined to an individual transaction. Story, Ag. § 19; 15 East 400, 408; Andrews v. Kneeland, 6 Cow. (N. Y.) 354.

Such an authority does not bind the employer, unless it is strictly pursued; for it is the business of the party dealing with the agent to examine his authority; and therefore, if there be any qualification or express restriction annexed to it, it must be observed; otherwise, the principal is discharged; Paley, Ag. 202.

Naked authority is that where the principal delegates the power to the agent wholly for the benefit of the former.

A naked authority may be revoked; an authority coupled with an interest is irrevocable.

Unlimited authority is that where the agent is left to pursue his own discretion.

See PRINCIPAL AND AGENT.

AUTOCRACY. A government where the power of the monarch is unlimited by law.

AUTOMATIC COUPLER. See SAFETY APPLIANCE ACT.

AUTOMOBILES. A vehicle for the carriage of passengers or freight, propelled by its own motor. It has been held to be a carriage, not a machine; Baker v. Fall River, 187 Mass. 53, 72 N. E. 336; but by the same court in a later case it was held that a statute enacted more than one hundred years ago providing that cities or towns should pay for the repairs of highways so as to make them reasonably safe for travellers with carriages could not be construed reasonably to include a heavy modern automobile; Doherty v. Inhabitants of Ager, 197 Mass. 241, 83 N. E. 677, 14 L. R. A. (N. S.) 816, 125 Am. St. Rep. 355.

The legislature may, under the police power, regulate the driving of automobiles and motor cycles and provide for a registration fee, which is a license fee, not a tax; Com. v. Boyd, 188 Mass. 79, 74 N. E. 255, 108 Am. St. Rep. 464; see Com. v. Densmore, 29 Pa. Co. Ct. R. 217. A city may, under a charter conferring the power to regulate the use of its highways, enact an ordinance requiring the registering and numbering of automobiles or other motor vehicles and exacting a fee from the owner to pay for the license tag to be furnished by the city; People v. Schneider, 139 Mich. 673, 103 N. W. 172, 69 L. R. A. 345, 5 Ann. Cas. 790. It may regulate the speed of automobiles and require the use of reasonable safety appliances; City of Chicago v. Banker, 112 Ill. App. 94. It may prescribe different rates of speed in different parts of the city, according to the width of the streets, their use, and the density of population; Chittenden v. Columbus, 26 Ohio C. C. 531. An ordinance limiting speed within certain limits is not invalid because another ordinance permits street cars to run at a greater rate of speed; *id.* A provision in the charter of a city which empowered it to regulate the use of the streets and the speed of vehicles, and to license and regulate certain occupations, was held not to confer power

to enact an ordinance requiring one who uses an automobile for his private business and pleasure only to submit to an examination and to be licensed; City of Chicago v. Banker, 112 Ill. App. 94; the ordinance was further held to impose a burden upon one class of citizens not imposed upon others.

There may be a recovery for common law negligence in operating an automobile, although the use of such vehicles has become a matter of statutory regulation; Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L. R. A. (N. S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487. The law does not denounce motor carriages as such on the public ways. So long as they are constructed and propelled in a manner consistent with the proper use of the highways and are calculated to subserve the public as a beneficial means of transportation, with reasonable safety to travellers by ordinary modes, they have an equal right with other vehicles in common use to occupy the streets and roads; Gregory v. Slaughter, 124 Ky. 345, 99 S. W. 247, 8 L. R. A. (N. S.) 1228, 124 Am. St. Rep. 402; Indiana Springs Co. v. Brown, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. (N. S.) 238, 6 Ann. Cas. 656. There is nothing dangerous in their use when carefully managed. Their guidance, speed and noise are all subject to quick and easy regulation, and under the control of a competent and considerate manager it is as harmless on the road as other vehicles in common use; McIntyre v. Orner, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. (N. S.) 1130, 117 Am. St. Rep. 359, 8 Ann. Cas. 1087. It is the manner of driving the vehicle, and that alone, which threatens the safety of the public. The ability to stop quickly, its quick response to guidance, its uncontrolled sphere of action, would seem to make the automobile one of the least dangerous of conveyances; Yale L. J. Dec. 1905. Because they are likely to frighten horses is no reason for prohibiting their use. In all human activities the law keeps up with improvement and progress brought about by discovery and invention; and in respect to highways, if the introduction of a new contrivance for transportation purposes, conducted with due care, is met with inconvenience and even accidental injury to those using ordinary modes, there can be no recovery, provided the contrivance is compatible with the general use and safety of the road. It is improper to say that the driver of a horse has rights in the road superior to the driver of the automobile; Hannigan v. Wright, 5 Pennewill (Del.) 537, 63 Atl. 234; Wright v. Crane, 142 Mich. 508, 106 N. W. 71; and each is equally restricted in the exercise of his rights by the corresponding rights of the other; Macomber v. Nichols, 34 Mich. 212, 22 Am. Rep. 522; Holland v. Bartch, 120 Ind. 46, 22 N. E. 83, 16 Am. St. Rep. 307. Each is required to use ordinary care, in order to avoid receiving injury as well as inflicting injury upon the other, and in this the degree of care required is to be estimated by the exigencies of the particular situation.

No operator of an automobile is exempt from liability for a collision in a public street by merely showing that at the time of the accident he did not run at a rate of speed exceeding the limit allowed by the law. He is bound to anticipate that he may meet persons at any point in a public street; Buscher v. Transp. Co., 106 App. Div. 493, 94 N. Y. Supp. 798; and he must keep a proper lookout for them; McFern v. Gardner, 121 Mo. App. 1, 97 S. W. 972; and keep his machine under such control as will enable him to avoid a collision with another person also using care and caution; Gregory v. Slaughter, 124 Ky. 345, 99 S. W. 247, 8 L. R. A. (N. S.) 1228, 124 Am. St. Rep. 402; if necessary he must run slowly, and even stop; Thies v. Thomas, 77 N. Y. Supp. 276. No blowing of a horn or whistle, nor the ringing of a bell or gong, without an attempt to lessen the speed, is sufficient, if the circumstances demand that the speed should be lessened, or the machine be stopped, and such a course is practicable. The true test is that he should use all the care which a careful driver would have exercised under the same circumstances; Thies v. Thomas, 77 N. Y. Supp. 276. He has been held to the same degree of care as a motorman of an electric car; McFern v. Gardner, 121 Mo. App. 1, 97 S. W. 972. A pedestrian crossing a street is not bound to "stop, look and listen" for automobiles; Baker v. Close, 204 N. Y. 92, 97 N. E. 501, 38 L. R. A. (N. S.) 487. That a statute limiting speed on the highways applies only to horseless vehicles does not render it void as an unjust discrimination; Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L. R. A. (N. S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487.

The U. S. R. S. prohibiting passenger steamers from carrying as freight certain articles, including petroleum products or other like explosive fluids, except under certain conditions, were amended by the act of Feb. 21, 1901, which provides that "nothing in the foregoing or following sections of this act shall prohibit the transportation by steam vessels of gasolene or any of the products of petroleum when carried by motor vehicles (commonly known as automobiles) using the same as a source of motive power: provided however that all fire, if any, in such vehicles or automobiles be extinguished before entering the said vessel, and the same be not relighted until after said vehicle shall have left the same." Under this act it was held that gasolene contained in the tank of an automobile being transported on a steam vessel was carried as freight within the meaning of the statute, that an automobile in which the motive power was generated by passing an electric spark through a compressed mixture of gasolene and air in the cylinder, causing

intermittent explosions, carried a fire while the vehicle was under motion from its own motive power; and that the carrying by a steam ferryboat of such a vehicle, which was run in and off the boat by its own power, was a violation of the statute; The Texas, 134 Fed. 909. In 1905, Congress amended the existing law by enacting that "nothing in the foregoing or following sections of this act shall prohibit the transportation by steam vessels of gasolene or any of the products of petroleum when carried by motor vehicles (commonly known as automobiles) using the same as a source of motive power: provided however, that all fire, if any, in such vehicles or automobiles be extinguished immediately after entering said vessels and the same be not relighted until immediately before said vehicle shall leave the vessel; provided further, that any owner, master, agent or other person having charge of passenger steam vessels shall have the right to refuse to transport automobile vehicles, the tanks of which contain gasolene, naptha or other dangerous burning fluids"; 33 Stat. L. 720.

An absent owner of an automobile is not liable for the negligence of the chauffeur committed at a time when he was not engaged in the owner's business; Clark v. Buckmobile Co., 107 App. Div. 120, 94 N. Y. Supp. 771; Reynolds v. Buck, 127 Ia. 601, 103 N. W. 946; even though, as in the latter case, the automobile was decorated for the purpose of advertising the owner's business.

A statute providing that one operating a motor vehicle who has caused an accident to his knowledge and leaves the place without stopping or leaving his name is guilty of a felony, was held to be a simple police regulation. The driver who discloses his identity is not furnishing evidence of guilt, but rather of innocence; Ex parte Kneedler, 243 Mo. 632, 147 S. W. 983, 40 L. R. A. (N. S.) 622, Ann. Cas. 1913C, 923.

See Huddy, Automobiles.

AUTONOMY (Greek, *αὐτονομία*). The state of independence.

The autonomos was he who lived according to his own laws,—who was free. The term was chiefly used of communities or states, and meant those which were independent of others. It was introduced into the English language by the divines of the seventeenth century, when it and its translation —self-government—were chiefly used in a theological sense. Gradually its translation received a political meaning, in which it is now employed almost exclusively. Of late the word autonomy has been revived in diplomatic language in Europe, meaning independence, the negation of a state of political influence from without or foreign powers. See Lieber, Civ. Lib.

AUTOPSY. See DEAD BODY.

AUTRE VIE (Fr.). The life of another. See ESTATE PUR AUTRE VIE.

AUTREFOIS ACQUIT (Fr. formerly acquitted). A plea made by a defendant indicted for a crime or misdemeanor, that he has formerly been tried and acquitted of the same offence.

The constitution of the United States, Amend. art. 5, provides that no person shall be subject for the same offence to be put twice in jeopardy of life or limb. This is simply a re-enactment of the common-law. The same provision is to be found in the constitution of almost all if not of every state, and if not in the constitution the same principles are probably declared by legislative act; so that they must be regarded as fundamental doctrines in every state; 2 Kent 12. See U. S. v. Perez, 9 Wheat. (U. S.) 579, 6 L. Ed. 165; U. S. v. Gibert, 2 Sumn. 19, Fed. Cas. No. 15,204; Com. v. Bowden, 9 Mass. 494; People v. Goodwin, 18 Johns. (N. Y.) 187, 9 Am. Dec. 203; State v. Hall, 9 N. J. L. 256. See, however, Com. v. Cook, 6 S. & R. (Pa.) 577, 9 Am. Dec. 465; State v. Garrigues, 2 N. C. 241; Whart. Crim. Pl. § 490. This plea is founded upon the maxim, *nemo debet bis vexari pro eadem causa;* Broom, Leg. Max. 265.

The court, however, must have been competent, having jurisdiction and the proceedings regular; McNeil v. State, 29 Tex. App. 48, 14 S. W. 393; Blyew v. Com., 91 Ky. 200, 15 S. W. 356; but see Powell v. State, 89 Ala. 172, 8 South. 109.

To be a bar, the acquittal must have been after a trial; Marston v. Jenness, 11 N. H. 156; State v. Odell, 4 Blackf. (Ind.) 156; State v. Tindal, 5 Harr. (Del.) 488; Hassell v. Nutt, 14 Tex. 260; and by verdict of a jury on a valid indictment; 4 Bla. Com. 335; People v. Barrett, 1 Johns. (N. Y.) 66; Heikes v. Com., 26 Pa. 513; State v. Wilson, 39 Mo. App. 187. In Pennsylvania and some other states, the discharge of a jury, even in a capital case, before verdict, except in case of absolute necessity, will support the plea; Com. v. Clue, 3 Rawle (Pa.) 498; State v. McGimsey, 80 N. C. 377, 30 Am. Rep. 90; but the prisoner's consent to the discharge of a previous jury is a sufficient answer; Peiffer v. Com., 15 Pa. 468, 53 Am. Dec. 605. In the United States courts and in some states, the separation of the jury when it takes place in the exercise of a sound discretion is no bar to a second trial; Whart. Cr. Pl. § 499; Clark, Cr. Law 373; Simmons v. U. S., 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968; as where the jury is discharged because of the sickness of a juror; People v. Ross, 85 Cal. 383, 24 Pac. 789; State v. Hazledahl, 2 N. D. 521, 52 N. W. 315, 16 L. R. A. 150; see Stocks v. State, 91 Ga. 831, 18 S. E. 847; or because they failed to agree; Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; State v. Whitson, 111 N. C. 695, 16 S. E. 332.

There must be an acquittal of the offence charged in law and in fact; Com. v. Myers, 1 Va. Cas. 188; Wortham v. Com., 5 Rand. (Va.) 669; Com. v. Goddard, 13 Mass. 457; McCreary v. Com., 29 Pa. 323; People v. March, 6 Cal. 543; Winn v. State, 82 Wis. 571, 52 N. W. 775; the plea will be bad if

the offences charged in the two indictments be perfectly distinct in point of law, however clearly they may be connected in fact; Burton v. U. S., 202 U. S. 345, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362, citing Com. v. Roby, 12 Pick. (Mass.) 502; but an acquittal is conclusive; Slaughter v. State, 6 Humphr. (Tenn.) 410; Com. v. Cummings, 3 Cush. (Mass.) 212, 50 Am. Dec. 732; State v. Brown, 16 Conn. 54; State v. Jones, 7 Ga. 422; State v. Johnson, 8 Blackf. (Ind.) 533; State v. Wright, 3 Brev. (S. C.) 421; State v. Spear, 6 Mo. 644; Dillard's Adm'r v. Moore, 7 Ark. 169; State v. De Hart, 7 N. J. L. 172; State v. Anderson, 3 Smedes & M. (Miss.) 751; State v. Burris, 3 Tex. 118; Lawyer v. Smith, 1 Denio (N. Y.) 207. If a *nolle prosequi* is entered without the prisoner's consent after issue is joined and the jury sworn, it is a bar to a subsequent indictment for the same offence; Franklin v. State, 85 Ga. 570, 11 S. E. 876; but the jeopardy does not begin until the jury is sworn, prior to that a *nol. pros.* may be entered without prejudice; State v. Paterno, 43 L. Ann. 514, 9 South. 442; a *nol. pros.* of two of three indictments is no bar to a prosecution under the third; O'Brien v. State, 91 Ala. 25, 8 South. 560. In Missouri the conviction of murder in the second degree, under an indictment for murder in the first degree, constitutes no bar to trial and conviction for murder in the first degree, upon a new trial, when the first verdict has been set aside; State v. Anderson, 89 Mo. 312, 1 S. W. 135.

Proceedings by state tribunals are no bar to court-martial instituted by the military authorities of the United States; 3 Opin. Atty.-Genl. 750; Stiener's Case, 6 *id.* 413; but a judgment of conviction by a military court, established by law in an insurgent state, is a bar to a subsequent prosecution by a state court for the same offence; Coleman v. Tennessee, 97 U. S. 509, 24 L. Ed. 1118. See COURTS-MARTIAL.

The plea must set out the former record, and show the identity of the offence and of the person by proper averments; Hawk. Pl. Cr. b. 2, c. 36; Atkins v. State, 16 Ark. 568; Wilson v. State, 24 Conn. 57.

The true test of whether a plea of *autrefois acquit* or *autrefois convict* is a sufficient bar in any particular case is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first; 1 Bish. Cr. L. 1012; 3 B. & C. 502; Com. v. Roby, 12 Pick. (Mass.) 504; State v. Williams, 45 La. Ann. 936, 12 South. 932. Thus, if a prisoner indicted for burglariously breaking and entering a house and stealing therein certain goods of A is acquitted, he cannot plead this acquittal in bar of a subsequent indictment for burglariously breaking and entering the same house and stealing other goods of B; 2 Leach 718, 719; Alexander v. State, 21 Tex. App. 406, 17 S. W. 139, 57 Am. Rep. 617.

The plea of *autrefois acquit* involves questions of mixed law and fact, and is properly referred to the jury when not demurrable on its face; State v. Williams, 45 La. Ann. 936, 12 South. 932.

The plea in the celebrated case of Regina v. Bird, 5 Cox Cr. Cas. 12, Templ. & M. 438, 2 Den. Cr. Cas. 224, is of peculiar value as a precedent.

See JEOPARDY.

AUTREFOIS ATTAINT (Fr. formerly attainted). A plea that the defendant has been attainted for one felony, and cannot, therefore, be criminally prosecuted for another; 4 Bla. Com. 336; 12 Mod. 109; R. & R. 268. This is not a good plea in bar in the United States, nor in England in modern law; 1 Bish. Cr. L. § 692; Singleton v. State, 71 Miss. 782, 16 South. 295, 42 Am. St. Rep. 488; Gaines v. State (Tex.) 53 S. W. 623; *contra*, Ex parte Myers, 44 Mo. 279; State v. Jolly, 96 Mo. 435, 9 S. W. 897. See State v. McCarty, 1 Bay (S. C.) 334.

AUTREFOIS CONVICT (Fr. formerly convicted). A plea made by a defendant indicted for a crime or misdemeanor, that he has formerly been tried and convicted of the same.

This plea is substantially the same in form as the plea of *autrefois acquit*, and is grounded on the same principle, viz.: that no man's life or liberty shall be twice put in jeopardy for the same offence; Whart. Cr. Pl. § 435; 1 Bish. Cr. Law § 651; State v. Cooper, 13 N. J. L. 361, 25 Am. Dec. 490; U. S. v. Keen, 1 McLean 429, Fed. Cas. No. 15,510; State v. Nelson, 7 Ala. 610; State v. Chaffin, 2 Swan (Tenn.) 493; State v. Parish, 43 Wis. 395.

A plea of *autrefois convict*, which shows that the judgment on the former indictment has been reversed for error in the judgment, is not a good bar to another indictment for the same offence; Cooley's Const. Lim. 326; Territory v. Dorman, 1 Ariz. 56, 25 Pac. 516; People v. Schmidt, 64 Cal. 260, 30 Pac. 814; State v. Rhodes, 112 N. C. 857, 17 S. E. 164; otherwise, if the reversal were not for insufficiency in the indictment nor for error at the trial, but for matter subsequent, and *dehors* both the conviction and the judgment; Hartung v. People, 26 N. Y. 167. A prior conviction before a justice of the peace, and a performance of the sentence, constitute a bar to an indictment for the same offence, although the complaint on which the justice proceeded was so defective that his judgment might have been reversed for error; Com. v. Loud, 3 Metc. (Mass.) 328, 37 Am. Dec. 139. Where a person has been convicted for failing to support his wife and being disorderly, it is no bar to a second prosecution on a similar charge, where at the

time of the second offence he was not in prison on account of his first sentence; People v. Hodgson, 126 N. Y. 647, 27 N. E. 378. Where one has been convicted of an assault but discharged without sentence on giving security for good behavior, he cannot afterwards be convicted on an indictment for the same assault; 24 Q. B. Div. 423. See AUTREFOIS ACQUIT.

AUXILIUM (Lat.). An aid; services paid by the tenant to his lord. *Auxilium ad filium militem faciendum, vel ad filiam maritandam.* (An aid for making the lord's son a knight, or for marrying his daughter.) Fitzh. Nat. Brev. 62.

AUXILIUM CURIÆ. An order of the court summoning one party, at the suit and request of another, to appear and warrant something. Kenn. Par. Ant. 477.

AUXILIUM REGIS. A subsidy paid to the king. Spelman.

AUXILIUM VICE COMITI. An ancient duty paid to sheriffs. Cowell.

AVAILABLE. Capable of being used; valid or advantageous.

Available means. That numerous class of securities which are known in the mercantile world as representatives of value easily converted into money, but not money. Brigham v. Tillinghast, 13 N. Y. 218.

AVAILS. Profits or proceeds, as the avails of a sale at auction. Webst. Dict.

With reference to wills it applies to the proceeds of an estate after the debts have been paid; McNaughton v. McNaughton, 34 N. Y. 201; Allen v. De Witt, 3 *id.* 276.

AVAL. In Canadian Law. A contract of suretyship or guarantee on a promissory note. 1 Low. C. 221; 9 *id.* 360.

In French Law. The guaranty of a bill of exchange; so called because usually placed at the foot or bottom (*aval*) of the bill. Sto. Bills §§ 394, 454. See 11 Harv. L. Rev. 55; INDORSEMENT.

AVARIA, AVARIE. Average; the loss and damage suffered in the course of a navigation. Pothier, *Marit. Louage* 105.

AVENAGE. A certain quantity of oats paid by a tenant to his landlord as a rent or in lieu of other duties. Jacob, L. Dict.

AVENTURE. A mischance causing the death of a man, as by drowning, or being killed suddenly without felony. Co. Litt. 391; Whishaw.

AVER. To assert. See AVERMENT.

To make or prove true; to verify.

The defendant will offer to *aver.* Cowell; Co. Litt. 362 *b.*

Cattle of any kind. Cowell, *Averia;* Kelham.

Aver et tenir. To have and to hold.

Aver corn. A rent reserved to religious houses, to be paid in corn. Corn drawn by the tenant's cattle. Cowell.

Aver-land. Land ploughed by the tenant for the proper use of the lord of the soil. Blount.

Aver-penny. Money paid to the king's averages to be free therefrom. *Termes de la Ley.*

Aver-silver. A rent formerly so called. Cowell.

AVERA. A day's work of a ploughman, formerly valued at eight pence. Jacob, L. Dict.

AVERAGE. In insurance law this is general, particular, or petty.

GENERAL AVERAGE (also called gross) consists of expense purposely incurred, sacrifice made, or damage sustained, for the common safety of the vessel, freight and cargo, or two of them, at risk, and is to be contributed for by the several interests in the proportion of their respective values exposed to the common danger, and ultimately surviving, including the amount of expense, sacrifice, or damage so incurred in the contributory value; 2 Phill. Ins. § 1269; and see *Code de Com.* tit. xi.; Aluzet, *Trait. des Av.* cxx.; Sturgess v. Cary, 2 Curt. C. C. 59, Fed. Cas. No. 13,572; Greely v. Ins. Co., 9 Cush. (Mass.) 415; McLoon's Adm'r v. Cummings, 73 Pa. 98; Star of Hope v. Annan, 9 Wall. (U. S.) 203, 19 L. Ed. 638; Bailey, Gen. Av.; 2 Pars. Mar. Law, ch. xi.; Stevens, Av.; Benecke, Av.; Pothier, Av.; *Lex Rhodia,* Dig. 14. 2. 1.

General average is a comparatively modern expression. The early writers expressed the same idea by the words "averidge," or "contribution," which with them were synonymous terms; 21 L. Quart. Rev. 155. In the common memorandum which was added to marine policies about 1749, the words, *general* and *average,* occur for the first time; *id.;* Loundes, Mar. Ins. 206 (2d ed. 1885). By this time the word *average* had acquired the dual meaning still attaching to it: a particular, partial loss, and a contribution to the general loss; it was necessary to insert the words "unless general" in order to prevent the operation of the exception being extended to losses of the latter class. Lord Mansfield held that the word "unless" meant the same as "except"; 3 Burr. 1550. Lord Esher, M. R., said the true construction of the words "free from average unless general" was free from partial loss unless it be a general average loss; 22 Q. B. D. 580. The result of these decisions is that, while the assurer is to be excused from paying a loss of the nature of particular average, his pre-existing obligation to contribute to general average, though acknowledged, is left untouched; 21 L. Q. R. 155.

General average is recoverable for loss by jettison; 19 C. B. N. S. 563; for ship's stores used to fire the donkey-engine which worked the pumps; 7 L. R. Ex. 39; 2 Q. B. D. 91, 295; and for damage to a cargo caused by pouring on water to extinguish a fire; 8 Q. B. D. 653; The Roanoke, 46 Fed. 297; *id.,* 53 Fed. 270; *id.,* 59 Fed. 161, 8 C. C. A. 67.

Prior to the Harter Act, a common carrier

by sea could not, by any agreement in the bill of lading, exempt himself from responding to the owner of cargo for damages arising from the negligence of the master or crew of the vessel; Liverpool & Great Western Steam Co. v. Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; New York C. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. Ed. 627. That act absolved the shipowner from responsibility for the negligence of the master and crew under certain circumstances. By its first and second sections shipowners are prohibited from inserting in their bills of lading agreements limiting their liability in certain respects. It was held under this act that if a vessel, seaworthy at the beginning of the voyage, is afterwards stranded by the negligence of her master, the shipowner, who has exercised due diligence to make his vessel seaworthy, properly manned, equipped and supplied, under its provisions has no right to general average contribution for sacrifices made and suffered by him subsequent to the stranding, in successful efforts to save vessel, freight, and cargo; The Irrawaddy, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130. This case was distinguished in a later case where it was held that a general average agreement inserted in bills of lading providing that if the owner of a ship shall have exercised due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, the cargo shall contribute in general average with the shipowner even if the loss resulted from negligence in the management of the ship, is valid under the Harter Act, and entitles the shipowner to collect a general average contribution from the cargo owners in respect to sacrifices made and extraordinary expenses incurred by him for the common benefit and safety of ship, cargo, and freight subsequent to a negligent stranding; The Jason, 225 U. S. 32, 32 Sup. Ct. 560, 56 L. Ed. 969. That in view of the provisions of section 3 of the act and of the general average clause the cargo owners have a right to contribution from the shipowner for sacrifices made subsequent to negligent stranding in order to save the joint interests from common peril is held; The Roanoke, 46 Fed. 297; *id.*, 59 Fed. 161; The Rapid Transit, 52 Fed. 320; The Santa Ana, 154 Fed. 800, 84 C. C. A. 312. There is a similar statute in England; 45 L. J. Q. B. 646; 8 Q. B. D. 653; [1908] 1 K. B. 51, affirmed [1908] App. Cas. 431.

Where a vessel was chartered to proceed to a foreign port and there take on a cargo, freight to be paid on the completion of the voyage home, and on the voyage out in ballast the vessel was grounded and a general average sacrifice made, it was held that, upon the subsequent completion of the voyage and the payment of the freight, such freight was liable to contribute to the general average sacrifice; [1901] 2 K. B. 861; and see 1 M. & S. 318; The Mary, 1 Sprague 17, Fed. Cas. No. 9,188; 15 Harv. L. Rev. 488.

If the peril is caused by a concealed defect in the shipment equally unknown to the shipper and shipowner, the shipper is entitled to the benefit of contribution; The Wm. J. Quillan, 180 Fed. 681, 103 C. C. A. 647.

The law of the destination, where ship and cargo separate, determines the right of general average; Monsen v. Amsinck, 166 Fed. 817.

Insurance is not a part of the owner's interest in a ship, and in case of general average, for the purpose of increasing the fund to be distributed, the insurance received by him should not be added to the value of what was saved; The Rapid Transit, 52 Fed. 320; The City of Norwich, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134; The Scotland, 118 U. S. 507, 6 Sup. Ct. 1174, 30 L. Ed. 153.

Average particular (also called partial loss) is a loss on the ship, cargo, or freight, to be borne by the owner of the subject on which it happens, and is so called in distinction from general average; and, if not total, it is also called a partial loss; 2 Phill. Ins. c. xvi.; Stevens, pt. 1, c. 2; Arnould, Mar. Ins. 953; *Code de Com.* l. 2, t. 11, a. 403; Pothier, Ass. 115; Benecke & S. Av., Phill. ed. 341.

It is insured against in marine policies in the usual forms on ship, cargo, or freight, when the action of peril is extraordinary, and the damage is not mere wear or tear; and, on the ship, covers loss by sails split or blown away, masts sprung, cables parted, spars carried away, planks started, change of shape by strain, loss of boat, breaking of sheathing or upper works or timbers, damage by lightning or fire, by collision or stranding, or in defence against pirates or enemies, or by hostile or piratical plunder; 2 Phill. Ins. c. xvi.; Orrok v. Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271; Sewall v. Ins. Co., 11 Pick. (Mass.) 90; 7 C. & P. 597; 3 *id.* 323; Sage v. Ins. Co., 1 Conn. 239; Waller v. Ins. Co., 9 Mart. O. S. (La.) 276; Fisk v. Ins. Co., 18 La. 77; Perry v. Ins. Co., 5 Ohio 306; Webb v. Ins. Co., 6 Ohio 456; Hallet v. Jenks, 3 Cra. (U. S.) 218, 2 L. Ed. 414; Byrnes v. Ins. Co., 1 Cow. (N. Y.) 265; Depau v. Ins. Co., 5 Cow. (N. Y.) 63, 15 Am. Dec. 431; Dunham v. Ins. Co., 11 Johns. (N. Y.) 315, 6 Am. Dec. 374.

Particular average on freight may be by loss of the ship, or the cargo, so that full freight cannot be earned; but not if the goods, though damaged, could have been carried on to the port of destination; Coolidge v. Ins. Co., 15 Mass. 341; McGau v. Ins. Co., 23 Pick. (Mass.) 405; Bork v. Norton, 2 McLean, 423, Fed. Cas. No. 1,659; Jordan v. Ins. Co., 1 Sto. 342, Fed. Cas. No. 7,524; Charleston Ins. & Trust Co. v. Corner, 2 Gill (Md.) 410; Saltus v. Ins. Co., 12 Johns. (N. Y.) 107, 7 Am. Dec. 290.

Particular average on goods is usually ad-

justed at the port of delivery on the basis of the value at which they are insured, viz.: the value at the place of shipment, unless it is otherwise stipulated in the policy; 2 Burr. 1167; 2 East 58; 12 *id.* 639; 3 B. & P. 308; Rankin v. Ins. Co., 1 Hall (N. Y.) 632; Newlin v. Ins. Co., 20 Pa. 312; 36 E. L. & Eq. 198; 3 Taunt. 162. See SALVAGE; Loss.

A particular average on profits is, by the English custom, adjusted upon the basis of the profits which would have been realized at the port of destination. In the United States the adjustment is usually at the same rate as on the goods the profits on which are the subject of the insurance; 2 Pars. Ins. 399; Fosdick v. Ins. Co., 3 Day (Conn.) 108; Alsop v. Ins. Co., 1 Sumn. 451, Fed. Cas. No. 262; Evans v. Ins. Co., 6 R. I. 47.

PETTY AVERAGE consists of small charges which were formerly assessed upon the cargo, viz.; pilotage, towage, light-money, beaconage, anchorage, bridge-toll, quarantine, pier-money. Le Guidon, c. 5, a. 13; Weyt, de A. 3, 4; Weskett, art. Petty Av.; 2 Phill. Ins. § 1269, n. 1; 2 Arnould, Mar. Ins. 927.

The doctrine of general average which has obtained in maritime insurance is not applicable to fire insurance; May, Ins. § 421 *a*.

AVERIA (Lat.). Cattle; working cattle. *Averia carucæ* (draft-cattle) are exempt from distress; 3 Bla. Com. 9; 4 Term 566.

AVERIIS CAPTIS IN WITHERNAM. A writ which lies in favor of a man whose cattle have been unlawfully taken by another, and driven out of the country where they were taken, so that they cannot be replevied.

It issues against the wrong-doer to take his cattle for the plaintiff's use. *Reg. Brev.* 82.

AVERIUM (Lat.). Goods; property. A beast of burden. Spelman, Gloss.

AVERMENT. A positive statement of facts, as opposed to an argumentative or inferential one. Bacon, Abr. *Pleas*, B.

Averments were formerly said to be general and particular; but only particular averments are found in modern pleading. 1 Chit. Pl. 277.

Particular averments are the assertions of particular facts.

There must be an averment of every substantive material fact on which the party relies, so that it may be replied to by the opposite party.

Negative averments are those in which a negative is used.

Generally, under the rules of pleading, the party asserting the affirmative must prove it; but an averment of illegitimacy, 2 Selwyn, Nisi P. 709, or criminal neglect of duty, must be proven; U. S. v. Hayward, 2 Gall. 498, Fed. Cas. No. 15,336; Hartwell v. Root, 19 Johns. (N. Y.) 345, 10 Am. Dec. 232; Com. v. Stow, 1 Mass. 54; 10 East 211; 3 Campb. 10; 3 B. & P. 302; 1 Greenl. Ev. § 80.

Immaterial and *impertinent averments* (which are synonymous, 5 D. & R. 209) are those which need not be made, and, if made, need not be proved. The allegation of deceit in the seller of goods in an action on the warranty is such an averment; 2 East 446; Panton v. Holland, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369.

Unnecessary averments are statements of matters which need not be alleged, but which, if alleged, must be proved. Carth. 200.

General averments are almost always of the same form. The most common form of making particular averments is in express and direct words, for example: And the party *avers*, or *in fact saith*, or *although*, or *because*, or *with this that*, or *being*, etc. But they need not be in these words; for any words which necessarily imply the matter intended to be averred are sufficient.

AVERRARE. To carry goods in a wagon or upon loaded horses; a duty required of some customary tenants. Jacob L. Dict.

AVERSIO (Lat.). An averting; a turning away. A sale in gross or in bulk.

Letting a house altogether, instead of in chambers. 4 Kent 517.

Aversio periculi. A turning away of peril. Used of a contract of insurance. 3 Kent 263.

AVET. In Scotch Law. To abet or assist. Tomlin, Dict.

AVIATICUS (Lat.). In Civil Law. A grandson.

AVIATION. The air space above the high seas and unoccupied territory is admittedly free to all nations and persons. It is with the air space above territorial lands and waters that conflicting views of the rights of nations are concerned. According to Hazeltine (Law of the Air), there are the freedom-of-the-air theories, which comprise absolute and partial freedom either by lateral zone divisions or limited exercise of rights; and the sovereignty-of-the-air theories which may also be classified into absolute sovereignty and limited sovereignty groups. The zone and limited sovereignty theories are usually based on analogy to the three mile limit of sovereignty over the high seas. This analogy is obviously unsound both on account of the unsafe condition of states if alien and hostile air-craft were permitted to sail over them above a prescribed height, and the difficulty of calculating the exact or even approximate height of air-craft. The absolute sovereignty theory is probably better justified on reason and practicality. Rights of aliens to unhindered passage and rules for alighting could be settled by international agreement. See 4 Am. J. Int. L. 95; 45 L. J. 402; 126 L. T. 168. It is said to be clear that the territorial jurisdiction of a state must extend to the atmosphere above its soil if the state is to be able to protect itself from airships which would otherwise have it in their power to violate the laws of the state, or to inflict injury upon the citizens of the state in case of accident to the airship. On the other hand, it is reasonable that a state should allow the innocent passage of foreign air-

ships through its territorial atmosphere, subject to the domestic regulations imposed upon the aërial traffic of its own citizens. In this respect the territorial atmosphere of a state may be considered as governed by the same rules as the territorial waters of the state. Hershey 232.

With regard to the rights of a landowner in the air space above his land, there are also divergent views of absolute and limited rights. The Roman Law regarded the air as *res publica*, freé to all persons. The French Code, on the other hand, defines land as including everything above and below the surface. The German Imperial Code adopts this same theory but limits the landowner's right to exclude persons from using the air space, to his actual interest in such exclusion. The Swiss Code is similar.

At common law the old maxim of *cujus est solum, ejus est usque ad cœlum* has led to much confusion. In its origin it had reference to the right of the owner to have the air space above his land remain in its natural state and to have excluded therefrom anything which would detract from his enjoyment of the land. 4 Am. J. Int. L. 95; 71 Cent. L. J. 1; 46 Can. L. J. 480. The flying of fowls, the passage of smoke and of wireless messages over another's land have never suggested such a conflict with the maxim as would amount to a trespass. Even navigation by balloons and aëroplanes for a century or more has been tacitly permitted. See 4 Camp. 219; 3 Bengal L. R. 43. But such passage in every instance must not by its frequency amount to a nuisance. The degree of peril and inconvenience to the landowner defines his legal rights; 14 Law Notes 69; 16 Case and Comment 216.

Under the commerce clause in the United States constitution it would seem that Congress has power to regulate aërial navigation; in the absence of such regulation, the individual states may legislate for their own exclusive territorial air space.

As to the liability of aviators for accidents it has been held that they are liable for all damage both direct and consequential; Guille v. Swan, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234; Conney v. Ass'n, 76 N. H. 60, 79 Atl. 517. This result is based on the view that all aërovehicles are dangerous devices and as such are operated at the aviator's peril. It is conceivable however that as aërial science develops, so that the present dangers and uncertainties are obviated, the stricter rule of liability will give way to one holding the aviator liable only for negligence. It has been urged that the more liberal rule would aid materially in the development of aërial science.

The intentional or negligent dropping and throwing articles overboard, which fall on private property and cause damage, is generally subjected to heavy liability. There is no inherent right to alight on private property without the consent of the owner, though an exception might possibly be allowed where an act of God or inevitable accident is the cause.

Every aëronaut shall be responsible for all damages suffered in this state by any person from injuries caused by any voyage in an airship directed by such aëronaut; and if he be the agent or employee of another in making such a voyage, his principal or employer shall be liable for such damage. Conn. Public Acts of 1911, p. 1351.

A Massachusetts act of May 7, 1913, regulates the use of air-craft; makes provision for the license of aviators after examination and registration; prescribes rules of the air for meeting and overtaking corresponding with the marine practice. Air machines are forbidden to fly over municipalities, except at prescribed altitudes, or to fly over crowds of people. Aviators are held liable for injuries resulting from flying unless they can demonstrate that they had taken every reasonable precaution to prevent injury. Dropping missles without special permission is forbidden, and also landing on public property without permission.

See generally Lyclama, Air Sovereignty; Hazeltine, Law of the Air; Davids, Law of Motor Vehicles, chap. 19.

The "Sovereignty of the Air" is treated by Blewett Lee, in Report of Tennessee Bar Ass'n (1913). He cites: Weili, The Air-Ship in Local Law, etc. (Zurich, 1908); Revue Juridicque Internat. de la Locomotion Aérienne, Vol. II.; Catellani, Il Diritto Aereo; Proceedings in Inter-Nat. Fair Association (1912, Paris Conference).

AVOCAT. **In French Law.** A barrister or advocate.

AVOIDANCE. A making void, useless, or empty.

In Ecclesiastical Law. It exists when a benefice becomes vacant for want of an incumbent.

In Pleading. Repelling or excluding the conclusions or implications arising from the admission of the truth of the allegations of the opposite party. See CONFESSION AND AVOIDANCE.

AVOIRDUPOIS (Fr.). The name of a system of weight.

This kind of weight is so named in distinction from the Troy weight. One pound avoirdupois contains seven thousand grains Troy; that is, fourteen ounces, eleven pennyweights, and sixteen grains Troy; a pound avoirdupois contains sixteen ounces; and an ounce sixteen drachms. Thirty-two cubic feet of pure spring-water, at the temperature of fifty-six degrees of Fahrenheit's thermometer, make a ton of two thousand pounds avoirdupois, or two thousand two hundred and forty pounds net weight. Dane, Abr. c. 211, art. 12, § 6. The avoirdupois ounce is less than the Troy ounce in the proportion of 72 to 79; though the pound is greater. Encyc Amer. *Avoirdupois*. For the derivation of this phrase, see Barrington, Stat. 206. See the Report of Secretary of State of the United States to the

Senate, February 22, 1821, pp. 44, 72, 76, 79, 81, 87, for a learned exposition of the whole subject. See WEIGHT.

AVOUCHER. See VOUCHER.

AVOUÉ. **In French and Canadian Law.** A solicitor or attorney.

AVOW. To acknowledge the commission of an act and claim that it was done with right. 3 Bla. Com. 150.

To make an avowry. For example, when replevin is brought for a thing distrained, and the party taking claims that he had a right to make the distress, he is said to avow. See Fleta, l. 1, c. 4; Cunningham, Dict.; AVOWRY; JUSTIFICATION.

AVOWANT. One who makes an avowry.

AVOWEE. An advocate of a church benefice.

AVOWRY. The answer of defendant in an action of replevin brought to recover property taken in distress, in which he acknowledges the taking, and, setting forth the cause thereof, claims a right in himself or his wife to do so. Lawes, Pl. 35.

A justification is made where the defendant shows that the plaintiff had no property by showing either that it was the defendant's or some third person's, or where he shows that he took it by a right which was sufficient at the time of taking though not subsisting at the time of answer. The avowry admits the property to have been the plaintiff's, and shows a right which had then accrued, and still subsists, to make such caption. See 2 W. Jones 25

An avowry is sometimes said to be in the nature of an action or of a declaration, so that privity of estate is necessary; Co. Litt. 320 *a;* Blaine's Lessee v. Chambers, 1 S. & R. (Pa.) 170. There is no general issue upon an avowry; and it cannot be traversed cumulatively; Hamilton v. Elliott, 5 S. & R. (Pa.) 377. Alienation cannot be replied to it without notice; for the tenure is deemed to exist for the purposes of an avowry till notice be given of the alienation; Hamm Part. 131.

The object of an avowry is to secure the return of the property, that it may remain as a pledge; see 2 W. Jones 25; and to this extent it makes the defendant a plaintiff. It may be made for rents, services, tolls; State v. Patrick, 14 N. C. 478; for cattle taken, damage feasant, and for heriots, and for such rights wherever they exist. See Gilbert, Distr. 176 *et seq.;* 1 Chit. Pl. 436; Comyns, Dig. *Pleader*, 3 K.

AVOWTERER. **In English Law.** An adulterer with whom a married woman continues in adultery. *Termes de la Ley.*

AVOWTRY. **In English Law.** The crime of adultery.

AVULSION. The removal of a considerable quantity of soil from the land of one man and its deposit upon or annexation to the land of another, suddenly and by the perceptible action of water. 2 Washb. R. P. 452.

In such case the property belongs to the first owner; Bract. 221; Hargr. Tract. *de Jure Mar.;* Schultes, Aq. Rights 115; Bouvier v. Stricklett, 40 Neb. 792, 59 N. W. 550. Avulsion by the Missouri river, the middle of whose channel forms the boundary line between the states of Missouri and Nebraska, works no change in such boundary, but leaves it in the centre line of the old channel; Missouri v. Nebraska, 196 U. S. 23, 25 Sup Ct. 155, 49 L. Ed. 372; Nebraska v. Iowa, 143 U. S. 361, 12 Sup Ct. 396, 36 L. Ed. 186.

See ACCRETION; ALLUVION; RIPARIAN PROPRIETORS; RELICTION.

AVUNCULUS. **In Civil Law.** A mother's brother. 2 Bla. Com. 230.

AWARD. The decision of arbitrators or referees of a case submitted for arbitration under agreement of the parties or rule of court. See ARBITRATION AND AWARD.

AWAY-GOING CROP. A crop sown before the expiration of a tenancy, which cannot ripen until after its expiration, to which, however, the tenant is entitled. Broom, Max. 306. See EMBLEMENTS.

AWN-HINDE. See THIRD-NIGHT-AWN-HINDE.

AYANT CAUSE. This term, which is used in Louisiana, signifies one to whom a right has been assigned, either by will, gift, sale, exchange, or the like; an assignee. An *ayant cause* differs from an heir who acquires the right by inheritance. 8 Toullier, n. 245.

AYUNTAMIENTO. **In Spanish Law.** A congress of persons; the municipal council of a city or town. 1 White, Rec. 416; 12 Pet. (U. S.) 442, notes.

B

B. The second letter of the alphabet.

It is used to denote the second page of a folio, and also as an abbreviation. See A.

BABY ACT. A term of reproach originally applied to the disability of infancy when pleaded by an adult in bar of recovery upon a contract made while he was under age, but extends to any plea of the statute of limitations. Anderson's Dict. L.

BACHELERIA. The commonalty as distinguished from the baronage. Cunningham, L. Dict.

BACHELOR. In modern use, one who has taken the first degree (baccalaureate) in the liberal arts and sciences, or in law, medicine, or divinity, in a college or university.

A man who has never been married.

An inferior kind of knight.

BACK-BOND. A bond of indemnification given to a surety.

In Scotch Law. A declaration of trust; a defeasance; a bond given by one who is apparently absolute owner, so as to reduce his right to that of a trustee or holder of a bond and disposition in security. Paterson, Comp.

BACK CARRY. In forest law, the crime of having, on the back, game unlawfully killed.

BACK-WATER. That water in a stream which, in consequence of some obstruction below, is detained or checked in its course, or re-flows.

The term is usually employed to designate the water which is turned *back*, by a dam erected in the stream below, upon the wheel of a mill above, so as to retard its revolution.

Every riparian proprietor is entitled to the benefit of the water in its natural state Another such proprietor has no right to alter the level of the water, either where it *enters* or where it *leaves* his property. If he claims either to throw the water back above, or to diminish the quantity which is to descend below, he must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or an uninterrupted enjoyment for twenty years. If he cannot maintain his claim in either of these ways, he is liable for damages in favor of the injured party, or to an injunction to restrain his unlawful use of the water; 1 B. & Ad. 258, 874; 9 Coke 59; Brown v. Mfg. Co., 5 Gray (Mass.) 460; Mertz v. Dorney, 25 Pa. 519; Butz v. Ihrie, 1 Rawle (Pa.) 218; Sherwood v. Burr, 4 Day (Conn.) 244, 4 Am. Dec. 211; Noyes v. Stillman, 24 Conn. 15; Gardner v. Newburgh, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526; Watson v. Bartlett, 62 N. H. 447; Hill v. Ward, 2 Gilm. (Ill.) 285; Bowman v. City of New Orleans, 27 La. Ann. 501; McDonald v. Bacon, 3 Scam. (Ill.) 432; Johns v. Stevens, 3 Vt. 308; Tyler v. Wilkinson, 4 Mas. 400, Fed. Cas. No. 14,312; Lincoln v. Chadbourne, 56 Me. 197; De Vaughn v. Minor, 77 Ga. 809, 1 S. E. 433. But he must show some actual, appreciable damage; Garrett v. McKie, 1 Rich. (S. C.) 444, 44 Am Dec. 263; Chalk v. McAlily, 11 Rich. (S. C.) 153; *contra*, Hendrick v. Cook, 4 Ga. 241; Graver v. Sholl, 42 Pa. 67.

A riparian owner who obstructs a stream, impeding the usual flow of water or that caused by ordinary freshets and causing land to be overflowed, becomes liable; Bierer v. Hurst, 155 Pa. 523, 26 Atl. 742. Where a railroad company maintains a dam which causes water to overflow adjacent land, it is liable, although the dam was originally constructed by the county under authority of the legislature; Payne v. R. Co., 112 Mo. 6, 20 S. W. 322, 17 L. R. A. 628. At common law a railroad company must construct and maintain its road across a watercourse so as not to injure adjacent lands; Ohio & M. Ry. Co. v. Thillman, 43 Ill. App. 78; Fick v. R. Co., 157 Pa. 622, 27 Atl. 783.

An action to recover damages for flowing land is local, and must, therefore, be brought in the county where the land lies; Worster v. Winnipiseogee Lake Co., 25 N. H. 525; Watts' Adm'rs v. Kinney, 23 Wend. (N. Y.) 484; 2 East 497.

In Massachusetts and other states, acts have been passed giving to the owners of mills the right to flow the adjoining lands, if necessary to the working of their mills, subject only to such damages as shall be ascertained by the particular process prescribed, which process is substituted for all other judicial remedies; Leland v. Woodbury, 4 Cush. (Mass.) 245; Nutting v. Page, 4 Gray (Mass.) 581; Waddy v. Johnson, 27 N. C. 333; Knox v. Chaloner, 42 Me. 150; Pratt v Brown, 3 Wis. 603; Anderson v. R. Co., 86 Ky. 44, 5 S. W. 49, 9 Am St. Rep 263. These statutes, however, confer no authority to flow back upon existing mills; Baird v. Wells, 22 Pick. (Mass.) 312. See DAMAGES; INUNDATION; WATERCOURSE.

BACKADATION. A consideration given to keep back the delivery of stock when the price is lower for time than for ready money. Whart. Dict.; Lewis, Stocks. Sometimes called *Backwardation*.

BACKBERENDE (Sax.). Bearing upon the back or about the person.

Applied to a thief taken with the stolen property in his immediate possession, Bracton, l. 3, tr. 2, c. 32. Used with *handhabend*, having in the hand.

BACKING. Indorsement. Indorsement by a magistrate.

Backing a warrant becomes necessary when it is desired to serve it in a county other than that in which it was first issued. In such a case the indorsement of a magistrate of the new county authorizes its service there as fully as if first issued in that county. The custom prevails in England, Scotland, and some of the United States. See 2 N. Y. R. S. 590.

BACKSIDE. A yard at the back part of or behind a house, and belonging thereto.

The term was formerly much used both in conveyances and in pleading, but is now of infrequent occurrence except in conveyances which repeat an ancient description. Chitty, Pr. 177.

BACKWARDATION. See BACKADATION.

BAD. Vicious, evil, wanting in good qualities; the reverse of good. See Riddell v. Thayer, 127 Mass. 487; Tobias v. Harland, 4 Wend. (N. Y.) 537.

BADGE. A mark or sign worn by some persons, or placed upon certain things, for the purpose of designation.

Some public officers, as watchmen, policemen, and the like are required to wear badges that they may be readily known. It is used figuratively when we say that retention of possession of personal property by the seller is a badge of fraud.

Under its police power a legislature may forbid persons who are not members of societies from wearing the badge of such societies; Hammer v. State, 173 Ind. 199, 89 N. E. 850, 24 L. R. A. (N. S.) 795, 140 Am. St. Rep. 248, 21 Ann. Cas. 1034; Com. v. Martin, 35 Pa. Super. Ct. 241; *contra*, State v. Holland, 37 Mont. 393, 96 Pac. 719. One who wears a badge of a society without being a member holds himself out to the public and to actual members as guilty of a false personation. It is a deceit and a false pretense, and its object could be nothing else than deception, which it is in itself, with possibly ulterior motives; Hammer v. State, 173 Ind. 199, 89 N. E. 850, 24 L. R. A. (N. S.) 795, 140 Am. St. Rep. 248, 21 Ann. Cas. 1034; an association may obtain injunctive relief against the use by another association of its emblems; Benevolent & Protective Order of Elks v. Improved & Protective Order of Elks of the World, 60 Misc. 223, 111 N. Y. Supp. 1067, affirmed *id.*, 133 App. Div. 918, 118 N. Y. Supp. 1094.

BADGE OF FRAUD. A term used in the law of conveyances made to hinder and defraud creditors. It is defined as a fact tending to throw suspicion upon a transaction, and calling for an explanation. Bump, Fr. Conv. 31.

When such a fact appears, its effect is to require more persuasive proof of the payment of the consideration and the good faith of the parties than would ordinarily be required; Terrell v. Green, 11 Ala. 207. It is not fraud of itself, but evidence to establish a fraudulent intent; Wilson v. Lott, 5 Fla. 305; Pilling v. Otis, 13 Wis. 495.

The following have been held to be badges of fraud: *Indebtedness* on the part of the grantor; Callan v. Statham, 23 How. (U. S.) 477, 16 L. Ed. 532; Jackson v. Mather, 7 Cow. (N. Y.) 301; Cox v. Fraley, 26 Ark. 20; the *expectation* of a suit; Glenn v. Glenn, 17 Ia. 498; Hughes v. Roper, 42 Tex. 116; Schaferman v. O'Brien, 28 Md. 565, 92 Am. Dec. 708; Redfield & Rice Mfg. Co. v. Dysart, 62 Pa. 62; Godfrey v. Germain, 24 Wis. 410; *false recitals* in the deed; McKinster v. Babcock, 26 N. Y. 378; *inadequacy* of consideration; Monell v. Scherrick, 54 Ill. 269; Burke v. Murphy, 27 Miss. 167; Bray v. Hussey, 24 Ind. 228; Jaeger v. Kelley, 52 N. Y. 274; Gibson v. Hill, 23 Tex. 77; Craver v. Miller, 65 Pa. 456; Wheeler v. Kirtland, 23 N. J. Eq. 14; Kempner v. Churchill, 8 Wall. (U. S.) 362, 19 L. Ed. 461; *false statement* of the *consideration;* McKinster v. Babcock, 26 N. Y. 378; Peebles v. Horton, 64 N. C. 374; Enders v. Swayne, 8 Dana (Ky.) 103; *secrecy;* Barrow v. Bailey, 5 Fla. 9; Warner v. Norton, 20 How. (U. S.) 448, 15 L. Ed. 950; *concealment* of the deed, not recording it and leaving it in the hands of the grantor; Sands v. Hildreth, 14 Johns. (N. Y.) 493; Coates v Gerlach, 44 Pa. 43; Beecher v. Clark, 12 Blatchf. 256, 10 N. B. R. 385, Fed. Cas. No. 1,223; Hildeburn v. Brown, 17 B. Monr. (Ky.) 779; *failure to record* a mortgage by agreement; Hutchinson v. Bank, 133 Ind. 271, 30 N. E. 952, 36 Am. St. Rep. 537; Day v. Goodbar, 69 Miss. 687, 12 South. 30; a *secret trust* between the grantor and grantee; 3 Co. 80; McCulloch v. Hutchinson, 7 Watts (Pa.) 434, 32 Am. Dec. 776; *retention of possession* of land by the grantor; Jackson v. Mather, 7 Cow. (N. Y.) 301; King v. Moon, 42 Mo. 551; Hartshorn v. Eames, 31 Me. 93; Lukins v. Aird, 6 Wall. (U. S.) 78, 18 L. Ed. 750; Purkitt v. Polack, 17 Cal. 327; Johnson v. Lovelace, 51 Ga. 18; mere delay to record a deed executed for a good consideration by an insolvent to his son, where there is no evidence that the son knew of the insolvency, is not a badge of fraud; Second Nat. Bank of Beloit v. Merrill, 81 Wis. 142, 50 N. W. 503, 29 Am. St. Rep. 870; but *in general* anything in the transaction out of the usual course of such transactions is held to be such; Danjean v. Blacketer, 13 La. Ann. 595; Bump, Fr. Conv. 50.

BADGER. (From the French *bagage*, a bundle, and thence is derived *bagagier*, a carrier of goods). One who buys corn and victuals in one place and carries them to another to sell and make a profit by them. A badger was exempted from the punishment of an engrosser by the statute 5 & 6 Ed. VI. c. 14. Jacob.

BAG. An uncertain quantity of goods and merchandise, from three to four hundred. Jacob.

BAGAVEL. The citizens of Exeter had granted to them by charter from Edward I.

the collection of a certain tribute or toll upon all manner of wares brought to that city to be sold, toward the paving of the streets, repairing of the walls, and maintenance of the city, which was commonly called bagavel, bethugavel and chippinggavel. Antiq. of Exeter.

BAGGAGE. Such articles of apparel, ornament, etc., as are in daily use by travellers, for convenience, comfort, or recreation. "It includes whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or ultimate purpose of the journey;" per Cockburn, C. J., in L. R. 6 Q. B. 612; only such articles of necessity or convenience as are generally carried by passengers for their personal use; Glovinsky v. Steamship Co., 6 Misc. 388, 26 N. Y. Supp. 751.

It is said that the decisions and text-books give us but one definite limitation to the term "baggage," and that is that it must be something for the personal use of the traveller; 12 Harv. L. Rev. 119; but that which one traveller would consider indispensable would be deemed superfluous by another; 19 C. B. N. S. 321; so that his station in life must be taken into consideration; Coward v. R. Co., 16 Lea (Tenn.) 225, 57 Am Rep. 227; New York, C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25 L. Ed. 531. What may be necessary for a voyage on land is unfit for a voyage at sea; and the length of the journey must be considered in determining the quantity of baggage necessary for it; 12 Harv. L. Rev. 119, and cases cited. The traveller is entitled to have carried with him whatever is essential to the ultimate purpose of his journey; Hannibal & St. J. R. Co. v. Swift, 12 Wall. (U. S.) 262, 20 L. Ed. 423; unless his requirements are unreasonable; Oakes v. R. Co., 20 Or. 392, 26 Pac. 230, 12 L. R. A. 318, 23 Am. St. Rep. 126; Merrill v. Grinnell, 30 N. Y. 594. It has been held that a bicycle is not baggage under a statute allowing 100 pounds of "ordinary baggage"; State v. R. Co., 71 Mo. App. 385; but in several states they are expressly declared baggage and in New York they must be carried free of charge if the owner travels on the same train.

In [1899] 1 Q. B. 243, it is said there are certain requirements which articles must meet in order that they may be regarded as "personal luggage": 1. They must be for the personal use of the passenger. 2. They must be for use in connection with the journey, i. e., something habitually taken by a person when travelling for his own use, not merely during the actual journey, but for use during the time he may be away from home. It was further considered that the word *luggage* involves the idea of a package, and that the law does not recognize as baggage the things contained, as distinct from the receptacle which contains them, and does not cast any duty on the carrier to receive personal baggage until it had been placed in a position of reasonable security for handling.

This term has been held to include jewelry carried as baggage, which formed a part of female attire, the plaintiff being on a journey with his family; 4 Bingh. 218; McGill v. Rowand, 3 Pa. 451, 45 Am. Dec. 654. A watch, carried in one's trunk, is proper baggage; Jones v. Voorhees, 10 Ohio 145; Walsh v. Wright, 1 Newb. 494, Fed. Cas. No. 17,115; but see Bomar v. Maxwell, 9 Humphr. (Tenn.) 621, 51 Am. Dec. 682; the surgical instruments of an army surgeon; Hannibal & St. J. R. Co. v. Swift, 12 Wall. (U. S.) 262, 20 L. Ed. 423; valuable laces carried by a foreign woman of rank, for which the jury found in $10,000 damages; New York, C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25 L. Ed. 531; one revolver, but not two, Chicago, R. I. & P. R. Co. v. Collins, 56 Ill. 212; an opera glass; Toledo, W. & W. R Co. v. Hammond, 33 Ind. 379, 5 Am. Rep. 221; bedding of a poor man moving with his family; Quimit v. Henshaw, 35 Vt. 604, 84 Am. Dec. 646, Glovinsky v. Steamship Co., 4 Misc. 266, 24 N. Y. Supp. 136; such articles as are ordinarily carried by travellers in valises; Hampton v. Car Co., 42 Mo. App. 134; books for reading or amusement; Doyle v. Kiser, 6 Ind. 242; a harness maker's tools, valued at $10; a rifle; Davis v. R. Co., 10 How. Pr. (N. Y.) 330, Porter v. Hildebrand, 14 Pa 129, a rifle, revolver, two gold chains, two gold rings and a silver pencil case; 32 U. C. Q. B. 66; a carpet; Minter v. R. R, 41 Mo. 503, 97 Am. Dec. 288; an illustrated catalogue, the individual property of a travelling salesman, prepared by himself at his own expense, necessary for use in his business; Staub v. Kendrick, 121 Ind. 226, 23 N. E. 79, 6 L. R. A. 619.

The following have been held not to be baggage: Jewelry bought for presents; Nevins v. Steamboat Co., 4 Bosw. (N. Y.) 225, Metz v. R. Co., 85 Cal. 329, 24 Pac. 610, 9 L. R. A. 431, 20 Am. St. Rep. 228; a stock of jewelry carried by a salesman to be sold (checked, without saying anything as to its contents, and there being nothing to indicate its contents, and railroad company's agent having checked it without inquiries); Humphreys v. Perry, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. Ed. 587; a feather-bed not intended for use on the journey; Connolly v. Warren, 106 Mass. 146, 8 Am. Rep. 300; a lawyer's papers and bank notes to be used by him in conducting a case; 19 C. B. N. S. 321; trunks containing stage properties, costumes, paraphernalia, and advertising matters of a theatrical company, unless accepted as baggage, but the carrier, though without fault, is liable for the destruction of the trunks where its agent checked them as baggage with full knowledge that they contained,

besides personal apparel, stage costumes and properties; Oakes v. R. Co., 20 Or. 392, 26 Pac. 230, 12 L. R. A. 318, 23 Am. St. Rep. 126. Samples of merchandise are not baggage; 13 C. B. N. S. 818; Stimson v. R. Co., 98 Mass. 83, 93 Am. Dec. 140; Hawkins v. Hoffman, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; Talcott v. R. Co., 66 Hun 456, 21 N. Y. Supp. 318; Alling v. R. Co., 126 Mass. 121, 30 Am. Rep. 667; Pennsylvania Co. v. Miller, 35 Ohio St. 541, 35 Am Rep. 620; Southern Kansas R. Co. v. Clark, 52 Kan. 398, 34 Pac. 1054; nor a trunk deposited with the carrier without being accompanied by the passenger; Wright v. Caldwell, 3 Mich. 51; nor money even to a reasonable amount; Hawkins v. Hoffman, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; Davis v. R. Co., 22 Ill. 278, 74 Am. Dec. 151; intended for trade, business or investment, or for transportation and not intended for the passenger while travelling; Pfister v. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404; Bomar v. Maxwell, 9 Humphr. (Tenn.) 621, 51 Am. Dec. 682; *contra*, Dunlap v. Steamboat Co., 98 Mass. 371; Merrill v. Grinnell, 30 N. Y. 594.

If a carrier knows that merchandise is included among baggage, and does not object, he is liable to the same extent as for other goods taken in the due course of his business; Butler v. R. Co., 3 E. D. Smith (N. Y.) 571; 8 Exch. 30; but he must have actual knowledge; L. R. 6 Q. B. 612; Michigan Cent. R. Co. v. Carrow, 73 Ill. 348, 24 Am. Rep. 248; Mississippi Cent. R. Co. v. Kennedy, 41 Miss. 671; Stoneman v. R. Co., 52 N. Y. 429; Ft. Worth & R. G. R. Co. v. Millinery Co. (Tex.) 29 S. W. 196. Where trunks containing merchandise were checked as baggage by a salesman (whose intention was to follow them to the same place) and through the negligence of the carrier were burnt soon after they had reached their destination, the carrier was held liable, McKibbin v. R. Co., 100 Minn. 270, 110 N. W. 964, 8 L. R. A. (N. S.) 489, 117 Am. St. Rep. 689; so where a carrier accepted as baggage trunks of samples belonging to the employer of the passenger, the owner was entitled to recover for their loss: Talcott v. R. Co., 159 N. Y. 461, 54 N. E. 1; but see 5 Q. B. D. 241; [1895] 2 Q. B. D. 387.

The general rule seems to be that where a railroad company has given an agent authority to receive and check baggage, he must be deemed to have authority to determine what class of articles come within the description of baggage, and when he accepts as baggage what is not strictly so, with knowledge or means of knowledge of its character, the company is held responsible for his acceptance of it: St. Louis S. W. R. Co. v. Berry, 60 Ark. 433, 30 S. W. 764, 28 L. R. A. 501, 46 Am. St. Rep. 212; Waldron v. R. Co., 1 Dak. 357, 46 N. W. 456; Chicago, R. I. & P. R. Co. v. Conklin, 32 Kan. 55, 3 Pac. 762; Bergstrom v. R. Co., 134 Ia. 223, 111 N. W. 818, 10 L. R. A. (N. S.) 1119, 13 Ann. Cas. 239; Sherlock v. R. Co., 85 Mo. App. 49; Trimble v. R. Co., 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115; but see Blumantle v. R. Co., 127 Mass. 322, 34 Am. Rep. 376; and see Bergstrom v. R. Co., 134 Ia. 223, 111 N. W. 818, 10 L. R. A. (N. S.) 1119, 13 Ann. Cas. 239; COMMON CARRIERS.

A railroad's liability for baggage is not affected by the fact that the passenger did not travel on the same train; Larned v. R. Co., 81 N. J. L. 571, 79 Atl. 289. In the supreme court of Michigan it was held that one who purchases a ticket for the sole purpose of checking his baggage upon it, and with the intention of travelling to his destination in his private conveyance, can hold the carrier liable only as a gratuitous bailee, if it be stolen without negligence on the carrier's part; 55 L. R. A. 650, where in a note the cases are considered and the conclusion is reached that the Michigan case is in conflict with the current of opinion and should not be accepted as a precedent, and that the purchase of a ticket is a contract which gives the passenger two distinct rights, one to be carried as a passenger, and the other to have his baggage transported; and that having paid for two privileges, there is no reason why he should be compelled to avail himself of both, unless the carrier's burden in respect of one of them is increased by his failure to exercise the other; and see Warner v. R. Co., 22 Ia. 166, 92 Am. Dec. 389, where it is held that, whether on the same, the preceding, or the next train, if the baggage is sent pursuant to an agreement, and as part of the consideration for the fare paid by the passenger, the same rules apply as to care.

Where a passenger bought a through ticket and checked his baggage to go by a certain route, and the first carrier by mistake delivered the baggage to another carrier, which lost it, the second carrier was held to have assumed the responsibility of a common carrier, as it should have known by the checks that the baggage was to be carried by another route; Fairfax v. R. Co., 73 N. Y. 167, 29 Am. Rep. 119.

Where a passenger in second-class car delivered a dog to the baggage-master and declined to pay for carrying it, and at the plaintiff's destination, the baggage-master refused to deliver the dog, without the payment of money, and it was carried past the destination and lost, by the negligence of the baggage-master, held, that plaintiff could recover because of his ignorance of a rule as to a payment for conveying his dog on the train; Kansas City, M. & B. R. Co. v. Higdon, 94 Ala. 286, 10 South. 282, 14 L. R. A. 515, 33 Am. St. Rep. 119.

The carrier may establish reasonable regulations as to baggage and is not liable if they are violated; Gleason v. Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

Limitations upon the liability of carriers

are taken most strongly against them; Louisville, N. A. & C. R. Co. v. Nicholai, 4 Ind. App. 119, 30 N. E. 424, 51 Am. St. Rep. 206. A stipulation exempting the carrier from liability for "any loss or damage" to baggage was held not to extend to loss arising from negligence; Saunders v. R. Co., 128 Fed. 15; and one limiting liability to $100; Prentice v. Decker, 49 Barb. (N. Y.) 21; and one exempting the company from liability for its servants' negligence would not cover a loss arising from the company's negligence; Weinberg v. S. S. Co., 8 N. Y. Supp. 195; but a provision inserted in a steamship ticket limiting the liability of a carrier for loss of baggage to a certain amount, unless the true value is declared and excess paid for at regular freight rates, will operate to relieve the carrier from liability for such loss, even when due to his own negligence; Tewes v. S. S. Co., 186 N. Y. 151, 78 N. E. 864, 8 L. R. A. (N. S.) 199, 9 Ann. Cas. 909.

Limitations as to the value of baggage are said not to apply to hand baggage carried by a passenger on a car; 15 Yale L. J. 428. A provision in a ticket, limiting liability for loss of baggage to $100, where goods of the value of $300 were stolen from the baggage while in company's possession, held not to relate to loss or damage from any particular cause, but to the amount of loss only, and if the jury found negligence on the part of the railroad company, the carrier would be liable for the full amount lost; Louisville, N. A. & C. Ry. Co. v. Nicholai, 4 Ind. App. 119, 30 N. E. 424, 51 Am. St. Rep. 206. Baggage carried by a woman, not a pauper, coming from Germany to the U. S., consisting of clothing for herself and her two children, together with some bed feathers and covering of the value of $285, is reasonable in quantity and value, and therefore a provision in the transportation ticket, limiting the carrier's liability for loss of baggage to $50, is invalid, and will not defeat a recovery for loss of such baggage; Glovinsky v. Steamship Co., 4 Misc. 266, 24 N. Y. Supp. 136.

A baggage check merely indicating designation of baggage beyond terminus of issuing carrier's route does not prove a contract to carry to such destination; Marmonstein v. R. Co., 13 Misc. 32, 34 N. Y. Supp. 97. The issuance of a baggage check by a carrier to a passenger is not a contract by the carrier to deliver the baggage at such a point, but simply a means of identification of the baggage at the end of the route; Hyman v. R. Co., 66 Hun 202, 21 N. Y. Supp. 119.

Unless negligence is shown, a steamship company is not liable for baggage stolen from a passenger's stateroom; The Humboldt, 97 Fed. 656; Clark v. Burns, 118 Mass. 275, 19 Am. Rep. 456; American S. S. Co. v. Bryan, 83 Pa. 446. The contrary rule in New York is based on the idea that a passenger steamboat is subject to the liability of an inn-keeper; Adams v. Steamboat Co., 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 56 Am. St. Rep. 616.

It was formerly held that carriers were not liable as such for baggage unless a distinct price be paid for its carriage; 1 Salk. 2821; and see 3 H. & C. 135; but the rule is now otherwise; L. R. 6 Q. B. 612; Powell v. Myers, 26 Wend. (N. Y.) 591; Parmelee v. McNulty, 19 Ill. 556; McGregor & Co. v. Kilgore, 6 Ohio 358, 27 Am. Dec. 260; Dill v. R. Co., 7 Rich. 158, 62 Am. Dec. 407; Bomar v. Maxwell, 9 Humph. (Tenn.) 621, 51 Am. Dec. 682; they may limit their common-law liability by express contract, and by reasonable regulations made known to the public, but they cannot relieve themselves from liability from loss occasioned by negligence, Hollister v. Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455; Cole v. Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470; Laing v. Colder, 8 Pa. 479, 49 Am. Dec. 533; Ohio & M. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719, Mobile & O. R. Co. v. Hopkins, 41 Ala. 488, 94 Am. Dec. 607. See L. R. 10 Q. B. 437. The carrier may make reasonable regulations for the checking, custody, and carriage of baggage; Najac v. R. Co., 7 Allen (Mass.) 329, 83 Am. Dec. 686. It is liable as a carrier until the passenger has had a reasonable time to remove his baggage after its arrival; Burgevin v. R. Co., 69 Hun 479, 23 N. Y. Supp. 415.

The carrier is not liable for loss of baggage occasioned by "act of God" (Johnstown flood) and not by his own negligence; Long v. R. Co., 147 Pa. 343, 23 Atl. 459, 14 L. R. A. 741, 30 Am. St. Rep. 732.

As to what may be carried as baggage in a sleeping car, see note 9 L. R. A. (N. S.) 407.

As to an innkeeper's liability for baggage of a guest, see INNKEEPER.

BAIL (Fr. *bailler*, to deliver). One who becomes surety for the appearance of the defendant in court.

To deliver the defendant to persons who, in the manner prescribed by law, become security for his appearance in court.

The word is used both as a substantive and a verb, though more frequently as a substantive, and in civil cases, at least, in the first sense given above. In its more ancient signification, the word includes the delivery of property, real or personal, by one person to another. Bail in actions was first introduced in favor of defendants, to mitigate the hardships imposed upon them while in the custody of the sheriff under arrest, the security thus offered standing to the sheriff in the place of the body of the defendant. Taking bail was made compulsory upon the sheriffs by the statute 23 Hen. VI. c. 9, and the privilege of the defendant was rendered more valuable and secure by successive statutes, until by statute 12 Geo. I. c. 29, made perpetual by 21 Geo. II. c. 3, and 19 Geo. III. c. 70, it was provided that arrests should not be made unless the plaintiff make *affidavit* as to the amount due, and this amount be endorsed on the writ; and for this sum and no more the sheriff might require bail.

In the King's Bench, bail above and below were both exacted as a condition of releasing the defend-

ant from the *custody* in which he was held from the time of his arrest till his final discharge in the suit. In the Common Bench, however, the origin of bail above seems to have been different, as the *capias* on which bail might be demanded was of effect only to bring the defendant to court, and after appearance he was theoretically in *attendance,* but not in *custody* The failure to file such bail as the emergency requires, although no arrest may have been made, is, in general, equivalent to a default

In some states the defendant when arrested gives bail by bond to the sheriff, conditioned to appear and answer to the plaintiff and abide the judgment and not to avoid, which thus answers the purpose of bail above and below; Hale v. Russ, 1 Greenl (Me) 336, Hamilton v. Dunklee, 1 N. H. 172, Pierce v Read, 2 N H 360, Champion v. Noyes, 2 Mass. 484; Broaders v. Welsh, 2 N. & McC (S C) 569, Harwood v. Robertson, 2 Hill (S. C) 336; West v. Ratledge, 15 N C 40; Liceth v. Cobb, 18 Ga 314. In criminal law the term is used frequently in the second sense given, and bail is allowed except in cases where the defendant is charged with the commission of the more heinous crimes.

Bail above. Sureties who bind themselves either to satisfy the plaintiff his debt and costs, or to surrender the defendant into custody, provided judgment be against him in the action and he fail to do so; Sellon, Pr. 137.

Bail to the action. Bail above.

Bail below, or *bail to the sheriff.* Sureties who bind themselves to the sheriff to secure the defendant's appearance, or his putting in bail to the action on the return-day of the writ. It may be demanded by the sheriff whenever he has arrested a defendant on a bailable process, as a prerequisite to releasing the defendant.

Civil bail. That taken in civil actions.

Common bail. Fictitious sureties formally entered in the proper office of the court.

It is a kind of bail above, similar in form to special bail, but having fictitious persons, John Doe and Richard Roe, as sureties. Filing common bail is tantamount to entering an appearance. 3 Bla. Com. c. xix. See BILL OF MIDDLESEX

Special bail. Responsible sureties who undertake as bail above.

Requisites of. A person to become bail must, in England, be a freeholder or housekeeper; 2 Chitt Bail 96; 5 Taunt. 174; Lofft 148; must be *subject to process* of the court, and not privileged from arrest either temporarily or permanently; 1 D. & R. 127; Coster v. Watson, 15 Johns. (N. Y.) 535; Brown v. Lord, Kirb. (Conn.) 209; must be *competent* to enter into a *contract;* must be *able to pay* the amount for which he becomes responsible, but the property may be real or personal if held in his own right; 2 Chit. Bail 97; 11 Price 158; and liable to ordinary legal process; 4 Burr. 2526.

Persons not excepted to as appearance bail cannot be objected to as bail above; Dunlops v. Laporte, 1 Hen. & M. (Va.) 22; and bail, if sufficient ability, should not be refused on account of the personal character or opinions of the party proposed; 4 Q. B. 468; 1 B. & H. Lead. Cr. Cas. 236.

When it may be given or required. In civil actions the defendant may give bail in all cases where he has been arrested; Richards v. Porter, 7 Johns. (N. Y.) 137; and bail below, even, may be demanded in some cases where no arrest is made; Coward v. Bohun, 1 Harr. & J. (Md.) 538; Mickle v. Baker, 2 McCord (S. C.) 250; but where a statute forbids the taking of bail, an order of court authorizing it will not entitle a party thereto or make it valid; Swanson v. Matson, 31 Ill. App. 594.

Bail above is required under some restrictions in many of the states in all actions for considerable amounts; Cheshire v. Edson, 2 McCord (S. C.) 385; either *common;* Bernbridge v. Turner, 2 Yeates (Pa.) 429; Anonymous, 20 N. J. L. 494; Morrison v. Silverburgh, 13 Ill. 551; which may be filed by the plaintiff, and judgment taken by default against the defendant if he neglects to file proper bail, after a certain period; Lane v. Cook, 8 Johns. (N. Y.) 359; Corse v. Colfax, 2 N. J. L. 684; or *special,* which is to be filed of course in some species of action and may be demanded in others; Pearson v. Picket, 1 McCord (S. C.) 472; Whiting v. Putnam, 17 Mass. 176; Purcell v. Hartness, 1 Wend. (N. Y.) 303; Douglass v. Wight, 2 Brev. (S. C.) 218; but in many cases only upon special cause shown; Coxe 277; Brookfield v. Jones, 8 N. J. L. 311; Clason v. Gould, 2 Caines (N. Y.) 47; Jack v. Shoemaker, 3 Binn. (Pa.) 283; Hatcher v. Lewis, 4 Rand. (Va.) 152.

The existence of a debt and the amount due; Nevins v. Merrie, 2 Whart. (Pa.) 499; Lewis v. Brackenridge, 1 Blackf (Ind.) 112; Jennings v. Sledge, 3 Ga. 128; in an action for debt, and, in some forms of action, other circumstances, must be shown by affidavit to prevent a discharge on common bail; Brooks v. McLellan, 1 Barb. (N. Y.) 247; Lewis v. Brackenridge, 1 Blackf. 112; Hockspringer v. Ballenburg, 16 Ohio 304; Mustin v. Mustin, 13 Ga. 357. It is a general rule that a defendant who has been once held to bail in a civil case cannot be held a second time for the same cause of action; Tidd, Pr. 184; Clark v. Weldo, 4 Yeates (Pa.) 206; President, etc., of Bank of South Carolina v. Green, 2 Rich. (S. C.) 336; but this rule does not apply where the second holding is in another state; Peck v. Hozier, 14 Johns. (N. Y.) 346; Hubbard v. Wentworth, 3 N. H. 43; Parasset v. Gautier, 2 Dall. (U. S.) 330, 1 L. Ed. 402; Man v. Lowden, 4 McCord (S. C.) 485. And see also James v. Allen, 1 Dall. (U. S.) 188, 1 L. Ed. 93; Read v. Chapman, 1 Pet. C. C. 404, Fed. Cas. No. 11,605; Woodbridge v. Wright, 3 Conn. 523; as to the effect of a discharge in insolvency.

In criminal cases the defendant may in general claim to be set at liberty upon giving bail, except when charged with the commission of a capital offence; 4 Bla. Com. 297; Ex parte Alexander, 59 Mo. 599, 21 Am. Rep. 393; State v. Arthur, 1 McMull. (S. C.) 456; State v. Holmes, 3 Strobh. (S. C.) 272;

Ex parte Richardson, 96 Ala. 110, 11 South. 316; Ready v. Com., 9 Dana (Ky.) 38; Ex parte White, 9 Ark. 222. One charged with murder should not be discharged on habeas corpus, unless the evidence before the committing magistrate was so insufficient that a verdict thereon requiring capital punishment would be set aside; In re Troia, 64 Cal. 152, 28 Pac. 231; Ex parte King, 86 Ala. 620, 5 South. 863; Ex parte Hamilton, 65 Miss. 147, 3 South. 241; and even in capital offences a defendant may be bailed in the discretion of the court, in the absence of constitutional or statutory provisions to the contrary; Archer's Case, 6 Gratt. (Va.) 705; Com. v. Semmes, 11 Leigh (Va.) 665; State v. Summons, 19 Ohio 139; People v. Van Horne, 8 Barb. (N. Y.) 158; Ex parte Croom, 19 Ala. 561; People v. Smith, 1 Cal. 9; Ex parte Wray, 30 Miss. 673; Com. v. Phillips, 16 Mass. 423; Ullery v. Com., 8 B. Mon. (Ky.) 3 Except under extraordinary circumstances, one convicted of felony will not be admitted to bail pending an appeal; Ex parte Smith, 89 Cal. 79, 26 Pac. 638; People v. Folmsbee, 60 Barb. (N. Y.) 480; Ex parte Ezell, 40 Tex. 451, 19 Am. Rep. 32; Corbett v. State, 24 Ga. 391. Where one is indicted for a capital offence, the burden rests on him to show that the proof of his guilt is not evident, on an application for bail; Ex parte Jones, 31 Tex. Cr. R. 422, 20 S. W. 983.

For any crime or offence against the United States, not punishable by death, any judge of the United States, or commissioner of a district court to take bail, or any chancellor, judge of the supreme or superior court, or first judge of any court of common pleas, or mayor of any city of any state, or any justice of the peace or magistrate of any state, where the offender may be found, may take bail; Act Sept. 24, 1789, § 33, Mar. 2, 1793, § 4; and, after commitment by a justice of the supreme or judge of district court of the United States, any judge of the supreme or superior court of any state (there being no judge of the United States in the district to take such bail) may admit the person to bail if he offer it.

When the punishment by the laws of the United States is death, bail can be taken only by the supreme or district court.

As to the principle on which bail is granted or refused in cases of capital offences in the King's Bench, see 1 E. & B. 1, 8; Dearsl. Cr. Cas. 51, 60.

The proceedings attendant on giving bail are substantially the same in England and the United States. An application is made to the proper officer; Gilliam v. Allen, 4 Rand. (Va.) 498, and the bond or the names of the bail proposed filed in the proper office, and notice is given to the opposite party, who must except within a limited time, or the bail justify and are approved. If exception is taken, notice is given, a hearing takes place, the bail must *justify*, and will then be approved unless the other party oppose successfully; in which case other bail must be added or substituted. A formal application is, in many cases, dispensed with, but a notification is given at the time of filing to the opposite party, and, unless exceptions are made and notice given within a limited time, the bail justify and are approved. If the sum in which the defendant is held is too large, he may apply for mitigation of bail.

The bail are said to enter into a recognizance when the obligation is one of record, which it is when government or the defendant is the obligee; when the sheriff is the obligee, it is called a bail bond. See BAIL BOND; RECOGNIZANCE.

Unless authorized by statute, it is illegal for an officer or magistrate to receive money in lieu of bail for the appearance of a person accused of a crime; Reinhard v. City, 49 Ohio St. 257, 31 N. E. 35.

Mitigation of excessive bail may be obtained by simple application to the court; Bunting v. Brown, 13 Johns. (N. Y.) 425; Keppele v. Zantzinger, 3 Yeates (Pa.) 83; and in other modes; Jones v. Kelly, 17 Mass. 116; Evans v. Foster, 1 N. H. 374. Exacting excessive bail is against the constitution of the United States, and was a misdemeanor at common law; U. S. Const. Amend art. 8; Alexander v. Winn, 1 Brev. (S. C.) 14; U. S. v. Lawrence, 4 Cra. C. C. 518, Fed. Cas. No. 15,577.

The liability of bail is limited by the bond; Beers v. Haughton, 9 Pet. (U. S.) 329, 9 L. Ed. 145; Fetterman v. Hopkins, 5 Watts (Pa.) 539; by the *ac etiam;* Mumford v. Stocker, 1 Cow. (N. Y.) 601, by the amount for which judgment is rendered; Longstreet v. Lafitte, 2 Speers (S. C.) 664; and special circumstances in some cases; Morton v. Bryce, 1 N. & McC. (S. C.) 64; Murden v. Perman, 1 McCord (S. C.) 128; Kinsler v. Kyzer, 4 McCord (S. C.) 315. See BAIL BOND; RECOGNIZANCE.

The powers of the bail over the defendant are very extensive. As they are supposed to have the custody of the defendant, they may, when armed with the bail piece, arrest him, though out of the jurisdiction of the court where they became bail, and in a different state; Parker v. Bidwell, 3 Conn. 84; Ruggles v. Corey, *id.* 421; Com. v. Brickett, 8 Pick. (Mass.) 138; Nicolls v. Ingersoll, 7 Johns. (N. Y.) 145; State v. Lingerfelt, 109 N. C. 775, 14 S. E. 75, 14 L. R. A. 605; may take him while attending court as a suitor, or at any time, even on Sunday; Broome v. Hurst, 4 Yeates (Pa.) 123; Read v. Case, 4 Conn. 170, 10 Am. Dec. 110; may break open a door if necessary; Nicolls v. Ingersoll, 7 Johns. (N. Y.) 145; Read v. Case, 4 Conn. 166, 10 Am. Dec. 110; may command the assistance of the sheriff and his officers; Com. v. Brickett, 8 Pick. (Mass.) 138; and may depute their power to others; State v. Ma-

hon, 3 Harr. (Del.) 568. He has been looked upon as the principal's gaoler, and the principal, when bailed, has been deemed as truly imprisoned as if he were still confined; 11 Harv. L. Rev. 541. "The bail have their principal on a string and may pull the string whenever they please and render him in their discharge;" 6 Mod. 231. Where the defendant has been surrendered by his sureties pending an appeal, a reasonable time and opportunity should be given him to get another bond; In re Bauer, 112 Mo. 231, 20 S. W. 488.

To refuse or delay to bail any person is an offence against the liberty of the subject, both at common law and by statute, but does not entitle the person refused to an action unless malice be shown; 4 Q. B. 468; 13 *id.* 240; Evans v. Foster, 1 N. H. 374.

In extradition cases bail is held not to be a question of practice, it is dependent on statute; although the United States statute in respect to procedure in extradition does not forbid bail in such cases, that is not enough, as the authority must be expressed; and as there is no provision for bail in the act, bail cannot be allowed; In re Carrier, 57 Fed. 578. In In re Wright, 123 Fed. 463, bail was denied in an extradition case for want of power. On appeal in Wright v. Henkel, 190 U. S. 40, 23 Sup. Ct. 781, 47 L. Ed. 948, it was said: "We are unwilling to hold that the circuit court possesses no power in respect of admitting to bail other than as specifically vested by statute, or that while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief." In [1898] 2 Q. B. 615, it was held that the King's Bench had at common law jurisdiction to admit to bail.

In Canadian Law. A lease. See Merlin, Répert. *Bail*

Bail emphyteotique. A lease for years, with a right to prolong indefinitely; 5 Low. C. 381. It is equivalent to an alienation; 6 Low. C. 58.

BAIL BOND. A specialty by which the defendant and other persons become bound to the sheriff in a penal sum proportioned to the damages claimed in the action, and which is conditioned for the due appearance of such defendant to answer to the legal process therein described, and by which the sheriff has been commanded to arrest him.

The defendant usually binds himself as principal with two sureties; but sometimes the bail alone bind themselves as principals, and sometimes also one surety is accepted by the sheriff. The bail bond may be said to stand in the place of the defendant so far as the sheriff is concerned, and, if properly taken, furnishes the sheriff a complete answer to the requirement of the writ, directing him to take and produce the body of the defendant. A bail bond is given to the sheriff, and can be taken only where he has custody of the defendant on process other than final, and is thus distinguished from recognizance, which see.

The sheriff can take the bond only when he has custody of the defendant's body on process other than final.

When a bail bond, with sufficient securities and properly prepared, is tendered to the sheriff, he must take it and discharge the defendant; Stat. 23 Hen. VI. c. 10, § 5.

The *requisites* of a bail bond are that it should be under seal; 1 Term 418; Walker v. Lewis, 3 N. C. 16; Peyton v. Moseley, 3 T. B. Monr. (Ky.) 80; Payne v. Britton's Ex'r, 6 Rand. (Va.) 101; should be to the sheriff by the name of the office; 1 Term 422; Loker v. Antonio, 4 McCord (S. C.) 175; Handley's Adm'r v. Ewings, 4 Bibb (Ky.) 505; Conant v. Sheldon, 4 Gray (Mass.) 300; conditioned in such manner that performance is possible; 3 Campb. 181; Fanshor v. Stout, 4 N. J. L. 319; for a proper amount; Oxley v. Turner, 2 Va. Cas. 334; Ellis v. Robinson, 3 N. J. L. 707; for the defendant's appearance at the place and day named in the writ; 1 Term 418; Holmes v. Chadbourne, 4 Greenl. (Me.) 10; Robeson v. Thompson, 9 N. J. L. 97; Carter v. Cockrill, 2 Munf. (Va.) 448; Blanding v. Rogers, 2 Brev. (S. C.) 394, 4 Am. Dec. 595; see BAIL; and should describe the action in which the defendant is arrested with sufficient accuracy to distinguish it; Ralston v. Love, Hard. (Ky.) 501; Colburn v. Downes, 10 Mass. 20; Kelly v. Com., 9 Watts (Pa.) 43; but need not disclose the nature of the suit; 6 Term 702. A bail bond which fails to specify the charge which the principal is to answer is void and the defect cannot be remedied by testimony; People v. Gillman, 58 Hun 368, 12 N. Y. Supp. 40. The sureties must be two or more in number to relieve the sheriff; 2 Bingh. 227; Long v. Billings, 9 Mass. 482; Seymour v. Curtiss, 1 Wend. (N. Y.) 108; and he may insist upon three, or even more, subject to statutory provisions on the subject; 5 M. & S. 223; but the bond will be binding if only one be taken; Glezen v. Rood, 2 Metc. (Mass.) 490; Caines v. Hunt, 8 Johns. (N. Y.) 358; Johnson's Assignee v. Williams, 2 Over. (Tenn.) 178; Lane v. Smith, 2 Pick. (Mass.) 284.

Putting in bail to the action; 5 Burr. 2683; and waiver of his right to such bail by the plaintiff; Phillips v. Oliver, 5 S. & R. (Pa.) 419; Flack v. Eager, 4 Johns. (N. Y.) 185; Culpeper Agricultural & Mfg. Soc. v. Digges, 6 Rand. (Va.) 165, 18 Am. Dec. 708; Hubbard v. Shaler, 2 Day (Conn.) 199; or a surrender of the person of the defendant, constitute a performance or excuse from the performance of the condition of the bond; 1 B. & P. 326; Stockton v. Throgmorton, 1 Baldw. 148, Fed. Cas. No. 13,463; Strang v. Barber, 1 Johns. Cas. (N. Y.) 329; Ellis v. Hay, *id.* 334; McClurg v. Bowers, 9 S. & R. (Pa.) 24; Coolidge v. Cary, 14 Mass. 115; Moyers v. Center, 2 Strobh. (S. C.) 439; Thorn v. Delany, 6 Ark. 219; see State v. Lingerfelt, 109 N. C. 775,

14 S. E. 75, 14 L. R. A. 605; as do many other matters which may be classed as changes in the circumstances of the defendant abating the suit; Treasurers of State v. Moore's Ex'rs, 1 N. & McC. (S. C.) 215; Champion v. Noyes, 2 Mass. 485; including a discharge in insolvency; Saunders v. Bobo, 2 Bail. (S. C.) 492; Kane v. Ingraham, 2 Johns. Cas. (N. Y.) 403; Champion v. Noyes, 2 Mass. 481; Sergeant v. Stryker, 16 N. J. L. 466, 32 Am. Dec. 404; Richmond v. De Young, 3 Gill & J. (Md.) 64; matters arising from the negligence of the plaintiff; 2 B. & P. 558; or from irregularities in proceeding against the defendant; 3 Bla. Com. 292; Boggs v. Chichester, 13 N. J. L. 209; Waples v. Derrickson, 1 Harr. (Del.) 134. Where the recognizance is for the appearance of a prisoner, and he does appear and pleads guilty, it cannot be forfeited for failure to appear subsequently to answer the sentence; State v. Cobb, 44 Mo. App. 375.

In those states in which the bail bond is conditioned to abide the judgment of the court as well as to appear, some of the acts above mentioned will not constitute performance. See RECOGNIZANCE. The plaintiff may demand from the sheriff an assignment of the bail bond, and may sue on it for his own benefit; Stat. 4 Anne, c. 16, § 20; Roop v. Meek, 6 S. & R. (Pa.) 545; Higgins v. Glass, 47 N. C. 353; unless he has waived his right so to do; Huguet v. Hallet, 1 Caines (N. Y.) 55; or has had all the advantages he would have gained by entry of special bail; Priestman v. Keyser, 4 Binn. (Pa.) 344; Union Bank of New York v. Kraft, 2 S. & R. (Pa.) 284.

The remedy is by *scire facias* in some states; Pierce v. Read, 2 N. H. 359; Hunter v. Hill, 3 N. C. 223; Harvey v. Goodman, 9 Yerg. (Tenn.) 273; Usher v. Frink, 2 Brev. (S. C.) 84; Belknap v. Davis, 21 Vt. 409; Waughhop v. State, 6 Tex. 337. The United States is not restricted to the remedies provided by the laws of a state in enforcing a forfeited bond taken in a criminal case, but may proceed according to the common law. U. S. v. Insley, 54 Fed. 221, 4 C. C. A. 296. See JUSTIFICATION.

BAIL COURT. A court auxiliary to the court of King's Bench at Westminster, wherein points connected more particularly with pleading and practice were argued and determined. Wharton, Law Dict. 2d Lond. ed. It has been abolished.

BAIL DOCK. Formerly at the Old Bailey, in London, a small room taken from one of the corners of the court, and left open at the top, in which certain malefactors were placed during trial. Cent. Dict.

BAIL PIECE. A certificate given by a judge or the clerk of a court, or other person authorized to keep the record, in which it is certified that the bail became bail for the defendant in a certain sum and in a particular case. It was the practice, formerly, to write these certificates upon small pieces of parchment, in the following form:—

In the court of ———, of the Term of ———, in the year of our Lord ——,

City and County of ———, ss.

Theunis Thew is delivered to bail, upon the taking of his body, to Jacobus Vanzant, of the city of ——, merchant, and to John Doe, of the same city, yeoman.

SMITH, JR. { At the suit of
Attor'y for Deft. } PHILIP CARSWELL.

Taken and acknowledged the — day of —, A. D. ——, before me. D. H.

See 3 Bla. Com. App.; 1 Sellon, Pr. 139.

BAILABLE ACTION. An action in which the defendant is entitled to be discharged from arrest only upon giving bond to answer.

BAILABLE PROCESS. Process under which the sheriff is directed to arrest the defendant and is required by law to discharge him upon his tendering suitable bail as security for his appearance. A *capias ad respondendum* is bailable; not so a *capias ad satisfaciendum.*

BAILEE. One to whom goods are bailed, the party to whom personal property is delivered under a contract of bailment.

His duties are to act in good faith, and perform his undertaking, in respect to the property intrusted to him, with the diligence and care required by the nature of his engagement.

When the bailee alone receives benefit from the bailment, as where he borrows goods or chattels for use, he is bound to exercise extraordinary care and diligence in preserving them from loss or injury; Bennett v. O'Brien, 37 Ill. 250; Ross v. Clark, 27 Mo. 549; but he is not an insurer; 9 C. & P. 383.

When the bailment is mutually beneficial, as where chattels are hired or pledged to secure a debt, the bailee is bound to exercise ordinary care in preserving the property; Petty v. Overall, 42 Ala. 145, 94 Am. Dec. 634; Dearbourn v. Bank, 58 Me. 275; Erie Bank v. Smith, 3 Brewst. (Pa.) 9; St. Losky v. Davidson, 6 Cal. 643.

When the bailee receives no benefit from the bailment, as where he accepts chattels or money to keep without recompense, or undertakes gratuitously the performance of some commission in regard to them, he is answerable only for the use of the ordinary care which he bestows upon his own property of a similar nature; Edw. Bailm. § 43. It has been held that such a bailee would be liable only for gross neglect or fraud; McKay v. Hamblin, 40 Miss. 472; Gulledge v. Howard, 23 Ark. 61; Edson v. Weston, 7 Cow. (N. Y.) 278; Burk v. Dempster, 34 Neb. 426, 51 N. W. 976; Hibernia Bldg. Ass'n

v. McGrath, 154 Pa. 296, 26 Atl. 377, 35 Am. St. Rep. 828. The case must have relation to the nature of the property bailed; Jenkins v. Motlow, 1 Sneed (Tenn.) 248, 60 Am. Dec. 154.

These differing degrees of negligence have been doubted. See BAILMENT.

The bailee is bound to redeliver or return the property, according to the nature of his engagement, as soon as the purpose for which it was bailed shall have been accomplished. Nothing will excuse the bailee from delivery to his bailor, except by showing that the property was taken from him by law, or by one having a paramount title, or that the bailor's title had terminated; Bliven v. R. Co., 36 N. Y. 403; Burton v. Wilkinson, 18 Vt. 186, 46 Am. Dec. 145; Bliven v. R. Co., 35 Barb. (N. Y.) 191.

He cannot dispute his bailor's title; Edw. Bailm. § 73; Dougherty v. Chapman, 29 Mo. App. 233; nor can he convey title as against the bailor, although the purchaser believes him to be the true owner; Hendricks v. Evans, 46 Mo. App. 313.

The bailee has a special property in the goods or chattels intrusted to him, sufficient to enable him to defend them by suit against all persons but the rightful owner. The depositary and mandatary acting gratuitously, and the finder of lost property, have this right; Edw. Bailm. § 215; Garlick v. James, 12 Johns. (N. Y.) 147, 7 Am. Dec. 294.

A bailee with a mere naked authority, having a right to remuneration for his trouble, but coupled with no other interest, may support trespass for any injury amounting to a trespass done while he was in the actual possession of the thing; Edw. Bailm. 37; Faulkner v. Brown, 13 Wend. (N. Y.) 63; Moran v. Packet Co., 35 Me. 55. A bailee may recover in trover for goods wrongfully converted by a third person; McGraw v. Patterson, 47 Ill. App. 87.

A bailee for work, labor, and services, such as a mechanic or artisan who receives chattels or materials to be repaired or manufactured, has a lien upon the property for his services; 2 Pars. Contr. 145, 146; 3 *id.* 270–273; Wheeler v. McFarland, 10 Wend. (N. Y.) 318. Other bailees, innkeepers, common carriers, and warehousemen, also, have a lien for their charges.

The responsibilities of a bailee cannot be thrust upon one without his knowledge and against his consent; they must be voluntarily assumed by him or his agents; First Nat. Bank of Lyons v. Bank, 60 N. Y. 278, 19 Am. Rep. 181; Story, Bailm. 60. A constructive acceptance is sufficient; Rodgers v. Stophel, 32 Pa. 111, 12 Am. Dec. 775; as where one comes into possession by mistake; 1 Str. 505; Morris v. R. Co., 1 Daly (N. Y.) 202; or fortuitously; Preston v. Neale, 12 Gray (Mass.) 222, citing Story, Bailm. § 44 *a*; or where it is a custom of trade; Westcott v. Thompson, 18 N. Y. 363. Where property is consigned to a person as bailee, with specific directions as to its disposal, he may refuse to accept; Kansas Elevator Co. v. Harris, 6 Kan. App. 89, 49 Pac. 674; since a person has the same right to decline becoming a bailee as he has to decline becoming a purchaser; King v. Richards, 6 Whart. (Pa.) 418, 37 Am. Dec. 420; but innkeepers, common carriers, wharfingers or warehousemen, as persons exercising a public employment, are not within this rule. See those titles.

See also Schouler, Bailm.; Coggs v. Bernard, Sm. Lead. Cas.; BAILMENT.

BAILIE. In Scotch Law. An officer appointed to give infeftment.

In certain cases it is the duty of the sheriff, as king's bailie, to act: generally, any one may be made bailie, by filling in his name in the precept of sasine

A magistrate possessing a limited criminal and civil jurisdiction. Bell, Dict.

BAILIFF. A person to whom some authority, care, guardianship, or jurisdiction is delivered, committed, or intrusted. Spelman, Gloss.

A sheriff's officer or deputy. 1 Bla. Com. 344.

A court attendant, sometimes called a tipstaff

A magistrate, who formerly administered justice in the parliaments or courts of France, answering to the English sheriffs as mentioned by Bracton.

There are still bailiffs of particular towns in England, as, the bailiff of Dover Castle, etc., otherwise, bailiffs are now only officers or stewards, etc., as, *bailiffs of liberties*, appointed by every lord within his liberty, to serve writs, etc; *bailiffs erriant or itinerant*, appointed to go about the country for the same purpose, *sheriff's bailiffs*, sheriff's officers to execute writs, these are also called *bound bailiffs*, because they are usually bound in a bond to the sheriff for the due execution of their office; *bailiffs of court-baron*, to summon the court, etc., *bailiffs of husbandry*, appointed by private persons to collect their rents and manage their estates; *water bailiffs*, officers in port towns for searching ships, gathering tolls, etc. Bacon, Abr

A person acting in a ministerial capacity who has by delivery the custody and administration of lands or goods for the benefit of the owner or bailor, and is liable to render an account thereof. Co. Litt. 271; Story, Eq. Jur. § 446; Barnum v. Landon, 25 Conn. 149.

The word is derived from the old French *bailler*, to deliver, and originally implied the delivery of real estate, as of land, woods, a house, a part of the fish in a pond; Ow. 20; 2 Leon 194, 37 Edw. III. c. 7; 10 Hen VII. c. 30; but was afterwards extended to goods and chattels. Every bailiff is a receiver, but every receiver is not a bailiff. Hence it is a good plea that the defendant never was receiver, but was bailiff. 18 Edw. III. 16. See Cro. Eliz. 82, 83; Fitzh. N. B. 134 F; 8 Coke 48 *a*, *b*

From a bailiff are required administration, care, management, skill. He is entitled to allowance for the expense of administration, and for all things done in his office according to his own judgment without the special direction of his principal, and also for casu-

al things done in the common course of business; Co. Litt. 89 *a*; Com. Dig. E, 12; Brooke, Abr. *Acc.* 18; but not for things foreign to his office; Brooke, Abr. *Acc.* 26, 88; Plowd. 282 *b*, 14; Com. Dig. *Acc.* E, 13; Co. Litt. 172. Whereas a mere receiver, or a receiver who is not also a bailiff, is not entitled to allowance for any expenses; 1 Rolle, Abr. 119; Com. Dig. E, 13; James v. Browne, 1 Dall. (U. S.) 340, 1 L. Ed. 165.

A bailiff may appear and plead for his principal in an assize; "and his plea commences" thus: "J. S., bailiff of T. N., comes," etc, not "T. N., by his bailiff J. S., comes," etc. Co. 2d Inst. 415; Keilw. 117 *b*. As to what matters he may plead, see Co. 2d Inst. 414.

BAILIWICK. The jurisdiction of a sheriff or bailiff. 1 Bla. Com. 344

A liberty or exclusive jurisdiction which was exempted from the sheriff of the county, and over which the lord appointed a bailiff, with such powers within his precinct as the under-sheriff exercised under the sheriff of the county. Whishaw, Lex.

BAILLEW DE FONDS. In Canadian Law. The unpaid vendor of real estate.

His claim is subordinate to that of a subsequent hypothecary creditor claiming under a conveyance of prior registration; 1 Low. C. 1, 6; but is preferred to that of the physician for services during the last illness; 9 Low. C. 497.

BAILLI. In Old French Law. One to whom judicial authority was assigned or delivered by a superior. Black, L. Dict.

BAILMENT. A delivery of something of a personal nature by one party to another, to be held according to the purpose or object of the delivery, and to be returned or delivered over when that purpose is accomplished. Prof Joel Parker, MS. Lect. Harvard Law School, 1851.

The right to hold may terminate, and a duty of restoration may arise, before the accomplishment of the purpose, but that does not necessarily enter into the definition, because such duty of restoration was not the original purpose of the delivery, but arises upon a subsequent contingency. The party delivering the thing is called the bailor, the party receiving it, the bailee.

Various attempts have been made to give a precise definition of this term, upon some of which there have been elaborate criticisms, see Story, Bailm. 4th ed § 2, n. 1, exemplifying the maxim, *Omnis definitio in lege periculosa est;* but the one above given is concise, and sufficient for a general definition.

Some other definitions are here given as illustrating the elements considered necessary to a bailment by the different authors cited.

A delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust. Story, Bailm. § 2. See Merlin, *Répert Bail*

A delivery of goods in trust upon a contract, either expressed or implied, that the trust shall be faithfully executed on the part of the bailee. 2 Bla. Com. 451 See *id.* 395.

A delivery of goods in trust upon a contract, expressed or implied, that the trust shall be duly executed, and the goods restored by the bailee as soon as the purposes of the bailment shall be answered 2 Kent 559.

A delivery of goods on a condition, express or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they are bailed shall be answered. Jones, Bailm. 1.

A delivery of goods in trust on a contract, either expressed or implied, that the trust shall be duly executed, and the goods redelivered as soon as the time or use for which they were bailed shall have elapsed or be performed Jones, Bailm. 117.

According to Story, the contract does not necessarily imply an undertaking to redeliver the goods, and the first definition of Jones here given would seem to allow of a similar conclusion. On the other hand, Blackstone, although his definition does not include the return, speaks of it in all his examples of bailments as a duty of the bailee; and Kent says that the application of the term to cases in which no return or delivery or redelivery to the owner or his agent is contemplated, is extending the definition of the term beyond its ordinary acceptation in the English law. A consignment to a factor would be a bailment for sale, according to Story; while according to Kent it would not be included under the term bailment

Sir William Jones has divided bailments into five sorts, namely: *depositum*, or deposit; *mandatum*, or commission without recompense; *commodatum*, or loan for use without pay; *pignus*, or pawn, *locatum*, or hiring, which is always with reward. This last is subdivided into *locatio rei*, or hiring, by which the hirer gains a temporary use of the thing; *locatio operis faciendi*, when something is to be done to the thing delivered; *locatio operis mercium vehendarum*, when the thing is merely to be carried from one place to another. Jones, Bailm. 36. See these several titles.

A better general division, however, for practical purposes, is into three kinds. *First*, those bailments which are for the benefit of the bailor, or of some person whom he represents. *Second*, those for the benefit of the bailee, or some person represented by him. *Third*, those which are for the benefit of both parties.

A radical distinction between a bailment and a chattel mortgage is that, by a mortgage, the title is transferred to the mortgagee, subject to be revested by performance of the condition, but, in case of a bailment, the bailor retains the title and parts with the possession for a special purpose; Walker v. Staples, 5 Allen (Mass.) 34. See MORTGAGE.

A hiring of property for a specific term is a bailment, though the hirer has an option to purchase before the expiration of the term; Hunt v. Wyman, 100 Mass. 198; Collins v. R. Co., 171 Pa. 243, 33 Atl. 331; Bailey v. Colby, 34 N. H. 29, 66 Am Dec. 752. A telegraph company receiving a message is said to be a bailee for hire and not a common carrier; Western Union Telegraph Co. v. Fontaine, 58 Ga. 433; and to be governed by the law applicable to that class of bailments called *locatio operis faciendi;* Pinckney v. Telegraph Co., 19 S. C. 71, 45 Am. Rep. 765. See TELEGRAPH.

An agreement by which A is to let B have a horse, in consideration that B will let A have another horse, creates an exchange, not a bailment; King v. Fuller, 3 Cai. (N. Y.) 152; and where a jeweler's sweepings were delivered under an option to return either the product or its equivalent in value, the transaction was held to be either an exchange or a sale; Austin v. Seligman, 21 Blatchf. 506, 18 Fed. 519.

Where animals are delivered to be taken care of for a certain time, and at the expiration of that time the same number of animals is to be returned, and any increase is to be enjoyed by both parties, there is a bailment, not a partnership; Robinson v. Haas, 40 Cal. 474; so one who hired a boat, paying its running expenses out of the earnings and dividing what was left with the owner, was held a bailee, prior to paying the expenses and striking a balance; Ward v. Thompson, Fed. Cas. No. 17,162.

A contract for hiring teams and carriages for a certain time at a certain price, which, by its terms, is one of bailment, is not converted into one of service, so as to render the owner liable for the acts of the hirer, because the contract provides for the rates to be charged upon sub-letting the property and limits the territory in which it can be used and the kind of work that can be done, and because the owner employs an agent to supervise this branch of his business, to secure men to undertake the work and to make contracts with them; McColligan v. R. Co., 214 Pa. 229, 63 Atl. 792, 6 L. R. A. (N. S.) 544, 112 Am. St. Rep. 739, distinguishing L. R. 7 C. P. 272; L. R. 23 Q. B. D. 281; [1902] 2 K. B. 38.

When the identical article is to be returned in the same or in some altered form, the contract is one of bailment and the title to the property is not changed; but when there is no obligation to return the specific article and the receiver is at liberty to return another thing of equal value, then the transaction is a sale; Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093. This distinction or test of a bailment is recognized in Laflin & R. Powder Co. v. Burkhardt, 97 U. S. 116, 24 L. Ed. 973; Walker v. Butterick, 105 Mass. 237; Middleton v. Stone, 111 Pa. 589, 4 Atl. 523.

There are three degrees of care and diligence required of the bailee, and three degrees of the negligence for which he is responsible, according to the purpose and object of the bailment, as shown in those three classes; and the class serves to designate the degree of care, and of the negligence for which he is responsible. Thus, in the first class the bailee is required to exercise only slight care, and is responsible, of course, only for gross neglect. In the second he is required to exercise great care, and is responsible even for slight neglect. In the third he is required to exercise ordinary care, and is responsible for ordinary neglect. See BAILEE.

It has been held in some cases that there are, properly speaking, no degrees of negligence (though the above distinctions have been generally maintained in the cases); Edw. Bailm. § 61); 11 M. & W. 113; The New World v. King, 16 How. (U. S.) 474, 14 L. Ed. 1019; Perkins v. R. Co., 24 N. Y. 207, 82 Am. Dec. 281; L. R. 1 C. P. 612.

When a person receives the goods of another to keep without recompense, and he acts in good faith, keeping them as his own, he is not answerable for their loss or injury. As he derives no benefit from the bailment, he is responsible only for bad faith or gross negligence; Smith v. Bank, 99 Mass. 605, 97 Am. Dec. 59; 2 Ad & E. 256; Griffith v. Zipperwick, 28 Ohio St. 388; Laforge v. Morgan, 11 Mart. (O. S.) La. 462; Knowles v. R. Co., 38 Me. 55, 61 Am. Dec. 234; Tracy v. Wood, 3 Mas. 132, Fed. Cas. No. 14,130; 2 C. B. 877; Burk v. Dempster, 34 Neb. 426, 51 N. W. 976; Kincheloe v. Priest, 89 Mo. 240, 1 S. W. 235, 58 Am. Rep. 117. But this obligation may be enlarged or decreased by a special acceptance; 2 Kent 565; Story, Bailm. § 33; 2 Ld. Raym. 910; Ames v. Belden, 17 Barb. (N. Y.) 515; and a spontaneous offer on the part of the bailee increases the amount of care required of him; 2 Kent 565. Knowledge by the bailee of the character of the goods; Jones, Bailm 38; and by the bailor of the manner in which the bailee will keep them; Knowles v. R. Co., 38 Me. 55, 61 Am. Dec. 234; are important circumstances.

A bank (national or otherwise) accustomed to keep securities, whether authorized to do so by its charter or not, is liable for their loss by gross carelessness; First Nat. Bank v. Graham, 79 Pa. 106, 21 Am. Rep. 49; Turner v. Bank, 26 Ia. 562; Chattahoochee Nat Bank v. Schley, 58 Ga. 369, Gray v. Merriam, 148 Ill. 179, 35 N. E. 810, 32 L. R. A. 769, 39 Am. St. Rep. 172; Preston v. Prather, 137 U. S. 604, 11 Sup. Ct. 162, 34 L. Ed. 788; see First Nat. Bank v. Bank, 60 N. Y. 278, 19 Am. Rep. 181; *contra*, Whitney v. Bank, 50 Vt. 389, 28 Am. Rep. 503. A national bank has power to receive such deposits; National Bank v. Graham, 100 U. S. 699, 25 L. Ed. 750.

So when a person receives an article and undertakes gratuitously some commission in respect to it, as to carry it from one place to another, he is only liable for its injury or loss through his gross negligence. It is enough if he keep or carry it as he does his own property; 6 C. Rob. Adm. 141; Tracy v. Wood, 3 Mas. 132, Fed. Cas. No. 14,130; and cases above. A treasurer of an association who receives no compensation is only liable for gross negligence in paying out funds, as he is a gratuitous bailee; Hibernia

Building Ass'n v. McGrath, 154 Pa. 296, 26 Atl. 377, 35 Am. St. Rep. 828. See MANDATE.

As to the amount of skill such bailee must possess and exercise, see 2 Kent 509; Story, Bailm. § 174; Fellowes v. Gordon, 8 B. Monr. (Ky.) 415; Beardslee v. Richardson, 11 Wend. (N. Y.) 25, 25 Am. Dec. 596; Ferguson v. Porter, 3 Fla. 27; 11 M. & W. 113; and more skill may be required in cases of voluntary offers or special undertakings; 2 Kent 573.

The borrower, on the other hand, who receives the entire benefit of the bailment, must use extraordinary diligence in taking care of the thing borrowed, and is responsible for even the slightest neglect; Niblett v. White's Heirs, 7 La. 253; Moore v. Westervelt, 27 N. Y. 234; 2 Ld. Raym. 909; Ross v. Clark, 27 Mo. 549; Green v. Hollingsworth, 5 Dana (Ky.) 173, 30 Am. Dec. 680. See Hagebush v. Ragland, 78 Ill. 40.

He must apply it only to the very purpose for which it was borrowed; 2 Ld. Raym. 915; Story, Bailm. § 232; cannot permit any other person to use it; 1 Mod. 210; Wilcox v. Hogan, 5 Ind. 546; Sarjeant v. Blunt, 16 Johns. (N. Y.) 76; cannot keep it beyond the time limited; Wheelock v. Wheelwright, 5 Mass. 104; and cannot keep it as a pledge for demands otherwise arising against the bailor, 2 Kent 574. See 9 C. & P. 383; Chamberlin v. Cobb, 32 Ia. 161.

A borrower cannot recover for injuries caused by a defect in the thing borrowed, where such defect is hidden and the bailor had no knowledge of it; [1899] 1 Q. B. D. 145. In a bailment for hire it is said to be the duty of the bailor to use due care to find hidden defects; 6 Q. B. Div. 685. The obligation of the lender goes no further than to make known to the borrower a defect in the subject matter of the bailment should he know of the existence of such defect; he is not liable for an injury caused by a defect, even if he might have known of it; 6 H. & N. 329; 8 El. & Bl 1035, Gagnon v. Dana, 69 N. H. 264, 39 Atl. 982, 41 L. R. A. 389, 76 Am. St. Rep 170; but if he knows of a defect and by gross negligence omits to inform the borrower of it, an action may be maintained; 68 L. J. Q. B. N. S. 147.

When the property has been lost or destroyed without fault on his part, he is not responsible to the owner; Clark v. U. S., 95 U. S. 539, 24 L. Ed. 518; Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 653, 22 Sup. Ct. 240, 46 L. Ed. 366; but when he contracts either expressly or by fair implication to return the thing even though it has been lost or destroyed without negligence on the bailee's part, such contract must be enforced according to its terms; Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 654, 22 Sup. Ct. 240, 46 L. Ed. 366.

In the third class of bailments under the division here adopted, the benefits derived from the contract are reciprocal: it is advantageous to both parties. In the case of a pledge given on a loan of money or to secure the payment of a debt, the one party gains a credit and the other security by the contract. And in a bailment for hire, one party acquires the use of the thing bailed and the other the price paid therefor: the advantage is mutual. So in a bailment for labor and services, as when one person delivers materials to another to be manufactured, the bailee is paid for his services and the owner receives back his property enhanced in value by the process of manufacture. In these and like cases the parties stand upon an equal footing: there is a perfect mutuality between them. And therefore the bailee can only be held responsible for the use of ordinary care and common prudence in the preservation of the property bailed; Knapp v. Curtis, 9 Wend. (N. Y.) 60; 5 Bingh. 217; Bakwell v. Talbot, 4 Dana (Ky.) 217; Fulton v. Alexander, 21 Tex. 148; Mayor and Council of Columbus v. Howard, 6 Ga. 213; Brown v. Waterman, 10 Cush. (Mass.) 117. A bailee for hire is supposed to take such care of property as a reasonably prudent man would of his own; Cloyd v. Steiger, 139 Ill. 41, 28 N. E 987.

The common law does not recognize the rule of the civil law that the bailor for hire is bound to keep the thing in repair, and in the absence of provision the question as to which party is bound to repair depends largely on custom and usage; Central Trust Co. of New York v. Ry. Co., 50 Fed. 857.

The depositary or mandatary has a right to the possession as against everybody but the true owner. Story, Bailm. § 93; Pitt v. Albritton, 34 N. C. 74; 4 E. L. & Eq. 438; see McMahon v. Sloan, 12 Pa. 229, 51 Am. Dec. 601; but is excused if he delivers it to the person who gave it to him, supposing him the true owner; Nelson v. Iverson, 17 Ala. 216; and may maintain an action against a wrong-doer; 1 B. & Ald. 59; Chamberlain v. West, 37 Minn. 54, 33 N. W. 114.

It is contended by Story that a mere depository has no special property in the deposit, but a custody only; Story, Bailm. §§ 93, 133, citing Norton v People, 8 Cow (N. Y.) 137; Com. v. Morse, 14 Mass. 217; and that there is a clear distinction between the custody of a thing and the property, whether general or special, in a thing; 1 Term 658. If a depository has a special property in the deposit, it must be equally true that every other bailee has, and indeed that every person who lawfully has the custody of a thing, with the assent of the owner, has a special property in it. Under such circumstances, the distinction between a special property and a mere custody would seem to be almost, if not entirely, evanescent; Story, Bailm. § 93 a, citing the leading case of Hartop v. Hoare, 3 Atk. 44, where certain jewels en-

closed in a sealed paper and sealed bag had been placed by the owner with a jeweller for safe custody, and the latter afterwards broke the seals and pledged the jewels to Hoare for an advance of money. The owner brought suit against the pledgee and the court held, first, that the delivery to the jeweller was a mere naked bailment for the use of the bailor, and the jeweller was a mere depository, having no general or special property in the jewels, and no right to dispose of them; secondly, that as the pledge by the jeweller was wrongful, the refusal by the defendant to deliver the jewels to the owner was a tortious conversion. In a criticism on this view, it has been said that that case does not constitute a sufficient authority for denying the bailee's right to a special property in the bailment; that although the jeweller came into possession of the jewels by right originally, yet when he broke the seals and took them out of the bag, he was possessor *mala fide;* and that from this it might be inferred that the principle was admitted that, as respects third persons, a depository *has* a special property, as otherwise there is no pertinency in resting the want of it on the circumstances of his breaking the seals and taking the jewels out of the envelopes, and thereby divesting himself of the special property he originally had, and in fact ceasing to be a bailee; 16 Am. Jur. 280. Sir William Jones says: "The general bailee has unquestionably a limited property in the goods entrusted to his care;" Jones, Bailm. 80; and Lord Coke says: "Bailment maketh a privity. If one has goods as bailee where he hath only a possession, and no property, yet he shall have an action for them," 2 Bulst. 306. If his possession be violated he may maintain trespass or trover; Waterman v. Robinson, 5 Mass. 303, where it was held that he had no special property by which he could maintain replevin.

A bailee of an officer in cases of an attachment of property has a sufficient property to maintain an action against a stranger for any dispossession or injury to the goods attached; Odiorne v. Colley, 2 N. H. 70, 9 Am. Dec. 39; Bender v. Manning, 2 N. H. 289.

A borrower has no property in the thing borrowed, but may protect his possession by an action against the wrong-doer; 2 Bingh. 173; Hurd v. West, 7 Cow. (N. Y.) 752. As to the property in case of a pledge, see PLEDGE.

In bailments for storage the bailee acquires a right to defend the property as against third parties and strangers, and is answerable for loss or injury occasioned through his failure to exercise ordinary care. See WAREHOUSEMAN; TROVER.

As to the lien of warehousemen and wharfingers for their charges on the goods stored with them, see LIEN.

The hire of things for use transfers a special property in them for the use agreed upon. The price paid is the consideration for the use: so that the hirer becomes the temporary proprietor of the things bailed, and has the right to detain them from the general owner for the term or use stipulated for. It is a contract of letting for hire, analogous to a lease of real estate for a given term. Edw. Bailm. § 325. See HIRE.

In a general sense, the hire of labor and services is the essence of every species of bailment in which a compensation is to be paid for care and attention or labor bestowed upon the things bailed. The contracts of warehousemen, carriers, forwarding and commission merchants, factors, and other agents who receive goods to deliver, carry, keep, forward, or sell, are all of this nature, and involve a hiring of services. In a more limited sense, a bailment for labor and services is a contract by which materials are delivered to an artisan, mechanic, or manufacturer to be made into some new form. The title to the property remains in the party delivering the goods, and the workman acquires a lien upon them for services bestowed upon the property. Cloth delivered to a tailor to be made up into a garment, a gem or plate delivered to a jeweller to be set or engraved, a watch to be repaired, may be taken as illustrations of the contract. The owner, who does not part with his title, may come and take his property after the work has been done; but the workman has his lien upon it for his reasonable compensation.

Where property is temporarily in charge of an incidental bailee such as a shopkeeper, restaurant keeper, barber, bathhouse proprietor, or the like, as an incident to his general business, the liability of the bailee does not differ in any respect from that of other bailees for hire; Tombler v. Koelling, 60 Ark. 62, 28 S. W. 795, 27 L. R. A. 502, 46 Am. St. Rep. 146; Dilberto v. Harris, 95 Ga. 571, 23 S. E. 112; Donlin v. McQuade, 61 Mich. 275, 28 N. W. 114; Bunnell v. Stern, 122 N. Y. 539, 25 N. E. 910, 10 L. R. A. 481, 19 Am. St. Rep. 519; Buttman v. Dennett, 9 Misc. 462, 30 N. Y. Supp. 247; Woodruff v. Painter, 150 Pa. 91, 24 Atl. 621, 16 L. R. A. 451, 30 Am. St. Rep. 786; Goff v. Wanamaker, 25 W. N. C. (Pa.) 358; Walpert v. Bohan, 126 Ga. 532, 55 S. E. 181, 6 L. R. A. (N. S.) 828, 115 Am. St. Rep. 114, 8 Ann. Cas. 89; but see Powers v. O'Neill, 89 Hun 129, 34 N. Y. Supp. 1007; and contributory negligence on the part of the bailor in such cases may relieve the bailee from liability; Powers v. O'Neill, 89 Hun 129, 34 N. Y. Supp. 1007. An innkeeper who conducts a public bath house as an incident to his business is not liable to a guest as an innkeeper, but as a bailee for hire; Walpert v. Bohan, 126 Ga. 532, 55 S. E. 181, 6 L. R. A. (N. S.) 828, 115 Am. St. Rep. 114, 8 Ann. Cas. 89; Minor v. Staples, 71 Me. 316, 36 Am. Rep. 318. It is said that

the implied contract on the part of a shopkeeper (the consideration for which is the chance of profit) that, if customers come to the store, no harm that can reasonably be averted shall overtake them, must be held to extend to the safety of such property as the customers necessarily or habitually carry with them; Woodruff v. Painter, 150 Pa. 91, 24 Atl. 621, 16 L. R. A. 451, 30 Am. St. Rep. 786; and that the proprietor should provide a safe place for the keeping of such property when the customer while trying on apparel must necessarily lay aside his own; Bunnell v. Stern, 122 N. Y. 539, 25 N. E. 910, 10 L. R. A. 481, 19 Am. St. Rep. 519; but see Wamser v. Browning, King & Co., 187 N. Y. 87, 79 N. E. 861, 10 L. R. A. (N. S.) 314, where the customer knowing the clerks to be busy, proceeded to wait on himself, knowing there was no one but himself to watch the garments he laid aside.

When the business of the bailee implies skill, a want of such skill as is customary in his calling will render him liable as for gross negligence; Western Union Tel. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480; Stanton v. Bell, 9 N. C. 145, 11 Am. Dec. 744; even though the bailment is for the sole benefit of the bailor and the bailee receives no compensation; Conner v. Winton, 8 Ind. 315, 65 Am. Dec. 761.

As to the duties and liabilities of common carriers and innkeepers, see those titles. As to warehouse receipts, see that title. See DEPOSIT; MANDATE; HIRE, AGISTOR; SALE; ROLLING STOCK; LIEN.

BAILOR. He who bails a thing to another.

The bailor must act with good faith towards the bailee; Story, Bailm. § 74; permit him to enjoy the thing bailed according to contract; and in some bailments, as hiring, warrant the title and possession of the thing hired, and, probably, keep it in suitable order and repair for the purpose of the bailment; Story, Bailm. § 388.

BAIRN'S PART. See LEGITIM.

BAITING. To bait is to attack with violence; to provoke and harass. 2 A. & E. Encyc. 63; L. R. 9 Q. B. 380.

BALÆNA. A large fish, called by Blackstone a whale. Of this the king had the head and the queen the tail as a perquisite whenever one was taken on the coast of England. Prynne, Ann. Reg. 127; 1 Bla. Com. 221.

BALANCE. The amount which remains due by one of two persons, who have been dealing together, to the other, after the settlement of their accounts.

In the case of mutual debts, the balance only can be recovered by the assignee of an insolvent or the executor of a deceased person. But this mutuality must have existed at the time of the assignment by the insolvent, or at the death of the testator.

It is often used in the sense of residue or remainder; Lopez v. Lopez, 23 S. C. 269; Skinner v. Lamb, 25 N. C. 155.

The term *general balance* is sometimes used to signify the difference which is due to a party claiming a lien on goods in his hands for work or labor done, or money expended in relation to those and other goods of the debtor; 3 B. & P. 485; 3 Esp. 268; McWilliams v. Allan, 45 Mo. 573.

The phrase "net balance" as applied to the proceeds of the sale of stock means in commercial usage the balance of the proceeds after deducting the expenses incident to the sale; Evans v. Waln, 71 Pa. 74.

BALANCE OF POWER. **In International Law.** A distribution and an opposition of forces, forming one system, so that no state shall be in a position, either alone or united with others, to impose its will on any other state or interfere with its independence. Ortolan.

BALANCE SHEET. A statement made by merchants and others to show the true state of a particular business. A balance sheet should exhibit all the balances of debits and credits, also the value of merchandise, and the result of the whole.

BALDIO. **In Spanish Law.** Vacant land having no particular owner, and usually abandoned to the public for the purposes of pasture.

BALE. A quantity or pack of goods or merchandise, wrapped or packed in cloth and tightly corded. Wharton.

A bale of cotton means a bale compressed so as to occupy less space than if in a bag; 2 Car. & P. 525.

BALIUS. **In Civil Law.** A teacher; one who has the care of youth; a tutor; a guardian. Du Cange, *Bajultis*; Spelman, Gloss

BALIVA (spelled also *Ballira*). Equivalent to *Baliratus*. *Baliwia*, a bailiwick, the jurisdiction of a sheriff; the whole district within which the trust of the sheriff was to be executed. Cowell. Occurring in the return of the sheriff, *non est inventus in balliva mea* (he has not been found in my bailiwick); afterwards abbreviated to the simple *non est inventus*; 3 Bla. Com. 283.

BALLAST. That which is used for trimming a ship to bring it down to a draft of water proper and safe for sailing. Great Western Ins. Co. v. Thwing, 13 Wall. (U. S.) 674, 20 L. Ed. 607.

BALLASTAGE. A toll paid for the privilege of taking up ballast from the bottom of the port. This arises from the property in the soil; 2 Chitty, Comm. Law 16.

BALLIUM. A fortress or bulwark; also bail. Cunningham.

BALLIVO AMOVENDO (L. Lat. for removing a bailiff). A writ to remove a bailiff out of his office.

BALLOT. Originally a ball used in voting; hence, a piece of paper, or other thing used for the same purpose; whole amount of votes cast.

The act of voting by balls or tickets. Webster.

A ballot or ticket is a single piece of paper containing the names of the candidates and the offices for which they are running. People v. Holden, 28 Cal. 136. See ELECTION.

BAN. In Old English and Civil Law. A proclamation; a public notice; the announcement of an intended marriage. Cowell. An excommunication; a curse, publicly pronounced. A proclamation of silence made by a crier in court before the meeting of champions in combat. Cowell. A statute, edict, or command; a fine, or penalty.

An open field; the outskirts of a village; a territory endowed with certain privileges.

A summons; as *arriere ban*. Spelman, Gloss.

In French Law. The right of announcing the time of moving, reaping, and gathering the vintage, exercised by certain seignorial lords. Guyot, *Rép Univ.*

BANALITY. In Canadian Law. The right by virtue of which a lord subjects his vassals to grind at his mill, bake at his oven, etc. Used also of the region within which this right applied. Guyot, *Rép. Univ.* It prevents the erection of a mill within the seignorial limits; 1 Low. C. 31; whether steam or water; 3 Low. C. 1.

BANC (Fr. bench). The seat of judgment; as, *banc le roy*, the king's bench; *banc le common pleas*, the bench of common pleas.

The meeting of all the judges, or such as may form a quorum, as distinguished from sittings at *Nisi Prius*: as, "the court sit in *banc*." Cowell.

BANCI NARRATORES. Advocates; counters; serjeants. Applied to advocates in the common pleas courts. 1 Bla. Com. 24.

BANCUS (Lat.). A bench; the seat or bench of justice; a stall or table on which goods are exposed for sale. Often used for the court itself.

A full bench, when all the judges are present. Cowell; Spelman, Gloss.

The English court of common pleas was formerly called *Bancus*. Viner, Abr. *Courts* (M). See BENCH; COMMON BENCH.

BANCUS REGINÆ (Lat.). The Queen's Bench.

BANCUS REGIS (Lat.). The King's Bench; the supreme tribunal of the king after parliament. 3 Bla. Com. 41.

In banco regis, in or before the court of king's bench.

The king has several times sat in his own person on the bench in this court, and all the proceedings are said to be *coram rege ipso* (before the king himself). But James I. was not allowed to deliver an opinion although sitting *in banco regis*. Viner, Abr. *Courts* (H L); 3 Bla. Com. 41; Co. Litt. 71 C.

BANDIT. A man outlawed; one under ban.

BANE. A malefactor. Bracton, l. 1, t. 8, c. 1.

BANISHMENT. A punishment inflicted upon criminals, by compelling them to quit a city, place, or country for a specified period of time, or for life. See Cooper v. Telfair, 4 Dall. (U. S.) 14, 1 L. Ed. 721. It is synonymous with exilement and imports a compulsory loss of one's country. 3 P. Wms. 38.

BANK (Anglicized form of *bancus*, a bench). The bench of justice.

Sittings in bank (or *banc*). An official meeting of four of the judges of a common-law court. Wharton, Lex.

Used of a court sitting for the determination of law points, as distinguished from *nisi prius* sittings to determine facts. 3 Bla Com 28, n.

Bank le Roy. The king's bench. Finch, 198.

The bank of the sea is the utmost border of dry land. Callis, Sewers 73.

In Commercial Law. A place for the deposit of money; Oulton v. Institution, 17 Wall. (U. S.) 118, 21 L. Ed. 618. See Curtis v. Leavitt, 15 N. Y. 166; Pratt v. Short, 79 N. Y. 440, 35 Am. Rep 531; People v. R. Co., 12 Mich. 389, 86 Am. Dec. 64.

The business of banking, as defined by law and custom, consists in the issue of notes payable on demand intended to circulate as money when the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. Mercantile Bank v. New York, 121 U. S. 138, 156, 7 Sup. Ct. 826, 30 L. Ed. 893.

Banks are said to be of three kinds, viz.; of *deposit*, of *discount*, and of *circulation*, they generally exercise all these functions; Oulton v. Sav. Soc., 17 Wall. (U. S.) 118, 21 L. Ed. 618.

It was the custom of the early money-changers to transact their business in public places, at the doors of churches, at markets, and, among the Jews, in the temple (Mark xi. 15). They used tables or benches for their convenience in counting and assorting their coins. The table so used was called *banche*, and the traders themselves, bankers or benchers. In times still more ancient, their benches was called *cambii*, and they themselves were called *cambiators*. Du Cange, *Cambii*.

The issue of paper in the similitude of bank notes and intended to circulate is an

act of banking; People v. R. Co., 12 Mich. 389, 86 Am. Dec. 64; so is keeping an office to discount notes; People v. Bartow, 6 Cow. (N. Y.) 290; but not if the party only lends his own money; People v. Brewster, 4 Wend. (N. Y.) 498; nor is merely receiving money on deposit; State v. Ins. Co., 14 Ohio 6; *contra*, Com. v. Sponsler, 16 Co. Ct. (Pa.) 116.

A corporation loaning its own money on mortgages is not a banking corporation; Oregon & W. Trust Inv. Co. v. Rathburn, 5 Sawy. 32, Fed. Cas. No. 10,555; nor a firm which does not lend money (except on landed security), discount paper or buy or sell drafts; Scott v. Burnham, 56 Ill. App. 30. An unincorporated bank owned by a private individual is not a legal entity, though it is conducted by a so-called president and cashier; Longfellow v. Barnard, 59 Neb. 455, 81 N. W. 307; to the same effect, In re Purl's Estate, 147 Mo. App. 105, 125 S. W. 849.

See NATIONAL BANKS; BANK NOTE; DISCOUNT; GUARANTEE FUND; CHECK; CASHIER; DIRECTOR; DEPOSIT; OFFICER; SAVINGS BANK.

BANK ACCOUNT. A fund which merchants, traders, and others have deposited into the common cash of some bank, to be drawn out by checks from time to time as the owner or depositor may require.

BANK CHARGES. This term in an action on a bill of exchange is equivalent to expenses of noting and may be especially endorsed as a liquidated demand; [1893] 1 Q. B. 318.

BANK CREDIT. A credit with a bank by which, on proper security given to the bank, a person receives liberty to draw to a certain extent agreed upon. In Scotland also called a cash account. Such credits were long a distinctive feature of Scotch banking. Cent. Dict.

BANK NOTE. A promissory note, payable on demand to the bearer, made and issued by a person or persons acting as bankers and authorized by law to issue such notes. The definition is confined to notes issued by incorporated banks in 2 Dan. Neg. Inst. § 1664. See 2 Pars. Bills & N. 88. Bank bills and bank notes are equivalent terms, even in criminal cases; Eastman v. Com., 4 Gray (Mass.) 416. The power thus to issue is not inherent or essential in banking business, and is not necessarily implied from the conference of a general power to do banking business. It must be distinctly, and in terms conferred in the incorporating act, or it will not be enjoyed. Morse, Banking, c. viii.; 11 Op. Att.-Gen. 334.

The notes of national banks have supplanted those of state banks at the present time.

For many purposes they are not looked upon as common promissory notes, and as mere evidences of debt. In the ordinary transactions of business they are recognized by general consent as cash. The business of issuing them being regulated by law, a certain credit attaches to them, that renders them a convenient substitute for money; Smith v. Strong, 2 Hill (N. Y.) 241. They may be reissued after payment; Chalm. Bills of Exch. 267.

The practice is, therefore, to use them as money, and they are a good tender, unless objected to; Snow v. Perry, 9 Pick. (Mass.) 542; Jefferson County Bank v. Chapman, 19 Johns. (N. Y.) 322; Felter v. Weybright, 8 Ohio 169; Hoyt v. Byrnes, 11 Me. 475; Ball v. Stanley, 5 Yerg. (Tenn.) 199, 26 Am. Dec. 263; Seawell v. Henry, 6 Ala. 226; 5 Dowl. & R. 289. They pass under the word "money" in a will, and, generally speaking, they are treated as cash; Mechanics' & Farmers' Bank v. Smith, 19 Johns. (N. Y.) 115; but see Armsworth v. Scotten, 29 Ind. 495, as to their receipt by a sheriff in payment of an execution. When payment is made in bank notes, they are treated as cash and receipts are given as for cash; Morris v. Edwards, 1 Ohio 189; Edwards v. Morris, 1 Ohio 524; Morrill v. Brown, 15 Pick. (Mass.) 177; Bradley v. Hunt, 5 G. & J. (Md.) 54, 23 Am. Dec. 597; Governor v. Carter, 10 N. C. 328, 14 Am. Dec. 588, Scott v. Com., 5 J. J. Marsh. (Ky.) 643; 1 Sch. & L. 318, 319; Tancil v. Seaton, 28 Gratt. (Va.) 605, 26 Am. Rep. 380; 1 Burr. 452. It has been held that the payment of a debt in bank notes discharges the debt; Bayard v. Shunk, 1 W. & S. (Pa.) 92, 37 Am. Dec. 441; Pearson v. Gayle, 11 Ala. 280; 2 Dan. Neg. Inst. § 1676; Edmunds v. Digges, 1 Gratt. (Va.) 359, 42 Am. Dec. 561; but not when the payer knew the bank was insolvent. The weight of authority is against the doctrine of the extinguishment of a debt by the delivery of bank notes which are not paid, when duly presented, in reasonable time. But it is undoubtedly the duty of the person receiving them to present them for payment as soon as possible; Gilman v. Peck, 11 Vt. 516, 34 Am. Dec. 702; Fogg v. Sawyer, 9 N. H. 365; President, etc., of Bank of U. S. v. Bank, 10 Wheat. (U. S.) 333, 6 L. Ed. 334; Young v. Adams, 6 Mass. 182; Houghton v. Adams, 18 Barb. (N. Y.) 545; Westfall, Stewart & Co. v. Braley, 10 Ohio St. 188, 75 Am. Dec. 509; Frontier Bank v. Morse, 22 Me. 88, 38 Am. Dec. 284; Townsends v. Bank, 7 Wis. 185; 6 B. & C. 373.

Bank notes are governed by the rules applicable to other negotiable paper. They are assignable by delivery: Rep. *t.* Hard. 53; President, etc., of Michigan State Bank v. Hastings, 1 Dougl. (Mich.) 236, 41 Am. Dec. 549. The holder of a note is entitled to payment, and cannot be affected by the fraud of a former holder, unless he is proved privy to the fraud; 1 Burr. 452; Sylvester v. Girard, 4 Rawle (Pa.) 185; Worcester County Bank v. Bank, 10 Cush. (Mass.) 488, 57 Am. Dec. 120; 2 Dan. Neg. Instr. § 1680; Olm-

stead v. Bank, 32 Conn. 278, 85 Am. Dec. 260. The *bona fide* holder who has received them for value is protected in their possession even against a real owner from whom they have been stolen. Payment in forged bank notes is a nullity; Pindall's Ex'rs v. Bank, 7 Leigh (Va.) 617; Hargrave v. Dusenberry, 9 N. C. 326; Ramsdale v. Horton, 3 Pa. 330; Eagle Bank of New Haven v. Smith, 5 Conn. 71, 13 Am. Dec. 37; but the taker of such must give prompt notice that they are counterfeit, and offer to return them; Simms v. Clark, 11 Ill. 137. But where the bank itself receives notes purporting to be its own, and they are forged, it is otherwise; President, etc., of Bank of U. S. v. Bank, 10 Wheat. (U. S.) 333, 6 L. Ed. 334. See 6 B. & C. 373. If a note be cut in two for transmission by mail, and one half be lost, the *bona fide* holder of the other half can recover the whole amount of the note; Hinsdale v. Bank, 6 Wend. (N. Y.) 378; Bank of Virginia v. Ward, 6 Munf. (Va.) 166; Farmers' Bank of Virginia v. Reynolds, 4 Rand. (Va.) 186; Dan. Neg. Inst. § 1696.

At common law, as choses in action, bank notes could not be taken in execution; 9 Cro. Eliz. 746. The statute laws of the several states, or custom, have modified the common law in this respect, and in many of them they can be taken on execution; Spencer v. Blaisdell, 4 N. H. 198, 17 Am. Dec. 412; Morrill v. Brown, 15 Pick. (Mass.) 173; Lovejoy v. Lee, 35 Vt. 430.

BANK STOCK. The capital of a bank. In England the sum is applied chiefly to the stock of the Bank of England.

BANKABLE. Bank notes, checks, and other securities for money received as cash by banks in the place where the word is used.

In the United States, the notes issued by the national banks have taken the place of those formerly issued by banks incorporated under state laws. The circulation of these notes being secured by United States bonds deposited with the treasurer of the United States, they are received as bankable money without regard to the locality of the bank issuing them. See U. S. Rev. Stat. § 5133, Veazie Bank v. Fenno, 8 Wall. (U. S.) 533, 19 L. Ed. 482.

BANKER'S NOTE. A promissory note given by a private banker or banking institution, not incorporate, but resembling a bank note in all other respects. 6 Mod. 29; 3 Chit. Comm. Law 590.

BANKRUPT. Originally and strictly, a trader who secretes himself or does certain other acts tending to defraud his creditors. 2 Bla. Com. 471.

A broken-up or ruined trader. Everett v. Stone, 3 St. 453, Fed. Cas. No. 4,577.

By modern usage, an insolvent person.

A person who has done or suffered to be done some act which is by law declared to be an act of bankruptcy.

The word is from the Italian *banca rota*, the custom being in the middle ages to break the benches or counters of merchants who failed to pay their debts. Voltaire, Dict. Phil. *voc. sig.* Banqueroute; Saint Bennet Dict. Faillete.

In the English law there were two characteristics which distinguished bankrupts from insolvents: the former must have been a *trader* and the object of the proceedings *against*, not *by*, him. Originally the bankrupt was considered a criminal; 2 Bla. Com. 471; and the proceedings were only against fraudulent traders; but this distinction has been abolished by the later English bankruptcy acts, although in some respects traders and non-traders continued to be put on a different footing; Mozl. & W. Law Dict. As used in American law, the distinction between a bankrupt and an insolvent is not generally regarded. Act of Congress of March 2, 1867, and Act of June 22, 1874 (both now repealed). On the continent of Europe the distinction between bankrupt and insolvent still exists; Holtz. Encyc. *voc. sig.* Bankerott. Under the constitution of the United States the Federal government has power to pass a uniform bankrupt law. The meaning of bankrupt as used in the constitution was not the technical early English one, but was commensurate with insolvent; Kunzler v. Kohaus, 5 Hill (N. Y.) 317. In the first bankrupt law of Apr. 4, 1800, repealed Dec. 19, 1803, the word bankrupt was used in the old English sense. The distinction, however, became less observed; Marshall, C. J., in Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. Ed. 529; 2 Kent 390; and was finally abandoned and broken down by the act of Aug. 19, 1841, which was a union of both species of laws, including "all persons whatsoever." The constitutionality of the voluntary part of the act was much contested, but was fully sustained: Kunzler v. Kohaus, 5 Hill (N. Y.) 317; McCormick v. Pickering, 4 N. Y. 283. (For the reasons assigned *contra*, see Sackett v. Andross, 5 Hill [N. Y.] 327.)

The only substantial difference between a strictly bankrupt law and an insolvent law lies in the circumstance that the former affords relief upon the application of the creditor, and the latter upon the application of the debtor. In the general character of the remedy there is no difference, however much the modes by which the remedy may be administered may vary. But even in the respect named there is no difference in this instance. The act of congress (1867) was both a bankrupt act and an insolvent act by definition, for it afforded relief upon the application of either the debtor or the creditor, under the heads of voluntary and involuntary bankruptcy; Martin v. Berry, 37 Cal. 222.

A state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts, and provided there be no act of congress in force to establish a uniform system of bankruptcy, conflicting

with such law; McMillan v. McNeill, 4 Wheat. (U. S.) 209, 4 L. Ed. 552; Odgen v. Saunders, 12 Wheat. (U. S.) 213, 6 L. Ed. 606.

A state bankrupt law so far as it attempts to discharge the contract is unconstitutional; McMillan v. McNeill, 4 Wheat. (U. S.) 209, 4 L. Ed. 552; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. Ed. 529; Farmers' & M. Bank v. Smith, 6 Wheat. (U. S.) 131, 5 L. Ed 224; whether passed before or after the debt was created; McMillan v. McNeill, 4 Wheat. (U. S.) 209, 4 L. Ed. 552; or where the suit was in a state of which both parties were citizens, and in which they resided until suit, and where the contract was made; Farmers' & M. Bank v. Smith, 6 Wheat. (U. S.) 131, 5 L. Ed. 224; but a bankrupt or insolvent law of a state which discharges the person of the debtor and his further acquisitions of property is valid, though a discharge under it cannot be pleaded in bar of an action by a citizen of another state in the courts of the United States or of any other state; Odgen v. Saunders, 12 Wheat. (U. S.) 213, 6 L. Ed. 606. Every state law is a bankrupt law in substance and fact, that causes to be distributed by a tribunal the property of a debtor among his creditors; and it is especially such if it causes the debtor to be discharged from his contracts, so far as it can do so; Nelson v. Carland, 1 How. (U. S.) 265, and note, 11 L. Ed. 126. When the United States statute is also an insolvent law acting upon the same persons and cases as the state insolvent law, the latter is suspended when the United States statute goes into operation; Nelson v. Carland, 1 How. (U. S.) 265, 11 L. Ed. 126; Ex parte Eames, 2 Sto. 326, Fed. Cas. No. 4,237, but the state law may be still in force as to a class of insolvents not included in the Federal act; Herron Co. v. Superior Court, 136 Cal. 279, 68 Pac. 814, 89 Am. St. Rep. 124. If the state court has acquired jurisdiction under a state statute, and is actually settling the debts and distributing the assets of the insolvent before or at the date at which the Federal law takes effect, it may proceed to a final conclusion of the case; Judd v. Ives, 4 Metc. (Mass.) 401; Martin v. Berry, 37 Cal. 208. A voluntary assignment made by the debtor within four months of being adjudged a bankrupt is void although it was made in conformity to the laws of his state; In re Gutwillig, 90 Fed. 475. See INSOLVENCY.

BANKRUPT LAWS.

Bankruptcy laws, as now understood, were not known to the common law. Certain acts in England, beginning with the statute 34 & 35 Henry VIII c. 4, were first mainly directed against the criminal frauds of traders. The bankrupt was treated as a criminal offender; and, formerly, the not duly surrendering his property under a commission of bankruptcy, when summoned, was a capital felony. The bankrupt laws are now, and have for some time past been, regarded as a connected system of civil legislation, having the double object of enforcing a complete discovery and equitable distribution of the property of an insolvent trader, and of conferring on the trader the reciprocal advantage of security of person and a discharge from all claims of his creditors.

By the Act 6 Geo. IV. c. 16, the former statutes were consolidated and many important alterations introduced. All business under the earlier statutes was entrusted to commissioners appointed by the Lord Chancellor for each case A subsequent statute, 1 & 2 Will. IV. c 56, changed the mode of proceeding by constituting a Court of Bankruptcy, and removing the jurisdiction of bankrupt cases in the first instance from the Court of Chancery to that of Bankruptcy, reserving only an appeal from that court to the lord chancellor as to matters of law and equity and questions of evidence; and other important alterations were introduced This was followed by the 5 & 6 Will. IV. c 29. In 1869, bankruptcies in the counties were transferred to the county courts and in London to the London Court of Bankruptcy. Its jurisdiction was transferred in 1883 to the King's Bench Division of the High Court of Justice The bankrupt laws were codified in 1883 and in 1890.

Bankrupt laws were passed in the United States in 1800, 1841, and 1867, but they were repealed after a brief existence.

The act of 1867 was repealed by act of June 7, 1878 (taking effect September 1, 1878) but not to affect pending cases.

A bankruptcy act was passed July 1, 1898. It extends not only to corporations ordinarily speaking, but to limited or other partnership associations whose capital alone is responsible for the debts of the association.

The act is not unconstitutional, though it provides that others than traders may be adjudged bankrupts on voluntary petition, though it allows the exemptions of the local laws, and though it provides that the discharge of the debtor under proceedings at his domicil shall be valid throughout the United States; Hanover Nat. Bank v. Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113.

A person shall be deemed insolvent within the act "whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." Wage-earner shall include any person who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year.

The courts of bankruptcy are the district courts of the United States and of the territories, the supreme court of the District of Columbia, and the United States courts of the Indian Territory and of Alaska. They are invested with such jurisdiction in law and at equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, to adjudge persons bankrupt who have had their principal place of business, resided, or had their domicil for the preceding six months, or the greater portion thereof, within their respective territorial jurisdictions, or who do not have

their principal place of business, reside, or have their domicil within the United States, but have property within the jurisdiction of the court or have been adjudged bankrupts by competent courts of jurisdiction without the United States, and have property within their jurisdictions.

Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground See PREFERENCE

A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months. Such time shall not expire until four months after (1) the date of the recording of the transfer, when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors, or for the purpose of giving a preference as in the act provided, or a general assignment for the benefit of his creditors, if by law such recording is required or permitted; (2) or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property, unless the petitioning creditor have received actual notice of such transfer or assignment.

It would be a defence to prove that the party was not insolvent as defined in the act at the time the petition was filed against him, and upon such proof the proceedings shall be dismissed. The burden of proof is on the alleged bankrupt. He must appear in court with books and accounts, and submit to an examination in respect to his insolvency.

The petitioner in involuntary proceedings is required to give bond with two good and sufficient sureties who shall reside in the jurisdiction to be approved by the court, in such sums as the court shall direct, conditioned on the payment of damages and costs in case the petition is dismissed. If the petition is dismissed the respondent is allowed all costs, counsel fees, expenses, and damages, to be fixed by the court and covered by the bond.

"Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a *voluntary* bankrupt."

"Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts." Mining corporations were added by the act of Feb. 5, 1903.

A partnership during its continuance or after its dissolution and before its final settlement may be adjudged a bankrupt. The court which has jurisdiction of one of the partners may have jurisdiction of all the partnership assets, but separate accounts of the partnership and individual property should be kept and expenses divided between them as the court shall determine. The net proceeds of partnership property goes to partnership debts, and those of the individual estates to individual debts. Any surplus in either case to the other class of debts. Proof of claims of partnership debts may be allowed against individual estates and *vice versa*, and the court may marshal the assets of both estates so as to prevent preferences and secure an equitable distribution.

If one or more but not all of the partners are adjudged bankrupt the partnership property shall not be administered in bankruptcy unless by consent of the partners not adjudged bankrupts. The latter shall settle the partnership business as expeditiously as possible and account for the interest of the bankrupt partners. Any exemptions in force when the petition was filed in the state where the bankrupt had his domicil for six months or the greater portion thereof immediately preceding the filing of the petition are preserved.

Provision is made for a composition with creditors, but not until the bankrupt has been examined in open court or at a meeting of creditors and has filed his schedule of assets and list of creditors. If the application therefor has been accepted in writing by a majority in number and amount of proved creditors, and the consideration thereof and money to pay all prior debts and costs have been deposited subject to the order of the court, it may be presented to the court, which, after notice and a hearing, may confirm it.

A discharge may be applied for, but not until one month after, and within the ensuing twelve months from the adjudication of bankruptcy (with a further extension, by order of court for cause, of six months). No discharge shall be granted if the bankrupt has committed an offence punishable by im-

prisonment under the act; or, with fraudulent intent to conceal his condition, etc., has destroyed, concealed, or failed to keep proper books of account.

A discharge releases all debts *except* taxes due the United States or the state, county, district, or municipality in which the bankrupt resides; judgments on claims for fraud or for obtaining property by false pretences and wilful injuries to the person or property of another; and debts not scheduled (unless the creditor was unknown to the bankrupt or the creditor had knowledge of the proceedings); or created by fraud, embezzlement, etc, as an officer or trustee; does not release a judgment obtained by a husband against the bankrupt for criminal conversation with his wife; Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754; nor a contract made by a divorced bankrupt by which he agreed to pay his wife a sum annually for her support and that of their child; Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084. A discharge in bankruptcy will be withheld if the bankrupt is shown to have obtained property on credit upon false representations in writing, and any creditors may avail themselves of this right; In re Harr, 143 Fed. 421.

The right to a trial by jury is given in respect of the fact of insolvency and of the commission of an act of bankruptcy, upon the application of the alleged bankrupt. The right is absolute and cannot be withheld at the court's discretion; Elliott v. Toeppner, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed 200.

The district court now has jurisdiction of all matters and proceedings in bankruptcy, Jud. Code, § 24, including controversies between the trustee and any adverse claimant of his property. Suits by the trustee must be brought in the court where the bankrupt might have brought them, unless by consent of the proposed defendant.

The circuit court of appeals (Judicial Code, § 130) has appellate and supervisory jurisdiction which is to be exercised in the manner provided in the bankruptcy act. By § 25, appeals may be taken to the circuit court of appeals: 1. From a judgment adjudging or refusing to adjudge the defendant a bankrupt; 2. From a judgment granting or denying a discharge; 3. From a judgment allowing or rejecting a debt or claim of $500 or over. Such appeal must be taken within ten days and may be heard by the appellate court in term time or in vacation.

The supreme court has appellate jurisdiction of controversies in bankruptcy from which it has appellate jurisdiction in other cases; and it exercises a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

An appeal may be taken to the supreme court from the final decision of the circuit court of appeals allowing or rejecting a claim, under such rules as may be prescribed by the supreme court in the following cases: 1. Where the amount in controversy exceeds $2,000 and the question involved is one which might have been taken on appeal or writ of error from the highest court of the state to the supreme court; 2. Where some justice of the supreme court shall certify that in his opinion the determination of the question involved is essential to the uniform construction of the bankruptcy laws.

Controversies may be certified to the supreme court from other United States courts and the supreme court may exercise jurisdiction thereof, and may issue writs of certiorari pursuant to the laws now in force.

In the computation of time the first day is excluded and the last included.

The act provides for the appointment for two years of a reasonable number of referees, to whom all matters may be referred. Referees in bankruptcy exercise much of the judicial authority of the court; Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405.

The creditors appoint one or three trustees at their first meeting, failing which, the court shall do so.

A trustee holds the bankrupt's property subject to all the equities against it; Security Warehousing Co. v. Hand, 206 U. S. 423, 27 Sup. Ct. 720, 51 L. Ed. 1117, 11 Ann. Cas. 789; he gets no better title than the bankrupt had; Hewit v. Mach. Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986. Section 70 gives the trustee title to all property which, prior to the bankruptcy, could have been transferred or levied upon or sold under judicial proceedings against the bankrupt. The filing of a petition places all the bankrupt property in the custody of the court, Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; but it has no jurisdiction against persons to whom the bankrupt made a sale or conveyance before the proceedings in bankruptcy, where it appears that the vendee acted in good faith; Wall v. Cox, 181 U. S. 244, 21 Sup. Ct. 642, 45 L. Ed. 845; but where the bankrupt made a general assignment for the benefit of creditors, and the assignee sold the property after a petition in bankruptcy was filed, it was held that the purchaser had no title superior to that of the trustee, although he bought the property in good faith; Bryan v. Bernheimer, 181 U. S. 188, 21 Sup Ct. 557, 45 L. Ed. 814. A contingent remainder does not pass in bankruptcy; In re Hoadley, 101 Fed. 233. A bankrupt trustee takes only the surrender value of the insurance policies on the bankrupt's life, or if the company has loaned on it, only the excess of surrender value. The bankrupt is entitled to the policy by paying for it the cash surrender value or the excess over loans made on it at the date of filing the petition; and if the policy ma-

tures before the adjudication he or his legal representative is entitled to the proceeds of the policy over and above such amount; and this even though the bankrupt committed suicide prior to adjudication; Everett v. Judson, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. —; Andrews v. Partridge, 228 U. S. 479, 33 Sup. Ct. 570, 57 L. Ed. —.

The first meeting of creditors shall be held not less than ten nor more than thirty days after the adjudication. Subsequent meetings may be held when all creditors whose claims are allowed sign a written consent thereto. The court shall call a meeting whenever one-fourth of those who have proved their claims apply in writing. A final meeting shall be held when the estate is ready to be closed.

Adjudication in bankruptcy terminates the relation of landlord and tenant, and a claim for rent accruing after such adjudication will not be allowed, though the tenant executed promissory notes therefor; In re Hays, Foster & Ward Co., 117 Fed. 879. A sworn proof of claim against a bankrupt is *prima facie* evidence of its allegations; Whitney v. Dresser, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584; and a creditor who knowingly received a preference and gave it up only when compelled by the trustee cannot thereafter prove his claim: In re Owings, 109 Fed. 623 An attorney is not entitled to a preferential claim out of the estate for professional services in preparing a general assignment for the bankrupt within the four months' period, Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165; nor for services in resisting an adjudication in voluntary bankruptcy; *id.;* but he may prove as an unsecured claim his services in the preparation of a deed of trust; *id.* Three or more creditors whose provable claims aggregate, above any securities, $500, or if all the creditors are less than twelve in number, then one whose claim exceeds such amount may petition in involuntary bankruptcy.

BANKRUPTCY. The state or condition of a bankrupt. See INSOLVENCY.

BANLEUCA. A certain space surrounding towns or cities, distinguished by peculiar privileges. Spelman, Gloss. It is the same as the French *banlieue.*

BANLIEU. In Canadian Law. See BANLEUCA.

BANNER. A small flag bearing a device or symbol and intended to be carried or waved. L. R. 2 P. C. 387. A canvas, particolored or bearing party words and stretched across a street is a banner; 4 O'M. & H. 179.

BANNERET. A degree of honor next after a baron's, when conferred by the king; otherwise, it ranks after a baronet. 1 Bla. Com. 403.

BANNITUS. One outlawed or banished. Calvinus, Lex.

BANNS OF MATRIMONY. Public notice or proclamation of a matrimonial contract, and the intended celebration of the marriage of the parties in pursuance of such contract, to the end that persons objecting to the same may have an opportunity to declare such objections before the marriage is solemnized. Cowell; 1 Bla. Com. 439; Pothier, *Du Mariage* p. 2, c. 2.

BANNUM. A ban.

BAR. To Actions. A perpetual destruction of the action of the plaintiff.

It is the *exceptio peremptoria* of the ancient authors Co. Litt. 303 *b;* Steph. Pl. App. xxviii. It is always a perpetual destruction of the *particular action* to which it is a *bar, Doctrina Plac* xxiii. § 1, p. 129, and it is set up only by a plea to the action, or in chief. But it does not always operate as a permanent obstacle to the plaintiff's right of action He may have good cause for an action, though not for the action which he has brought; so that, although that particular action, or any one like it in nature and based on the same allegations, is forever barred by a well-pleaded bar, and a decision thereon in the defendant's favor, yet where the plaintiff's difficulty really is that he has misconceived his action, and advantage thereof be taken under the general issue (which is in bar), he may still bring his proper action for the same cause, Gould, Pl. c. v. § 137, 6 Coke 7, 8. Nor is final judgment on a demurrer, in such a case, a bar to the proper action, subsequently brought; Gould, Pl c. ix § 46. And where a plaintiff in one action fails on demurrer, from the omission of an essential allegation in his declaration, which allegation is supplied in the second suit, the judgment in the first is no bar to the second; for the merits shown in the second declaration were not decided in the first, Gould, Pl c. ix. § 45, c. v. § 158.

Another instance of what is called a temporary bar is a plea (by executor, etc) of *plene administravit,* which is a bar until it appears that more goods have come into his hands, and then it ceases to be a bar to that suit, if true before its final determination, or to a new suit of the same nature: *Doctrina Plac.* c. xxiii. § 1, p 130, 4 East 508

Where a person is bound in any action, real or personal, by judgment on demurrer, confession, or verdict, he is barred, that is, debarred, as to that or any other action of the like nature or degree, from the same thing forever. But the *effect* of such a bar is different in personal and real actions.

In personal actions, as in debt or account, trover, replevin, and for torts generally (and *all* personal actions), a recovery by the plaintiff is a perpetual bar to another action for the same matter. He has had one recovery; *Doctr. Plac.* c. lxviii. § 1, p. 412. So where a defendant has judgment against the plaintiff, it is a perpetual bar to another action of *like nature* for the same cause (*like nature* being here used to save the cases of misconceived action or an omitted averment, where, as above stated, the bar is *not* perpetual). And inasmuch as, in personal actions, all are of the *same degree,* a plaintiff against whom judgment has passed cannot, for the subject thereof, have an action of a *higher nature;* therefore he gener-

ally has in such actions no remedy (no manner of avoiding the bar of such a judgment) except by taking the proper steps to *reverse* the very judgment itself (by writ of error, or by appeal, as the case may be), and thus taking away the bar by taking away the judgment; 6 Coke 7, 8. (For occasional exceptions to this rule, see authorities above cited.)

In real actions, if the plaintiff be barred as above by judgment on a verdict, demurrer, confession, etc., he may still have an action of a higher nature, and try the same right again; Lawes, Plead. 39; Stearns, Real Act. See, generally, Bacon, Abr. *Abatement*, n.; *Plea in bar;* 3 East 346.

A particular part of the court-room.

As thus applied, and secondarily in various ways, it takes its name from the actual bar, or enclosing rail, which originally divided the bench from the rest of the court-room, as well as from that bar, or rail, which then divided, and now usually divides, the space including the bench and the place which lawyers occupy in attending on and conducting trials, from the body of the court-room.

Those who are authorized to appear before the court and conduct the trial of causes.

Those who, as advocates or counsellors, appeared as *speakers* in court, were said to be "called to the bar," that is, called to appear in presence of the court, as *barristers*, or persons who stay or attend at the bar of court Richardson, Dict *Barrister* By a natural transition, a secondary use of the word was applied to *the persons* who were so called, and the advocates were, as a class, called "the bar " And in this country, since attorneys, as well as counsellors, appear in court to conduct causes, the members of the legal profession, generally, are called the bar, and in this sense are employed the terms "members of the bar" and "admission to the bar "

The court, in its strictest sense, sitting in *full term.*

Thus, a civil case of great consequence was not left to be tried at *nisi prius*, but was tried at the "bar of the court itself," at Westminster; 3 Bla Com. 352. So a criminal trial for a capital offence was had "at bar," 4 *id* 351, it is still used in a criminal trial before three judges in the King's Bench Division. It is also used in this sense, with a shade of difference (as not distinguishing *nisi prius* from full term, but as applied to *any* term of the court), when a person indicted for crime is called "the prisoner at the bar," or is said to stand at the bar to plead to the indictment. See Merlin, *Répert. Barreau;* 1 Dupin, *Prof. d'Av.* 451.

An obstacle or opposition. Thus, relationship within the prohibited degrees, or the fact that a person is already married, is a *bar* to marriage.

BAR ASSOCIATIONS. Associations of members of the bar have been organized in most of the states. The first of them was in Mississippi in 1825, but it is not known to have had a continued existence. One was formed in Boston for the state of Massachusetts in 1849, but it does not appear to have had any real life. An association of Grafton and Coos counties in New Hampshire had an existence before 1800, and probably a more or less continuous life since then, having finally merged into a state association. A state association was formed in Iowa in 1875, and existed for not more than five years. All printed reports relating to these associations are in the collection of the Harvard Law School. Similar associations exist in many of the counties in various states, especially in Pennsylvania, where they are chiefly Library Associations. The oldest association of the kind, certainly the oldest that has had a continuous life, is the Law Association of Philadelphia, organized in 1802. The American Bar Association was organized at Saratoga, in August, 1878, and has held annual meetings ever since. The National Bar Association, based upon representation from state and local associations, was organized in May, 1888, and held its last meeting in December, 1891.

BAR FEE. A fee taken by the sheriff, time out of mind, for every prisoner who is acquitted. Bacon, Abr. *Extortion.* Abolished by stats. 14 Geo. III. c. 26; 55 Geo. III. c. 50; 8 & 9 Vict. c. 114.

BAR ROOM. See SALOON.

BARBER. Barbers were incorporated with the surgeons of London, but not to practice surgery, except the drawing of teeth; 32 Hen. VIII. c. 42.

The business of a barber involves the public health and interest to such an extent that the requirement of a license is a valid exercise of legislative power; State v. Zeno, 79 Minn. 80, 81 N. W. 748, 48 L. R A. 88, 79 Am. St. Rep. 422. Within the meaning of a civil rights act a barber shop is not a place of public accommodation; Faulkner v. Solazzi, 79 Conn. 541, 65 Atl. 947, 9 L. R. A. (N. S.) 601, 9 Ann. Cas. 67.

Shaving on Sunday is not a work of necessity, charity or mercy; 4 Cl. & F. 234. A barber's work is a worldly labor in the course of the ordinary calling; State v. Frederick, 45 Ark. 347, 55 Am. Rep. 555. In Com. v. Waldman, 140 Pa. 89, 21 Atl. 248, 11 L. R. A. 563, the court refused to say as a matter of law that the keeping open his place of business on Sunday by a barber was a matter of necessity. Shaving an aged or infirm person in his own home on Sunday is not, as a matter of law, a work of necessity: Stone v. Graves, 145 Mass. 353, 13 N. E. 906. A statute declaring that keeping open a barber shop is not deemed a work of necessity or charity does not exceed constitutional bounds, though as to other kinds of labor, that question is left to be determined as one of fact: State v. Petit, 74 Minn. 376, 77 N. W. 225; affirmed in Petit v. Minnesota, 177 U. S. 164, 20 Sup. Ct. 666, 44 L. Ed. 716.

Where a state constitution forbids the passage of special or local laws for the punishment of crimes, a law making it a misdemeanor for a barber to work on Sunday after 12 noon was held unconstitutional; Ex parte Jentzsch, 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664; and see Eden v. People, 161 Ill.

296, 43 N. E. 1108, 32 L. R. A. 659, 52 Am. St. Rep. 365; State v. Granneman, 132 Mo. 326, 33 S. W. 784; Armstrong v. State, 170 Ind. 188, 84 N. E. 3, 15 L. R. A. (N. S.) 646; so where a law prohibited barbers from opening their bath rooms on Sunday, but did not prohibit other persons from doing so; Raglo v. State, 86 Tenn. 272, 6 S. W. 401; but see *contra*, State v. Bergfeldt, 41 Wash. 234, 83 Pac. 177, 6 Ann. Cas. 979; People v. Havnor, 149 N. Y. 195, 43 N. E. 541, 31 L. R. A. 689, 52 Am. St. Rep. 707, the latter case by a divided court, three of seven judges dissenting on the ground that the act (making it a misdemeanor for a barber to work on Sunday, except in the cities of New York and Saratoga Springs, and there only until one o'clock) was vicious class legislation; and that the result necessarily leads to the conclusion that the legislature, by permitting barber shops to remain open for a portion of Sunday in two cities necessarily proceeded upon the theory that the business is a work of necessity. Where a general law prohibits all labor on Sunday, an act prohibiting barbers from working on that day is not class legislation; Breyer v. State, 102 Tenn. 103, 50 S. W. 769.

BARE. Naked; absence of a covering; unaccompanied. A bare trustee is one whose trust is to convey, and the time has arrived for a conveyance by him; or a trustee to whose office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them or by their direction. 1 Ch. Div. 281.

BAREBONES PARLIAMENT. A parliament summoned by Cromwell in 1653.

BARGAIN. It signifies a contract or agreement between two parties, the one to sell goods or lands, and the other to buy them Hunt v. Adams, 5 Mass. 358, 4 Am. Dec. 68.

BARGAIN AND SALE. A contract or bargain by the owner of land, in consideration of money or its equivalent paid, to sell land to another person, called the bargainee, whereupon a use arises in favor of the latter, to whom the seisin is transferred by force of the statute of uses. 2 Washb. R. P. 128; Bisp. Eq. 419.

Upon principles of equity, any agreement, supported by a valuable consideration, to the effect that an estate or interest in land should be conveyed, as it might be specially enforced in the court of chancery, was held to entitle the purchaser to the use or beneficial ownership according to the terms and intent of the agreement, without any legal conveyance; and accordingly the vendor was held to be or stand seised to the use of the purchaser. Such transaction, as creating a use executed by the statute, became technically known as a *bargain and sale*. As a bargain and sale thus would have been effectual to convey a legal estate under the statute by mere force of the agreement without any writing or formality, it was thought expedient to add some formal conditions to the operation of the statute upon it; and it was enacted by a statute of the same session of parliament, 27 Hen. VIII. c. 16, to the effect that no estate of *freehold* shall pass by reason only of a bargain and sale, unless made by *writing indented, sealed*, and *enrolled* in manner and place therein provided. This statute applied only to estates of freehold, and a use for a term of years might still be created within the statute of uses by mere bargain and sale without deed or enrolment. Leake, Land Laws 108.

This is a very common form of conveyance in the United States In consequence of the consideration paid, and the bargain made by the vendor, of which the conveyance was evidence, a use was raised at once in the bargainee. To this use the statute of uses transferred and annexed the seisin, whereby a complete estate became vested in the bargainee; 2 Washb. R P. 128.

All things, for the most part, that may be granted by any deed may be granted by bargain and sale, and an estate may be created in fee, for life, or for years; 2 Coke 54; Dy. 309.

There must have been a valuable consideration; Springs v. Hanks, 27 N C. 30; Wood v. Beach, 7 Vt. 522; Hanrick v. Thompson, 9 Ala 410; Cheney's Lessee v. Watkins, 1 Harr. & J (Md) 527, 2 Am. Dec. 530; Okison v. Patterson, 1 W. & S. (Pa.) 395; Jackson v. Sebring, 16 Johns. (N. Y.) 515, 8 Am. Dec. 357; Cro. Car. 529; Tiedem. R. P. § 776; but its adequacy is immaterial; thus a rent of one peppercorn was held sufficient; 2 Mod. 249; see Leake, Land Laws 109; the consideration need not be expressed; Jackson v. Fish, 10 Johns. (N. Y.) 456. See Washb. R. P., Hayes v. Kershow, 1 Sandf. Ch. (N. Y.) 259; Jackson v. Leek, 19 Wend. (N. Y.) 339; Wood v. Beach, 7 Vt. 522; Eckman v. Eckman, 68 Pa. 460; Trafton v. Hawes, 102 Mass. 533, 3 Am. Rep. 494; Perry v. Price, 1 Mo. 553; Jackson v. Dillon's Lessee, 2 Over. (Tenn.) 261.

The proper and technical words to denote a bargain and sale are *bargain and sell;* Mitch. R. P. 425; but any other words that are sufficient to raise a use upon a valuable consideration are sufficient; 2 Wood, Conv. 15; as, for example, *make over and grant;* Jackson v. Alexander, 3 Johns. (N. Y.) 484, 3 Am. Dec. 517; *release and assign;* Lynch v. Livingston, 8 Barb. (N. Y.) 463. See 2 Washb. R. P. 620; Shepp. Touchst. 222.

An estate *in futuro* may be conveyed by deed of bargain and sale; Rogers v. Eagle Fire Co., 9 Wend. (N. Y.) 611; 4 H. & N. 277; Drown v. Smith, 52 Me. 141; Trafton

v. Hawes, 102 Mass. 533, 3 Am. Rep. 494; Fisher v. Strickler, 10 Pa. 348, 51 Am. Dec. 488; Mellichamp v. Mellichamp, 28 S. C. 125, 5 S. E. 333; *contra*, Sowle v. Sowle, 10 Pick. (Mass.) 376; Marden v. Chase, 32 Me. 329; 2 Washb. R. P. *417; but not at common law; note to Doe v. Tranmar, 2 Sm. Lead. Cas. 473, where the cases are discussed.

Consult Gilbert on Uses, Sugden's edition; Tiedem. R. P.

BARGAINEE. The grantee of an estate in a deed of bargain and sale. The person to whom property is tendered in a bargain.

BARGAINOR. The person who makes a bargain; he who is to deliver the property and receive the consideration.

BARGE. Lighters or a flat bottom boat for loading or unloading ships; or a boat used for pleasure. See The Mamie, 5 Fed. 813.

BARMOTE. See BERGMOTH.

BARO. A man, whether slave or free.

Si quis homicidium perpetravent in barone libro seu servo, if any one shall have perpetrated a murder upon any man, slave or free. A freeman or freedman; a strong man; a hired soldier; a vassal; a feudal client.

Those who held of the king immediately were called barons of the king

A man of dignity and rank; a knight.

A magnate in the church.

A judge in the exchequer (*baro scaccarii*).

The first-born child.

A husband.

The word is said by Spelman to have been used more frequently in its latter sense; Spelman, Gloss.

It is quite easy to trace the history of *baro*, from meaning simply man, to its various derived significations. Denoting a man, one who possessed the manly qualities of courage and strength would be desirable as a soldier, or might misuse them as a robber. One who possessed them in an eminent degree would be *the* man, and hence *baro*, in its sense of a title of dignity or honor, particularly applicable in a warlike age to the best soldier. See, generally, Bacon, Abr.; Comyns, Dig; Spelman, Gloss. *Baro*.

BARON. A general title of nobility. 1 Bla. Com. 398; a particular title of nobility, next to that of viscount. The lowest title in Great Britain. Originally barons comprehended all the nobility, being the feudatories of provinces. At present barons may be by *prescription*, because they and their ancestors have immemorially sat in the House of Lords; by *patent;* or by *tenure*, holding the title as annexed to land.

A judge of the exchequer. 1 Bla. Com. 44.

A husband. See BARON ET FEME.

A freeman.

It has essentially the same meanings as *Baro*, which see.

BARON ET FEME. Man and woman; husband and wife.

It is doubtful if the words had originally in this phrase more meaning than man and woman. The vulgar use of *man* and *woman* for husband and wife suggests the change of meaning which might naturally occur from man and woman to husband and wife. Spelman, Gloss; 1 Bla. Com. 442

BARONAGE. A term used to designate the entire nobility of England of all ranks.

BARONES SCACCARII. See BARONS OF THE EXCHEQUER.

BARONET. A British title of hereditary rank next below that of a baron; it is the only title of hereditary knighthood. It is given by patent, not by investiture. The order was founded in 1611. They rank above all knights except those of the Garter. The order of Baronets of Ireland was founded in 1619 with the same privileges. The order of Baronets of Scotland was founded in 1625; after the Union (1707) they became Baronets of the United Kingdom. None have been created since. The usual abbreviation after the name is Bart. Cent. Dict.

BARONS OF THE CINQUE PORTS. See CINQUE PORTS.

BARONS OF THE EXCHEQUER. The judges of the exchequer. See EXCHEQUER.

BARONY. The dignity of a baron; a species of tenure; the territory or lands held by a baron. Spelman, Gloss. It is possible that this tenure was distinct from that of knight service. 2 Holdsw. Hist. Eng. L. 159.

In Scotland a large freehold estate even though the proprietor is not a baron.

BARRATOR. One who commits barratry.

BARRATRY (Fr. *barat*, *barraterie*, robbery, deceit, fraud). Sometimes written Barretry. The offence of frequently exciting and stirring up quarrels and suits, either at law or otherwise. 4 Bla. Com. 134; Co. Litt. 368. See 1 Cowp. 154, by Lord Mansfield.

An indictment for this offence must charge the offender with being a common barrator; 1 Sid. 282; Train & H. Prec. 55; and the proof must show at least three instances of offending; Com. v. McCulloch, 15 Mass. 227; State v. Simpson, 1 Bail. (S. C.) 379, Com. v. Mohn, 52 Pa. 243, 91 Am. Dec. 153; Lucas v. Pico, 55 Cal. 126; Voorhees v. Dorr, 51 Barb. (N. Y.) 580.

An attorney is not liable to indictment for maintaining another in a groundless action; State v. Simpson, 1 Bail. (S. C.) 379. See 2 Bish. Cr. Law § 63; 2 *id.* § 57; Lambert v. People, 9 Cow. (N. Y.) 587; Com. v. McCulloch, 15 Mass. 229; State v. Simpson, 1 Bail. (S. C.) 379; 2 Saund. 308 and note.

The purchase of a single claim, with the intention of suing upon it, does not amount to barratry; to constitute the offence there must be a practice of fomenting suits; Chase's Bla. Com. 905, n. 7; Voorhees v. Dorr, 51 Barb. (N. Y.) 580.

In Maritime Law and Insurance. An unlawful or fraudulent act, or very gross and culpable negligence, of the master or mariners of a vessel in violation of their duty as such, and directly prejudicial to the owner, and without his consent; Roccus, n. t.; Abbott, Ship. 167, n.; 2 Ld. Raym. 349; Kendrick v. Delafield, 2 Caines (N. Y.) 67; Suckley v. Delafield, *id.* 222; McIntire v. Bowne, 1 Johns. (N. Y.) 229; Grim v. Ins. Co., 13 *id.* 451; Brown v. U. S., 8 Cra. (U. S.) 139, 3 L. Ed. 504; Greene v. Ins. Co., 9 Allen (Mass.) 217; Brown v. Ins. Co., 5 Day (Conn.) 1, 5 Am. Dec. 123; Hughes v. Ins. Co., 3 Wheat. (U. S.) 163, 4 L. Ed. 357; Crousillat v. Ball, 4 Dall. (Pa.) 294, 1 L. Ed. 840, 2 Am. Dec. 375; 5 B. & Ald. 597; Lawton v. Ins. Co., 2 Cush. (Mass.) 511; Patapsco Ins. Co. v. Coulter, 3 Pet. (U. S.) 230, 7 L. Ed. 659. It is said that the term implies an intentional injury; it does not embrace cases of negligence; Atkinson v. Ins. Co., 4 Daly (N. Y.) 1. A part owner of a ship who is its master may be guilty of barratry towards his co-owners; Hutchins v. Ford, 82 Me. 363, 19 Atl. 832; Voisin v. Ins. Co., 62 Hun 4, 16 N. Y. Supp. 410. It extends, in addition to grosser cases of barratry, to the following:—sailing out of a port without paying port dues, whereby the cargo is forfeited; 6 Term 379; disregarding an embargo; 1 Term 127; or a blockade; 6 Taunt. 375; and when a master was directed to make purchases, and went into an enemy's settlement to trade (though it could be done there to better advantage), whereby the ship was seized, it was held barratry, L. R. 1 Q. B. 162; even though he thought thereby to benefit the owner. When a master is entitled to use his discretion, his conduct will not constitute barratry, unless he goes against his better judgment; 1 Stark. 240. See L. R. 3 C. P. 476. The grossest barratries, as piratically or feloniously seizing or running away with the vessel or cargo, or voluntarily delivering the vessel into the hands of pirates, or mutiny, are capital offences by the laws of the United States; Act of Congress, April 30, 1790, 1; Story's Laws U. S. 84. Barratry is one of the risks usually insured against in marine insurance; 3 Kent, Lacy's ed. 305, n. 50. See INSURABLE INTEREST.

BARREL. A measure of capacity, equal to thirty-six gallons.

BARREN MONEY. A debt which bears no interest.

BARRENNESS. The incapacity to produce a child.

This, when arising from impotence which existed at the time the relation was entered into, is a cause for dissolving a marriage; 1 Foderé, Méd. Leg. § 254; where a woman, by an operation, had been rendered incapable of bearing children, known to the husband before marrying, it was not ground of divorce; Jorden v. Jorden, 93 Ill. App. 633.

BARRISTER. In English Law. A counsellor admitted to plead at the bar. It did not become a usual name until the 16th century. As a popular name it meant an utter barrister; 21 L. Q. R. 253.

Inner barrister. A serjeant or king's counsel who pleads within the bar.

Outer or *Utter barrister.* One who pleads without the bar. Because they sat "uttermost on the forms of the benchers which they call the bar." 29 L. Q. R. 25. They are distinguished from benchers, or those who have been readers, and are allowed to plead within the bar, as are the king's counsel. See UTTER BARRISTER.

Vacation barrister. A counsellor newly called to the bar, who is to attend for several long vacations the exercises of the house.

In the old books, barristers are called *apprentices, apprentitii ad legem*, or *ad barras* (from which the term barrister was derived), being looked upon as learners, and not qualified until they obtain the degree of serjeant. Edmund Plowden, the author of the Commentaries, a volume of reports in the reigns of Edward VI., Mary, Philip and Mary, and Elizabeth, describes himself as an apprentice of the common law. See generally, Weeks on Attys. § 29.

Barristers are now either "utter barristers," now more frequently called "junior barristers," or king's counsel. The former is a person who was formerly a student at an Inn of Court and who has been "called to the bar" by the benchers of his Inn and at his Inn. A recent writer insists that the judges, by statute, alone have the right to call to the bar, i. e. alone can give the "right of audience"; the judges have constituted the benchers of the Inns of Court their deputies for that purpose; W. C. Bolland, 24 L. Q. R. 397; 23 *id.* 438. The Inns of Court only call to the bar of their societies and not to the bar itself; 29 L. Q. R. 23. See DISBAR.

A king's counsel is a barrister whom the judges have "called within the bar" at the Royal Courts of Justice; Odger, C. L. 1425.

See INNS OF COURT; SERJEANTS-AT-LAW.

Barristers have an exclusive right of audience as advocates in the House of Lords, Privy Council, Supreme Court of Judicature, Central Criminal Court and Assizes; also in Courts of County and Borough Quarter Sessions whenever a sufficient number regularly attend the court. They have no exclusive right in County Courts, Sheriffs' Courts, Coroners' Courts, Ecclesiastical Courts and Courts of Petty Sessions; Odger C. L. 1427. They are obliged to accept any brief (accompanied by a suitable fee) except under special circumstances.

BARTER. A contract by which parties exchange goods for goods.

It differs from a sale in that a barter is always of goods for goods; a sale is of goods for money, or for money and goods. In a sale there is a fixed price; in a barter there is not. See Benj. Sales 1; Speigle v. Meredith, 4 Biss. 120, Fed. Cas. No. 13,227; Com. v. Davis, 12 Bush (Ky.) 241; Cooper v. State, 37 Ark. 418.

There must be delivery of goods to complete the contract.

If an insurance be made upon returns from a country where trade is carried on by barter, the valuation of the goods in return shall be made on the cost of those given in barter, adding all charges; Weskett, Ins. 42. See 3 B. & Ald. 616; 3 Campb. 351; Cowp. 118; 1 Dougl. 24, n.; 4 B. & P. 151; Troplong, *De l'Echange*.

BARTON. In Old English Law. The demesne land of a manor; a farm distinct from the mansion.

Sometimes it is used for the manor house itself; and in some places for out houses and fold yards. In the statute 2 & 3 Edw. 6, c. 12, Barton lands and demesne lands are used as synonymous. Cowell.

BAS CHEVALIERS. Knights by tenure of a base military fee, as distinguished from bannerets, who were the chief or superior knights. Kennett, Paroch. Ant.; Blount.

BASE BALL. It is a game of skill within the criminal offense of betting on such a game; Mace v. State, 58 Ark. 79, 22 S. W. 1108. Prohibition of base ball playing on Sunday does not violate the right of conscience in matters of religion secured to the individual by the Ohio Bill of Rights; State v. Powell, 58 Ohio St. 324, 50 N. E. 900, 41 L. R. A. 854; nor does imposing a larger penalty on persons who play base ball on Sunday in violation of a statute than upon those who are engaged in hunting, fishing, rioting or quarrelling, and in acts of common labor, violate the constitutional right of citizens to equal privileges and immunities; State v. Hogreiver, 152 Ind. 652, 53 N. E. 921, 45 L. R. A. 504.

Under a contract of hiring for a definite time, which is silent as to the degree of skill to be possessed, the ordinary skill, knowledge and efficiency of base ball players is all that is required; Baltimore Baseball Club & Exhibition Co. v. Pickett, 78 Md. 375, 28 Atl. 279, 22 L. R. A. 690, 44 Am. St. Rep. 304.

See SPECIFIC PERFORMANCE OF NEGATIVE COVENANTS; INJUNCTION.

BASE COIN. Debased coin. Cohens v. Virginia, 6 Wheat. (U. S.) 333, 5 L. Ed. 257.

BASE COURT. An inferior court, that is, not of record, as the court baron. Cunningham.

BASE FEE. A fee which has a qualification annexed to it, and which must be determined whenever the annexed qualification requires.

A grant to A and his heirs, tenants of Dale, continues *only* while they are such tenants, 2 Bla Com. 109. See Wiggins Ferry Co. v. R. Co., 91 Ill 93.

The proprietor of such a fee has all the rights of the owner of a fee-simple until his estate is determined. Plowd. 557; 1 Washb. R. P. 62; 1 Prest. Est. 431; Co. Litt. 1 *b*.

BASE SERVICES. Such services as were unworthy to be performed by the nobler men, and were performed by the peasants and those of servile rank. 2 Bla. Com. 62; 1 Washb. R. P. 25.

BASEMENT. A floor partly beneath the surface of the ground but distinguished from a cellar by being well lighted and fitted for living purposes. In England the ground floor of a city house.

BASILICA. An abridgment of the Corpus Juris Civilis of Justinian, translated into Greek and first published in the ninth century.

The emperor Basilius, finding the Corpus Juris Civilis of Justinian too long and obscure, resolved to abridge it, and under his auspices the work was commenced A D 867, and proceeded to the fortieth book, which at his death remained unfinished. His son and successor, Leo Philosophus, continued the work, and published it, in sixty books, about the year 880 Constantine Porphyro-genitus, younger brother of Leo, revised the work, rearranged it, and republished it, A D 947. From that time the laws of Justinian ceased to have any force in the eastern empire, and the Basilica were the foundation of the law observed there till Constantine XIII., the last of the Greek emperors, under whom, in 1453, Constantinople was taken by Mahomet the Turk, who put an end to the empire and its laws. Histoire de la Jurisprudence, Etienne, Intr. à l'Etude du Droit Romain, § 53 The Basilica were translated into Latin by J. Cujas (Cujacius), Professor of Law in the University of Bourges, and published at Lyons, 22d of January, 1566, in one folio volume

BASOCHE (Fr). An association of the "Clercs du Parlement" of Paris, supposed to have been instituted in 1302. It judged all civil and criminal matters that arose among the clerks and all actions brought against them. Hist. for Ready Reference.

BASSA TENURA. See BASE FEE.

BASTARD (*bas* or *bast*, abject, low, base, *acrd*, nature).

One born of an illicit connection, and before the lawful marriage of its parents.

One begotten and born out of lawful wedlock. 2 Kent 208.

One born of an illicit union. La. Civ. Code, arts. 29, 199.

The second definition, which is substantially the same as Blackstone's, is open to the objection that it does not include with sufficient certainty those cases where children are born during wedlock but are not the children of the mother's husband.

The term is said to include those born of parties under disability to contract marriage, as slaves. Timmins v. Lacy, 30 Tex. 115.

A child is a bastard if born before the marriage of his parents, but he is not a bastard if born after marriage, although begotten before; 1 Bla. Com. 455, 456; 8 East 210; State v. Herman, 35 N. C. 502. By the civil law and by the statute law of many of the states, a subsequent marriage of the parents legitimates children born prior thereto. The rule prevails substantially in Arkansas, Alabama, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, Ohio, Pennsylvania, Texas, Vermont,

and Virginia, with somewhat varying provisions in the different states; 2 Kent 210; but under the common law this is not so; Brock v. State, 85 Ind. 397; Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321. See HEIR.

A child is a bastard if born during coverture under such circumstances as to make it impossible that the husband of his mother can be his father; Nich. Adult. Bast 249; Hall v. Com., Hard. (Ky.) 479; Patterson v. Gaines, 6 How. (U. S.) 550, 12 L. Ed. 553; 2 M. & K. 349; State v. Britt, 78 N. C. 439; Herring v. Goodson, 43 Miss. 392; Bussom v. Forsyth, 32 N. J. Eq. 277; Kleinert v. Ehlers, 38 Pa. 439; Caujolle v. Ferrié, 23 N. Y. 90; but in England the presumption of legitimacy holds if the husband had any opportunity of sexual access during the natural period of gestation, and the question for the jury is not—was the husband the father, but could he have been; 1 Broom & H. Com. 562; and such is the rule in the United States; Van Aernam v. Van Aernam, 1 Barb. Ch. (N. Y.) 375; Dennison v. Page, 29 Pa. 420, 72 Am. Dec. 644; Watts v. Owen, 62 Wis. 512, 22 N. W. 720; Chase's Bla. Com. 172, n. 13. If there were opportunities for intercourse, evidence is generally not allowed to establish illegitimacy; 2 Gr. Ev. §§ 150, 151 and n.; Inhabitants of Abington v. Inhabitants of Duxbury, 105 Mass. 287. See 9 Beav. 552; 1 Whart. Ev. § 608; 2 *id.* 1298; 1 Bish. Mar. & Div. §§ 1170, 1179. It is, however, held that a strong moral impossibility, or such improbability as to be beyond a reasonable doubt is sufficient; Stegall v. Stegall, 2 Brock. 256, Fed. Cas. No. 13,351; Cross v. Cross, 3 Paige Ch. (N. Y.) 139, 23 Am. Dec. 778; Wright v. Hicks, 15 Ga. 160, 60 Am. Dec. 687; State v. Herman, 35 N. C. 502. The presumption of legitimacy of a child born in wedlock is so strong that it cannot be overcome by proof of the adultery of the wife while cohabiting with her husband, much less by the mere admission of the adulterer; Grant v. Mitchell, 83 Me. 23, 21 Atl. 178; [1903] P. 141; 1 Moo. & Rob. 269, where Alderson, B., said: "The law will not under such circumstances, allow a balance of evidence, as to who is most likely to have been the father."

As to who may be admitted to prove non-access, see 3 E. L. & Eq. 100; Bowles v. Bingham, 2 Munf. (Va.) 442, 5 Am. Dec. 497; People v. Overseers of Poor, 15 Barb. (N. Y.) 286; Parker v. Way, 15 N. H. 45; Dennison v. Page, 29 Pa. 420, 72 Am. Dec. 644; 1 Bla. Com. 458; Gardner Peerage Case, Le Marchant's report; 5 C. & F. 163; Dejol v. Johnson, 12 La. Ann. 853. Neither husband nor wife are competent for this purpose; Mink v. State, 60 Wis. 583, 19 N. W. 445, 50 Am. Rep. 386; Tioga County v. South Creep Tp., 75 Pa. 436; Corson v. Corson, 44 N. H. 587; 1 Q. B. 444; 5 Ad. & E. 180; but see State v. McDowell, 101 N. C. 734, 7 S. E. 785, and see ACCESS.

The child may be exhibited to the jury to show resemblance to the putative father; Gaunt v. State, 50 N. J. L. 490, 14 Atl. 600; Finnegan v. Dugan, 14 Allen (Mass.) 197; Warlick v. White, 76 N. C. 175; 15 Yale L. J. 96; *contra*, Clark v. Bradstreet, 80 Me. 454, 15 Atl. 56, 6 Am. St. Rep. 221. See 14 Harv. L. Rev. 545.

A child is a bastard if born beyond a competent time after the coverture has determined; Co. Litt. 123 *b*; Hargrave & B. note; 2 Kent 210. See GESTATION.

The principal right which a bastard child has is that of maintenance from his parents; 1 Bla. Com. 458; La. Civ. Code § 254; (though not from his father at common law; Schoul. Dom. Rel. *384); which may be secured by the public officers who would be charged with the support of the child, by a peculiar process, or in some cases by the mother; 2 Kent 215. A bastard has no inheritable blood at common law; but he may take by devise if described by the name he has gained by reputation; 1 Ves. & B. 423; Stover v. Boswell's Heir, 3 Dana (Ky.) 233; Cooley v. Dewey, 4 Pick. (Mass.) 93, 16 Am. Dec. 326; Barwick v. Miller, 4 Des Eq. (S. C.) 434. In many of the states, by statute, bastards can inherit from and transmit to their mothers real and personal estate under some modifications; 2 Kent 213; Schoul. Dom. Rel. *381; Pettus v. Dawson, 82 Tex. 18, 17 S. W. 714; see Stoltz v. Doering, 112 Ill. 234; Cox v. Rash, 82 Ind. 519; and in Utah it can inherit from its father; Cope v. Cope, 137 U. S. 682, 11 Sup. Ct. 222, 34 L. Ed. 832. Whether a person claiming an inheritance in real estate is the lawful child of the last owner is to be determined by the *lex rei sitæ;* Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321.

Nearly all of the states have statutory provisions relative to bastardy proceedings and as to the liability of the father criminally as well as to the care of the child.

In bastardy proceedings, evidence of improper relations of the prosecutrix with other men than the defendant, but not during the period of gestation, is incompetent; Olson v. Peterson, 33 Neb. 358, 50 N. W. 155.

Bastardy complaints are civil actions; 85 Me. 285; they abate on the death of the respondent before trial and during the pendency of the proceedings; McKenzie v. Lombard, 85 Me. 224, 27 Atl. 110. See HEIR.

BASTARD EIGNÉ. Bastard elder.

By the old English law, when a man had a bastard son, and he afterwards married the mother, and by her had a legitimate son, the first was called a bastard eigné, or, as it is now spelled, aîné, and the second son was called puisné, or since born, or sometimes he was called mulier puisné. 2 Bla Com. 248.

BASTARDA. A female bastard. Calvinus, Lex.

BASTARDY. The offence of begetting a bastard child. The condition of a bastard.

BASTARDY PROCESS. The statutory mode of proceeding against the putative father of a bastard to secure a proper maintenance for the bastard.

BASTON. **In Old English Law.** A staff or club.

In some old English statutes the servants or officers of the wardens of the fleet are so called, because they attended the king's courts with a red staff. See JUSTICES OF TRAIL BASTON.

BATTEL. See WAGER OF BATTEL.

BATTERY. Any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent. 2 Bish. Cr. L. § 71; Clark, Cr. L. 199; Long v. Rogers, 17 Ala. 540; Pike v. Hanson, 9 N. H. 491.

An unlawful touching the person of another by the aggressor himself, or any other substance put in motion by him; Kirland v. State, 43 Ind 153, 13 Am. Rep. 386. The slightest touching of another in anger is a battery; Goodrum v. State, 60 Ga. 511.

It must be either wilfully committed, or proceed from want of due care; Stra. 596; Plowd. 19; Bullock v. Babcock, 3 Wend. (N. Y.) 391. Hence an injury, be it ever so small, done to the person of another in an angry, spiteful, rude, or insolent manner; Com. v. Wing, 9 Pick. (Mass) 1, 19 Am. Dec. 347; as by spitting in his face; 6 Mod. 172; or on his body; 1 Swint. 597; or any way touching him in anger; 1 Russell, Cr. 751; Johnson v. State, 17 Tex. 515; or throwing water on him; 3 N. & P. 564; or violently jostling him; see 4 H. & N. 481; or where one riding a bicycle recklessly runs against a person standing with his back partially towards him, when by the exercise of slight care it could be avoided; Mercer v. Corbin, 117 Ind. 450, 20 N. E. 132, 3 L. R. A. 221, 10 Am. St. Rep. 76; is a battery in the eye of the law; 1 Hawk. Pl. Cr. 263. And anything attached to the person partakes of its inviolability: if, therefore, A strikes a cane in the hands of B, it is a battery; Respublica v. De Longchamps, 1 Dall. (U. S.) 114, 1 L. Ed. 59; State v. Davis, 1 Hill (S. C.) 46; Rich v. Hogeboom, 4 Denio (N. Y.) 453; United States v. Ortega, 4 Wash. C. C. 534, Fed. Cas. No. 15,971. Whether striking a horse is striking the driver, see Kirland v. State, 43 Ind. 146, 13 Am. Rep. 386.

A battery may be justified on various accounts.

As a salutary mode of correction. A parent may correct his child (though if done to excess, it is battery); Com. v. Coffey, 121 Mass. 66; Neal v. State, 54 Ga. 281; Smith v. Slocum, 62 Ill. 354; a guardian his ward; Stanfield v. State, 43 Tex. 167; a master his apprentice; 24 Edw. IV.; Com. v. Randall, 4 Gray (Mass.) 36; State v. Pendergrass, 19 N. C. 365, 31 Am. Dec. 416; a teacher his scholar, within reason; State v. Mizner, 45 Ia. 248, 24 Am. Rep. 769; State v. Alford, 68 N. C. 322; Starr v. Liftchild, 40 Barb. (N. Y.) 541; Marlsbary v. State, 10 Ind. App. 21, 37 N. E. 558; and a superior officer, one under his command; Keilw. 136; Buller, N. P. 19; Bee, Adm. 161; Flemming v. Ball, 1 Bay (S. C.) 3; Brown v. Howard, 14 Johns. (N. Y.) 119; Sampson v. Smith, 15 Mass. 365. And see Cowp. 173; Hannen v. Edes, 15 Mass. 347; 3 C. & K. 142; but a master, ordinarily, not his servant; Com. v. Baird, 1 Ashm. (Pa.) 267; Davis v. State, 6 Tex. App. 133; and the mate of a steamboat has no legal right to enforce his orders by beating one of the crew; The General Rucker, 35 Fed. 152. See ASSAULT; BEAT; CORRECTION. Doubtless these cases, or some of them, would hardly now be followed.

As a means of preserving the peace, in the exercise of an office, under process of court, and in aid of an authority at law. See ARREST.

As a necessary means of defence of the person against the plaintiff's assaults in the following instances: in defence of himself, his wife, 3 Salk 46, his child, and his servant, Ow. 150 (but see 1 Salk. 407); but he is not justified in using force against a man to prevent his wife leaving him at the persuasion of such other; State v. Weathers, 98 N. C 685, 4 S. E. 512. So, likewise, a person may defend any member of his family against an assault as he could himself, the wife may justify a battery in defending her husband, the child its parent, and the servant his master; 3 Salk. 46; Com. v. Malone, 114 Mass. 295; Smith v. Slocum, 62 Ill. 354; Patten v. People, 18 Mich. 314, 100 Am. Dec. 173; State v. Greer, 22 W. Va. 800; Staten v. State, 30 Miss. 619; Webb, Poll. Torts, 255. In these situations, the party need not wait until a blow has been given; for then he might come too late, and be disabled from warding off a second stroke or from protecting the person assailed. Care, however, must be taken that the battery do not exceed the bounds of necessary defence and protection; for it is only permitted as a means to avert an impending evil which might otherwise overwhelm the party and not as a punishment or retaliation for the injurious attempt; Stra. 593, 1 Const. S. C. 34; Watrous v. Steel, 4 Vt. 629, 24 Am. Dec. 628; Shain v. Markham, 4 J. J. Marsh. (Ky.) 578, 20 Am. Dec. 232; Poll. Torts 255. The degree of force necessary to repel an assault will naturally depend upon, and be proportioned to, the violence of the assailant; but with this limitation any degree is justifiable; 1 Ld. Raym. 177; Young v. State, 11 Humphr. (Tenn.) 200; Shorter v. People, 2 N. Y. 193, 51 Am. Dec. 286; Stewart v. State, 1 Ohio St. 66; Holmes v. State, 23 Ala. 17; Carroll v. State, 23 Ala. 28, 58 Am. Dec. 282; Rapp v. Com., 14 B. Monr. (Ky.) 614; Campbell v. People, 16 Ill. 17, 61 Am. Dec. 49; Monroe v. State, 5 Ga. 85.

Evidence justifying an assault and battery is not admissible under a general denial; Hathaway v. Hatchard, 160 Mass. 296, 35 N. E. 857.

A battery may likewise be justified in the necessary defence of one's property; State v. Miller, 12 Vt. 437; Filkins v. People, 69 N. Y. 101, 25 Am. Rep. 143. If the plaintiff is in the act of entering peaceably upon the defendant's land, or, having entered, is discovered, not committing violence, a request to depart is necessary in the first instance; 2 Salk. 641; Abt v. Burgheim, 80 Ill. 92; see Low v. Elwell, 121 Mass. 309, 23 Am. Rep. 272; Townsend v. Briggs, 99 Cal. 481, 34 Pac. 116; and if the plaintiff refuses, the defendant may then, and not till then, gently lay hands upon the plaintiff to remove him from the close, and for this purpose may use, if necessary, any degree of force short of striking the plaintiff, as by thrusting him off; Skinn. 28. See Everton v. Esgate, 24 Neb. 235, 38 N. W. 794. If the plaintiff resists, the defendant may oppose force to force; Com. v. Clark, 2 Metc. (Mass.) 23; 1 C. & P. 6. But if the plaintiff is in the act of forcibly entering upon the land, or, having entered, is discovered subverting the soil, cutting down a tree, or the like, 2 Salk. 641, a previous request is unnecessary, and the defendant may immediately lay hands upon the plaintiff; 8 Term 78. A man may justify a battery in defence of his *personal* property without a previous request, if another forcibly attempt to take away such property; 2 Salk. 641. One from whom property has been wrongfully taken may regain the momentarily interrupted possession by the use of reasonable force, especially after demanding possession; Com. v. Donahue, 148 Mass. 529, 20 N. E. 171, 2 L. R. A. 623, 12 Am. St. Rep. 591.

BATTONIER. In French and Canadian law, a member of the bar selected as the head of the bar.

BATTURE (Fr. shoals, shallows). An elevation of the bed of a river *under* the surface of the water; but it is sometimes used to signify the same elevation when it has risen *above* the surface. Morgan v. Livingston, 6 Mart. (O. S.) 19, 216. See Municipality No. 2 v. Orleans Cotton Press, 18 La. 123, 36 Am. Dec. 624; Hollingsworth v. Chaffe, 33 La. Ann. 551.

The term battures is applied principally to certain portions of the bed of the river Mississippi, which are left dry when the water is low, and are covered again, either in whole or in part, by the annual swells.

If it rises high, to be susceptible of ownership it does not pass in a grant of the adjacent land; Producers' Oil Co. v. Hanszen, 132 La. 691, 61 South. 754.

BAWDY-HOUSE. A house of ill-fame, kept for the resort and unlawful commerce of lewd people of both sexes. State v. Evans, 27 N. C. 603. See HOUSE OF ILL FAME.

BAY. An enclosure, or other contrivance, to keep in the water for the supply of a mill, so that the water may be able to drive the wheels of such mill. Stat. 27 Eliz. c. 19. (This is generally called a forebay.)

A bending or curving of the shore of the sea or of a lake, so as to form a more or less inclosed body of water. State v. Town of Gilmanton, 14 N. H. 477.

BAY WINDOW. A window projecting from the wall of a building so as to form a recess or bay within and, properly speaking, rising from the ground or basement, with straight sides only; but the term is also ordinarily applied to such projecting windows with curved sides, properly called bow windows, and also to projecting windows supported from the building, above the ground, properly called oriel windows.

The footways of streets being under municipal control, the authorities may determine the extent to which the sidewalks may be obstructed by such projections beyond the building line; their erection will not be enjoined by a court of equity if it appear that they will cause no appreciable injury, either by the finding of the master to that effect; Livingston v. Wolf, 136 Pa. 519, 20 Atl. 551, 20 Am. St. Rep. 936; or from the affidavits submitted on an application by the attorney-general to prevent the erection as a public nuisance; Gray v. Baynard, 5 Del. Ch. 499. Equity will not interfere in such cases at suit of a private person; Blanchard v. Reyburn, 1 W. N. C. (Pa.) 529; but will at suit of the attorney-general to prevent the erection of bay windows extending over the street; Commonwealth v. Harris, 10 W. N. C. (Pa.) 10; Com. v. Reimer, 39 Leg. Int. (Pa.) 108; and a second story bay window is a nuisance and will be restrained; Appeal of Reimer, 100 Pa. 182, 45 Am. Rep. 373.

BAYOU. A stream which is the outlet of a swamp near the sea. Applied to the creeks in the lowlands lying on the Gulf of Mexico.

BEACH. See FORESHORE; SEA-SHORE.

BEACONAGE. Money paid for the maintenance of a beacon. Comyns, Dig. *Navigation* (H).

BEADLE (Sax. *Bcodan*, to bid). A church servant chosen by the vestry, whose business it is to attend the vestry, to give notice of its meetings, to execute its orders, to attend upon inquests, and to assist the constables. See BEDEL.

BEARER. One who bears or carries a thing.

If a bill or note be made payable to bearer, it will pass by delivery only, without indorsement; and whoever fairly acquires a right to it may maintain an action against the drawer or acceptor.

It has been decided that the bearer of a bank note, payable to bearer, is not an assignee of a chose in action within the eleventh section of the judiciary act of 1789, c. 20, limiting the jurisdiction of the circuit court; Wood v. Dummer, 3 Mas. 308, Fed. Cas. No. 17,944.

BEARERS. Such as bear down or oppress others; maintainers.

BEARING DATE. Words frequently used in pleading and conveyancing to introduce the date which has been put upon an instrument.

When in a declaration the plaintiff alleges that the defendant *made* his promissory note on such a day, he will not be considered as having alleged that it *bore date* on that day, so as to cause a variance between the declaration and the note produced bearing a different date, 2 Greenl. Ev. § 160; 2 Dowl. & L. 759.

BEAST. Any four-footed animal which may be used for labor, food, or sport; as opposed to man; any irrational animal. Webst. A cow is a beast; Taylor v. State, 6 Humph. (Tenn.) 285; and so is a horse; Winfrey v. Zimmerman, 8 Bush (Ky.) 587; and a hog; State v. Enslow, 10 Ia. 115; but a dog was held not to be; U. S. v. Gideon, 1 Minn. 292 (Gil. 226); but see Morewood v. Wakefield, 133 Mass. 241.

BEASTS OF THE CHASE. Properly, the buck, doe, fox, martin, and roe, but in a common and legal sense extending likewise to all the beasts of the forest, which beside the others are reckoned to be the hind, hare, bear, and wolf, and, in a word, all wild beasts of venery or hunting. Co. Litt. 233; 2 Bla. Com. 39. See ANIMAL.

BEASTS OF THE FOREST. See BEASTS OF THE CHASE.

BEASTS OF THE WARREN. Hares, coneys, and roes. Co. Litt. 233; 2 Bla. Com. 39.

BEAT or BEATING. To strike or hit repeatedly, as with blows.

To beat, in a legal sense, is not merely to whip, wound, or hurt, but includes any unlawful imposition of the hand or arm. The slightest touching of another in anger is a battery. Goodrum v. State, 60 Ga. 511.

The beating of a horse by a man refers to the infliction of blows; Com. v. McClellan, 101 Mass. 35. See BATTERY.

BEATING OF THE BOUNDS. An ancient custom in England by which, once a year, the minister, etc., of a parish walked about its boundaries to preserve a recollection of them. Cent. Dict. (Perambulation).

BEAUPLEADER (L. Fr. fair pleading). A writ of prohibition directed to the sheriff or another, directing him not to take a fine for beaupleader.

There was anciently a fine imposed called a fine for beaupleader, which is explained by Coke to have been originally imposed for bad pleading Coke, 2d Inst. 123. It was set at the will of the judge of the court, and reduced to certainty by consent, and annually paid. Com. Dig. *Prerogative* (D, 52). The statute of Marlebridge (52 Hen. III.) c. 11, enacts, that neither in the circuit of justices, nor in counties, hundreds, or courts-baron, any fines shall be taken for *fair pleading;* namely, for not pleading fairly or aptly to the purpose Upon this statute this writ was ordained, directed to the sheriff, bailiff, or him who shall demand the fine; and it is a prohibition or command not to do it; New Nat Brev. 596, Fitzh. N. B. 270 *a;* Hall, Hist. Comm Law, c. 7. Mr Reeve explains it as a fine paid for the privilege of a fair hearing, 2 Reeve, Eng. Law 70. This latter view would perhaps derive some confirmation from the connection in point of time of this statute with Magna Carta, and the resemblance which the custom bore to the other customs against which the clause in the charter of *nulli vendemus, etc*, was directed. See Com. Dig *Prerogative* (D, 51, 52), Cowell; Co. 2d Inst. 122, Crabb, Eng Law 150

BED. The channel of a stream; the part between the banks worn by the regular flow of the water. See Howard v. Ingersoll, 13 How. (U. S.) 426, 14 L. Ed. 189.

The phrase divorce from *bed* and *board*, contains a legal use of the word synonymous with its popular use.

BED-ALE or BID-ALE. A friendly assignation for neighbors to meet and drink at the house of newly married persons or other poor people and then for the guests to contribute to the housekeepers. Cowell.

BEDEHOUSE. A hospital or almshouse for bedesmen or poor people who prayed for their founders and benefactors; from the Saxon *biddan*, to pray. Cunningham.

BEDEL. In English Law. A crier or messenger of court, who summons men to appear and answer therein. Cowell. An inferior officer in a parish or liberty, or in an institution, such as the Blue Coat School in London.

A subordinate officer of a university who walked with a mace before one of the officers on ceremonial occasions and performed other minor duties ordinarily.

A herald to make public proclamations. Cent. Dict.

The more usual spelling is BEADLE, *q. v.*

BEDELARY. The jurisdiction of a *bedel*, as a bailiwick is the jurisdiction of a bailiff. Co. Litt. 234 *b;* Cowell.

BEDEREPE. A service which certain tenants were anciently bound to perform, as to reap their landlord's corn at harvest. Said by Whishaw to be still in existence in some parts of England. Blount; Cowell.

BEDEWERI. Those which we now call *banditti;* profligate and excommunicated persons. Cunningham.

BEEF. This word is used frequently to mean an animal of the cow species and not beef prepared for market. A beef or one beef is an expression frequently used to designate an animal fit for use as beef, instead

of designating it as a steer, a heifer, an ox, or a cow. Davis v. State, 40 Tex. 135.

BEER. A malt liquor of the lighter sort and differs from ordinary beer or ales, not so much in its ingredients as in its processes of fermentation.

BEES are animals *ferœ naturæ* while unreclaimed; Wallis v. Mease, 3 Binn. (Pa.) 546; Cock v. Weatherby, 5 Smedes & M. (Miss.) 333. See Inst. 2. 1. 14; Dig. 41. 1. 5. 2; Gillet v. Mason, 7 Johns. (N. Y.) 16; 2 Bla. Com. 392. If while so unreclaimed they take up their abode in a tree, they belong to the owner of the soil, but not so if reclaimed and they can be identified; Goff v. Kilts, 15 Wend. (N. Y.) 550. See Ferguson v. Miller, 1 Cow. (N. Y.) 243, 13 Am. Dec. 519; Idol v. Jones, 13 N. C. 162. See ANIMAL.

BEGGAR. One who obtains his livelihood by asking alms. The laws of several of the states punish begging as an offence. See TRAMP; VAGRANT.

BEGIN. To originate. To come into existence. As to the right to begin at a trial, see OPENING AND CLOSING.

BEGOTTEN. "To be begotten" means the same as "begotten," embracing all those whom the parent shall have begotten during his life, *quos procreaverit.* 1 Maule & S. 135; Wager v. Wager, 1 S. & R. (Pa.) 377.

BEGUN. In a statute providing that nothing contained in it should affect prosecutions "begun" under any existing act, the word "begun" means both those which have already been begun and those which may hereafter be begun. Lang v. U. S., 133 Fed. 201, 66 C. C. A. 255.

BEHALF. Benefit, support, defence, or advantage.

BEHAVIOR. Manner of having, holding, or keeping one's self; carriage of one's self, with respect to propriety, morals, and the requirements of law. Surety to be of good behavior is a larger requirement than surety to keep the peace; Dalton, c. 122; 4 Burns, Just. 355. See GOOD BEHAVIOR.

BEHETRIA. In Spanish Law. Lands situated in districts and manors in which the inhabitants had the right to select their own lords.

BEHOOF (Sax.). Use; service; profit; advantage. It occurs in conveyances.

BELIEF. Conviction of the mind, arising not from actual perception or knowledge, but by way of inference, or from evidence received or information derived from others. See DECEIT.

Belief may evidently be stronger or weaker according to the weight of evidence adduced in favor of the proposition to which belief is granted or refused; Thompson v. White, 4 S. & R. (Pa.) 137; 1 Greenl. Ev. §§ 7-13. See 1 Stark. Ev. 41; 2 Powell, Mortg. 555; 1 Ves. Ch. 95; 12 *id.* 80; Dy. 53, 2 W. Bla. 881; Carmalt v. Post, 8 Watts (Pa.) 406; Bennifield v. Hypres, 38 Ind. 504; Hatch v. Carpenter, 9 Gray (Mass.) 274; Humphreys v. McCall, 9 Cal. 62, 70 Am. Dec. 621; Ventress v. Smith, 10 Pet. (U. S.) 171, 9 L. Ed. 382.

BELLIGERENCY. In International Law. The status of *de facto* statehood attributed to a body of insurgents, by which their hostilities are legalized. Before they can be recognized as belligerents they must have some sort of political organization and be carrying on what in international law is regarded as legal war. There must be an armed struggle between two political bodies, each of which exercises *de facto* authority over persons within a determined territory, and commands an army which is prepared to observe the ordinary laws of war. It is not enough that the insurgents have an army; they must have an organized civil authority directing the army.

The exact point at which revolt or insurrection becomes belligerency is often extremely difficult to determine; and belligerents are not usually recognized by nations unless they have some strong reason or necessity for doing so, either because the territory where the belligerency is supposed to exist is contiguous to their own, or because the conflict is in some way affecting their commerce or the rights of their citizens. Thus in 1875 President Grant refused to recognize the Cubans as belligerents, although they had been maintaining hostilities for eight years, because they had no real and palpable political organization manifest to the world, and because, being possessed of no seaport, their contest was solely on land and without the slightest effect upon commerce; Moore, Int. Law Dig. I, 196. One of the most serious results of recognizing belligerency is that it frees the parent country from all responsibility for what takes place within the insurgent lines; Dana's Wheaton, note 15, page 35.

When revolutionists have no organized political government and it becomes necessary to recognize them in some way, a status of insurgency (*q. v.*) is sometimes recognized. In this way the parent state avoids the necessity of treating the insurgents as pirates and third Powers obtain certain of the rights of neutrals. In 1895 President Cleveland recognized a status of insurgency in Cuba and enjoined the observance of the Neutrality Laws. Moore I, 242. See Hall, 6th ed. 31-42; Hershey 118-123.

BELLIGERENT. In International Law. As adj. and noun. Engaged in lawful war; a state so engaged. In plural. A body of insurgents who by reason of their temporary organized government are regarded as conducting lawful hostilities. Also, militia,

corps of volunteers, and others, who although not part of the regular army of the state, are regarded as lawful combatants provided they observe the laws of war; 4 H. C. 1907, arts. 1, 2. See WAR; BELLIGERENCY.

BELONG. To appertain to; to be the property of. Property "belonging" to a person has two general meanings: (1) ownership; (2) the absolute right of user. A road may be said with perfect propriety to belong to a man who has the right to use it as of right although the soil does not belong to him; 31 L. J. Ex. 227. See FIXTURES.

It may also signify a legal residence. As, the town to which a slave belongs is that alone in which he has a legal settlement; Columbia v. Williams, 3 Conn. 467.

BELOW. Inferior; preliminary. The court below is the court from which a cause has been removed. See BAIL.

BENCH. A tribunal for the administration of justice.

The judges taken collectively, as distinguished from counsellors and advocates, who are called the bar.

The term, indicating originally the seat of the judges, came to denote the body of judges taken collectively, and also the tribunal itself. The *jus banci*, says Spelman, properly belongs to the king's judges, who administer justice in the last resort The judges of the inferior courts, as of the barons, are deemed to judge *plano pede*, and are such as are called in the civil law *pedanei judices*, or by the Greeks *χαμαιδικασταί*, that is *humi judicantes* The Greeks called the seats of their higher judges *βήματα*, and of their inferior judges *βαθρα*. The Romans used the word *sellæ* and *tribunalia* to designate the seats of their higher judges, and *subsellia* to designate those of the lower. See Spelman, Gloss. *Bancus;* 1 Reeve, Eng. Law 40, 4th ed.

"The court of common pleas in England was formerly called *Bancus*, the Bench, as distinguished from *Bancus Regis*, the King's Bench It was also called *Communis Bancus*, the Common Bench, and this title is still retained by the reporters of the decisions in the court of Common Pleas. Mention is made in the Magna Charta *'de justiciariis nostris de Banco,'* which all men know to be the justices of the court of Common Pleas, commonly called the Common Bench, or the Bench." Viner, Abr. *Courts* (n. 2).

BENCH WARRANT. An order issued by or from a bench, for the attachment or arrest of a person. It may issue either in case of a contempt, or where an indictment has been found.

BENCHERS. Seniors in the Inns of Court, intrusted with their government.

They have the absolute and irresponsible power of punishing a barrister of their Inn guilty of misconduct, by either admonishing or rebuking him, by prohibiting him from dining in the hall, or even by expelling him from the bar, called disbarring. They may also refuse admission to a student, or reject his call to the bar. Wharton, Lex. But see BARRISTER, as to the sole right of the judges to admit to the bar and to debar.

See INNS OF COURT; COUNCIL OF THE BAR.

BENEFICE. An ecclesiastical preferment. In its more extended sense, it includes any such preferment; in a more limited sense, it applies to rectories and vicarages only. See BENEFICIUM; SIMONY.

BENEFICE DE DISCUSSION. See BENEFIT OF DISCUSSION.

BENEFICIAL ASSOCIATIONS. Voluntary associations for mutual assistance in time of need and sickness, and for the care of families of deceased members. Niblack, Ben. Soc. and Accid. Ins. These associations form in substance a very effective system of co-operative life insurance. The payment to the beneficiary is not a gift, but a right arising from the contract of membership, and when the conditions of membership have been fulfilled may be enforced at law; *id.* ch. xxvi. The suspension of a subordinate lodge will not defeat a recovery unless legally done; Young v. Grand Lodge of Sons of Progress, 173 Pa. 302, 33 Atl. 1038.

In a suit for sick benefits the constitution and by-laws of the society constitute the contract between the parties, and the mode which they provide to ascertain the right to benefits must be pursued in order to recover; Delaware Lodge No. 1, I. O. O. F., v. Allmon, 1 Pennewill (Del.) 160, 39 Atl. 1098. When after a certificate had been issued under the law as it then stood payable at death to a creditor (named), a subsequent law prohibiting payment to other than relatives or dependents of the insured could have no retroactive effect nor compel him to designate a new beneficiary; Emmons v. Supreme Conclave, I. O. H., 6 Pennewill (Del.) 115, 63 Atl. 871; Peterson v. Gibson, 191 Ill. 365, 61 N. E. 127, 54 L. R. A. 836, 85 Am. St. Rep. 263, Sargent v. Knights of Honor, 158 Mass. 557, 33 N. E. 650; Mulderick v. Grand Lodge of A. O. U. W., 155 Pa. 505, 26 Atl. 663; Wist v. Grand Lodge A. O. U. W., 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603; Hadley v. Queen City Camp No. 27, W. O. W., 1 Tenn. Ch. App. 413; Roberts v. Cohen, 60 App. Div. 259, 70 N. Y. Supp. 57. The beneficiary has not a vested right and a change could have been made by the member but the legislation was intended to be prospective and could not *proprio vigore* disturb existing relations; Hadley v. Queen City Camp No. 27, W. O. W., 1 Tenn. Ch. App. 413.

Where a statute authorizes a beneficial association to issue certificates for the benefit of certain enumerated relatives or dependents, and a person outside the specified classes is named in the certificate, that fact will not avoid the right in the fund of the beneficiaries designated by law; Royal League v. Shields, 251 Ill. 250, 96 N. E. 45, 36 L. R. A. (N. S.) 208. A servant is not a dependent; Grand Lodge A. O. U. W. of New Jersey v. Gandy, 63 N. J. Eq. 692, 53 Atl. 142; a mother, under certain facts, has been held not to be; Elsey v. Odd Fellows Mut.

Relief Ass'n, 142 Mass. 224, 7 N. E. 844; or a brother; Supreme Council American Legion of Honor v. Smith, 45 N. J. Eq. 466, 17 Atl. 770; an adopted child may or may not be a dependent, and the dependency will not rest upon whether there has been a legal adoption; Murphy v. Nowak, 223 Ill. 301, 79 N. E. 112, 7 L. R. A. (N. S.) 393. A person who assisted a deceased member and took care of him in his last illness was held not to be a dependent; Groth v. Central Verein der Gegenseitigen Unterstuetzungs Gesellschaft Germania, 95 Wis. 140, 70 N. W. 80; a creditor is not; Skillings v. Benefit Ass'n, 146 Mass. 217, 15 N. E. 566; nor an illegitimate child, even though the father had been boarding with the mother and paying therefor; Lavigne v. Ligue des Patriotes, 178 Mass. 25, 59 N. E. 674, 54 L. R. A. 814, 86 Am. St. Rep. 460; Supreme Tent of Knights of Maccabees of the World v. McAllister, 132 Mich. 69, 92 N. W. 770, 102 Am. St. Rep. 382; James v. Supreme Council of Royal Arcanum, 130 Fed. 1014. Dependency for favor or affection or companionship is held to be excluded; Alexander v. Parker, 144 Ill. 366, 33 N. E. 183, 19 L. R. A. 187, where an affianced wife was held not to be a dependent; *contra*, McCarthy v. Supreme Lodge, 153 Mass. 314, 26 N. E. 866, 11 L. R. A. 144, 25 Am. St. Rep. 637.

It is held in some courts that a woman is a dependent who in good faith lives with a member in the belief that she is his wife, although there is no legal marriage; Supreme Lodge, A. O. U. W., v. Hutchinson, 6 Ind. App. 399, 33 N. E. 816; Supreme Tent of Knights of Maccabees of the World v. McAllister, 132 Mich. 69, 92 N. W. 770, 102 Am. St. Rep. 382; *contra*, Severa v. Beranak, 138 Wis. 144, 119 N. W. 814. Where the association has charter power to pay sums to the family and heirs of deceased members, a contract to pay to his legal representatives was construed to mean his heirs; Harton's Estate, 213 Pa. 499, 62 Atl. 1058, 4 L. R. A. (N. S.) 939.

A failure to apportion the proceeds of a benefit certificate between the beneficiaries entitles one to the entire sum upon the other proving ineligible; Cunat v. Supreme Tribe of Ben Hur, 249 Ill. 448, 94 N. E. 925, 34 L. R. A. (N. S.) 1192, Ann. Cas. 1912A, 213.

For most purposes mutual benefit associations are insurance companies and certificates issued by them are policies of life insurance. There are, however, some essential differences, one of which is the power on the part of the assured in mutual benefit associations to change the beneficiary; Holland v. Taylor, 111 Ind. 121, 12 N. E. 116. In a policy of life insurance, the beneficiary has a vested right. In a benevolent society the beneficiary has no vested right in the certificate before the death of the member; Masonic Benevolent Ass'n v. Bunch, 109 Mo. 560, 19 S. W. 25. The certificates of such associations are said to partake of the nature of testamentary dispositions of property; Woodruff v. Tilman, 112 Mich. 188, 70 N. W. 420. They may be disposed of by will unless the rules of the society prohibit it; Woodruff v. Tilman, 112 Mich. 188, 70 N. W. 420; Catholic Ben. Ass'n v. Priest, 46 Mich. 429, 9 N. W. 481; High Court Catholic Order of Foresters v. Malloy, 169 Ill. 58, 48 N. E. 392. The member may change the beneficiary without the latter's consent; Masonic Ben. Ass'n v. Bunch, 109 Mo. 560, 19 S. W. 25; he may change as to a portion of the insurance; Woodruff v. Tilman, 112 Mich. 188, 70 N. W. 420; *contra*, McClure v. Johnson, 56 Ia. 620, 10 N. W. 217.

If the by-laws point out the mode in which the beneficiary may be changed, another beneficiary can be substituted only in the manner provided, and an attempt of the member to dispose of the fund by will is held ineffectual; Stewart v. Trustees of College, 2 Den. (N. Y.) 409 (where the objection was raised by the society); Holland v. Taylor, 111 Ind. 121, 12 N. E. 116; Stephenson v. Stephenson, 64 Ia. 534, 21 N. W. 19; McCarthy v. New England Order of Protection, 153 Mass. 314, 26 N. E. 866, 11 L. R. A. 144, 25 Am. St. Rep. 637; Fink v. Fink, 171 N. Y. 616, 64 N. E. 506. Opposing this rule, it is held that such a provision was for the benefit of the association which might waive it or insist upon it, and if waived by the association, the member might change his beneficiary by will; Splawn v. Chew, 60 Tex. 532; Kepler v. Supreme Lodge, 45 Hun (N. Y.) 274.

Where no method of changing the beneficiary is provided, a letter mailed to the company directing the payment to a new beneficiary completes the change; Hirschl v. Clark, 81 Ia. 200, 47 N. W. 78, 9 L. R. A. 811; Fink v. Mutual Aid Society, 57 App. Div. 507, 68 N. Y. Supp. 80.

Such association has power to amend its by-laws so as to increase the assessments on its members, where the existing rate has proved inadequate, under charter authority to provide for the payment of a certain death benefit to be secured by assessment; Reynolds v. Supreme Council of Royal Arcanum, 192 Mass. 150, 78 N. E. 129, 7 L. R. A. (N. S.) 1154, 7 Ann. Cas. 776; Gaut v. Life Ass'n, 121 Fed. 403; Miller v. National Council of Knights & Ladies of Security, 69 Kan. 234, 76 Pac. 830; *contra*, unless there was an express agreement that a member should be bound by future by-laws, varying or modifying his contract; Covenant Mut. Life Ass'n of Illinois v. Kentner, 188 Ill. 431, 58 N. E. 966; Pearson v. Indemnity Co., 114 Mo. App. 283, 83 S. W. 588; Wright v. Knights of Maccabees of the World, 48 Misc. 558, 95 N. Y. Supp. 996 (though the proposed increase was necessary to keep the association solvent). A member cannot be assessed for losses that occurred prior to his mem-

bership unless he had so agreed; Clark v. Traveling Men's Ass'n (Ia.) 135 N. W. 1114, 42 L. R. A. (N. S.) 631; or for the creation of an emergency fund; *id.*

If at the time one becomes a member of a beneficial order, its constitution and by-laws expressly reserve the right to make amendments thereto, he is bound by a subsequent amendment injuriously affecting him; Robinson v. Templar Lodge, 117 Cal. 370, 49 Pac. 170, 59 Am. St. Rep. 193. Such an amendment must be reasonable; Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 104 Fed. 638, 44 C. C. A. 93; Modern Woodmen of America v. Wieland, 109 Ill. App. 340; Smith v. Supreme Lodge, 83 Mo. App. 512; O'Neill v. Supreme Council, 70 N. J. L. 410, 57 Atl. 463, 1 Ann. Cas. 422. The power to make it, not being a power to destroy the contract rights of the members; Parish v. Produce Exchange, 169 N. Y. 34, 61 N. E. 977, 56 L. R. A. 149; but where it makes so radical a change as to amount to a repudiation of a contract it will be void; Beach v. Supreme Tent, 177 N. Y. 100, 69 N. E. 281. The voluntary acceptance of by laws providing for the imposition of coercive fines does not make such fines legal and the standing threat of their imposition may properly be classed with the ordinary threat of suits upon groundless claims; Boutwell v. Marr, 71 Vt. 1, 42 Atl. 607, 43 L. R. A. 803, 76 Am St. Rep. 746.

A discussion of the effect of an erroneous description of the beneficiary in a certificate by Cyrus J. Wood, 57 Cent. L. J. 383, reaches the conclusion that the courts are inclined to take into consideration the benevolent character and purpose of these societies and, in order to effectuate this purpose, liberally construe by-laws and statutes, giving a broad interpretation to such terms as relatives, families and dependents, so that one wrongfully described as a relative may obtain the benefit on proving dependency, and if the beneficiary cannot be brought within the prescribed limits, those who are within the rules may receive the benefit as against both the insured and the society since a misdescription seems to be ignored and the rights of all concerned are decided according to the benevolent purpose of the society with regard to the real relation of the appointed beneficiary to the deceased. See 17 Harv. L. Rev. 211.

See In re Harton's Estate, 213 Pa. 499, 62 Atl. 1058, 4 L. R. A. (N. S.) 939; RAILROAD RELIEF FUNDS.

See ASSOCIATION; FAMILY.

BENEFICIAL INTEREST. Profit, benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control.

A *cestui que trust* has the beneficial interest in a trust estate while the trustee has the legal estate. If A makes a contract with B to pay C a sum of money, C has the beneficial interest in the contract.

BENEFICIAL POWER. It is used in New York and has for its object the donee of the power, and is to be executed solely for his benefit, in contradistinction to *trust powers*, which have for their object persons other than the donee and are to be executed solely for their benefit. Jennings v. Conboy, 73 N. Y. 234.

BENEFICIAL SOCIETIES. See BENEFICIAL ASSOCIATIONS.

BENEFICIARY. A term suggested by Judge Story as a substitute for *cestui que trust*, and adopted to some extent. 1 Story, Eq. Jur. § 321.

The person named in a policy of insurance to whom the insurance is payable upon the happening of the event insured against.

The beneficiary of a contract is not a *cestui que trust;* 12 Harv. L. Rev. 564.

BENEFICIO PRIMO (more fully *beneficio primo ecclesiastico habendo*). A writ directed from the king to the chancellor, commanding him to bestow the benefice which shall first fall in the King's gift, above or under a certain value, upon a particular and certain person. *Reg. Orig.* 307.

BENEFICIUM (Lat.). A portion of land or other immovable thing granted by a lord to his followers for their stipend or maintenance.

It originally meant a "benefaction" from the king, usually to a noble. The analogous English institution was the laen or loan; Maitl. Domesd. Book & Beyond 301.

In the early feudal times, grants were made to continue only during the pleasure of the grantor, which were called *munera;* but soon afterwards these grants were made for life, and then they assumed the name of *beneficia.* Dalrymple, Feud. Pr. 199 Pomponius Laetus, as cited by Hotoman, *De Feudis,* c. 2, says, "That it was an ancient custom, revived by the Emperor Constantine, to give lands and villas to those generals, prefects, and tribunes who had grown old in enlarging the empire, to supply their necessities as long as they lived, which they called *parochial* parishes, etc. But between *(feuda)* fiefs or feuds and *(parochias)* parishes there was this difference, that the latter were given to old men, veterans, etc, who, as they deserved well of the republic, were sustained the rest of their life *(publico beneficio)* by the public benefaction; or, if any war afterwards arose, they were called out not so much as soldiers as leaders *(magistri militum).* Feuds *(feuda),* on the other hand, were usually given to robust young men who could sustain the labors of war. In later times, the word *parochia* was appropriated exclusively to ecclesiastical persons, while the word *beneficium (militare)* continued to be used in reference to military fiefs or fees.

A general term applied to ecclesiastical livings. 4 Bla. Com. 107. See BENEFICE.

In Civil Law. Any favor or privilege.

BENEFICIUM CLERICALE. Benefit of clergy, which see.

BENEFICIUM COMPETENTIÆ. In Scotch Law. The privilege of retaining a competence belonging to the obligor in a gratuitous obligation. Such a claim consti-

tutes a good defence in part to an action on the bond. Paterson, Comp.

In Civil Law. The right which an insolvent debtor had, among the Romans, on making cession of his property for the benefit of his creditors, to retain what was required for him to live honestly according to his condition. 7 Toullier, n. 258.

A defendant's privilege of being condemned only in an amount which he could pay without being reduced to a state of destitution. Sand. Justinian iv. vi. 37.

BENEFICIUM DIVISIONIS. See BENEFIT OF DIVISION.

BENEFICIUM INVENTARII. See BENEFIT OF INVENTORY.

BENEFICIUM ORDINIS. In Scotch and Civil Law. The privilege of the surety allowing him to require that the creditor shall take complete legal proceedings against the debtor to exhaust him before he calls upon the surety. 1 Bell, Com. 347.

BENEFIT. Profit, fruit, or advantage.

The acceptance of the benefits of a contract estops a party from denying its validity; City of St. Louis v. Davidson, 102 Mo. 149, 14 S. W. 825, 22 Am. St. Rep. 764; Spencer v. Jennings, 139 Pa. 198, 21 Atl. 73; Wood v. Bullard, 151 Mass. 324, 25 N. E. 67, 7 L. R. A. 304; Palmerton v. Hoop, 131 Ind. 23, 30 N. E. 874; Gladstone Exch. Bank v. Keating, 94 Mich. 429, 53 N. W. 1110; St. Louis & S. F. R. Co. v. Foltz, 52 Fed. 627.

BENEFIT ASSOCIATION. See BENEFICIAL ASSOCIATIONS.

BENEFIT OF CESSION. In Civil Law. The release of a debtor from future imprisonment for his debts, to which he is entitled upon the surrender of his property for the benefit of his creditors. Pothier, *Procéd. Civ.* part 5, c. 2, § 1.

This was something like a discharge under the insolvent laws, which releases the person of the debtor, but not goods he acquires afterwards. See BANKRUPT; CESSIO BONORUM, INSOLVENT.

BENEFIT OF CLERGY. Originally it meant that an ordained clerk charged with felony could be tried only in the Ecclesiastical Court. But, before the end of Henry III.'s reign, the king's court, though it delivered him to the Ecclesiastical Court for trial, took a preliminary inquest as to his guilt or innocence. The latter court tried him by compurgation. It could sentence him to degradation, imprisonment or whipping. Benefit of clergy did not apply to treason, breach of forest laws, trespasses or misdemeanors. In time it changed and became a complicated series of rules exempting certain persons from punishment for certain criminal offences. It was extended to secular clerks, then to all who could read. In 1705 this requirement was abolished. Till 1692 a woman commoner could not claim it. By act in 1487, all persons except those in orders were, if convicted of a clergyable felony, branded and disabled from claiming the privilege a second time. A peer, even if he could not read, had the privilege (1547). By act in 1717, persons (not peers or clerks in orders) were if convicted of clergyable larcenies transported for 7 years. Gradually the number of non-clergyable offences was increased and new offences, when created, were made non-clergyable. It was abolished in England in 1827. 1 Holdsw. H. E. L. 381.

Kelyng reports, "At the Lent Assizes for Winchester (18 Car. II.) the clerk appointed by the bishop to give clergy to the prisoners, being to give it to an old thief, I directed him to deal clearly with me, and not to say *legit* in case he could not read; and thereupon he delivered the book to him, and I perceived the prisoner never looked on the book at all and yet the bishop's clerk, upon the demand of *'legit? or non legit?'* answered *'legit.'* And thereupon I told him I doubted he was mistaken, and had the question again put to him; whereupon he answered again, something angrily, *'legit.'* Then I bid the clerk of assizes not to record it, and I told the parson that he was not the judge whether the culprit could read or no, but a ministerial officer to make a true report to the court; and so I caused the prisoner to be brought near, and delivered him the book, when he confessed that he could not read Whereupon I told the parson that he had unpreached more that day than he could preach up again in many days, and I fined him five marks" An instance of humanity is mentioned by Donne, of a culprit convicted of a non-clergyable offence prompting a convict for a clergyable one in reading his *neck-verse*. In the very curious collection of *prolegomena* to Coryat's Crudities are commendatory lines by Inigo Jones. The famous architect wrote,

"Whoever on *this* book with scorn would look,
May he at sessions crave, and want *his* book."

When one who could read had the privilege, it was enough to read a line in a book, and the same verse of Psalms li. 1, was said to be used with each prisoner, called the "neck-verse."

See 1 Soc. Engl. 297; 1 P. & M. 429; 1 Stephen H. C. L. 464.

The benefit of clergy seems never to have been extended to breach of forest laws, trespass or high treason, nor misdemeanors inferior to felony. In time it became a complicated series of rules exempting certain persons from punishment for certain criminal offences. It has been usually acknowledged as belonging to the common law of most of the United States; 1 Bish. Cr. L. 938. See 1 Chit. Cr. L. 667; 4 Bla. Com. ch. 28; 1 Bish. Cr. Law § 936.

By act of congress of April 30, 1790, R. S. § 5329, the benefit of clergy shall not be used or allowed upon conviction of any crime for which the punishment is death. Repealed by act of March 4, 1909; apparently the doctrine thus becomes obsolete.

See BURNING IN THE HAND.

BENEFIT OF DISCUSSION. The right which a surety has to cause the property of the principal debtor to be applied in satisfaction of the obligation in the first instance. La. Civ. Code, art. 3014. See BENEFICE DE DISCUSSION.

BENEFIT OF DIVISION. In Civil Law. The right of one of several joint sureties, when sued alone, to have the whole obligation apportioned amongst the solvent sureties, so that he need pay but his share. La. Civ. Code, arts. 3014–3020.

BENEFIT OF INVENTORY. In Civil Law. The privilege which the heir obtains of being liable for the charges and debts of the succession, only to the value of the effects of the succession, by causing an inventory of these effects within the time and manner prescribed by law. La. Civ. Code, art. 1025; Pothier, *des Successs.* c. 3, s. 3, a. 2. See Spence, Eq. Jurisd. 585. See also Paterson, Comp. as to the Scotch law.

BENERETH. A service which the tenant rendered to his lord with his plow and cart. Cowell.

BENEVOLENCE. A voluntary gratuity given by the subjects to the king. Cowell.

Benevolences were first granted to Edward IV.; but under subsequent monarchs they became anything but voluntary gifts, and by the Petition of Rights (3 Car. I.) no benevolence shall be extorted without the consent of parliament. The illegal claim and collection of these benevolences was one of the prominently alleged causes of the rebellion of 1640. 1 Bla. Com. 140; 4 *id.* 436.

The love of humanity; the desire to promote its prosperity or happiness. When used in a bequest with charity, it is synonymous. Saltonstall v. Sanders, 11 Allen (Mass.) 446. See CHARITABLE USES.

BENEVOLENTIA REGIS HABENDA. The form in ancient fines and submissions to purchase the king's pardon and favor in order to be restored to place, title or estate. Paroch. Antiq. 172.

BENHURST. In Berkshire, a remedy for the inhabitants thereof to levy money recovered against them on the statute of hue and cry. 39 Eliz. c. 25.

BEQUEATH. To give personal property by will to another. Lasher v. Lasher, 13 Barb. (N. Y.) 106. The word may be construed *devise*, so as to pass real estate; Wigram, Wills 11; or *devise and* bequeath; Laing v. Barbour, 119 Mass. 525; Dow v. Dow, 36 Me. 216; Lasher v. Lasher, 13 Barb. (N. Y.) 109. See LEGACY.

BEQUEST. A gift by will of personal property. See LEGACY.

BERTILLON SYSTEM. See ANTHROPOMETRY.

BESAILE, BESAYLE. The great-grandfather, *proavus*. 1 Bla. Com. 186.

BESIDES. In addition to; moreover. In provisions in a will for children "besides" an eldest son, no children take unless there be a son; 4 Dr. & War. 235.

BESOT. To stupefy, to make dull or senseless, to make to dote; and "to dote" is to be delirious, sill or insane. Gates v. Meredith, 7 Ind. 441.

BEST. Of the highest quality. Of the greatest usefulness for the purpose intended. Where one covenants to use his best endeavors, there is no breach if he is prevented by causes wholly beyond his control and without any default on his part; 7 H. & N. 92. A contract to erect a building of the best lumber means the best lumber of which buildings are ordinarily constructed at that place; McIntire v. Barnes, 4 Col. 285.

BEST EVIDENCE. The best evidence of which the nature of the case admits, not the highest or strongest evidence which the nature of the thing to be proved admits of: *e. g.* a copy of a deed is not the best evidence: the deed itself is better. 1 Greenl. Ev., Lewis's ed. § 82, State v. McDonald, 65 Me. 467; Taylor v. Riggs, 1 Pet. (U. S.) 591, 7 L. Ed. 275; Whitehead v. School Dist., 145 Pa. 418, 22 Atl. 991; 15 Q. B. 782.

The rule requiring the best evidence to be produced is to be understood of the best *legal* evidence; Gray v. Pentland, 2 S. & R. (Pa.) 34; 3 Bla. Com. 368, n. 10, by Christian. It is relaxed in some cases, as where the words or the act of the opposite party avow the fact to be proved. A tavern-keeper's sign avows his occupation; taking of tithes avows the clerical character; Cummin v. Smith, 2 S. & R. (Pa.) 440; 1 Saund. Pl. 49.

Letterpress copies of letters are the best secondary evidence of their contents; Ford v. Cunningham, 87 Cal. 209, 25 Pac. 403. Where a note and the deed of trust given to secure it differ in describing the payee of the note, the note will prevail as evidence over the deed of trust; Magee v. Burch, 108 Mo. 336, 18 S. W. 1078.

Prof. Thayer (Evid. 484) treats the subject and expresses the opinion that this phraseology tends to confusion; though admitting that in the earlier days it may have been useful and may become so again as the discretion of the courts is enlarged. He prefers "primary" and "secondary." *Id.* 505.

BESTIALITY. A sexual connection between a human being and a brute of the opposite sex. Buggery seems to include both sodomy and bestiality; Ausman v. Veal, 10 Ind. 356, 71 Am. Dec. 331. See SODOMY.

BETROTHMENT, BETROTHAL. A contract between a man and a woman by which they agree that at a future time they will marry together.

The contract must be mutual; the promise of the one must be the consideration for the promise of the other. It must be obligatory on both parties at the same instant, so that each may have an action upon it, or it will bind neither; 1 Freem. 95; 3 Kebl. 148; Co. Litt. 79 *a*, *b*.

The parties must be able to contract. If either be married at the time of betrothment, the contract is void; but the married party cannot take advantage of his own wrong, and set up a marriage or previous engagement as an answer to the action for the breach of the contract, because this disability proceeds from the defendant's own act; 1 Ld. Raym. 387; 3 Inst. 89; 1 Sid. 112; 1 Bla. Com. 432.

The performance of this contract, or the completion of the marriage, must be accomplished within a reasonable time. Either party may, therefore, call upon the other to fulfil the engagement, and, in case of refusal or neglect to do so within a reasonable time after request made, may treat the betrothment as at an end, and bring action for the breach of the contract; 2 C. & P. 631. For a breach of the betrothment without a just cause, an action on the case may be maintained for the recovery of damages. It may be maintained by either party; 1 Salk. 24.

In Anglo-Saxon times the betrothal was between the bridegroom and the woman's father or other protector; 2 Poll. & Maitl. H. E. L. 365.

In Germany and Holland a party could be compelled to complete his contract. See PROMISE OF MARRIAGE. As to the Roman Law, see Bryce, Studies in History.

BETTER EQUITY. The right which, in a court of equity, a second incumbrancer has who has taken securities against subsequent dealings to his prejudice, which a prior incumbrancer neglected to take although he had an opportunity. 1 Chanc. Prec. 470, n.; Oliver v. Oliver, 4 Rawle (Pa.) 144, 26 Am. Dec. 123.

BETTERMENTS. Improvements made to an estate. It signifies such improvements as render it better than mere repairs. Maddocks v. Jellison, 11 Me. 482; Davis' Lessee v. Powell, 13 Ohio, 308; M'Kinly v. Holliday, 10 Yerg. (Tenn.) 477; Thompson v. Gilman, 17 Vt. 109. The term is also applied to denote the additional value which an estate acquires in consequence of some public improvement, as laying out or widening a street, etc.

The measure of the value of betterments is not their actual cost, but the enhanced value they impart to the land, without reference to the fact that they were not desired by the true owner or could not profitably be used by him; Carolina Cent. R. Co. v. McCaskill, 98 N. C. 526, 4 S. E. 468.

BETTING. The act of making a wager; a species of gambling.

A bet or wager is ordinarily an agreement between two or more that a sum of money or some valuable thing, in contributing which those agreeing take part, shall become the property of one or some of them, on the happening in the future of an event at the present uncertain; Harris v. White, 81 N. Y. 539. See GAMING.

BETWEEN. In the intermediate space of, without regard to distance; from one to another; belonging to two as a mutual relation.

The words "between A. & B." in a deed excludes the termini mentioned therein; Revere v. Leonard, 1 Mass. 93, but see Morris & E. R. Co. v. R. Co., 31 N. J. L. 212. Between two places is held to exclude both; 8 C. & P. 612.

"Between" when properly predicable of time is intermediate. "Between two days" was held exclusive of both; Bunce v. Reed, 16 Barb. (N. Y.) 352. See Robinson v. Foster, 12 Ia. 186. A testamentary gift to two or more between or amongst them creates a tenancy in common; 2 Mer. 70. It is often synonymous with among; Myres v. Myres, 23 How. Pr. (N. Y.) 415. When *between* and *among* follow the verb *divide*, the general signification is very similar and in popular use they are synonymous; Senger v. Senger's Ex'r, 81 Va. 698.

BEYOND SEAS. Out of the kingdom of England; out of the state; out of the United States. "Beyond seas" means, generally, without the jurisdiction of the state or government in which the question arises; 32 E. L. & Eq. 84; Forbes' Adm'r v. Foot's Adm'r, 2 McCord (S. C.) 331, 13 Am. Dec. 732; Galusha v. Cobleigh, 13 N. H. 79; Hatch v. Spofford, 24 Conn 432.

It means "out of the United States;" Thurston v. Fisher, 9 S. & R. (Pa.) 288; Earle v. McDowell, 12 N. C. 16; Davie v. Briggs, 97 U. S. 638, 24 L. Ed. 1086; Keeton's Heirs v. Keeton's Adm'r, 20 Mo 530; Darling v. Meachum, 2 G. Greene (Ia.) 602. Other cases hold that it means out of the state; Byrne v. Crowninshield, 1 Pick. (Mass.) 263; Pancoast's Lessee v. Addison, 1 Harr. & J. (Md.) 350, 2 Am. Dec. 520; Forbes' Adm'r v. Foote's Adm'r, 2 McCord (S. C.) 331, 13 Am. Dec. 732; Mansell's Adm'r v. Israel, 3 Bibb (Ky.) 510; Houston v. Moore, 3 Wheat. (U. S.) 433, 4 L. Ed. 428; Galusha v. Cobleigh, 13 N. H. 86; Stephenson v. Doe, 8 Blackf. (Ind.) 515, 46 Am. Dec. 489; Richardson's Adm'rs v. Richardson's Adm'rs, 6 Ohio, 126, 25 Am. Dec. 745; Thomason v. Odum, 23 Ala. 486; Wakefield v. Smart, 8 Ark. 489. See also Sleght v. Kane, 1 Johns. Cas. (N. Y.) 76; and to this effect is the very uniform current of authorities.

In the various statutes of limitation the term "out of the state" is now generally used. And the United States courts adopt and follow the decisions of the respective states upon the interpretation of their respective laws; Shelby v. Guy, 11 Wheat. (U. S.) 361, 6 L. Ed. 495. What constitutes absence out of the state within the

meaning of the statute is wholly undeterminable by any rule to be drawn from the decisions. It seems to be agreed that temporary absence is not enough; but what is a temporary absence is by no means agreed; Ang. Lim. § 200, n. Any place in Ireland was held to be "beyond the sea," under 21 Jac. I. c. 16; Show. 91; but this is changed by stat. 3 & 4 William IV. c. 27, which enacted that no part of the United Kingdom of Great Britain and Ireland, nor of the Channel Islands, should be deemed to be beyond seas within the meaning of the acts of limitation.

BIAS. A particular influential power which sways the judgment; the inclination or propensity of the mind towards a particular object; adopted in Willis v. State, 12 Ga. 449.

Justice requires that the judge should have no bias for or against any individual, and that his mind should be perfectly free to act as the law requires.

There is, however, one kind of bias which the courts suffer to influence them in their judgments: it is a bias favorable to a class of cases, or persons, as distinguished from an individual case or person. A few examples will explain this. A bias is felt on account of convenience; 1 Ves. Sen. 13; 3 Atk. 524. It is also felt in favor of the heir at law, as when there is an heir on one side and a mere volunteer on the other; 1 W. Bla. 256; 1 Ball & B. 309; 1 Wils. 310. On the other hand, the court leans against double portions for children; 13 Price 599; against double provisions, and double satisfactions; 3 Atk. 421; and against forfeitures; 3 Term 172.

BIBLE. See SCHOOLS; FAMILY BIBLE.

BICAMERAL SYSTEM. A term applied by Jeremy Bentham to the division of a legislative body into two chambers, as in the United States government.

BICYCLE. A two-wheeled vehicle propelled by the rider.

To ride a bicycle in the ordinary manner on a public highway for convenience, pleasure, or business is lawful. A person driving a horse thereon has no rights superior to a person riding a bicycle; Thompson v. Dodge, 58 Minn. 555, 60 N. W. 545, 28 L. R. A. 608, 49 Am. St. Rep. 503.

It has been held that an ordinance which attempts to forbid bicyclists to use that part of the street which is devoted to the use of vehicles is void as against common right; Swift v. City of Topeka, 43 Kan. 671, 23 Pac. 1075, 8 L. R. A. 772; City of Emporia v. Wagoner, 6 Kan. App. 659, 49 Pac. 701; but see Twilley v. Perkins, 77 Md. 252, 26 Atl. 286, 19 L. R. A. 632, 39 Am. St. Rep. 408.

Their proper place is the roadway rather than the sidewalk; State v. Collins, 16 R I. 371, 17 Atl. 131, 3 L. R. A. 394; and statutes and ordinances in some states declare their use upon sidewalks unlawful; Com. v. Forrest, 170 Pa. 40, 32 Atl. 652, 29 L. R. A. 365; Mercer v. Corbin, 117 Ind. 450, 20 N. E. 132, 3 L. R. A. 221, 10 Am. St. Rep. 76. It has been held that, even in the absence of an ordinance prohibiting it, one riding a bicycle upon a sidewalk takes the risk of any injury he may thereby cause to pedestrians; Fielder v. Tipton, 149 Ala. 608, 42 South. 985, 8 L. R. A. (N. S.) 1268, 123 Am. St. Rep. 69, 13 Ann. Cas. 1012; and that permission under municipal ordinance is not justification for violating a statute prohibiting riding a bicycle on a sidewalk; Millett v. City of Princeton, 167 Ind. 582, 79 N. E. 909, 10 L. R. A. (N. S.) 785. A municipal corporation, however, is not liable for injury to a person struck by a bicycle ridden by another on a sidewalk because of failure to enact or enforce an ordinance prohibiting the riding of bicycles on sidewalks; Jones v. City of Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294. Where a rider was injured by a defective sidewalk, it was held that the use of a bicycle thereon was not unlawful and that he could recover; Lee v. City of Port Huron, 128 Mich. 533, 87 N. W. 637, 55 L. R. A. 308.

Bicycles may be left standing in the street while the owner is calling at a residence or place of business, as any other vehicle may; Lacey v. Winn, 3 D. R. (Pa.) 811; Lacy v. Winn, 4 *id.* 409. Whether a bicyclist who leaves his wheel standing against the curbstone in front of a horse and wagon is negligent in failing to ascertain whether the horse was unattended and unfastened is a question of fact for the jury; Wagner v. Milk Co., 21 Misc. 62, 46 N. Y. Supp. 939.

An innkeeper is liable for damages where a bicycle belonging to a guest is stolen from the yard of the inn; 28 Ir. L. T. & S. J. 297. A municipality has power to require bicyclists to carry lights when using the streets after dark; City of Des Moines v. Keller, 116 Ia. 648, 88 N. W. 827, 57 L. R. A. 243, 93 Am. St. Rep. 268. A person who rides a bicycle without a light or signal of warning in a public thoroughfare at a time when objects can be discerned readily at a distance of but a few feet is, as a matter of law, guilty of negligence; Cook v. Fogarty, 103 Ia. 500, 72 N. W. 677, 39 L. R. A. 488.

Where a statute declares that bicycles are entitled to the same rights and subject to the same restrictions as are prescribed in the case of persons using carriages, the rider of a bicycle must turn out for a heavy vehicle; Taylor v. Traction Co., 184 Pa. 465, 40 Atl. 159, 47 L. R. A. 289, following the rule of the road established in earlier decisions; Beach v. Parmeter, 23 Pa. 196; Grier v. Sampson, 27 Pa. 183; but see *contra*,

Foote v. Produce Co., 195 Pa. 190, 45 Atl. 934, 49 L. R. A. 764, 78 Am. St. Rep. 806.

A bicyclist has a right to insist that the highway shall be maintained in a reasonably safe condition of repair; if not so maintained the corporation is answerable for injury to him or his vehicle; Geiger v. Turnpike Road, 167 Pa. 582, 31 Atl. 918, 28 L. R. A. 458. Though, on an ordinary country road, he is exposed to greater danger than a person in a vehicle drawn by horses, the commissioners of highways are not bound to any higher obligation to him, but only to maintain such road in reasonably safe condition; Sutphen v. Town of North Hempstead, 80 Hun 409, 30 N. Y. Supp. 128; Fox v. Clarke, 25 R. I. 515, 57 Atl. 305, 65 L. R. A. 234, 1 Ann. Cas. 548.

Bicycles are carriages under the tariff act; Adams, Tariff 99; so for the purpose of collecting tolls; Geiger v. Turnpike Road, 167 Pa. 582, 31 Atl. 918, 28 L. R. A. 458; and under an act forbidding furiously driving a carriage; L. R. 4 Q. B. Div. 228; and an act requiring carriages to turn to the right; State v. Collins, 16 R. I. 371, 17 Atl. 131, 3 L. R. A. 394. But in Glouchester & Salem Turnpike Co. v. Leppe, 62 N. J. L. 92, 40 Atl. 681, 41 L. R. A. 457, they were held not liable to tolls as "carriages of burthen or pleasure." They were held not to be within an act of 1786, requiring highways to be kept reasonably safe for carriages; Richardson v. Danvers, 176 Mass. 413, 57 N. E. 688, 50 L. R. A. 127, 79 Am. St. Rep. 320; to the same effect under an early act in Fox v. Clarke, 25 R. I. 515, 57 Atl. 305, 65 L. R. A. 234, 1 Ann. Cas. 548.

As to bicycles as baggage, see BAGGAGE.

BID. An offer to pay a specified price for an article about to be sold at auction.

An offer to perform a contract for work and labor or supplying materials at a specified price.

BIDDER. One who offers to pay a specified price for an article offered for sale at a public auction. Webster v. French, 11 Ill. 254; one who offers to enter into a contract for work and labor, or supplying materials at a specified price.

The bidder at an auction has a right to withdraw his bid expressly at any time before it is accepted, which acceptance is generally manifested by the fall of the hammer; Benj. Sales 50, 73; 3 Term 148; Doolin v. Ward, 6 Johns. (N. Y.) 194; Bab. Auct. 30, 42; Blossom v. R. Co., 3 Wall. (U. S.) 196, 18 L. Ed. 43; Coker v. Dawkins, 20 Fla. 153; Nebraska Loan & Trust Co. v. Hamer, 40 Neb. 293, 58 N. W. 695; or the bid may be withdrawn by implication, as by an adjournment of the sale before the article under the hammer is knocked down; Faunce v. Sedgwick, 8 Pa. 408.

The bidder is required to act in good faith, and any combination between him and others, to prevent a fair competition, would avoid the sale made to himself; 3 B. & B. 116; Martin v. Ranlett, 5 Rich. (S. C.) 541, 57 Am. Dec. 770; Barnes v. Mays, 88 Ga. 696, 16 S. E. 67; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Veazie v. Williams, 8 How. (U. S.) 134, 12 L. Ed. 1018. But there is nothing illegal in two or more persons agreeing together to purchase a property at sheriff's sale, fixing a certain price which they are willing to give, and appointing one of their number to be the bidder; Smull v. Jones, 6 W. & S. (Pa.) 122; National Fire Ins. Co. v. Loomis, 11 Paige Ch. (N. Y.) 431; Kearney v. Taylor, 15 How. (U. S.) 494, 14 L. Ed. 787; Veazie v. Williams, 3 Sto. 623, Fed. Cas. No. 16,907. See AUCTION; AUCTIONEER.

The writ of mandamus will not lie to compel city authorities to award a contract to the lowest bidder, where, in the exercise of their discretion, they have decided that the faithful performance of the contract requires judgment and skill which he does not possess, notwithstanding his ability to furnish good security; Com. v. Mitchell, 82 Pa. 343.

BIENNIALLY. In a statute this term signifies not duration of time, but a period for the happening of an event; People v. Tremain, 9 Hun (N. Y.) 573. In most of the states legislative sessions occur biennially; that is, once in two years.

BIENS (Fr. goods). Property of every description, except estates of freehold and inheritance. Sugd. Vend. 495; Co. Litt. 119 *b*; Dane, Abr.

In the French law, this term includes all kinds of property, real and personal. Biens are divided into *biens meubles*, movable property; and *biens immeubles*, immovable property. The distinction between movable and immovable property is recognized by them, and gives rise, in the civil as well as in the common law, to many important distinctions as to rights and remedies. Story, Confl. Laws, § 13, note 1.

Tous les biens means in French law "all the property, and must therefore be accepted as including both real and personal estate"; Lindsay v. Wilson, 103 Md. 252, 63 Atl. 566, 2 L. R. A. (N. S.) 408.

In Eddy v. Davis, 35 Vt. 247, it was held that *biens*, goods, includes both animate and inanimate movable property, citing Co. Litt. 118 *b*, to the effect that "*biens, bona*," are words which include all chattels, as well real as personal, and adding: "In this sense the word *goods* is used in the ancient and well known form of the solemnization of matrimony contained in the Book of Common Prayer: * * * 'With all my worldly *goods* I thee endow.'"

In *biens*, real estate is included "in the sense of the civilians and continental jurists"; Adams v. Akerlund, 168 Ill. 632, 48 N. E. 454; Sto. Confl. L. §§ 13, 146.

BIGAMUS. In Civil Law. One who had been twice married, whether both wives were

alive at the same time or not. One who had married a widow.

Used in ecclesiastical matters as a reason for denying benefit of the clergy. *Termes de la Ley.*

BIGAMY. The state of a man who has two wives, or of a woman who has two husbands, living at the same time.

When the man has more than two wives, or the woman more than two husbands, living at the same time, then the party is said to have committed polygamy; but the name of bigamy is more frequently given to this offence in legal proceedings. 1 Russell, Cr. 187.

According to the canonists, bigamy is threefold, viz.: *(vera, interpretativa et similitudinaria)* real, interpretative, and similitudinary. The first consisted in marrying two wives successively (virgins they may be), or in once marrying a widow; the second consisted, not in a repeated marriage, but in marrying e. g. *meretricem vel ab alio corruptam,* a harlot, the third arose from two marriages, indeed, but the one metaphorical or spiritual, the other carnal. This last was confined to persons initiated in sacred orders, or under the vow of continence. Deferriere's Tract. Juris Canon. tit. xxi. See also Bacon, Abr. *Marriage.*

In England this crime was punishable by the stat. 24 & 25 Vict. c. 100, § 57, which made the offence felony; but it exempted from punishment the party whose husband or wife should continue to remain absent for seven years before the second marriage without being heard from, and persons who had been legally divorced. The statutory provisions in the United States against bigamy or polygamy are in general similar to, and copied from, the statute of 1 Jac. I. c. 11, which was supplied by the act of 24 & 25 Vict. c. 100, excepting as to the punishment. The several exceptions to this statute are also nearly the same in the American statutes; but the punishment of the offence is different in many of the states; 2 Kent 69.

Bigamy and polygamy are crimes by the laws of all civilized and Christian countries, and the First Amendment to the constitution declaring that congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was never intended to be a protection against legislation for the punishment of such crimes; Davis v. Beason, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637. It is no defence that polygamy is a religious belief; U. S. v. Reynolds, 1 Utah 226; Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244.

The act of March 22, 1882, creates a new and distinct offence from bigamy or polygamy, one which is declared to be a misdemeanor (there having been and being no such declaration as to bigamy and polygamy), and the punishment is much less than for bigamy and polygamy. It is the offence of cohabiting with more than one woman; Snow v. U. S., 118 U. S. 346, 6 Sup. Ct. 1059, 30 L. Ed. 207.

It is no defence that the accused believed his former marriage was annulled, when the statute merely defines the offence as marrying again where a former spouse is living; State v. Zichfeld, 23 Nev. 304, 46 Pac. 802, 34 L. R. A. 784, 62 Am. St. Rep. 800.

If a woman, who has a husband living, marries another person, she is punishable, though her husband has voluntarily withdrawn from her and remained absent and unheard of for any term of time less than seven years, and though she honestly believes, at the time of her second marriage, that he is dead; Com. v. Mash, 7 Metc. (Mass.) 472. See a discussion of this case by Mr. Bishop, in which he dissents from its ruling, in 4 So. L. J. (N. S.) 153; Clark, Cr. L. 311. Also, 12 Am. L. Rev. 471. The same rule applies also to the marriage of the husband, where he believes the wife to be dead; Dotson v. State, 62 Ala. 141, 34 Am. Rep. 2; Davis v. Com., 13 Bush (Ky.) 318. The same rule now obtains in England, after some conflict of opinion; 14 Cox C. C. 45; but *quære,* if her belief were founded on positive evidence; Steph. Dig. Cr. Law, art. 34, n. 9. On the trial of a woman for bigamy whose first husband had been absent from her for more than seven years, the jury found that they had no evidence that at the time of her second marriage she knew that he was alive, but that she had the means of acquiring knowledge of that fact had she chosen to make use of them. It was held that upon this finding the conviction could not be supported; 1 Dearsl. & B. Cr. Cas. 98. If a man is prosecuted for bigamy, his first wife cannot be called to prove her marriage with the defendant; T. Raym. 1; Williams v. State, 44 Ala. 24; 15 Low. Can. J. 21; nor it seems even to prove that the first marriage was invalid; 4 Up. Can. Q. B. 588; but see as to this last point, 2 Whart. Cr. L. § 1709.

In a prosecution for bigamy it devolves on the state to prove a valid first marriage and that the lawful spouse of the defendant was living at the time of the second marriage; Sokel v. People, 212 Ill. 238, 72 N. E. 382; State v. Kniffen, 44 Wash. 485, 87 Pac. 837, 120 Am. St. Rep. 1009, 12 Ann. Cas. 113; McCombs v. State, 50 Tex. Cr. R. 490, 99 S. W. 1017, 9 L. R. A. (N. S.) 1036, 123 Am. St. Rep. 855, 14 Ann. Cas. 72. Belief of the death of the former wife is no defence to a prosecution for bigamy; Cornett v. Com., 134 Ky. 613, 121 S. W. 424, 21 Ann. Cas. 399. The first marriage may be proved by the admissions of the prisoner; Miles v. U. S., 103 U. S. 304, 26 L. Ed. 481. When the first marriage is proved to the satisfaction of the court, the second husband is admissible as a witness for or against the defendant; Whart. Cr. Ev. § 397; State v. Johnson, 12 Minn. 476 (Gil. 378), 93 Am. Dec. 241; 4 Up. Can. (Q. B.) 588; Miles v. U. S., 103 U. S. 304, 26 L. Ed. 481.

A conviction for bigamy has been supported although the person who solemnized the marriage had not the required authority;

Carmichael v. State, 12 Ohio St. 553, but see Bates v. State, 29 Ohio Cir. Ct. Rep. 189; 20 Harv. L. Rev. 576. Admissions of a prior marriage in a foreign country are sufficient without proof of cohabitation or other corroborating circumstances to establish the marriage; State v. Wylde, 110 N. C. 500, 15 S. E. 5.

Where the first marriage was made abroad, it must be shown to have been valid where made; People v. Lambert, 5 Mich. 349, 72 Am. Dec. 49. When the celebration of the marriage is once shown, every fact necessary to its validity will be presumed until the contrary is shown; People v. Calder, 30 Mich. 85, Fleming v. People, 27 N. Y. 329; Com. v. Kenney, 120 Mass. 387, where the marriage was performed in a foreign country; but see Weinberg v. State, 25 Wis. 370.

Reputation and cohabitation are not sufficient to establish the fact of the first marriage; Gahagan v. People, 1 Park Cr. Cas. (N. Y.) 378. If the second marriage be in a foreign state, it is not bigamy; People v. Mosher, 2 Park. Cr. Cas. (N. Y.) 195; except by statute; 36 E. L. & Eq. 614. Where the first marriage was not performed according to the statute and there is no evidence of subsequent cohabitation of the parties the second marriage is not bigamy; People v. McQuaid, 85 Mich. 123, 48 N. W. 161.

See MARRIAGE.

BILAN. A book in which bankers, merchants, and traders write a statement of all they owe and all that is due to them. A balance sheet. The term is used in Louisiana, and is derived from the French.

BILATERAL CONTRACT. A contract in which both the contracting parties are bound to fulfill obligations reciprocally towards each other. *Leç. Elém.* § 781. See CONTRACT; UNILATERAL CONTRACT; ACCEPTANCE.

BILGED. The state of a ship in which water is freely admitted through holes and breaches made in the planks of the bottom, occasioned by injuries, whether the ship's timbers are broken or not. Peele v. Ins. Co., 3 Mas. 39, Fed. Cas. No. 10,905.

BILINE. Collateral.

BILINGUIS. Using two languages.

A term formerly applied to juries half of one nation and half of another. Plowd. 2.

BILL (Lat. *billa*). A complaint in writing addressed to the chancellor, or judges of a court exercising chancery jurisdiction.

Its office in a chancery suit is the same as a declaration in an action at law, a libel in a court of admiralty, or an allegation in the spiritual courts.

A bill formerly consisted of nine parts, which contained *the address*, to the chancellor, court, or judge acting as such; *the names* of the plaintiffs and their descriptions, but the statement of the parties in this part of the bill merely is not sufficient; 2 Ves. & B. 327; *the statement* of the plaintiff's case, called *the stating part*, which should contain a distinct though general statement of every material fact to which the plaintiff means to offer evidence; 1 Brown, Ch. 94; 3 P. Wms. 276; 2 Atk. 96; 1 Vern. 483; 11 Ves. Ch. 240; 2 Hare 264; James v. McKernon, 6 Johns. (N. Y.) 565; Nesmith v. Calvert, 1 Woodb. & M. 34, Fed. Cas. No. 10,123; Story, Eq. Pl. § 265 *a*; *a general charge* of confederacy; *the allegations* of the defendant's pretences, and charges in evidence of them; *the clause* of jurisdiction and an averment that the acts complained of are contrary to equity; *a prayer* that the defendant may *answer* the interrogatories, usually called the interrogating part; *the prayer for relief; the prayer for process;* 2 Madd. 166; Wright v. Wright, 8 N. J. Eq. 143; 1 Mitf. Eq. Pl. 41.

In England and in most, if not all, of the states, including those having a separate court of chancery, the formal style of the old English bill has fallen entirely into disuse. The form used and generally provided for by rule of court, is a concise and consecutive statement of the plaintiff's case in numbered paragraphs, stripped of technical phrases and verbiage, concluding with prayers, consecutively numbered, for answer, for account, if incidental or appropriate to the relief sought, for the special relief sought, as payment of sums found due, specific performance, etc., for injunction, if required, for other relief, and for process.

By Equity Rule 25 of the United States Supreme Court, in effect February 1, 1913 (33 Sup. Ct. xxv), a bill must contain the names, citizenship and residence of the parties (with their disabilities, if any); a short and plain statement of the grounds of jurisdiction; a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence; reasons for the omission of any proper parties, if any be omitted; and a prayer for any special relief pending the suit or on final hearing, which may be stated in alternative forms.

The bill must be signed by counsel; Davis v. Davis, 19 N. J. Eq. 180; 1 Dan. Ch. Pr. *312. It need not ordinarily be sworn to; but if special relief pending suit be asked, it must be verified by plaintiff, or some one having knowledge of the facts. Equity Rule 25 of S. C. of U. S. So, it is said, where some preliminary relief is required or in bills praying for the production of documents, incident to relief at law, or for relief in equity on a lost instrument; 1 Dan. Ch. Pr. *393, and cases cited in notes; so, bills to perpetuate testimony must have an affidavit of the circumstances under which the testimony is likely to be lost; *id.* *394, n. 3; and bills of interpleader must have an affidavit

of no collusion; *id.* *394, n. 4. A bill filed by a corporation need not be under seal; Georges Creek Coal & Iron Co. v. Detmold, 1 Md. Ch. Dec. 371; City of Moundsville v. R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161; so also of a bill brought by a municipal corporation; City of Moundsville v. R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161.

A bill filed by a woman need not show whether she is married or single; Paige v. Broadfoot, 100 Ala. 610, 13 South. 426.

A bill in the United States district court must, in the prayer for a subpœna, contain the names of the defendants; otherwise it may be dismissed by the court of its own motion; City of Carlsbad v. Tibbetts, 51 Fed. 852. It is a fatal defect; Goebel v. Supply Co., 55 Fed. 825. But the new equity rules omit that provision.

"A bill is not to be construed strictly as an indictment would have been 100 years ago, but is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech. The demurrer is to be read with the same liberality." Swift & Co. v. U. S., 196 U. S. 395, 25 Sup. Ct. 279, 49 L. Ed. 518, per Holmes, J.

Bills are said to be original, not original, or in the nature of original bills.

Original bills are those which do, and which do not, pray for relief. Story, Eq. Pl. § 17.

Those which pray for relief are either *bills* praying the decree or order touching some right claimed by the party exhibiting the bill, in opposition to some right, real or supposed, claimed by the party against whom the bill is exhibited, or touching some wrong done in violation of the plaintiff's right, which is the most common kind of bill; Mitf. Eq. Pl. 34; 1 Dan. Ch. Pr. 305.

Those which do not pray for relief are either to perpetuate testimony; to examine witnesses *de bene esse;* or for discovery.

Bills not original are either supplemental; of *revivor;* or of *revivor and supplement.*

Also a *cross bill;* a *bill of review;* a *bill to impeach* a decree; *to suspend* the operation, or *avoid the decree* for subsequent matter; *to carry a decree* into effect; *or partaking* of the qualities of some one or all of them. See Mitf. Eq. Pl. 35; Story, Eq. Pl. § 18. Van Heythuysen (Equity Draftsman 444) designates these as bills in the nature of original bills, and adds to them: A *bill in the nature of a bill of revivor,* to obtain the benefit of a suit after abatement in certain cases which do not admit of a continuance of the original bill; and a *bill in the nature of a supplement bill* to obtain the benefit of a suit either after abatement in other cases which do not admit of a continuance of the original bill, or after the suit is become defective, without abatement in cases which do not admit of a supplemental bill to supply that defect.

For an account of these bills, consult the various titles.

As a Contract. An obligation; a deed, whereby the obligor acknowledges himself to owe the obligee a certain sum of money or some other thing, in which, besides the names of the parties, are to be considered the sum or thing due, the time, place, and manner of payment or delivery thereof. It may be indented or poll, and with or without a penalty. West, Symb. § 100.

This signification came to include all contracts evidenced by writing, whether specialties or parol, but is no longer in use except in phrases, such as bill payable, bill of lading.

In Legislation. A special act passed by a legislature in the exercise of a quasi judicial power. Thus, bills of attainder, bills of pains and penalties, are spoken of. See ACT; BILL OF ATTAINDER; BILL OF PAINS AND PENALTIES.

The draft of a law submitted to the consideration of a legislative body for its adoption. Southwark Bank v. Com., 26 Pa. 450. By the constitution of the United States, all bills for raising revenue must originate in the house of representatives; but the senate may propose or concur with amendments as on other bills. See MONEY BILLS.

As to money bills in Parliament, see PARLIAMENTARY ACT.

Every bill, before it becomes a law, must be approved by the president of the United States, or within ten days returned, with his objections, to the house in which it originated. Two-thirds of each house may then enact it into a law. Similar provisions are copied in the constitutions of most of the states; U. S. Const. art. 1, § 7.

In Mercantile Law. The creditor's written statement of his claim, specifying the items.

It differs from an account stated in this, that a bill is the creditor's statement; an account stated is a statement which has been assented to by both parties. See ACCOUNT STATED.

In England it has been held that a bill thus rendered is conclusive against the party making it out against an increase of charge on any of the items contained in it; and strong evidence as to items; 1 B. & P. 49. But in New York it has been held that merely presenting a bill, no payment or agreement as to the amount being shown, does not conclude the party from suing for a larger sum; Williams v. Glenny, 16 N. Y. 389.

BILL FOR A NEW TRIAL. One filed in a court of equity praying for an injunction after a judgment at law when there is any fact which renders it against conscience to execute such judgment, and of which the injured party could not avail himself in a court of law, or, if he could, was prevented by fraud or accident, unmixed with any fault or negligence of himself or his agents. Mitford, Eq. Pl. 131; 2 Story Eq. Pl. § 887.

Bills of this description are not now generally countenanced: Woodworth v. Van Buskerk, 1 Johns. Ch. (N. Y.) 432; Floyd v. Jayne, 6 Johns. Ch. (N. Y.) 479.

BILL FOR FORECLOSURE. One which is filed by a mortgagee against the mortgagor, for the purpose of having the property sold, thereby to obtain the sum secured on the premises, with interest and costs. 1 Madd. Ch. Pr. 528. See FORECLOSURE.

BILL IMPEACHING A DECREE FOR FRAUD. This must be an original bill, which may be filed without leave of court; 1 Sch. & L. 355; 1 Ves. Ch. 120; 3 Bro. C. C. 74. It must state the decree, the proceedings which led to it, and the ground on which it is impeached; Story, Eq. Pl. § 428.

The effect of the bill, if the prayer be granted, is to restore the parties to their former situation, whatever their rights. See Story, Eq. Pl. § 426; Mitf. Eq. Pl. 84.

BILL IN AID OF EXECUTION. A bill which assumes as its basis the principle of a decree and seeks merely to carry it into effect. Story, Eq. Pl. § 249. For instance, where all the facts do not distinctly appear on the record; 1 Ph. 181; or where, since the decree, the rights of the parties have become embarrassed by subsequent events, and a new decree is necessary; Adams, Eq. 415.

BILL IN NATURE OF A BILL OF REVIEW. One which is brought by a person not bound by a decree, praying that the same may be examined and reversed; as where a decree is made against a person who has no interest at all in the matter in dispute, or had not an interest sufficient to render the decree against him binding upon some person claiming after him.

Relief may be obtained against error in the decree by a bill in the nature of a bill of review. This bill in its frame resembles a bill of review except that, instead of praying that the former decree may be reviewed and reversed, it prays that the cause may be heard with respect to the new matter made the subject of the supplemental bill, at the same time that it is reheard upon the original bill, and that the plaintiff may have such relief as the nature of the case made by the supplemental bill may require; 1 Harrison, Ch. Pr. 145.

BILL IN NATURE OF A BILL OF REVIVOR. One which is filed when the death of a party, whose interest is not determined by his death, is attended with such a transmission of his interest that the title to it, as well as the person entitled, may be litigated in the court of chancery. In the case of a devise of real estate, the suit is not permitted to be continued by bill of revivor; 1 Chanc. Cas. 123, 174; 3 Chanc. Rep. 39; Mosel. 44.

In such cases, an original bill, upon which the title may be litigated, must be filed, and this bill will have so far the effect of a bill of revivor that if the title of the representative by the act of the deceased party is established, the same benefit may be had of the proceedings upon the former bill as if the suit had been continued by bill of revivor; 1 Vern. 427; 2 *id.* 548, 672; 2 Brown, P. C. 529; 1 Eq. Cas. Abr. 83; Mitf. Eq. Pl. 71.

BILL IN NATURE OF A SUPPLEMENTAL BILL. One which is filed when the interest of the plaintiff or defendant, suing or defending, wholly determines, and the same property becomes vested in another person not claiming under him. Hinde, Ch. Pr. 71.

The principal difference between this and a supplemental bill seems to be that a supplemental bill is applicable to such cases only where the same parties or the same interests remain before the court; whereas an original bill in the nature of a supplemental bill is properly applicable where new parties, with new interests arising from events occurring since the institution of the suit, are brought before the court; Cooper, Eq. Pl. 75; Story, Eq. Pl. § 345. For the exact distinction between a bill of review and a supplemental bill in the nature of a bill of review, see 2 Phill. Ch. 705; 1 Macn. & G. 397.

BILL OBLIGATORY. A bond absolute for the payment of money. It is called also a single bill, and differs from a promissory note only in having a seal; Farmers' & Mechanics' Bank v. Greiner, 2 S. & R. (Pa.) 115. See Read, Pl. 236; West, Symb.

BILL OF ADVENTURE. A writing signed by a merchant, ship-owner, or master to testify that goods shipped on board a certain vessel are at the venture of another person, he himself being answerable only for the produce.

BILL OF CERTIORARI. In Equity Practice. One praying for a writ of certiorari to remove a cause from an inferior court of equity. Cooper, Eq. 44. Such a bill must state the proceedings in the inferior court, and the incompetency of such court by suggestion of the reason why justice is not likely to be done—as distances of witnesses, lack of jurisdiction etc.,—and must pray a writ of certiorari to remove the record to the superior court. Harrison, Ch. Pr. 49; Story, Eq. Pl. § 298.

Where an equitable right is sued for in an inferior court of equity, and by means of its limited jurisdiction the defendant cannot have complete justice, the defendant may file a bill in chancery, praying a special writ, called a bill of certiorari, to remove the cause into the Court of Chancery; Mitf. & Tyler, Eq. Pl. 148.

BILL OF CONFORMITY. In Equity Practice. One filed by an executor or administrator, who finds the affairs of the deceased so much involved that he cannot safely administer the estate except under the direction of a court of chancery. This bill is filed against the creditors, generally, for the purpose of having all their claims adjusted, and procuring a final decree settling the order of payment of the assets. 1 Story, Eq. Jur. 440.

BILL OF COSTS. A statement of the items which form the total amount of the costs of a suit or action. It must be taxed by the proper officer of the court, and is demandable as a matter of right before the

payment of the costs. See COSTS; TAXING COSTS.

BILL OF CREDIT. Paper issued by the authority of a state on the faith of the state, and designed to circulate as money. Briscoe v. Bank, 11 Pet. (U. S.) 257, 9 L. Ed. 709.

Promissory notes or bills issued by a state government, exclusively, on the credit of the state, and intended to circulate through the community for its ordinary purposes as money, redeemable at a future day, and for the payment of which the faith of the state is pledged. 4 Kent 408.

The constitution of the United States provides that no state shall emit bills of credit, or make anything but gold and silver coin a legal tender in payment of debts. U. S. Const. art. 1, § 10. This prohibition, it seems, does not apply to bills issued by a bank owned by the state but having a specific capital set apart; Cooley, Const. Lim. 84; State v. Billis, 2 McCord (S. C.) 12; McFarland v. Bank, 4 Ark. 44, 37 Am. Dec. 761; Briscoe v. Bank, 11 Pet. (U. S.) 257, 7 L. Ed. 709; Darrington v. Bank, 13 How. (U. S.) 12, 14 L. Ed. 30; but see Craig v. Missouri, 4 Pet. (U. S.) 410, 7 L. Ed. 903; Linn v. Bank, 1 Scam. (Ill.) 87, 25 Am. Dec. 71; nor does it apply to notes issued by corporations or individuals which are not made legal tender; 4 Kent 408; nor to coupons on state bonds, receivable for taxes and negotiable, but not intended to circulate as money; Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185. But it does apply to a state warrant containing a direct promise to pay the bearer the amount stated on its face, and which is intended to circulate as money; Bragg v. Tuffts, 49 Ark. 554, 6 S. W. 158.

In Mercantile Law. A letter sent by an agent or other person to a merchant, desiring him to give credit to the bearer for goods or money. Comyns, Dig. *Merchant*, F, 3; 3 Burr. 1667; Pagaud v. State, 5 Smedes & M. (Miss.) 491; McFarland v. Bank, 4 Ark. 44; State v. Calvin, R. M. Charlt. (Ga.) 151.

BILL OF DEBT. An ancient term including promissory notes and bonds for the payment of money. Coinyns, Dig. *Merchant*, F, 2.

BILL OF DISCOVERY. In Equity Practice. One which prays for the discovery of facts resting within the knowledge of the person against whom the bill is exhibited, or of deeds, writings, or other things in his custody or power. Hinde, Ch. Pr. 20; Blake, Chanc. Pract. 37.

It does not seek relief in consequence of the discovery (and this constitutes its characteristic feature), though it may ask for a stay of proceedings till discovery is made; 2 Story, Eq. Jur. § 1483; Bisph. Eq. § 557; and such relief as does not require a hearing before the court may be part, it is said, of the prayer; Eden, Inj. 78; 19 Ves. Ch. 376; 4 Madd. 247; 5 id. 218; 1 Sch. & L. 316; 1 Sim. & S. 83.

It is commonly used in aid of the jurisdiction of a court of law, to enable the party who prosecutes or defends a suit at law to obtain a discovery of the facts which are material to such prosecution or defence; Hare, Discov. 119; Marsh v. Davison, 9 Paige, Ch. (N. Y.) 580; Lane v. Stebbins, 9 Paige, Ch. (N. Y.) 622; 2 Dan. Ch. Pr. 1536; Langd. Eq. Pl. § 167. A defendant in equity may obtain the same relief by a cross bill; Langd. Eq. Pl. § 128.

The plaintiff must be entitled to the discovery he seeks, and can only have a discovery of what is necessary for his own title, as of deeds he claims under, and not to pry into that of the defendant; 2 Ves. Ch. 445. See Mitf. Eq. Pl. 52; 1 Madd. Ch. Pr. 196; Hare; Wigram, Disc. It will not lie to compel a judgment debtor to disclose assets on which execution may be levied; Cargill v. Kountze, 86 Tex. 386, 22 S. W. 1015, 25 S. W. 13, 24 L. R. A. 183, 40 Am. St. Rep. 853.

There has been much controversy as to whether the defendant is entitled to discovery to aid him in preparing his answer; Langd. Eq. Pl. § 129.

The bill must show a present and vested title and interest in the plaintiff, and what that title and interest are; Pease v. Pease, 8 Metc. (Mass.) 395; 1 Vern. 105; Story, Eq. Jur. § 1490; Baxter v. Farmer, 42 N. C. 239; with reasonable certainty; 3 Ves. 343; must state a case which will constitute a just ground for a suit or a defence at law; McIntyre v. Mancius, 3 Johns. Ch. (N. Y.) 47; 1 Bro. C. C. 96; must describe the deeds and acts with reasonable certainty; 3 Ves. Ch. 343; Horton v. Moseley, 17 Ala. 794; must state that a suit is brought, or about to be, and the nature thereof must be given with reasonable certainty; 5 Madd. 18; must show that the defendant has some interest; 1 Ves. & B. 550; Wakeman v. Bailey, 3 Barb. Ch. (N. Y.) 484; and, where the right arises from privity of estate, what that privity is; Mitf. Eq. Pl.; it must show that the matter is material, and how; Many v. Iron Co., 9 Paige Ch. (N. Y.) 188; Marsh v. Davison, 9 Paige Ch. (N. Y.) 580; Lane v. Stebbins, 9 Paige Ch. (N. Y.) 622; Stacy v. Pearson, 3 Rich. Eq. (S. C.) 148; and must set forth the particulars of the discovery sought; Laight v. Morgan, 2 Caines Cas. (N. Y.) 344; 1 Y. & J. 577. Adverse examination before trial of a defendant will not be permitted for the purpose of discovering a cause of action; Britton v. MacDonald, 3 Misc. 514, 23 N. Y. Supp. 350.

A bill for discovery but waiving answer under oath is not demurrable for want of an affidavit and cannot be treated as a bill for discovery; Harrington v. Harrington, 15 R. I. 341, 5 Atl. 502; if the oath has been waived, the defendant is not excused from answering, but he loses the benefit of his own declarations, while his admissions are evidence against him; Uhlmann v. Brewing Co., 41 Fed. 369.

It will not lie in aid of a criminal prosecution, a mandamus, or suit for a penalty; 2 Ves. Ch. 398; Colton v. Ross, 2 Paige Ch. (N. Y.) 399, 22 Am. Dec. 648; Story, Eq. Jur. § 1494; 1 Pom. Eq. Jur. § 197.

BILL OF EXCEPTIONS. A written statement of objections to the decision of a court upon a point of law, made by a party to the cause, and properly certified by the judge or court who made the decision.

The object of a bill of exceptions is to put the decision objected to upon record for the information of the court having cognizance of the cause in error. They were authorized by statute Westm. 2d (13 Edw. I.), c. 31, the principles of which have been adopted in all the states, though the statute has been held to be superseded in some, by their own statutes. It provides for compelling the judges to sign such bills, and for securing the insertion of the exceptions upon the record. They may be brought by either plaintiff or defendant Abolished in England by the Judicature Act, 1873.

"The statute gives a bill of exceptions only in a trial according to the course of the common law; and there is no other means of putting evidence on a record;" Union Canal Co. v. Keiser, 19 Pa. 137, per Gibson, J.

In what cases. In the trial of civil causes, wherever the court, in making a decision, is supposed by the counsel against whom the decision is made to have mistaken the law, such counsel may tender exceptions to the ruling, and require the judge to authenticate the bill; 3 Bla. Com. 372; Sowerwein v. Jones, 7 Gill & J. (Md.) 335; Ray v. Lipscomb, 48 N. C. 185; including the receiving improper, and the rejecting proper, evidence; Samuel v. Withers, 9 Mo. 166; Com. v. Bosworth, 6 Gray (Mass.) 479; King v. Gray, 17 Tex. 62; and a failure to call the attention of the jury to material matter of evidence, after request; Ex parte Baily, 2 Cow. (N. Y.) 479; and including a refusal to charge the jury in a case proper for a charge; Fletcher v. Howard, 2 Aik. (Vt.) 115, 16 Am. Dec. 686; Emerson v. Hogg, 2 Blatchf. 1, Fed. Cas. No. 4,440; Com. v. Packard, 5 Gray (Mass.) 101; but not including a failure to charge the jury on points of law when not requested; Texas & P. R. Co. v. Volk, 151 U. S. 73, 14 Sup. Ct. 239, 38 L. Ed. 78; Law v. Merrills, 6 Wend. (N. Y.) 274; Brigham v. Wentworth, 11 Cush. (Mass.) 123; Rogers v. R. Co., 38 Me. 227; and including a refusal to order a special verdict in some cases; Syme v. Butler, 1 Call (Va.) 105. It can be taken to the action or want of proper action of the trial court, upon any proceeding in the progress of the trial from the commencement of the same to its conclusion and when properly presented can be considered by the court on writ of error; Wilson v. United States, 149 U. S. 67, 13 Sup. Ct. 765, 37 L. Ed. 650.

An exception cannot be taken to the decision of the court upon matters resting in its discretion; Cummings v. Fullam, 18 Vt. 459; Law v. Merrills, 6 Wend. (N. Y.) 277; Deloach v. Walker, 7 How. (Miss.) 164; Mosseaux v. Brigham, 19 Vt. 457; nor upon any theory announced by the court, unless such be expressed in particular language; Bogk v. Gassert, 149 U. S. 17, 13 Sup. Ct. 738, 37 L. Ed. 631; nor for the refusal of a non-suit; Ballentine v. White, 77 Pa. 20; nor where the record shows a fatal error, as want of jurisdiction; Fields v. Maloney, 78 Mo. 172; nor, generally, in cases where there is a right of appeal; Wheelock v. Moulton, 13 Vt. 430; though the practice in some states is otherwise.

In *criminal* cases, at common law, judges are not required to authenticate exceptions; 1 Chitty, C. L. 622; People v. Holbrook, 13 Johns. (N. Y.) 90; Wynhamer v. People, 20 Barb. (N. Y.) 567; Case v. Com., 1 Va. Cas. 264; Middleton v. Com., 2 Watts (Pa.) 285; U. S. v. Gibert, 2 Sumn. 19, Fed. Cas. No. 15,204; but statutory provisions have been made in several states authorizing the taking of exceptions in criminal cases; Com. v. Jones, 1 Leigh (Va.) 598; Wynhamer v. People, 20 Barb. (N. Y.) 567; Osburn v. State, 7 Ohio, 214, pt. 1; Donnelly v. State, 26 N. J. L. 463; Shannon v. People, 5 Mich. 36; Fife v. Com., 29 Pa. 429.

When to be taken. The bill must be tendered at the time the decision is made; Midberry v. Collins, 9 Johns. (N. Y.) 345; State v. Lord, 5 N. H. 336; Coburn v. Murray, 2 Greenl. (Me.) 336; Bratton v. Mitchell, 5 Watts (Pa.) 69; Hawkins' Heirs v. Lowry, 6 J. J. Marsh. (Ky.) 247; Agnew v. Campbell's Adm'rs, 17 N. J. L. 291; Lenox v. Pike, 2 Ark. 14; Bompart v. Boyer, 8 Mo. 234; Randolph v. Alsey, 8 Mo. 656; Croft v. Ferrell, 21 Ala. 351; Patterson v. Phillips, 1 How. (Miss.) 572; McKell v. Wright, 4 Ia. 504; Houston v. Jones, 4 Tex. 170; and it must, in general, be taken before the jury have delivered their verdict; Morris v. Buckley, 8 S. & R. (Pa.) 211; Lanuse v. Barker, 10 Johns. (N. Y.) 312; Kilgore v. Bonic, 9 Mo. 291; Fugate v. Muir, 9 Mo. 355; Jones v. Van Patten, 3 Ind. 107; Armstrong v. Mock, 17 Ill. 166; Martin v. State, 25 Tex. App. 557, 8 S. W. 682; State v. Brown, 100 N. C. 519, 6 S. E. 568.

In the circuit court of appeals no exceptions to rulings at a trial will be considered, unless taken at the trial, embodied in a bill of exceptions, presented to the judge at the same term or at a time allowed by rule of court made at the term, or by a standing rule of court, or by consent of the parties, and except under extraordinary circumstances must be allowed and filed with the clerk during the same term; New York & N. E. R. Co. v. Hyde, 56 Fed. 188, 5 C. C. A. 461. See Morse v. Anderson, 150 U. S. 156, 14 Sup. Ct. 43, 37 L. Ed. 1037; U. S. v. Jones, 149 U. S. 262, 13 Sup. Ct. 840, 37 L. Ed. 726.

In practice, however, the point is merely noted at the time, and the bill is afterwards settled; Bull. N. P. 315; Stewart v. Hunt-

ingdon Bank, 11 S. & R. (Pa.) 270, 14 Am. Dec. 628; State v. Lord, 5 N. H. 336; Shipherd v. White, 3 Cow. (N. Y.) 32; Ferrell v. Alder, 2 Swan (Tenn.) 77; but in general before the close of the term of court; Staggs v. State, 3 Humphr. (Tenn.) 372; Pomeroy v. Selmes, 8 Mo. 727; Sheppard v. Wilson, 6 How. (U. S.) 260, 12 L. Ed. 430; and then must appear on its face to have been signed at the trial; Walton v. U. S., 9 Wheat. (U. S.) 651, 6 L. Ed. 182; Law v. Merrills, 6 Wend. (N. Y.) 268; Byrd v. Tucker, 3 Ark. 451. A bill may be sealed by the judge after the record has been removed, and even after the expiration of his term; Bennett v. Davis, Morris (Ia.) 364. See Whitcomb v. Williams, 4 Pick. (Mass.) 228; Consaul v. Lidell, 7 Mo. 250. If presented to and signed by a judge after the close of term, and the record does not show any order or consent so to do, the supreme court will affirm the judgment: U. S. v. Jones, 149 U. S. 262, 13 Sup. Ct. 840, 37 L. Ed. 726.

Formal proceedings. The bill must be signed by the judge or a majority of the judges who tried the cause; Law v. Jackson, 8 Cow. (N. Y.) 746; Gordon v. Brownes' Ex'r, 3 Hen. & M. (Va.) 219; Kennedy v. Trustees of Covington, 4 J. J. Marsh. (Ky.) 543; Darling v. Gill, Wright (Ohio) 73; Small v. Haskins, 29 Vt. 187; Cameron v. Ward, 22 Ga. 168; upon notice of time and place when and where it is to be done; Bull. N. P. 316; Law v. Jackson, 8 Cow. (N. Y.) 746; Harris v. State, 2 Ga. 211; Smith v. Burn, *id.* 262.

Allowing and signing a bill of exceptions is a judicial act, which can only be done by the judge who sat at the trial, or by the presiding judge if more than one sat; consent of counsel will not give validity; Malony v. Adsit, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. Ed. 163. If the proper judge die before signing it, the court will grant a new trial; *id.*, citing 16 C. B. 29; 3 *id.* 796; State v. Weiskittle, 61 Md. 51. It was held in Penn. Mut. Life Ins. Co. v. Ashe, 145 Fed. 593, 76 C. C. A. 283, 7 Ann. Cas. 491, that if a circuit judge dies, pending a motion for a new trial, and there is no record from which his successor could fairly pass upon the motion and sign a bill of exceptions, his only authority under the statute is to grant a new trial. In case a judge resigns, his successor has jurisdiction, in his discretion, to sign a bill of exceptions; McIntyre v. Modern Woodmen of America, 200 Fed. 1.

Where the bill is presented for signature within the prescribed time, one will not be prejudiced by the refusal or neglect of the judge to sign it within the prescribed time; Hawes v. Pulver, 129 Ill. 123, 21 N. E. 777; Wright v. Judge of Superior Court, 41 Mich. 726, 49 N. W. 925. The bill need not be sealed; U. S. R. S. § 953; but must be signed by the judge, and the initials "A. B." are not the signature of the judge and do not constitute a sufficient authentication; Origet v. U. S., 125 U. S. 240, 8 Sup. Ct. 846, 31 L. Ed. 743; Malony v. Adsit, 175 U. S. 287, 20 Sup. Ct. 115, 44 L. Ed. 163.

Facts not appearing on the bill are not presumed; Beavers v. Smith, 11 Ala. 29; Cravins v. Gant, 4 T. B. Monr. (Ky.) 126; Courtney v. Com., 5 Rand. (Va.) 666; Snowden v. Warder, 3 Rawle (Pa.) 101; Berry v. Hale, 1 How. (Miss.) 315; Pons v. Hart, 5 Fla. 457; Dunlop v. Munroe, 7 Cra. (U. S.) 270, 3 L. Ed. 329.

Effect of. The bill when sealed is conclusive evidence as to the facts therein stated as between the parties; 3 Burr. 1765; Bingham v. Cabbot, 3 Dall. (U. S.) 38, 1 L. Ed. 491; Law v. Merrills, 6 Wend. (N. Y.) 276; in the suit to which it relates, but no further; Shotwell v. Hamblin, 23 Miss. 156, 55 Am. Dec. 83; see Baylor v. Smithers, 1 T. B. Monr. (Ky.) 6; and all objections not appearing by the bill are excluded; 8 East 280; Baring v. Shippen, 2 Binn. (Pa.) 168; Allen v. Smith, 12 N. J. L. 160; Com. v. Stephens, 14 Pick. (Mass.) 370; Dean v. Gridley, 10 Wend. (N. Y.) 254; Newsum v. Newsum, 1 Leigh (Va.) 86, 19 Am. Dec. 739; Picket v. Allen, 10 Conn. 146; Drexel v. Man, 6 W. & S. (Pa.) 343; Bone v. McGinley, 7 How. (Miss.) 671; Brown v. Brown, 7 Mo. 288; Stimpson v. R. Co., 3 How. (U. S.) 553, 11 L. Ed. 722; Lewis v. Lewis, 75 Ia. 669, 37 N. W. 166. But see Murdock v. Herndon's Ex'rs, 4 Hen. & M. (Va.) 200. In the absence of a bill of exceptions pointing out the alleged errors the appellate court will not review the instructions unless fundamentally erroneous: Howard v. State, 25 Tex. App. 602, 8 S. W. 806. An exception to conclusions of law admits the findings of fact; Neisler v. Harris, 115 Ind. 560, 18 N. E. 39.

It draws in question only the points to which the exception is taken; Van Gordon v. Jackson, 5 Johns. (N. Y.) 467; Coxe v. Field, 13 N. J. L. 216; Watson v. Watson, 10 Conn. 75; Picket v. Allen, *id.* 146; and an exception to an instruction will not be considered when the bill of exceptions does not show what the evidence tended to prove; Phœnix Mut. Life Ins. Co. v. Raddin, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644. It does not of itself operate as a stay of proceedings; Seymour v. Slocum, 18 Wend. (N. Y.) 509; Holcombe v. Roberts, 19 Ga. 588. The practice of making the entire charge to the jury a part of the bill of exceptions is strongly disapproved; Phœnix Life Ins. Co. v. Raddin, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644.

A stipulation, if it can be understood, may answer in place of a bill of exceptions; Houlehan v. Rassler, 73 Wis. 557, 41 N. W. 720.

If the judge's rulings and the grounds of objection thereto appear of record, the right of the party excepting is fully preserved without the retention of a bill; State v. Judge Twenty-Third District Court, 40 La. Ann. 809, 5 South. 467. If the judge has

certified and filed the record containing the evidence, exceptions, and charge, he is not compelled to sign a second or separate bill for the party excepting; Com. v. Arnold, 161 Pa. 320, 29 Atl. 270. Where the error is apparent upon the record it need not be presented by a bill of particulars; Moline Plow Co. v. Webb, 141 U. S. 616, 12 Sup. Ct. 100, 35 L. Ed. 879.

They have been abolished in English practice.

A curious case in McDonald v. Faulkner, 2 Ark. 472, shows what is probably the only instance of the kind,—a bill of exceptions certified by bystanders. The verdict and judgment was entered for the plaintiff September 10, 1833, September 12 the defendant moved for a new trial, and on the 16th the motion was overruled and the defendant accepted and obtained leave to prepare a bill of exceptions. Under date of the 21st, the record states: "The defendant filed his bill of exceptions, whereupon the plaintiff filed his bill of exceptions certified by the bystanders." To the latter the judge appended a statement that he declined signing it, "not that it does not contain the facts of the case, but because it purports to be an exception to the opinion of the court in signing a bill of exceptions taken to a former decision of the court in signing a bill of exceptions in the progress of the cause." Thereupon the plaintiff's bill of exceptions was signed and certified to be true by five bystanders. The judgment was reversed and a new trial ordered, but no mention is made of plaintiff's bill of exceptions on petition for rehearing. In an opinion denying it, the judge refers to the "plaintiff's bill of exceptions taken and signed by bystanders on the 25th of September," and holds him estopped by the statements in it from denying the accuracy of defendant's bill of exceptions.

BILL OF EXCHANGE.

A written order from one person to another, directing the person to whom it is addressed to pay to a third person a certain sum of money therein named. Byles, Bills 1.

By the Negotiable Instrument Act, a bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it requiring the addressee to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. It may be either an inland bill or a foreign bill, and may be drawn in sets. The act defines a check as a bill of exchange drawn on a bank and payable on demand. See NEGOTIABLE INSTRUMENTS, for the states, etc., in which it has been enacted.

A bill of exchange may be negotiable or non-negotiable. If negotiable, it may be transferred either before or after acceptance.

The person making the bill, called the drawer, is said to draw upon the person to whom it is directed, and undertakes impliedly to pay the amount with certain costs if he refuse to comply with the command. The drawee is not liable on the bill till after acceptance, and then becomes liable as principal to the extent of the terms of the acceptance; while the drawer becomes liable to the payee and indorsees conditionally upon the failure of the acceptor to pay. The liabilities between indorsers and indorsees are subject to the same rules as those of indorsers and indorsees on promissory notes. Regularly, the drawee is the person to become acceptor; but other parties may accept, under special circumstances.

A *foreign* bill of exchange is one of which the drawer and drawee are residents of countries foreign to each other. In this respect the states of the United States are held foreign as to each other; Phœnix Bank v. Hussey, 12 Pick. (Mass.) 483; Wells v. Whitehead, 15 Wend. (N. Y.) 527; Hopkins v. Clay, 3 A. K. Marsh. (Ky.) 488; Bank of Cape Fear v. Stinemetz, 1 Hill (S. C.) 44; Brown v. Ferguson, 4 Leigh (Va.) 37, 24 Am. Dec. 707; Green v. Jackson, 15 Me. 136; Donegan v. Wood, 49 Ala. 242, 20 Am. Rep. 275; Todd v. Neal's Adm'r, 49 Ala. 266; Rice v. Hagan, 8 Dana (Ky.) 133; Carter v. Burley, 9 N. H. 558; Armstrong v. Bank, 133 U. S. 433, 10 Sup. Ct. 450, 33 L. Ed. 747; Knickerbocker Life Ins. Co. v. Pendleton, 112 U. S. 696, 5 Sup. Ct. 314, 28 L. Ed. 866; Ticonic Bank v. Stackpole, 41 Me. 302; 1 Dan. Neg. Inst. § 9. But see *contra*, Miller v. Hackley, 5 Johns. (N. Y.) 384, 4 Am. Dec. 372, and see Grimshaw v. Bender, 6 Mass. 162.

An *inland* bill is one of which the drawer and drawee are residents of the same state or country; Ragsdale v. Franklin, 25 Miss. 143. As to whether a bill is considered as foreign or inland when made partly in one place and partly in another, see 5 Taunt. 529; 8 *id.* 679; 1 Maule & S. 87. Defined by statute 19 & 20 Vict. c. 97, § 7.

The distinction between inland and foreign bills becomes important with reference to the question whether protest and notice are to be given in case of non-acceptance. See 3 Kent 95; PROTEST.

The *parties* to a bill of exchange are the drawer, the drawee, the acceptor, and the payee. Other persons connected with a bill in case of a transfer as parties to the transfer are the indorser, indorsee, and holder. See those titles. It sometimes happens that one or more of the apparent parties to a bill are fictitious persons. The rights of a *bonâ fide* holder are not thereby prejudiced where the payee and indorser are fictitious; 2 H. Bla. 78; 1 Campb. 130; Blodgett v. Jackson, 40 N. H. 26; Benj. Chal. Dig. § 85; or even where the drawer and payee are both fictitious; 10 B. & C. 468; and all the various parties need not be different persons; Wildes v. Savage, 1 Sto. 22, Fed. Cas. No. 17,653. The qualifications of parties who are to be made liable by the making or transfer of bills are the same as in case of other contracts. See PARTIES; FICTITIOUS PAYEE.

The bill must be *written*; 1 Pardessus, 344; 2 Stra. 955. See Goldman v. Blum, 58 Tex. 636.

It should be properly *dated*, both as to place and time of making; Beawes, *Lex Merc.* pl. 3; 2 Pardessus, n. 333; 1 B. & C. 398. But it is not essential to the validity of a bill; 1 Dan. Neg. Inst. § 82; Drake v. Rogers, 32 Me. 524; Coon v. Swan, 30 Vt. 11. If not dated, it will be considered as dated at the time it was made; Seldonridge v. Connable, 32 Ind. 375; Cowing v. Altman, 71 N. Y. 441, 27 Am. Rep. 70; First Nat.

Bank of St. Charles v. Hunt, 25 Mo. App. 174. Bills are sometimes ante or post-dated for convenience; Union Bethel African M. E. Church v. Sheriff, 33 La. Ann. 1461; Frazier v. Printing & Bookbinding Co., 24 Hun (N. Y.) 281.

The *superscription* of the sum for which the bill is payable will aid an omission in the bill, but is not indispensable; Smith v. Smith, 1 R. I. 398, 53 Am. Dec. 652; 10 Q. B. Div. 30.

The *time* of payment should be expressed; but if no time is mentioned it is considered as payable on demand; 2 B & C. 157; Porter v. Porter, 51 Me 376; First Nat. Bank of St. Charles v. Hunt, 25 Mo. App. 174; Converse v. Johnson, 146 Mass. 22, 14 N. E. 925; Hall v. Toby, 110 Pa. 318, 1 Atl. 369; Roswell Mfg. Co. v. Hudson, Watson & Co., 72 Ga. 25; L. R. 3 Q. B. 573. In Massachusetts it must be payable at a definite time or at such a time as can be made definite upon election of the holder; Stults v. Silva, 119 Mass. 137; Mahoney v. Fitzpatrick, 133 Mass. 151, 43 Am. Rep. 502.

The *place* of payment may be prescribed by the drawer; 8 C. B. 433; or by the acceptor on his acceptance; 3 Jur. 34; Green v. Goings, 7 Barb. (N. Y.) 652; but is not as a general practice, in which last case the bill is considered as payable and to be presented at the usual place of business of the drawee, King v. Holmes, 11 Pa. 456, at his residence, where it was made, or to him personally anywhere; 10 B. & C. 4; M. & M. 381; 4 C. & P. 35; Scott v. Perlee, 39 Ohio St. 67, 48 Am. Rep. 421.

Such an *order* or request to pay must be made as demands a right, and not asks a favor; M. & M. 171; and it must be absolute, and not contingent; 2 B. & Ald. 417; Woolley v. Sergeant, 8 N. J. L. 262, 14 Am. Dec. 419; Smurr v. Forman, 1 Ohio, 272; Van Vacter v. Flack, 1 Smedes & M. (Miss.) 393, 40 Am. Dec. 100; Henry v. Hazen, 5 Ark. 401; Kinney v. Lee, 10 Tex. 155. Mere civility in the terms does not alter the legal effect of the instrument.

The word *pay* is not necessary; *deliver* is equally operative; 8 Mod. 364; as well as other words; 9 C. B. 570; but they must be words requiring *payment;* 10 Ad. & E. 98; *"il vous plaira de payer"* is, in France, the proper language of a bill; Pailliet, Man. 841.

Each of the duplicate or triplicate (as the case may be) bills of a set of foreign exchange contains a provision that the particular bill is to be paid only if the others remain at the time unpaid; see 2 Pardessus, n. 342; and all the parts of the set constitute but one bill; Ingraham v. Gibbs, 2 Dall. (U. S.) 134, 1 L. Ed. 320.

A bill should *designate the payee*; 26 E. L. & Eq. 404; Lyon v. Marshall, 11 Barb. (N. Y.) 241; Moody v. Threlkeld, 13 Ga. 55; Tittle v. Thomas, 30 Miss. 122, 64 Am. Dec. 154; Adams v. King, 16 Ill. 169, 61 Am. Dec. 64; and see Wheeler v. Webster, 1 E. D. Smith (N. Y.) 1; Moore v. Anderson, 8 Ind. 18; but when no payee is designated, the holder by indorsement may fill the blank with his own name; 2 Maule & S. 90; and if payable to the bearer it is sufficient; 3 Burr. 1526.

To make it negotiable, it must be payable to the order of the payee or to the bearer, or must contain other equivalent and operative words of transfer; 9 B & C. 409; Gerard v. La Coste, 1 Dall. (U. S.) 194, 1 L. Ed. 96; Downing v. Backenstoes, 3 Caines (N. Y.) 137; Fernon v. Farmer's Adm'r, 1 Harr. (Del.) 32; Hackney v. Jones, 3 Humphr. (Tenn.) 612; Reed v. Murphy, 1 Ga. 236; Smurr v. Forman, 1 Ohio, 272; Raymond v. Middleton, 29 Pa. 530, otherwise in some states of the United States by statute, and in Scotland; Maxwell v. Goodrum, 10 B. Monr. (Ky.) 286. But in England and the United States negotiability is not essential to the validity of a bill; 3 Kent 78; Big Bills & N. 12; 6 Term 123; President, etc., of Goshen & Minisink Turnpike Road v. Hurtin, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273; Duncan v. Sav. Inst., 10 Gill & J. (Md.) 299, Coursin v. Ledlie's Adm'rs, 31 Pa. 506; Michigan Bank v. Eldred, 9 Wall. (U. S.) 544, 19 L. Ed 763, though it is otherwise in France; Code de Comm. art. 110, 188; 2 Pardessus, n. 339. The fact that the bill provides that it shall bear interest from date in case of failure to pay at maturity, will not affect its negotiability as the rule that it must be for a sum certain applies to the principal and not interest; Christian County Bank v. Goode, 44 Mo. App. 129; nor a provision that a higher rate of interest shall be paid after default; Merrill v. Hurley, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859; nor will its negotiability be affected by a stipulation in it to pay a reasonable attorney's fee; Bank of Commerce of Owensboro v. Fuqua, 11 Mont 285, 28 Pac. 291, 14 L. R. A. 588, 28 Am. St. Rep. 461; Wolff v. Dorsey, 38 Ill. App. 305; Stark v. Olsen, 44 Neb. 646, 63 N. W. 37; Benn v. Kutzschau, 24 Or. 28, 32 Pac. 763; *contra*, Clark v. Barnes, 58 Mo. App. 667; First Nat. Bank of Decorah v. Laughlin, 4 N. D. 391, 61 N. W. 473; Woods v. North, 84 Pa. 407, 24 Am. Rep. 201.

The *sum* for which the bill is drawn should be written in full in the body of the instrument, as the words in the body govern in case of doubt; 5 Bingh. N. C. 425; Mears v. Graham, 8 Blackf. (Ind.) 144; Smith v. Smith, 1 R. I. 398, 53 Am. Dec. 652; the marginal figures are not a part of the contract, but a mere memorandum; Smith v. Smith, 1 R. I. 398, 53 Am. Dec. 652; Com. v. Bank, 98 Mass. 12, 93 Am. Dec. 126.

The amount must be fixed and certain, and not contingent; 2 Salk. 375; Philadelphia Bank v. Newkirk, 2 Miles (Pa.) 442; Story v. Lamb, 52 Mich. 525, 18 N. W. 248. It must be payable in money, and not in mer-

chandise; Jerome v. Whitney, 7 Johns. (N. Y.) 321; Thomas v. Roosa, *id.* 461; Peay v. Pickett, 1 N. & Mc. (S. C.) 254; Gwinn v. Roberts, 3 Ark. 72; Strader v. Batchelor, 8 B. Monr. (Ky.) 168; Hosstatter v. Wilson, 36 Barb. (N. Y.) 307; and is not negotiable if payable in bank bills or in *currency* or other substitutes for legal money of similar denominations; Hasbrook v. Palmer, 2 McLean, 10, Fed. Cas. No. 6,188; Collins v. Lincoln, 11 Vt. 268; Kirkpatrick v. McCullough, 3 Humphr. (Tenn.) 171, 39 Am. Dec. 158; Hawkins v. Watkins, 5 Ark. 481; McCormick v. Trotter, 10 S. & R. (Pa.) 94; Irvine v. Lowry, 14 Pet. (U. S.) 293, 10 L. Ed. 462; Bank of Mobile v. Brown, 42 Ala. 108; held otherwise in Swetland v. Creigh, 15 Ohio, 118; Besancon v. Shirley, 9 Smedes & M. (Miss.) 457; Cockrill v. Kirkpatrick, 9 Mo. 697; Wilburn v. Greer, 6 Ark. 255; Ogden v. Slade, 1 Tex. 13; Fleming v. Nall, *id.* 246; Chevallier v. Buford, *id.* 503; Lacy v. Holbrook, 4 Ala. 88; Carter v. Penn, *id.* 140; Bull v. Bank, 123 U. S. 112, 8 Sup. Ct. 62, 31 L. Ed. 97; Laird v. State, 61 Md. 309.

It is not necessary, however, that the money should be current in the place of payment, or where the bill is drawn; it may be in the money of any country whatever; Black v. Ward, 27 Mich. 193, 15 Am. Rep. 162; Thompson v. Sloan, 23 Wend. (N. Y.) 71, 35 Am. Dec. 546; King v. Hamilton, 12 Fed. 478; 1 Dan. Neg. Inst. § 58. But it is necessary that the instrument should express the specific denomination of money when payable in the money of a foreign country, in order that the courts may be able to ascertain its equivalent value; otherwise it is not negotiable; 1 Dan. Neg. Inst. § 58. As to bills payable in Confederate money, see Thorington v. Smith, 8 Wall. (U. S.) 12, 19 L. Ed. 361; The Confederate Note Case, 19 Wall. (U. S.) 548, 22 L. Ed. 196; Stewart v. Salamon, 94 U. S. 434, 24 L. Ed. 275; and that title.

"Value received" is often inserted, but is not of any use in a negotiable bill; Hubble v. Fogartie, 3 Rich. (S. C.) 413, 45 Am. Dec. 775; Mandeville v. Welch, 5 Wheat. (U. S.) 277, 5 L. Ed. 87; Lines v. Smith, 4 Fla. 47; Coursin v. Ledlie's Adm'rs, 31 Pa. 506; 3 M. & S. 351.

A *direction* to place to the account of some one, drawer, drawee, or third person, is often added, but is unnecessary; Comyns, Dig. *Merchant*, F, 5; 1 B. & C. 398.

As per advice, inserted in a bill, deprives the drawee of authority to pay the bill until advised; Chitty, Bills 162.

It should be *subscribed* by the drawer, though it is sufficient if his name appear in the body of the instrument; 2 Ld. Raym. 1376; Claussen v. La Franz, 1 Ia. 231; May v. Miller, 27 Ala. 515; and should be *addressed* to the drawee by the Christian name and surname, or by the full style of the firm; 2 Pardessus, n. 335; Beawes, *Lex Merc.* pl. 8; Chitty, Bills 186.

Provision may be made by the drawer, and inserted as a part of the bill, for applying to another person, for a return without protest, or for limiting the damages for re-exchange, expense, etc., in case of the failure or refusal of the drawee to accept or to pay; Chitty, Bills 188.

A *bona fide* holder of a bill negotiated before maturity merely as a security for an antecedent debt is not affected, without notice, by equities or defences between the original parties; Brooklyn City & N. R. Co. v. Bank, 102 U. S. 14, 26 L. Ed. 61.

A certificate, made and payable in a state out of a particular fund, and purporting to be the obligation of a municipal corporation, is not governed by the law merchant, and is open in the hands of subsequent holders to the same defences as existed against the original payee; Indiana v. Glover, 155 U. S. 513, 15 Sup. Ct. 186, 39 L. Ed. 243.

See INDORSEMENT; INDORSER; INDORSEE; ACCEPTANCE; PROTEST; DAMAGES; PROMISSORY NOTE; NEGOTIABLE INSTRUMENT; FOREIGN BILL OF EXCHANGE.

BILL OF GROSS ADVENTURE. In French Maritime Law. Any written instrument which contains a contract of bottomry, respondentia, or any other kind of maritime loan. There is no corresponding English term. Hall, Marit. Loans 182. See BOTTOMRY; RESPONDENTIA.

BILL OF HEALTH. A certificate, properly authenticated, that a certain ship or vessel therein named comes from a place where no contagious distempers prevail, and that none of the crew at the time of her departure were infected with any such distemper.

It is generally found on board ships coming from the Levant, or from the coasts of Barbary where the plague prevails; 1 Marsh. Ins. 408; and is necessary whenever a ship sails from a suspected port, or where it is required at the port of destination; Holt 167; 1 Bell, Comm. 5th ed. 553.

BILL OF INDICTMENT. A written accusation of one or more persons of a crime or misdemeanor, lawfully presented to a grand jury. If twelve or more members of the jury are satisfied that the accused ought to be tried, the return is made, A true bill; but when no sufficient ground is shown for putting the accused on trial, a return is made, Not a true bill, or, Not found; formerly, *Ignoramus*, and this phrase is still sometimes used. See INDICTMENT; TRUE BILL.

BILL OF INFORMATION. One which is instituted by the attorney-general or other proper officer in behalf of the state or of those whose rights are the objects of its care and protection. It is usually termed simply an information, or information in equity.

If the suit immediately concerns the right

of the state, the information is generally exhibited without a relator. If it does not immediately concern those rights, it is conducted at the instance and under the immediate direction of some person whose name is inserted in the information and is termed the relator. In case a relator is concerned, the officers of the state are not further concerned than as they are instructed and advised by those whose rights the state is called upon to protect and establish. In such case the attorney-general simply determines *in limine* whether the suit is one proper to be instituted in his name, and the subsequent proceedings are usually conducted by the solicitor of the relator at the cost of the latter. See Harrison, Ch. Pr. 151; Mitf. Eq. Pl. (by Tyler) 196; INFORMATION.

BILL OF INTERPLEADER. One in which the person exhibiting it claims no right in opposition to the rights claimed by the persons against whom the bill is exhibited, but prays the decree of the court touching the rights of those persons, for the safety of the person exhibiting the bill. Cooper, Eq. Plead. 43; Mitf. Eq. Pl. 32; Winfield v. Bacon, 24 Barb. (N. Y.) 154; Adams v. Dixon, 19 Ga. 513, 65 Am. Dec. 608.

An interpleader is a proceeding in equity for the relief of a party against whom there are, at law, separate and conflicting claims, whether in suit or not, for the same debt, duty, or thing, and where a recovery by one of the claimants will not, at law, protect the party against a recovery for the same debt or duty by the other claimant. It is out of this latter circumstance that the equity to relief arises; *per* Bates, Ch., Hastings v Cropper, 3 Del. Ch. 165; Badeau v. Rogers, 2 Paige, Ch. (N. Y.) 209; and where the facts present a proper case for an interpleader, equity will not entertain a bill simply to restrain one of the parties claiming the fund in controversy from prosecuting his claims until the other party has failed to establish his claim; Hastings v. Cropper, 3 Del. Ch. 165; but leave will be granted to amend by making it a bill of interpleader by adding proper parties, bringing the fund into court, and filing the affidavit denying collusion; *id.*

A bill exhibited by a third person, who, not knowing to whom he ought of right to render a debt or duty or pay his rent, fears he may be hurt by some of the claimants, and therefore prays that they may interplead, so that the court may judge to whom the thing belongs, and he be thereby safe on the payment; Pract. Reg. 78; Bedell v. Hoffman, 2 Paige Ch. (N. Y.) 199; City Bank v. Bangs, *id.* 570; Cameron v. The Marcellus, 48 N. C. 83; Hall v. Craig, 125 Ind. 523, 25 N. E. 538; Glaser v. Priest, 29 Mo. App. 1.

A bill of the former character may, in general, be brought by one who has in his possession property to which two or more lay claim; Strange v. Bell, 11 Ga. 103; Consociated Presbyterian Soc. of Green's Farm v. Staples, 23 Conn. 544; Herndon v. Higgs, 15 Ark. 389; Freeland v. Wilson, 18 Mo. 380; Heusner v. Ins. Co., 47 Mo. App. 336.

Such a bill must contain the plaintiff's statement of his rights, negativing any interest in the thing in controversy; 3 Story, Eq. Jur. § 821; but showing a clear title to maintain the bill; 3 Madd. 277; and also the claims of the opposing parties; Mohawk & H. R. Co. v. Clute, 4 Paige Ch. (N. Y.) 384; 7 Hare 57; Robards v. Clayton, 49 Mo. App. 608; that the adverse title of the claimants is derived from a common source is sufficient; Crane v. McDonald, 118 N. Y. 648, 23 N. E. 991; must have annexed to it the affidavit of the plaintiff that there is no collusion between him and either of the parties; Farley v. Blood, 30 N. H. 354; must contain an offer to bring money into court if any is due, the bill being demurrable, if there is failure, unless it is offered or else actually produced; Mitf. Eq. Pl. 49; Barton, Suit in Eq. 47, n. 1; must show that there are persons in being capable of interpleading and setting up opposing claims; 18 Ves. Ch. 377; it is also demurrable if upon its face it shows that one of the defendants has no claim to the debt due from the complainant; Pusey & Jones Co. v. Miller, 61 Fed. 401.

These proceedings should not be brought except when there is no other way for one to protect himself, and in order to maintain the action, it is necessary to show that the plaintiff has not acted in a partisan manner as between the claimants; Hinckley v. Pfister, 83 Wis. 64, 53 N. W. 21.

It should pray that the defendants set forth their several titles, and interplead, settle, and adjust their demands between themselves. It also generally prays an injunction to restrain the proceedings of the claimants, or either of them, at law; and in this case the bill should offer to bring the money into court; and the court will not, in general, act upon this part of the prayer unless the money be actually brought into court; Mohawk & H. R. Co. v. Clute, 4 Paige, Ch. (N. Y.) 384; Richards v. Salter, 6 Johns. Ch. (N. Y.) 445.

In the absence of statutes, such a bill does not ordinarily lie, except where there is privity of some sort between all the parties, and where the claim by all is of the same nature and character; 3 Beav. 579; Story, Eq. Jur. § 807; Lincoln v. R. Co., 24 Vt. 639; White Water Valley Canal Co. v. Comegys, 2 Ind. 469. The granting of an order of interpleader is within the judicial discretion; Taylor v. Satterthwaite, 2 Misc. 441, 22 N. Y. Supp. 187.

The decree for interpleader may be obtained after a hearing in the usual manner; 4 Bro. Ch. 297; City Bank v. Bangs, 2 Paige, Ch. (N. Y.) 570; or without a hearing, if the

defendants do not deny the statements of the bill; 16 Ves. Ch. 203; Story, Eq. Pl. § 297 *a*.

A bill in the nature of a bill of interpleader will lie in many cases by a party in interest to ascertain and establish his own rights, where there are other conflicting rights between third persons; Story, Eq. Pl. § 297 *b*; Bedell v. Hoffman, 2 Paige, Ch. (N. Y.) 199; Cameron v. The Marcellus, 48 N. C. 83.

In a bill of interpleader the complainant being indifferent between the parties, the duty of his solicitor is ended as such, when the bill is filed, and he has no interest in the decree except that the bill shall be adjudged to be properly filed. The solicitor may then appear for one of the parties, but only by leave of the court, which will be granted only upon consideration of the special circumstances of the facts of the case and the conclusion that the case is a proper one for granting the leave; Morrow v. Robinson, 4 Del. Ch. 534, note; Webster v. McDaniel, 2 *id.* 297; and see Houghton v. Kendall, 7 Allen (Mass.) 72. See INTERPLEADER.

A bill of interpleader is said in 22 Harv. L. R. 294, to lie on behalf of one who is in the position of an innocent stakeholder who is ready to do his duty, in order to free him from subjection to two suits and the possibility of a double liability. The requisites of the suit are, roughly speaking, ten in number: 1. The adverse claims must be mutually exclusive; National Ins. Co. v. Pingrey, 141 Mass. 411, 6 N. E. 93; Bassett v. Leslie, 123 N. Y. 396, 25 N. E. 386. It would be manifestly unjust to make the claimants fight each other when the validity of one claim is not dependent upon the invalidity of the other; there can then be no dispute between the claimants. For this reason, if one of the claimants gets a verdict or judgment the bill no longer lies; see Maxwell v. Leichtman, 72 N. J. Eq. 780, 65 Atl. 1007. 2. The complainant must be willing to bring into court or surrender all that is claimed by either defendant; M. & H. R. Co. v. Clute, 4 Paige (N. Y.) 384. If he has a counterclaim against either claimant he cannot have it determined in such a proceeding. 3. The position of the stakeholder must be such a precarious one that he really needs the aid of equity to prevent injustice. Thus, one who is in possession of land claiming no title need only move out. So also the bill does not lie if all the claims would be settled in one suit at law; Fitts v. Shaw, 22 R. I. 17, 46 Atl. 42; or if one of the claims is clearly invalid; M. & H. R. Co. v. Clute, *supra;* or both are illegal; Applegarth v. Colley, 2 Dowl. N. S. 223. 4. There must be no collusion between the complainant and either claimant; Murietta v. So. Amer. Co., 62 L. J. Q. B. N. S. 396. The bill lies to help only a disinterested stakeholder. 5. The stakeholder must not have been placed in his precarious position through his own fault; Horner v. Willcocks, 1 Ir. Jur. O. S. 136; and he must not be guilty of laches in pursuing his remedy. 6. If equity is unable to enjoin the prosecution of one of the claims at law, it can give no relief. Thus a state court declined to entertain a bill because it could not enjoin a federal court from enforcing its judgment; Smith v. Reed, 74 N. J. Eq. 776, 70 Atl. 961. These six requisites are based on sound principles of justice. The following, although supported by authority, are extremely technical and will be found upon examination to have a doubtful equitable basis. 7. It is often required that all the claims be derived from a common source; First Nat. Bank v. Bininger, 26 N. J. Eq. 345. This is a survival of the narrow view of interpleader held by the common law. The requisite of privity is foreign to the purpose of the bill; for the position of a stakeholder is equally precarious irrespective of the sources from which the defendants derive their claims. The refusal to allow an interpleader therefore seems unsound; see Crane v. McDonald, 118 N. Y. 648, 23 N. E. 991; 17 Harv. L. Rev. 489. 8. It is sometimes required that the stakeholder have no claim or interest in the stake; see 4 Pomeroy, Eq. Jurisp. § 1325; Maclennan, Interpleader 64. If the amount of the stakeholder's charge is disputed, the bill will not lie; Lawson v. Warehouse Co., 70 Hun 281, 24 N. Y. Supp. 281; but it is otherwise if the claim is available against, and admitted by, both defendants; Gibson v. Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592. The result should be the same where the lien is available against only one of the defendants, if he does not dispute it. Hence this requirement is really covered by the second class above. 9. The stakeholder must have incurred no collateral or independent liability to either claimant; Bartlett v. His Imperial Majesty, 23 Fed. 257; Crawshay v. Thornton, 2 My. & C. 1; *contra*, Attenborough v. London, etc., Co., 3 C. P. D. 450 (statutory); since, it is argued, one of the claimants may be subjected to two suits to enforce his rights. On the contrary (and this seems to be the better and more modern view) the bill will settle once and for all the ownership of the *res;* and it may settle the whole controversy; see In re Mersey Docks, [1890] 1 Q. B. 546. The fact of the collateral liability is immaterial and relief should therefore be granted. 10. Lastly, it is insisted that the same thing, debt, or duty, must be claimed by all the defendants; Slaney v. Sidney, 14 M. & W. 800. See 4 Pomeroy, Eq. Jurisp. § 1323. This however seems unnecessarily refined in its technicality. So long as the claims are mutually exclusive, and the stakeholder is willing to bring into court the full amount claimed by either, it would seem that he should be entitled to maintain his bill. And in a few cases it has so been held; Thomson v. Ebbets, Hopk. Ch. (N. Y.) 272.

In Hayward & Clark v. McDonald, 192 Fed. 890, 113 C. C. A. 368, it was said that the true limits of equity jurisdiction in bills of interpleader is not precisely settled; but that a strict bill is one in which the complainant claims no relief against either defendant. There are, however, innumerable cases of bills in the nature of bills of interpleader in which the complainant may be entitled to relief by such bill; among these is a case where the complainant has property in which others have conflicting claims, but in which the complainant may have equitable rights himself, citing Van Winkle v. Owen, 54 N. J. Eq. 253, 34 Atl. 400; Stephenson & Coon v. Burdett, 56 W. Va. 109, 48 S. E. 846, 10 L. R. A. (N. S.) 748; Groves v. Sentell, 153 U. S. 465, 14 Sup. Ct. 898, 38 L. Ed. 785.

BILL OF LADING. The written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight.

A written acknowledgment of the receipt of certain goods and an agreement for a consideration to transport and to deliver the same at a specified place to a person therein named or his order. See Porter, Bills of Lading. See also The Delaware, 14 Wall. (U. S.) 596, 20 L. Ed. 779.

It is at once a receipt and a contract; St. Louis, I. M. & S. R. Co. v. Knight, 122 U. S. 79, 7 Sup. Ct. 1132, 30 L. Ed. 1077; Schouler, Pers. Prop. 408; but it has been said that rather than to consider it as a mere receipt, it seems better to regard it as analogous to a negotiable instrument; 19 Harv. L. Rev. 391. A bill of lading ordinarily represents title to the goods covered by it; Peters v. Elliott, 78 Ill. 321; and this is said to be the prevalent American view; 12 Harv. L. Rev. 436.

A memorandum or acknowledgment in writing, signed by the captain or master of a ship or other vessel, that he has received in good order on board of his ship or vessel, therein named, at the place therein mentioned, certain goods therein specified, which he promises to deliver in like good order (the dangers of the sea excepted) at the place therein appointed for the delivery of the same, to the consignee therein named, or to his assigns, he or they paying freight for the same; 1 Term 745; Abb. Sh. 216; Code de Comm. art. 281.

A similar acknowledgment made by a carrier by land.

A through bill of lading is one where a railroad contracts to transport over its own line for a certain distance carloads of merchandise or stock, there to deliver the same to its connecting lines to be transported to the place of destination at a fixed rate per car-load for the whole distance; Gulf, C. & S. F. R. Co. v. Vaughn, 4 Willson, Ct. App. Tex. § 182, 16 S. W. 775.

It should contain the name of the shipper or consignor; the name of the consignee; the names of the vessel and her master; the places of shipment and destination; the price of the freight, and, in the margin, the marks and numbers of the things shipped. Jacobsen, Sea Laws.

The general rule that contracts are governed as to nature, validity, and interpretation by the *lex loci contractus*, unless it clearly appears that the parties had some other law in view, is applicable to a bill of lading; Brockway v. Exp. Co., 171 Mass. 158, 50 N. E. 626; Frasier v. R., 73 S. C. 140, 52 S. E. 964; Illinois Cent. R. Co. v. Beebe, 174 Ill. 13, 50 N. E. 1019, 42 L. R. A. 210, 66 Am. St. Rep. 253; Herf & Frerichs Chemical Co. v. Lackawanna Line, 100 Mo. App. 164, 73 S. W. 346; but where one provides for the delivery of goods in a state it has been held to be a contract of that state although made in another state; Pennsylvania Co. v. Yoder, 25 Ohio Cir. Ct. 32; C., C., C. & St. L. Ry. Co. v. Simon, 15 *id.* 123. Any reasonable doubt as to the construction of the printed portion should be resolved against the carrier; Baltimore & O. R. Co. v. Doyle, 142 Fed. 669, 74 C. C. A. 245.

Writing is unnecessary and an oral contract satisfactorily proved, if there is no fraud or imposition, is equally obligatory; Missouri K. & T. Ry. Co. v. Patrick, 144 Fed. 632, 75 C. C. A. 434. A promise to carry on the faith of which the shipper buys goods is a contract of carriage; Bigelow v. Ry. Co., 104 Wis. 109, 80 N. W. 95; Meloche v. Ry. Co., 116 Mich. 69, 74 N. W. 301; and so is the receipt of goods and undertaking to deliver; Indiana, I. & I. R. Co. v. Mfg. Co., 118 Ill. App. 652; but a mere promise to ship is not sufficient; Southern Ry. Co. v. Wilcox, 99 Va. 394, 39 S. E. 144. It was held in effect that the legal liability of a common carrier is part of the contract as if written in it; Evansville & T. H. R. Co. v. McKinney, 34 Ind. App. 402, 73 N. E. 148; and so is the obligation to ship within a reasonable time; Pennsylvania Co. v. Clark, 2 Ind. App. 146, 27 N. E. 586, 28 N. E. 208.

Ordinarily parol evidence is not admissible in the absence of fraud or mistake to vary a bill of lading; Inman & Co. v. R. Co., 159 Fed. 960; De Sola v. Pomares, 119 Fed. 373; Tallassee Falls Mfg. Co. v. R. R., 117 Ala. 520, 23 South. 139, 67 Am. St. Rep. 179; Chouteaux v. Leech & Co., 18 Pa. 224, 57 Am. Dec. 602; Keller v. R. Co., 10 Pa. Super. Ct. 240; Gibbons v. Robinson, 63 Mich. 146, 29 N. W. 533; but it has been held competent to contradict a statement that the goods were received in apparent good order; Foley v. R. Co., 96 N. Y. Supp. 182; and, of course, in case of error or fraud; Sonia Cotton-Oil Co. v. The Red River, 106 La. 42, 30 South. 303, 87 Am. St. Rep. 293; and it is said to make a *prima facie* case only and to be open to explanation; Planters' Fertilizer Mfg. Co. v. Elder, 101 Fed. 1001, 42 C. C. A. 130; or to

correct an omission or ambiguity; Louisville & N. R. Co. v. Duncan, 137 Ala. 446, 34 South. 988; either as to the route; Louisville & N. R. Co. v. Duncan, 137 Ala. 446, 34 South. 988; or the time of arrival; Sloop v. R. Co., 117 Mo. App. 204, 84 S. W. 111.

Where the conditions are on the face and in the body of the bill of lading, and the consignor receives it and ships the goods without complaint, he is presumed to have assented to these conditions, and they become, if not inimical to law, a valid contract. The shipper's signature is not essential; Inman & Co. v. R. Co., 159 Fed. 960; Smith v. Express Co., 108 Mich. 572, 66 N. W. 479; Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; Com. v. R. Co., 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053.

An exception in a bill of lading, limits the liability, not the duty; hence it is the duty of the owner by himself and his servants to do all he can to avoid the excepted perils; Bowen, L. J., in [1891] 1 Q. B. 619 (C. A.).

An exception of losses caused by (*inter alia*) "pirates, robbers, or thieves of whatever kind, whether on board or not, by land or sea," did not apply to thefts committed by persons in the service of the ship; [1891] 1 Q. B. 619 (C. A.).

Exceptions in a bill of lading are to be construed most strongly against the shipowner. As between the shipowner and the shipper, the bill of lading only can be considered as the contract; The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644.

Under the Harter Act (*q. v.*) there is provided in section 2 a prohibition of the insertion "in any bill of lading or shipping document" of any covenant or agreement relieving the owner from the exercise of due diligence in equipping, etc., vessels. The Southwark, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65. Under this act a stipulation limiting the liability of a vessel owner to $100 was held invalid, not only under the Harter Act but under the decisions upon the subject generally; Calderon v. S. S. Co., 170 U. S. 272, 18 Sup. Ct. 588, 42 L. Ed. 1033. As to the construction of the Harter Act generally, see SHIP.

Though it is not necessary that the shipper should sign the bill of lading, yet if its terms restrict the carrier's common-law liability, his assent thereto must be shown. This assent need not be express, it is sufficiently indicated by an acceptance of the bill of lading containing the restrictions; Port. B. of L. 157; Lawrence v. R. Co., 36 Conn. 63; Wertheimer v. R. Co., 1 Fed. 232; McMillan v. R. Co., 16 Mich. 79, 93 Am. Dec. 208; Boorman v. Exp. Co., 21 Wis. 152; Robinson v. Transp. Co., 45 Ia. 476. Where the bill contains a limitation of the carrier's common law liability and is accepted by the shipper, there is a limitation of the liability which binds all the parties, although the shipper could not read, and did not know of the limitation in the bill; Jones v. R. Co., 89 Ala. 376, 8 South. 61; Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; Nines v. R. Co., 107 Mo. 475, 18 S. W. 26; Dimmitt v. R. Co., 103 Mo. 433. 15 S. W. 761. See Louisville & N. R. Co. v. Meyer, 78 Ala. 597.

A bill of lading is usually made in three or more original parts, one of which is sent to the consignee with the goods, one or more others are sent to him by different conveyances, one is retained by the merchant or shipper, and one should be retained by the master. Abbott, Shipp. 217; 2 Dan. Neg. Inst. § 1735. Where one is marked "original" and the other "duplicate," the latter is in effect an original; Missouri Pac. R. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861.

It is regarded as so much merchandise of the kind covered by it; Shaw v. R. Co., 101 U. S. 557, 25 L. Ed. 892. It is not negotiable, but rather a symbol or representative of the goods themselves; *id;* Raleigh & Gaston R. Co. v. Lowe, 101 Ga. 320, 28 S. E. 867; Brown v. Babcock, 3 Mass. 29; Stollenwerck v. Thacher, 115 Mass. 224. At common law it is *quasi* negotiable; 1 T. R. 63; Lickbarrow v. Mason, 1 Sm. L. C. 1148; National Bank of Bristol v. R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321; and in many of the states is made so by statute. A statute making bills of lading negotiable by endorsement does not impart to them all the characteristics of bills and notes; Shaw v. R. Co., 101 U. S. 557, 25 L. Ed. 892. The mere sending of a bill of lading without endorsement or actual delivery of the goods to the consignee does not, of itself, pass title; Delta Bag Co. v. Kearns, 112 Ill. App. 269; it is *prima facie* evidence, but not conclusive; Harrison v. Hixson, 4 Blackf. (Ind.) 226; but delivery *without* endorsement as security for advances, or for a valuable consideration, transfers title; Lewis v. Bank, 166 Ill. 311, 46 N. E. 743; Jeffersonville R. Co. v. Irvin, 46 Ind. 180; American Zinc Lead & Smelting Co. v. Lead Works, 102 Mo. App. 158, 76 S. W. 668; National Newark Banking Co. v. R. Co., 70 N. J. L. 774, 58 Atl. 311, 66 L. R. A. 595, 103 Am. St. Rep. 825; Neill v. Produce Co., 41 W. Va. 37, 23 S. E. 702. There may also be constructive delivery; White Live Stock Commission Co. v. R. Co., 87 Mo. App. 330; Storey v. Hershey, 19 Pa. Super. Ct. 485; or by way of estoppel against the carrier and also against the shipper and endorser; Rowley v. Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec. 607.

It is also assignable by endorsement, whereby the assignee becomes entitled to the goods subject to the shipper's right of stoppage in transitu, in some cases, and to various

liens; Port. B. of L. 438; Pollard v. Reardon, 65 Fed. 848, 13 C. C. A. 171. See LIENS; STOPPAGE IN TRANSITU.

By endorsement to a vendee, the vendor transfers the possession to him; People v. Midkiff, 71 Ill. App. 141; and the property; Law v. Hatcher, 4 Blackf. (Ind.) 364. As against the carrier, when the bill of lading is attached to sight drafts, the transferee is entitled to receive the goods; Walters v. R. Co., 66 Fed. 862, 14 C. C. A. 267; or to sue for wrongful delivery; Tishomingo Sav. Inst. v. Johnson (Ala.) 40 South. 503; to the pledgor without surrender of the bills; Chesapeake S. S. Co. v. Bank, 102 Md. 589, 63 Atl. 113; even when the bill of lading did not contain the words "or order"; Chicago & S. R. Co. v. Bank, 26 Ind. App. 600, 59 N. E. 43. One in possession under a bill of lading can sue for conversion against one with no better title; Adams v. O'Connor, 100 Mass. 515, 1 Am. Rep. 137. Placing a car on a side track and notifying the transferee is a sufficient delivery; Anchor Mill Co. v. Ry. Co., 102 Ia. 262, 71 N. W. 255. The assignee of a bill of lading as collateral security for drafts upon the consignee is in a general sense the absolute owner of the goods; 2 Term 63; at least to the extent and until payment of the drafts; Dows v. Bank, 91 U. S. 618, 23 L. Ed. 214; Willman Mercantile Co. v. Fussy, 15 Mont. 514, 39 Pac. 738, 48 Am. St. Rep. 698; Missouri Pac. R. Co. v. Law, 57 Neb. 560, 78 N. W. 291; and the consignee takes the goods subject to the rights of the holder of the bill of lading and cannot set off the price against a debt due from the consignor; Emery v. Bank, 25 Ohio St. 360, 18 Am. Rep. 299. But in Mason v. Cotton Co., 148 N. C. 492, 62 S. E. 625, 18 L. R. A. (N. S.) 1221, 128 Am. St. Rep. 635, it was held that the right of such assignee does not extend so far as to make him liable for a breach of warranty by the consignor in the sale of the property, and the case in Finch v. Gregg, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, which was *contra* (and which the Supreme Court of Alabama followed in Haas v. Bank, 144 Ala. 562, 39 South. 129, 1 L. R. A. [N. S.] 242, 113 Am. St. Rep. 61, and the Supreme Court of Tennessee refused to follow in Leonhardt & Co. v. Small & Co., 117 Tenn. 153, 96 S. W. 1051, 6 L. R. A. [N. S.] 887, 119 Am. St. Rep. 994), was expressly overruled after having been subjected to much criticism. See the above cited cases, the opinions in which and the annotations collect the cases.

But the assignee obtains by such assignment only the title of his assignor, and the negotiability is mostly the quality of transferability by endorsement and delivery which enables the rightful assignee to sue in his own name; Shaw v. R. Co., 101 U. S. 557, 25 L. Ed. 892; Stollenwerck v. Thacher, 115 Mass. 224; Dickson v. Elevator Co., 44 Mo. App. 498. It is only negotiable so far that the owner may transfer it by endorsement or assignment so as to vest the legal title in the assignee; Douglas v. Bank, 86 Ky. 176, 5 S. W. 420, 9 Am. St. Rep. 276.

Delivery of a bill of lading is delivery of the property; Forbes v. R. Co., 133 Mass. 154; but the transfer from one who wrongfully attains it, having no title to the property shipped, passes no title as against the true owner; Merchants' Nat. Bank v. Bales, 148 Ala. 279, 41 South. 516; and the transfer by endorsement of a bill of lading, drawn to the shipper's order, vests the title to the goods in the transferee, as purchaser or pledgee, as the case may be; Scheuermann v. Fruit Co., 123 La. 55, 48 South. 647.

It is considered to partake of the character of a written contract, and also of that of a receipt; St. Louis, I. M. & S. Ry. Co. v. Knight, 122 U. S. 79, 7 Sup. Ct. 1132, 30 L. Ed. 1077; Schoul. Pers. Prop. 408; The Missouri v. Webb, 9 Mo. 193; Mears v. R. Co., 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. Rep. 192; Chicago & N. W. Ry. Co. v. Simon, 160 Ill. 648, 43 N. E. 596. In so far as it admits the character, quality, or condition of the goods at the time they were received by the carrier, it is a mere receipt, and the carrier may explain or contradict it by parol; Missouri Pac. R. Co. v. McFadden, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 944; Fasy v. Nav. Co., 77 App. Div. 469, 79 N. Y. Supp. 1103, affirmed without opinion Fasy v. Nav. Co., 177 N. Y. 591, 70 N. E. 1098; Baltimore & O. R. Co. v. Wilkens, 44 Md. 11, 22 Am. Rep. 26; but as respects the agreement to carry and deliver, it is a contract, and must be construed according to its terms; Ellis v. Willard, 9 N. Y. 529; White v. Van Kirk, 25 Barb. (N. Y.) 16; 1 Abb. Adm. 209, 397; Louisville & N. R. Co. v. Fulgham, 91 Ala. 555, 8 South. 803; Snow v. R. Co., 109 Ind. 422, 9 N. E. 702; Portland Flouring Mills Co. v. Ins. Co., 130 Fed. 860, 65 C. C. A. 344, affirming British & Foreign Marine Ins. Co. v. Mills Co., 124 Fed. 855. And see Rhodes v. Newhall, 126 N. Y. 574, 27 N. E. 947, 22 Am. St. Rep. 859.

One who receives it without objection is presumed to have assented to its terms; Cox v. R. Co., 170 Mass. 129, 49 N. E. 97; mere ignorance from failure to read or ascertain them is not sufficient in the absence of fraud or concealment; Schaller v. Ry. Co., 97 Wis. 31, 71 N. W. 1042. Reasonable doubt as to the construction of its printed terms is resolved against the carrier; Baltimore & O. R. Co. v. Doyle, 142 Fed. 669, 74 C. C. A. 245, affirming Doyle v. R. Co., 126 Fed. 841. Where a bill of lading is given, and accepted without objection, it is the real contract by which the mutual obligations of the parties is to be governed and not any prior agreement; The Caledonia, 43 Fed. 681.

Stipulations stamped on it before delivery

are part of the contract; The Henry B. Hyde, 82 Fed. 681. And one in a bill of lading that all claims for damages must be presented within 30 days from its date is reasonable; The Queen of the Pacific, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. 419; as is also an exemption of loss by fire though the regular freight rates were charged; Arthur v. R. Co., 204 U. S. 506, 27 Sup. Ct. 338, 51 L. Ed. 590. In an action against a carrier for damages to property transported the shipper cannot set up a special contract and recover on an implied one, nor can he rely on a parol agreement and recover on proof of a written contract; Evansville & T. H. R. Co. v. McKinney, 34 Ind. App. 402, 73 N. E. 148.

A clean bill of lading is one which contains nothing in the margin qualifying the words in the bill of lading itself; 61 Law T. 330. Under a "clean" bill of lading in the usual form (viz, one having no stipulation that the goods shipped are to be carried on deck), there is a contract implied that the goods shall be carried under the deck; and parol evidence to the contrary will not be received; Creery v. Holly, 14 Wend. (N. Y.) 26; Sayward v. Stevens, 3 Gray (Mass.) 97; The Governor Carey, 2 Hask. 487, Fed Cas. No. 5,645a; but evidence of a well-known and long-established usage is admissible, and will justify the carriage of goods on deck, though, under a general rule, the party relying on a local custom must prove it by clear and conclusive evidence; The Paragon, 1 Ware 322, Fed. Cas. No. 10,708.

See CARRIERS; FREIGHT; SHIPPING; HARTER ACT.

It was decided in England that the master of a ship who signed a bill of lading for goods which had never been received was not to be regarded as the agent of the owner so as to make the latter responsible; 10 C. B. 665. This decision was immediately followed by an act of Parliament, which makes clear the right of a holder for valuable consideration of such a bill of lading as against the master or other person signing the bill, unless the holder of the bill had notice that the goods had not been taken on board; 18 & 19 Vict. The statute makes the bill conclusive against the person who signed the document; 18 Q. B. D. 147. As far as the shipowner or other principal of the agent issuing the document is concerned, the law of the first decision has been constantly followed in England; [1902] A. C. 117; Scotland; 25 Sc. L. Rep. 112; and Canada; 5 Duval 179. In the United States the question has given rise to great difference of opinion. Most of the cases relate to bills of lading issued by station agents of railroads. The English rule has been followed in Missouri P. R. Co. v. McFadden, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 944; Friedlander v. R. Co., 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991; Pollard v. Vinton, 105 U. S. 7, 26 L. Ed. 998; Clark v. S. S. Co., 148 Fed. 243; The Isola Di Procida, 124 Fed. 942; The Asphodel, 53 Fed. 835; Martin v. Ry. Co., 55 Ark. 510, 19 S. W. 314; National Bank of Commerce v. R. Co., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566; Hazard v. R. Co., 67 Miss. 32, 7 South. 280; Louisiana Nat. Bank v. Laveille, 52 Mo. 380; Williams v. R. Co., 93 N. C. 42, 53 Am. Rep. 450; Anderson v. Mills Co., 37 Or. 483, 60 Pac. 839, 50 L. R. A. 235, 82 Am. St. Rep. 771; Roy & Roy v. R. Co., 42 Wash. 572, 85 Pac. 53, 6 L. R. A. (N. S.) 302, 7 Ann. Cas. 728. Other cases hold that as against a *bona fide* purchaser the principal is estopped; Jasper Trust Co. v. R. Co., 99 Ala. 416, 14 South. 546, 42 Am. St. Rep. 75; Relyea v. Mill Co., 42 Conn. 579; Wichita Sav. Bank v. R. Co., 20 Kan. 519; Sioux City & Pac. R. Co. v. Bank, 10 Neb. 556, 7 N. W. 311, 35 Am. Rep. 488; Armour v. R. Co., 65 N. Y. 111, 22 Am. Rep. 603; Brooke v. R. Co., 108 Pa. 529, 1 Atl. 206, 56 Am. Rep. 235; Watson v. R. Co., 9 Heisk. (Tenn.) 255. In countries where the civil law prevails, the carrier would generally be held liable; 25 Sc. L. Rep. 112; French Commercial Code, art. 283; and the same is copied in Belgium, Holland, Italy, Spain, Mexico and many Central and South American countries; 34 Reichsgericht 79.

As against the consignee, the bill of lading is not conclusive as to the quantity of goods received, though of great weight; the ship may show that she delivered all the cargo she received; James v. Oil Co., 191 Fed. 827, 112 C. C. A. 341.

There are statutes in many states making it a criminal offence for any agent of a carrier to issue documents of title when the goods have not been received. Such provision is in the Uniform act. An act to make uniform the law of bills of lading has been passed in Illinois, Iowa, Massachusetts, Maryland, New York, Ohio, Pennsylvania, Connecticut, New Jersey, Louisiana and Alaska.

Its chief provisions make bills of lading non-negotiable or straight bills, and negotiable or order bills. Negotiable bills must not be issued in sets. Duplicate as well as non-negotiable bills must be so marked. The insertion of the name of the person to be notified does not affect the negotiability of the bill. Upon receipt of the bill, if consignor makes no objection, he and those after him are bound by its terms. Negotiable bills must be cancelled when goods are delivered, and if not the carrier is liable to a *bona fide* purchaser of the bill without notice of the delivery. Such bills must be so marked when a part is delivered. Any alteration of a bill without consent is void and the bill is enforceable according to its original tenor. In the cases of lost or destroyed bills the court may order delivery upon sufficient proof and the giving of a bond. The carrier has reasonable time to ascertain the validity of

claims, but an adverse title is no defence to the consignee of a non-negotiable bill or to the holder of a negotiable bill unless enforced by legal process. The issuance of a bill, where no goods have been received by an agent whose actual or apparent authority includes the issuing of bills of lading, makes the carrier liable to one who has given value in good faith relying upon the description therein of the goods. The carrier may, by inserting the words "shipper's load and count" or such like words, indicate that the goods were loaded by the shipper and the description made by him; and if such is the case the carrier shall not be liable for damages caused by improper loading, non-receipt or mis-description of the goods. If goods are under negotiable bills then one cannot attach or levy; the remedies are to reach the bills. The carrier has a lien for his charges, but this must be stated on the bill. Negotiation may be by delivery or endorsement and the rights of the holder are substantially the same as the holder of a negotiable note or bill of exchange. The endorser is not a guarantor but is held to give the usual warranties. One who holds a bill as security, and, receiving payment of the debt, transfers the bill, shall not be deemed a guarantor. The manner in which the bill is drawn may indicate the rights of the buyer and seller. If the seller sends a bill with a sight draft attached, the buyer is bound to honor the draft in order to secure any rights under the bill, but if the buyer transfers it to a *bona fide* holder in due course, the latter is protected. Negotiation defeats the vendor's lien in the case of an order bill. Issuing a bill, where goods have not been received, is a criminal offence. It is likewise a criminal offence for a person to ship goods to which he has no title or upon which there exists any lien, and where one takes an order bill which he negotiates with intent to deceive. Inducing a carrier to issue bill, when the person knows the carrier has not received the goods, is criminal. Any person who with intent to defraud issues or aids in issuing a non-negotiable bill, without the words "not negotiable" placed plainly upon the face, shall be guilty of a crime. England has a similar act.

BILL OF MIDDLESEX. A fiction by which the King's Bench acquired jurisdiction in ordinary civil suits. The court could proceed by bill against certain officials of the court, or against any persons accused of contempts, deceits or trespasses. But this process did not apply in actions of debt, detinue, account or covenant. A method was found in the fact or fiction of the custody of the marshal. It was held that a mere record on the rolls of the court that the defendant had given bail would be sufficient evidence of actual custody. To get this evidence on record a bill of Middlesex was filed stating that the defendant was guilty of trespass *vi et armis*—an offence falling properly within the jurisdiction of the court. The plaintiff gave pledges for the prosecution which, even in Coke's day, were John Doe and Richard Roe. The sheriff of Middlesex was then directed to produce the defendant to answer the plaintiff of a plea of trespass. If the sheriff made return to the bill of "*non est inventus*," a writ of *latitat* was issued to the sheriff of an adjoining county. This recited the bill of Middlesex and the proceedings thereon and stated that the defendant "*latitat et discurrit*" in the county and directed the sheriff to catch him. If the defendant did not live in Middlesex, the *latitat* was the first step taken. If the defendant appeared, the court obtained jurisdiction; if not, the plaintiff could enter an appearance for him and give as sureties John Doe and Richard Roe. This was called "common bail." In certain cases substantial bail was required; this was called "special bail."

The above process did not set forth the true cause of action. That was added by the so-called "*ac etiam*" clause stating the true cause of action. The supposed trespass gave jurisdiction; the real cause of action in the "*ac etiam*" clause authorized the arrest in default of "special bail." These fictions were abolished by 2 Will. IV. c. 39. See 1 Holdsw. Hist. E. L. 87. The "*nec non*" clause was used as a like fiction to give jurisdiction in certain cases to the Common Pleas.

BILL OF MORTALITY. A written statement or account of the number of deaths which have occurred in a certain district within a given time.

See VITAL STATISTICS.

BILL OF PAINS AND PENALTIES. A special act of the legislature which inflicts a punishment less than death upon persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. 2 Woodd. Lect. 625. It differs from a bill of attainder in this, that the punishment inflicted by the latter is death. The clause in the constitution prohibiting bills of attainder includes bills of pains and penalties; Story, Const. § 1338; Hare, Am. Const. L. 549; Cummings v. Missouri, 4 Wall. (U. S.) 323, 18 L. Ed. 356; Ex parte Law, 35 Ga. 285, 300, Fed. Cas. No. 8,126. See Fletcher v. Peck, 6 Cra. (U. S.) 138, 3 L. Ed. 162.

BILL OF PARCELS. An account containing in detail the names of the items which compose a parcel or package of goods. It is usually transmitted with the goods to the purchaser, in order that if any mistake has been made it may be corrected.

BILL OF PARTICULARS. A detailed informal statement of a plaintiff's cause of action, or of the defendant's set-off. It is an

account of the items of the claim, and shows the manner in which they arose.

The plaintiff is required, sometimes under statutory provisions, which vary widely in the different states, to file a bill of particulars, either in connection with his declaration; Com. v. Giles, 1 Gray (Mass.) 466; Moore v. Mauro, 4 Rand. (Va.) 488; Landon v. Sage, 11 Conn. 302; Soria v. Bank, 3 How. (Miss.) 46; Cregier v. Smyth, 1 Speers (S. C.) 298; or subsequently to it, upon request of the other party; Davis v. Hunt, 2 Bail. (S. C.) 416; Brown v. Calvert, 4 Dana (Ky.) 219; Watkins v. Brown, 5 Ark. 197; McCreary v. Hood, 5 Blackf. (Ind.) 316; Williams v. Sinclair, 3 McLean 289, Fed. Cas. No. 17,737; Dennison v. Smith, 1 Cal. 437; upon an order of the court, in some cases; Constable v. Hardenbergh, 76 Hun 434, 27 N. Y. Supp. 1022; in others, without such order.

He need not give particulars of matters which he does not seek to recover; 4 Exch. 486; nor of payments admitted; Williams v. Shaw, 4 Abb. Pr. (N. Y.) 209. See 6 Dowl. & L. 656.

The plaintiff is concluded by the bill when filed; Hall v. Sewell, 9 Gill (Md.) 146; and where he gives notice at the trial that he intends to rely only upon the count for an account stated, the notice operates as an amendment of the pleadings and an abandonment of the bill of particulars; Waidner v. Pauly, 141 Ill. 442, 30 N. E. 1025.

The defendant, in giving notice or pleading set-off, must give a bill of particulars; failing to do which, he will be precluded from giving any evidence in support of it at the trial; Starkweather v. Kittle, 17 Wend. (N. Y.) 20; Harding v. Griffin, 7 Blackf. (Ind.) 462; Rice's Ex'r v. Annatt's Adm'r, 8 Gratt. (Va.) 557.

The court may order the defendant to file a bill of particulars where he alleges matter by way of counterclaim; Peabody v. Cortada, 64 Hun 632, 18 N. Y. Supp. 622; where the defence is payment it will not be required; Moody v. Belden, 60 Hun 582, 15 N. Y. Supp. 119.

The bill must be as full and specific as the nature of the case admits in respect to all matters as to which the adverse party ought to have information; 16 M. & W. 773; but need not be as special as a count on a special contract. The object is to prevent surprise; Chesapeake & O. Canal Co. v. Knapp, 9 Pet. (U. S.) 541, 9 L. Ed. 222; Smith v. Hicks, 5 Wend. (N. Y.) 51; Watkins v. Brown, 5 Ark. 197. If the bill is not sufficiently explicit, application should be made to the court for a more specific one, as the objection cannot be made on the trial; Buckeye Tp. v. Clark, 90 Mich. 432, 51 N. W. 528; Minneapolis Envelope Co. v. Vanstrom, 51 Minn. 512, 53 N. W. 768.

It is not error to refuse to strike out part of a bill of particulars; Lewis v. Godman, 129 Ind. 359, 27 N. E. 563.

According to ancient practice, a defect in a pleading in a divorce suit may in some states, and in England, be cured by filing a bill of particulars; but this will not supply the want of a more definite allegation; 12 P. D. 19; Realf v. Realf, 77 Pa. 31; Harrington v. Harrington, 107 Mass. 329; Sanders v. Sanders, 25 Vt. 713. This is not proper under the Code system, however; and has been abandoned in the Code states, except New York; Freeman v. Freeman, 39 Minn. 370, 40 N. W. 167. See Mitchell v. Mitchell, 61 N. Y. 398; Carpenter v. Carpenter, 17 N. Y. Supp. 195.

BILL OF PEACE. In Equity Practice. One which is filed when a person has a right which may be controverted by various persons, at different times, and by different actions. It is necessary to allege that the complainant is in possession or that both parties are out of possession; Boston & M. Consol. Copper & S. Mining Co. v. Ore Co., 188 U. S. 632, 23 Sup. Ct. 434, 47 L. Ed. 626.

In such a case, the court will prevent a multiplicity of suits by directing an issue to determine the right and ultimately grant an injunction; 1 Madd. Ch. Pr. 166; 2 Story, Eq. Jur. § 852; Eldridge v. Hill, 2 Johns. Ch. (N. Y.) 281; The Thomas Gibbons, 8 Cra. (U. S.) 426, 3 L. Ed. 610; L. R. 2 Ch. 8; Bisph. Eq. 415. Such a bill cannot usually be maintained until the right of the complainant has been established at law; Bisph. Eq. § 417; and it must be filed on behalf of all who are interested in establishing the right; *id.*

Another species of bill of peace may be brought when the plaintiff, after repeated and satisfactory trials, has established his right at law, and is still in danger of new attempts to controvert it. In order to quiet the possession of the plaintiff, and to suppress future litigation, equity will grant a perpetual injunction; Eldridge v. Hill, 2 Johns. Ch. (N. Y.) 281; Alexander v. Pendleton, 8 Cra. (U. S.) 462, 3 L. Ed. 624; Mitf. Eq. 143; Primm v. Raboteau, 56 Mo. 407; Douglass v. McCoy, 5 Ohio 522. A bill will lie to enjoin a defendant from interfering with plaintiff's tenants; Polk v. Rose, 25 Md. 153, 89 Am. Dec. 773. A bill to quiet title can be filed only by a party in possession, against a defendant who has been ineffectually seeking to establish a legal title by repeated actions of ejectment; and as a prerequisite to such bill it is necessary that the plaintiff's title should have been established by at least one successful trial at law; Wehrman v. Conklin, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. Ed. 167. See BILL QUIA TIMET; BILL TO QUIET POSSESSION.

A community of interest in the law and fact involved is enough on which to found a bill of peace; Crawford v. R. Co., 83 Miss.

708, 36 South. 82, 102 Am. St. Rep. 476; *contra* Ducktown Sulphur, Copper & Iron Co. v. Fain, 109 Tenn. 56, 70 S. W. 813.

For violation of a city ordinance requiring street railroads under penalty, to furnish sufficient cars to prevent overcrowding, etc., the appellant had begun in the justice's court sixty suits against one appellee, and a hundred against the other, and was threatening more. The two appellees, for themselves and others similarly situated, filed a bill of peace to have the suits enjoined on the ground that the ordinance was unconstitutional. It was held a bill of peace would not lie; Chicago v. Ry. Co., 222 Ill. 560, 78 N. E. 890.

BILL OF PRIVILEGE. In English Law. The form of proceeding against an attorney of the court, who is not liable to arrest. Brooke, Abr. *Bille;* 12 Mod. 163.

It is considered a privilege for the benefit of clients; 4 Burr. 2113; Dougl. 381; and is said to be confined to such as practise; 2 Maule & S. 605. But see 1 Bos. & P. 4; 2 Lutw. 1667. See 3 Sharsw. Bla. Com. 289.

BILL OF PROOF. The claim made by a third person to the subject-matter in dispute between the parties to a suit in the court of the mayor of London. 2 Chitty, Pr. 492; 1 Marsh. 233.

BILL OF REVIEW. One which is brought to have a decree of the court reviewed, altered, or reversed.

It is only brought after enrollment; 1 Ch. Cas. 54; 3 P. Will. 371; Simpson v. Downs, 5 Rich. Eq. (S C.) 421; 1 Story, Eq. Pl. § 403; and is thus distinguished from a bill in the nature of a bill in review, or a supplemental bill in the nature of a bill in review; Dexter v. Arnold, 5 Mas. 303, Fed. Cas No. 3856; Greenwich Bank v. Loomis, 2 Sandf. Ch (N. Y.) 70; Gilbert, For. Rom. c. 10, p. 182.

It must be brought either for error in point of law; Wiser v. Blachly, 2 Johns. Ch. (N. Y.) 488; Cooper, Eq. Pl. 89; or for some new matter of fact, relevant to the case, discovered since publication passed in the cause, and which could not, with reasonable diligence, have been discovered before; Irwin v. Meyrose, 7 Fed. 533; Putnam v. Day, 22 Wall. (U. S.) 60, 22 L. Ed. 764; Buffington v. Harvey, 95 U. S. 99, 24 L. Ed. 381; Wiser v. Blachly, 2 Johns. Ch. (N. Y.) 488; see U. S. v. Samperyac, 1 Hempt. 118, Fed. Cas. No. 16,216 *a;* Stevens v. Dewey, 27 Vt. 638; Foy v. Foy, 25 Miss. 207; Cocke v. Copenhaver, 126 Fed. 145, 61 C. C. A. 211; Hill v. Phelps, 101 Fed. 650, 41 C. C. A. 569; or to correct an error apparent on the face of a decree in the original suit; Osborne v. Land & Town Co., 178 U. S. 22, 20 Sup. Ct. 860, 44 L. Ed. 961; where there are no disputed questions of fact; Smyth v. Fitzsimmons, 97 Ala. 451, 12 South. 48.

If based on newly discovered evidence it requires leave of court; Buckingham v. Corning, 29 N. J. Eq. 238; Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672; Reynolds v. R. Co., 42 Fla. 387, 28 South. 861; Florida Cent. & P. R. Co. v. Reynolds, 183 U. S. 471, 22 Sup. Ct. 176, 46 L. Ed. 283; the evidence must be new or else such as the party could not by diligence have known, and failure to produce it sooner must be explained; it must be controlling, not cumulative; Acord v. Corporation, 156 Fed. 989; Kern v. Wyatt & Co., 89 Va. 885, 17 S. E. 549. Granting it is discretionary with the court, and is subject to review; Reynolds v. R. Co., 42 Fla. 387, 28 South. 861; Florida Cent. & P. R. Co. v. Reynolds, 183 U. S. 471, 22 Sup. Ct. 176, 46 L. Ed. 283; it will be refused for laches; Taylor v. Easton, 180 Fed. 363, 103 C. C. A. 509; or if granting it would work hardship to innocent parties; Acord v. Corporation, 156 Fed. 989; Ricker v. Powell, 100 U. S. 104, 25 L. Ed. 527; if it is based upon fraud it is a matter of right; Cox v. Bank (Tenn.) 63 S. W. 237; so if filed for error of law appearing on the face of the record; Wood v. Wood, 59 Ark. 441, 27 S. W. 641, 28 L. R. A. 157, 43 Am. St. Rep. 42; Denson v. Denson, 33 Miss. 560; a bill may join both error in law and newly discovered evidence; Acord v. Corporation, 156 Fed. 989. It is held that if for error of law, it must be filed within the time of appeal; Jorgenson v. Young, 136 Fed. 378, 69 C. C. A. 222; Taylor v. Easton, 180 Fed. 363, 103 C. C. A. 509; and for newly discovered evidence, within a reasonable time; Camp Mfg. Co. v. Parker, 121 Fed. 195; within two months after decree was held in time; Bruschke v. Verein, 145 Ill. 433, 34 N. E. 417. The practice is to petition for leave if leave be necessary; Massie v. Graham, Fed. Cas. No. 9,263. Granting leave does not prejudge the case at final hearing; Hopkins v. Hebard, 194 Fed. 301, 114 C. C. A. 261.

A rehearing upon the ground that the court had overlooked a controlling fact (not brought to its attention by counsel) was refused in Moneyweight Scale Co. v. Scale Co., 199 Fed. 905, 118 C. C. A. 235.

Application after judgment in the appellate court must be made in that court; Kingsbury v. Buckner, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. Ed. 1047; Camp Mfg. Co. v. Parker, 121 Fed. 195; Keith v. Alger, 124 Fed. 32, 59 C. C. A. 552.

Where one proceeds to a decree after discovering facts on which a new claim is founded, he cannot afterwards file a supplemental bill in the nature of a bill of review on such new facts; Hood v. Green, 42 Ill. App. 664.

BILL OF REVIVOR. One which is brought to continue a suit which has abated before its final consummation, as, for example, by death, or marriage of a female plaintiff. It is not the commencement of a new suit, but a continuation of the old one; Clarke v. Mathewson, 12 Pet. (U. S.) 164, 9 L. Ed. 1041.

Under the new Supreme Court equity rule 35 (33 Sup. Ct. xxviii) it is not necessary to set forth any of the statements in the original suit unless the special circumstances of the case may require it.

It must be brought by the proper representatives of the person deceased, with reference to the property which is the subject-matter; 4 Sim. 318; Douglass v. Sherman, 2 Paige, Ch. (N. Y.) 358; Story, Eq. Pl. § 354.

BILL OF REVIVOR AND SUPPLEMENT. One which is a compound of a supplemental bill and bill of revivor, and not only continues the suit, which has abated by the death of the plaintiff, or the like, but supplies any defects in the original bill arising from subsequent events, so as to entitle the party to relief on the whole merits of his case. Westcott v. Cady, 5 Johns. Ch. (N. Y.) 334, 9 Am. Dec. 306; Mitf. Eq. Pl. 32, 74; 13 Ves. 161; Eastman v. Batchelder, 36 N. H. 141, 72 Am. Dec. 295; Pendleton v. Fay, 3 Paige, Ch. (N. Y.) 204.

BILL OF RIGHTS. A formal and public declaration of popular rights and liberties.

The document pre-eminently known by that name was the English statute, 1 W. and M., Sess. 2, c. 2 (1689).

What was known as the Declaration of Right was delivered to the Prince and Princess of Orange (afterwards William III. and Mary) by the English lords and commons, and in December, 1689 (at the second session of the Convention Parliament, which had reassembled October 25, 1689), it was, with some amendments, few but important, enacted into a statute known as the Bill of Rights. The Declaration was presented to the new monarchs as embodying the conditions of their election, and only after their acceptance of its terms was proclamation of their accession made, on February 13, 1689; 2 Gneist, Hist. Eng. Const. 316, note.

The Bill of Rights contained 13 clauses or guaranties, suggested by the illegal and arbitrary acts previously committed by the Crown. These were a declaration of the *illegality* of (1) the pretended power of the suspension of laws or their execution, by regal authority, without consent of Parliament; (2) the recent assumption and exercise of the same power; (3) the commission for erecting the late Court of Commissioners for ecclesiastical causes and other similar commissions and courts; (4) levying money for the use of the Crown by pretense of prerogative without grant of Parliament; (6) raising or keeping a standing army in time of peace, without consent of Parliament. There were also *declarations* in favor of (5) the right of petition; (7) the right of Protestants to bear arms; (8) free elections of members of Parliament; (9) freedom of speech and debates in Parliament, which should not be questioned elsewhere; (10) that excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted; (11) the due impanelling and return of jurors, and that those in treason trials should be freeholders; (12) that grants and promises of fines and forfeitures before conviction are illegal and void; (13) that Parliament ought to be held frequently.

The absence of what was popularly known as a Bill of Rights in the Federal Constitution, as originally adopted, was the cause of some opposition to the work of the Convention which framed it, and an effort was made to secure its insertion by Congress. This failed and it was believed by Madison, and those who joined him in opposing the movement to amend, that its success would, by creating confusion as to what instrument was to be ratified, have endangered the final adoption of the Constitution. 2 Curtis, Hist. Const. U. S. 498.

Subsequently and very soon after the original instrument went into effect the first ten amendments, adopted together, embodied, as limitations upon the powers of the Federal government, substantially all the guaranties, considered applicable to our conditions, of the English Bill of Rights. Since all of those provisions are also embodied in most, if not all, of the American Constitutions, their assertion of fundamental, political and personal liberty are referred to collectively as a "bill of rights." Indeed some of the State Constitutions preserve the name as well as the substance.

The text of the English Bill of Rights will be found in 2 Hist. for Ready Ref. 937.

See CONSTITUTION OF THE UNITED STATES.

BILL OF SALE. A writing evidencing the transfer of personal property from one person to another. Putnam v. McDonald, 72 Vt. 4, 5, 47 Atl. 159.

It is in frequent use in the transfer of personal property, especially that of which immediate possession is not or cannot be given.

In England a bill of sale of a ship at sea or out of the country is called a *grand bill of sale;* but no distinction is recognized in this country between grand and ordinary bills of sale; Portland Bank v. Stacey, 4 Mass. 661, 3 Am. Dec. 253. The effect of a bill of sale is to transfer the property in the thing sold.

By the maritime law, the transfer of a ship must generally be evidenced by a bill of sale; Weston v. Penniman, 1 Mas. 306, Fed. Cas. No. 17,455; and by act of congress, every sale or transfer of a registered ship to a citizen of the United States must be accompanied by a bill of sale, setting forth, at length, the certificate of registry; R. S. U. S. § 4170. Where the bill is insufficient under the statute, the executor of the seller can be compelled to reform it; Sprague v. Thurber, 17 R. I. 454, 22 Atl. 1057. And this bill of sale is not valid except between the parties or those having actual notice, unless recorded; R. S. § 4192. A contract to sell, accompanied by delivery of possession, is, however, sufficient; Taggard v. Loring,

16 Mass. 336, 8 Am. Dec. 140; Bixby v. Ins. Co., 8 Pick. (Mass.) 86; Wendover v. Hogeboom, 7 Johns. (N. Y.) 308.

See SALE.

BILL OF SIGHT. A written description of goods, supposed to be inaccurate, but made as nearly exact as possible, furnished by an importer or his agent to the proper officer of the customs, to procure a landing and inspection of the goods. It was allowed by an English statute where the merchant is ignorant of the real quantity and quality of goods consigned to him, so as to be unable to make a proper entry of them.

BILL OF SUFFERANCE. A license granted to a merchant, permitting him to trade from one English port to another without paying customs.

BILL PAYABLE. A bill of exchange accepted, or a promissory note made, by a merchant, whereby he has engaged to pay money. It is so called as being payable by him. An account is usually kept of such bills in a book with that title, and also in the ledger. See Parsons, Notes and Bills.

BILL PENAL. A written obligation by which a debtor acknowledges himself indebted in a certain sum, and binds himself for the payment thereof, in a larger sum.

Bonds with conditions have superseded such bills in modern practice, Steph. Pl. 265, n. They are sometimes called bills obligatory, and are properly so called; but every bill obligatory is not a bill penal; Comyns, Dig *Obligations*, D.; Cro. Car. 515. See 2 Ventr. 106, 198.

BILL QUIA TIMET. A bill to guard against possible future injuries and to conserve present rights from possible destruction or serious impairment. The limits of the application of the remedy are not clearly defined, but it rests on the principle of relieving the party and his title from some claim or liability which may, if enforced, entail serious loss. Such a bill may be filed when a person is entitled to property of a personal nature after another's death, and has reason to apprehend it may be destroyed by the present possessor; or when he is apprehensive of being subjected to a future inconvenience, probable, or even possible, to happen or be occasioned by the neglect, inadvertence, or culpability of another; or when he seeks to be relieved against an invalid title, claim, or incumbrance which has been created by the act of another. See 3 Daniell, Ch. Pr. 1961, n. Another illustration of the application of the remedy is in case of a counterbond; although the surety is not troubled for the money, after it becomes payable, a decree for its payment may be had against the principal, or when a trustee has incurred liability as the holder of shares for another under a covenant of indemnity, against liability; L. R. 7 Ch. 395.

Upon a proper case being made out, the court will, in one case, secure the property for the use of the party (which is the object of the bill), by compelling the person in possession of it to give a proper security against any subsequent disposition or wilful destruction; and, in the other case, they will quiet the party's apprehension of future inconvenience, by removing the causes which may lead to it; 1 Madd. Ch. Pr. 218; 2 Story, Eq. Jur. §§ 825, 851. See BILL TO QUIET POSSESSION AND TITLE; BILL OF PEACE.

BILL RECEIVABLE. A promissory note, bill of exchange, or other written instrument for the payment of money at a future day, which a merchant holds. So called because the amounts for which they are given are receivable by the merchant. They are entered in a book so called, and are charged to an account in the ledger under the same title, to which account the cash, when received, is credited. See Pars. N. & B.

BILL, SINGLE. A written unconditional promise by one or more persons to pay to another person or other persons therein named a sum of money at a time therein specified. It is usually under seal, and may then be called a bill obligatory; Farmers' & Mechanics' Bank v. Greiner, 2 S. & R. (Pa.) 115. It has no condition attached, and is not given in a penal sum; Comyns, Dig. *Obligation*, C. See Jarvis v. McMain, 10 N. C. 10; Fields v. Mallett, 10 N. C. 465.

BILL, SUPPLEMENTAL. See SUPPLEMENTAL BILL.

BILL TO CARRY A DECREE INTO EXECUTION. One which is filed when, from the neglect of parties or some other cause, it may become impossible to carry a decree into execution without the further decree of the court. Hinde, Ch. Pr. 68; Story, Eq. Pl. § 429.

BILL TO MARSHAL ASSETS. See ASSETS.

BILL TO MARSHAL SECURITIES. See MARSHALLING SECURITIES.

BILL TO PERPETUATE TESTIMONY. One which is brought to secure the testimony of witnesses with reference to some matter which is not in litigation, but is liable to become so.

It differs from a bill to take testimony *de bene esse* (*q. v.*) inasmuch as the latter is sustainable only when there is a suit already pending.

A bill to perpetuate testimony "lies when the party is in actual, undisturbed possession; or where lands are devised by will from the heir at law; or when no action has been brought, but the party intends to commence a suit." Hickman v. Hickman, 1 Del. Ch. 133. It proceeds on the ground that, the party not being in a situation to bring his title to a trial, his evidence may be lost,

through lapse of time, a risk affecting all evidence, irrespective of the condition of a witness; Hall v. Stout, 4 Del. Ch. 269.

It must show the subject-matter touching which the plaintiff is desirous of giving evidence; Rep. *temp.* Finch 391; 4 Madd. 8; that the plaintiff has a positive interest in the subject-matter which may be endangered if the testimony in support of it be lost, as a mere expectancy, however strong, is not sufficient; Mitf. Eq. Pl. 51; May v. Armstrong, 3 J. J. Marsh. (Ky.) 260, 20 Am. Dec. 137. That the defendant has, or pretends to have, or that he claims, an interest to contest the title of the plaintiff in the subject-matter of the proposed testimony; Cooper, Pl. 56; Story, Eq. Pl. § 302; and some ground of necessity for perpetuating the evidence; Story, Eq. Pl. § 303; Mitf. Eq. Pl. 52, 148, n.

The bill should describe the right in which it is brought with reasonable certainty, so as to point the proper interrogations on both sides to the true merits of the controversy; 1 Vern. 312; Cooper, Eq. Pl. 56; and should pray leave to examine the witnesses touching the matter stated, to the end that their testimony may be preserved and perpetuated; Mitf. Eq. Pl. 52. The bill is filed and service made in the usual way; Green v. Compagnia Generale Italiana Di Navigation, 82 Fed. 490.

A bill is demurrable if it contains a prayer for relief; Hickman v. Hickman, 1 Del. Ch. 133; 2 Ves. 497.

It must appear that the relief is absolutely necessary to prevent a failure of justice; Crawford v. McAdams, 63 N. C. 67; if no reason exists for bringing the action in aid of which such a bill is filed, the bill will be dismissed; In re Ketchum, 60 How. Pr. (N. Y.) 154. Where a party sought to perpetuate testimony of his legitimacy, the bill was dismissed because the legitimacy act gave him a remedy; [1903] 2 Ch. 378. So as to a threatened slander suit where the answer released all claims against the plaintiff for slander; Hanford v. Ewen, 79 Ill. App. 327. The testimony of an injured man not expected to live may be taken for the benefit of his family; Ohio Copper Min. Co. v. Hutchings, 172 Fed. 201, 96 C. C. A. 653 (under a Utah statute).

Where one is threatened by patent suits which are not brought, he may file a bill under R. S. § 866, to perpetuate testimony that the patent is invalid; Westinghouse Mach. Co. v. Battery Co., 170 Fed. 430, 95 C. C. A. 600, 25 L. R. A. (N. S.) 673, with note; and it is held that he need not show that it is necessary to take the depositions to prevent a failure of justice; *id.*

BILL TO QUIET POSSESSION AND TITLE. Also called a bill to remove a cloud in title, and though sometimes classed with bills *quia timet* or for the cancellation of void instruments, they may be resorted to in other cases when the complainant's title is clear and there is a cloud to be removed; Mellen v. Iron Works, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. Ed. 178; Town of Corinth v. Locke, 62 Vt. 411, 20 Atl. 809; Alsop v. Eckles, 81 Ill. 424; the latter may be said to exist whenever in ejectment by the holder of the adverse title any evidence would be required to defeat a recovery; Sloan v. Sloan, 25 Fla. 53, 5 South. 603.

Whenever an instrument exists which may be vexatiously or injuriously used against a party, after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he cannot immediately protect his right by any proceedings at law, equity will afford relief by directing the instrument to be delivered up and cancelled, or by making any other decree which justice and the rights of the parties may require; Martin v. Graves, 5 Allen (Mass.) 602; Dull's Appeal, 113 Pa. 510, 6 Atl. 540; 2 Story, Eq. § 694.

Equity will entertain a bill to adjust the claims or to settle the priorities of conflicting claimants, where there is thereby created a cloud over the title, which would prevent the sale of the land at a fair market price; Bisph. Eq. 236; to restrain the collection of an illegal tax; *ibid.*; to set aside deeds, etc., which may operate as a cloud upon the legal title of the owner; whether they be void or voidable, and whether the character of the instrument appears on its face or not; Kerr v. Freeman, 33 Miss. 292; Peirsoll v. Elliott, 6 Pet. (U. S.) 95, 8 L. Ed. 332; but it has been held that equity will not interfere to remove an alleged cloud upon title to land, if the instrument or proceeding constituting such alleged cloud is absolutely void upon its face, so that no extrinsic evidence is necessary to show its invalidity; nor if the instrument or proceeding is not thus void on its face, but the party claiming, in order to enforce it, must necessarily offer evidence which will inevitably show its invalidity; Rich v. Braxton, 158 U. S. 375, 15 Sup. Ct. 1006, 39 L. Ed. 1022.

In a suit brought in the district court of the United States, to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, an order may be made upon a defendant not residing in the district or found therein, and not appearing *gratis*, to appear and answer, plead or demur by a certain day; 18 Stat. L. 472, c. 137, Sec. 8; Mellen v. Iron Works, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. Ed. 178; but such suit will affect only the property concerned; *id.* See BILL OF PEACE; BILL QUIA TIMET.

BILL TO SUSPEND A DECREE. One brought to avoid or suspend a decree under

special circumstances. See 1 Ch. Cas. 3, 61; 2 *id.* 8; Mitf. Eq. Pl. 85, 86.

BILL TO TAKE TESTIMONY DE BENE ESSE. One which is brought to take the testimony of witnesses to a fact material to the prosecution of a suit at law which is actually commenced, where there is good cause to fear that the testimony may otherwise be lost before the time of trial; Hall v. Stout, 4 Del. Ch. 269, where the distinction between this bill and one to perpetuate testimony is clearly stated. The right to a bill to take testimony *de bene esse* depends on the condition of the witness, while the other depends on the situation of the party with respect to his power to bring his rights to immediate investigation; *id.* See 1 S. & S. 83; 2 Story, Eq. Jur. § 1813, n.; 13 Ves. 56.

It lies, in general, where witnesses are aged or infirm; Cooper, Eq. Pl. 57; Ambl. 65; 13 Ves. Ch. 56, 261; propose to leave the country; 2 Dick. 454; Story, Eq. Pl. § 308; or there is but a single witness to a fact; 1 P. Wms. 97; 2 Dick. 648.

The one at whose instance the deposition is taken has no control over it, and if he directs the commissioner to withhold it because he is surprised by the testimony, the court will order its return; First Nat. Bank of Grand Haven v. Forest, 44 Fed. 246.

BILLA CASSETUR (Lat. that the bill be quashed or made void). A plea in abatement concluded, when the pleadings were in Latin, *quod billa cassetur* (that the bill be quashed). 3 Bla. Com. 303.

BILLA EXCAMBII. A bill of exchange.

BILLA EXONERATIONIS. A bill of lading.

BILLA VERA (Lat.). A true bill. The form of words indorsed on a bill of indictment, when proceedings were conducted in Latin, to indicate the opinion of the grand jury that the person therein accused ought to be tried. See TRUE BILL.

BILLET DE CHANGE. A contract to furnish a bill of exchange. A contract to pay the value of a bill of exchange already furnished. Guyot, *Répert. Univ.*

Where a person intends to furnish a bill of exchange *(lettre de change)*, and is not quite prepared to do so, he gives a *billet de change*, which is a contract to furnish a *lettre de change* at a future time Guyot, *Répert. Univ.*; Story, Bills § 2.

BINDER. Used to designate a temporary insurance against fire. In effect, an agreement to insure, but taking effect immediately. It is usually unwritten. See AGREEMENT FOR INSURANCE.

BINDING OUT. A term applied to the contract of apprenticeship, which see.

The contract must be by deed, to which the infant, as well as the parent or guardian, must be a party, or the infant will not be bound; 3 B. & Ald. 584; In re McDowle, 8 Johns. (N. Y.) 328; Stringfield v. Heiskell, 2 Yerg. (Tenn.) 546; Pierce v. Massenburg, 4 Leigh (Va.) 493, 26 Am. Dec. 333; Trimble v. State, 4 Blackf. (Ind.) 437; Balch v. Smith, 12 N. H. 438.

BINDING OVER. The act by which a magistrate or court hold to bail a party accused of a crime or misdemeanor.

The binding over may be to appear at a court having jurisdiction of the offence charged, to answer, or to be of good behavior, or to keep the peace.

BIPARTITE. Of two parts. This term is used in conveyancing; as, this indenture bipartite, between A, of the one part, and B, of the other part.

BIRRETUM, BIRRETUS. A cap or coif used formerly in England by judges and sergeants at law. Spelman, Gloss.

BIRTH. The act of being wholly brought into the world.

The conditions of live birth are not satisfied when a part only of the body is born. The whole body must be brought into the world and detached from that of the mother, and after this event the child must be alive; 5 C. & P. 329; 7 *id.* 814. The circulating system must also be changed, and the child must have an independent circulation; 5 C. & P. 539; 9 *id.* 154; Tayl. Med. Jur. 591.

But it is not necessary that there should have been a separation of the umbilical cord. That may still connect the child with its mother, and yet the killing of it will constitute murder; 7 C. & P. 814. See 1 Beck, Med. Jur. 478; 1 Chit. Med. Jur. 438; GESTATION; LIFE; VITAL STATISTICS.

BISAILE. See BESAILE.

BISHOP. In England, an ecclesiastical officer, who is the chief of the clergy of his diocese, and is the next in rank to an archbishop. A bishop is a corporation sole; 1 Bla. Com. 469. In the United States it is the title of a high ecclesiastical officer of the Roman Catholic, Episcopal and Methodist Episcopal and some other churches. In the first two he is the head of a diocese. He is addressed in the Church of England and the Protestant Episcopal Church as Right Reverend.

In England the two archbishops and twenty-four bishops are entitled to sit in the House of Lords, and are known as spiritual peers. When there is a vacancy, the senior existing bishop is entitled to fill it and not the successor of the one who died. The bishop's powers are threefold: 1. *Potestas ordinis*, under which he confers orders, confirms, consecrates churches, etc.; 2. *Potestas jurisdictionis*, which he exercises as ecclesiastical judge of the diocese; 3. *Administratio familiaris*, by which he governs the revenue; 1 Bla. Com. 377, 155. As to his appointment, see CONGÉ D'ÉLIRE; CHURCH OF ENGLAND.

In the Roman Church he is the governing authority in his diocese and is said to be "the supreme pastor, the supreme teacher, the supreme governor." It is his duty, under the laws and discipline of his church, to administer the regulations provided by its laws, and to construe and interpret such regulations. The court will not review the judgments or acts of a religious organization with reference to its internal affairs for the purpose of ascertaining their regularity or accordance with the discipline and usage of such organization; Pounder v. Ashe, 44 Neb. 673, 63 N. W. 48; Bonacum v. Harrington, 65 Neb. 831, 91 N. W. 886. See RELIGIOUS SOCIETY.

BISHOP'S COURT. **In English Law.** An ecclesiastical court held in the cathedral of each diocese, the judge of which is the bishop's chancellor.

BISHOPRIC. **In Ecclesiastical Law.** The extent of country over which a bishop has jurisdiction; a see; a diocese.

BISSEXTILE. The day which is added every fourth year to the month of February, in order to make the year agree with the course of the sun.

By statute 21 Hen. III., the 28th and 29th of February count together as one day. This statute is in force in some of the United States. Porter v. Holloway, 43 Ind. 35; Harker v. Addis, 4 Pa. 515.

A writ in 1256 to the justices of the bench, relating to the manner in which Leap Year should be counted, had the force of a statute. Holdsw. Hist. E. L. 174.

It is called *bissextile*, because in the Roman calendar it was fixed on the *sixth* day before the calends of March (which answers to the twenty-fourth day of February), and this day was counted *twice;* the first was called *bissextus prior*, and the other *bissextus posterior;* but the latter was properly called bissextile or intercalary day. See CALENDAR.

BITCH. A female dog, wolf or fox. See 1 C. & K. 459. An approbious name for a woman. State v. Harwell, 129 N. C. 550, 40 S. E. 48. Although it has been held that when applied to a woman, it does not, in its common acceptation, import whoredom in any of its forms, and therefore is not slanderous; Schurick v. Kollman, 50 Ind. 336.

BLACK ACRE. A term used by the old writers to distinguish one parcel of land from another, to avoid ambiguity, as well as the inconvenience of a fuller description. "White acre" is also so used. A and B are used in the same way to distinguish persons.

BLACK ACT. **In English Law.** The act of parliament, 9 Geo. II. c. 22. This act was passed for the punishment of certain marauders who committed great outrages disguised and with faces blackened. It was repealed by 7 & 8 Geo. IV. c. 11. See 4 Sharsw. Bla. Com. 245. It is held not to be a part of the common law in Georgia; State v. Campbell, T. U. P. Charlt. (Ga.) 167.

BLACK BOOK OF THE ADMIRALTY. An ancient book compiled in the reign of Edward III. It has always been deemed of the highest authority in matters concerning the admiralty. It contains the laws of Oleron, at large; a view of the crimes and offences cognizable in the admiralty; ordinances and commentaries on matters of prize and maritime torts, injuries, and contracts, De Lovio v. Boit, 2 Gall. 404, Fed. Cas. No. 3,776. It is said by Selden to be not more ancient than the reign of Henry VI. Selden, *de Laud. Leg. Ang.* c. 32. By other writers it is said to have been composed earlier. It was republished (1871) by the British government, with an introduction by Sir Travers Twiss.

BLACK BOOK OF THE EXCHEQUER. The name of a book kept in the English exchequer, containing a collection of treaties, conventions, charters, etc.

BLACK CAP. A portion of the full dress of a judge. It is not known when the custom of putting on the black cap when passing sentence of death was introduced into England. Townsend, Man. of Dates.

BLACK MAIL. Rents reserved, payable in work, grain, and the like.

Such rents were called black mail *(reditus nigri)* in distinction from white rents *(blanche firmes)*, which were rents paid in silver.

A yearly payment made for security and protection to those bands of marauders who infested the borders of England and Scotland about the middle of the sixteenth century and laid the inhabitants under contribution. Hume, Hist. Eng. vol. i. 473; vol. ii. App. No. 8; Cowell.

In common parlance, the term is equivalent to, and synonymous with, extortion—the exaction of money, either for the performance of a duty, the prevention of an injury, or the exercise of an influence. It supposes the service to be unlawful, and the payment involuntary. Not unfrequently it is extorted by threats, or by operating upon the fears or the credulity, or by promises to conceal, or offers to expose the weaknesses, the follies, or the crimes of the victim. Edsall v. Brooks, 17 Abb. Pr. (N. Y.) 226.

Threats by defendant to accuse another of a crime, with intent, himself, to commit the crime of extortion, accompanied by success in obtaining money from that other.

That such other person was endeavoring to induce defendant to receive money, for the purpose of accusing him of extortion, and so could not have been moved by fear, will not prevent his conviction for an attempt at extortion; People v. Gardner, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. Rep. 741; under an act declaring it a crime to threaten a person with a criminal prosecution for the purpose of extorting money, it is immaterial that the person making the

threats believed that the person threatened had committed the crime; People v. Eichler, 75 Hun 26, 26 N. Y. Supp. 998; where threats of prosecution for perjury were made maliciously and with intent to compel the one threatened to do an act against his will, the offence is complete; and it is immaterial whether the one threatened was guilty of perjury; People v. Whittemore, 102 Mich. 519, 61 N. W. 13. In a prosecution under an act providing for the punishment of one who, for the purposes of extortion, sends a letter expressing or implying, or adapted to imply, any threat, and the letter threatens to make a charge against the person to whom it is sent, the truth or falsity of the charge is immaterial; People v. Choynski, 95 Cal. 640, 30 Pac. 791; an act making it an offence to accuse one of crime "with intent to extort money," etc., does not cover the case of an owner who demands compensation for property criminally destroyed, and accompanies his demand with a threat to accuse the defendant of the crime, and, where he is indicted for extortion, it is error to charge that it is immaterial whether the accusation made by him was true or false; Mann v. State, 47 Ohio St. 556, 26 N. E. 226, 11 L. R. A. 656. A charge of soliciting sexual intercourse with the wife of another is a charge of immoral conduct, which, if true, would tend to disgrace one and subject him to the contempt of society, and threatening to make such charge is black mail; Motsinger v. State, 123 Ind. 498, 24 N. E. 342.

On a trial for maliciously threatening to accuse another of burning a building with intent to extort money, evidence of the truth of the charge is inadmissible on the question of malice or of intent, or to impeach the prosecuting witness; Com. v. Buckley, 148 Mass. 27, 18 N. E. 577, 1 L. R. A. 624.

BLACK RENTS. Rents reserved in work, grain, or baser money than silver. Whishaw.

BLACK ROD, GENTLEMAN USHER OF THE. A chief officer of the king, deriving his name from his Black Rod of Office, on the top of which reposes a golden lion. During the session of Parliament he attends on the peers, summons the Commons to the House of Lords, and to his custody all peers impeached for any crime or contempt are first committed. Black Book 255; Wharton. His deputy is the Yeoman Usher. Similar officers are found in the Dominion of Canada and other colonies. Cent. Dict.

BLACKLEG. A professed gambler, a person who makes a business of betting—not necessarily dishonest, though disreputable: 3 H. & N. 376; 31 L. T. O. S. 217, per Pollock, C. B. In the same case Watson, B., thought the word had no precise signification; but Martin and Bramwell, BB., thought it imputed the indictable offence of cheating at cards.

BLACKLISTING. A list of names of persons kept for the purpose of prohibiting or recommending against dealings with them.

The publication of such a list is libellous *per se* unless justified or privileged; Hartnett v. Plumbers' Supply Ass'n, 169 Mass. 229, 47 N. E. 1002, 38 L. R. A. 194; Nettles v. Somervell, 6 Tex. Civ. App. 627, 25 S. W. 658; Western Union Telegraph Co. v. Pritchett, 108 Ga. 411, 34 S. E. 216. To blacklist has been held not to impute the commission of a crime or other conduct exposing one to public hatred, punishment, disgrace or derision; Wabash R. Co. v. Young, 162 Ind. 103, 69 N. E. 1003, 4 L. R. A. (N. S.) 1091. False statements manifestly hurtful to a man in his credit or business and intended to be so are not privileged; Weston v. Barnicoat, 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612; nor are communications sent to the members of an organization for the purpose of coercing the payment of the claims of the persons publishing such communication; Muetze v. Tuteur, 77 Wis. 236, 46 N. W. 123, 9 L. R. A. 86, 20 Am. St. Rep. 115. See COMMERCIAL AGENCY; LIBEL.

A more general understanding of the term is that it has reference to the practice of one employer presenting to another the names of employés for the purpose of furnishing information concerning their standing as employés; State v. Justus, 85 Minn. 279, 88 N. W. 759, 56 L. R. A. 757, 89 Am. St. Rep. 550.

In the report of the Anthracite Coal Strike Commission, May, 1903, it is described as a combination among employers not to employ workmen discharged by any of the members of the coal combination, and in this sense it is recognized by the legislative enactments in many of the states which prohibit employers from blacklisting an employé with the intent of preventing his employment by others. But many of these acts also contain a provision that they shall not be construed as preventing an employer from furnishing a truthful statement of the cause of discharge. Such an act is held not to be in violation of the 14th amendment and not to be class legislation; State v. Justus, 85 Minn. 279, 88 N. W. 759, 56 L. R. A. 757, 89 Am. St. Rep. 550; Joyce v. R. Co., 100 Minn. 225, 110 N. W. 975, 8 L. R. A. (N. S.) 756.

In the absence of malice, it is not libelous to circulate a blacklist of workmen among officials whose duty it is to employ them; Missouri Pac. Ry. Co. v. Richmond, 73 Tex. 568, 11 S. W. 555, 4 L. R. A. 280, 15 Am. St. Rep. 794; and a record may be kept of the reasons for the discharge of a railway servant and communicated to persons interested; Hebner v. R. Co., 78 Minn. 289, 80 N. W. 1128, 79 Am. St. Rep. 387. Such a communication, when the employé was discharged for gross neglect of duty, was held privileged; [1891] 2 Q. B. 189; but blacklisting was held libelous in Hartnett v. Plumb-

ers' Supply Ass'n, 169 Mass. 229, 47 N. E. 1002, 38 L. R. A. 194.

An agreement among several railroad companies not to employ a person discharged for a good cause by any of them is not legally injurious, unless the statements are false and the person has sought and been refused employment elsewhere; Hundley v. R. Co., 105 Ky. 162, 48 S. W. 429, 63 L. R. A. 289, 88 Am. St. Rep. 298; nor is an agreement among employers not to employ those who leave without cause and refuse to conform to certain rules an unlawful combination or conspiracy; Willis v. Mfg. Co., 120 Ga. 597, 48 S. E. 177, 1 Ann. Cas. 472. It has been said that an agreement of employers not to employ a particular person, in order more effectively to compete with employés, is not distinguishable from an agreement of laborers not to work for a particular person; 17 Harv. L. R. 139; but see Mattison v. R. Co., 3 Oh. S. C. & C. P. 526, where such a combination of employers was declared illegal.

Striking employés, whose names were in a blacklist sent to other employers in the same city, may not unite in an action. If a right exists, it is in favor of each one separately; Worthington v. Waring, 157 Mass. 421, 32 N. E. 744, 20 L. R. A. 342, 34 Am. St. Rep. 294.

An injunction will not be granted to restrain a company from placing employés' names on a blacklist, or from maintaining such a list and permitting other employers to inspect it; Boyer v. Tel. Co., 124 Fed. 246; but see Casey v. Cincinnati Typographical Union No. 3, 45 Fed. 135, 12 L. R. A. 193, where the publication of posters, circulars, etc., by employés for the purpose of carrying out a conspiracy to boycott was restrained by injunction.

A blacklisting statute requiring a corporation to give to its employés service letters stating the true reason for their discharge does not deprive it of the equal protection of the laws under the 14th amendment; St. Louis Southwestern R. Co. v. Hixon (Tex.) 126 S. W. 338.

See BOYCOTT; COMBINATION; CONSPIRACY; INJUNCTION; LIBEL; LABOR UNION.

BLADA. Growing crops of grain. Spelman, Gloss. Any annual crop. Cowell. Used of crops, either growing or gathered. Reg. Orig. 94 *b*; Coke, 2d Inst. 81.

BLANC SEIGN. It is a paper signed at the bottom by him who intends to bind himself, give acquittance, or compromise at the discretion of the person whom he entrusts with such *blanc seign*, giving him power to fill it with what he may think proper, according to agreement. This power is personal and dies with the attorney. Musson v. Blank, U. S., 6 Mart. O. S. (La.) 718.

BLANCH HOLDING. In Scotch Law. A tenure by which land is held.

The duty is generally a trifling one, as a peppercorn. It may happen, however, that the duty is of greater value; and then the distinction received in practice is founded on the nature of the duty. Stair. Inst. sec. iii. lib. 3, § 33. See Paterson, Comp. 15; 2 Bla. Com. 42.

BLANCHE FIRME. A rent reserved, payable in silver.

BLANK. A space left in a writing, to be filled up with one or more words to complete the sense.

When a blank is left in a written agreement which need not have been reduced to writing, and would have been equally binding whether written or unwritten, it is presumed, in an action for the non-performance of the contract, parol evidence might be admitted to explain the blank. And where a written instrument which was made professedly to record a fact is produced as evidence of that fact which it purports to record, and a blank appears in a material part, the omission may be supplied by other proof; Wood v. Beach, 7 Vt. 522. Hence a blank left in an award for a name was allowed to be supplied by parol proof; Lynn v. Risberg, 2 Dall. (U. S.) 180, 1 L. Ed. 339. But where a creditor signs a deed of composition, leaving the amount of his debt in blank, he binds himself to all existing debts; 1 B. & Ald.

It is said that a blank may be filled by consent of the parties and the instrument remain valid; Cro. Eliz. 626; 11 M. & W. 468; Smith v. Crooker, 5 Mass. 538; Woodworth v. Bank, 19 Johns. (N. Y.) 396, 10 Am. Dec. 239; Cribben v. Deal, 21 Or. 211, 27 Pac. 1046, 28 Am. St. Rep. 746; though not, it is said, where the blank is in a part material to the operation of the instrument as an instrument of the character which it purports to be; 6 M. & W. 200; McKee v. Hicks, 13 N. C. 379; Gilbert v. Anthony, 1 Yerg. (Tenn.) 69, 24 Am. Dec. 439; Boyd v. Boyd, 2 N. & McC. (S. C.) 125; Byers v. McClanahan, 6 Gill & J. (Md.) 250; at least, without a new execution; 2 Pars. Cont. 8th ed. *724. But see Wiley v. Moor, 17 S. & R. (Pa.) 438, 17 Am. Dec. 696; Commercial Bank of Buffalo v. Kortright, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; Bank of Commonwealth v. Curry, 2 Dana (Ky.) 142; Duncan v. Hodges, 4 McCord (S. C.) 239, 17 Am. Dec. 734; 4 Bingh. 123. If a blank is left in a policy of insurance for the name of the place of destination of a ship, it will avoid the policy; Park. Ins. 22; Wesk. Ins. 42. See cases in note to 10 Am. Rep. 268.

A power of attorney to convey land is inoperative until the name of the attorney is inserted by some one having authority from the principal; U. S. v. Mfg. Co., 198 Fed. 881. As to filling in blanks after execution, see Lewis's Gr. Evid. § 568.

Leaving blanks in a note and chattel mortgage as to the amount, and the delivery of the instruments in that condition, create an agency in the receiver to fill them in the manner contemplated by the maker; Mackey v. Basil, 50 Mo. App. 190. As between the parties to a deed it is not void because it did not contain the grantee's name when acknowledged, if it was afterwards written in by the grantor; Vought's Ex'rs v. Vought, 50 N. J. Eq. 177, 27 Atl. 489.

Where the amount is left blank in the body of a note, its insertion in figures in the margin does not complete it; Hollen v. Davis, 59 Ia. 444, 13 N. W. 413, 44 Am. Rep. 688; Norwich Bank v. Hyde, 13 Conn. 279; *contra*, Witty v. Ins. Co., 123 Ind. 411, 24 N. E. 141, 8 L. R. A. 365, 18 Am. St. Rep. 327; nor if words as well as figures are in the margin; Chestnut v. Chestnut, 104 Va. 530, 52 S. E. 348, 2 L. R. A. (N. S.) 879, note, 7 Ann. Cas. 802. So where the name of the payee is left blank, although a *bona fide* holder may insert his own name; Tittle v. Thomas, 30 Miss. 122, 64 Am. Dec. 156; it must be done before suit; Thompson v. Rathbun, 18 Or. 202, 22 Pac. 837; Greenhow v. Boyle, 7 Blackf. (Ind.) 56; Seay v. Bank, 3 Sneed (Tenn.) 558, 67 Am. Dec. 579.

A transfer of shares by deed executed in blank as to the name of the purchaser or the number of the shares, is void in England, though sanctioned by the usage of the stock exchange; 4 D. & J. 559; 2 H. & C. 175. But the rule is otherwise in Kortright v. Bank, 20 Wend. (N. Y.) 91; German Union Bldg. & Sav. Fund Ass'n v. Sendmeyer, 50 Pa. 67; (but see Denny v. Lyon, 38 Pa. 98, 80 Am. Dec. 463); Day v. Holmes, 103 Mass. 306; Bridgeport Bank v. R. Co., 30 Conn. 274. See the subject discussed in Lewis, Stocks 50. As to blanks in notes, see Knoxville Nat. Bank v. Clark, 51 Ia. 264, 1 N. W. 491, 33 Am. Rep. 130.

See ALTERATION.

BLANK BAR. See COMMON BAR.

BLANK INDORSEMENT. An indorsement which does not mention the name of the person in whose favor it is made.

Such an indorsement is generally effected by writing the indorser's name merely on the back of the bill; Chit. Bills 170. A note so indorsed is transferable by delivery merely, so long as the indorsement continues blank; and its negotiability cannot be restricted by subsequent special indorsements; 1 Esp. 180; Peake 225; Mitchell v. Fuller, 15 Pa. 268, 53 Am. Dec. 594. See 3 Campb. 339; INDORSEMENT.

BLANKET POLICY. A policy which contemplates that the risk is shifting, fluctuating, or varying, and is applied to a class of property, rather than to any particular thing. 1 Wood, Ins. § 40. See Home Ins. Co. v. Warehouse Co., 93 U. S. 541, 23 L. Ed. 868.

BLASPHEMY. To attribute to God that which is contrary to his nature, and does not belong to him, and to deny what does. A false reflection uttered with a malicious design of reviling God. Emlyn's Pref. to vol. 8, St. Tr.; Com. v. Kneeland, 20 Pick. (Mass.) 244.

An impious or profane speaking of God or of sacred things; reproachful, contemptuous, or irreverent words uttered impiously against God or religion. Blasphemy cognizable by common law is defined by Blackstone to be "denying the being or providence of God, contumelious reproaches of our Saviour Christ, profane scoffing at the Holy Scripture, or exposing it to contempt or ridicule;" by Kent as "maliciously reviling God or religion."

In general blasphemy may be described as consisting in speaking evil of the Deity with an impious purpose to derogate from the divine majesty, and to alienate the minds of others from the love and reverence of God. It is purposely using words concerning God calculated and designed to impair and destroy the reverence, respect, and confidence due to him as the intelligent creator, governor, and judge of the world. It embraces the idea of detraction, when used towards the Supreme Being; as "calumny" usually carries the same idea when applied to an individual. It is a wilful and malicious attempt to lessen men's reverence for God by denying his existence, or his attributes as an intelligent creator, governor, and judge of men, and to prevent their having confidence in him as such; Com. v Kneeland, 20 Pick. (Mass.) 211, 212, per Shaw, C. J

If a man, not for the sake of argument, makes a scurrilous attack on doctrines which the majority of persons hold to be true, in a public place where passersby may be offended and young people may come, he becomes liable for a blasphemous libel; see 72 J. P. 188.

The offense of publishing a blasphemous libel, and the crime of blasphemy, are in many respects technically distinct, and may be differently charged; yet the same act may, and often does, constitute both. The latter consists in blaspheming the name of God, by denying, cursing, or contumeliously reproaching God, his creation, government, or final judging of the world; and this may be done by language orally uttered. But it is not the less blasphemy if the same thing be done by language written, printed, and published; although when done in this form it also constitutes the offence of libel; Com. v. Kneeland, 20 Pick. (Mass.) 213, per Shaw, C. J.; Heard, Lib. & Sl. § 336.

In most of the United States, statutes have been enacted against this offence; but these statutes are not understood in all cases to have abrogated the common law; the rule being that where the statute does not vary the class and character of an offence, but only authorizes a particular mode of proceeding and of punishment, the sanction is cumulative and the common law is not taken away. And it has been decided that neither these statutes nor the common-law doctrine is repugnant to the constitutions of those states in which the question has arisen; Heard, Lib.

& Sl. § 343; Com. v. Kneeland, 20 Pick. (Mass.) 206; Updegraph v. Com., 11 S. & R. (Pa.) 394; People v. Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335; Andrew v. New York Bible & Common Prayer Book Society, 4 Sandf. (N. Y.) 156; State v. Chandler, 2 Harr. (Del.) 553; Vidal v. Girard, 2 How. (U. S.) 127, 11 L. Ed. 205.

In England, to speak, write and publish any profane words vilifying or ridiculing God, Jesus Christ or the Holy Ghost, the Old or New Testament, or Christianity in general, with intent to shock and insult believers or to pervert or mislead the ignorant or unwary, is a misdemeanor. The intent is an essential element. Odgers, C. L. 206. See [1908] 72 J. P. 188.

In France, before the 25th of September, 1791, it was a blasphemy, also, to speak against the Holy Virgin and the saints, to deny the faith, to speak with impiety of holy things, and to swear by things sacred; Merlin, *Répert.* The law was repealed on that date.

The Civil Law forbade blasphemy; such, for example, as to swear by the hair of the head of God; and it punished its violation with death. *Si enim contra homines factæ blasphemiæ impunitæ non relinquuntur, multo magis qui ipsum Deum blasphemant digni sunt supplicia sustinere.* (For if slander against men is not left unpunished, much more do those deserve punishment who blaspheme God.) No. 77. 1. § 1.

In Spain it is blasphemy not only to speak against God and his government, but to utter injuries against the Virgin Mary and the saints. *Senen Vilanova y Manes, Materia Criminal, forense,* Observ. 11, cap. 3, n. 1. See CHRISTIANITY.

BLASTING. A mode of rending rock and other solid substances by means of explosives.

Blasting rock in the city of New York is necessary and therefore legal; Gourdier v. Cormack, 2 E. D. Sm. (N. Y.) 254; Wiener v. Hammell, 14 N. Y. Supp. 365. It is a useful and often a necessary means for the improvement of land, and where it does not amount to a nuisance, the person is answerable only if negligent; Klepsch v. Donald, 4 Wash. 436, 30 Pac. 991, 31 Am. St. Rep. 936. Absolute liability is imposed on the keeper of dangerous explosives only when by reason of the location and surrounding circumstances the magazine is a nuisance; Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654. Many cases hold that injuries to a house caused by pulsations of the earth, vibrations of the air, and jarring the house will not render the one blasting liable therefor; Simon v. Henry, 62 N. J. L. 486, 41 Atl. 692; Benner v. Dredging Co., 134 N. Y. 156, 31 N. E. 328, 17 L. R. A. 220, 30 Am. St. Rep. 649; Holland House Co. v. Baird, 169 N. Y. 136, 62 N. E. 149; Bessemer Coal, Iron & Land Co. v. Doak, 152 Ala. 166, 44 South. 627, 12 L. R. A. (N. S.) 389; in the absence of negligence on his part; *id.; contra,* Fitz Simons & Connell Co. v. Braun, 199 Ill. 390, 65 N. E. 249, 59 L. R. A. 421; City of Chicago v. Murdock, 212 Ill. 9, 72 N. E. 46, 103 Am. St. Rep. 221; Longtin v. Persell, 30 Mont. 306, 76 Pac. 699, 65 L. R. A. 655, 104 Am. St. Rep. 723, 2 Ann. Cas. 198; but it has been held in other cases to be a nuisance where it causes loud noises and renders adjoining property untenantable; Gossett v. R. Co., 115 Tenn. 376, 89 S. W. 737, 1 L. R. A. (N. S.) 97, 112 Am. St. Rep. 846; that the continuance of the concussions amount to a private nuisance; Morgan v. Bowes, 17 N. Y. Supp. 22; and that injury to buildings caused by blasting renders the user of the explosives liable in damages, whether he was or was not negligent; Farnandis v. R. Co., 41 Wash. 486, 84 Pac. 18, 5 L. R. A. (N. S.) 1086, 111 Am. St. Rep. 1027; Colton v. Onderdonk, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556. One engaged in blasting was held liable for a fire communicated by the explosion of blasts; City of Tiffin v. McCormack, 34 Ohio St. 638, 32 Am. Rep. 408; and for the splitting of the underlying strata of rock; Gourdier v. Cormack, 2 E. D. Sm. (N. Y.) 200. That one attempting to use dynamite in blasting cannot foresee the consequences of his act does not relieve him from liability for an injury to the occupant of a neighboring property, in a populous neighborhood; Kimberly v. Howland, 143 N. C. 398, 55 S. E. 778, 7 L. R. A. (N. S.) 545.

For injuries to land caused by débris cast thereon by blasts in an adjoining quarry, trespass is the proper remedy; Scott v. Bay, 3 Md. 431; right to blast for the purpose of making excavations on one's own land is subject to the limitation that the soil, stones, etc., must not be cast upon neighboring land; Hay v. Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279 (a leading case). An injunction will be granted; Sayen v. Johnson, 4 Pa. Co. Ct. 360; Wilsey v. Callanan, 21 N. Y. Supp. 165; though negligence is not proved; Central Iron & Coal Co. v. Vanderheuk, 147 Ala. 546, 41 South. 145, 61 L. R. A. (N. S.) 570, 119 Am. St. Rep. 102, 11 Ann. Cas. 346; and notwithstanding the work was authorized by a city ordinance; Rogers v. Hanfield, 14 Daly (N. Y.) 339. So an injunction was granted to prevent the violent disturbance of a house, where the effect ultimately would be to shake it down; Hill v. Schneider, 13 App. Div. 299, 43 N. Y. Supp. 1; but it is held that blasting at night in a mine cannot be restrained by the owner of the surface, merely because the blasting disturbs sleep; Marvin v. Mining Co., 55 N. Y. 538, 14 Am. Rep. 322.

One who blasts on his own land is liable where death results, irrespective of negligence; Sullivan v. Dunham, 161 N. Y. 290, 55 N. E. 923, 47 L. R. A. 715, 76 Am. St. Rep. 274; though the blast is fired for a lawful purpose and by one skilled at the work; People's Gas Co. v. Tyner, 131 Ind. 277, 31

N. E. 59, 16 L. R. A. 443, 31 Am. St. Rep. 433. It is negligence not to cover the blast, where the work is done on land adjacent to a public road; Beauchamp v. Min. Co., 50 Mich. 163, 15 N. W. 65, 45 Am. Rep. 30. Where a city ordinance requires the blast to be covered and the orifice to be protected by planks and timber, a failure to comply with it is a sufficient neglect of duty to justify a finding of negligence; Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451; Devlin v. Gallagher, 6 Daly (N. Y.) 494. If it is not practicable to cover the blast, it is incumbent on the person doing the work to see that there is notice of danger; Herrington v. Village of Lansingburgh, 110 N. Y. 145, 17 N. E. 728, 6 Am. St. Rep. 348; see City of Logansport v. Dick, 70 Ind. 65, 36 Am. Rep. 166. On the ground that the work is intrinsically dangerous, a city is held liable for damage caused by blasting in a street done by a contractor in constructing a sewer; City of Joliet v. Harwood, 86 Ill. 110, 29 Am. Rep. 17; City of Logansport v. Dick, 70 Ind. 78, 36 Am. Rep. 166; but see Pack v. City of New York, 8 N. Y. 222; Kelly v. City of New York, 11 N. Y. 432; Simon v. Henry, 62 N. J. L. 486, 41 Atl. 692. The negligence of a contractor in blasting in a street to make trenches for a water company, was held to be chargeable to the company; Ware v. St. Paul Water Co., 2 Abb. U. S. 261, Fed. Cas. No. 17,172.

BLIND. The condition of one who is deprived of the faculty of seeing.

Persons who are blind may enter into contracts and make wills like others; Carth. 53; Barnes, 19; Boyd v. Cook, 3 Leigh (Va.) 32. When an attesting witness becomes blind, his handwriting may be proved as if he were dead; 1 Starkie, Ev. 341. But before proving his handwriting the witness must be produced, if within the jurisdiction of the court; 1 Ld. Raym. 734; 1 Mood. & R. 258.

It is not negligence for a blind man to travel along a highway; Sleeper v. Town of Sandown, 52 N. H. 244.

BLOCKADE. In International Law. The actual investment of a port or place by a hostile force fully competent, under ordinary circumstances, to cut off all communication therewith, so arranged or disposed as to be able to apply its force to every point of practicable access or approach to the port or place so invested.

Nature and character. Blockades may be either military or commercial, or may partake of the nature of both. As military blockades they may partake of the nature of a land or land and sea investment of a besieged city or seaport, or they may consist of a masking of the enemy's fleet by another belligerent fleet in a port or anchorage where commerce does not exist. As commercial blockades, they may consist of operations against an enemy's trade or revenue, either localized at a single important seaport, or as a more comprehensive strategic operation, by which the entire sea frontier of an enemy is placed under blockade. A blockade, being an operation of war, any government, independent or *de facto*, whose rights as a belligerent are recognized, can institute a blockade as an exercise of those rights.

The justification of blockade lies in the international recognition of the necessity which the belligerent is under of imposing that restriction upon neutral commerce for the successful prosecution of hostilities.

It is not settled whether the mouth of an international river can be blockaded in case one or more of the upper riparian states remain neutral. But if a river constitutes the boundary line between a belligerent and a neutral, it may not be blockaded so as to prevent access to the neutral side of the river. The Peterhoff, 5 Wall. (U. S.) 49, 18 L. Ed. 564. In case of civil war, a government may blockade certain of its own ports, as was done by the United States during the American Civil War and by France during the Franco-Prussian War.

Effectiveness. In international jurisprudence it is a well-settled principle that the blockading force must be present and of sufficient force to be effective, and a mere notification of one belligerent that the port of the other is blockaded, sometimes termed a paper blockade, is not sufficient to establish a legal blockade. A blockade may be made effective by batteries on shore as well as by ships afloat, and, in case of inland ports, may be maintained by batteries commanding the river or inlet by which it may be approached, supported by a naval force sufficient to warn off innocent and capture offending vessels attempting to enter; The Circassian, 2 Wall. (U. S.) 135, 17 L. Ed. 796. In 1856 the Declaration of Paris prescribed that blockades to be obligatory must be effective, that is to say, maintained by a sufficient force really to prevent access of the enemy's ships and other vessels. The United States, although not a party to this declaration, has upheld the same doctrine since 1781, when, by ordinance of Congress, it was declared that there should be a number of vessels stationed near enough to the port to make the entry apparently dangerous; Journals of Congress, vol. vii. p. 186. By the convention of the Baltic Powers in 1780, and again in 1801, the same doctrine was promulgated; and in 1871, by treaty between Italy and the United States, a clearer and more satisfactory definition of an effective blockade was agreed upon, as follows: "It is expressly declared that such places only shall be considered blockaded as shall be actually invested by naval forces capable of preventing the entrance of neutrals, and

so stationed as to create an evident danger on their part to attempt it."

The French doctrine of an effective blockade is that access must be barred by a line of ships forming a chain around the blockaded port, while the United States, Great Britain and Japan hold that it is sufficient to have men-of-war cruising in the vicinity of the port, provided the disposition of the cruisers constitutes an actual danger to a vessel seeking to run the blockade. A blockade does not cease to be effective because the blockading force is temporarily withdrawn owing to stress of weather. 1 C. Rob. 86, 154. If a single modern cruiser, blockading a port, renders it in fact dangerous for other craft to enter the port, the blockade is practically effective; the Olinde Rodrigues, 174 U. S. 510, 19 Sup. Ct. 851, 43 L. Ed. 1065.

Neutrals. To involve a neutral in the consequences of violating the blockade, it is indispensable that he should have due notice of it. This information may be communicated to him in two ways: either actually, by a formal notice from the blockading power, or constructively, by notice to his government, or by the notoriety of the fact; Prize Cases, 2 Black (U. S.) 635, 17 L. Ed. 459; 6 C. Rob. Adm. 367; 2 *id.* 110, 128; 1 Act. Prize Cas. 61. Formal notice is not required; any authentic information is sufficient; 1 C. Rob. Adm. 334; 5 *id.* 77, 286; Edw. Adm. 203; 3 Phill. Int. Law 397; The Revere, 24 Bost. L. Rep. 276, Fed. Cas. No. 11,716; Hall, Int. L. 648; it is a settled rule that a vessel in a blockaded port is presumed to have notice of a blockade as soon as it begins; 2 Black 630.

Breach. A violation may be either by going into the place blockaded, or by coming out of it with a cargo laden after the commencement of the blockade. Also placing himself so near a blockaded port as to be in a condition to slip in without observation, is a violation of the blockade, and raises the presumption of a criminal intent; 6 C. Rob. Adm. 30, 101, 182; Radcliff v. Ins. Co., 7 Johns. (N. Y.) 47; 1 Edw. Adm. 202; Fitzsimmons v. Ins. Co., 4 Cra. (U. S.) 185, 2 L. Ed. 591; The Josephine, 3 Wall. (U. S.) 83, 18 L. Ed. 65. The sailing for a blockaded port, knowing it to be blockaded, is held by the English prize courts to be such an act as may charge the party with a breach of the blockade; British instructions to their fleet in the West India station, Jan. 5, 1804; and the same doctrine is recognized in the United States; Yeaton v. Fry, 5 Cra. (U. S.) 335, 3 L. Ed. 117; The Nereide, 9 Cra. (U. S.) 440, 3 L. Ed. 769; 1 Kent *150; The Bermuda, 3 Wall. (U. S.) 514, 18 L. Ed. 200; 3 Phill. Int. Law, 397; Hall, Int. L. 662; The Revere, 24 Bost. L. Rep. 276, Fed. Cas. No. 11,716. See Fitzsimmons v. Ins. Co., 4 Cra. (U. S.) 185, 2 L. Ed. 591; Maryland Ins. Co. v. Woods, 6 Cra. (U. S.) 29, 3 L. Ed. 143; Vos v. Ins. Co., 2 Johns. Cas. (N. Y.) 180; *id.*, 469; 10 Moore, P. C. 58; The Adula, 176 U. S. 361, 20 Sup. Ct. 432, 44 L. Ed. 505.

But in the case of long voyages, sailing for a blockaded port, contingently, might be permitted, if inquiry were afterwards made at convenient ports; Maryland Ins. Co. v. Woods, 6 Cra. (U. S.) 29, 3 L. Ed. 143; Sperry v. Delaware Ins. Co., 2 Wash. C. C. 243, Fed. Cas. No. 13,236; but the ordinance of 1781 authorized the condemnation of vessels "destined" to any blockaded port, without any qualification based upon proximity or notice. A neutral vessel in distress may enter a blockaded port; The Diana, 7 Wall. (U. S.) 354, 19 L. Ed. 165.

Penalty. When the ship has contracted guilt by a breach of the blockade she may be taken at any time before the end of her voyage; but the penalty travels no further than the end of her return voyage; 2 C. Rob. Adm. 128; 3 *id.* 147; The Wren, 6 Wall. (U. S.) 582, 18 L. Ed. 876. When taken, the ship is confiscated; and the cargo is always, *prima facie*, implicated in the guilt of the owner or master of the ship; and the burden of rebutting the presumption that the vessel was going in for the benefit of the cargo, and with the direction of the owners rests with them; 1 C. Rob. Adm. 67, 130; 3 *id.* 173; 4 *id.* 93; 1 Edw. Adm. 39. The Declaration of London (*q. v.*) Arts. 1–21, apart from re-stating existing practice, lays down the following rules upon controverted points: The question whether a blockade is effective is a question of fact, that is, each case must be decided upon its own merits; a "declaration" of the blockade must be made by the blockading government or by the naval authorities acting in its name. This declaration must be followed by a "notification," first, to the neutral powers themselves, and, secondly, to the local authorities, who must, in turn, notify the foreign consular officers at the place. The liability of a neutral vessel is dependent upon the knowledge of the blockade, and this knowledge is presumed if the vessel left port subsequently to the notification of the blockade to the neutral power. Neutral vessels may not be captured for breach of blockade except within the area of operations of the war-ships maintaining the blockade, nor, if they have broken blockade "outwards," are they liable to capture after pursuit has been abandoned by the blocking force. This overrules the British and American doctrine stated above.

BLOOD. Relationship; stock; family. 1 Roper, Leg. 103; 1 Belt, Suppl. Ves. 365. Kindred. Bacon, Max. Reg. 18.

Brothers and sisters are said to be of the whole blood if they have the same father and mother, and of the half-blood if they have only one parent in common. Baker v. Chalfant, 5 Whart. (Pa.) 477. See Oglesby Coal Co. v. Pasco, 79 Ill. 166; 15 Ves. 107.

BLOOD FEUD. Avenging the slaughter of kin on the person who slaughtered him,

or on his belongings. Whether the Teutonic or the Anglo-Saxon law had a legal right of blood feud has been disputed, but in Alfred's day it was unlawful to begin a feud until an attempt had been made to exact the price of the life *(wer-gild)*.

BLOOD STAINS. See STAINS, BLOOD.

BLOODHOUND. Evidence from the tracking of a prisoner by bloodhounds is not permissible until it is shown that they were reliable and accurate; State v. Adams, 85 Kan. 435, 116 Pac. 608, 35 L. R. A. (N. S.) 870; State v. Dickerson, 77 Ohio St. 34, 82 N. E. 969, 122 Am. St. Rep. 479, 11 Ann. Cas. 1181; other cases express in various ways the foundation that must be laid; Richardson v. State, 145 Ala. 46, 41 South. 82, 8 Ann. Cas. 108; Parker v. State, 46 Tex. Cr. R. 461, 80 S. W. 1008, 108 Am. St. Rep. 1021, 3 Ann. Cas. 893; in Brott v. State, 70 Neb. 395, 97 N. W. 593, 63 L. R. A. 789, such evidence is held dangerous and incompetent.

Such dogs are remarkable for their sense of smell and ability to follow a scent or track a human being; to permit evidence that a hound has tracked an alleged criminal, it must be shown that it had been trained in that work; Pedigo v. Com., 103 Ky. 41, 44 S. W. 143, 42 L. R. A. 432, 82 Am. St. Rep. 566.

BLOODWIT. An amercement for bloodshed. Cowell. The privilege of taking such amercements. Skene.

A privilege or exemption from paying a fine or amercement assessed for bloodshed. Cowell; *Termes de la Ley*.

BLUE LAWS. A name often applied to severe laws for the regulation of religious and personal conduct in the colonies of Connecticut and New Haven; hence any rigid Sunday laws or religious regulations. The best account of the Blue Laws is by Trumbull, "The True Blue Laws of Connecticut and New Haven, and the False Blue Laws invented by the Rev. Sam'l Peters, etc." The latter reference is to a collection without credit. See also Hinman; Schmucker, Blue Laws; Barker; Hist. & Antiq. of New Haven; Peters, Hist. Conn.; Fiske, Beginnings of New England 238.

BLUE SKY LAW. A popular name for acts providing for the regulation and supervision of investment companies, for the protection of the community from investing in fraudulent companies. The first of these acts was passed in Kansas (1911). Some twenty states have passed them. Such act was held valid in a lower court in Kansas, and invalid in Alabama & N. O. Transp. Co. v. Doyle, 210 Fed. 173 (Michigan act).

BOARD OF HEALTH. See HEALTH; DELEGATION.

BOARD OF SPECIAL INQUIRY. An instrument of executive power, not a court, made up of the immigrant officials in the service, subordinates of the commissioner of immigration, whose duties are declared to be administrative. Its decisions are not binding upon the Secretary of Commerce. The act of congress making them final means final where they are most likely to be questioned, in the courts; Pearson v. Williams, 202 U. S. 281, 26 Sup. Ct. 608, 50 L. Ed. 1029.

BOARD OF SUPERVISORS. A county board of representatives of towns or townships, under a system existing in some states, having charge of the fiscal affairs of the county.

This system originated in the state of New York, and has been adopted in Michigan, Illinois, Wisconsin, and Iowa The board, when convened, forms a deliberative body, usually acting under parliamentary rules It performs the same duties and exercises like authority as the COUNTY COMMISSIONERS or BOARD OF CIVIL AUTHORITY in other states. See, generally, Haines's Township Laws of Mich., and Haines's Town Laws of Ill. & Wis.

BOARD OF TRADE. See CHAMBER OF COMMERCE; GRAIN.

BOARDER. One who makes a special contract with another person for food with or without lodging. Berkshire Woollen Co v. Proctor, 7 Cush. (Mass.) 424; Pollock v. Landis, 36 Ia. 651. To be distinguished from a guest of an innkeeper; Story, Bailm. § 477; McDaniels v. Robinson, 26 Vt. 343, 62 Am. Dec. 574; Chamberlain v. Masterson, 26 Ala. 371; Berkshire Woollen Co. v. Proctor, 7 Cush. (Mass.) 417. See Edwards, Bailments § 456.

In a boarding-house, the guest is under an express contract, at a certain rate, for a certain time; but in an inn there is usually no express engagement: the guest, being on his way, is entertained from day to day according to his business, upon an implied contract; Willard v. Reinhardt, 2 E. D. Smith (N. Y.) 148; Stewart v. McCready, 24 How. Pr. (N. Y.) 62; Cady v. McDowell, 1 Lans. (N. Y.) 484.

There is a duty on the part of a boarding house keeper to take reasonable care for the safety of property brought by a guest into his house, and evidence of refusal to furnish a key of the bed room and also for a chest of drawers therein was sufficient to go to the jury as a breach of that duty; [1905] 2 K. B. 805, in the English Court of Appeal, where the prior cases are examined and criticized, and Danzy v. Richardson, 3 E. & B. 144, is approved. Holder v. Soulley, 8 C. B. N. S. 254, not followed, and Calye's Case, 8 Co. 32 *a*, explained. See note in 31 Mag. L. Rev. 226; BAILMENT; INNKEEPER.

BOAT. A boat does not pass by the sale of a ship and appurtenances; Molloy, b. 2, c. 1; § 8; Beawes, *Lex. Merc.* 56; Starr v. Goodwin, 2 Root (Conn.) 71; Park Ins. 8th ed. 126. But see Briggs v. Strange, 17 Mass. 405; 2 Marsh. 727. Insurance on a ship covers her boats; 1 Mann. & R. 392; 1 Pars. Marit. Law 72, n.

BOC (Sax.). A writing; a book. Used of the *land-bocs*, or evidences of title among the Saxons, corresponding to modern deeds. These *bocs* were destroyed by William the Conqueror. 1 Spence, Eq. Jur. 22; 1 Washb. R. P. *17, 21. See 1 Poll. & Maitl. 472, 571; 2 *id.* 12, 86.

BOC HORDE. A place where books, evidences, or writings are kept. Cowell. These were generally in monasteries. 1 Spence, Eq. Jur. 22.

BOC LAND. Alodial lands held by written evidence of title.

Such lands might be granted upon such terms as the owner should see fit, by greater or less estate, to take effect presently, or at a future time, or on the happening of any event. In this respect they differed essentially from feuds. 1 Washb. 5th ed. R. P. *17; 4 Kent 441. But see ALOD.

BODY. A person. Used of a natural body, or of an artificial one created by law, as a corporation.

A collection of laws; that is, the embodiment of the laws in one connected statement or collection, called a body of laws.

In practice when the sheriff returns *cepi corpus* to a capias, the plaintiff may obtain a rule, before special bail has been entered, to bring in the body; and this must be done either by committing the defendant or entering special bail. See DEAD BODY.

BODY CORPORATE. A corporation. This is an early and undoubtedly correct term to apply to a corporation. Co. Litt. 250 *a*; Ayliffe, Par. 196; Ang. Corp. § 6.

BODY POLITIC. See CORPORATION.

BONA (Lat. *bonus*). Goods; personal property; chattels, real or personal; real property.

Bona et catalla (goods and chattels) includes all kinds of property which a man may possess. In the Roman law it signified every kind of property, real, personal, and mixed; but chiefly it was applied to *real estate*, chattels being distinguished by the words *effects*, *movables*, etc. *Bona* were, however, divided into *bona mobilia* and *bona immobilia*. It is taken in the civil law in nearly the sense of *biens* in the French law. See NULLA BONA.

BONA CONFISCATA. Goods confiscated or forfeited to the imperial *fisc* or treasury. 1 Bla. Com. 299.

BONA FIDE HOLDER FOR VALUE. The Negotiable Instruments Act provides, § 52: A holder in due course is a holder who has taken the instrument under the following conditions: 1. That it is complete and regular upon its face; 2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; 3. That he took it in good faith and for value; 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

If he has had notice of any infirmity in the instrument or defect in the title of the person he took it from before he had paid the full amount agreed to be paid, he is a holder in due course only to the amount theretofore paid by him. The title of a person who negotiates an instrument is defective when he obtained it, or any signature to it, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud. To constitute notice of an infirmity, etc., the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable; but a holder who derives his title through a holder in due course and is not himself party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument is defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course; but this does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title. See NEGOTIABLE INSTRUMENTS for the States, etc., in which it is enacted.

BONA FIDE PURCHASER FOR VALUE. See PURCHASER FOR VALUE WITHOUT NOTICE.

BONA FIDES. Good faith, honesty, as distinguished from *mala fides* (bad faith).

Bona fide. In good faith.

BONA FORISFACTA. Forfeited goods. 1 Bla. Com. 299.

BONA GESTURA. Good behavior.

BONA GRATIA. Voluntarily; by mutual consent. Used of a divorce obtained by the agreement of both parties.

BONA MOBILIA. In Civil Law. Movables. Those things which move themselves or can be transported from one place to another; which are not intended to make a permanent part of a farm, heritage, or building.

BONA NOTABILIA. Chattels or goods of sufficient value to be accounted for.

Where a decedent leaves goods of sufficient amount *(bona notabilia)* in different dioceses, administration is granted by the metropolitan, to prevent the confusion arising from the appointment of many different administrators; 2 Bla. Com. 509; Rolle, Abr. 908; Williams, Ex. 7th ed. The value

necessary to constitute property *bona notabilia* has varied at different periods, but was finally established at £5, in 1603.

BONA PERITURA. Perishable goods. An executor, administrator, or trustee is bound to use due diligence in disposing of perishable goods, such as fattened cattle, grain, fruit, or any other article which may be worse for keeping; Bacon, Abr. *Executors;* 5 Co. 9; Cro. Eliz. 518; McCall v. Peachy's Adm'r, 3 Munf. (Va.) 288; 1 Beatt. Ch. 5, 14. A carrier is in general not liable for injuries to perishable goods occurring without his negligence; 7 L. R. Ch. 573; 1 C. P. D. 423. He may discriminate in favor of such goods, if pressed by a rush of business; Great Western Ry. Co. v. Burns, 60 Ill. 284; Michigan Cent. R. Co. v. Burrows, 33 Mich. 6; Peet v. R. Co., 20 Wis. 594, 91 Am. Dec. 446. See PERISHABLE GOODS.

BONA VACANTIA. Goods to which no one claims a property, as shipwrecks, treasure-trove, etc.; vacant goods.

Bona vacantia belonged, under the common law, to the finder, except in certain instances, when they were the property of the king. 1 Sharsw. Bla. Com. 298, n.

BONA WAVIATA. Goods thrown away by a thief in his fright for fear of being apprehended. By common law such goods belonged to the crown. 1 Bla. Com. 296.

BOND. An obligation in writing and under seal. Taylor v. Glaser, 2 S. & R. (Pa.) 502; Pinkard v. Ingersol, 11 Ala. 19; Cantey v. Duren, Harp. (S. C.) 434; Deming v. Bullitt, 1 Blackf. (Ind.) 241; Denton v. Adams, 6 Vt. 40; Harman v. Harman, 1 Baldw. 129, Fed. Cas. No. 6,071; Biery v. Steckel, 194 Pa. 445, 45 Atl. 376.

It may be single—*simplex obligatio*—as where the obligor obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day named, or it may be *conditional* (which is the kind more generally used), that if the obligor does some particular act, the obligation shall be void, or else shall remain in full force, as payment of rent, performance of covenants in a deed, or repayment of a principal sum of money, borrowed of the obligee, with interest, which principal sum is usually one-half of the *penal* sum specified in the bond.

There must be proper parties; and no person can take the benefit of a bond except the parties named therein; Fuller v. Fullerton, 14 Barb. (N. Y.) 59; except, perhaps, in some cases of bonds given for the performance of their duties by certain classes of public officers; Fellows v. Gilman, 4 Wend. (N. Y.) 414; Ing v. State, 8 Md. 287; Roll v. Raguet, 4 Ohio 418, 22 Am. Dec. 759; Baker v. Bartol, 7 Cal. 551; Hartz v. Com., 1 Grant, Cas. (Pa.) 359; State v. Druly, 3 Ind. 431. A man cannot be bound to himself even in connection with others; Smith v. Lusher, 5 Cow. (N. Y.) 688. See McDowell v. Butler, 56 N. C. 311. But if a bond is given by the treasurer of a corporation to the directors as a class, of which he is one, it is not for that reason invalid; Durburow v. Niehoff, 37 Ill. App. 403. If the bond run to several persons jointly, all must join in suit for a breach, though it be conditioned for the performance of different things for the benefit of each; Pearce v. Hitchcock, 2 N. Y. 388.

The instrument must be in writing and sealed: Harman v. Harman, 1 Baldw. 129, Fed. Cas. No. 6,071; Denton & Smith v. Adams, 6 Vt. 40; but a sealing sufficient where the bond is made is held sufficient though it might be an insufficient sealing if it had been made where it is sued on; Meredith v. Hinsdale, 2 Caines (N. Y.) 362. The signature and seal may be in any part of the instrument; Reed v. Drake, 7 Wend. (N. Y.) 345. See McLeod v. State, 69 Miss. 221, 13 South. 268. An instrument not under seal is not a bond and will not satisfy a statute requiring an appeal bond; Corbin v. Laswell, 48 Mo. App. 626; although in the body thereof it is recited that the parties thereto have set their hands and seals; Williams v. State, 25 Fla. 734, 6 South. 831, 6 L. R. A. 821.

It must be delivered by the party whose bond it is to the other; Carey v. Dennis, 13 Md. 1; Chase v. Breed, 5 Gray (Mass.) 440; Towns v. Kellett, 11 Ga. 286; Harris v. Regester, 70 Md. 109, 16 Atl. 386. But the delivery and acceptance may be by attorney; Madison & I. Plank-Road Co. v. Stevens, 10 Ind. 1. The date is not considered of the substance of a deed; and therefore a bond which either has no date or an impossible one is still good, provided the real day of its being dated or given, that is, delivered, can be proved; 2 Bla. Com. 304; Com. Dig. *Fait*, B, 3; Ross v. Overton, 3 Call (Va.) 309, 2 Am. Dec. 552. There is a presumption that a deed was executed on the day of its date; Steph. Dig. Ev. Art. 87; Costigan v. Gould, 5 Denio (N. Y.) 290.

The condition is a vital part of a conditional bond, and generally limits and determines the amount to be paid in case of a breach; Strang v. Holmes, 7 Cow. (N. Y.) 224; but interest and costs may be added; Van Wyck v. Montrose, 12 Johns. (N. Y.) 350; Campbell v. Pope, 1 Hempst. 271, Fed. Cas. No. 2,365a. The recovery against a surety in a bond for the payment of money is not limited to the penalty, but may exceed it so far as necessary to include interest from the time of the breach. So far as interest is payable by the terms of the contract, and until default made, it is limited by the penalty; but after breach it is recoverable, not on the ground of contract, but as damages, which the law gives for its violation; Brainard v. Jones, 18 N. Y. 35.

See Philadelphia & R. R. Co. v. Knight, 124 Pa. 58, 16 Atl. 492. The omission from a statutory bond of a clause which does not affect the rights of the parties, and imposes no harder terms upon the obligors, does not invalidate it; Power v. Graydon, 53 Pa. 198.

Where a bond is for the performance of an illegal contract the parties are not bound thereon; State v. Pollard, 89 Ala. 179, 7 South. 765.

On the *forfeiture* of the bond, or its becoming single, the whole penalty was formerly recoverable at law; but here the courts of equity interfered, and would not permit a man to take more than in conscience he ought, viz.: his principal, interest, and expenses in case the forfeiture accrued by non-payment of money borrowed, the damages sustained upon non-performance of covenants, and the like. And the like practice having gained some footing in the courts of law, the statute 4 & 5 Anne, c. 16, at length enacted, that, in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due with interest and costs, even though the bond were forfeited and a suit commenced thereon, should be a full satisfaction and discharge; 2 Bla. Com. 340.

All of the obligors in a joint bond are presumed to be principals, except such as have opposite their names the word "security;" Harper's Adm'r v. McVeigh's Adm'r, 82 Va. 751, 1 S. E. 193; or unless it is otherwise expressed.

If in a bond the obligor *binds himself*, without adding his *heirs, executors, and administrators*, the executors and administrators are bound, but not the heir; Sheppard, Touchst. 369; for the law will not imply the obligation upon the heir; Co. Litt. 209 *a*.

If a bond lie *dormant* for twenty years, it cannot afterwards be recovered; for the law raises a presumption of its having been paid, and the defendant may plead *solvit ad diem* to an action upon it; 1 Burr. 434; 4 *id.* 1963. And in some cases, under particular circumstances, even a less time may create a presumption; 1 Term 271; Cowp. 109. The presumption of payment after twenty years is in the nature of a statute of limitations. It is available as a bar to an action to recover on the instrument, but not where the party asks affirmative relief based upon the fact of payment; Lawrence v. Ball, 14 N. Y. 477.

Where a company bought in its own debentures and then reissued them, held that the new holder could not claim *pari passu* with the other holders; [1904] 2 Ch. 474; so where debentures were used as collateral and the loan was paid and a second loan made; [1907] 2 Ch. 540; [1906] 2 Ch. 216; [1905] 2 Ch. 587, A. C. But where receivers used the corporate funds to buy in its mortgage funds, it was held that if reissued, they could share in the mortgage security; In re Fifty-Four First Mortgage Bonds, 15 S. C. 304, Simpson, C. J., dissenting upon the ground that they had been extinguished. In Pruyne v. Mfg. Co., 92 Hun 214, 36 N. Y. Supp. 361, there seems to have been an agreement that there was no merger. Corporation mortgages usually provide that all bonds shall share equally in the mortgage security, no matter when issued, so that the English cases are not in point.

Forthcoming Bond. A bond conditioned that a certain article shall be forthcoming at a certain time or when called for.

General Mortgage Bond. A bond secured upon an entire corporate property, parts of which are subject to one or more prior mortgages.

Heritable Bond. In Scotch Law, a bond for a sum of money to which is joined a conveyance of land or of heritage, to be held by the creditor in security of the debt.

Income Bonds. Bonds of a corporation the interest of which is payable only when earned and after payment of interest upon prior mortgages.

Lloyd's Bond. A bond issued for work done or goods delivered and bearing interest. This was a device of an English barrister named Lloyd, by which railway and other companies did, in fact, increase their indebtedness without technically violating their charter provisions prohibiting the increase of debt.

Municipal Bond, *q. v.*

Railroad Aid Bonds are issued by municipal corporations to aid in the construction of railways. The power to subscribe to the stock of railways, and to issue bonds in pursuance thereof, does not belong to towns, cities, or counties, without special authority of the legislature, and the power of the latter to confer such authority, where the state constitution is silent, has been a much-contested question. The weight of the very numerous decisions is in favor of the power. In several of the states the constitutions prohibit or restrict the right of municipal corporations to invest in the stock of railroads or similar corporations; Citizens' Savings & Loan Ass'n v. Topeka, 20 Wall. (U. S.) 655, 22 L. Ed. 455; Pitzman v. Village of Freeburg, 92 Ill. 111; Lowell v. City of Boston, 111 Mass. 454, 15 Am. Rep. 39; Ogden v. Daviess County, 102 U. S. 634, 26 L. Ed. 263; Harshman v. County Court, 122 U. S. 306, 7 Sup. Ct. 1171, 30 L. Ed. 1152; Knox County v. Bank, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. Ed. 93; Barnum v. Okolona, 148 U. S. 393, 13 Sup. Ct. 638, 37 L. Ed. 495; Cairo v. Zane, 149 U. S. 122, 13 Sup. Ct. 803, 37 L. Ed. 673; McKittrick v. Ry. Co., 152 U. S. 473, 14 Sup. Ct. 661, 38 L. Ed. 518; Rogers v. Keokuk, 154 U. S. 546, 14 Sup. Ct. 1162, 18 L. Ed. 74; Ætna Life Ins. Co. v. Pleasant Tp., 62 Fed. 718,

10 C. C. A. 611; Denison v. City of Columbus, 62 Fed. 775; Atlantic Trust Co. v. Town of Darlington, 63 Fed. 76; Dill. Mun. Corp. § 508.

The recital in bonds issued by a municipal corporation in payment of a subscription to railroad stock, that they were issued "in pursuance of an act of the legislature . . . and ordinances of the city council . . . passed in pursuance thereof," does not put a *bona fide* purchaser for value upon inquiry as to the terms of the ordinances under which the bonds were issued, nor does it put him on inquiry whether a proper petition of two-thirds of the residents had been presented to the common council before it subscribed for the stock; Evansville v. Dennett, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760; and recitals in county bonds, that they are issued in pursuance of an order of the court, etc., as a subscription to the capital stock, estop the county issuing them as against an innocent purchaser from showing that the bonds are void because in fact issued as a donation to the railroad company, whereas the statute only authorized a subscription to its stock; Ashman v. Pulaski County, 73 Fed. 927, 20 C. C. A. 232; where a county, under authority from the state, issued its bonds in payment of a subscription to stock in a railway company, made upon a condition which was never complied with, and which was subsequently waived by the county, and received and held the certificates and paid interest on its bonds and refunded them under legislative authority, the bonds originally issued were held valid in the hands of a *bona fide* holder for value before maturity; Graves v. Saline County, 161 U. S. 359, 16 Sup. Ct. 526, 40 L. Ed. 732; where there is a total want of power to subscribe for such stock and to issue bonds in payment, a municipality cannot estop itself by admissions or by issuing securities in negotiable form, nor even by receiving and enjoying the proceeds of such bonds; *id.*

STRAW BOND. A bond upon which is used either the name of fictitious persons or those unable to pay the sum guaranteed; generally applied to insufficient bail bonds, improperly taken, and designated by the term "straw bail."

As to the overissue of bonds, see OVERISSUE.

BONDAGE. A term which has not obtained a juridical use distinct from the vernacular, in which it is either taken as a synonym with *slavery*, or as applicable to any kind of personal servitude which is involuntary in its continuation.

The propriety of making it a distinct juridical term depends upon the sense given to the word *slavery*. If *slave* be understood to mean, exclusively, a natural person who, in law, is known as an object in respect to which legal persons may have rights of possession or property, as in respect to domestic animals and inanimate things, it is evident that any one who is regarded as a legal person, capable of rights and obligations in other relations, while bound by law to render service to another, is not a slave in the same sense of the word Such a one stands in a legal relation, being under an obligation correlative to the right of the person who is by law entitled to his service, and, though not an object of property, nor possessed or owned as a chattel or thing, he is a person bound to the other, and may be called a *bondman*, in distinction from a *slave* as above understood. A greater or less number of rights may be attributed to persons bound to render service. Bondage may subsist under many forms. Where the rights attributed are such as can be exhibited in very limited spheres of action only, or are very imperfectly protected, it may be difficult to see wherein the condition, though nominally that of a legal person, differs from chattel slavery. Still, the two conditions have been plainly distinguishable under many legal systems, and even as existing at the same time under one source of law. The Hebrews may have held persons of other nations as slaves of that chattel condition which anciently was recognized by the laws of all Asiatic and European nations; but they held persons of their own nation in bondage only as legal persons capable of rights, while under an obligation to serve. Cobb's Hist. Sketch, ch. 1. When the serfdom of feudal times was first established, the two conditions were coexistent in every part of Europe (*ibid.* ch. 7), though afterwards the bondage of serfdom was for a long period the only form known there until the revival of chattel slavery, by the introduction of negro slaves into European commerce, in the sixteenth century. Every villein under the English law was clearly a legal person capable of some legal rights, whatever might be the nature of his services. Co. Litt. 123 *b*; Coke, 2d Inst. 4, 45. But at the first recognition of negro slavery in the jurisprudence of England and her colonies, the slave was clearly a natural person, known to the law as an object of possession or property for others, having no legal personality, who therefore, in many legal respects, resembled a thing or chattel It is true that the moral responsibility of the slave and the duty of others to treat him as an accountable human being and not as a domestic animal were always more or less clearly recognized in the criminal jurisprudence. There has always been in his condition a mingling of the qualities of person and of thing, which has led to many legal contradictions. But while no rights or obligations, in relations between him and other natural persons such as might be judicially enforced by or against him, were attributed to him, there was a propriety in distinguishing the condition as *chattel slavery*, even though the term itself implies that there is an essential distinction between such a person and natural things, of which it seems absurd to say that they are either free or not free. The phrases *instar rerum, tanquam bona*, are aptly used by older writers. The bondage of the villein could not be thus characterized; and there is no historical connection between the principles which determined the existence of the one and those which sanctioned the other. The law of English villenage furnished no rules applicable to negro slavery in America. Com. v. Turner, 5 Rand (Va.) 680, 683; Fable v. Brown, 2 Hill, Ch. (S. C.) 390; Neal v. Farmer, 9 Ga. 561; 1 Hurd, Law of Freedom and Bondage, cc. 4, 5. Slavery in the colonies was entirely distinct from the condition of those white persons who were held to service for years, which was involuntary in its continuance, though founded in most instances on contract. These persons had legal rights, not only in respect to the community at large, but also in respect to the person to whom they owed service.

In the American slaveholding states before the Civil War, the moral personality of those held in the customary slavery was recognized by jurisprudence and statute to an extent which makes it difficult to say whether, there, slaves were by law regarded as things and not legal persons (though subject to the laws which regulate the title and transfer of property), or whether they were still things and property in the same sense and degree in which

they were so formerly. Compare laws and authorities in Cobb's Law of Negro Slavery, ch. iv., v.

The Emancipation Proclamation (January 1, 1863), and the amendments to the constitution of the United States, have rendered the views entertained on the subject purely speculative, as slavery has ceased to exist.

The Emancipation Proclamation was issued by President Lincoln as commander-in-chief of the army and navy of the United States during the existence of armed rebellion, and by its terms purported to be nothing more than "a fit and necessary war measure for suppressing said rebellion." By virtue of this power, it was therein ordered and declared that all persons held as slaves within certain designated states, and parts of states, were and henceforward should be free, and that the executive government of the United States, including the military and naval authorities thereof, should recognize and maintain the freedom of said persons. The proclamation was not meant to apply to those states or parts of states not in rebellion.

The constitutionality of this measure has been a subject of some doubt, the prevailing opinion being that it could be supported as a war measure alone, and apply where the slaveholding territory was actually subdued by the military power of the United States; Slaughter-House Cases, 16 Wall. (U. S.) 68, 21 L. Ed. 394, In South Carolina, it has been held that slavery was not abolished by the Emancipation Proclamation, and the same view was sustained in Texas; Pickett v. Wilkins, 13 Rich. Eq. (S. C.) 366; Hall v. Keese, 31 Tex. 504. In Louisiana, Posey v. Driggs, 20 La. Ann. 199, and Alabama, Morgan v. Nelson, 43 Ala. 592, the opposite view is held. But see McElvain v. Mudd, 44 Ala. 70, 4 Am. Rep. 106 In Mississippi the question of the time when slavery was abolished is left open; Herrod v. Davis, 43 Miss. 102.

The 13th Amendment to the constitution, proclaimed Dec. 18, 1865, was the definite settlement of the question of slavery in the United States. It declares, "1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to its jurisdiction. 2. Congress shall have power to enforce this article by appropriate legislation." See SLAVE; MANUMISSION.

BONDED WAREHOUSE. A warehouse for the storage of goods, wares and merchandise, deposited pursuant to law, held under bond for the payment of duties or revenue taxes.

Under the act authorizing persons to keep a warehouse for the storage of dutiable goods, it was held that no person has any right to do so unless appointed by the Secretary of the Treasury, and such appointment can be revoked at pleasure; Corkle v. Maxwell, Fed. Cas. No. 3,231. Goods in a bonded warehouse under the revenue laws, are in possession of the sovereign and no lien can be obtained thereon by a creditor; In re Johnston, Fed. Cas. No. 7,424. The statutes regulating bonded warehouses, usually provide that goods deposited therein may be withdrawn for consumption within one year of the date of original importation, on payment of duties and charges; Allen v. Jones, 24 Fed. 13. The Tariff Act of 1909 makes the period of withdrawal three years; sec. 20. The goods cannot be transferred from the original packages for safety or preservation while in the warehouse, unless entered for exportation and legally removed from the warehouse into the possession of the importer; W. H. Thomas & Son Co. v. Barnett, 144 Fed. 338, 75 C. C. A. 300. The expense of storage of imported merchandise pending inspection and analysis under the Pure Food Law should be borne by the government and not by the importer; U. S. v. Acker, Merrall & Condit, 133 Fed. 842. The Tariff Act of 1913 re-enacts the former law, with an amendment permitting the manufacture of cigars in a bonded warehouse. Ore and metal smelting and refining works may be designated as bonded warehouses.

BONIS NON AMOVENDIS. A writ addressed to the sheriff, when a writ of error has been brought, commanding that the person against whom judgment has been obtained be not suffered to remove his goods till the error be tried and determined. Reg. Orig. 131.

BONITARIAN OWNERSHIP. DOMINIUM BONITARIUM. The term *in bonis habere* was used to express an ownership which was practically absolute, because it was protected by the authority of the prætor in cases where, wishing to give all the advantages of ownership, he was prevented by the civil law from giving the legal (Quiritarian) *dominium*.

BONO ET MALO. A special writ of jail delivery, which formerly issued of course for each particular prisoner. 4 Bla. Com. 270.

BONUS. A premium paid to a grantor or vendor.

A sum exacted by the state from a corporation as a consideration for granting a charter; in such case it is clearly distinguished from a tax; Baltimore & O. R. Co. v. Maryland, 21 Wall. (U. S.) 456, 22 L. Ed. 678; Com. v. Transp. Co., 107 Pa. 112.

A consideration given for what is received. Extraordinary profit accruing in the operation of a stock company or private corporation. 10 Ves. Ch. 185; 7 Sim. 634; 2 Spence, Eq. Jur. 569.

An additional premium paid for the use of money beyond the legal interest. Mechanics' & Working Men's Mut. Sav. Bank & Bldg. Ass'n of New Haven v. Wilcox, 24 Conn. 147. It it not a gift or gratuity, but is paid for some services or consideration and is in addition to what would ordinarily be given; Kenicott v. Wayne County, 16 Wall. (U. S.) 452, 21 L. Ed. 319.

In its original sense of *good* the word was formerly much used. Thus, a jury was to be composed of twelve good men *(boni homines)*; 3 Bla. Com. 349; *bonus judex* (a good judge). Co. Litt. 246.

BOOK. A general name given to every literary composition which is printed, but appropriately to a printed composition bound in a volume. See COPYRIGHT.

A manuscript may, under some circumstances, be regarded as a "book;" In re Beecher's Estate, 17 Pa. C. C. R. 161; 8 L. J. Ch. 105.

BOOK-LAND. **In English Law.** Land, also called charter-land, which was held by deed under certain rents and fee services, and differed in nothing from free socage land. 2 Bla. Com. 90. See 2 Spelman, English Works 233, tit. *Of Ancient Deeds and Charters;* Boc-Land.

Land held by book, by a royal and ecclesiastical *privilegium.* Maitland, Domesday and Beyond 257. The church introduced the custom of conveying land by written documents. The "boc" or written charter was ecclesiastical in its origin. It was used by the king, the church or very great men. The practice never became common. 2 Holdsw. Hist. E. L. 14, 60.

BOOK OF ACCOUNT. See Original Entry, Books of.

BOOK OF ACTS. The records of a surrogate's court.

BOOK OF ADJOURNAL. **In Scotch Law.** The records of the court of justiciary.

BOOK OF RATES. An account or enumeration of the duties or tariffs authorized by parliament. 1 Bla. Com. 316.

BOOK OF RESPONSES. **In Scotch Law.** An account which the director of the Chancery keeps particularly to note a seizure when he gives an order to the sheriff in that part to give it to an heir whose service has been returned to him. Wharton, Lex.

BOOKS OF ORIGINAL ENTRIES. See Original Entry, Books of.

BOOKS OF SCIENCE. Scientific books, even of received authority, are not admissible in evidence before a jury; 5 C. & P. 73; Com. v. Sturtivant, 117 Mass. 122, 19 Am. Rep. 401; Harris v. R. Co., 3 Bosw. (N. Y.) 18; 2 Carl. 617; 1 Greenl. Ev. § 440, *a;* except to contradict an expert who bases his opinion upon them; City of Bloomington v. Shrock, 110 Ill. 219, 51 Am. Rep. 678; standard medical works with explanation of technicalities are admissible; Carter v. State, 2 Ind. 617; Stoudenmeir v. Williamson, 29 Ala. 558. Counsel may read such books to the jury in their argument; State v. Hoyt, 46 Conn. 330 (two judges dissenting); *contra,* Com. v. Wilson, 1 Gray (Mass.) 337; Ordway v. Haynes, 50 N. H. 159; People v. Anderson, 44 Cal. 65; Gale v. Rector, 5 Ill. App. 481. In Wade v. De Witt, 20 Tex. 398 and Luning v. State, 1 Chand. (Wis.) 178, it was held that the admission of such evidence was in the discretion of the court. See 26 Am. Law Rev. 390; Wade v. De Witt, 20 Tex. 398; Washburn v. Cuddihy, 8 Gray (Mass.) 430; Gallagher v. Ry. Co., 67 Cal. 13, 6 Pac. 869, 51 Am. Rep 680, n.

The law of foreign countries may be proved by printed books of statutes, reports, and text writers, as well as by the sworn testimony of experts; so held, in a learned opinion by Lowell, J., in the U. S. C. C. The Pawashick, 2 Low. 142, Fed. Cas. No. 10,851. See Farmers' Loan & Trust Co. v. Telegraph Co., 44 Hun (N. Y.) 400; Bollinger v. Gallagher, 163 Pa. 245, 29 Atl. 751, 43 Am. St. Rep. 791; *contra,* but without authority, Dickerson v. Matheson, 50 Fed. 73. A scientific witness may testify to the written foreign law, with or without the text of the law before him; 11 Cl. & F. 85, 114; 8 Q. B. 208. It has been said that foreign law must always be proved by an expert; 1 Greenl. Ev. 486, 488; but see Westl. Pr. Int. Law (3d ed.) § 356; but the court may in its discretion require the printed book of law to be produced in order to corroborate the witness; Pierce v. Indseth, 106 U. S. 546, 1 Sup. Ct. 418, 27 L. Ed. 254.

See Foreign Law; Experts.

BOOKS, PRODUCTION OF. See Production of Books and Documents.

BOOM. An enclosure formed upon the surface of a stream or other body of water, by means of spars, for the purpose of collecting or storing logs or timber. 10 Am. & Eng. Corp. Cas. 399. See Logs.

BOOM COMPANY. A company formed for the purpose of improving streams for the floating of logs, by means of booms and other contrivances, and for the purpose of running, driving, booming, and rafting logs. 10 Am. & Eng. Corp. Cas. 399; A. & E. Encyc.

BOON-DAYS. Certain days in the year on which copyhold tenants were bound to perform certain services for the lord. Called, also, due-days. Whishaw.

BOOTY. The capture of personal property by a public enemy on land, in contradistinction to prizé, which is a capture of such property by such an enemy on the sea.

After booty has been in complete possession of the enemy for twenty-four hours, it becomes absolutely his, without any right of postliminy in favor of the original owner, particularly when it has passed *bona fide* into the hands of a neutral; 1 Kent 110. The right to booty belongs to the sovereign; but sometimes the right of the sovereign, or of the public, is transferred to the soldiers, to encourage them; Pothier, *Droit de Propriété,* p. 1, c. 2, a. 1, § 2; 2 Burl. Nat. & Pol. Law, pt. 4, c. 7, n. 12.

BORDAGE. A species of base tenure by which *bordlands* were held. The tenants were called *bordarii.* These bordarii would seem to have been those tenants of a less servile condition, who had a cottage and land assigned to them on condition of supplying their lord with poultry, eggs, and such small matters for his table. Whishaw; Cowell.

BORDEREAU. In French law, a detailed statement of account; a summary of an instrument.

BORDLANDS. The demesnes which the lords keep in their hands for the maintenance of their board or table. Cowell.

BORDLODE. The rent or quantity of food which the *bordarii* paid for their lands. Cowell.

BORG (Sax.). Suretyship.

Borgbriche (violation of a pledge or suretyship) was a fine imposed on the *borg* for property stolen within its limits.

A tithing in which each one became a surety for the others for their good behavior. Spelman, Gloss.; Cowell; 1 Bla. Com. 115.

BORN. It is now settled according to the dictates of common sense and humanity, that a child *en ventre sa mère* for all purposes for his own benefit, is considered as absolutely born; Swift v. Duffield, 5 S. & R. (Pa.) 40.

If an infant is born dead or at such an early stage of pregnancy as to be unable to live, it is to be considered as never born; Marsellis v. Thalhimer, 2 Paige, Ch. (N. Y.) 35.

See BIRTH; EN VENTRE SA MÈRE.

BOROUGH. A town; a town of note or importance. Cowell. An ancient town. Littleton § 164. A town which sends burgesses to parliament, whether corporate or not. 1 Bla. Com. 115; Whishaw.

A corporate town that is not a city. 1 M. & G. 1; Cowell. In its more modern English acceptation, it denotes a town or city organized for purposes of government. 3 Steph. Com. (11th ed.) 33. See TOWN.

It is impossible to reconcile the meanings of this word given by the various authors cited, except upon the supposition of a change of requirements necessary to constitute a borough at different periods. The only essential circumstance which underlies all the meanings given would seem to be that of a number of citizens bound together for purposes of joint action, varying in the different boroughs, but being either for representation or for municipal government.

Many causes, in no two cases quite alike, went to make up the peculiar community which the 13th Century recognized as a borough. The borough community, though a different variety, is not a different genus from that of the other communities with which England of the early Middle Ages was peopled; 2 Holdsw. Hist. E. L. 257. See BURH; Brit. Borough Charters 1042-1216, by Bolland; Batteson, Borough Customs.

In American Law. In Pennsylvania, the term denotes a political division, organized for municipal purposes; and the same is true of Connecticut and New Jersey. Sav. Bor. L. 4; Southport v. Ogden, 23 Conn. 128; see also Brown v. State, 18 Ohio St. 496; 1 Dill. Mun. Corp. § 41, n.

In Scotch Law. A corporation erected by charter from the crown. Bell, Dict.

BOROUGH COURTS. In English Law. Courts of limited jurisdiction held in particular districts by prescription, charter, or act of parliament, for the prosecution of petty suits. 19 Geo. III. c. 70; 3 Will. IV. c. 74; 3 Bla. Com. 80. See COURTS OF ENGLAND.

BOROUGH ENGLISH. A custom prevalent in some parts of England, by which the youngest son inherits the estate in preference to his older brothers. 1 Bla. Com. 75.

The custom is said by Blackstone to have been derived from the Saxons, and to have been so called in distinction from the Norman rule of descent; 2 Bla. Com. 83. A reason for the custom is found in the fact that the elder children were usually provided for during the life of the parent as they grew up, and removed, while the younger son usually remained. See, also, Bacon, Abr.; Comyns, Dig. *Borough English; Termes de la Ley;* Cowell. The custom applies to socage lands; 2 Bla. Com. 83. See BURGAGE.

BORROW. The word is often used in the sense of returning the thing borrowed in specie, as to borrow a book, or any other thing to be returned again. But it is evident where money is borrowed the identical money loaned is not to be returned, because if this is so, the borrower would derive no benefit from the loan. In a broad sense it means a contract for the use of money. State v. School Dist. No. 24, 13 Neb. 88, 12 N. W. 812; Kent v. Min. Co., 78 N. Y. 177.

BORROWER. He to whom a thing is lent at his request.

In general he has the right to use the thing borrowed, himself, during the time and for the purpose intended between the parties. He is bound to take extraordinary care of the thing borrowed; to use it according to the intention of the lender; to restore it in proper condition at the proper time; Story, Bailm. § 268; Edw. Bailm. 135; 2 Kent 446. See BAILMENT.

BOSCAGE. That food which wood and trees yield to cattle.

To be quit of boscage is to be discharged of paying any duty of wind-fall wood in forest; Whishaw; Manwood, For. Laws.

BOSCUS. Wood growing; wood; both high wood or trees, and underwood or coppice. The high wood is properly called *saltus.* Spelman, Gloss.; Co. Litt. 5 *a.*

BOTE, BOT. A recompense or compensation. The common word *to boot* comes from this word. Cowell. The term is applied as well to making repairs in houses, bridges, etc., as to making a recompense for slaying a man or stealing property. *House bote,* materials which may be taken to repair a house; *hedge bote,* to repair hedges; *brig bote,* to repair bridges; *man bote,* compensation to be paid by a murderer. It was this system of bot and wer, resting upon blood-feud and upon outlawry, which was the ground work of the Anglo-Saxon criminal law; 2 Holdsw. Hist. E. L. 36.

Bote is known to the English law also under the name of Estover; 1 Washb. R. P. *90; 2 Bla. Com. 35. The tenant for life was entitled to take reasonable "botes" and "estovers," without committing waste. 3 Holdsw. Hist. E. L. 105.

BOTTOMRY. A contract in the nature of a mortgage, by which the owner of a ship, or the master, as his agent, borrows money for the use of the ship, and for a specified

voyage, or for a definite period, pledges the ship (or the keel or *bottom* of the ship, *pars pro toto*) as a security for its repayment, with maritime or extraordinary interest on account of the marine risks to be borne by the lender; it being stipulated that if the ship be lost in the course of the specified voyage, or during the limited time by any of the perils enumerated in the contract, the lender shall also lose his money. 2 Hagg. Adm. 48; 2 Sumn. 157. See Davies & Co. v. Soelberg, 24 Wash. 308, 64 Pac. 540.

Bottomry differs materially from an ordinary loan. Upon a simple loan the money is wholly at the risk of the borrower, and must be repaid at all events. But in bottomry, the money, to the extent of the enumerated perils, is at the risk of the lender during the voyage on which it is loaned, or for the period specified. Upon an ordinary loan only the usual legal rate of interest can be reserved; but upon *bottomry* and *respondentia* loans any rate of interest, not grossly extortionate, which may be agreed upon, may be legally contracted for.

When the loan is not made upon the ship, but on the goods laden on board and which are to be sold or exchanged in the course of the voyage, the borrower's personal *responsibility* is deemed the principal security for the performance of the contract, which is therefore called respondentia, which see. And in a loan upon respondentia the lender must be paid his principal and interest though the ship perish, provided the goods are saved. In most other respects the contracts of *bottomry* and of *respondentia* stand substantially upon the same footing. See further, 10 Jur. 845; 4 Thornt. 285, 512; 2 W. Rob. Adm. 83-85; Thompson v. Perkins, 3 Mas. 225, Fed. Cas. No. 13,972.

Bottomry bonds may be given by a master appointed by the charterers of the ship, by masters necessarily substituted or appointed abroad, or by the mate who has become master, as *hæres necessarius*, on the death of the appointed master. 1 Dod. 278; 3 Hagg. Adm. 18; The Fortitude, 3 Sumn. 246, Fed. Cas. No. 4,953. But while in a port in which the owners, or one of them, or a recognized agent of the owners, reside, the master, as such, has no authority to make contracts affecting the ship, and a bottomry bond executed under such circumstances is void; Lavinia v. Barclay, 1 Wash. C. C. 49, Fed. Cas. No. 8,125; 22 Eng. L. & Eq. 623. Unless, it has been held in an English case, he has no means of communicating with the owners; 1 Dod. 273. See 7 Moore's P. C. C. 398. The master has authority to hypothecate the vessel only in a foreign port; but in the jurisprudence of the United States all maritime ports, other than those of the state where the vessel belongs, are foreign to the vessel; Burke v. Rich, 1 Cliff. 308, Fed. Cas. No. 2,161; The William & Emmeline, 1 Blatch. & H. 66, Fed. Cas. No. 17,687; The Hilarity, 1 Blatch. & H. 90, Fed. Cas. No. 6,480.

The owner of the vessel may borrow upon bottomry in the vessel's home port, and whether she is in port or at sea; and it is not necessary to the validity of a bond made by the owner that the money borrowed should be advanced for the necessities of the vessel or her voyage; The Draco, 2 Sumn. 157, Fed. Cas. No. 4,057; The Mary, 1 Paine, 671, Fed. Cas. No. 9,187; 2 Dods. Ad. R. 461. But it may well be doubted, whether when money is thus borrowed by the owner for purposes other than necessities or uses of the ship, and a bottomry bond in the usual form is given, a court of admiralty has jurisdiction to enforce the lien; Bee 348. As a contract made and to be performed on land, and having no necessary connection with the business of navigation, it is probable that it would not now be deemed a maritime contract, but would take effect and be enforced as a common-law mortgage. See Hurry v. John & Alice, 1 Wash. C. C. 293, Fed. Cas. No. 6,923; Shrewsbury v. Two Friends, Bee, 433, Fed. Cas. No. 12,819; 1 Swab. 269. But see The Mary, 1 Paine 671, Fed. Cas. No. 9,187; Rucher v. Conyngham, 2 Pet. Adm. 295, Fed. Cas. No. 12,106.

If the bond be executed by the master of the vessel, it will be upheld and enforced only upon proof that there was a necessity for the loan, and also for pledging the credit of the ship; as the authority of the master to borrow money on the credit of the vessel rests upon the necessity of the case, and only exists under such circumstances of necessity as would induce a prudent owner to hypothecate his ship to raise money for her use; 3 Hagg. Adm. 66, 74; The Fortitude, 3 Sumn. 228, Fed. Cas. No. 4,953; The Aurora, 1 Wheat. (U. S.) 96, 4 L. Ed. 45; The Mary, 1 Paine, 671, Fed. Cas. No. 9,187; Tunno v. The Mary, Bee, 120, Fed. Cas. No. 14,237. His authority is not confined, however, to such repairs and supplies as are absolutely and indispensably necessary, but includes also all such as are reasonably fit and proper for the ship and the voyage; The Lulu, 10 Wall. (U. S.) 192, 19 L. Ed. 906; The Emily Souder, 17 Wall. (U. S.) 666, 21 L. Ed. 683.

If the master could have obtained the necessary supplies or funds on the personal credit of himself or of his owner, and this fact was known to the lender, the bond will be held invalid; The Fortitude, 3 Sumn. 257, Fed. Cas. No. 4,953. And if the master borrows on bottomry without apparent necessity, or when the owner is known to be accessible enough to be consulted upon the emergency, the bond is void, and the lender can look only to the personal responsibility of the master; 3 W. Rob. Adm. 243, 265. For the fact that the advances were necessary, and were made on the security of the vessel, is not, in any instance, to be presumed; Walden v. Chamberlain, 3 Wash. C. C. 290, Fed. Cas. No. 17,055. And moneys advanced to the master without inquiry as to the necessity of the advance, or seeing to the proper application, have been disallowed; 33 Eng. L. & Eq. 602. It may be given after the advances have been made, in pursuance of a prior agreement; The Virgin v. Vyfhius, 8 Pet. (U. S.) 538, 8 L. Ed. 1,036. If given for a larger sum than the actual advances,

in fraud of the owners or underwriters, it vitiates the bond and avoids the bottomry lien even for the sum actually advanced; Carrington v. The Ann C. Pratt, 18 How. (U. S.) 63, 15 L. Ed. 267; The Ann C. Pratt, 1 Curt. C. C. 341, Fed. Cas. No. 409.

The contract of bottomry is usually in form a bond (termed a bottomry bond) conditioned for the repayment of the money lent, with the interest agreed upon, if the ship safely accomplishes the specified voyage or completes in safety the period limited by the contract; The Draco, 2 Sumn. 157, Fed. Cas. No. 4,057. See The Lykus, 36 Fed. 919. Sometimes it is in that of a bill of sale, and sometimes in a different shape; but it should always specify the principal lent and the rate of maritime interest agreed upon; the names of the lender and borrower; the names of the vessel and of her master; the subject on which the loan is effected, whether of the ship alone, or of the ship and freight; whether the loan is for an entire or specific voyage or for a limited period, and for what voyage or for what space of time; the risks the lender is contented to bear; and the period of repayment. Where the master of a ship in a foreign port gives a draft on the owners for money advanced for wages and supplies, it was held to be an abbreviated form of bottomry; Hanschell v. Swan, 23 Misc. 304, 51 N. Y. Supp. 42. It is negotiable; 5 C. Rob. Adm. 102. Where the bond covers "the vessel, her tackle, apparel, furniture, and freight as per charter-party," demurrage previously earned is not freight; Brett v. Van Praag, 157 Mass. 132, 31 N. E. 761. It cannot be given in connection with personal security by the owner of the vessel to pay the debt regardless of the return of the vessel to port; Theo. H. Davies & Co. v. Soelberg, 24 Wash. 308, 64 Pac. 540.

In case a highly extortionate or wholly unjustifiable rate of interest be stipulated for in a bottomry bond, courts of admiralty will enforce the bond for only the amount fairly due, and will not allow the lender to recover an unconscionable rate of interest. But in mitigating an exorbitant rate of interest they will proceed with great caution. For the course pursued where the amount of interest was accidentally omitted, see 1 Swab. 240. Fraud will induce a court of equity to set aside a bottomry bond, in England; 8 Sim. 358; 3 M. & C. 451, 453, n.

Where the express contract of bottomry is void for fraud, no recovery can be had, on the ground of an implied contract and lien of advances actually made; The Ann C. Pratt, 1 Curt. C. C. 340, Fed. Cas. No. 409; Carrington v. The Ann C. Pratt, 18 How. (U. S.) 63, 15 L. Ed. 267. But a bottomry bond may be good in part and bad in part; The Packet, 3 Mas. 255, Fed. Cas. No. 10,654; Furniss v. The Magoun, Olc. 55, Fed. Cas. No. 5,163. And it has been held in England that fraud of the owner or mortgagor of a vessel, which might render the voyage illegal, does not invalidate a bottomry bond to a *bona fide* lender; L. R. 1 Adm. & Ec. 13.

Not only the ship, her tackle, apparel, and furniture (and the freight, if specifically pledged), are liable for the debt in case the voyage or period is completed in safety, but the borrower is also, in that event, personally responsible. See 2 Bla. Com. 457; Brett v. Van Praag, 157 Mass. 132, 31 N. E. 761. It binds not only the ship but her entire earnings, as against prior bottomries, mortgages and other loans to the owner or master; The Anastasia, Fed. Cas. No. 347. But only, it would seem, in cases in which such responsibility has been especially made a condition of the bond; Kelly v. Cushing, 48 Barb. (N. Y.) 269.

The borrower on bottomry is affected by the doctrines of seaworthiness and deviation; 3 Kent 360; and if, before or after the risk on the bottomry bond has commenced, the voyage or adventure is voluntarily broken up by the borrower, in any manner whatsoever, whether by a voluntary abandonment of the voyage or adventure, or by a deviation or otherwise, the maritime risks terminate, and the bond becomes presently payable; The Draco, 2 Sumn. 157, Fed. Cas. No. 4,057; 3 Kent 360. But maritime interest is not recoverable if the risk has not commenced.

But in England and America the established doctrine is that the owners are not personally liable, except to the extent of the fund pledged which has come into their hands; The Virgin v. Vyfhius, 8 Pet. (U. S.) 538, 554, 8 L. Ed. 1036; 1 Hagg. Adm. 1, 13. If the ship or cargo be lost, not by the enumerated perils of the sea, but by the fraud or fault of the borrower or master, the hypothecation bond is forfeited and must be paid.

The risks assumed by the lender are usually such as are enumerated in the ordinary policies of marine insurance. If the ship be wholly lost in consequence of these risks, the lender, as before stated, loses his money; but the doctrine of constructive total loss does not apply to bottomry contracts; 1 Maule & S. 30; Pope v. Nickerson, 3 Sto. 465, Fed. Cas. No. 11,274. See 13 C. B. 442.

It is usual in bottomry bonds to provide that, in case of damage to the ship (not amounting to a total loss) by any of the enumerated perils, the lender shall bear his proportion of the loss, viz.: an amount which will bear the same proportion to the whole damage that the amount lent bears to the whole value of the vessel prior to the damage. Unless the bond contains an express stipulation to that effect, the lender is not entitled to take possession of the ship pledged, even when the debt becomes due; but he may enforce payment of the debt by a proceeding *in rem*, in the admiralty, against the ship; under which she may be

arrested, and, in pursuance of a decree of the court, ultimately sold for the payment of the amount due. And this is the ordinary and appropriate remedy of the lender upon bottomry; though he has also, as a general rule, his remedy by action of covenant or debt at common law upon the bond; Tyl. Mar. Loans 782. It was held in Mississippi that state legislatures have no authority to create maritime liens, or confer jurisdiction on state courts to enforce such liens by proceedings *in rem*. Such jurisdiction is exclusively in the courts of admiralty of the United States; Murphey v. Trade Co., 49 Ala. 436; The Belfast, 7 Wall. (U. S.) 624, 19 L. Ed. 266.

In entering a decree in admiralty upon a bottomry bond, the true rule is to consider the sum lent and the maritime interest as the principal, and to allow *common interest* on that sum from the time such principal became due; The Packet, 3 Mas. 255, Fed. Cas. No. 10,654. Where money is necessarily taken up on bottomry to defray the expenses of repairing a partial loss, against which the vessel is insured, the underwriter (although he has nothing to do with bottomry bond) is liable to pay his share of the extra expense of obtaining the money, in that mode, for the payment of such expenses; Braalie v. Insurance Co., 12 Pet. (U. S.) 378, 9 L. Ed. 1123.

The lien or privilege of a bottomry bond holder, like all other maritime liens, has, ordinarily, preference of all prior and subsequent common-law and statutory liens, and binds all prior interests centering in the ship; Blaine v. The Charles Carter, 4 Cra. (U. S.) 328, 2 L. Ed. 636. It holds good (if reasonable diligence be exercised in enforcing it) as against subsequent purchasers and common-law incumbrancers; but the lien of a bottomry bond is not indelible, and, like other admiralty liens, may be lost by unreasonable delay in asserting it, if the rights of purchasers or incumbrancers have intervened; The St. Jago De Cuba, 9 Wheat. (U. S.) 409, 6 L. Ed. 122; 2 W. & M. 48; 1 Swab. 269; 1 Cliff. 308; 5 Rob. Adm. 94. The lien extends to the fund recoverable for the ship's tortious destruction; Miller v. O'Brien, 59 Fed. 621. The rules under which courts of admiralty marshal assets claimed to be applicable to the payment of bottomry and other maritime liens and of common-law and statutory liens, will be more properly and fully considered in the article Maritime Liens, which see. But it is proper here to state that, as between the holders of two bottomry bonds upon the same vessel in respect to different voyages, the later one, as a general rule, is entitled to priority of payment out of the proceeds of the vessel; 1 Dod. 201; Furniss v. The Magoun, Olc. 55, Fed. Cas. No. 5,163.

Seamen have a lien, prior to that of the holder of the bottomry bond, for their wages for the voyage upon which the bottomry is founded, or any subsequent voyage; but the owners are also personally liable for such wages, and if the bottomry-bond holder is compelled to discharge the seamen's lien, he has a resulting right to compensation over against the owners, and has been held to have a lien upon the proceeds of the ship for his reimbursement; The Virgin v. Vyfhius, 8 Pet. (U. S.) 538, 8 L. Ed. 1036; 1 Hagg. Adm. 62. And see 1 Swab. 261; 1 Dod. 40; Blaine v. The Charles Carter, 4 Cra. (U. S.) 328, 2 L. Ed. 636.

Under the laws of the United States, bottomry bonds are only *quasi* negotiable, and except in cases subject to the principle of equitable estoppel, the indorsee takes only the payee's right; The Serapis, 37 Fed. 436.

The act of congress of July 29, 1850, declaring bills of sale, mortgages, hypothecations, and conveyances of vessels invalid against persons other than the grantor or mortgagor, his heirs and devisees, not having actual notice thereof, unless recorded in the office of the collector of the customs where such vessel is registered or enrolled, expressly provided that the lien by bottomry on any vessel, created during her voyage by a loan of money or materials necessary to repair or enable such vessel to prosecute a voyage, shall not lose its priority or be in any way affected by the provisions of that act.

Contracts of bottomry and respondentia are so different in different countries that when disputes arise they are to be decided by the words used in the contract rather than by principles of general commercial law; O'Brien v. Miller, 168 U. S. 287, 18 Sup. Ct. 140, 42 L. Ed. 469.

Where a bottomry bond of an English vessel was executed in New Orleans and the charter provided she should be governed by American law, the liability was according to law of United States; The Wyandotte, 136 Fed. 470; affirmed in The Wyandotte, 145 Fed. 321, 75 C. C. A. 117.

BOUGHT NOTE. A written memorandum of a sale, delivered, by the broker who effects the sale, to the vendee. Story, Ag. § 28; 11 Ad. & E. 589; 8 M. & W. 834.

Bought and sold notes are made out usually at the same time, the former being delivered to the vendee, the latter to the vendor. When the broker has not exceeded his authority, both parties are bound thereby; 1 C. & P. 388; 5 B. & C. 436; 1 Bell, Com. (4th ed.) 347, 477. Where the same broker acts for both parties, the notes must correspond; 5 B. & C. 436; 17 Q. B. 103; Suydam v. Clark, 2 Sandf. (N. Y.) 133. The broker, as to this part of the transaction, is agent for both parties; 2 H. & N. 210; Coddington v. Goddard, 16 Gray (Mass.) 442. Whether a memorandum in the broker's books will cure a disagreement, see 17 Q. B. 115; 1 H. & N. 484; but it is said to be the better opinion that the signed entry in the

broker's book constitutes the real contract between the parties; 1 C. P. D. 777; 9 M. & W. 802; but it may be shown that the entry was in excess of the broker's authority; 4 L. R. Ir. 94; that the bought and sold notes do not constitute the contract, see 17 Q. B. 115. Where there is a variance between the bought and sold notes, and no entry of the transaction, there is no contract; 17 Q. B. 115. A bought note will take the case out of the Statute of Frauds, if there is no variance; 16 C. B. N. S. 11. See a full discussion in Benj. Sales § 276; Tiedman, Sales § 79.

BOUND BAILIFF. A sheriff's officer, who serves writs and makes arrests. He is so called because bound to the sheriff for the due execution of his office. 1 Bla. Com. 345.

BOUNDARY. Any separation, natural or artificial, which marks the confines or line of two contiguous estates. 3 Toullier, n. 171.

The term is applied to include the objects placed or existing at the angles of the bounding lines, as well as those which extend along the lines of separation.

A *natural* boundary is a natural object remaining where it was placed by nature.

A river or stream is a natural boundary, and the centre line of the stream is the line; Jackson v. Louw, 12 Johns. (N. Y.) 252; People v. Seymour, 6 Cow. (N. Y.) 579; Haye's Ex'r v. Bowman, 1 Rand. (Va.) 417; Arnold v. Mundy, 6 N. J. L. 1, 10 Am. Dec. 356; Dunlap v. Stetson, 4 Mas. 349, Fed. Cas. No. 4,164; State v. Town of Gilmanton, 9 N. H. 461; 1 Tayl. 136; Morgan v. Reading, 3 Smedes & M. (Miss.) 366; Browne v. Kennedy, 5 Harr. & J. (Md.) 195, 9 Am. Dec. 503; Hammond v. Ridgely's Lessee, 5 Harr. & J. (Md.) 245, 9 Am. Dec. 522; MacDonald v. Morrill, 154 Mass. 270, 28 N. E. 259. Where a natural pond is the boundary, the line is the natural shore; but where an artificial pond, the thread of the stream; Waterman v. Johnson, 13 Pick. (Mass.) 261; State v. Town of Gilmanton, 9 N. H. 461; Mansur v. Blake, 62 Me. 38; Kirkpatrick v. Ice Co., 45 Mo. App. 335; Gouverneur v. Ice Co., 134 N. Y. 355, 31 N. E. 865, 18 L. R. A. 695, 30 Am. St. Rep. 669; Noyes v. Collins, 92 Ia. 566, 61 N. W. 250, 26 L. R. A. 609, 54 Am. St. Rep. 571; where a meandered lake, the middle thereof; Olson v. Huntamer, 6 S. D. 364, 61 N. W. 479; where the seashore, the line is at low water mark; Doane v. Willcutt, 5 Gray (Mass.) 335, 66 Am. Dec. 369; U. S. v. Pacheco, 2 Wall. (U. S.) 587, 17 L. Ed. 865; Oakes v. De Lancey, 133 N. Y. 227, 30 N. E. 974, 28 Am. St. Rep. 628. So where one of the great lakes is the boundary; Sloan v. Biemiller, 34 Ohio St. 492; or a navigable lake; see Village of Wayzata v. Ry. Co., 50 Minn. 438, 52 N. W. 913. A grant of land bounded by navigable tide-water, carries no title to land below high water mark; De Lancey v. Piepgras, 63 Hun 169, 17 N. Y. Supp. 681.

Where land is bounded by the sea, and the latter suddenly recedes, leaving considerable space uncovered, this new land, under the royal prerogative, becomes the property of the king. But if the dereliction be gradual, and by imperceptible degrees, then the land gained belongs to the adjacent owner, for *de minimis non curat lex;* 3 Barn. & C. 91, and cases cited. Similarly, where a stream forming the boundary between two owners *gradually* changes its course, it continues to mark the line; but if the change be sudden and immediate, the boundary remains in the old channel; 2 Bla. Com. 262; Collins v. State, 3 Tex. App. 323, 30 Am. Rep. 142; Niehaus v. Shepherd, 26 Ohio St. 40; Holbrook v. Moore, 4 Neb. 437; Missouri v. Kentucky, 11 Wall. (U. S.) 395, 20 L. Ed. 116.

An *artificial* boundary is one erected by man.

The ownership, in case of such boundaries, must, of course, turn mainly upon circumstances peculiar to each case; 5 Taunt. 20; 8 B. & C. 259; generally extending to the centre; Child v. Starr, 4 Hill (N. Y.) 369; Warner v. Southworth, 6 Conn. 471. A tree standing directly on the line is the joint property of both proprietors; Griffin v. Bixby, 12 N. H. 454, 37 Am. Dec. 225; otherwise, where it only stands so near that the roots penetrate; 1 M. & M. 112; 2 Rolle 141. Land bounded on a highway extends to the centre-line, though a private street; Newhall v. Ireson, 8 Cush. (Mass.) 595, 54 Am. Dec. 790; Paul v. Carver, 26 Pa. 223, 67 Am. Dec. 413; Railroad v. Bingham, 87 Tenn. 522, 11 S. W. 705; Schneider v. Jacob, 86 Ky. 101, 5 S. W. 350; Halloway v. Southmayd, 64 Hun 632, 18 N. Y. Supp. 707; unless the description excludes the highway; Jackson v. Hathaway, 15 Johns. (N. Y.) 454, 8 Am. Dec. 263; Town of Chatham v. Brainerd, 11 Conn. 60; Codman v. Evans, 1 Allen (Mass.) 443; 3 Washb. R. P. *635.

Boundaries are frequently denoted by monuments fixed at the angles. In such case the connecting lines are always presumed to be straight, unless described to be otherwise; Allen v. Kingsbury, 16 Pick. (Mass.) 235; Baker v. Talbott, 6 T. B. Monr. (Ky.) 179; Burrows v. Vandevier, 3 Ohio, 382; Nelson v. Hall, 1 McLean 519, Fed. Cas. No. 10,107; 2 Washb. R. P. *632. A practical surveyor may testify whether, in his opinion, certain marks on trees, piles of stones, or other marks on the ground were intended as monuments of boundaries; Northumberland Coal Co. v. Clement, 10 W. N. C. (Pa.) 321.

The following is the order of importance in boundaries: *first*, the highest regard is had to natural boundaries; Redmond v Stepp, 100 N. C. 212, 6 S. E. 727; Walrod v. Flanigan, 75 Ia. 365, 39 N. W. 645; Morse

v. Rollins, 121 Pa. 537, 15 Atl. 645; Hughes v. Cawthorn, 35 Fed. 248; Wood v. Ramsey, 71 Md. 9, 17 Atl. 563; McAninch v. Freeman, 69 Tex. 445, 4 S. W. 369; *second*, to lines actually run and corners marked at the time of the grant; *third*, if the lines and courses of an adjoining tract are called for, the lines will be extended, if they are sufficiently established, and no other departure from the deed is required, preference being given to marked lines; *fourth*, to courses and distances; Yanish v. Tarbox, 49 Minn. 268, 51 N. W. 1051.

Courses and distances give way to monuments, but they must be of a permanent character, and the place where they are at the time of the conveyance must be satisfactorily located; Brown v. Morrill, 91 Mich. 29, 51 N. W. 700; Whitehead v. Ragan, 106 Mo. 231, 17 S. W. 307. But this is a mere rule of construction; Green v. Horn, 207 N. Y. 489, 101 N. E. 430. When a description in a deed by metes and bounds conflicts with a description by reference to plats, the former governs; Waldin v. Smith, 76 Ia. 652, 39 N. W. 82.

Parol evidence is often admissible to identify and ascertain the locality of monuments called for by a description; Waterman v. Johnson, 13 Pick. (Mass.) 267; Frost v. Spaulding, 19 Pick. (Mass.) 445, 31 Am. Dec. 150; and where the description is ambiguous, the practical construction given by the parties may be shown; Choate v. Burnham, 7 Pick. (Mass.) 274. Common reputation may be admitted to identify monuments, especially if of a public or quasi-public nature; Griffin v. Graham, 8 N. C. 116, 9 Am. Dec. 619; Harmer v. Morris, 1 McLean, 45, Fed. Cas. No. 6,076; Nelson v. Hall, 1 McLean, 518, Fed. Cas. No. 10,107; Whitney v. Smith, 10 N. H. 43; Cravenson v. Meriwither, 2 A. K. Marsh. (Ky.) 158; Beaty v. Hudson, 9 Dana (Ky.) 322; Smith v. Shackleford, 9 Dana (Ky.) 465; Boardman v. Reed, 6 Pet. (U. S.) 341, 8 L. Ed. 415; Harriman v. Brown, 8 Leigh (Va.) 697; McCoy's Lessee v. Galloway, 3 Ohio, 282, 17 Am. Dec. 591. On a conflict of boundaries between deeds from the same person, the one that was first executed controls; Flynn v. Sparks, 11 S. W. 206, 10 Ky. L. Rep. 960. Where there are two conflicting monuments, and one corresponds with the courses and distances, that one should be taken and the other rejected as surplusage; Zelbold v. Foster, 118 Mo. 349, 24 S. W. 155.

The determination of the boundaries of the states is placed by the constitution in the supreme court of the United States; Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657, 9 L. Ed. 1233; *id.*, 4 How. (U. S.) 591, 11 L. Ed. 1116; Virginia v. West Virginia, 11 Wall. (U. S.) 39, 20 L. Ed. 67. This position was taken by that court against the opinion of Chief Justice Taney, who held that a controversy between states, or between individuals, in relation to the boundaries of a state, falls within the province of the court where the suit is brought to try a right of property in the soil, or any other right which is properly the subject of *judicial* cognizance and decision; but not a contest for rights of sovereignty and jurisdiction between states over any particular territory. This he held to be a *political* question; Rhode Island v. Massachusetts, 12 Pet. (U. S.) 752, 9 L. Ed. 1233. All the cases of boundary disputes between states which arose prior to the constitution and were tried under the articles of confederation, by courts specially constituted by Congress, are collected in 131 U. S. App. II.

Long acquiescence in the assertion of a particular boundary between states and the exercise of sovereignty within it, should be accepted as conclusive; Louisiana v. Mississippi, 202 U. S. 1, 26 Sup. Ct. 571, 50 L. Ed. 934.

See LINE.

As to state boundaries, when they are rivers, see AVULSION; RIVER.

BOUNDING OR ABUTTING. See ABUT.

BOUNTY. An additional benefit conferred upon, or a compensation paid to, a class of persons.

It differs from a reward, which is usually applied to a sum paid for the performance of some specific act to some person or persons. It may or may not be part of a contract. Thus, the bounty offered a soldier would seem to be part of the consideration for his services. The bounty paid to fishermen is not a consideration for any contract, however. See Fowler v Danvers, 8 Allen (Mass.) 80; Eichelberger v. Sifford, 27 Md. 320; Abbe v. Allen, 39 How. Pr. (N. Y.) 481.

A premium offered or given to induce men to enlist into the public service. Abbe v. Allen, 39 How. Pr. (N. Y.) 481.

BOURSE. An exchange. Bourses owe their origin to the Jews. The word originated at Bruges, where merchants gathered at the house of Van der Bruse; or the word is from the three purses (bourses) carved on the gable of the house where the meetings were held. Stock Exchange by Van Antwerp.

BOUWERYE. A farm.

BOUWMASTER. A farmer.

BOVATA TERRÆ. As much land as one ox can cultivate. Said by some to be thirteen, by others eighteen, acres in extent. Skene; Spelman, Gloss.; Co. Litt. 5 *a*.

Bovate is used in expressing a quantity of land and meaning one-eighth of a carucate, *i. e.* the amount of land which can be ploughed by one ox; generally about fifteen acres. 2 Holdsw. Hist. E. L. 57. See CARUCATE. Both terms seem to be French, and not part of the official Latin. Maitl. Domesday and Beyond 395.

BOYCOTT. An organized effort to exclude a person from business relations with

others by persuasion, intimidation and other acts which tend to violence, and thereby to coerce him, through fear of resulting injury, to submit to dictation in the management of his affairs. Casey v. Typographical Union, 45 Fed. 135, 12 L. R. A. 193, citing State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23.

In State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23, it was held that to threaten or intimidate a person to compel him against his will to do or abstain from doing any act which he has a legal right to do, is an unlawful conspiracy. See also 15 Q. B. D. 476; 23 *id.* 598; [1892] A. C. 25; [1893] 1 Q. B. 715; Toledo Ry. Co. v. Penn. Co., 54 Fed. 730, 19 L. R. A. 387; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689; Lucke v. Clothing Cutters, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421; Crump's Case, 84 Va. 940, 6 S. E. 620, 10 Am. St. Rep. 895; Hopkins v. Stave Co., 83 Fed. 912, 28 C. C. A. 99. The word itself is held in Casey v. Typographical Union, 45 Fed. 135, 12 L. R. A. 193, to be a threat. Intimidation and coercion are its essential elements; Gray v. Council, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477, 1 Ann. Cas. 172.

On the other hand it is held that a boycott is not unlawful, unless attended by some act in itself illegal; Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319; Longshore Printing & Pub. Co. v. Howell, 26 Or. 527, 38 Pac. 547, 28 L. R. A. 464, 46 Am. St. Rep. 640; that an act lawful in itself is not converted by a bad motive into an unlawful or tortious act; Allen v. Flood, [1898] A. C. 1.

A product may be the subject of a boycott; Purvis v. Local No. 500, United Brotherhood of Carpenters & Joiners, 214 Pa. 348, 63 Atl. 585, 12 L. R. A. (N. S.) 642, 112 Am. St. Rep. 757, 6 Ann. Cas. 275; Purington v. Hinchliff, 219 Ill. 159, 76 N. E. 47, 2 L. R. A. (N. S.) 824, 109 Am. St. Rep. 322; Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; and combinations for this purpose both on the part of dealers to compel one in the same business to join their association and of labor unions to force an employer to submit to their terms are usually in the United States held illegal; Purington v. Hinchliff, 219 Ill. 159, 76 N. E. 47, 2 L. R. A. (N. S.) 824, 109 Am. St. Rep. 322; Purvis v. Local No. 500, United Brotherhood of Carpenters & Joiners, 214 Pa. 348, 63 Atl. 585, 12 L. R. A. (N. S.) 642, 112 Am. St. Rep. 757, 6 Ann. Cas. 275, where it was held "a man's business is his property, and to put one in actual fear of its loss or of injury to his business is often no less potent in coercing than fear of violence to his person," citing Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330.

In Allen v. Flood, [1898] A. C. 1, it is said that workmen have an equal right of property in their labor, to dispose of it as they please, limited only by the equal right of the employer to do the same; that as each workman and all of them had a right to refuse to work if his demands were not acceded to, it could be in no sense coercion to put the employer to an election; and because the incidents of the situation made it to his interests to accede to the demand made so that (unless he was willing to assume the resulting loss) he had no real option in the matter, his yielding was no proof of intimidation. It was further said: "In every such case the controlling inquiry is one of means, and these can never be unlawful, if what was in fact done marks an exercise of a right, or a declaration of a purpose to do that which is not of itself unlawful."

In Quinn v. Leathem, [1901] A. C. 495, Allen v. Flood is distinguished, and it is held that a conspiracy to injure, if there be damage, gives rise to civil liability; that an oppressive combination differs widely from an invasion of civil rights by a single person; that if wrongful interference with a man's liberty of action is intended to injure, and in fact damages a third person, such third person has a remedy by an action; and that annoyance and coercion by many may be actionable, where like conduct on the part of one person would not be so. This case approves Temperton v. Russel, [1893] 1 Q. B. 715. In Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, a combination to boycott a manufactured product was held to fall within the class of restraints of trade prohibited by the federal anti-trust act.

In Gompers v. Stove & Range Co., 221 U. S. 437, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, it is said: "Courts differ as to what constitutes a boycott that may be enjoined. All hold that there must be a conspiracy causing irreparable damage to the business or property of the complainant. Some hold that a boycott against the complainant by a combination of persons not immediately connected with him in business may be restrained. Others hold that the secondary boycott can be enjoined where the conspiracy extends not only to injuring the complainant, but secondarily coerces or attempts to coerce his customers to refrain from dealing with him, by threats that unless they do, they themselves will be boycotted. Others hold that no boycott can be enjoined, unless there are acts of physical violence, or intimidation caused by threats of physical violence."

The publication of letters, circulars and printed matter may constitute a means whereby a boycott is unlawfully continued, and their use for such purpose may amount

to a violation of the injunction; Reynolds v. Davis, 198 Mass. 300, 84 N. E. 457, 17 L. R. A. (N. S.) 162; Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689; Brown v. Pharmacy Co., 115 Ga. 452, 41 S. E. 553, 57 L. R. A. 547, 90 Am. St. Rep. 126; Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S. W. 997, 22 L. R. A. (N. S.) 607, 128 Am. St. Rep. 492; Thomas v. R. Co., 62 Fed. 803; Continental Ins. Co. v. Board, 67 Fed. 310; Beck v. Protective Union, 118 Mich. 527, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421; Barr v. Trades Council, 53 N. J. Eq. 102, 30 Atl. 881. See, also, Ludwig v. West Tel. Co., 216 U. S. 156, 30 Sup. Ct. 280, 54 L. Ed. 423; Bitterman v. R. Co., 207 U. S. 206, 28 Sup. Ct. 91, 52 L. Ed. 171; Scully v. Bird, 209 U. S. 489, 28 Sup. Ct. 597, 52 L. Ed. 899. (These cases are cited in the opinion. Gompers v. Stove & Range Co., 221 U. S. 438, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. [N. S.] 874.)

One who is under no contract relation to another may without question withdraw from business relations with that other. This includes the right to cease to deal not only with the individual who may be pursuing a course deemed by him detrimental, but with all who, by their patronage, aid in the maintenance of the objectionable policies; J. F. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165, where it was held that if the workmen violated no right of the company by refusing to work for it, they violated none by refusing to work for contractors who used material bought of it. To the same effect, [1892] A. C. 25; National Protective Ass'n of Steam Fitters & Helpers v. Cumming, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648; Clemmitt v. Watson, 14 Ind. App. 38, 42 N. E. 367; Cote v. Murphy, 159 Pa. 420, 28 Atl. 190, 23 L. R. A. 135, 39 Am. St. Rep. 686; Macauley v. Tierney, 19 R. I. 255, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. Rep. 770; Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319; Payne v. R. Co., 13 Lea (Tenn.) 507, 49 Am. Rep. 666; Heywood v. Tillson, 75 Me. 225, 46 Am. Rep. 373; Raycroft v. Tayntor, 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. Rep. 882; State v. Van Pelt, 136 N. C. 633, 49 S. E. 177, 68 L. R. A. 760, 1 Ann. Cas. 495; Lindsay & Co. v. Federation of Labor, 37 Mont. 264, 96 Pac. 127, 18 L. R. A. (N. S.) 707, 127 Am. St. Rep. 722; [1898] A. C. 128.

On the other hand, it is held that it is unlawful, in an effort to compel A to yield a legitimate benefit to B, for B to demand that C withdraw his patronage from A under penalty of losing B's services or patronage to which he has no contract right; Thomas v. Ry. Co., 62 Fed. 803; *id.*, 4 Inters. Com. Rep. 788; Hopkins v. Stave Co., 83 Fed. 912, 28 C. C. A. 99, 49 U. S. App. 709; Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; Beck v. Protective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421; Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477, 1 Ann. Cas. 172; Barr v. Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Lucke v. Clothing Cutters & Trimmers' Assembly, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421; Jackson v. Stanfield, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588; Crump's Case, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895; [1901] A. C. 495.

The term seems to have been derived from an incident that occurred in Ireland. Captain Boycott, an Englishman, who was agent of Lord Earne and a farmer of Lough Mask, served notices upon the lord's tenants, and they in turn, with the surrounding population, resolved to have nothing to do with him, and, as far as they could prevent it, not to allow any one else to have. His life appeared to be in danger, and he had to claim police protection. His servants fled from him, and the awful sentence of excommunication could hardly have rendered him more helplessly alone for a time. No one would work for him, and no one would supply him with food. He and his wife were compelled to work in their own fields with the shadows of armed constabulary ever at their heels; Justin MacCarthy's "England under Gladstone." See State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23, 18 L. R. Ir. 430.

Combinations, in the nature of boycotts, which have been held to be unlawful conspiracies are: To compel a member of a labor union to pay a fine assessed against him for working in a mill with steam machinery by preventing his obtaining employment; 5 Cox, C. C. 162; to obstruct an employer in the conduct of his business; People v. Petheram, 64 Mich. 252, 31 N. W. 188; 10 Cox, C. C. 592; to coerce an employer to conduct his business with reference to apprentices and delinquent members according to the demand of the union, by injuring his business through notices to customers and material men that dealings with him would be followed by similar measures against them; Moores & Co. v. Bricklayers' Union, 23 Wkly. L. B. (Ohio) 48; to prevent the employment of a granite cutter declared by a labor union to be a "scab"; State v. Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; State v. Donaldson, 32 N. J. L. 151, 90 Am. Dec. 649; to compel an employer to discharge non-union men; State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23; People v. Wilzig, 4 N. Y. Crim. Rep. 403; People v. Kostka, *id.* 429; People v. Smith, 5 N. Y. Crim. Rep. 509; to induce employés to leave their employment and prevent others from entering it; Walker v. Cronin, 107 Mass. 555; to induce workmen to quit in a body to enforce the demands of a labor union; Old Dominion S. S. Co. v. McKenna, 30 Fed. 48; to parade in front of a factory with banners to induce workmen to keep away; Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689. Com-

binations to prevent the sale of a manufactured product except upon conditions with which the manufacturer does not wish to comply; Purington v. Hinchliff, 219 Ill. 159, 76 N. E. 47, 2 L. R. A. (N. S.) 824, 109 Am. St. Rep. 322; or to force a business man to conform his prices to those of an association of others in the same business; Doremus v. Hennessy, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203; or to join are association of other men in the same business; Boutwell v. Marr, 71 Vt. 1, 42 Atl. 607, 43 L. R. A. 803, 76 Am. St. Rep. 746; Martell v. White, 185 Mass. 255, 69 N. E. 1085, 64 L. R. A. 260, 102 Am. St. Rep. 341; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608; or to unionize his place of business; Purvis v. United Brotherhood of Carpenters & Joiners, 214 Pa. 348, 63 Atl. 585, 12 L. R. A. (N. S.) 642, 112 Am. St. Rep. 757, 6 Ann. Cas. 275; Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; are illegal means of enforcing a boycott; and so it is held are any combinations to secure action which essentially obstructs the free flow of commerce between the states or restricts, in that regard, the liberty of a trader to engage in business; Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; an agreement by shipowners, in order to secure a carrying trade exclusively for themselves, that agents of members should be prohibited upon pain of dismissal from acting in the interests of competing shipowners; [1892] A. C. 25; a combination of retailers binding the members to refuse to purchase of wholesalers who should sell to non-members of the combination; Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319; an agreement of contractors to withdraw their patronage from wholesalers selling to a contractor who has conceded to the demands of his employés for an eight hour day; Cote v. Murphy, 159 Pa. 420, 28 Atl. 190, 23 L. R. A. 135, 39 Am. St. Rep. 686; a threat by a railroad company to discharge any employé who should deal with the plaintiff; Payne v. R. Co., 13 Lea (Tenn.) 507, 49 Am. Rep. 666; a threat by an employer that he would discharge any laborer who rented plaintiff's house; Heywood v. Tillson, 75 Me. 225, 46 Am. Rep. 373.

To gather around a place of business and follow employés to and from work, and to collect about their boarding-places with threats, intimidation, and ridicule; Murdock v. Walker, 152 Pa. 595, 25 Atl. 492, 34 Am. St. Rep. 678; Barnes & Co. v. Typographical Union, 232 Ill. 424, 83 N. E. 940, 14 L. R. A. (N. S.) 1018, 13 Ann. Cas. 54; or to congregate around the entrance to a place of business for the purpose of preventing the public from entering; Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230; Jensen v. Cooks' & Waiters' Union, 39 Wash. 531, 81 Pac. 1069, 4 L. R. A. (N. S.) 302; such besetting of works is called *picketing (q. v.)*.

Boycotts may be restrained by injunction; Friedman v. Israel, 26 Fed. 803; Casey v. Typographical Union, 45 Fed. 135, 12 L. R. A. 193; a violation of which is punishable as a contempt; U. S. v. Debs, 64 Fed. 724; In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; when they are found to be unlawful conspiracies; Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477, 1 Ann. Cas. 172; Barr v. Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; and the fact that they are such will not prevent such remedy where they threaten irreparable injury to persons or property; Cranford v. Tyrrell, 128 N. Y. 341, 28 N. E. 514. That the ultimate purpose of the combination is to secure benefits to its members rather than to inflict damage on a boycotted business is held to be no justification; Erdman v. Mitchell, 207 Pa. 79, 56 Atl. 327, 63 L. R. A. 534, 99 Am. St. Rep. 783. The court cannot look beyond the immediate injury to the remote result; Purvis v. United Brotherhood, 214 Pa. 348, 63 Atl. 585, 12 L. R. A. (N. S.) 642, 112 Am. St. Rep. 757, 6 Ann. Cas. 275. In their efforts to better their condition they may inflict more or less damage upon others. But these results should be incidental damage and inconvenience consequent on the operation of general rules, lawful in themselves, rather than those which follow a specific intent and immediate purpose of injury to others in order that good may ultimately come to themselves. The doctrine that the end justifies the means has no place in a condition of society where law prevails; Curran v. Galen, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496; Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 30, where it was said that the right to be free from molestation must be considered as well as that of bettering a class condition, per O. W. Holmes, Jr., C. J.

On the other hand, where the publication of a libelous circular for the purpose of creating a boycott was sought to be enjoined, it was held that the court cannot, by injunction interfere with the constitutional right freely to speak or write; Marx v. Haas Jeans Clothing Co. v. Watson, 168 Mo. 133, 67 S. W. 391, 56 L. R. A. 951, 90 Am. St. Rep. 440; and for the same offense, an injunction was refused on the ground that the plaintiffs had no property right in the trade of any particular person. In several states there are statutes on the subject, some of them merely declaratory of the common law, and others, more drastic, which extend the doctrine to new acts and circumstances.

See, generally, Moses, Strikes; Stimson's Handbook of Labor Law in the U. S.;

COMBINATION; LABOR UNION; BLACKLISTING; CONSPIRACY; MALICE; MOTIVE; RESTRAINT OF TRADE; STRIKE.

BOZERO. **In Spanish Law.** An advocate; one who pleads the causes of others, either suing or defending. *Las Partidas*, part. 3, tit. v. l. 1–6.

Called also *abogado*. Amongst other classes of persons excluded from this office are minors under seventeen, the deaf, the dumb, friars, women, and infamous persons. White, New Rec. 274.

BRANCH. A portion of the descendants of a person, who trace their descent to some common ancestor, who is himself a descendant of such person.

The whole of a genealogy is often called the *genealogical tree;* and sometimes it is made to take the form of a tree, which is in the first place divided into as many branches as there are children, afterwards into as many branches as there are grandchildren, then great-grandchildren, etc. If, for example, it be desired to form the genealogical tree of Peter's family, Peter will be made the trunk of the tree; if he has had two children, John and James, their names will be written on the first two branches, which will themselves shoot out into as many smaller branches as John and James have children; from these others proceed, till the whole family is represented on the tree. Thus the origin, the application, and the use of the word branch in genealogy will be at once perceived.

BRANDING. An ancient mode of punishment by inflicting a mark on an offender with a hot iron. It is generally disused in civil law, but is a recognized punishment for some military offences.

It is also used with reference to the marking of cattle for the purpose of identification. See ANIMAL.

BRANKS. An instrument of punishment formerly made use of in some parts of England for the correction of scolds, which it was said to do so effectually and so very safely that it was looked upon by Dr. Plotts, in his History of Staffordshire, p. 389, "as much to be preferred to the ducking-stool, which not only endangers the health of the party, but also gives the tongue liberty 'twixt every dip, to neither of which is this liable; it brings such a bridle for the tongue as not only quite deprives them of speech, but brings shame for the transgression and humiliation thereupon before it is taken off."

BRASS KNUCKLES. A weapon worn on the hand for the purposes of offence or defence, so made that in hitting with the fist considerable damage is inflicted.

It is called "brass knuckles" because it was originally made of brass. The term is now used as the name of the weapon without reference to the metal of which it is made; Patterson v. State, 3 Lea (Tenn.) 575.

BREACH. **In Contracts.** The violation of an obligation, engagement, or duty.

A *continuing* breach is one where the condition of things constituting a breach continues during a period of time, or where the acts constituting a breach are repeated at brief intervals; F. Moore 242; Holt 178 2 Ld. Raym. 1125.

The right to rescind a contract for nonperformance is a remedy as old as the law of contract itself. When the contract is entire—indivisible—the right is unquestioned. The undertakings on the one side and on the other are dependent, and performance by the one party cannot be enforced by the other without performance or a tender of performance on his own part; Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366. In that case plaintiff agreed to ship 5,000 tons of rails at the rate of about 1,000 tons a month beginning in February, and the whole contract to be shipped before the first of August of the same year. Only 400 tons were shipped in February and 885 in March, and it was held that the failure to fulfill the contract in respect to these first two installments justified the rescission of the whole contract, provided that the defendants distinctly and seasonably asserted their right to rescind; and the fact that the defendants had accepted the shipment of 400 tons in February was no waiver of this right, because it took place without notice or means of knowledge that the stipulated quantity had not been shipped in February. An English case in 1859 allowed rescission on the ground of insufficient delivery of the first installment of an iron contract; 5 H. & N. 19. Where on a year's contract for furnishing coke, payment to be made on the twentieth of each month for the deliveries of the preceding month, it was held that there might be a breach of the contract on the twenty-third of the month, if the sum were still unpaid; Hull Coal & Coke Co. v. Coal & Coke Co., 113 Fed. 256, 51 C. C. A. 213. The supreme court of Michigan has decided, in a contract to deliver wood in installments, that a refusal to pay for the third installment was not such a breach as to excuse the defendant from making further deliveries, on the ground that the defendant's refusal to pay did not evince an intention no longer to be bound by the contract; West v. Bechtel, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791. This case is distinguished from Norrington v. Wright, *supra*, in that the latter was a breach for non-delivery and the Michigan case was a breach for non-payment.

In Iowa it was held that a failure to pay for a shipment of coal within thirty days, as agreed in a contract for the shipment of a certain amount in quantities as ordered, does not go to the whole consideration of the contract, and does not therefore give the right to rescind; Osgood v. Bauder, 75 Ia. 550, 39 N. W. 887, 1 L. R. A. 655; *contra*, Ross-Meehan Foundry Co. v. Wheel Co., 113 Tenn. 370, 83 S. W. 167, 68 L. R. A. 829, 3 Ann. Cas. 898; and in New Jersey a failure to deliver the first installment of goods on a contract for delivery in installments does

not justify a rescission by the buyer; Gerli v. Silk Mfg. Co., 57 N. J. L. 432, 31 Atl. 401, 30 L. R. A. 61, 51 Am. St. Rep. 611. Acts indicating an intention to abandon a contract justify the aggrieved party in rescinding, but mere breach in performance, without repudiation, cannot warrant rescission; 9 C. P. 208; [1900] 2 Ch. 298. Where one party to a contract is guilty of a breach, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform. Such an abandonment is not technically a rescission of the contract, but merely an acceptance of the situation which the wrongdoing of the other party has brought about; Anvil Min. Co. v. Humble, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814; Pierce v. R. Co., 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591; Roehm v. Horst, 178 U. S. 14, 20 Sup. Ct. 780, 44 L. Ed. 953. It has been held that when a contract is repudiated by one party, and the other party has not elected to treat such a repudiation as a breach, the latter is not excused from continuing to perform on his part; Smith v. Banking Co., 113 Ga. 975, 39 S. E. 410.

Where the agreement is mutual and dependent, and one party fails to perform his part, the other party may treat it as rescinded; South Texas Telephone Co. v. Huntington (Tex.) 121 S. W. 242; and he is not bound to tender performance; Hollerbach & May Contract Co. v. Wilkins, 130 Ky. 51, 112 S. W. 1126. The abandonment of a ship is a renunciation of the contract of affreightment; The Eliza Lines, 199 U. S. 119, 26 Sup. Ct. 8, 50 L. Ed. 115, four judges dissenting. Where one party to a contract refuses, by anticipation, to perform the contract, the other party may consider it a breach and sue immediately; Hochster v. De la Tour, 2 El. & Bl. 678. In Frost v. Knight, 7 Ex. 111, defendant had promised to marry plaintiff as soon as his father should die. While his father was yet alive, he absolutely refused to marry plaintiff; it was held that an action would lie during the father's lifetime In 17 Q. B. 127, it was held that upon the defendant railroad company giving notice to plaintiff that it would not receive any more of its chairs, it might sue for the breach without tendering the goods. In 16 Q. B. Div. 467, it was held that where one party by anticipation refuses to perform the contract, it entitled the other party, if he pleased, to agree to the contract being put an end to. In Dingley v. Oler, 117 U. S. 502, 6 Sup. Ct. 850, 29 L. Ed. 984, the court considered the cases, but declined to decide whether or not the rule should be maintained as applicable to the class of cases to which the one then before it belonged; and said it has been called in England a "novel doctrine" and has never been applied in that court.

The cases of Foss-Schneider Brewing Co. v. Bullock, 59 Fed. 87, 8 C. C. A. 14, and Edward Hines Lumber Co. v. Alley, 73 Fed. 603, 19 C. C. A. 599, followed Hochster v. De la Tour. In Horst v. Roehm, 84 Fed. 569, Dallas, J., was of opinion that the question was an open one, so far as the supreme court was concerned, and followed the ruling of Judge Lowell in Dingley v. Oler, 11 Fed. 372, supported by the two federal cases last above mentioned. He considered that Judge Lowell had answered the argument of the court in Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384; and concurred with him in thinking that the cases which follow the English rule are "founded in good sense, and rest on strong grounds of convenience however difficult it may be to reconcile them with the strictest logic."

Wallace, C. J., in Marks v. Van Eeghen, 85 Fed. 853, 30 C. C. A. 208, considered that Dingley v. Oler, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984, was a *dictum*, and that there was an overwhelming preponderance of adjudication in favor of the doctrine of Hochster v. De la Tour. He cited also Nichols v. Steel Co., 137 N. Y. 471, 33 N. E. 561; Kalkhoff v. Nelson, 60 Minn. 284, 62 N. W. 332; Davis v. School-Furniture Co., 41 W. Va. 717, 24 S. E. 630.

In Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, 4 Ann. Cas. 406, the court reviewing the English and American cases, held that, upon such breach, the other party may consider himself absolved from any future performance, and either sue immediately, or wait till the time when the act was to be done, still holding the contract as prospectively binding for the exercise of his option.

In The Eliza Lines, 199 U. S. 119, 26 Sup. Ct. 8, 50 L. Ed. 115, 4 Ann. Cas. 406, Holmes, J., said: "A repudiation of a contract, amounting to a breach, warrants the other party in going no further in performance on his side. Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, 4 Ann. Cas. 406."

The rule adopted in Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, 4 Ann. Cas. 406, was applied in John A. Roebling's Sons' Co. v. Fence Co., 130 Ill. 660, 22 N. E. 518; Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436; *id.*, 12 N. Y. St. Rep. 292; Hocking v. Hamilton, 158 Pa. 107, 27 Atl. 836; McCormick v. Basal, 46 Ia. 235; Davis v. Furniture Co., 41 W. Va. 717, 24 S. E. 630; Remy v. Olds, 88 Cal. 537, 26 Pac. 355; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275.

The renunciation must be unequivocal and absolute; and must be acted upon by the other parties and must terminate the entire contract; [1900] 2 Ch. 298; John A. Roebling's Sons' Co. v. Fence Co., 130 Ill. 660, 22 N. E. 518. It does not operate as a rescission of the contract, because one party alone cannot rescind; but the other party may adopt such renunciation with the effect that the

contract is at an end, except for the purpose of bringing an action for the damages consequent upon the renunciation; [1910] 2 Ch. 248. The rule in Hochster v. De la Tour was disapproved in Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384, and Stanford v. McGill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760, on elaborate consideration. The rejection of the rule in the former case was based upon its inapplicability to commercial paper, but in Roehm v. Horst, 178 U. S. 17, 20 Sup. Ct. 780, 44 L. Ed. 953, it was pointed out that in that case the consideration had passed, there were no mutual obligations, and that such case did not fall within the reason of the rule, citing Nichols v. Steel Co., 137 N. Y. 487, 33 N. E. 561.

See Wald's Anson, Contracts (Williston's ed.) 355.

Where a trust company agrees to make a loan upon a building to be built and later repudiates the agreement, a right of action arises at once and the prospective borrower need not wait until the building is completed; Holt v. Ins. Co., 74 N. J. L. 795, 67 Atl. 118, 11 L. R. A. (N. S.) 100, 12 Ann. Cas. 1105. In New York it is held that an action will not lie at once where the maker of a draft declares he will not pay it on maturity; Benecke v. Haebler, 38 App. Div. 344, 58 N. Y. Supp. 16; and so where an insurance company decides to limit the amount payable on existing policies; Langan v. Supreme Council, 174 N. Y. 266, 66 N. E. 932; Porter v. Supreme Council, 183 Mass. 326, 67 N. E. 238; *contra*, O'Neill v. Supreme Council, 70 N. J. L. 410, 57 Atl. 463, 1 Ann. Cas. 422.

In a contract for the purchase of a horse in return for personal services for a specified period, where the buyer refuses to work, the seller may retake the horse; Cleary v. Morson, 94 Miss. 278, 48 South. 817; where one cancels an order for clothing before it is manufactured, the seller cannot complete the manufacture and sue for the full contract; he is bound to reduce his damages as far as possible; Woolf v. Hamburger, 129 App. Div. 883, 114 N. Y. Supp. 186.

Though a party has waived a breach for which he could have declared a forfeiture, he may still counterclaim damages for such breach; Clark v. West, 193 N. Y. 349, 86 N. E. 1; neither payments on account, nor permitting the contractor to complete the work after the specified time, is a waiver of such damages; Reading Hardware Co. v. City of New York, 129 App. Div. 292, 113 N. Y. Supp. 331; nor taking possession of a building before completion; Mikolajewski v. Pugell, 62 Misc. 449, 114 N. Y. Supp. 1084. But where the defendant has himself repudiated the contract after the delivery of one installment he is barred from setting up the defectiveness of such installment subsequently discovered; 21 T. L. R. 413. Where government officials test and accept a defective dock in ignorance of such defects which if known would have led to a refusal to accept, the government is not precluded from refusing it on subsequent discovery; U. S. v. Walsh, 115 Fed. 697, 52 C. C. A. 419.

An anticipatory breach will operate as a present breach only if accepted and acted upon by the other party, who may disregard it and await the appointed day. If not accepted by the other party, the renunciation may be withdrawn before performance is due, but if not withdrawn it is evidence of a continued intention to that effect. It operates as a continued waiver of all conditions precedent to the liability for performance; Leake, Contract 639.

As to one endeavoring to persuade a third party to break his contract, see INJUNCTION.

In Pleading. That part of the declaration in which the violation of the defendant's contract is stated.

It is usual in assumpsit to introduce the statement of the particular breach, with the allegation that the defendant, contriving and fraudulently intending craftily and subtilely to deceive and defraud the plaintiff, neglected and refused to perform, or performed, the particular act, contrary to the previous stipulation.

In debt, the breach or cause of action complained of must proceed only for the nonpayment of money previously alleged to be payable; and such breach is very similar whether the action be in debt on simple contract, specialty, record, or statute, and is usually of the following form: "Yet the said defendant, although often requested so to do, hath not as yet paid the said sum of ——— dollars, above demanded, nor any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused so to do, to the damage of the said plaintiff ——— dollars, and therefore he brings suit," etc.

The breach must obviously be governed by the nature of the stipulation; it ought to be assigned in the words of the contract, either negatively or affirmatively, or in words which are coextensive with its import and effect; Comyns, Dig. *Pleader*, C, 45; 2 Wms. Saund. 181 *b*, *c*; Fletcher v. Peck, 6 Cra. (U. S.) 127, 3 L. Ed. 162. And see Hughes v. Smith, 5 Johns. (N. Y.) 168; Bender v. Fromberger, 4 Dall. (U. S.) 436, 1 L. Ed. 898; Craghill v. Page, 2 Hen. & M. (Va.) 446; Steph. Pl. (And. ed.) 115.

When the contract is in the disjunctive, as on a promise to deliver a horse by a particular day, or to pay a sum of money, the breach ought to be assigned that the defendant did not do the one act nor the other; 1 Sid. 440; Hardr. 320; Comyns, Dig. *Pleader*, C.

BREACH OF CLOSE. Every unwarrantable entry upon the soil of another is a breach of his close; 3 Bla. Com. 209.

BREACH OF COVENANT. A violation of, or a failure to perform the conditions of, a bond or covenant. The remedy is in some cases by a writ of covenant; in others, by an action of debt; 3 Bla. Com. 156.

BREACH OF THE PEACE. A violation of public order; the offence of disturbing the public peace. One guilty of this offence may be held to bail for his good behavior. An act of public indecorum is also a breach of the peace. The remedy for this offence is by indictment.

Persons who go out on a "strike" and then linger about the place of their former employment, hooting at others taking their places, may be bound over to keep the peace; Com. v. Silvers, 11 Pa. Co. C. R. 481. One may disturb the peace while on his own premises by the use of violent language to a person lawfully there; State v. Brumley, 53 Mo. App. 126.

BREACH OF PRISON. An unlawful escape out of prison. This is of itself a misdemeanor; 1 Russell, Cr. 378; 4 Bla. Com. 129; 2 Hawk. Pl. Cr. c. 18, s. 1; State v. Leach, 7 Conn. 452, 18 Am. Dec. 113. The remedy for this offence is by indictment. See ESCAPE.

BREACH OF PROMISE OF MARRIAGE. See PROMISE OF MARRIAGE.

BREACH OF TRUST. The wilful misappropriation, by a trustee, of a thing which had been lawfully delivered to him in confidence.

The distinction between larceny and a breach of trust is to be found chiefly in the terms or way in which the thing was taken originally into the party's possession; and the rule seems to be, that whenever the article is obtained upon a fair contract not for a mere temporary purpose, or by one who is in the employment of the deliverer, then the subsequent misappropriation is to be considered as an act of breach of trust. This rule is, however, subject to many nice distinctions. Lewer v. Com., 5 S & R. (Pa.) 93, 97. It has been adjudged that when the owner of goods parts with the *possession* for a particular purpose, and the person who receives them avowedly for that purpose has at the time a fraudulent intention to make use of the possession as a means of converting the goods to his own use, and does so convert them, it is larceny; but if the owner part with the *property*, although fraudulent means have been used to obtain it, the act of conversion is not larceny; Alison, Princ. c. 12, p. 354.

In the Year Book 21 Hen. VII. 14, the distinction is thus stated:—"*Pigot.* If I deliver a jewel or money to my servant to keep, and he flees or goes from me with the jewel, is it felony? *Cutler* said, Yes: for so long as he is with me or in my house, that which I have delivered to him is adjudged to be in my possession; as my butler, who has my plate in keeping, if he flees with it, it is felony. Same law, if he who keeps my horse goes away with him. The reason is, they are always in my possession. But if I deliver a horse to my servant to ride to market or the fair, and he flee with him, it is no felony; for he comes lawfully to the possession of the horse by delivery. And so it is if I give him a jewel to carry to London, or to pay one, or to buy a thing, and he flee with it, it is not felony; for it is out of my possession, and he comes lawfully to it. *Pigot.* It can well be; for the master in these cases has an action against him, viz.: Detinue, or Account." See this point fully discussed in Stanford, Pl. Cr. lib. 1. See also Year B. Edw. IV. fol. 9; 52 Hen. III. 7; 21 Hen. VII. 15. See BREAKING BULK.

BREAKING. Parting or dividing by force and violence a solid substance, or piercing, penetrating, or bursting through the same.

In cases of burglary and housebreaking, the removal of any part of the house, or of the fastenings provided to secure it, with violence and a felonious intent.

The breaking is actual, as in the above case; or constructive, as when the burglar or housebreaker gains an entry by fraud, conspiracy or threat; Whart. Cr. L. 759; 1 Hale, Pl. Cr. 553; State v. Wiseman, 68 N. C. 207; Johnston v. Com., 85 Pa. 54, 27 Am. Rep. 622; Com. v. Lowrey, 158 Mass. 18, 32 N. E. 940; lifting a latch in order to enter a building is a breaking; State v. O'Brien, 81 Ia. 93, 46 N. W. 861. In England it has been decided that if the sash of a window be partly open, but not sufficiently so to admit a person, the raising of it so as to admit a person is not a breaking of the house; 1 Mood. 178; followed in Com. v. Strupney, 105 Mass. 588, 7 Am. Rep. 556. See People v. Dupree, 98 Mich. 26, 56 N. W. 1046. No reasons are assigned. It is difficult to conceive, if this case be law, what further opening will amount to a breaking. But see 1 Moody 327, 377; 1 B. & H. Lead. Cr. Cas. 524. See BURGLARY.

It was doubted, under the ancient common law, whether the breaking out of a dwelling-house in the night-time was a breaking sufficient to constitute burglary. Sir M. Hale thinks that this was not burglary, because *fregit et exivit, non fregit et intravit;* 1 Hale, Pl. Cr. 554; Rolland v. Com., 82 Pa. 324, 22 Am. Rep. 758; see Brown v. State, 55 Ala. 123, 28 Am. Rep. 693. It may, perhaps, be thought that a breaking out is not so alarming as a breaking in, and, indeed, may be a relief to the minds of the inmates, they may exclaim, as Cicero did of Catiline, *Magno me metu liberabis, dummodo inter me atque te murus intersit.* But this breaking was made burglary by the statute 12 Anne, c. 1, § 7 (1713). The getting the head out through a skylight has been held to be a sufficient breaking out of a house to complete the crime of burglary, 1 Jebb 99. The statute of 12 Anne is too recent to be binding as a part of the common law in all of the United States; 2 Bish. Crim. L. § 99; 1 B. & H. Lead. Cr. Cas. 540.

BREAKING BULK. The doctrine of breaking bulk proceeds upon the ground of a determination of the privity of the bailment by the wrongful act of the bailee. Thus, where a carrier had agreed to carry certain bales of goods, which were delivered to him, to Southampton, but carried them to another place, broke open the bales, and took the goods contained in them feloniously and converted them to his own use, the majority of the judges held that if the party had sold the entire bales it would not have been felony; "but as he broke them, and took what was in them, he did it without warrant," and so was guilty of felony; Y. B. 13 Edw. IV. fol. 9. If a miller steals part of the meal, "although the corn was delivered to him to grind, nevertheless if he steal

it it is felony, being taken from the rest;" 1 Rolle, Abr. 73, pl. 16; Com. v. James, 1 Pick. (Mass.) 375. This construction involves the absurd consequence of its being felony to steal *part* of a package, but a breach of trust to steal the whole.

In an early case in Massachusetts, it was decided that if a wagon-load of goods, consisting of several packages, is delivered to a common carrier to be transported in a body to a certain place, and he, with a felonious intent, separates one entire package, whether before or after the delivery of the other packages, this is a sufficient breaking of bulk to constitute larceny, without any breaking of the package so separated; Com. v. Brown, 4 Mass. 580. But this decision is in direct conflict with the English cases. Thus, where the master and owner of a ship steals a package out of several packages delivered him to carry, without removing anything from the particular package; 1 Russ. & R. 92; or where a letter-carrier is intrusted with two directed envelopes, each containing a 5*l.* note, and delivers the envelopes, having previously taken out the two notes; 1 Den. Cr. Cas. 215; or where a drover separates one sheep from a flock intrusted to him to drive a certain distance; 1 Jebb. 51; this is not a breaking of bulk sufficient to terminate the bailment and to constitute larceny; 2 Bish. Cr. L. 860, 868. The Larceny Act of 1861 has met the difficulty of deciding this class of cases in England, by providing that a bailee of any chattel, money, or valuable security, who fraudulently takes the same, although not breaking bulk, shall be guilty of larceny.

BREAKING DOORS. Forcibly removing the fastenings of a house so that a person may enter. See ARREST.

BREATH. In Medical Jurisprudence. The air expelled from the chest at each expiration.

Breathing, though a usual sign of life, is not conclusive that a child was *wholly* born alive; as breathing may take place before the whole delivery of the mother is complete; 5 C. & P. 329. See BIRTH; LIFE; INFANTICIDE.

BREHON LAW. The ancient system of Irish law; so named from the judges, called Brehons, or Breitheamhuin. Its existence has been traced from the earliest period of Irish history down to the time of the Anglo-Norman invasion. It is still a subject of antiquarian research. An outline of the system will be found in Knight's English Cyclopædia, and also in the Penny Cyclopædia. See Encyc. Brit.

BRETHREN. It is used in the sense of brother.

It may be legitimately used in addressing mixed numbers, although such use is unusual; it may include a daughter; Terry v. Brunson, 1 Rich. Eq. (S. C.) 78. It is so used in the Protestant Episcopal Prayer Book.

BRETHREN OF TRINITY HOUSE. See ELDER BRETHREN.

BRETTS AND SCOTTS, LAWS OF THE. A code or system of laws in use among the Celtic tribes of Scotland down to the beginning of the fourteenth century, and then abolished by Edward I. A fragment only is now extant. See Acts of Parl. of Scotland, vol. 1, pp. 299–301, Edin. 1844. It is interesting, like the Brehon laws of Ireland, in a historical point of view.

BREVE (Lat. *breve, brevis*, short). A writ. An original writ. Any writ or precept issuing from the king or his courts.

It is the Latin term which in law is translated by "writ." In the Roman law these *brevia* were in the form of letters; and this form was also given to the early English *brevia*, and is retained to some degree in the modern writs. Spelman, Gloss. The name *breve* was given because they stated briefly the matter in question *(rem quæ est breviter narrat)*. It was said to be "shaped in conformity to a rule of law" *(formatum ad similitudinem regulæ juris)*; because it was requisite that it should state facts against the respondent bringing him within the operation of some rule of law. The whole passage from Bracton is as follows: *"Breve quidem, cum sit formatum ad similitudinem regulæ juris quia breviter et paucis verbis intentionem proferentes exponit, et explanat sicut regula juris rem quæ est breviter narrat. Non tamen ita breve esse debet, quin rationem et vim intentionis contineat."* Bracton 413 *b*, § 2. It is spelled *briefe* by Brooke Each writ soon came to be distinguished by some important word or phrase contained in the brief statement, or from the general subject-matter; and this name was in turn transferred to the form of action, in the prosecution of which the writ (or *breve*) was procured. Stephen, Pl 9 See WRIT. It is used perhaps more frequently in the plural *(brevia)* than in the singular, especially in speaking of the different classes of writs.

BREVE INNOMINATUM. A writ containing a general statement only of the cause of action.

BREVE NOMINATUM. A writ containing a statement of the circumstances of the action.

BREVE ORIGINALE. An original writ.

BREVE DE RECTO. A writ of right. The writ of right patent is of the highest nature of any in the law. Cowell; Fitzherb. Nat. Brev.

BREVE TESTATUM. A written memorandum introduced to perpetuate the tenor of the conveyance and investiture of lands. 2 Bla. Com. 307.

It was prepared after the transaction, and depended for its validity upon the testimony of witnesses, as it was not sealed. Spelman, Gloss.

In Scotch Law. A similar memorandum made out at the time of the transfer, attested by the *pares curiæ* and by the seal of the superior. Bell, Dict.

BREVET. In French Law. A warrant

granted by government to authorize an individual to do something for his own benefit.

Brevet d'invention. A patent.

In American Law. A commission conferring on a military officer a degree of rank specified in the commission, without, however, conveying a right to receive corresponding pay. See U. S. v. Hunt, 14 Wall. (U. S.) 552, 20 L. Ed. 739.

BREVIA (Lat.). Writs. The plural of *breve*, which see.

BREVIA ANTICIPANTIA (Lat.). Writs of prevention. See QUIA TIMET.

BREVIA DE CURSU (Lat.). Writs of course. See BREVIA FORMATA.

BREVIA FORMATA (Lat.). Certain writs of approved and established form which were granted of course in actions to which they were applicable, and which could not be changed but by consent of the great council of the realm. Bracton 413 *b*.

All original writs, without which an action could not anciently be commenced, issued from the chancery. Many of these were of ancient and established form, and could not be altered; others admitted of variation by the clerks according to the circumstances of the case. In obtaining a writ, a præcipe was issued by the party demandant, directed to the proper officer in chancery, stating the substance of his claim. If a writ already in existence and enrolled upon the Register was found exactly adapted to the case, it issued as of course *(de cursu)*, being copied out by the junior clerks, called *cursitors*. If none was found, a new writ was prepared by the chancellor and subjected to the decision of the grand council, their assent being presumed in some cases if no objection was made. In 1250 it was provided that no new writs should issue except by direct command of the king or the council. The clerks, however, it is supposed, still exercised the liberty of adapting the old forms to cases new only in the *instance*, the council, and its successor (in this respect, at least), parliament, possessing the power to make writs new in principle. The strictness with which the common-law courts, to which the writs were returnable, adhered to the ancient form, gave occasion for the passage of the Stat. Westm. 2, c. 24, providing for the formation of new writs. Those writs which were contained in the Register are generally considered as pre-eminently *brevia formata*.

BREVIA JUDICIALIA (Lat.). Judicial writs. Subsidiary writs issued from the court during the progress of an action, or in execution of the judgment.

They were said to vary according to the variety of the pleadings and responses of the parties to the action; Bract. 413 *b*; Fleta, lib. 2, c. 13, § 3; Co. Litt. 54 *b*, 73 *b*. The various forms, however, became long since fixed beyond the power of the courts to alter them; Barnet v. Ihrie, 1 Rawle (Pa.) 52. Some of these judicial writs, especially that of *capias*, by a fiction of the issue of an original writ, came to supersede original writs entirely, or nearly so. See ORIGINAL WRIT.

BREVIA MAGISTRALIA. Writs framed by the masters in chancery. They were subject to variation according to the diversity of cases and complaints. Bracton, 413 *b*; Fleta, lib. 2, c. 13, § 4.

BREVIA TESTATA. See BREVE TESTATUM.

BREVIARIUM ALARICIANUM. A compilation made by order of Alaric II. and published for the use of his Roman subjects in the year 506. It contained large excerpts from the Theodosian Codex, a few from the Gregorianus and Hermogenianus, some post-Theodosian constitutions, some of the *Sententiæ* of Paulus, one little scrap of Papinian and an abridged version of the Institutes of Gaius. Maitland, 1 Sel. Essays in Anglo-Amer. L. H. 15 (14 L. Q. R. 13). It is also known as *Lex Romana Visigothorum*. It became the principal, if not the only, representative of Roman law among the Franks. *Id.*

BREVIATE. An abstract or epitome of a writing. Holthouse. The name is usually applied to the famous brief of Mr. Murray (afterwards Lord Mansfield) for the complainant in the case of Penn v. Lord Baltimore, 1 Ves. 444. A copy of the original printed folio is in the Pennsylvania Historical Society and it is reprinted in the Pennsylvania Archives, making volume 16 of the Third Series.

BREVIBUS ET ROTULIS LIBERANDIS. A writ or mandate directed to a sheriff, commanding him to deliver to his successor the county and the appurtenances, with all the briefs, rolls, remembrances, and other things belonging to his office.

BRIBE. The gift or promise, which is accepted, of some advantage as the inducement for some illegal act or omission; or of some illegal emolument, as a consideration for preferring one person to another, in the performance of a legal act.

BRIBERY. The receiving or offering any undue reward by or to any person whomsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office, and to incline him to act contrary to his duty and the known rules of honesty and integrity. Co. 3d Inst. 149; 1 Hawk. Pl. Cr. c. 67, s. 2; 4 Bla. Com. 139; State v. Ellis, 33 N. J. L. 102, 97 Am. Dec. 707; Dishon v. Smith, 10 Ia. 212.

The term bribery now extends further, and includes the offence of giving a bribe to many other classes of officers; it applies both to the actor and receiver, and extends to voters, cabinet ministers, legislators, sheriffs, and other classes; 2 Whart Cr L. § 1858 The offence of the giver and the receiver of the bribe has the same name. For the sake of distinction, that of the former—viz.: the briber—might be properly denominated active bribery; while that of the latter—viz.: the person bribed—might be called passive bribery.

Bribery consists in offering a present or receiving one; extortion is demanding a fee or present by color of office; State v. Pritchard, 107 N. C. 921, 12 S. E. 50.

Bribery at elections for members of parliament has always been a crime at common law, and punishable by indictment or information. It still remains so in England, not-

withstanding the stat. 24 Geo. II. c. 14; 3 Burr. 1340, 1589. So is payment or promise of payment for votes at an election of an assistant overseer of a parish; 16 Cox, C. C. 737. To constitute the offence, it is not necessary that the person bribed should in fact vote as solicited to do; 3 Burr. 1236; or even that he should have a right to vote at all; both are entirely immaterial; 3 Burr. 1590; State v. Ellis, 33 N. J. L. 102, 97 Am. Dec. 707; or that he acted without jurisdiction; People v. Jackson, 191 N. Y. 293, 84 N. E. 65, 15 L. R. A. (N. S.) 1173, 14 Ann. Cas. 243.

Bribery of a voter consists in the offering of a reward or consideration for his vote or his failure to vote; Nichols v. Mudgett, 32 Vt. 546; State v. Jackson, 73 Me. 91, 40 Am. Rep. 342; Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569; 15 Q. B. 870.

An attempt to bribe, though unsuccessful, has been held criminal; U. S. v. Worrall, 2 Dall. (Pa.) 384, Fed. Cas. No. 16,766, 1 L. Ed. 426; 4 Burr. 2500; Co. 3d Inst. 147; State v. Ellis, 33 N. J. L. 102, 97 Am. Dec. 707; Com. v. Chapman, 1 Va. Cas. 138. In Illinois a proposal by an officer to receive a bribe, though not bribery, was held to be an indictable misdemeanor at common law; 21 Am. L. Reg. 617 (with note by Judge Redfield); s. c. Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569; but it has been held that upon such a proposal by an officer, one offering him a bribe was not punishable; O'Brien v. State, 6 Tex. App. 665. Keeping open house for the entertainment of the members of the legislature is not bribery; Randall v. News Ass'n, 97 Mich. 136, 56 N. W. 361.

On the trial of an officer for bribery for taking unlawful fees, a corrupt intent must be proved; State v. Pritchard, 107 N. C. 921, 12 S. E. 50.

A writing containing a statement that a person has been bribed to testify as a witness imputes to such person the crime of perjury and is libelous; Atlanta News Publishing Co. v. Medlock, 123 Ga. 714, 51 S. E. 756, 3 L. R. A. (N. S.) 1139; Hillhouse v. Dunning, 6 Conn. 391.

See LOBBYIST; CORRUPT PRACTICES.

BRIBOUR. One who pilfers other men's goods; a thief. See 28 Edw. II. c. 1.

BRIDGE. A structure erected over a river, creek, stream, ditch, ravine, or other place to facilitate the passage thereof; including by the term both arches and abutments; Board of Chosen Freeholders of Sussex County v. Strader, 18 N. J. L. 108, 35 Am. Dec. 530; Bardwell v. Town of Jamaica, 15 Vt. 438; Daniels v. Intendent & Wardens of Athens, 55 Ga. 609; and approaches of the length of 180 feet on either side of it; 71 L. T. 430; and the roadway over it; 57 L. J. Q. B. 280. The embankment contiguous to a bridge is a part of it; Morgan County v. Glass, 139 Ga. 415, 77 S. E. 583. A railway viaduct, designed only for the passage of engines and cars, is not a "bridge," within the statutory meaning of that word; Bridge Proprietors v. Land & Improvement Co., 1 Wall. (U. S.) 116, 17 L. Ed. 571. See Lake v. R. Co., 7 Nev. 294; Whitall v. Board of Chosen Freeholders of Gloucester County, 40 N. J. L. 305.

A bridge may be a street; 26 L. J. Q. B. 11. It is a public highway; Murphy v. Village of Ft. Edward, 79 Misc. 296, 140 N. Y. Supp. 885.

Bridges are either public or private. Public bridges are such as form a part of the highway, common, according to their character as foot, horse, or carriage bridges, to the public generally, with or without toll; 2 East 342; though their use may be limited to particular occasions, as to seasons of flood or frost; 2 Maule & S. 262; 4 Camp. 189 They are established either by legislative authority or by dedication.

By legislative authority. By the Great Charter (9 Hen. III. c. 15), in England, no town or freeman can be compelled to make new bridges where never any were before, but by act of parliament. Under such act, they may be erected and maintained by corporations chartered for the purpose, or by counties, or in whatever other mode may be prescribed; Woolrych, Ways 196. In this country it is the practice to charter companies for the same purpose, with the right to take tolls for their reimbursement; Williams v. Turnpike Corporation, 4 Pick. (Mass.) 341; or to erect bridges at the state's expense; or by general statutes to impose the duty of erection and maintenance upon towns, counties, or districts; Com. v. Com'rs of Monroe County, 2 W. & S. (Pa.) 495; Sampson v. Goochland Justices, 5 Gratt. (Va.) 241; Town of Granby v. Thurston, 23 Conn. 416; Nelson County Court v. Washington County Court, 14 B. Mon. (Ky.) 92; Lobdell v. Inhabitants of New Bedford, 1 Mass. 153; Hill v. Board of Sup'rs of Livingston County, 12 N. Y. 52; State v. Town of Campton, 2 N. H. 513; Town of Waterville v. Kennebec County Com'rs, 59 Me. 80. In re Saw-Mill Run Bridge, 85 Pa. 163; State v. Titus, 47 N. J. L. 89. For their erection the state may take private property, upon making compensation, as in case of other highways; Ang. Highw. § 81; the rule of damages for land so taken being not its mere value for agricultural purposes, but its value for a bridge site, minus the benefits derived to the owner from the erection; Young v. Harrison, 17 Ga. 30. The right to erect a bridge upon the land of another may also be acquired by mere parol license, which, when acted upon, becomes irrevocable; Amerioscoggin Bridge v. Bragg, 11 N. H. 102; Hall v. Boyd, 14 Ga. 1. But see Foster v. Browning, 4 R. I. 47, 67 Am. Dec. 505. The franchise of a toll bridge or ferry may be taken, like other property, for a free bridge; West River Bridge Co. v. Dix, 6 How. (U. S.) 507, 12 L. Ed. 535; Central Bridge Corporation v.

Lowell, 4 Gray (Mass.) 474; State v. Canterbury, 28 N. H. 195; and, when vested in a town or other public corporation, may be so taken without compensation; Town of East Hartford v. Bridge Co., 10 How. (U. S.) 511, 13 L. Ed. 518.

A new bridge may be erected, under legislative authority, so near an older bridge or ferry as to impair or destroy its value, without compensation, unless the older franchise be protected by the terms of its grant; Proprietors of Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 9 L. Ed. 773; *id.*, 7 Pick. (Mass.) 344; Thompson v. R. Co., 3 Sandf. Ch. (N. Y.) 625; Platt v. Bridge Co., 8 Bush (Ky.) 31; Parrot v. Lawrence, 2 Dill. 332, Fed. Cas. No. 10,772; 21 Can. S. C. R. 456; The Binghamton Bridge, 3 Wall. (U. S.) 51, 18 L. Ed. 137; but, unless authorized by statute, a new bridge so erected is unlawful, and may be enjoined as a nuisance; 3 Bla. Com. 218; 2 Cr. M. & R. 432; Norris v. Farmers' & Teamsters' Co., 6 Cal. 590, 65 Am. Dec. 535; Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 11 Pet. (U. S.) 621, 9 L. Ed. 773. And if the older franchise, vested in an individual or private corporation, be protected, or be exclusive within given limits, by the terms of its grant, the erection of a new bridge or ferry, even under legislative authority, is unconstitutional, as an act impairing the obligations of contract; Proprietors of Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35; Enfield Toll Bridge Co. v. R. Co., 17 Conn. 40, 42 Am. Dec. 716; Mayor, etc., of City of Columbus v. Rodgers, 10 Ala. 37. See 21 Can. S. C. R. 456. The entire expense of a bridge erected within a particular district may be assessed upon the inhabitants; Shaw v. Dennis, 5 Gilman (Ill.) 405; Town of Granby v. Thurston, 23 Conn. 416. The absolute control of navigable streams in the United States is vested in congress; Miller, Const. 457; but in the absence of legislation by congress a state has the right to erect a bridge over a navigable river within its own limits; Gilman v. Philadelphia, 3 Wall. (U. S.) 713, 18 L. Ed. 96; Com. v. Breed, 4 Pick. (Mass.) 460; Works v. R. Co., 5 McLean 425, Fed. Cas. No. 18,046; Dugan v. Bridge Co., 27 Pa. 303, 67 Am. Dec. 464; People v. R. Co., 15 Wend. (N. Y.) 113, 30 Am. Dec. 33; and so may a county; In re Waverly Borough's Bridge, 12 Pa. Co. Ct. 669; although in exercising this right, care must be taken to interrupt navigation as little as possible; State v. Inhabitants of Freeport, 43 Me. 198; Renwick v. Morris, 3 Hill (N. Y.) 621; Terre-Haute Drawbridge Co. v. Halliday, 4 Ind. 36; Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339; Columbus Ins. Co. v. Ass'n, 6 McLean 70, Fed. Cas. No. 3,046; Columbus Ins. Co. v. Curtenius, 6 McLean 209, Fed. Cas. No. 3,045.

The erection of a bridge entirely within a state across a navigable river running partly within and partly without the state is not a matter so directly connected with interstate commerce as to be under the exclusive control of congress, and in the absence of congressional action the state has authority to regulate the same; Rhea v. R. Co., 50 Fed. 16.

A state has no power to fix tolls on a bridge connecting it with another state, thereby regulating charges on interstate commerce without the consent of congress or the concurrence of such other state. The chief justice and three associate justices concurred on the ground that concurrent acts of the state incorporating the bridge company and authorizing it to fix tolls constituted a contract between the corporation and both states which could not be altered by one state without the consent of the other; Covington & Cincinnati Bridge Co. v. Com., 154 U. S. 204, 224, 14 Sup. Ct. 1087, 38 L. Ed. 962. The power of erecting a bridge, and taking tolls thereon, over a navigable river forming the boundary between two states, can only be conferred by the concurrent legislation of both; President, etc., for Erecting a Bridge near Trenton v. Bridge Co., 13 N. J. Eq. 46; Dover v. Portsmouth Bridge, 17 N. H. 200.

A bridge is no less a means of commercial intercourse than a navigable stream, and the state power may properly determine whether the interruption to commerce occasioned by the bridge be not more than compensated by the facilities which it affords. And if the bridge be authorized in good faith by a state, the federal courts are not bound to enjoin it. However, congress, since its power to regulate commerce is supreme, may interpose whenever it may see fit, by general or special laws, and may prevent the building of a bridge, or cause the removal of one already erected; Gilman v. Philadelphia, 3 Wall. (U. S.) 713, 18 L. Ed. 96; The Passaic Bridges, 3 Wall. (U. S.) 782, 16 L. Ed. 799; Silliman v. Bridge Co., 4 Blatchf. 74, Fed. Cas. No. 12,851; Id., 4 Blatchf. 395, Fed. Cas. No. 12,852; The Clinton Bridge, 10 Wall. (U. S.) 454, 19 L. Ed. 969; or it may authorize the erection of a bridge over a navigable river, although it may partially obstruct the free navigation; People v. Kelly, 76 N. Y. 475. So railroads, having become the principal instruments of commerce, are as much under the control of congress as navigable streams, and a railroad bridge might be authorized by congress; In re Clinton Bridge, 1 Woolw. 150, Fed. Cas. No. 2,900; which has power directly or through a corporation created for the purpose to construct bridges over navigable waters between states, for the purpose of interstate commerce by land; Luxton v. Bridge Co., 153 U. S. 525, 14 Sup. Ct. 891, 38 L. Ed. 808; or it may grant such rights to an existing corporation; Haeussler v. City of St. Louis, 205

Mo. 656, 103 S. W. 1034; the bridge across East River between New York and Brooklyn is authorized by acts of New York and of congress and cannot be declared to be a public nuisance, even though it may injuriously affect the business of a warehouseman on the banks of the river above the bridge; Miller v. New York, 109 U. S. 385, 3 Sup. Ct. 228, 27 L. Ed. 971. See also on the subject at large Miller, Const. U. S. Lect. ix. For any unecessary interruption the proprietors of the bridge will be liable in damages to the persons specially injured thereby, or to have the bridge abated as a nuisance, by injunction, though not by indictment; such bridge, although authorized by state laws, being in contravention of rights secured by acts of congress regulating commerce; Pennsylvania v. Bridge Co., 13 How. (U. S.) 518, 14 L. Ed. 249; 1 W. & M. 401; Works v. Junction Railroad, 5 McLean 425, Fed. Cas. No. 18,046; Columbus Ins. Co. v. Bridge Ass'n, 6 McLean 70, Fed. Cas. No. 3,046; Jolly v. Drawbridge Co., 6 McLean 237, Fed. Cas. No. 7,441.

Dedication. The dedication of bridges depends upon the same principles as the dedication of highways, except that their acceptance will not be presumed from mere use, until they are proved to be of public utility; 5 Burr. 2594; State v. Town of Campton, 2 N. H. 513; Williams v. Cummington, 18 Pick. (Mass.) 312; 3 M. & S. 526. See Town of Dayton v. Town of Rutland, 84 Ill. 279, 25 Am. Rep. 457; State v. Bridge Co., 22 Kan. 438; HIGHWAYS.

Repairs to. At common law, all public bridges are *primâ facie* to be repaired by the inhabitants of the county, without distinction of foot, horse, or carriage bridges, unless they can show that others are bound to repair particular bridges; 13 East 95; Bacon, Abr. *Bridges*, p. 533; 5 Burr. 2594. In this country, the common law not prevailing, the duty of repair is imposed by statute, generally, upon towns or counties; State v. Town of Franklin, 9 Conn. 32; State v. Campton, 2 N. H. 513; Hill v. Livingston County, 12 N. Y. 52; House v. Board of Com'rs, 60 Ind. 580, 28 Am. Rep. 657; Township of Newlin v. Davis, 77 Pa. 317; Hedges v. Madison County, 1 Gilman (Ill.) 567; Bardwell v. Town of Jamaica, 15 Vt. 438; Saunders v. Hathaway, 25 N. C. 402; Waterville v. Kennebec County, 59 Me. 80; McCalla v. Multnomah County, 3 Or. 424; Agawam v. Hampden, 130 Mass. 528; or chartered cities; Shartle v. Minneapolis, 17 Minn. 308 (Gil. 284); Holmes v. Hamburg, 47 Ia. 348; except that bridges owned by corporations or individuals are reparable by their proprietors; Williams v. Bridge & Turnpike Corp., 4 Pick. (Mass.) 341; Ward v. Turnpike Co., 20 N. J. L. 323; Townsend v. Turnpike Road, 6 Johns. (N. Y.) 90; Beecher v. Ferry Co., 24 Conn. 491; and that where the necessity for a bridge is created by the act of an individual or corporation in cutting a canal, ditch, or railway through a highway, it is the duty of the author of such necessity to make and repair the bridge; Perley v. Chandler, 6 Mass. 458, 4 Am. Dec. 159; Dygert v. Schenck, 23 Wend. (N. Y.) 446, 35 Am. Dec. 575; Nobles v. Langly, 66 N. C. 287; Pennsylvania R. Co. v. Borough of Irwin, 85 Pa. 336; Roberts v. Ry. Co., 35 Wis. 679. Where a bridge is rebuilt at county expense, but over which it has no control or care and on which it expends no money thereafter, it does not become liable to maintain or repair it; Delta Lumber Co. v. Board of Auditors of Wayne County, 71 Mich. 572, 40 N. W. 1. The parties chargeable must constantly keep the bridge in such repair as will make it safe and convenient for the service for which it is required; Hawk. Pl. Cr. c. 77, s. 1; Frankfort Bridge Co. v. Williams, 9 Dana (Ky.) 403, 35 Am. Dec. 151; Holley v. Turnpike Co., 1 Aik. (Vt.) 74; People v. Turnpike Road, 23 Wend. (N. Y.) 254. See Town of Grayville v. Whitaker, 85 Ill. 439; Holmes v. City of Hamburg, 47 Ia. 348; Rapho Tp. v. Moore, 68 Pa. 408, 8 Am. Rep. 202; Hicks v. Chaffee, 13 Hun (N. Y.) 293; Abbot v. Wolcott, 38 Vt. 666.

Remedies for failure to repair. If the parties chargeable with the duty of repairing neglect so to do, they are liable to indictment; Hawk. Pl. Cr. c. 77, s. 1; People v. Dutchess County, 1 Hill (N. Y.) 50; State v. Canterbury, 28 N. H. 195; Com. v. Newburyport Bridge, 9 Pick. (Mass.) 142; State v. King, 25 N. C. 411. It has also been held that they may be compelled by mandamus to repair; Brander v. Chesterfield Justices, 5 Call (Va.) 548, 2 Am. Dec. 606; Dinwiddie Justices v. Chesterfield Justices, 5 Call (Va.) 556; People v. Dutchess County, 1 Hill (N. Y.) 50; Nelson County Court v. Washington County Court, 14 B. Monr. (Ky.) 92; State v. Freeholders of Essex, 23 N. J. L. 214. But see 12 A. & E. 427; 3 Campb. 222; State v. Cloud County Com'rs, 39 Kan. 700, 18 Pac. 952. If a corporation be charged with the duty by charter, they may be proceeded against by *quo warranto* for the forfeiture of their franchise; People v. R. Co., 23 Wend. (N. Y.) 254; or by action on the case for damages in favor of any person specially injured by reason of their neglect; Sherwood v. Weston, 18 Conn. 32; Townsend v. Turnpike Road, 6 Johns. (N. Y.) 90; Richardson v. Turnpike Co., 6 Vt. 496; Randall v. Turnpike, 6 N. H. 147, 25 Am. Dec. 453; Williams v. Turnpike, 4 Pick. (Mass.) 341; Board of Com'rs of Sullivan County v. Sisson, 2 Ind. App. 311, 28 N. E. 374. And a similar action is given by statute, in many states, against public bodies chargeable with repair; Whipple v. Walpole, 10 N. H. 130; Board of Com'rs of Allen County v. Creviston, 133 Ind. 39, 32 N. E. 735. A city is liable to an action for damages caused by a failure to maintain a bridge as required by law; City of Boston

v. Crowley, 38 Fed. 202. In Georgia counties are not liable for injuries from defects in free bridges or ferries; Arline v. Laurens County, 77 Ga. 249, 2 S. E. 833.

Tolls. The law of travel upon bridges is the same as upon highways, except when burdened by tolls. The payment of tolls can be lawfully enforced only at the gate or toll-house; State v. Dearborn, 15 Me. 402. Where by the charter of a bridge company, certain persons are exempted from payment, such exemption is to be liberally construed; Cayuga Bridge Co. v. Stout, 7 Cow. (N. Y.) 33; Salmon v. Mallett, 6 N. C. 372; South Carolina R. Co. v. Jones, 4 Rich. Eq. (S. C.) 459.

Bridges, when owned by individuals, are real estate; In re Meason's Estate, 4 Watts (Pa.) 341; Arnold v. Ruggles, 1 R. I. 165, Hudson River Bridge Co. v. Patterson, 74 N. Y. 365; and also when owned by the public; yet the freehold of the soil is in its original owner; Co. 2d Inst. 705. The materials of which they are formed belong to the parties who furnished them, subject to the public right of passage; and when the bridge is taken down or abandoned become the property of those who furnished them; 6 East 154; President, etc., of Turnpike Road Co. v. Com'rs of Franklin County, 6 S. & R. (Pa.) 229.

A *private* bridge is one erected for the use of one or more private persons. Such a bridge will not be considered a public bridge although it may be occasionally used by the public; 12 East 203; Thompson v. R. Co., 3 Sandf. Ch. (N. Y.) 625; 1 Rolle, Abr. 368, *Bridges*, pl. 2; 2 Inst. 701; 1 Salk. 359. The builder of a private bridge over a private way is not indictable for neglect to repair, though it be generally used by the public. See Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 7 Pick. (Mass.) 344; *id.*, 11 Pet. (U. S.) 539, 9 L. Ed. 773; People v. Cooper, 6 Hill (N. Y.) 516.

As to bridges over navigable waters, see that title.

See COMMERCE; FERRY.

BRIEF (Lat. *brevis*, L. Fr. *briefe*, short).

In Ecclesiastical Law. A papal rescript sealed with wax. See BULL.

In Practice. A writ. It is found in this sense in the ancient law authors.

An abridged statement of the party's case.

A *trial* brief properly and thoroughly prepared should contain a *statement* of the *names of the parties*, and of their residence and occupation, the character in which they sue and are sued, and wherefore they prosecute or resist the action; an abridgment of all the pleadings; a chronological and methodical *statement* of the *facts*, in plain language; a *summary* of the *points* or *questions* in issue, and of the proof which is to support such issues, mentioning specially the names of the witnesses by which the facts are to be proved, or, if there be written evidence, an abstract of such evidence; the *personal character* of the witnesses, whether the moral character is good or bad, whether they are naturally timid or over-zealous, whether firm or wavering; of the *evidence* of the *opposite party*, if known, and such facts as are adapted to oppose, confute, or repel it.

This statement should be perspicuous and concise. The object of a brief is to inform the person who tries the case of the facts important for him to know, to present his case properly where it has been prepared by another person—as is the general practice in England, and to some extent in this country—or as an aid to the memory of the person trying a case when he has prepared it himself.

A brief on *error or appeal* is a legal argument upon the questions which the record brings before the appellate court. These are written or printed and vary somewhat according to the purposes they are to subserve.

The rules of most of the appellate courts require the filing of printed briefs for the use of the court and opposing counsel at a time designated for each side before hearing. In the rules of the supreme court and circuit court of appeals of the United States the brief is required to contain a concise statement of the case, a specification of errors relied on, including the substance of evidence, the admission or rejection of which is to be reviewed, or any extract from a charge excepted to, and a brief of argument exhibiting clearly the points of law or fact to be discussed, with proper reference to the record or the authorities relied upon. When a statute is cited, so much as is relied on should be printed at length. Such a brief will generally be sufficient to answer the requirements of any of the courts in the several states whose rules require printed briefs.

See Briefmaking by Lyle (Cooley's ed.).

BRIEF OF TITLE. An abridged and orderly statement of all matters affecting the title to a certain portion of real estate.

It should give the effective parts of all patents, deeds, indentures, agreements, records, and papers relating to such estate, with sufficient fulness to disclose their full effect, and should mention incumbrances existing whether acquired by deed or use. All the documents of title should be arranged in chronological order, noticing particularly in regard to deeds, the date, names of parties, consideration, description of the property, and covenants. See 1 Chit Pr. 304, 463; 14 Am. L. Reg. N. S. 529. See ABSTRACT OF TITLE.

BRIGBOTE (Sax.). A contribution to repair a bridge. See BOTE.

BRINGING MONEY INTO COURT. The act of depositing money in the hands of the proper officer of the court for the purpose of satisfying a debt or duty, or of an interpleader. See PAYMENT INTO COURT.

BROCAGE. The wages or commissions of a broker. His occupation is also sometimes called brocage.

BROCARIUS, BROCATOR. A broker; a middle-man between buyer and seller; the

agent of both transacting parties. Used in the old Scotch and English law. Bell, Dict.; Cowell.

BROKERAGE. The trade or occupation of a broker; the commissions paid to a broker for his services.

BROKERS. Those who are engaged for others in the negotiation of contracts relative to property, with the custody of which they have no concern. Paley, Agency 13. See Com. Dig. *Merchant*, C.

A broker is, for some purposes, treated as the agent of both parties; but, in the first place, he is deemed the agent only of the person by whom he is originally employed, and does not become the agent of the other until the bargain or contract has been definitely settled, as to the terms, between the principals, when he becomes the agent of both parties for the purpose of executing the bought and sold notes; Evans v. Waln, 71 Pa. 69; 5 B. & Ald. 333; Hinckley v. Arey, 27 Me. 362; Woods v. Rocchi, 32 La. Ann. 210.

A commission merchant differs from a broker in that he may buy and sell in his own name without disclosing his principal, while the broker can only buy or sell in the name of his principal. A commission merchant has a lien upon the goods for his charges, advances, and commissions, while the broker has no control of the property and is only responsible for bad faith; Edwards v. Hoeffinghoff, 38 Fed. 635.

One who negotiates a sale of another's property without having either actual or constructive possession of it is a broker as distinguished from a factor; J. M. Robinson, Norton & Co. v. Cotton Factory, 124 Ky. 435, 99 S. W. 305, 102 S. W. 869, 8 L. R. A. (N. S.) 474, 14 Ann. Cas. 802.

The authority of a broker to bind his principal may by special agreement be carried to any extent that the principal may choose, but the customary authority of brokers is for the most part so well settled as to be a constituent part of the law merchant; Benj. Sales § 273.

Bill and Note Brokers negotiate the purchase and sale of bills of exchange and promissory notes.

They are paid a commission by the seller of the securities; and it is not their custom to disclose the names of their principals. There is an implied warranty that what they sell is what they represent it to be; and should a bill or note sold by them turn out to be a forgery, they are held to be responsible; but it would appear that by showing a payment over to their principals, or other special circumstances attending the transaction proving that it would be inequitable to hold them responsible, they will be discharged; Edw. Fact. & Bro. § 10; Aldrich v. Butts, 5 R. I. 218, *contra*, Baxter v. Duren, 29 Me. 434, 50 Am. Dec. 602; Morrison v. Currie, 4 Duer (N. Y.) 79.

Exchange Brokers negotiate bills of exchange drawn on foreign countries, or on other places in this country.

It is sometimes part of the business of exchange brokers to buy and sell uncurrent bank notes and gold and silver coins, as well as drafts and checks drawn or payable in other cities; although, as they do this at their own risk and for their own profit, it is difficult to see the reason for calling them brokers. The term is often thus erroneously applied to all persons doing a money business.

Insurance Brokers procure insurance, and negotiate between insurers and insured.

Merchandise Brokers negotiate the sale of merchandise without having possession or control of it, as factors have.

Pawnbrokers lend money in small sums, on the security of personal property, generally at usurious rates of interest. They are licensed by the authorities, and excepted from the operation of the usury laws.

Real Estate Brokers. Those who negotiate the sale or purchase of real property. In addition to the above duty they sometimes procure loans on mortgage security, collect rents, and attend to the leasing of houses and lands.

Ship Brokers negotiate the purchase and sale of ships, and the business of freighting vessels. Like other brokers, they receive a commission from the seller only.

Stock Brokers. Those employed to buy and sell stocks and bonds of incorporated companies, and government bonds.

In the larger cities, the stock brokers are associated together under the name of the *Board of Brokers*. This Board is an association admission to membership in which is guarded with jealous care. Membership is forfeited for default in carrying out contracts, and rules are prescribed for the conduct of the business, which are enforced on all members. The purchases and sales are made at sessions of the Board, and are all officially recorded and published by the association. Stock brokers charge commission to both the buyers and sellers of stocks.

See COMMISSIONS; MARGIN; STOCK EXCHANGE; PLEDGE; BOUGHT NOTE; PRINCIPAL AND AGENT; REAL ESTATE BROKER.

See Story, Ag. § 28; Malynes, *Lex Merc.* 143; Liverm. Ag.; Whart. Ag.; Benj. Sales; Lewis, Stock Exchange; Biddle, Stock Brokers; Mechem, Ag.; Gross; Walker, Real Est.

BROTHEL. A bawdy-house; a common habitation of prostitutes.

Such places have always been deemed common nuisances in the United States, and the keepers of them may be fined and imprisoned. Till the time of Henry VIII. they were licensed in England, but that prince suppressed them. See Coke, 2d Inst. 205; BAWDY-HOUSE. For the history of these places, see Merlin, *Rép. Mot Bordel;* Parent Duchatellet, *De la Prostitution dans la Ville de Paris; Histoire de la Législation sur les Femmes publiques*, etc., par Sabatier.

BROTHER. He who is born from the same father and mother with another, or from one of them only.

Brothers are of the whole blood when they are born of the same father and mother, and of the half-blood when they are the issue of one of them only. In the civil law, when they are the children of the same father and mother, they are called

brothers germain; when they descend from the same father but not the same mother, they are *consanguine brothers;* when they are the issue of the same mother, but not the same father, they are *uterine brothers.* A *half-brother* is one who is born of the same father or mother, but not of both; one born of the same parents before they were married, a *left-sided brother;* and a bastard born of the same father or mother is called a *natural brother.* See BLOOD; HALF-BLOOD; LINE; Merlin, *Répert. Frère; Dict. de Jurisp. Frère;* Code 3. 28. 27; Nov. 84, præf.; Dane, Abr. Index; 44 U. C. Q. B. 536; Gardner v. Collins, 3 Mas. 398, Fed. Cas. No. 5,223; *id.,* 2 Pet. (U. S.) 58, 7 L. Ed. 347; Wheeler v. Clutterbrick, 52 N. Y. 67.

To obtain a conviction of the crime of incest, under a statute forbidding the marriage of brother and sister, it is not necessary to show legitimacy of birth; State v. Schaunhurst, 34 Ia. 547.

BROTHERHOOD AND GUESTLING, COURT OF. The Brotherhood was a conference of seven towns (*i. e.,* the Cinque Ports and two other ancient towns) as to the provision of the necessary ships and as to arranging for the herring sale at Yarmouth, and for other such purposes. The Guestling was rather a wider meeting, at which not merely the Brotherhood, but deputies from other associated towns were present for the discussion of subjects of common interest to all.

BROTHER-IN-LAW. The brother of a wife, or the husband of a sister.

There is no *relationship,* in the former case, between the husband and the brother-in-law, nor in the latter, between the brother and the husband of the sister: there is only *affinity* between them. See Vaugh. 302, 329.

BRUISE. In Medical Jurisprudence. An injury done with violence to the person, without breaking the skin: it is nearly synonymous with *contusion* (*q. v.*). 1 Ch. Pr. 38. See 4 C. & P. 381, 487, 558.

BUBBLE ACT. The name given to the statute 6 Geo. I. c. 18 (1719), intended "for restraining several extravagant and unwarrantable practices therein mentioned." See 2 P. Wms. 219.

BUCKET SHOP. An establishment nominally for the transaction of a stock exchange business, or business of a similar character, but really for the registration of bets or wagers, usually for small amounts, on the rise and fall of the prices of stocks, grain, oil, etc., there being no transfer or delivery of the stock or commodities nominally dealt in. State v. McGinnis, 138 N. C. 724, 51 S. E. 50, adopting definition of Cent. Dict.; Gatewood v. North Carolina, 203 U. S. 531, 27 Sup. Ct. 167, 51 L. Ed. 305. Ostensible brokerage offices in which transactions in stocks and commodities are closed by the payment of gains or losses, as determined by price quotations. No property is bought or sold. Report to Gov. Hughes of N. Y., 1909.

See GAMBLING.

BUGGERY. See SODOMY.

BUILDING. An edifice, erected by art, and fixed upon or over the soil, composed of brick, marble, wood, or other proper substance, connected together, and designed for use in the position in which it is so fixed. Every building is an accessory to the soil, and is therefore real estate; it belongs to the owner of the soil; Cruise, Dig. tit. 1, s. 46; but a building placed on another's land by his permission is the personal estate of the builder; 2 Bla. Com. 17.

BUILDING ASSOCIATIONS. Co-operative associations, usually incorporated, established for the purpose of accumulating and loaning money to their members upon real estate security. It is usual for the members to make monthly payments upon each share of stock, and for those who borrow money from the association to make such payments in addition to interest on the sum borrowed. When the stock, by successive payments and the accumulation of interest, has reached par, the mortgages given by borrowing members are cancelled, and the non-borrowing members receive in cash the par of their stock. See Endlich, Build. Assoc.; Wrigl. Build. Assoc. The general design of such an association is the accumulation from fixed periodical contributions of its shareholders and from the profits derived from the investment of the same, of a fund to be applied from time to time in accommodating such shareholders with loans, to enable them to acquire and improve real estate by building thereon; the conditions of the loan being such that the liability incurred therefor may be gradually extinguished by the borrower's periodical contributions upon his stock, so that when the latter shall be fully paid up the amount paid shall be sufficient to cancel the indebtedness; State v. Loan Ass'n, 45 Minn. 154, 47 N. W. 540, 10 L. R. A. 752. It differs from an ordinary corporation among other ways in the fact that in an ordinary business corporation stock is subscribed and either paid for at the time, or if partly paid for it becomes the property of the subscriber subject to future calls, while in a building association the stock subscriber is not the out and out owner of the stock from the beginning. He pays thereon a monthly payment, and, when these monthly payments, with his increment of gains accrued, equal the par value of the share of stock he is entitled to receive that amount. If, in the meantime, he has borrowed on his stock, it by pledge or operation of the loan remains the property or quasi property of the corporation, and the loan is returned by the payment of interest and stock dues, penalties, etc., the repayment of the loan culminating at the same time the stock itself matures, at which time, in theory, the corporation, or a given series or issue of its stock, is liquidated—the non-borrowing stockholders have their stock redeemed and the borrowers have

their loans cancelled; Cobe v. Lovan, 193 Mo. 235, 92 S. W. 93, 4 L. R. A. (N. S.) 439, 112 Am. St. Rep. 480.

That it has power to borrow money to pay its stockholders when their stock reaches its par value is held in North Hudson Mut. Bldg. & Loan Ass'n v. Bank, 79 Wis. 31, 47 N. W. 300, 11 L. R. A. 845; that such power is implied when no statute denies it is held in Bohn v. Bldg. & Loan Ass'n, 135 Ia. 140, 112 N. W. 199, 124 Am. St. Rep. 263; Marion Trust Co. v. Inv. Co., 27 Ind. App. 451, 61 N. E. 688, 87 Am. St. Rep. 257. Other cases hold that a loan for the purpose of paying withdrawing members is *ultra vires* and void in the absence of an express borrowing power in the association; 22 Ch. D. 61; Standard Savings & Loan Ass'n v. Aldrich, 163 Fed. 216, 89 C. C. A. 646, 20 L. R. A. (N. S.) 393.

It has no power to transfer to another association the contract of a borrowing stockholder; Thomp. Bldg. & Loan Ass'n (2d ed.) 286; Barton v. Loan & Bldg. Ass'n, 114 Ind. 226, 16 N. E. 486, 5 Am. St. Rep. 608; Lovelace v. Pratt, 163 Mo. 70, 63 S. W. 383. That it has such power in the absence of statutory prohibitions, is held in Bowlby v. Kline, 28 Ind. App. 659, 63 N. E. 723; Quein v. Smith, 108 Pa. 325.

In case of an advance by one loan association to take up a loan in another upon stock which has partly matured, the net amount of the loan is the sum still due, and not the face value of the loan, although the latter amount is charged on the books of the association and a credit as of an advance payment thereon given for the withdrawal value of the stock in the other association; Butson v. Sav. & Trust Co., 120 Ia. 370, 105 N. W. 645, 4 L. R. A. (N. S.) 98, 113 Am. St. Rep. 463.

One loaning money to a building association to satisfy the claims of withdrawing members, taking an assignment of mortgages of borrowing members as security, cannot hold the mortgages against the claims of a receiver of the association, since he is charged with knowledge of the want of power of the association to make the assignment; Standard Savings & Loan Ass'n v. Aldrich, 163 Fed. 216, 89 C. C. A. 646, 20 L. R. A. (N. S.) 393. A statute authorizing such associations to retire stock out of a portion of its current receipts, was held not to confer any power to give its notes to retiring stockholders; Appeal of Powell, 93 Mo. App. 296. Such an association may stipulate in a contract of loan for the payment of a monthly premium limited to a certain number of payments; Burkheimer v. Bldg. & Loan Ass'n, 59 W. Va. 209, 53 S. E. 372, 4 L. R. A. (N. S.) 1047.

When its articles have been amended to conform to a statute providing for lower rates of interest, the association may not deny its benefits to members who have borrowed before the act was passed on the ground that the provisions of the amended articles do not refer to pre-existing contracts; St. John v. Bldg. & Loan Ass'n, 136 Ia. 448, 113 N. W. 863, 15 L. R. A. (N. S.) 503.

An absolute promise to mature its shares in a specified time is not changed to a conditional one dependent upon the success of the enterprise, by the shareholder's agreement, as expressed in the certificate of stock, to pay a specified monthly installment on each share until it matures or is withdrawn, and the provision of the by-laws accepted by him, that such installments shall be paid until each share is fully paid; Eastern Building & Loan Ass'n v. Williamson, 189 U. S. 122, 23 Sup. Ct. 527, 47 L. Ed. 735, following Vought v. Building & Loan Ass'n, 172 N. Y. 508, 65 N. E. 496, 92 Am. St. Rep. 761, and affirming Williamson v. Building & Loan Ass'n, 62 S. C. 390, 38 S. E. 616, 1008.

The ground that such a promise on the part of the association was *ultra vires* was held not available where the shareholder had fully performed his part of the contract; Assets Realization Co. v. Heiden, 215 Ill. 9, 74 N. E. 56; Eastern Building & Loan Ass'n v. Williamson, 189 U. S. 122, 23 Sup. Ct. 527, 47 L. Ed. 735; Floyd-Jones v. Anderson, 30 Mont. 351, 76 Pac. 751; Leahy v. Building & Loan Ass'n, 100 Wis. 555, 76 N. W. 625, 69 Am. St. Rep. 945; Hammerquist v. Savings & Loan Co., 15 S. D. 70, 87 N. W. 524.

But it has been held, where authority to issue stock having a fixed period of maturity was not expressly given by statute or by the articles or by-laws of the association, the ground of *ultra vires* may be set up by the association; O'Malley v. Building, Loan & Savings Ass'n, 92 Hun 572, 36 N. Y. Supp. 1016; McKean v. Building & Loan Ass'n, 10 Pa. Dist. R. 197; and to the same effect, King v. Building, Loan & Inv. Union, 170 Ill. 135, 48 N. E. 677; Schell v. Loan & Inv. Ass'n, 150 Mo. 103, 51 S. W. 406.

A stockholder who actively or passively concurs in the management of the affairs of a building association must bear his share of the losses during his membership resulting from such management; Browne v. Sanders, 20 D. C. 455.

In considering the question of usury in a loan from a building association, payments made by the borrower as dues are not to be considered as interest, as such payments are made in order to acquire an interest in the property of the association and not for the use of money; Tilley v. Building & Loan Ass'n, 52 Fed. 618; a premium bid for a loan cannot be allowed as a cloak for usury; International Building & Loan Ass'n v. Bierling, 86 Tex. 476, 25 S. W. 622, 26 S. W. 39.

Fines imposed for default in payment of dues and interest cannot be collected by fore-

closure of a mortgage given to secure payment of an amount borrowed, unless it has been agreed that this may be done; Bowen v. Building & Loan Ass'n, 51 N. J. Eq. 272, 28 Atl. 67.

BUILDING CONTRACT. A contract to erect a building subject to the acceptance or rejection of the architect and in strict accordance with the plans, does not make the architect's acceptance conclusive (there being no clause to that effect); Mercantile Trust Co. v. Hensey, 205 U. S. 298, 27 Sup. Ct. 535, 51 L. Ed. 811, 10 Ann. Cas. 572.

BUILDING PERMIT. A city, when authorized by its charter to control the construction and repair of all houses, may require a permit from it as a prerequisite to the erection of a building; Fellows v. City of Charleston, 62 W. Va. 665, 59 S. E. 623, 13 L. R. A. (N. S.) 737, 125 Am. St. Rep. 990, 13 Ann. Cas. 1185; Commissioners of Easton v. Covey, 74 Md. 262, 22 Atl. 266. But it cannot require buildings to conform in size, appearance, etc., to other buildings in the same neighborhood; Bostock v. Sams, 95 Md. 400, 52 Atl. 665, 59 L. R. A. 282, 93 Am. St. Rep. 394.

BUILDING RESTRICTION. When one makes deeds of different portions of a tract of land, each containing the same restriction upon the lot conveyed which is imposed as a part of a general plan for the benefit of the several lots, such a restriction not only imposes a liability upon the grantee of each lot as between him and the grantor, but it gives him a right in the nature of an easement which will be enforced in equity against the grantee of one of the other lots, although there is no direct contractual relation between the two. Through the common character of the deeds, the grantees are given an interest in a contractual stipulation which is used for their common benefit; Evans v. Foss, 194 Mass. 513, 80 N. E. 587, 9 L. R. A. (N. S.) 1039, 11 Ann. Cas. 171, where the erection of a garage was held to be within a restriction forbidding the erection on the property of any building for shops or any other business objectionable to the neighborhood for dwelling houses. The maintenance of a hospital was enjoined where a covenant provided that the premises should not be leased for any noisome, obnoxious or offensive trade or business; 58 L. J. Ch. N. S. 83; 48 *id.* 339. An undertaker's establishment where bodies were received, kept and embalmed, funeral services and autopsies were held, and bodies dissected, was enjoined where the restriction provided that no trade or business offensive to the neighborhood should be carried on; Rowland v. Miller, 139 N. Y. 93, 34 N. E. 765, 22 L. R. A. 182. The location of a coal yard which received and broke up coal and separated it from the dust was enjoined under such a restrictive covenant; Barron v. Richard, 3 Edw. Ch. (N. Y.) 96; as was the location of a large school for boys; 68 L. J. Ch. 8.

But such a covenant is held not, as a matter of law, to be violated by the erection of a three-story building with stores on the first floor and flats or apartments above; Hurley v. Brown, 44 App. Div. 480, 60 N. Y. Supp. 846; or by one for the sale of groceries and provisions; Tobey v. Moore, 130 Mass. 448; Evans v. Foss, 194 Mass. 513, 80 N. E. 587, 9 L. R. A. (N. S.) 1039, 11 Ann. Cas. 171. Generally, such restrictions will be construed in favor of the free use of property; James v. Irvine, 141 Mich. 376, 104 N. W. 631.

That a house shall be set back a certain distance and shall correspond with the grantor's adjoining house is the benefit of the land, and not a personal covenant: its life is limited to the life of the first house erected on the granted premises; Welch v. Austin, 187 Mass. 256, 72 N. E. 972, 68 L. R. A. 189.

See EASEMENT; MUNICIPAL CORPORATION; POLICE POWER.

The state may limit the height of buildings to be erected in cities; Welch v. Swasey, 193 Mass. 364, 79 N. E. 745, 23 L. R. A. (N. S.) 1160, 118 Am St. Rep. 523; Cochran v. Preston, 108 Md. 220, 70 Atl. 113, 23 L. R. A. (N. S.) 1163, 129 Am. St. Rep. 432, 15 Ann. Cas. 1048. It may permit them to be higher in the sections where there is a demand for office space than in the residential portions, though the streets in the former may be narrower than in the latter; Welch v. Swasey, 193 Mass. 364, 79 N. E. 745, 23 L. R A. (N. S.) 1160, 118 Am. St. Rep. 523. It may restrict the height of buildings adjacent to a certain square in a city, compensation being given to persons injured in their property rights; Attorney General v. Williams, 174 Mass. 476, 55 N. E. 77, affirmed in Williams v. Parker, 188 U. S. 491, 23 Sup. Ct. 440, 47 L. Ed. 559, where the statute was held not to be in conflict with the federal constitution.

A city may forbid the erection of any frame structure within the "fire limits"; O'Bryan v. Apartment Co., 128 Ky. 282, 108 S. W. 257, 15 L. R. A. (N. S.) 419; may require the removal of a wooden building within such limits; Davison v. City of Walla Walla, 52 Wash. 453, 100 Pac. 981, 21 L. R. A. (N. S.) 454, 132 Am. St. Rep. 983; may require buildings used for certain purposes to be equipped with fire escapes; Arnold v. Starch Co., 194 N. Y. 42, 86 N. E. 815, 21 L. R. A. (N. S.) 178; may refuse its consent to the repair of a wooden building within the fire limits which has been damaged by fire; Brady v. Ins. Co., 11 Mich. 425. The owner thereof in such case, it is said, must first be given opportunity to remove the building; Village of Louisville v. Webster, 108 Ill. 418.

It may destroy a building infected with smallpox, as a nuisance; Sings v. City of Joliet, 237 Ill. 300, 86 N. E. 663, 22 L. R. A.

(N. S.) 1128, 127 Am. St. Rep. 323. It may prevent the moving of a wooden building into the city limits from a point outside; Red Lake Falls Milling Co. v. City of Thief River Falls, 109 Minn. 52, 122 N. W. 872, 24 L. R. A. (N. S.) 456, 18 Ann. Cas. 182; Griffin v. City of Gloversville, 67 App. Div. 403, 73 N. Y. Supp. 684; Kaufman v. Stein, 138 Ind. 49, 37 N. E. 333, 46 Am. St. Rep. 368.

BULK. Merchandise which is neither counted, weighed, nor measured.

A sale by bulk is a sale of a quantity of goods such as they are, without measuring, counting, or weighing. La. Civ. Code, art. 3522, n. 6.

As to contracts forbidding "sales in bulk" of a tradesman's entire stock, see SALES.

BULL (Lat. *bulla*, a stud or boss). A letter from the pope of Rome, written on parchment, to which is attached a metal seal impressed with the images of Saint Peter and Saint Paul, on either side of a cross. On the other side of the seal is the name of the pope, with the year of his pontificate. See SEAL; BULLÆ.

There are three kinds of apostolical rescripts—the *brief*, the *signature*, and the *bull;* which last is most commonly used in legal matters. Bulls may be compared to the edicts and letters-patents of secular princes: when the bull grants a favor, the seal is attached by means of silken strings; and when to direct execution to be performed, with flax cords. Bulls are written in Latin, in a round and Gothic hand. Ayliffe, Par. 132; Ayliffe, Pand 21; Merlin, *Répert.*

BULLÆ. Metal seals used, chiefly in the southern countries of Europe, in place of wax, which would be affected by heat; also used in other parts of Europe and even in England. Usually of lead, but sometimes of gold. Encycl. Br.

BULLETIN. An official account of public transactions in matters of importance. In France, it is the registry of the laws.

BULLION. The term bullion is commonly applied to uncoined gold and silver, in the mass or lump.

BULLION FUND. A deposit of public money at the mint and its branches. The object of this fund is to enable the mint to make returns of coins to private depositors of bullion without waiting until such bullion is actually coined. If the bullion fund is sufficiently large, depositors are paid as soon as their bullion is melted and assayed and the value ascertained. It thus enables the mint to have a stock of coin on hand to pay depositors in advance. Such bullion becomes the property of the government, and, being subsequently coined, is available as a means of prompt payment to other depositors; Act of June 22, 1874, Rev. Stat. U. S. § 3545.

BUNDLE. To sleep on the same bed without undressing; applied to the custom of a man and woman, especially lovers, thus sleeping. A. & E. Ency. See Seagar v. Sligerland, 2 Cai. (N. Y.) 219; Hollis v. Wells, 3 Clark (Pa.) 169.

BUOY. A piece of wood, or an empty barrel, or other thing, moored at a particular place and floating on the water, to show the place where it is shallow, to mark the channel, or to indicate the danger there is to navigation.

The act of congress approved the 28th September, 1850, enacts that all buoys shall be so colored and lettered that in passing up the coast or up a harbor, red buoys with even numbers shall be on the right, black buoys with uneven numbers on the left and with red and black stripes on either hand. In channels with alternate black and white stripes.

BURDEN OF PROOF. The duty of proving the facts in dispute on an issue raised between the parties in a cause. See People v. McCann, 16 N. Y. 66, 69 Am. Dec. 642; Ex parte Walls, 64 Ind. 461; Wilder v. Cowles, 100 Mass. 487.

Burden of proof is to be distinguished from *prima facie* evidence or a *prima facie* case. Generally, when the latter is shown, the duty imposed upon the party having the burden will be satisfied; but it is not necessarily so; Delano v. Bartlett, 6 Cush. (Mass.) 364; Tourtellot v. Rosebrook, 11 Metc. (Mass.) 460; Swallow v. State, 22 Ala. 20; Doty v. State, 7 Blackf. (Ind.) 427; Com. v. McKie, 1 Gray (Mass.) 61, 61 Am. Dec. 410.

The burden of proof lies upon him who substantially asserts the affirmative of the issue; 1 Greenl. Ev. § 74; 3 M. & W. 510; but where the plaintiff grounds his case on negative allegations, he has the burden; 1 C. & P. 220; 5 B. & C. 758; 1 Greenl. Ev. § 81; Daugherty v. Deardorf, 107 Ind. 527, 8 N. E. 296. As a general rule the burden of proof is upon the plaintiff to establish the facts alleged as the cause of action; Read v. Buffum, 79 Cal. 77, 21 Pac. 555, 12 Am. St. Rep. 131; Stoddard v. Rowe, 74 Ia. 670, 39 N. W. 84; Woolsey v. Jones, 84 Ala. 88, 4 South. 190; Brimberry v. R. Co., 78 Ga. 641, 3 S. E. 274; but in certain forms of action the burden may by the pleadings be shifted to the defendant.

In criminal cases, on the twofold ground that a prosecutor must prove every fact necessary to substantiate his charge against a prisoner, and that the law will presume innocence in the absence of convincing evidence to the contrary, the burden of proof, unless shifted by legislative interference, will fall on the prosecuting party, though in order to convict he must necessarily have recourse to negative evidence; 1 Tayl. Ev. 8th ed. §§ 113, 371; U. S. v. Gpoding, 12 Wheat. (U. S.) 460, 6 L. Ed. 693. The burden of proof is throughout on the government, to make out the whole case; and when a *prima facie* case is established, the burden of proof is not thereby shifted upon the defendant, and he is not bound to restore himself to that presumption of innocence in which he was at the commencement of the trial; State v. Middleham, 62 Ia. 150, 17 N. W. 446; Wharton v. State, 73 Ala. 366; People v. Fairchild, 48 Mich. 31, 11 N. W.

773. As to the burden of proof where the defence of insanity is set up, see INSANITY.

BUREAU (Fr.). A place where business is transacted.

In the classification of the ministerial officers of government, and the distribution of duties among them, a bureau is understood to be a division of one of the great departments of which the secretaries or chief officers constitute the cabinet.

BURGAGE. A species of tenure, described by old law-writers as but tenure in socage, where the king or other person was lord of an *ancient borough*, in which the tenements were held by a rent certain.

Such boroughs had, and still have, certain peculiar customs connected with the tenure, which distinguished it from the ordinary socage tenure. These customs are known by the name of Borough-English; and they alter the law in respect of descent, as well as of dower, and the power of devising. By it the youngest son inherits the lands of which his father died seised. A widow, in some boroughs, has dower in respect to all the tenements which were her husband's; in others, she has a moiety of her husband's lands so long as she remains unmarried; and with respect to devises, in some places, such lands only can be devised as were acquired by purchase; in others, estates can only be devised for life; 2 Bla. Com. 82; Glanv. b. 7, c. 3; Litt. § 162; Cro. Car. 411; 1 P. Wms. 63; Fitzh. N. B. 150; Cro. Eliz. 415.

The tenure at a money rent would become the typical tenure of a burgage tenement; Maitl. Domesday & Beyond 198.

BURGATOR. One who breaks into houses or enclosed places, as distinguished from one who committed robbery in the open country. Spelman, Gloss. *Burglaria.*

BURGESS. A magistrate of a borough. Blount. An officer who discharges the same duties for a borough that a mayor does for a city. The word is used in this sense in Pennsylvania.

An inhabitant of a town; a freeman; one legally admitted as a member of a corporation. Spelman, Gloss. A qualified voter. 3 Steph. Com. 192. A representative in parliament of a town or borough. 1 Bla. Com. 174.

BURGESS ROLL. A list of those entitled to new rights under the act of 5 & 6 Will. IV. c. 74; 3 Steph. Com. 34, 38.

BURGHMOTE. In Saxon Law. A court of justice held twice a year, or oftener, in a *burg*. All the thanes and free owners above the rank of ceorls were bound to attend without summons. The bishop or lord held the court. Spence, Eq. Jur.

BURGLAR. One who commits burglary. He that by night breaketh and entereth into the dwelling-house of another. Wilmot, Burgl. 3.

BURGLARIOUSLY. A technical word which must be introduced into an indictment for burglary at common law. The essential words are "feloniously and burglariously broke and entered the dwelling-house in the night-time"; Whart. Cr. Pl. § 265. No other word at common law will answer the purpose, nor will any circumlocution be sufficient; 4 Co. 39; 5 *id.* 121; Cro. Eliz. 920; Bacon, Abr. *Indictment* (G, C); State v. McClung, 35 W. Va. 280, 13 S. E. 654. But there is this distinction: when a statute punishes an offence by its legal designation without enumerating the acts which constitute it, then it is necessary to use the terms which technically charge the offence named at common law. But this is not necessary when the statute describes the whole offence, and the indictment charges the crime in the words of the statute. Thus, an indictment which charges the statute crime of burglary is sufficient, without averring that the crime was committed "burglariously;" Tully v. Com., 4 Metc. (Mass.) 357. See Portwood v. State, 29 Tex. 47, 94 Am. Dec. 258; People v. Bosworth, 64 Hun 72, 19 N. Y. Supp. 114.

BURGLARY. The breaking and entering the house of another in the night-time, with intent to commit a felony therein, whether the felony be actually committed or not. Co. 3d Inst. 63; 1 Hale, Pl. Cr. 549; 1 Hawk. Pl. Cr. c. 38, s. 1; 4 Bla. Com. 224; 2 Russ. Cr. 2; State v. Wilson, 1 N. J. L. 441, 1 Am. Dec. 216; Com. v. Newell, 7 Mass. 247; 1 Whart Cr. L. (9th ed.) § 758; Allen v. State, 40 Ala. 334, 91 Am. Dec. 477.

In what place a burglary can be committed. It must, in general, be committed in a mansion-house, actually occupied as a dwelling; but if it be left by the owner *animo revertendi*, though no person resides in it in his absence, it is still his mansion; Fost. 77; Com. v. Brown, 3 Rawle (Pa.) 207; Com. v. Barney, 10 Cush. (Mass.) 478. See DWELLING-HOUSE. But burglary may be committed in a church, at common law. And under the statutes of some of the states, it has been held that it could be committed in a store over which were rooms in which the owner lived; Quinn v. People, 71 N. Y. 561, 27 Am. Rep. 87. A shoeshop in a room connected with the dwelling is a part of it; People v. Dupree, 98 Mich. 26, 56 N. W. 1046; a wheat house; Bass v. State, 1 Lea (Tenn.) 444; a railroad depot; State v. Bishop, 51 Vt. 287, 31 Am. Rep. 690; a stable; Orrell v. People, 94 Ill. 456, 34 Am. Rep. 241; but not a millhouse, seventy-five yards from the owner's dwelling, and not shown to be appurtenant; 3 Cox 581; Co. 3d Inst. 64. It must be the dwelling-house of another person; 2 Bish. Cr. Law § 90; 2 East, Pl. Cr. 502. A storehouse in which a clerk sleeps to protect the property is a dwelling; State v. Pressley, 90 N. C. 730; U. S. v. Johnson, 2 Cra. C. C. 21, Fed. Cas. No. 15,485.

At what time it must be committed. The

offence must be committed in the night; for in the daytime there can be no burglary; 4 Bla. Com. 224; 1 C. & K. 77; Lewis v. State, 16 Conn. 32; State v. Bancroft, 10 N. H. 105. For this purpose it is deemed night when by the light of the sun a person cannot clearly discern the face or countenance of another; 1 Hale, Pl. Cr. 550; Co. 3d Inst. 62; 1 C. & P. 297; 7 Dane, Abr. 134. This rule, it is evident, does not apply to moonlight; 4 Bla. Com. 224; 2 Russ. Cr. 32; State v. Bancroft, 10 N. H. 105; Thomas v. State, 5 How (Miss.) 20; State v. McKnight, 111 N. C. 690, 16 S. E. 319. The breaking and entering need not be done the same night; 1 R. & R. 417; but it is necessary that the breaking and entering should be in the night-time; for if the breaking be in daylight and the entry in the night, or *vice versa*, it is said, it will not be burglary; 1 Hale, Pl. Cr. 551; 2 Russ. Cr. 32. But *quære*, Wilmot, Burgl. 9. See Com., Dig. *Justices*, P, 2; 2 Chit. Cr. Law 1092. In some states by statute the breaking and entering in the daytime with intent to commit a misdemeanor or felony is burglary; State v. Miller, 3 Wash. 131, 28 Pac. 375; State v. Hutchinson, 111 Mo. 257, 20 S. W. 34.

The means used. There must be both a *breaking* and an *entry* or an *exit*. An *actual breaking* takes place when the burglar breaks or removes any part of the house, or the fastenings provided for it, with violence; 1 Bish. Cr. Law 91. Breaking a window, taking a pane of glass out, by breaking or bending the nails or other fastenings; 1 C. & P. 300; 9 *id.* 44; 1 R. & R. 341, 499; Walker v. State, 52 Ala. 376; cutting and tearing down a netting of twine nailed over an open window; Com. v. Stephenson, 8 Pick. (Mass.) 354; Sims v. State, 136 Ind. 358, 36 N. E. 278; raising a latch, where the door is not otherwise fastened; 8 C. & P. 747; Coxe 439; Curtis v. Hubbard, 1 Hill (N. Y.) 336; State v. Newbegin, 25 Me. 500; Bass v. State, 1 Lea (Tenn.) 444; Timmons v. State, 34 Ohio St. 426, 32 Am. Rep. 376; State v. O'Brien, 81 Ia. 93, 46 N. W. 861; picking open a lock with a false key; putting back the lock of a door, or the fastening of a window, with an instrument; lowering a window fastened only by a wedge or weight; 1 R. & R. 355, 451; State v. Moore, 117 Mo. 395, 22 S. W. 1086; Walker v. State, 52 Ala. 376; or opening a door when not locked or bolted; Grimes v. State, 77 Ga. 762, 4 Am. St. Rep. 112; *contra*, Williams v. State (Tex.) 13 S. W. 609; State v. Reid, 20 Ia. 413; Timmons v. State, 34 Ohio St. 426, 32 Am. Rep. 376; People v. Nolan, 22 Mich. 229; Carter v. State, 68 Ala. 96; Lyons v. People, 68 Ill. 271; turning the key when the door is locked in the inside, or unloosing any other fastening which the owner has provided; lifting a trap-door; 1 Mood. 377; but see 4 C. & P. 231; are several instances of actual breaking. But removing a loose plank in a partition wall was held not a breaking; Com. v. Trimmer, 1 Mass. 476. According to the Scotch law, entering a house by means of the true key, while in the door, or when it had been stolen, is a breaking; Alison, Pr. 284. See 1 Swint. Just. 433.

Constructive breakings occur when the burglar gains an entry by fraud; 1 Cr. & D. 202; Ducher v. State, 18 Ohio, 308; State v. Henry, 31 N. C. 463; Rolland v. Commonwealth, 82 Pa. 306; by conspiracy or threats; 1 Russ. Cr. Graves ed. 792; 2 *id.* 2; State v. Rowe, 98 N. C. 629, 4 S. E. 506; by bribing a servant; by knocking at the door, and, when opened, rushing in; by gaining admittance on pretense of wishing to speak to some one within; by gaining admittance by threats; Odgers, Com. L. 383. When one of three breaks and enters, another watches at the door, and a third stands farther off to give notice if help comes, it is burglary in all; 1 Hale, Pl. Cr. 555.

Where one is let into a store in the nighttime on pretence of making a purchase and while in he unbolts a door and admits his accomplice, who secretes himself on the inside and afterwards steals, both may be convicted of breaking and entering; Com. v. Lourey, 158 Mass. 18, 32 N. E. 940. Where a window is slightly raised in the daytime so as to prevent the bolt from being effectual, it would not prevent the subsequent breaking and entering in the nighttime through the window from being burglary; People v. Dupree, 98 Mich. 26, 56 N. W. 1046. The breaking of an inner door of the house will be sufficient to constitute a burglary; 1 Hale, Pl. Cr. 553; 8 C. & P. 747; People v. Fralick, Lalor's Sup. (N. Y.) 63; 2 Bish. Cr. Law § 97; or the opening of an inner closed door; 2 East, P. C. 48; and it is not necessary that such breaking be accompanied with an intention to commit a felony in the very room entered; Hartmann v. Com., 5 Pa. 66. Entry through an open door in the night-time with intent to steal is not burglary; Costello v. State (Tex.) 21 S. W. 360.

Any, the least *entry*, with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony, will be sufficient to constitute the offence; Co. 3d Inst. 64; 4 Bla. Com. 227; Bacon, Abr. *Burglary* (B); Com. Dig. *Justices*, P, 4; Allen v. State, 40 Ala. 334, 91 Am. Dec. 477; Franco v. State, 42 Tex. 276; Com. v. Glover, 111 Mass. 395; Harris v. People, 44 Mich. 305, 6 N. W. 677. Where a person enters a chimney of a storehouse intending to go down such into the store to steal, he is guilty of burglary; Olds v. State, 97 Ala. 81, 12 South. 409. But the introduction of an instrument, in the act of breaking the house, will not be sufficient entry unless it be in-

troduced for the purpose of committing a felony; 1 Leach 406; 1 Mood. 183. The whole physical frame need not pass within; 2 Bish. Cr. Law § 92; 1 Gabb. Cr. Law 176.

There was, at common law, doubt whether breaking out of a dwelling-house would constitute burglary; 4 Bla. Com. 227; 1 B. & H. Lead. Cr. Cas. 540; but it was declared to be so by stat. 12 Anne, c. 7, § 3, and 7 & 8 Geo. IV. c. 29, § 11. The better opinion seems to be that it was not so at common law; Rolland v. Com., 82 Pa. 324, 22 Am. Rep. 758; Whart. Cr. L. 9th ed. § 771; *contra*, State v. Ward, 43 Conn. 489, 21 Am. Rep. 665. As to what acts constitute a breaking out, see 1 Jebb 99; 8 C. & P. 747; 1 Russ. Cr. (Graves ed.) 792; 1 B. & H. Lead. Cr. Cas. 540.

The intention. The intent of the breaking and entry must be felonious; if a felony, however, be committed, the act will be *prima facie* evidence of an intent to commit it; 1 Gabb. Cr. Law 192. See Alexander v. State, 31 Tex. Cr. R. 359, 20 S. W. 756; State v. Scripture, 42 N. H. 485; People v. Young, 65 Cal. 225, 3 Pac. 813. See State v. Colter, 6 R. I. 195; Com. v. Tuck, 20 Pick. (Mass.) 356; Lowder v. State, 63 Ala. 143, 35 Am. Rep. 9. If the breaking and entry be with an intention to commit a trespass, or a mere misdemeanor, and nothing further is done, the offence will not be burglary; Com. v. Newell, 7 Mass. 245; State v. Cooper, 16 Vt. 551; People v. Urquidas, 96 Cal. 239, 31 Pac. 52; 1 Hale, Pl. Cr. 560.

See HAMOSOCNE; BREAKING; CREPUSCULUM.

It need not appear that the ulterior felony was actually committed. And if a tramp enters for shelter and is tempted to steal, it is not burglary; Odgers, Com. L. 384.

BURGOMASTER. In Germany, this is the title of an officer who performs the duties of a mayor.

BURH. For a long time after the Germanic invasion of England, it meant a fastness. The hill-top that has been fortified is a burh. Very often it has given its name to a neighboring village; it is the future *borough*. The entrenchment around a great man's house was a burh. Early in the 10th century a burh came to have many men in it and usually a moot was held there—a burh-gemot. See Maitland, Domesday and Beyond, 183.

BURIAL. The act of interring the dead. No burial is lawful unless made in conformity with the local regulations; and when a dead body has been found, it cannot be lawfully buried until the coroner has holden an inquest over it. In England it is the practice for coroners to issue warrants to bury, after a view. See DEAD BODY; CEMETERY.

BURLAW COURTS. In Scotch Law. Assemblages of neighbors to elect burlaw men, or those who were to act as rustic judges in determining disputes in their neighborhood. Skene; Bell, Dict.

BURNING. See ACCIDENT; FIRE.

BURNING IN THE HAND. When a layman was admitted to benefit of the clergy he was burned in the hand, "in the brawn of the left thumb," in order that he might not claim the benefit twice. This practice was finally abolished by stat. 19 Geo. III. c. 74; though before that time the burning was often done with a cold iron; 12 Mod. 448; 4 Bla. Com. 267. See BENEFIT OF CLERGY.

BURYING-GROUND. A place appropriated for depositing the dead; a cemetery. In Massachusetts, burying-grounds cannot be appropriated to roads without the consent of the owners. Mass. Gen. Stat. 244. So in Pennsylvania by acts passed in 1849 and 1861. See CEMETERY.

BUSHEL. The Winchester bushel, established by the 13 Will. III. c. 5 (1701) was made the standard of grain. A cylindrical vessel, eighteen and a half inches in diameter, and eight inches deep inside, contains a bushel; the capacity is 2145.42 cubic inches. The bushel established by the 5 & 6 Geo. IV. c. 74, is to contain 2218.192 cubic inches. This measure has been adopted in many of the United States. In other states the capacity varies.

See the subject discussed in report of the Secretary of State of the United States to the Senate, Feb. 22, 1821.

BUSINESS. That which occupies the time, attention, and labor of men for the purpose of livelihood or profit, but it is not necessary that it should be the sole occupation or employment. It embraces everything about which a person can be employed; Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312. The doing of a single act pertaining to a particular business will not be considered engaging in or carrying on the business, yet a series of such acts would be so considered. Lemons v. State, 50 Ala. 130; People v. Com'rs of Taxes of City of New York, 23 N. Y. 244.

It is a word of large and indefinite import; the legislature could not well have used a larger word. Jessel, M. R., in 15 Ch. D. 258. See PLACE OF BUSINESS; DOMICIL.

BUSINESS HOURS. The time of the day during which business is transacted. In respect to the time of presentment and demand of bills and notes, business hours generally range through the whole day down to the hours of rest in the evening, except when the paper is payable at a bank or by a banker; Cayuga County Bank v. Hunt, 2 Hill (N. Y.) 635. See Flint v. Rogers, 15 Me.

67; Lunt v. Adams, 17 *id.* 230; Byles, Bills 283.

The term "usual business hours" does not mean the time an employer may require his employé's services, but those of the community generally; Derosia v. R. Co., 18 Minn. 154 (Gil. 119).

See TIME.

BUTLERAGE. A certain portion of every cask of wine imported by an alien, which the king's butler was allowed to take.

Called also prisage; 2 Bulstr. 254. Anciently, it might be taken also of wine imported by a subject. 1 Bla. Com. 315; *Termes de la Ley;* Cowell.

BUTT. A measure of capacity, equal to one hundred and eight gallons; also denotes a measure of land. Jac. Dict.; Cowell. See MEASURE.

BUTTALS. The bounding lines of land at the end; abuttals, which see.

BUTTS. The ends or short pieces of arable lands left in ploughing. Cowell.

BUTTS AND BOUND. The lines bounding an estate. The angles or points where these lines change their direction. Cowell; Spelman, Gloss. See ABUTTALS.

BUYING TITLES. The purchase of the rights of a desseisee to lands of which a third person has the possession.

When a deed is made by one who, though having a legal right to land, is at the time of the conveyance disseised, the sale is void as a general rule of the common law: the law will not permit any person to buy a quarrel, or, as it is commonly termed, a pretended title. Such a conveyance is an offence at common law and by a statute of 32 Hen. VIII. c. 9. This rule has been generally adopted in the United States, and is affirmed by statute in some states; 3 Washb. R. P. *596. In the following states the act is unlawful, and the parties are subject to various penalties in the different states: in *Connecticut*, Hinman v. Hinman, 4 Conn. 575; *Georgia*, Helms v. May, 29 Ga. 124; *Indiana*, Webb v. Thompson, 23 Ind. 432; Galbreath v. Doe, 8 Blackf. (Ind.) 366; *Kentucky*, Wash v. McBrayer, 1 Dana (Ky.) 566; Williams v. Rogers, *id.* 374; see Young v. Kimberland, 2 Litt. (Ky.) 225; Aldridge v. Kincaid, *id.* 393; Ewing's Heirs v. Savary, 4 Bibb (Ky.) 424; *Massachusetts*, Brinley v. Whiting, 5 Pick. (Mass.) 356; Wade v. Lindsey, 6 Metc. (Mass.) 407; *Mississippi*, Bush v. Cooper, 26 Miss. 599, 59 Am. Dec. 270; *New Hampshire*, Dame v. Wingate, 12 N. H. 291; *New York*, Thurman v. Cameron, 24 Wend. (N. Y.) 87; *North Carolina*, Den v. Shearer, 5 N. C. 114; Hoyle v. Logan, 15 N. C. 495; *Ohio*, Walker, Am. Law 297, 351; *Vermont*, Selleck v. Starr, 6 Vt. 198; see White v. Fuller, 38 Vt. 204; Park v. Pratt, *id.* 553.

By the transaction, the grantor does not lose his estate; Brinley v. Whiting, 5 Pick. (Mass.) 348; Sohier v. Coffin, 101 Mass. 179.

In *Illinois*, Fetrow v. Merriwether, 53 Ill. 279; *Missouri*, Rev. Stat. 119; *Pennsylvania*, Cresson v. Miller, 2 Watts (Pa.) 272; *Ohio*, Hall's Lessee v. Ashby, 9 Ohio 96, 34 Am. Dec. 424; *Wisconsin*, Stewart v. McSweeney, 14 Wis. 471; *South Carolina*, Poyas v. Wilkins, 12 Rich. (S. C.) 420; *Maine*, Rev. Stat. c. 73, § 1; *Michigan*, Crane v. Reeder, 21 Mich. 82, 4 Am. Rep. 430; such sales are valid. See CHAMPERTY.

BY. Near, beside, passing in presence, and it also may be used as exclusive. Rankin v. Woodworth, 3 P. & W. (Pa.) 48.

When used descriptively in a grant it does not mean in immediate contact with, but near to the object to which it relates. It is a relative term, meaning, when used in land patents, very unequal and different distances; Wilson v. Inloes, 6 Gill (Md.) 121.

BY-BIDDING. Bidding with the connivance or at the request of the vendor of goods by auction, without an intent to purchase, for the purpose of obtaining a higher price than would otherwise be obtained.

By-bidders are also called *puffers*, which see. It has been said that the practice is probably allowable if it be done fairly, with an intention only to prevent a sale at an unduly low price; Latham's Ex'rs v. Morrow, 6 B. Monr. (Ky.) 630; Veazie v. Williams, 3 Sto. 622, Fed. Cas. No. 16,907; 15 M. & W. 371; Steele v. Ellmaker, 11 S. & R. (Pa.) 86. A bidder is required to act in good faith and any combination to prevent a fair competition would avoid the sale; 3 B. & B. 116; Martin v. Ranlett, 5 Rich. (S. C.) 541, 57 Am. Dec. 770; Barnes v. Nays, 88 Ga. 696, 16 S. E. 67; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Veazie v. Williams, 8 How. (U. S.) 153, 12 L. Ed. 1018. See BID; AUCTION.

Lord Mansfield held that the employment of a single puffer was a fraud; Cowp. 395; this rule was afterwards relaxed, in equity only, so as to allow a single bidder; 12 Ves. 477. The rule was stated in L. R. 1 Ch. 10, to be, that a single puffer will vitiate a sale in law, but may be allowed in equity; though either at law or in equity, such bidding is permissible upon notice at the sale. By 30 and 31 Vict. c. 48, the rule in equity was declared to be the same as at law. See L. R. 9 Eq. 60. Lord Mansfield's opinion was followed in Appeal of Pennock, 14 Pa. 446, 53 Am. Dec. 561, per Gibson, C. J., overruling Steele v. Ellmaker, 11 S. & R. (Pa.) 86; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Baham v. Bach, 13 La. 287, 33 Am. Dec. 561. In New Jersey it seems that if there is a *bona fide* bid next before that of the buyer, the bidding of puffers will not avoid the sale (so held also in Veazie v. Williams, 3 Story 611, Fed. Cas. No. 16,907); but it is

intimated that it would be a better rule to forbid puffing; National Bank of the Metropolis v. Sprague, 20 N. J. Eq. 159. Kent favors Lord Mansfield's rule; 2 Kent *540. The employment of a puffer to enhance the price of property sold is a fraud; Fisher v. Hersey, 17 Hun (N. Y.) 373. So held in Caldwell v. U. S. 8 How. (U. S.) 378, 12 L. Ed. 1115. Exceptions to the rule may occur when it does not appear that the buyer paid more than the value of the property or than he had determined to bid; Tomlinson v. Savage, 41 N. C. 430. A purchaser thus misled must restore the property as soon as he discovers the fraud; Backenstoss v. Stahler's Adm'rs, 33 Pa. 251, 75 Am. Dec. 592; Veazie v. Williams, 3 Story 611, 631, Fed. Cas. No. 16,907. In Phippen v. Stickney, 3 Metc. (Mass.) 384, the validity of the sale is held to depend upon the *animus* with which the puffing is carried on. Where a sale is advertised to be "without reserve" or "positive," the secret employment of by-bidders renders the sale voidable by the buyer; Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. 332.

BY BILL. Actions commenced by *capias* instead of by original writ were said to be *by bill*. 3 Bla. Com. 285, 286. See Harkness v. Harkness, 5 Hill (N. Y.) 213.

The usual course of commencing an action in the King's Bench was by a bill of Middlesex. In an action commenced *by bill* it is not necessary to notice the form or nature of the action, 1 Chit. Pl. 283

BY ESTIMATION. A term used in conveyances. In sales of land it not unfrequently occurs that the property is said to contain a certain number of acres *by estimation*, or so many acres, *more or less*. When these expressions are used, if the land fall short by a small quantity, the purchaser will receive no relief. In one case of this kind, the land fell short two-fifths, and the purchaser received no relief; Ketchum v. Stout, 20 Ohio 453; Stull v. Hurtt, 9 Gill (Md.) 446; Jollife v. Hite, 1 Call (Va.) 301, 1 Am. Dec. 519; Stebbins v. Eddy, 4 Mas. 419, Fed. Cas. No. 13,342; Jones's Devisees v. Carter, 4 H. & M. (Va.) 184; Boar v. M'Cormick, 1 S. & R. (Pa.) 166; Mann v. Pearson, 2 Johns. (N. Y.) 37; Howe v. Bass, 2 Mass. 382, 3 Am. Dec. 59; Snow v. Chapman, 1 Root (Conn.) 528. The meaning of these words has never been precisely ascertained by judicial decision. See Sugden, Vend. 231, where the author applies the rule to contracts *in fieri*. But this distinction was not accepted in Noble v. Googins, 99 Mass. 234.

See MORE OR LESS; SUBDIVISION.

BY-LAW MEN. In an ancient deed, certain parties are described as "yeomen and *by-law men* for this present year in Easinguold." 6 Q. B. 60.

They appear to have been men appointed for some purpose of limited authority by the other inhabitants, as the name would suggest, under by-laws of the corporation appointing.

BY-LAWS. Rules and ordinances made by a corporation for its own government. See Drake v. R. Co., 7 Barb. (N. Y.) 539. The office of a by-law is to regulate the conduct and define the duties of the members towards the corporation and among themselves; Flint v. Pierce, 99 Mass. 70, 96 Am. Dec. 691. A by-law was originally a *town* law, from "by" the Scandinavian word for town. So the Anglo-Saxon *bylage*, a private law. Thomp. Corp. § 938. As to the analogy between by-law and ordinance, see 34 Am. Dec. 627, n.; Dillon, Munc. Corp. § 307. The power to make by-laws is usually conferred by express terms of the charter creating the corporation. When not expressly granted, it is given by implication, and it is incident to the very existence of a corporation; Brice, *Ultra Vires* (3d Ed.) 6; Moraw. Priv. Corp. 491. When there is an express grant, limited to certain cases and for certain purposes, the corporate power of legislation is confined to the objects specified, all others being excluded by implication; 2 P. Wms. 207; Ang. Corp. 177. The power of making by-laws, if the charter is silent, resides in the members of the corporation; Union Bank of Maryland v. Ridgely, 1 Harr. & G. (Md.) 324; 4 Burr. 2515; 6 Bro. P. C. 519; Morton Gravel Road Co. v. Wysong, 51 Ind. 4; People v. Throop, 12 Wend. (N. Y.) 183; State v. Ferguson, 33 N. H. 424; and the power to repeal them also exists; Bank of Holly Springs v. Pinson, 58 Miss. 4215, 38 Am. Rep. 330; 7 Dowl. & R. 267; Smith v. Nelson, 18 Vt. 511.

By-laws, when contrary to the Constitution or laws of the state or the U. S. are void whether the charter authorizes the making of such by-law or not; because no legislature can grant power larger than that which it possesses; Coates v. City of New York, 7 Cow. (N. Y.) 585; Stuyvesant v. City of New York, *id.* 604; First Nat. Bank v. Lanier, 11 Wall. (U. S.) 369, 20 L. Ed. 172; Jay Bridge Corporation v. Woodman, 31 Me. 573; In re Butcher's Beneficial Ass'n, 35 Pa. 151; People v. Fire Department, 31 Mich. 458; State v. Curtis, 9 Nev. 325; 1 Q. B. D. 12. They must not be inconsistent with the charter; Green's Brice, *Ultra Vires*, 15.

By-laws must be reasonable; Cartan v. Benevolent Society, 3 Daly (N. Y.) 20; Com. v. Gill, 3 Whart. (Pa.) 228; State v. Merchants' Exchange, 2 Mo. App. 96; and not retrospective; People v. Crockett, 9 Cal. 112; People v. Fire Department, 31 Mich. 458; they bind the members; Cummings v. Webster, 43 Me. 192; Weatherly v. Medical & Surgical Society, 76 Ala. 567; Kent v. Mining Co., 78 N. Y. 179; Harrington v. Benevolent Ass'n, 70 Ga. 341; Flint v. Pierce, 99 Mass. 68, 96 Am. Dec. 691; who are presumed to have notice of them; Cummings

v. Webster, 43 Me. 192; Village of Buffalo v. Webster, 10 Wend. (N. Y.) 100; Clark v. Life Ass'n, 14 App. D. C. 154, 43 L. R. A. 390; Purdy v. Life Ass'n, 101 Mo. App. 91, 74 S. W. 486; but a by-law void as against strangers or non-assenting members, may be good as a contract against assenting members; Slee v. Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; Cooper v. Frederick, 9 Ala. 738; Davis v. Proprietors of Meeting-House, 8 Metc. (Mass.) 321. See State v. Overton, 24 N. J. L. 440, 61 Am. Dec. 671. It has been held that third parties dealing with corporations are not bound to take notice of by-laws; Fay v. Noble, 12 Cush. (Mass.) 1; Wild v. Bank, 3 Mas. 505, Fed. Cas. No. 17,646; see Samuel v. Holladay, Woolw. 400, Fed. Cas. No. 12,288, where a distinction was raised between by-laws made by the corporation and those made by the directors, so far as relates to notice to third parties; but, *contra*, Adriance v. Roome, 52 Barb. (N. Y.) 399.

See Williston, 3 Sel. Essays on Anglo-Amer. Leg. Hist. 213.

But it is said that where third persons who deal with a corporation know its course of business and follow a prescribed regulation, it will be presumed that they dealt with reference thereto; Thomp. Corp. Sec. 492. A court will not take judicial notice of the by-laws of a corporation; Haven v. Asylum for Insane, 13 N. H. 532, 38 Am. Dec. 512. Unless required by statute it is not necessary that the by-laws of a private corporation should be in writing; Knights and Ladies of America v. Weber, 101 Ill. App. 488.

A by-law may be created and made binding upon the members by custom; Stafford v. Banking Co., 16 Ohio Cir. Ct. 50.

A by-law which is acquiesced in for eleven years must be presumed to be regularly adopted; Marsh v. Mathias, 19 Utah, 350, 56 Pac. 1074; and by-laws adopted by stockholders but not by an expressed vote of the directors will be considered as adopted by the directors, their conduct indicating that they regarded them as the by-laws of the corporation; Graebner v. Post, 119 Wis. 392, 96 N. W. 783, 100 Am. St. Rep. 890.

In England the term *by-law* includes any order, rule or regulation made by any local authority or statutory corporation subordinate to Parliament; 1 Odgers, C. L. 91.

Under some circumstances an action may be brought upon by-laws against members; Thomp. Corp. § 949.

BY THE BYE. Without process. A declaration is said to be filed by the bye when it is filed against a party already in the custody of the court under process in another suit. This might have been done, formerly, where the party was under arrest and technically in the custody of the court; and even giving common bail was a sufficient custody in the King's Bench; 1 Sellon, Pr. 228; 1 Tidd. Pr. 419. It is no longer allowed; Archbold, New Pr. 293.

C

C. The third letter of the alphabet. It was used among the Romans to denote condemnation, being the initial letter of *condemno*. See A.

In Rhode Island as late as 1785 it was branded on the forehead as part of the punishment for counterfeiting; Anderson, Dict. Law.

C. A. V. See CURIA ADVISARI VULT.

C. C. An abbreviation of *capi corpus*, I have taken his body.

C. C.; B. B. I have taken his body; bail bond entered. See CAPIAS AD RESPONDENDUM.

C. C. & C. I have taken his body and he is held.

C. F. & I. Letters used in British contracts for *cost, freight and insurance*, indicating that the price fixed covers not only cost but freight and insurance to be paid by the seller; Benj. Sales, § 887; L. R. 8 Ex. 179. The invoice gives the buyer credit for the freight he will have to pay on delivery of the goods; L. R. 5 H. L. 395, 406. A contract for a shipment of iron to a port C. F. & I. does not of itself import a delivery at that port; 7 H. & N. 574.

C. O. D. Collect on delivery. Where goods shipped are thus marked, the carrier in addition to his ordinary liabilities, and responsibilities is to collect the amount specified by the consignor, and for failure to return to him, either the price or the goods, he has a right of action on the contract against the carrier. See United States Exp. Co. v. Keefer, 59 Ind. 264; State v. Intoxicating Liquors, 73 Me. 278; American Merchants' Union Exp. Co. v. Schier, 55 Ill. 140; Collender v. Dinsmore, 55 N. Y. 206, 14 Am. Rep. 224.

These initials have acquired a fixed and determinate meaning, which courts and juries may recognize from their general information; State v. Intoxicating Liquors, 73 Me. 278.

The weight of authority is said by Williston (Sales § 279) to support the view that possession only is to be retained by the seller until the price is paid, and that property passes immediately on delivery to the car-

rier, which view he prefers, citing U. S. v. Exp. Co., 119 Fed. 240; Pilgreen v. State, 71 Ala. 368; City of Carthage v. Munsell, 203 Ill. 474, 67 N. E. 831; State v. Intoxicating Liquors, 98 Me. 464, 57 Atl. 798; Higgins v. Murray, 73 N. Y. 252; Coleman v. Lytle, 49 Tex. Civ. App. 44, 107 S. W. 562. That property does not pass, see The Robert W. Parsons, 191 U. S. 41, 24 Sup. Ct. 8, 48 L. Ed. 43; State v. Exp. Co., 118 Ia. 447, 92 N. W. 66; State v. Wingfield, 115 Mo. 428, 22 S. W. 363, 37 Am. St. Rep. 406; State v. O'Neil, 58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557. To the same effect E. M. Brash Cigar Co. v. Wilson, 32 Okl. 153, 121 Pac. 223; Guarantee Title & Trust Co. v. Bank, 185 Fed. 373; 107 C. C. A. 429. See also Harlan, J., dissenting, in O'Neil v. Vermont, 144 U. S. 323, 12 Sup. Ct. 393, 36 L. Ed. 450. See cases collected in 4 Col. L. Rev. 541, by Prof. Gregory.

See SALES; DELIVERY.

CA. SA. An abbreviation of *capias ad satisfaciendum, q. v.*

CABALLERIA. **In Spanish Law.** A quantity of land, varying in extent in different provinces. In those parts of the United States which formerly belonged to Spain, it is a lot of one hundred feet front, two hundred feet depth, and equivalent to five peonias. 2 White, New Recop. 49; 12 Pet. (U. S.) 444, n.; Escriche, Dicc. Raz.

CABINET. Certain officers who, taken collectively, form a council or advisory board; as the cabinet of the president of the United States, which is composed of the secretary of state, the secretary of the treasury, the secretary of the interior, the secretary of war, the secretary of the navy, the secretary of agriculture, the attorney-general, the postmaster-general, the secretary of commerce and the secretary of labor. See DEPARTMENTS.

"The president—not the cabinet—is responsible for all the measures of the administration, and whatever is done by one of the heads of department is considered as done by the president, through the proper executive agent;" 1 Cooley's Bla. Com. 232. The cabinet, as such, has no legal existence. In passing the act (1913) creating the department of labor, a provision that the incumbent should "be a member of the cabinet" was stricken out.

In case of the removal, death, resignation or inability of both the president and vice-president of the United States, then the members of the cabinet shall act as president until such disability is removed or a president elected, in the following order: the secretary of state, secretary of the treasury, secretary of war, attorney-general, postmaster-general, secretary of the navy, and secretary of the interior; 24 Stat. L. p. 1. No provision is made for the succession of the remaining (and more recently created) secretaries.

These officers are the heads of their respective departments; and by the constitution (art. 2, sec. 2) the president may require the opinion in writing of these officers upon any subject relating to the duties of their respective departments. These officers respectively have, under different acts of congress, the power of appointing many inferior officers charged with duties relating to their departments. See Const. art. 2, sec. 2.

The cabinet meets frequently at the executive mansion, by direction of the president. No record of its doings is kept; and it has, as a body, no legal authority. Its action is advisory merely; and the president and heads of departments in the execution of their official duties may disregard the advice of the cabinet and take the responsibility of independent action.

See Lerned, The President's Cabinet.

In Great Britain, the members of the Ministry are the heads of various executive departments of the government. The Prime Minister and his associates, having been selected from the party in power in the House of Commons, may be said to be in control of the House. If they lose their majority in the House, they resign office in a body and a new Ministry is then chosen from the new party in power.

The head of the Cabinet and of the Ministry is the Prime Minister, who is selected by the Crown. He chooses his colleagues, but his choice really extends rather to the division of offices and to the choice of ministers; he is in effect limited to the prominent parliamentary leaders of his own party. He almost invariably holds the office of First Lord of the Treasury, unless he is a Peer, and then that office is held by the government leader of the House of Commons. His resignation dissolves the Cabinet. Other members of the Cabinet are: Lord Chancellor; the Chancellor of the Exchequer; the five Secretaries of State; the First Lord of the Admiralty; the Lord President of the Council; the Lord Privy Seal; the Attorney General; the Presidents of the Board of Trade, the Local Government Board and the Board of Education (of late years); the Chief Secretary for Ireland (except when the Lord Lieutenant is a member); the Secretary for Scotland; and the Chancellor of the Duchy of Lancaster (usually). The President of the Board of Agriculture, and the Postmaster General are often members; the First Commissioner of Works and the Lord Chancellor of Ireland (occasionally). The tendency now is said to be towards including the head of any considerable branch of the administration. Lowell, Gov. of Engl.

The king, under the British constitution, is irresponsible; or, as the phrase is, the king can do no wrong. (See that title.) The

real responsibility of government in that country, therefore, rests with his ministers, some of whom constitute the cabinet. The king may dismiss his ministers if they do not possess his confidence; but they are seldom dismissed by the king. They ordinarily resign when they cannot command a majority in favor of their measures in the house of commons.

CABOTAGE. A nautical term from the Spanish, denoting strictly navigation from cape to cape along the coast without going out into the open sea. In International Law, cabotage is identified with *coasting-trade* so that it means navigating and trading along the coast between the ports thereof. In construing this term in commercial treaties and International Law no consideration need be given to the fact that municipal laws sometimes attach a meaning absolutely different from that it has or can have in International Law.

It is the universally recognized law of nations that every littoral state can exclude foreign merchantmen from the cabotage within the maritime belt, just as it can exclude foreigners from the fisheries therein.

In commercial treaties the meaning of cabotage has been stretched so as to exclude "sea-trade between any two ports of the same country, whether on the same coast or different coasts (cabotage petit or grand cabotage), provided always that the different coasts are all of them the coasts of the same country as a political and geographical unit." Thus Russia excludes foreigners from trade between Russian ports and Vladivostok. The United States makes a further extension of the word so as to exclude trade between ports of the United States proper and ports in the Philippines, Porto Rico and the Hawaiian Islands.

CACICAZGOS. In Spanish Law. Lands held in entail by the caciques in Indian villages in Spanish America.

CADASTRE. The official statement of the quantity and value of real property in any district, made for the purpose of justly apportioning the taxes payable on such property. 12 Pet. (U. S.) 428, n.; 3 Am. St. Pap. 679.

CADERE (Lat.). To fall; to fail; to end; to terminate.

The word was generally used to denote the termination or failure of a writ, action, complaint, or attempt: as, *cadit actio* (the action fails), *cadit assisa* (the assise abates), *cadere causa* or *a causa* (to lose a cause). Abate will translate *cadere* as often as any other word, the general signification being, as stated, to fail or cease. *Cadere ab actione* (literally, to fall from an action), to fail in an action; *cadere in partem*, to become subject to a division.

To become; to be changed to; *cadit assisa in juratam* (the assize has become a jury). Calvinus, Lex.

CADET. A younger brother. One trained for the army or navy.

CADI. A Turkish civil magistrate.

CADUCA (Lat. *cadere*, to fall). In Civil Law. An inheritance; an escheat; every thing which falls to the legal heir by descent.

Bona caduca are said to be those to which no heir succeeds, equivalent to escheats. Du Cange.

Glans caduca, "the acorn which has fallen to the ground," is used in a famous judgment of Kekewich, J., in [1902] 1 Ch. 847, where a fund in court belonging to an Austrian intestate, who was a bastard, was held not to go to the Austrian government by the law of Austria, but to the British crown by the law of England.

CADUCARY. Relating to or of the nature of escheat, forfeiture or confiscation. 2 Bla. Com. 245.

CÆSARIAN OPERATION. A surgical operation whereby the fœtus, which can neither make its way into the world by the ordinary and natural passage, nor be extracted by the attempts of art, whether the mother and fœtus be yet alive, or whether either of them be dead, is by a cautious and well-timed operation taken from the mother with a view to save the lives of both, or either of them.

If this operation be performed after the mother's death, the husband cannot be tenant by the curtesy; since his right begins from the birth of the issue, and is consummated by the death of the wife; but if mother and child are saved, then the husband would be entitled after her death. Wharton.

CÆTERIS PARIBUS (Lat.). Other things being equal.

CÆTERORUM. See ADMINISTRATION.

CALEFAGIUM. A right to take fuel yearly. Blount.

CALENDAR. An almanac.

Julius Cæsar ordained that the Roman year should consist of three hundred and sixty-five days, except every fourth year, which should contain three hundred and sixty-six—the additional day to be reckoned by counting the 24th day of February (which was the 6th of the calends of March) twice. See BISSEXTILE. This period of time exceeds the solar year by eleven minutes or thereabouts, which amounts to the error of a day in about one hundred and thirty-one years. In 1582 the error amounted to eleven days or more, which was corrected by Pope Gregory. Out of this correction grew the distinction between Old and New Style. The Gregorian or New Style was introduced into England in 1752, the 2d day of September (O. S) of that year being reckoned as the 14th day of September (N. S.).

A list of causes pending in a court; as court calendar.

In Criminal Law. A list of prisoners, containing their names, the time when they were committed and by whom, and the cause of their commitments.

CALENDS. See IDES.

CALIFORNIA. The eighteenth state admitted to the Union.

In 1534 a Portuguese navigator in the Spanish service discovered the Gulf of California and penetrated into the mainland, but no settlement was made until about a century afterwards, when the Franciscan Fathers planted a mission on the site of San Diego; other settlements soon followed, and

in a short time the country was entirely under the control of the priests, who accumulated great wealth. The Spanish power in the territory now constituting California was overthrown by the Mexican revolution in 1822, and the secular government by the priests was abolished. By the treaty of Guadalupe Hidalgo, May 30, 1848, terminating the war between the United States and Mexico, the latter country ceded to the United States for $15,000,000 a large tract of land including the present states of California, Nevada, and Utah, and part of Colorado and Wyoming, and of the present territories of Arizona and New Mexico, and the whole tract was called the territory of New Mexico.

The commanding officer of the U. S. forces exercised the duties of civil governor at first, but June 3, 1849, Brigadier-General Riley, then in command, issued a proclamation for holding an election August 1, 1849, for delegates to a general convention to frame a state constitution.

The convention met at Monterey, Sept. 1, 1849, adopted a constitution on October 10, 1849, which was ratified by a vote of the people, November 13, 1849. At the same time an election was held for governor and other state officers, and two members of congress.

The first legislature met at San Jose, December 15, 1849. General Riley, on December 20, 1849, resigned the administration of civil affairs to the newly elected officers under the constitution, and shortly thereafter two United States senators were elected.

In March, 1850, the senators and representatives submitted to congress the constitution, with a memorial asking the admission of the state into the American Union.

On September 9, 1850, congress passed an act admitting the state into the Union on an equal footing with the original states, and allowing her two representatives in congress until an apportionment according to an actual enumeration of the inhabitants of the United States. The third section of the act provides for the admission, upon the express condition that the people of the state, through their legislation or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall not pass any law or do any act whereby the title of the United States to any right to dispose of the same shall be impaired or questioned, and that they shall never lay any tax or assessment of any description whatsoever upon the public domain of the United States, and that in no case shall non-resident proprietors who are citizens of the United States be taxed higher than residents; and that all the navigable waters within the state shall be common highways, and forever free, as well to the inhabitants of the state as to the citizens of the United States, and without any tax, impost, or duty therefor.

Congress passed an act, March 3, 1851, to ascertain and settle the private land claims in the state of California. By this act a board of commissioners was created, before whom every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican governments, was required to present his claim, together with such documentary evidence and testimony of witnesses as he relied upon. From the decision of this board an appeal might be taken to the district court of the United States for the district in which the land was situated. Both the board and the court, on passing on the validity of any claim, were required to be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim was derived, the principles of equity, and the decisions of the supreme court of the United States.

A large part of the best agricultural lands of the state was claimed under Spanish and Mexican grants. The evidence in support of these grants was in many instances meagre and unsatisfactory, and the amount of litigation arising therefrom was enormous and has not yet wholly ceased. The board of commissioners, having completed its work, went out of existence.

By an act passed September 28, 1850, congress declared all laws of the United States, not locally inapplicable, in force within the State.

The constitution adopted in 1849 was amended November 4, 1856, and September 3, 1862, and on January 1, 1880, was superseded by the present constitution, which had been framed by a convention March 3, 1879, and adopted by popular vote May 7, 1879. It was further amended in 1898, 1902 and 1906. Section 1, article IV amended in 1911 by providing for initiative, referendum and recall; section 1, article II, amended by giving right of equal suffrage to women in 1912.

CALL. An agreement to sell. Treat v. White, 181 U. S. 264, 21 Sup. Ct. 611, 45 L. Ed. 853.

It is within the War Revenue Act of June 13, 1898, requiring a revenue stamp on all sales or agreements to sell or memoranda of sale or deliveries or transfers of stock; *id.*

CALL DAY. There are four call days at the Inns of Court in London: In January, May, June and November.

CALLING THE PLAINTIFF. A formal method of causing a nonsuit to be entered.

When a plaintiff perceives that he has not given evidence to maintain his issue, and intends to become nonsuited, he withdraws himself; whereupon the crier is ordered to call the plaintiff, and on his failure to appear he becomes nonsuited. The phrase "let the plaintiff be called," which occurs in some of the earlier state reports, is to be explained by reference to this practice. See 3 Bla. Com. 376; 2 C. & P. 403; Porter v. Perkins, 5 Mass. 236, 4 Am. Dec. 52; Trask v. Duval, 4 Wash. C. C. 97, Fed. Cas. No. 14,143; NON DICIT.

CALLING TO THE BAR. Conferring the degree or dignity of barrister upon a member of the inns of court. Holthouse, Dict.

"Calls to the bench and bar are to be made by the most ancient, being a reader, who is present at supper on call night." 1 Black Books of Lincoln's Inn. 339. But see BARRISTER as to admission to the bar.

CALUMNIÆ JUSJURANDUM (Lat.). The oath against calumny.

Both parties at the beginning of a suit, in certain cases, were obliged to take an oath that the suit was commenced in good faith and in a firm belief that they had a good cause. Bell, Dict. It was a fore-oath—before suit brought. The object was to prevent vexatious and unnecessary suits. It was especially used in divorce cases, though of little practical utility; Bish. Marr. & Div. § 353; 2 Bish. Marr. Div. & Sep. § 264. A somewhat similar provision is to be found in the requirement made in some states that the defendant shall file an affidavit of merits.

CALUMNIATORS. In Civil Law. Persons who accuse others, whom they know to be innocent, of having committed crimes.

CALVO DOCTRINE. The doctrine stated by the Argentine jurist, Carlos Calvo, that a government is not bound to indemnify aliens for losses or injuries sustained by them in consequence of domestic disturbances or civil war, where the state is not at fault, and that therefore foreign states are not justified in intervening, by force or otherwise, to secure the settlement of claims of their citizens on account of such losses or injuries. Such intervention, Calvo says, is not

in accordance with the practice of European States towards one-another, and is contrary to the principle of state sovereignty. 3 Calvo §§ 1280, 1297. The Calvo Doctrine is to be distinguished from the Drago Doctrine (*q. v.*).

See 18 Green Bag 377.

CAMBIALE JUS. The law of exchange.

CAMBIATORS. See BANK.

CAMBIO. Exchange.

CAMBIPARTIA. Champerty.

CAMBIPARTICEPS. A champertor.

CAMBIST. A person skilled in exchange; one who deals or trades in promissory notes or bills of exchange; a broker.

CAMBIUM. Change, exchange. Applied in the civil law to exchange of lands, as well as of money or debts. Du Cange.

Cambium reale or *manuale* was the term generally used to denote the technical common-law exchange of lands, *cambium locale, mercantile, or trajectitium,* was used to designate the modern mercantile contract of exchange, whereby a man agrees, in consideration of a sum of money paid him in one place, to pay a like sum in another place. Pothier, *de Change,* n. 12; Story, Bills § 2.

CAMERA. See IN CAMERA.

CAMERA REGIS. In old English law a chamber of the king; a place of peculiar privileges especially in a commercial point of view. The city of London was so called. Year Book, p. 7, Hen. VI. 27; Burrill, Law Dic.

CAMERA SCACCARII. The Exchequer Chamber. Spelman, Gloss.

CAMERA STELLATA. The Star Chamber.

CAMERARIUS. A chamberlain; a keeper of the public money; a treasurer. Spelman, Gloss. *Cambellarius;* 1 Perr. & D. 243.

CAMPARTUM. A part or portion of a larger field or ground, which would otherwise be in gross or in common. See CHAMPERTY.

CAMPERTUM. A cornfield; a field of grain. Cowell; Whishaw.

CAMPUM PARTERE. To divide the land. See CHAMPERTY.

CAMPUS (Lat. a field). In old European law an assembly of the people so called from being held in the open air, in some plain capable of containing a large number of persons. 1 Robertson's Charles V. App. n. 38.

In feudal or old English law a field or plain. Burrill, Law Dict.

CANADA. The name given to a confederation of all the British possessions in North America except Newfoundland.

The first explorations of this country, of which any authentic information exists, were by Jacques Cartier, between the years 1534 and 1554, thus giving to France the first claim upon its territory. Great activity was shown during these and the succeeding years on the part of Great Britain and France to acquire territorial jurisdiction on the newly discovered continent, and the division lines between their acquisitions were not very clearly marked. Those of France included Florida in the south and the lands watered by the St. Lawrence in the north, and to it all the name of "New France" was given. In 1603 an expedition for trading purposes was fitted out under the command of Samuel Champlain, whose explorations up the river St. Lawrence and its tributary, the Richelieu River, brought him to the lake which still bears his name.

The viceroyalty of New France was conferred in 1612 upon the Prince de Condé, who made a formal assignment of it in 1619 to Admiral Montmorency, who personally visited the country.

In 1628, under the rule of Cardinal Richelieu in France, the colony was ceded to "La Compagnie de Cents Associés" (The Company of the One Hundred Associates), a trading company, but armed, like the Hudson Bay Company in later years, with full power for the administration of justice in the primitive forms practicable in new countries and with mixed populations.

This company had an unsuccessful career financially, and upon its disorganization, in 1663, Louis XIV. resumed territorial jurisdiction over the colony, and in April of that year published an edict establishing a "Sovereign Council" for the government of Canada, and this council was specially instructed to prepare laws and ordinances for the administration of justice, framed as much as possible upon those then in force in France under the provisions of the "Custom of Paris."

For more than one hundred years all the legal business of the province was determined by this council—in fact, until the conquest by the English in 1759. By the terms of the capitulation, it was stipulated and conceded that the ancient laws of land tenure should continue to subsist, but it was understood that the English criminal and commercial law should be introduced and adopted.

Under this stipulation the law of France, as it existed in 1759, was recognized as the civil law of Canada, and has always since formed the basis of that law—modified, of course, after the subsequent establishment of a representative government in the colony, by the statutory provisions of the colonial parliaments. This result was applicable, however, only to that section of the country which subsequently was called Lower Canada, now the province of Quebec. The portion of the colony since known as the province of Upper Canada (now the province of Ontario) was then unsettled, and being subsequently colonized from Great Britain and her other dependencies, the whole body of law, civil as well as criminal, was based upon that in force in England.

Under the provisions of a statute passed by the imperial parliament of Great Britain in 1774, called "The Quebec Act," a legislative council of twenty-three members was established for the province, with power to enact laws. In 1791, Pitt introduced the bill into the English House of Commons which gave a constitution to Canada and divided it into the two provinces of Upper and Lower Canada. Since then (with the short interregnum from 1837 to 1841), regular parliaments have been held, at which the jurisprudence of the country and the establishment of its courts have been determined by formal acts.

In 1867, the confederation of the different North American dependencies of Great Britain, under the name of the "Dominion of Canada," was consummated by an act of the imperial parliament, at the instance and request of the different provinces, including Upper and Lower Canada (under the names of Ontario and Quebec), New Brunswick, and Nova Scotia, to which have since been added Prince Edward Island, Manitoba, and British Columbia (all the provinces except Newfoundland). The act under which this confederation was established—called The British North American Act (in effect July 1, 1868)—contains the provisions of a written constitution, under which the executive government and authority is declared to be vested in the sover-

eign of Great Britain, whose powers are deputed to a governor-general, nominated by the imperial government, but whose salary is paid by the Dominion. The form of government is modelled after that of Great Britain. The governor-general acts under the guidance of a council, nominally selected by himself, but which must be able to command the support of a majority in that branch of parliament which represents the suffrages of the electors.

THE JUDICIAL POWER.—There is a supreme court with ultimate jurisdiction in matters affecting the Dominion and as a final court of appeal from the provincial courts. It consists of a chief justice and five puisne judges, and holds three sessions a year at Ottawa. The exchequer court can hold sessions at any town, and is a colonial court of admiralty and exercises admiralty jurisdiction throughout Canada and the waters thereof. Certain local judges of admiralty are created with limited jurisdiction, the appeal from whose decisions lies to the Court of Exchequer, or it may lie direct to the Supreme Court of Canada under certain conditions.

CANAL. An artificial cut or trench in the earth, for conducting and confining water to be used for transportation. See Bishop v. Seeley, 18 Conn. 394.

Public canals originate under statutes and charters enacted to authorize their construction and to protect and regulate their use. They are in this country constructed and managed either by the state itself or by companies incorporated for the purpose. These commissioners and companies are armed with authority to appropriate private property for the construction of their canals, in exercising which they are bound to a strict compliance with the statutes by which it is conferred. Where private property is thus taken, it must be paid for in gold and silver; State v. Beackmo, 8 Blackf. (Ind.) 246. Such payment need not precede or be cotemporaneous with the taking; Rogers v. Bradshaw, 20 Johns. (N. Y.) 735; Hankins v. Lawrence, 8 Blackf. (Ind.) 266; though, if postponed, the proprietor of the land taken is entitled to interest; People v. Canal Com'rs, 5 Denio (N. Y.) 401; Harness v. Canal Co., 1 Md. Ch. Dec. 248. A city through which a canal passes cannot construct levees along its banks and recover the cost thereof from the canal company; City of New Orleans v. Canal & Nav. Co., 42 La. Ann. 6, 7 South. 63.

After the appropriation of land for a canal, duly made under statute authority, though the title remains in the original owner until he is paid therefor, he cannot sustain an action against the party taking the same for any injury thereto; Turrell v. Norman, 19 Barb. (N. Y.) 263; Ligat v. Com., 19 Pa. 456. But if there be a deviation from the statute authority, the statute is no protection against suits by persons injured by such deviation; Lynch v. Stone, 4 Denio (N. Y.) 356; Farnum v. Canal Corp., 1 Sumn. 46, Fed. Cas. No. 4,675; 2 Dow. 519. Though a special remedy for damages be given by a statute authorizing the construction of a canal, the party injured thereby is not barred of his common-law action; Denslow v. New Haven & N. Co., 16 Conn. 98. But see, to the contrary, Stevens v. Canal, 12 Mass. 466; Town of Lebanon v. Olcott, 1 N. H. 339. The legislature has the exclusive power to determine when land may be taken for a canal or other public use, and the courts cannot review its determination in that respect; Harris v. Thompson, 9 Barb. (N. Y.) 350; Hankins v. Lawrence, 8 Blackf. (Ind.) 266.

In navigating canals, it is the duty of the canal-boats to exercise due care in avoiding collisions, and in affording each other mutual accommodation; and for any injury resulting from the neglect of such care the proprietors of the boats are liable in damages; 1 Sher. & Redf. Neg. 404; Rathbun v. Payne, 19 Wend. (N. Y.) 399; Sheerer v. Kissinger, 1 Pa. 44. The proprietors of the canal will be liable for any injury to canal-boats occasioned by a neglect on their part to keep the canal in proper repair and free from obstructions; Riddle v. Proprietors, 7 Mass. 169, 5 Am. Dec. 35; James River & Kanawha Co. v. Early, 13 Gratt. (Va.) 541; Muir v. Canal Co., 8 Dana (Ky.) 161; Moore v. Canal, 7 Ind. 462; Griffith v. Follett, 20 Barb. (N. Y.) 620; 11 A. & E. 223. Where a state exercises control over a canal, it is liable for injuries caused by an officer's negligence in failing to repair bridges over it; Woodman v. People, 127 N. Y. 397, 28 N. E. 20.

In regard to the right of the proprietors of canals to tolls, the rule is that they are only entitled to take them as authorized by statute, and that any ambiguity in the terms of the statute must operate in favor of the public; 2 B. & Ad. 792; Perrine v. Canal Co., 9 How. (U. S.) 172, 13 L. Ed. 92; Myers v. Foster, 6 Cow. (N. Y.) 567; Delaware & H. Canal Co. v. Coal Co., 21 Pa. 131. A statutory authority to charge tolls upon boats, etc., used for transportation along it gives no authority to charge tolls on tugs while towing vessels through the canal or on the return trip; Sturgeon Bay Harbor Co. v. Leatham, 164 Ill. 239, 45 N. E. 422.

A canal constructed and maintained at private expense is like a private highway over which the public is permitted to travel, but in which it obtains no vested right; Potter v. Ry. Co., 95 Mich. 389, 54 N. W. 956.

An easement in the waters of state canals cannot be acquired by prescription; Burbank v. Fay, 65 N. Y. 57.

CANAL ZONE. See PANAMA CANAL.

CANCELLARIA. Chancery; the court of chancery. *Curia cancellaria* is also used in the same sense. See 4 Bla. Com. 46; Cowell.

CANCELLARIUS (Lat.). A chancellor.

In ancient law, a janitor or one who stood at the door of the court and was accustomed to carry out the commands of the judges; afterwards a secretary; a scribe; a notary. Du Cange.

In early English law, the keeper of the king's seal.

The office of chancellor is of Roman origin. He appears at first to have been a chief scribe or secretary, but was afterwards invested with judicial power, and had superintendence over the other officers of the empire. From the Romans the title and office passed to the church; and therefore every bishop of the Catholic church has, to this day, his chancellor, the principal judge of his consistory. In ecclesiastical matters it was the duty of the *cancellarius* to take charge of all matters relating to the books of the church,—acting as librarian; to correct the laws, comparing the various readings, and also to take charge of the seal of the church, affixing it when necessary in the business of the church.

When the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities, according to their different constitutions. In all he seems to have had a supervision of all charters, letters, and such other public instruments of the crown as were authenticated in the most solemn manner; and when seals came into use, he had the custody of the public seal.

According to Du Cange it was under the reign of the Merovingian kings in France that the *cancellarii* first obtained the dignity corresponding with that of the English chancellor, and became keepers of the king's seal.

In this latter sense only of keeper of the seal, the word chancellor, derived hence, seems to have been used in the English law; 3 Bla. Com. 46.

The origin of the word has been much disputed; but it seems probable that the meaning assigned by Du Cange is correct, who says that the *cancellarii* were originally the keepers of the gate of the king's tribunal, and who carried out the commands of the judges. Under the civil law their duties were varied, and gave rise to a great variety of names, as *notarius, a notis, abactis, secretarius, a secretis, a cancellis, a responsis, a libellis,* generally derived from their duties as keepers and correctors of the statutes and decisions of the tribunals.

The transition from keeper of the seal of the church to keeper of the king's seal would be natural and easy in an age when the clergy were the only persons of education sufficient to read the documents to which the seal was to be appended. And this latter sense is the one which has remained and been perpetuated in the English word Chancellor. See Du Cange, Spelman, Gloss.; Spence, Eq. Jur. 78; 3 Bla. Com. 46.

It was an evolution which passed through several stages, the first of which had its origin in the period when the king was actually as well as theoretically the fountain of justice and equity. At first he personally heard their complaints and administered justice to his subjects.

It was, however, after the growth of the population had increased the applications to the king for the redress of grievances to such an extent as to require him to seek assistance, that the officer afterwards called chancellor appeared. He was then a scribe to whom were referred the complaints made, and it was his duty to determine if they should be entertained and the form of writ adapted to the case. Thus what was afterwards the primary duty of the chancellor was devolved upon this officer, called the *referendarius,* and known by this title, according to Selden, during the reign of Ethelbert and subsequent kings to Edred. To separate and protect them from the suitors this officer and his assistants sat by a lattice, the laths of which were called *cancelli,* and to this commentators ascribe the origin of the word *cancellarius,* which was used in the reign of the Confessor and is not clearly traced to an earlier date. At that time little more appears than that he was an officer who issued writs, but during Anglo-Saxon times he seems to have been little more, and the charter of Westminster shows his precedence at that time to have been after two archbishops, nine bishops, and seven abbots, though now the lord chancellor is second only after the royal family. True, it is said by Ingulphus that Edward the Elder appointed Torquatel his chancellor, so that whatever business of the king, spiritual or temporal, required a decision, should be decided by his advice and decree, and, being so decided, the decree should be held irrevocable; Spence, Eq. Jur. 78, n. Nevertheless there does not seem to have been at that period a conception of the office as one maintained for the exercise of judicial functions. According to Pollock and Maitland, "even in Edward I.'s reign it is not in our view a court of justice; it does not hear and determine causes. It was a great secretarial bureau, a home office, a foreign office, and a ministry of justice," 1 Hist. Eng. Law 172.

The chancellor's jurisdiction was an off-shoot from that of the king's council. It does not appear that he had any individual judicial functions otherwise than as one of the council; he certainly acquired power to sit alone, or had it confirmed, in 1349, but this did not forthwith exclude the older practice. Pollock, Expans. of C. L. 68.

But whatever the origin of the title, it is not difficult to apprehend the development of the janitor or keeper of the gate, acting as intermediary between the suitor and the king or judge, into the officer whose judgment was relied on in dealing with the petition, and how the original scribe or *referendarius,* exercising at first clerical functions, but selected for them because it required legal learning to discharge them, gradually developed into the chancellor of modern conception, holding the seal and representing the conscience of the king. The fact that it is an evolution is clear, however obscure and difficult to trace are some of its successive stages.

Lord Ellesmere, who is practically the first chancellor whose decrees have come down to us, was the most conspicuous representative of the period of the Tudors and the first Stuarts. He did much towards settling the practice and procedure of the court. He successfully fought the great fight with Coke over the supremacy of the chancellor's writ of injunction, and during the period from Ellesmere to the Restoration the real foundation was laid of an equitable system modifying ancient common law principles and practices which no longer agreed with current views of justice; 15 Harv. L. Rev. 110. Instances of specific relief, under what became in after times the great heads of equity, may nevertheless be found at a surprisingly early day. The editor of the Selden Society's volume of Select Cases in Chancery gives the following list of the earliest cases: Accident, after 1398; account, 1385; cancellation and delivery of instruments, 1337; charities, after 1393; discovery, 1415-17; dower, 1393; duress, 1337; fraud, 1386; injunctions, 1396-1403; mistake, 1417-24; mortgage, 1456; partition, 1423-43; perpetuation of testimony, 1486-1500; rescission of contract, 1396-1403; specific performance, after 1393, trusts, after 1393; waste, 1461-67; wills, after 1393.

In his efforts to establish some sort of fixed practice, Lord Ellesmere frequently referred to precedents, but numerous instances of his vicarious charity reveal the latitude of his discretion. In the Earl of Oxford's Case, 2 W. & T. 644, he expressly claimed the power to legislate on individual rights.

The Restoration, or rather the chancellorship of Lord Nottingham, marks an epoch in the history of equity, of which he has been justly called the "father." The interference of the chancellors had been instrumental in bringing about, through legislation and otherwise, a steady improvement in common law practice and procedure, and the necessity for further intervention, except where there was an avowed divergence between the two systems, had become rare. Then the abolition of the incidents of feudal tenure by the Restoration Parliament introduced a system of real property which continued almost to the reign of Victoria. Controversies arising out of these new methods of conveyancing and settlement naturally found their way into chancery, where alone trusts and equities of redemption were recognized and contracts specifically enforced; and the contemporaneous abolition of the Court of Wards

ultimately turned the guardianship of the estates of infants into chancery. Moreover, the searching investigations which had been made during the Commonwealth exercised a powerful influence in the direction of reform in procedure. All these influences combined to form a new era in equity. Prior to the Restoration, it could be said with entire accuracy that the "grand reason for the interference of a court of equity is the imperfection of the legal remedy in consequence of the universality of legislative provisions." But during the period from Nottingham to Eldon the chancellor was chiefly occupied with the adjudication and administration of proprietary rights. At the close of Lord Eldon's service, equity was no longer a system corrective of the common law; its principles were no less universal than those of the common law. It could be described only as that part of remedial justice which was administered in chancery; its work was administrative and protective, as contrasted with the remedial and retributive justice of the common law. See 15 Harv. L. Rev. 109.

See 4 Co. Inst. 78; Dugdale Orig. Jur. fol. 34; and generally Selden, Discourses; Inderwick, King's Peace; 3 Steph. Com. 346; 1 Poll & Maitl. 172; 1 Stubbs, Const. Hist 381; Campbell, Lives of the Lord Chancellors, vol. 1; Holdsw. Hist. E. L.; Pollock, Expans. of C. L. See CHANCELLOR; EQUITY.

CANCELLATION. The act of crossing out a writing. The manual operation of tearing or destroying a written instrument; 1 Eq. Cas. Abr. 409.

The statute of frauds provides that the revocation of a will by cancellation must be by the "testator himself, or in his presence and by his direction and consent." This provision is in force in many of the states; 1 Jarm. Wills (3d Am. ed.) *113 n. In order that a revocation may be effected, it must be proved to have been done according to the statute; Delafield v. Parish, 25 N. Y. 79; Heise v. Heise, 31 Pa. 246; Spoonemore v. Cables, 66 Mo. 579; Barker v. Bell, 46 Ala. 216; declarations of a testator are not sufficient; Lewis v. Lewis, 2 W. & S. (Pa.) 455; Wittman v. Goodhand, 26 Md. 95; Jackson v. Kniffen, 2 Johns. (N. Y.) 31, 3 Am. Dec. 390.

Cancelling a will, *animo revocandi*, is a revocation; and the destruction or obliteration need not be complete; 3 B. & Ald. 489; Avery v. Pixley, 4 Mass. 462; Card v. Grinman, 5 Conn. 168; Burns v. Burns, 4 S. & R. (Pa.) 567. It must be done *animo revocandi*; Schoul. Wills 384; Wolf v. Bollinger, 62 Ill. 368; Dickey v. Malechi, 6 Mo. 177, 34 Am. Dec. 130; and evidence is admissible to show with what intention the act was done; Jackson v. Holloway, 7 Johns. (N. Y.) 394; Hatch v. Hatch, 9 Mass. 307, 6 Am. Dec. 67; Botsford v. Morehouse, 4 Conn. 550; Corliss v. Corliss, 8 Vt. 373; Tomson v. Ward, 1 N. H. 9; Burns v. Burns, 4 S. & R. (Pa.) 297; Bates v. Holman, 3 Hen. & M. (Va.) 502; Carroll's Lessee v. Llewellin, 1 Harr. & McH. (Md.) 162; 4 Kent 531; Collagan v. Burns, 57 Me. 449; Harring v. Allen, 25 Mich. 505; Durant v. Ashmore, 2 Rich. (S. C.) 184; Patterson v. Hickey, 32 Ga. 156. Accidental cancellation is not a revocation; Smock v. Smock, 11 N. J. Eq. 156. Where the first few lines of a will were cut off, the remainder, which was complete, was admitted to probate; L. R. 2 P. & D. 206. Partial cancellation, with proof of an *animus revocandi*, will revoke a will; Bohanon v. Walcot, 1 How. (Miss.) 336, 29 Am. Dec. 631; and when more than one-third of the items were cancelled, leaving the remainder unintelligible and repugnant, the will was held to be revoked; Dammann v. Dammann (Md.) 28 Atl. 408. Where the testator wrote on his will "This will is invalid," held a revocation; Witter v. Mott, 2 Conn. 67.

Cancellation by an insane man will not revoke a valid will; In re Forman's Will, 54 Barb. (N. Y.) 274; Ford v. Ford, 7 Humphr. (Tenn.) 92. See Laughton v. Atkins, 1 Pick. (Mass.) 535; Farr v. O'Neall, 1 Rich. (S. C.) 80.

In Louisiana it requires a written instrument executed with formalities to revoke a will, hence placing it among waste paper and refusal to receive it after attention was called to it, and an unsuccessful attempt to make a new will, were held to be no cancellation; Succession of Hill, 47 La. Ann. 329, 16 South. 819.

There may be a partial obliteration, which works a revocation *pro tanto*; Clark v. Smith, 34 Barb. (N. Y.) 140; Bigelow v. Gillott, 123 Mass. 102, 25 Am. Rep. 32; Wolf v. Bollinger, 62 Ill. 368; Giffin v. Brooks, 48 Ohio St. 211, 31 N. E. 743; and a careful interlineation is not a cancellation; Dixon's Appeal, 55 Pa. 424. A cancellation by pencil is enough; 2 D. & B. 311; 6 Hare 39; L. R. 2 P. & D. 256; Estate of Tomlinson, 133 Pa. 245, 19 Atl. 482, 19 Am. St. Rep. 637. Where a will is found among a testator's papers, torn, there is a presumption of revocation: Beaumont v. Keim, 50 Mo. 28; In re Johnson's Will, 40 Conn. 587; Idley v. Bowen, 11 Wend. (N. Y.) 227. Where after a person's death a will is found in an unsealed envelope which had been in his possession up to the time of his death and with lines drawn through his signature, the presumption is that he himself drew the lines for the purpose of revoking the will; In re Philp, 64 Hun, 635, 19 N. Y. Supp. 13.

Perpendicular marks across a will are not "handwriting;" In re Hopkins, 172 N. Y. 360, 65 N. E. 173, 65 L. R. A. 95, 92 Am. St. Rep. 746.

Mere cancellation of a deed does not divest the grantee's title; Devlin, Deeds 300, 305; Holbrook v. Tirrell, 9 Pick. (Mass.) 108; Fawcetts v. Kimmey, 33 Ala. 264; Botsford v. Morehouse, 4 Conn. 550; National Union Bld'g Ass'n v. Brewer, 41 Ill. App. 223; even though done before recording; Hall v. McDuff, 24 Me. 312; but it might practically have that effect between the parties by estoppel; Sawyer v. Peters, 50 N. H. 143; or by reason of the destruction of the only evidence of the transaction; Blaney v. Hanks, 14 Ia. 400; Parker v. Kane, 4 Wis. 12, 65 Am. Dec. 283.

On a bill in equity for the re-execution of lost securities, which were held by a decedent in his lifetime and after his death were not found among his papers, a party alleging their destruction or cancellation by the decedent is bound to prove the fact to the satisfaction of the court. The absence of the papers raises no presumption of such destruction or cancellation; nor is mere proof of an intention to destroy or cancel, or of the declaration of such intention, alone sufficient; Gilpin v. Chandler, 2 Del. Ch. 219.

In the case of an insurance policy after death, the remedy of the company for fraud, etc., is at law by way of a defence to a suit on the policy; a bill in equity will not lie for revocation in the absence of special facts; Riggs v. Ins. Co., 129 Fed. 207, 63 C. C. A. 365.

See DEED; INSURANCE; WILL; LOST INSTRUMENT; REVOCATION.

CANDIDATE (Lat. *candidatus*, from *candidus*, white. Said to be from the custom of Roman candidates to clothe themselves in a white tunic).

One who offers himself, or is offered by others, for an office.

One who seeks office is a candidate; it is not necessary that he should have been nominated for it. Leonard v. Com., 112 Pa. 621, 4 Atl. 220.

CANON. In Ecclesiastical Law. A prebendary, or member of a chapter. All members of chapters except deans are now entitled *canons*, in England. 2 Steph. Com. 11th ed. 687, n.; 1 Bla. Com. 382.

CANON LAW. A body of ecclesiastical law, which originated in the church of Rome, relating to matters of which that church has or claims jurisdiction.

A canon is a rule of doctrine or of discipline, and is the term generally applied to designate the ordinances of councils and decrees of popes. The position which the canon law obtains beyond the papal dominions depends on the extent to which it is sanctioned or permitted by the government of each country; and hence the system of canon law as it is administered in different countries varies somewhat.

In the wording of a canon it is not enough to admonish or to express disapprobation; its wording must be explicitly permissive or prohibitory, backed by the provision, expressed or admittedly understood, that its infringement will be visited with punishment. Cent. Dict.

Though this system of law is of primary importance in Roman Catholic countries alone, it still maintains great influence and transmits many of its peculiar regulations down through the jurisprudence of Protestant countries which were formerly Roman Catholic. Thus, the canon law has been a distinct branch of the profession in the ecclesiastical courts of England for several centuries; but the recent modifications of the jurisdiction of those courts have done much to reduce its independent importance.

The *Corpus Juris Canonici* is drawn from various sources—the opinions of the ancient fathers of the church, the decrees of councils, and the decretal epistles and bulls of the holy see, together with the maxims of the civil law and the teachings of the Scriptures. These sources were first drawn upon for a regular ecclesiastical system about the time of Pope Alexander III. (1139), when one Gratian, an Italian monk, animated by the discovery of Justinian's Pandects, collected the ecclesiastical constitutions also into some method in three books, which he entitled *Concordia Discordantium Canonum.* These are generally known as *Decretum Gratiani.* They were never promulgated as a code, like the preceding.

The subsequent papal decrees to the time of the pontificate of Gregory IX. were collected in much the same method, under the auspices of that pope, about the year 1234, in five books, entitled *Decretalia Gregorii Noni.* A sixth book was added by Boniface VIII., about the year 1298, which is called *Sextus Decretalium*, or *Liber Sextus.* The Clementine Constitution, or decrees of Clement V, were in like manner authenticated in 1313 by his successor, John XXII., who also published twenty constitutions of his own, called the *extravagantes Joannis*, so called because they were in addition to, or beyond the boundary of, the former collections, as the additions to the civil law were called Novels. To these have since been added some decrees of later popes, down to the time of Sixtus IV., in five books, called *Extravagantes communes.* And all these together—Gratian's Decrees, Gregory's Decretals, the Sixth Decretals, the Clementine Constitutions, and the Extravagants of John and his successors—form the *Corpus Juris Canonici*, or body of the Roman canon law, 1 Bla Com. 82; *Encyclopédie, Droit Canonique, Droit Public Ecclésiastique;* Dict. de Jur *Droit Canonique;* Erskine, Inst. b 1, t. 1, s. 10

This body of canon law was the *jus commune* of the church in England. The English provincial constitutions merely formed a supplement to it and were valid only as interpreting or enforcing the papal decrees, 1 Holdsw H E. L. 355. It forms no part of the law of England, unless it has been brought into use and acted on there; 11 Q B. 649.

See generally Encycl. Br., *sub voce*, Canon Law; Maitland, Canon Law, Jenks' Teutonic Law; 1 Sel. Essays on Anglo-Amer. Leg Hist. 46.

See, in general, Ayliffe, Par Jur Can. Ang.; Shelford, Marr. & D. 19, Preface to Burn, Eccl. Law, Tyrwhitt ed. 22; Hale, Civ. L 26; Bell's Case of a Putative Marriage, 203; *Dict. du Droit Canonique;* Stair, Inst. b. 1, t. 1, 7; 1 Poll. & Maitl 90; 2 Sel. Essays on Anglo-Amer. Leg. Hist. 258. See EXTRAVAGANTES.

CANONRY. An ecclesiastical benefice attaching to the office of canon. Holthouse, Dict.

CANT. A method of dividing property held in common by two or more persons peculiar to the civil law, and may be avoided by the consent of all of those who are interested, in the same manner that any other contract or agreement may be avoided. Hayes v. Cuny, 9 Mart. O. S. (La.) 89. See LICITACION.

CANTERBURY, ARCHBISHOP OF. The primate of all England; the chief ecclesiastical dignitary in the church. His customary privilege is to crown the kings and queens of England. By 25 Hen. VIII. c. 21, he had the power of granting dispensations in any case not contrary to the Holy Scriptures and the law of God where the pope used formerly to grant them, which is the foundation of his granting special licenses to marry at any place or time, etc. Wharton. See CHURCH OF ENGLAND.

CANTRED. A hundred, a district containing a hundred villages. Used in Wales

in the same sense as hundred in England. Cowell; *Termes de la Ley*.

CANVASS. The act of examining the returns of votes for a public officer. This duty is usually intrusted to certain officers of a state, district, or county, who constitute a board of canvassers. The determination of the board of canvassers of the persons elected to an office is *prima facie* evidence only of their election. A party may go behind the canvass to the ballots, to show the number of votes cast for him. The duties of the canvassers are wholly ministerial; People v. Ferguson, 8 Cow. (N. Y.) 102; People v. Vail, 20 Wend. (N. Y.) 14; People v. Van Cleve, 1 Mich. 362, 53 Am. Dec. 69; People v. Kilduff, 15 Ill. 492, 60 Am. Dec. 769. A canvassing board has no power to go behind the returns and inquire into the legality of the votes; McQuade v. Furgason, 91 Mich. 438, 51 N. W. 1073; State v. Van Camp, 36 Neb. 9, 91, 54 N. W. 113. In making a recount they have no authority to throw out the vote of a precinct or ward on the ground of fraud, as their power is merely ministerial; May v. Board of Canvassers, 94 Mich. 505, 54 N. W. 377. See In re Woods, 5 Misc. 575, 26 N. Y. Supp. 169; ELECTION.

CANVASSING BOARD. See CANVASS.

CAPACITY. Ability, power, qualification, or competency of persons, natural or artificial, for the performance of civil acts depending on their state or condition as defined or fixed by law; as, the capacity to devise, to bequeath, to convey lands; or to take and hold lands; to make a contract, and the like. 2 Com. Dig. 294.

CAPAX DOLI (Lat. capable of committing crime). The condition of one who has sufficient mind and understanding to be made responsible for his actions. See DISCRETION.

CAPE. A judicial writ, now abolished, touching a plea of lands and tenements. The writs which bear this name are of two kinds—namely, *cape magnum*, or grand cape, and *cape parvum*, or petit cape. The *cape magnum* was the writ for possession where the tenant failed to appear. The petit cape is so called not so much on account of the smallness of the writ as of the latter; it was the shorter writ issued when the plaintiff prevailed after the tenant had appeared. Fleta, l. 6, c. 55, § 40. For the difference between the form and the use of these writs, see 2 Wms. Saund. 45 *c*, *d*; Fleta, l. 6, c. 55, § 40.

CAPERS. Vessels of war owned by private persons, and different from ordinary privateers only in size, being smaller. Beawes, *Lex Merc.* 230.

CAPIAS (Lat. that you take). A writ directing the sheriff to take the person of the defendant into custody.

It is a judicial writ, and issued originally only to enforce compliance with the summons of an original writ or with some judgment or decree of the court. It was originally issuable as a part of the original process in a suit only in case of injuries committed by force or with fraud, but was much extended by statutes. See ARREST; BAIL. Being the first word of distinctive significance in the writ, when writs were framed in Latin, it came to denote the whole class of writs by which a defendant's person was to be arrested. It was issuable either by the court of Common Pleas or King's Bench, and bore the seal of the court.

See Spence, Eq. Jur.; BAIL; BREVE; ARREST; and the titles here following.

CAPIAS AD AUDIENDUM JUDICIUM. A writ issued, in a case of misdemeanor, after the defendant has appeared and is found guilty, to bring him to judgment if he is not present when called. 4 Bla. Com. 368.

CAPIAS AD COMPUTANDUM. A writ which issued in the action of account rendered upon the judgment *quod computet*, when the defendant refused to appear in his proper person before the auditors and enter into his account.

According to the ancient practice, the defendant might, after arrest upon this process, be delivered on mainprize, or, in default of finding mainpernors, was committed to the Fleet prison, where the auditors attended upon him to hear and receive his account. The writ is now disused.

Consult Thesaurus Brevium 38; Coke, Entries 46, 47; Rastell, Entries 14 b. 15.

CAPIAS PRO FINE. A writ which issued against a defendant who had been fined and did not discharge the fine according to the judgment.

The object of the writ was to arrest a defendant against whom a plaintiff had obtained judgment, and detain him until he paid to the king the fine for the public misdemeanor, coupled with the remedy for the private injury sustained, in all cases of forcible torts; 11 Coke 43, 5 Mod. 285, falsehood in denying one's own deed; Co. Litt. 131; 8 Coke 60, unjustly claiming property in replevin, or contempt by disobeying the command of the king's writ, or the express prohibition of any statute; 8 Coke 60. It is now abolished. 3 Bla. Com. 398

CAPIAS AD RESPONDENDUM. A writ commanding the officer to whom it is directed "to take the body of the defendant and keep the same to answer the plaintiff," etc.

This is the writ of capias which is generally intended by the use of the word capias, and was formerly a writ of great importance. For some account of its use and value, see ARREST; BAIL.

According to the course of the practice at common law, the writ bears teste, in the name of the chief justice, or presiding judge of the court, on some day in term-time, when the judge is supposed to be present, not being Sunday, and is made returnable on a regular return day.

If the writ has been served and the defendant does not give bail, but remains in custody, it is returned C. C. (*cepi corpus*); if he have given bail, it is returned C. C. B. B. (*cepi corpus*, bail bond); if the defendant's appearance have been accepted, the return is, "C. C., and defendant's appearance accepted." See 1 Archb. Pr. 67.

CAPIAS AD SATISFACIENDUM. A writ directed to the sheriff or coroner, commanding him to take the person therein named and him safely keep so that he may have his body in court on the return day of the writ, to satisfy (*ad satisfaciendum*) the party who has recovered judgment against him.

It is a writ of execution issued after judgment, and might have been issued against a plaintiff against whom judgment was obtained for costs, as well as against the defendant in a personal action. As a rule at common law it lay in all cases where a *capias ad respondendum* lay as a part of the mesne process. Some classes of persons were, however, exempt from arrest on mesne process who were liable to it on final. It was a very common form of execution, until within a few years, in many of the states; but its efficiency has been destroyed by statutes facilitating the discharge of the debtor, in some states, and by statutes prohibiting its issue, in others, except in specified cases. See ARREST; PRIVILEGE. It is commonly known by the abbreviation *ca. sa.*

It is tested on a general teste day, and returnable on a general return day.

It is executed by arresting the defendant and keeping him in custody. He cannot be discharged upon bail or by consent of the sheriff. See ESCAPE. And payment to the sheriff is held in England not to be sufficient to authorize a discharge. He might be discharged by showing irregularities in the writ; 3 D. P. C. 291; 4 *id.* 6.

The return made by the officer is either C. C. & C. (*cepi corpus et committitur*), or N. E. I. (*non est inventus*). The effect of execution by a ca. sa. is to prevent suing out any other process against the lands or goods of the person arrested, at common law; but this is modified by statutes in the modern law. See EXECUTION.

CAPIAS UTLAGATUM. A writ directing the arrest of an outlaw.

If *general*, it directs the sheriff to arrest the outlaw and bring him before the court on a general return day.

If *special*, it directs the sheriff, in addition, to take possession of the goods and chattels of the outlaw, summoning a jury to determine their value.

It was a part of the process subsequent to the capias, and was issued to compel an appearance where the defendant had absconded and a capias could not be served upon him. The outlawry was readily reversed upon any plausible pretext, upon appearance of a party in person or by attorney, as the object of the writ was then satisfied. The writ issued after an outlawry in a criminal as well as in a civil case. See 3 Bla. Com. 281; 4 *id.* 320.

CAPIAS IN WITHERNAM. A writ directing the sheriff to take other goods of a distrainor equal in value to a distress which he has formerly taken and still withholds from the owner beyond the reach of process.

When chattels taken by distress were decided to have been wrongfully taken and were by the distrainor *elongned*, that is, carried out of the county or concealed, the sheriff made such a return. Thereupon this writ issued, thus putting distress against distress.

Goods taken *in withernam* are irrepleviable till the original distress be forthcoming; 3 Bla. Com. 148.

CAPIATUR PRO FINE. See CAPIAS PRO FINE.

CAPITA (Lat.). Heads, and figuratively entire bodies, whether of persons or animals. Spelman.

An expression of frequent occurrence in laws regulating the distribution of the estates of persons dying intestate. When all the persons entitled to shares in the distribution are of the same degree of kindred to the deceased person (*e. g.* when all are grandchildren), and claim directly from him in their own right, and not through an intermediate relation, they take *per capita*, that is, equal shares, or share and share alike. But when they are of different degrees of kindred (*e. g.* some the children, others the grandchildren or the great-grandchildren of the deceased), those more remote take *per stirpem* or *per stirpes*, that is, they take respectively the shares their parents (or other relation standing in the same degree with them of the surviving kindred entitled, who are in the nearest degree of kindred to the intestate) would have taken had they respectively survived the intestate Reeve, Descent, Introd. xxvii.; also, 1 Roper, Leg. 126, 130 See PER CAPITA; PER STIRPES; STIRPES.

CAPITAL. The sum of money which a merchant, banker, or trader adventures in any undertaking, or which he contributes to the common stock of a partnership, and also the fund of a trading company. McCulloch.

Capital signifies the actual estate, whether in money or property, owned by an individual or corporation; People v. Com'rs of Taxes, 23 N. Y. 192; it is the fund upon which it transacts its business, which would be liable to its creditors, and in case of insolvency pass to a receiver; International Life Assur. Soc. of London v. Com'rs of Taxes, 28 Barb. (N. Y.) 318; it does not include money borrowed temporarily; Bailey v. Clark, 21 Wall. (U. S.) 284, 22 L. Ed. 651. See, also, Mechanics' & Farmers' Bank v. Townsend, 5 Blatchf. 315, Fed. Cas. No. 9,381; People v. Sup'rs, 18 Wend. (N. Y.) 605.

Profits of a corporation are not appropriated to its capital because it has incurred a debt nearly equal to such profits in permanent improvements; Davis v. Jackson, 152 Mass. 58, 25 N. E. 21, 23 Am. St. Rep. 801. See DIVIDENDS; INCOME; MONEYED CAPITAL.

As to what is moneyed capital in a federal act respecting state taxation of national bank stock, see Mercantile Bank v. New York, 121 U. S. 157, 7 Sup. Ct. 826, 30 L. Ed. 895; First Nat. Bank v. Chapman, 173 U. S. 214, 19 Sup. Ct. 407, 43 L. Ed. 669.

CAPITAL CRIME. One for which the punishment of death is inflicted.

CAPITAL PORTMEN. See IPSWICH, DOMESDAY OF.

CAPITAL PUNISHMENT. The punishment of death.

The subject of capital punishment has occupied the attention of enlightened men for a long time, particularly since the middle of the last century; and none deserves to be more carefully investigated. The right of punishing its members by society is admitted; but how far this right extends, by the laws of nature or of God, has been much disputed by theoretical writers, although it cannot be denied

that most nations, ancient and modern, have deemed capital punishment to be within the scope of the legitimate powers of government. Beccaria contends with zeal that the punishment of death ought not to be inflicted in time of peace, nor at other times, except in cases where the laws can be maintained in no other way. Beccaria, chap. 28.

The ancient method of administering the law was by retribution or the vindication of the law upon the offender, and in England, as late as Geo. III., there were about two hundred offences punishable by death, among which were cutting down a tree, robbing a rabbit warren, harboring an offender against the revenue acts, stealing in a dwelling-house to the amount of forty shillings, or in a shop goods to the amount of five shillings, counterfeiting the stamps that were used for the sale of perfumery, etc. Owing to the efforts of Sir Samuel Romilly, and later of Sir James Mackintosh, the old criminal code was succeeded by more humane legislation, and since the statute of 1861 there are but four crimes now punishable in England by death, high treason, murder, piracy with violence, and setting fire to the king's ships, dockyards, arsenals or stores. See, also, 2 Poll & Maitl. 450; CRIMES; EXECUTION. It was abolished in Italy in 1890, and has recently been restored in France. It has been abolished in some states. It is usually by hanging; some states have adopted electrocution; and two states permit a choice between hanging and shooting.

See ELECTROCUTION.

CAPITAL STOCK. The sum, divided into shares, which is raised by mutual subscription of the members of a corporation. It is said to be the sum upon which calls may be made upon the stockholders, and dividends are to be paid; Barry v. Exchange Co., 1 Sandf. Ch. (N. Y.) 280; State v. Fire Ass'n, 23 N. J. L. 195; Ang. & A. Corp. §§ 151, 556; Union Bank of Tennessee v. State, 9 Yerg. (Tenn.) 490; State Bank of Wisconsin v. City of Milwaukee, 18 Wis. 281. The term is used to indicate the amount of capital which the charter provides for, and not the value of the property of the corporation; State v. Fire Ass'n, 23 N. J. L. 195; or the original amount upon which a corporation commences; State Bank v. City Council, 3 Rich. (S. C.) 346. See St. Louis, I. M. & S. Ry. Co. v. Loftin, 30 Ark. 693 (*contra*, under an Illinois revenue statute; Pacific Hotel Co. v. Lieb, 83 Ill. 602); the entire sum agreed to be contributed to the enterprise, whether paid in or not; Reid v. Mfg. Co., 40 Ga. 98, 2 Am. Rep. 563.

It has been held to mean the amount paid in, not the amount subscribed; City of Philadelphia v. Ry. Co., 52 Pa. 177; Mayeski v. His Creditors, 40 La. Ann. 98, 4 South. 9; *contra*, Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; nor that named in the articles of association; Pratt v. Munson, 17 Hun (N. Y.) 475. See 1 Thomp. Corp. § 1060; STOCK.

CAPITALIS JUSTICIARIUS. See JUSTICIAR.

CAPITANEUS. He who held his land or title directly from the king himself.

A commander or ruler over others, either in civil, military, or ecclesiastical matters.

A naval commander. This latter use began A. D. 1264. Spelman, Gloss. *Capitaneus, Admiralius.*

CAPITATION (Lat. *caput*, head). A poll-tax. An imposition yearly laid upon each person.

The constitution of the United States provides that "no capitation or other direct tax shall be laid, unless in proportion to the census, or enumeration, hereinbefore directed to be taken." Art. 1, s. 9, n. 4. See Hylton v. U. S., 3 Dall. (U. S.) 171, 1 L. Ed. 556; Loughborough v. Blake, 5 Wheat. (U. S.) 317, 5 L. Ed. 98.

CAPITE. See IN CAPITE.

CAPITULA. Collections of laws and ordinances drawn up under heads or divisions. Spelman, Gloss.

The term is used in the civil and old English law, and applies to the ecclesiastical law also, meaning chapters or assemblies of ecclesiastical persons. Du Cange.

The *Royal and Imperial Capitula* were the edicts of the Frankish Kings and Emperors. They are distinguishable from the *leges* and probably had a less permanent effect. They might, by general consent, become a part of the *leges—legibus addita.*

CAPITULA CORONÆ. Specific and minute schedules, or *capitula itineris.*

CAPITULA ITINERIS. Schedules of inquiry delivered to the justices in eyre before setting out on their circuits, and which were intended to embrace all possible crimes.

CAPITULA DE JUDÆIS. A register of mortgages made to the Jews. 2 Bla. Com. 343; Crabb, Eng. Law 139.

CAPITULARY. **In French Law.** A collection of laws and ordinances orderly arranged by divisions.

The term is especially applied to the collections of laws made and published by the early French emperors. The execution of these capitularies was intrusted to the bishops, courts, and *missi regis*, and many copies were made. The best edition of the Capitularies is said to be that of Baluze, 1677, Co. Litt. 191 *a*, Butler's note 77.

In Ecclesiastical Law. A collection of laws and ordinances orderly arranged by divisions. A book containing the beginning and end of each Gospel which is to be read every day in saying mass. Du Cange.

CAPITULATION. The treaty which determines the conditions under which a fortified place or army in the field is abandoned to the commanding officer of the opposing army.

On surrender by capitulation, all the property of the inhabitants protected by the articles is considered by the law of nations as neutral, and not subject to capture on the high seas by the belligerent or its ally: Miller v. The Resolution, 2 Dall. (U. S.) 8, 1 L. Ed. 263.

Capitulations. The name used for treaty engagements between the Turkish government and the principal states of Europe by which subjects of the latter, residents in the territory of the former, were exempt from the laws of the places where they dwelt. 1 Kinglake, Invasion of Crimea 116.

In Civil Law. An agreement by which the prince and the people, or those who have

the right of the people, regulate the manner in which the government is to be administered. Wolffius, § 989.

CAPITULUM (Lat.). A leading division of a book or writing; a chapter; a section. Tert. Adv. Jud. 9, 19. Abbreviated, Cap.

CAPTAIN (Lat. *capitaneus;* from *caput,* head). The commander of a company of soldiers.

The term is also used of officers in the municipal police in a somewhat similar sense: as, captain of police, captain of the watch.

The master or commander of a merchant-vessel, or a vessel of war.

A subordinate officer having charge of a certain part of a vessel of war.

In the United States, the commander of a merchant-vessel is, in statutes and legal proceedings and language, more generally termed *master,* which title see. In foreign laws and languages he is frequently styled *patron.*

The rank of captain in the United States navy is next above that of commander; and captains are generally appointed from this rank in the order of seniority. The president has the appointing power, subject to the approval and consent of the senate

CAPTATION. In French Law. The act of one who succeeds in controlling the will of another, so as to become master of it. It is generally taken in a bad sense.

It was formerly applied to the first stage of the hypnotic or mesmeric trance.

Captation takes place by those demonstrations of attachment and friendship, by those assiduous attentions, by those services and officious little presents, which are usual among friends, and by all those means which ordinarily render us agreeable to others. When these attentions are unattended by deceit or fraud, they are perfectly fair, and the captation is lawful; but if, under the mask of friendship, fraud is the object, and means are used to deceive the person with whom you are connected, then the captation is fraudulent, and the acts procured by the captator are void.

CAPTION (Lat. *capere,* to take). A taking, or seizing; an arrest. The word is no longer used in this sense.

The heading of a legal instrument, in which is shown when, where, and by what authority it was taken, found, or executed.

In the English practice, when an inferior court, in obedience to the writ of certiorari, returned an indictment into the king's bench, it was annexed to the caption, then called a schedule, and the caption concluded with stating that "it is presented in manner and form as appears in a certain indictment thereto annexed," and the caption and indictment were returned on separate parchments. 1 Wms Saund. 309, n. 2.

In some of the states, every indictment has a caption attached to it, and returned by the grand jury as part of their presentment in each particular case, and in this respect a caption differs essentially from that of other tribunals, where the separate indictments are returned without any caption, and the caption is added by the clerk of the court, as a general caption embracing all the indictments found at the term; Com. v. Stone, 3 Gray (Mass.) 454; Com. v. Edwards, 4 Gray (Mass.) 5; Com. v. Gee, 6 Cush. (Mass.) 174.

In Criminal Practice. The object of the caption is to give a formal statement of the proceedings, describe the court before which the indictment is found, and the time when and place where it was found; Hall, Int. L. 413; Com. v. Stone, 3 Gray (Mass.) 454; and the jurors by whom it was found; Whart. Cr. Pl. § 91. Thus particulars must be set forth with reasonable certainty; U. S. v. Prentice, 6 McLean, 66, Fed. Cas. No. 16,083; State v. Conley, 39 Me. 78; Reeves v. State, 20 Ala. 33. It must show that the *venire facias* was returned and from whence the jury came; Whart. Cr. Pl. § 91. The caption may be amended in the court in which the indictment was found; U. S. v. Prentice, 6 McLean 66, Fed. Cas. No. 16,083; Com. v. Hines, 101 Mass. 33; Brown v. Com., 78 Pa. 122; even in the supreme court; State v. Jones, 9 N. J. L. 357, 17 Am. Dec. 483; State v. Williams, 2 McCord (S. C.) 301. It is no part of the indictment; Com. v. Stone, 3 Gray (Mass.) 454; State v. Wentworth, 37 N. H. 196; People v. Bennett, 37 N. Y. 117, 93 Am. Dec. 551; Noles v. State, 24 Ala. 672.

A clerical error in naming the district court of Alaska in the caption of an indictment as "the District Court of the United States," etc., does not vitiate such indictment; Jackson v. U. S., 102 Fed. 473, 42 C. C. A. 452.

In Depositions. The caption should state the title of the cause, the names of the parties, and at whose instance the depositions are taken; Knight v. Nichols, 34 Me. 208. See Waskern v. Diamond, 1 Hemp. 701, Fed. Cas. No. 17,248; Weeks, Depositions.

For some decisions as to the forms and requisites of captions, see State v. Sutton, 5 N. C. 281; State v. Creight, 1 Brev. (S. C.) 169, 2 Am. Dec. 656; Mitchell v. State, 8 Yerg. (Tenn.) 514; State v. Brickell, 8 N. C. 354; Kirk v. State, 6 Mo. 469; Duncan v. People, 1 Scam. (Ill.) 456; Beauchamp v. State, 6 Blackf. (Ind.) 299; Thomas v. State, 5 How. (Miss.) 20.

CAPTIVE. A prisoner of war. Such a person does not by his capture lose his civil rights.

CAPTOR. In International Law. A belligerent who has taken property from an enemy or from an offending belligerent. The term also designates a belligerent who has captured the person of an enemy.

Formerly, goods taken in war were adjudged to belong to the captor; they are now considered to vest primarily in the state or sovereign, and belong to the individual captors only to the extent that the municipal laws provide. Captors are responsible to the owners of the property for all losses and damages, when the capture is tortious and without reasonable cause in the exercise of belligerent rights. But if the capture is originally justifiable, the captors will not be responsible, unless by subsequent misconduct they become trespassers *ab initio;* 1 C. Rob. Adm. 93, 96. See The Flying Fish, 2 Gall. 374, Fed. Cas. No. 4,892; The Anne Green, 1 Gall. 274, Fed. Cas. No. 414; Hart v. The

Littlejohn, 1 Pet. Adm. 116, Fed. Cas. No. 6,153; The London Packet, 1 Mas. 14, Fed. Cas. No. 8,474.

CAPTURE. In International Law. The taking of property by one belligerent from another or from an offending neutral.

Private property of the enemy is not subject to capture on land, but the contrary rule holds at sea. When private enemy vessels are seized at sea, title does not immediately vest in the captor, but the vessel must be brought before a prize court and legally condemned. When public enemy vessels are seized, title vests immediately in the captor state. Capture is deemed lawful when made in accordance with the laws of war.

Private neutral property is subject to capture by a belligerent for the carriage of contraband (*q. v.*), breach of blockade (*q. v.*) and unneutral service (*q. v.*) The Declaration of Paris (*q. v.*) laid down the rule that enemy goods, except contraband of war, should not be subject to capture under a neutral flag, nor neutral goods under an enemy flag.

It has been a subject of controversy whether captured neutral vessels may be destroyed by a belligerent under exceptional circumstances. British practice held that neutral prizes should be abandoned if they could not be brought into court. Russia followed the opposite rule in the war with Japan in 1905. The Declaration of London (*q. v.*) compromised the question and allows destruction of a neutral vessel when it is liable to condemnation upon the facts of the case and when the release of the vessel would involve danger to the safety of the war-ship and the success of the operations in which she is engaged at the time. II Opp. 546–558. See NEUTRALITY.

CAPUT (Lat. head).

In Civil Law. Status; a person's civil condition.

According to the Roman law, three elements concurred to form the *status* or *caput* of the citizen, namely, liberty, *libertas*, citizenship, *civitas*, and family, *familia*.

Libertas est naturalis facultas ejus quod cuique facere libet, nisi si quid vi aut jure prohibetur. This definition of liberty has been translated by Dr Cooper, and all the other English translators of the Institutes, as follows: "Freedom, from which we are denominated free, is the natural power of acting as we please, unless prevented by force or by the law." This, although it may be a literal, is certainly not a correct, translation of the text. It is absurd to say that liberty consists in the power of acting as we think proper, so far as not restrained by force; for it is evident that even the slave can do what he chooses, except so far as his volition is controlled by the power exercised over him by his master. The true meaning of the text is: "Liberty (from which we are called free) is the power which we derive from nature of acting as we please, except so far as restrained by physical and moral impossibilities." It is obvious that a person is perfectly free though he cannot reach the moon nor stem the current of the Mississippi; and it is equally clear that true freedom is not impaired by the rule of law not to appropriate the property of another to ourselves, or the precept of morality to behave with decency and decorum.

Civitas—the city—reminds us of the celebrated expression, "*civis sum Romanus*," which struck awe and terror into the most barbarous nations. The citizen alone enjoyed the *jus Quiritium*, which extended to the family ties, to property, to inheritance, to wills, to alienations, and to engagements generally. In striking contrast with the *civis* stood the *peregrinus hostis, barbarus*. *Familia*—the family—conveyed very different ideas in the early period of Roman jurisprudence from what it does in modern times. Besides the singular organization of the Roman family, explained under the head of pater familias, the members of the family were bound together by religious rites and sacrifices,—*sacra familiæ*.

The loss of one of these elements produced a change of the *status*, or civil condition; this change might be threefold; the loss of liberty carried with it that of citizenship and family, and was called the *maxima capitis deminutio;* the loss of citizenship did not destroy liberty, but deprived the party of his family, and was denominated *media capitis deminutio;* when there was a change of condition by adoption or abrogation, both liberty and citizenship were preserved, and this produced the *minima capitis deminutio*. But the loss or change of the *status*, whether the great, the less, or the least, was followed by serious consequences: all obligations merely civil were extinguished; those purely natural continued to exist. Gaius says, *Eas obligationes quæ naturalem præstationem habere intelliguntur, palam est capitis deminutione non perire, quia civilis ratio naturalia jura corrumpere non potest.* Usufruct was extinguished by the diminution of the head: *amittitur usufructus capitis deminutione.* D. 3. 6. § 28. It also annulled the testament: *"Testamenta jure facta infirmantur, cum is qui fecerit testamentum capite deminutus sit."* Gaius, 2, § 143.

At Common Law. A head.

Caput comitatis (the head of the county). The sheriff; the king. Spelman, Gloss.

A person; a life. The upper part of a town. Cowell. A castle. Spelman, Gloss.

Caput anni. The beginning of the year. Cowell.

CAPUT LUPINUM (Lat.). Having a wolf's head.

Outlaws were anciently said to have *caput lupinum*, and might be killed by any one who met them, if attempting to escape. 4 Bla. Com 320. In the reign of Edward III. this power was restricted to the sheriff when armed with lawful process, and this power, even, disappeared, and the process of outlawry was resorted to merely as a means of compelling an appearance; Co. Litt. 128 *b;* 4 Bla. Com. 284; 1 Reeve's Hist. Eng. Law 471. See OUTLAWRY.

CAPUTAGIUM. Head-money; the payment of head-money. Spelman, Gloss.; Cowell.

CAR TRUST ASSOCIATION. See ROLLING STOCK.

CAR TRUST SECURITIES. A name used commercially to indicate a class of investment securities based upon the conditional sale or hire of railroad cars or locomotives to railroad companies with a reservation of title or lien in the vendor or bailor until the property is paid for. See ROLLING STOCK.

CARAT. The weight of four grains, used by jewellers in weighing precious stones. Webster.

CARCAN. In French Law. An instrument of punishment, somewhat resembling a pillory. It sometimes signifies the punishment itself. Biret, Vocab.

CARDINAL. The title given to one of the highest dignitaries of the church of Rome.

Cardinals are next to the pope in dignity: he is elected by them and out of their body. There are cardinal bishops, cardinal priests, and cardinal deacons. See Fleury, *Hist. Eccles.* liv. xxxv. n 17, li. n. 19; Thomassin, part. ii. liv. i. c. 53, part iv. liv. i. cc. 79, 80; Loiseau, *Traité des Ordres*, c. 3, n. 21; André *Droit Canon.*

CARDS. Small rectangular pasteboards, on which are figures of various colors, used for playing certain games. The playing of cards for amusement is not forbidden; nor is gaming for money, at common law; Bish. Stat. Cr. § 504.

One who obtains from another a sum of money by a fraudulent use of cards is guilty of larceny; State v. Donaldson, 35 Utah 96, 99 Pac. 447, 20 L. R. A. (N. S.) 1164, 136 Am. St. Rep. 1041.

Cards are a gambling device; State v. Herryford, 19 Mo. 377; State v. Lewis, 12 Wis. 434.

CARE. Charge or oversight; implying responsibility for safety and prosperity. Webst. Dict.

It is used with reference to the degree of care required of bailees and carriers. For the utmost care, see Baltimore & O. R. Co. v. Worthington, 21 Md. 275, 83 Am. Dec. 578; Brand v. R. Co., 8 Barb. (N. Y.) 368; extraordinary care, Toledo, W. & W. Ry. Co. v. Baddeley, 54 Ill. 19, 5 Am. Rep. 71; great care, Brand v. R. Co., 8 Barb. (N. Y.) 368; especial care, Chicago & N. W. Ry. Co. v. Clark, 2 Ill. App. 116; proper and reasonable care, Neal v. Gillett, 23 Conn. 443; South & N. A. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; due care, Heathcock v. Pennington, 33 N. C. 640; Butterfield v. R. Co., 10 Allen (Mass.) 532, 87 Am. Dec. 678; ordinary care, State v. Railroad, 52 N. H. 528; Ernst v. R. Co., 35 N. Y. 9, 90 Am. Dec. 761; Smith v. R. Co., 10 R. I. 22; slight care, Johnson v. R. Co., 20 N. Y. 65, 75 Am. Dec. 375. See NEGLIGENCE.

CARETA (spelled, also, *Carreta* and *Carecta*). A cart; a cart-load.

In Magna Charta (9 Hen. III. c. 21) it is ordained that no sheriff shall take horses or carts *(careta)* without paying the ancient livery therefor.

CARGO. The entire load of a ship or other vessel. Abbott, Shipp.; Phile v. The Anna, 1 Dall. (U. S.) 197, 1 L. Ed. 98; Merlin, *Répert.*; Allegre's Adm'rs v. Ins. Co., 2 Gill & J. (Md.) 136, 20 Am. Dec. 424. See Benj. Sales §§ 589, 590.

This term is usually applied to *goods* only, and does not include human beings; 1 Phill. Ins. 185; 4 Pick. 429. But in a more extensive and less technical sense it includes persons: thus, we say, A cargo of emigrants. See 7 M. & G. 729, 744; Davison v. Von Lingen, 113 U. S. 49, 5 Sup. Ct. 346, 28 L. Ed. 885.

CARLISLE TABLES. Life and annuity tables compiled at Carlisle, England, about 1870. Used by actuaries and others. See LIFE TABLES.

CARMACK ACT. An act of Congress, June 29, 1906, amending the Hepburn Act. It supersedes all state regulations; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. Ed. 323.

CARNAL KNOWLEDGE. Sexual connection. Com. v. Squires, 97 Mass. 59; Noble v. State, 22 Ohio St. 541. The term is generally, if not exclusively, applied to the act of a male.

In the statutes relating to abuse or carnal knowledge of a female child of tender age, the word abuse includes the words carnally know, and the latter term also includes the former, as there could be no carnal knowledge of such a child by a man capable of committing rape, without injury; Dawkins v. State, 58 Ala. 376, 29 Am. Rep. 754.

CARNALLY KNEW. A technical phrase usual in an indictment to charge the defendant with the crime of rape.

These words were considered essential; Com. Dig. *Indictment;* 1 Ch. Cr. L. 243; 1 Hale, P. C. 632; but Chitty afterwards says that it does not seem so clear; 3 Ch. Cr. L. 812; and the settled opinion seems to be that the words "carnally knew" are included in the term "rapuit" and are therefore unnecessary; 2 Hawk. P. C. c. 25, § 56; 2 Stark. Cr. Pl. 431, n. *(e)*; but it is safer not to omit them; *id.;* 1 Ch. Cr. L. 243; 1 East, P. C. 448. These authorities would apply in states in which the offence is described simply as the crime of rape, but in those states where the crime is designated by the words "did ravish and carnally know" it would on general principles of criminal pleading be safer to use the words of the statute. The use of the words "carnally knew" will not supply the omission of the word "ravished"; 1 Hale, P. C. 628, 632; 3 Russell, Cr. (6th ed.) 230. See Noble v. State, 22 Ohio St. 545; Dawkins v. State, 58 Ala. 378, 29 Am. Rep. 754.

CARRIAGE. See VEHICLE; AUTOMOBILE.

CARRIER. One who undertakes to transport goods from one place to another. 2 Pars. Contr. (8th ed.) *163.

They are either *common* or *private.* Private carriers incur the responsibility of the exercise of ordinary diligence only, like other bailees for hire; Story, Bailm. § 495; Satterlee v. Groat, 1 Wend. (N. Y.) 272; ——— v. Jackson, 2 N. C. 14; Robertson & Co. v. Kennedy, 2 Dana (Ky.) 430, 26 Am. Dec. 466; 2 C. B. 877. Special carriers of goods are not insurers and are only liable for injuries caused by negligence; Allis v. Voigt, 90 Mich. 125, 51 N. W. 190. A carrier's liability attaches the moment goods are delivered to him; Gregory v. Ry. Co., 46 Mo. App. 574;

Railway Co. v. Neel, 56 Ark. 279, 19 S. W. 963.

See COMMON CARRIERS.

CARRYING AWAY. Such a removal or taking into possession of personal property as is required in order to constitute the crime of larceny.

The words "did take and carry away" are a translation of the words *cepit et asportavit*, which were used in indictments when legal processes and records were in the Latin language. But no single word in our language expresses the meaning of *asportavit*. Hence the word "away," or some other word, must be subjoined to the word "carry," to modify its general signification and give it a special and distinctive meaning. Com. v. Adams, 7 Gray (Mass.) 45.

Any removal, however right, of the entire article, which is not attached either to the soil or to any other thing not removed, is sufficient; 2 Bish. Cr. Law § 699; 1 Dearsl. 421; State v. Wilson, 1 N. J. L. 439, 1 Am. Dec. 216. Thus, to snatch a diamond from a lady's ear, which is instantly dropped among the curls of her heir; 1 Leach 320; to remove sheets from a bed and carry them into an adjoining room; 1 Leach 222, n.; to take plate from a trunk, and lay it on the floor with intent to carry it away; *id.*; to remove a package from one part of a wagon to another, with a view to steal it; 1 Leach 236; have respectively been holden to be felonies. But nothing less than such a severance will be sufficient; 2 East, Pl. Cr. 556; 1 Ry. & M. 14; 4 Bla. Com. 231; 2 Russ. Cr. 96; Clarke, Cr. L. 242, 260.

CARRYING CONCEALED WEAPONS. See ARMS.

CARS. See RAILROAD; INTERSTATE COMMERCE COMMISSION; ROLLING STOCK.

CART. A carriage for luggage or burden, with two wheels, as distinguished from a wagon, which has four wheels. Worcester, Dict.; Brande. The vehicle in which criminals are taken to execution. Johnson.

The term has been held to include four-wheeled vehicles, to carry out the intent of a statute; Favers v. Glass, 22 Ala. 621, 58 Am. Dec. 272.

CART BOTE. An allowance to the tenant of wood sufficient for carts and other instruments of husbandry. 2 Bla. Com. 35. See BOTE.

CARTA. A charter, which title see. Any written instrument.

In Spanish Law. A letter; a deed; a power of attorney. *Las Partidas*, pt. 3, t. 18, l. 30.

CARTA DE FORESTA. See CHARTA DE FORESTA.

CARTA MERCATORIA. A grant (1303) to certain foreign merchants, in return for custom duties, of freedom to deal wholesale in all cities and towns of England, power to export their merchandise, and liberty to dwell where they pleased, together with other rights pertaining to speedy justice; 1 Holdsw. Hist. E. L. 311.

CARTE BLANCHE. The signature of one or more individuals on a white paper, with a sufficient space left above it to write a note or other writing.

In the course of business, it not unfrequently occurs that, for the sake of convenience, signatures in blank are given with authority to fill them up. These are binding upon the parties. But the blank must be filled up by the very person authorized; Musson v. Bank, 6 Mart. O. S. (La.) 707. See Chit. Bills 70; Frazer v. D'Invilliers, 2 Pa. 200, 44 Am. Dec. 190. BLANK.

CARTEL. Agreements between belligerents authorizing certain non-hostile intercourse between one another which would otherwise be prevented by the state of war; for example, agreements for the exchange of prisoners, for intercommunication by post, telegraph, telephone, railway. II Op. 282.

Cartel ship. A ship commissioned in time of war to exchange prisoners, or to carry any proposals between hostile powers; she must carry no cargo, ammunition, or implements of war, except a single gun for signals. The conduct of ships of this description cannot be too narrowly watched. The service on which they are sent is so highly important to the interests of humanity that it is peculiarly incumbent on all parties to take care that it should be conducted in such a manner as not to become a subject of jealousy and distrust between the two nations; 4 C. Rob. Adm. 357. See Merlin, *Répert.*; Dane, Abr. c. 40, a. 6, § 7; 1 Kent 68; 3 Phill. Int. Law 161; Crawford v. Penn, 1 Pet. C. C. 106, Fed. Cas. No. 3,372; 3 C. Rob. Adm. 141; 6 *id.* 336; 1 Dods. Adm. 60.

A written challenge to a duel.

CARTMEN. Persons who carry goods and merchandise in carts, either for great or short distances, for hire.

Cartmen who undertake to carry goods for hire as a common employment are common carriers; 3 C. & K. 61; Edw. Bailm. 500; Story, Bailm. § 496. And see Allen v. Sewall, 2 Wend. (N. Y.) 327; Cohen v. Hume, 1 McCord (S. C.) 414; Smyrl v. Niolon, 2 Bail. (S. C.) 421, 23 Am. Dec. 146; Spencer v. Daggett, 2 Vt. 92; Williams v. Branson, 5 N. C. 417, 4 Am. Dec. 562; Bac. Abr. *Carriers*, A.

CARTULARIES. Ancient English records containing documents and legal proceedings —the muniments of title of the great landowners, and other miscellaneous documents. 2 Holdsw. Hist. E. L. 273. See 1 Poll. & Maitl. p. xxii.

CARUCA. A plow. A four-wheeled carriage. A team for a plow, of four oxen abreast. See CARUCATA.

CARUCAGE. A taxation of land by the *caruca*. The act of plowing.

The *caruca* was as much land as a man could cultivate in a year and a day with a single plow *(caruca)*. *Carucage, carugage,* or *caruage* was the tribuate paid for each *caruca* by the *carucarius,* or tenant. Spelman, Gloss.; Cowell.

CARUCATA, CARUCATE. A certain quantity of land used as the basis for taxation. A cartload. As much land as may be tilled by a single plow in a year and a day. Skene, *de verb. sig.* A plow land of one hundred acres. Ken. Gloss. The quantity varies in different counties from sixty to one hundred and twenty acres. Whart. See Littleton, Ten. cclxii.

It may include houses, meadow, woods, etc. It is said by Littleton to be the same as *soca,* but has a much more extended signification. Spelman, Gloss.; Blount; Cowell.

Carucate was a primitive measure of land in England. *Caruca* was a plow team. *Carucate* was based upon the amount of land eight oxen could cultivate in a year. As a fiscal unit it was equivalent to a hide of 120 acres. An eighth was a bovate. 2 Holdsw. Hist. E. L. 56; Maitl. Domesday Book and Beyond 395. See 1 L. J. R. 96.

CASE. A question contested before a court of justice. An action or suit at law or in equity. Martin v. Hunter, 1 Wheat. (U. S.) 352, 4 L. Ed. 97.

A case arising under a treaty, within U. S. Const. art. 3, § 2, is a suit in which the validity or construction of a treaty of the United States is drawn in question; 2 Sto. Const. § 1647; and under the judiciary act of 1789, § 25, the United States supreme court exercises an appellate jurisdiction in such cases decided by a state court only when the decision of the latter is against the title, right, privilege, or exemption set up or claimed by the party seeking to have the decision reviewed; Martin v. Hunter, 1 Wheat. (U. S.) 356, 4 L. Ed. 97. The decision of the state court against the claimant must be upon the construction of the treaty; if it rests upon other grounds it is not a case arising under a treaty, and the supreme court is without any jurisdiction; Gill v. Oliver, 11 How. (U. S.) 529, 13 L. Ed. 799; Williams v. Oliver, 12 How. (U. S.) 111, 13 L. Ed. 915.

In Practice. A form of action which lies to recover damages for injuries for which the more ancient forms of action will not lie. Steph. Pl., And. ed. § 52.

Case, or, more fully, action upon the case, or trespass on the case, includes in its widest sense *assumpsit* and *trover,* and distinguishes a class of actions in which the writ is framed according to the special circumstances of the case, from the ancient actions, the writs in which, called *brevia formata,* are collected in the *Registrum Brevium.*

By the common law, and by the statute Westm. 2d, 13 Edw. I. c. 24, if any cause of action arose for which no remedy had been provided, a new writ was to be formed, analogous to those already in existence which were adapted to similar causes of action. The writ of trespass was the original writ most commonly resorted to as a precedent; and in process of time the term trespass seems to have been so extended as to include every species of wrong causing an injury, whether it was *malfeasance, misfeasance,* or *nonfeasance,* apparently for the purpose of enabling an action on the case to be brought in the king's bench. It thus includes actions on the case for breach of a parol undertaking, now called assumpsit (see ASSUMPSIT), and actions based upon a finding and subsequent unlawful conversion of property, now called trover (see TROVER), as well as many other actions upon the case which seem to have been derived from other originals than the writ of trespass, as nuisance, deceit, etc.

And, as the action had thus lost the peculiar character of a technical trespass, the name was to a great extent dropped, and actions of this character came to be known as actions on the case.

As used at the present day, *case* is distinguished from *assumpsit* and *covenant,* in that it is not founded upon any contract, express or implied; from *trover,* which lies only for unlawful conversion; from *detinue* and *replevin,* in that it lies only to recover damages; and from *trespass,* in that it lies for injuries committed without force, or for forcible injuries which damage the plaintiff consequentially only, and in other respects. See 3 Reeves, Eng. Law 84; 1 Spence, Eq. Jur. 237; 1 Chit. Pl. 123; 3 Bla. Com. 41; Poll. Tort 645; 5 Term 648.

A similar division existed in the civil law, in which upon nominate contracts an action distinguished by the name of the contract was given. Upon innominate contracts, however, an action *præscriptis verbis* (which lay where the obligation was one already recognized as existing at law, but to which no name had been given), or *in factum* (which was founded on the equity of the particular case), might be brought.

The action lies for:

Torts not committed with force, actual or implied; Metcalf v. Alley, 24 N. C. 38; Law v. Law, 2 Gratt. (Va.) 366; Griffin v. Farwell, 20 Vt. 151; as, for malicious prosecution; Muse v. Vidal, 6 Munf. (Va.) 27; Shaver v. White, 6 Munf. (Va.) 113, 8 Am. Dec. 730; Warfield v. Walter, 11 Gill & J. (Md.) 80; Hays v. Younglove, 7 B. Monr. (Ky.) 545; Seay v. Greenwood, 21 Ala. 491; Lally v. Cantwell, 30 Mo. App. 524; Swift v. Chamberlain, 3 Conn. 537; 5 M. & W. 270; see MALICIOUS PROSECUTION; fraud in contracts of sale; Hughes v. Robertson, 1 T. B. Monr. (Ky.) 215, 15 Am. Dec. 104; Ward v. Wiman, 17 Wend. (N. Y.) 193; Casco Mfg. Co. v. Dixon, 3 Cush. (Mass.) 407; Mowry v. Schroder, 4 Strobh. (S. C.) 69; Johnson v. McDaniel, 15 Ark. 109; Oliver v. Perkins, 92 Mich. 304, 52 N. W. 609; conspiracy to defame; Wildee v. McKee, 111 Pa. 335, 2 Atl. 108, 56 Am. Rep. 271.

Torts committed forcibly where the matter affected was *not tangible;* Wetmore v. Robinson, 2 Conn. 529; Wilson v. Wilson, 2 Vt. 68; as for obstructing a private way; Lambert v. Hoke, 14 Johns. (N. Y.) 383; Wright v. Freeman, 5 Harr. & J. (Md.) 467; Cushing v. Adams, 18 Pick. (Mass.) 110; Osborne v. Butcher, 26 N. J. L. 308; disturbing the plaintiff in the use of a pew; 1 Chit. Pl. 43; injury to a franchise.

Torts committed forcibly when the injury is consequential merely, and not immediate; Cotteral v. Cummins, 6 S. & R. (Pa.) 348; Knott v. Digges, 6 Harr. & J. (Md.) 230;

4 D. & B. 146; Hamilton v. Water Power Co., 81 Mich. 21, 45 N. W. 648; as, special damage from a public nuisance; Martin v. Bliss, 5 Blackf. (Ind.) 35, 32 Am. Dec. 56; Garrett v. McKie, 1 Rich. (S. C.) 444, 44 Am. Dec. 263; Hay v. Cohoes Co., 3 Barb. (N. Y.) 42; Beardsley v. Swan, 4 McLean, 333, Fed. Cas. No. 1,187; Plumer v. Alexander, 12 Pa. 81; Scott v. Bay, 3 Md. 431; acts done on the defendant's land which by immediate consequence injure the plaintiff; Shrieve v. Stokes, 8 B. Monr. (Ky.) 453, 48 Am. Dec. 401; Woodward v. Aborn, 35 Me. 271, 58 Am. Dec. 699; Hay v. Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279; Tremain v. Cohoes Co., 2 N. Y. 163, 51 Am. Dec. 284; Thayer v. Brooks, 17 Ohio 489, 49 Am. Dec. 474; Nelson v. Godfrey, 12 Ill. 20; Whitney v. Bartholomew, 21 Conn. 213. See Pruitt v. Ellington, 59 Ala. 454; Fleming v. Lockwood, 36 Mont. 384, 92 Pac. 962, 14 L. R. A. (N. S.) 628, 122 Am. St. Rep. 375, 13 Ann. Cas. 263.

Injuries to the relative rights; Vanhorn v. Freeman, 6 N. J. L. 322; Haney v. Townsend, 1 McCord (S. C.) 207; Ream v. Rank, 3 S. & R. (Pa.) 215; McGowen v. Chapen, 6 N. C. 61; Durden v. Barnett, 7 Ala. 169; Hopson v. Boyd, 6 B. Monr. (Ky.) 296; Van Vacter v. McKillip, 7 Blackf. (Ind.) 578; Wilbur v. Brown, 3 Den. (N. Y.) 361; enticing away servants and children; 4 Litt. 25; Legaux v. Feasor, 1 Yeates (Pa.) 586; Thacker Coal Co. v. Burke, 59 W. Va. 253, 53 S. E. 161, 5 L. R. A. (N. S.) 1091, 8 Ann. Cas. 885; seduction of a daughter or servant; Clough v. Tenney, 5 Greenl. (Me.) 446; or wife; Matheis v. Mazet, 164 Pa. 580, 30 Atl. 434. Also for criminal conversation with spouse, by husband; Bedan v. Turney, 99 Cal. 649, 34 Pac. 442; Browning v. Jones, 52 Ill. App. 597; Dalton v. Dregge, 99 Mich. 250, 58 N. W. 57; but not by wife against another woman; Kroessin v. Keller, 60 Minn. 372, 62 N. W. 438, 27 L. R. A. 685, 51 Am. St. Rep. 533; for alienation of affection of spouse, by husband; French v. Deane, 19 Colo. 504, 36 Pac. 609, 24 L. R. A. 387; Fratini v. Caslani, 66 Vt. 273, 29 Atl. 252, 44 Am. St. Rep. 843; or the wife; Railsback v. Railsback, 12 Ind. App. 659, 40 N. E. 276, 1119; Young v. Young, 8 Wash. 81, 35 Pac. 592; Price v. Price, 91 Ia. 693, 60 N. W. 202, 29 L. R. A. 150, 51 Am. St. Rep. 360; Rice v. Rice, 104 Mich. 371, 62 N. W. 833. See HUSBAND; WIFE.

Injuries which result from *negligence;* Carey v. R. Co., 1 Cush. (Mass.) 475, 48 Am. Dec. 616; Cook v. Transp. Co., 1 Den. (N. Y.) 91; Ellis v. R. Co., 24 N. C. 138; Clifford v. Richardson, 18 Vt. 620; McCready v. R. Co., 2 Strobh. (S. C.) 356; Freer v. Cameron, 4 Rich. (S. C.) 228, 55 Am. Dec. 663; Ferrier v. Wood, 9 Ark. 85; Thomasson v. Agnew, 24 Miss. 93; Lord v. Ocean Bank, 20 Pa. 387, 59 Am. Dec. 728; Fleet v. Hollenkemp, 13 B. Monr. (Ky.) 219, 56 Am. Dec. 563; Conger v. R. Co., 15 Ill. 366; Kerwhaker v. R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; though the direct result of actual force; 4 B. & C. 223; Blin v. Campbell, 14 Johns. (N. Y.) 432; Dalton v. Favour, 3 N. H. 465; Cole v. Fisher, 11 Mass. 137; Maull v. Wilson, 2 Harr. (Del.) 443; Baldridge v. Allen, 24 N. C. 206; Claflin v. Wilcox, 18 Vt. 605; Schuer v. Veeder, 7 Blackf. (Ind.) 342; Brennan v. Carpenter, 1 R. I. 474.

Wrongful acts done under a legal process regularly issuing from a court of competent jurisdiction; Watson v. Watson, 9 Conn. 141, 23 Am. Dec. 324; Hayden v. Shed, 11 Mass. 500; Plummer v. Dennett, 6 Greenl. (Me.) 421, 20 Am. Dec. 316; Lovier v. Gilpin, 6 Dana (Ky.) 321; Turner v. Walker, 3 Gill & J. (Md.) 377, 22 Am. Dec. 329; Riley v. Johnston, 13 Ga. 260; Robinson v. Kellum, 6 Cal. 399; Joseph v. Henderson, 95 Ala. 213, 10 South. 843.

Wrongful acts committed by the defendant's servant without his order, but for which he is responsible; Powell v. Deveney, 3 Cush. (Mass.) 300, 50 Am. Dec. 738; Broughton v. Whallon, 8 Wend. (N. Y.) 474; Mayor, etc., of City of Memphis v. Lasser, 9 Humphr. (Tenn.) 757; Fleet v. Hollenkemp, 13 B. Monr. (Ky.) 219, 56 Am. Dec. 563; Samyn v. McClosky, 2 Ohio St. 536; Illinois Cent. R. Co. v. Reedy, 17 Ill. 580.

The infringement of rights given by statute; Sharp v. Curtiss, 15 Conn. 526; Riddle v. Proprietors of Locks and Canals, 7 Mass. 169, 5 Am. Dec. 35; Savings Inst. v. Makin, 23 Me. 371; Hunt v. Town of Pownal, 9 Vt. 411; Hull v. Richmond, 2 Woodb. & M. 337, Fed. Cas. No. 6,861.

Injuries committed to property of which the plaintiff has the *reversion* only; Ashley v. Ashley, 4 Gray (Mass.) 197; Noyes v. Stillman, 24 Conn. 15; Hall v. Snowhill, 14 N. J. L. 8; Campbell v. Arnold, 1 Johns. (N. Y.) 511; Hilliard v. Dortch, 10 N. C. 246; Williams v. Lanier, 44 N. C. 30; McGowen v. Chapen, 6 N. C. 61; Elliot v. Smith, 2 N. H. 430; Ives v. Cress, 5 Pa. 118, 47 Am. Dec. 401; Short v. Piper, 4 Harr. (Del.) 181; Kidder v. Jennison, 21 Vt. 108; Beavers v. Trimmer, 25 N. J. L. 97; Tinsman v. R. Co., 25 N. J. L. 255, 64 Am. Dec. 415; Files v. Magoon, 41 Me. 104; as where property is in the hands of a bailee for hire; 3 East 593; Hilliard v. Dortch, 10 N. C. 246; Hawkins v. Phythian, 8 B. Monr. (Ky.) 515; also where grantor destroys an unrecorded deed placed in his hands for safekeeping by the grantee; Edwards v. Dickinson, 102 N. C. 519, 9 S. E. 456.

As to the effect of intention, as distinguishing case from trespass, see Bell v. Lakin, 1 McMull. (S. C.) 364; Schuer v. Veeder, 7 Blackf. (Ind.) 342; Vandenburgh v. Truax, 4 Den. (N. Y.) 464, 47 Am. Dec. 268; Schuneman v. Palmer, 4 Barb. (N. Y.) 225; Kelly

v. Lett, 35 N. C. 50; Moore v. Appleton, 26 Ala. 633. In some states the distinction is expressly abolished by statute; Welch v. Whittemore, 25 Me. 86; Hines v. Kinnison, 8 Blackf. (Ind.) 119; Luttrell v. Hazen, 3 Sneed (Tenn.) 20; Schultz v. Frank, 1 Wis. 352.

The declaration must not state the injury to have been committed *vi et armis;* Gates v. Miles, 3 Conn. 64 [yet after verdict the words *vi et armis* (with force and arms) may be rejected as surplusage; White v. Marshall, Harp. (S. C.) 122]; and should not conclude *contra pacem;* Com. Dig. *Action on the Case* (C, 3).

Damages not resulting necessarily from the acts complained of must be specially stated; Rowand v. Bellinger, 3 Strobh. (S. C.) 373; Swan v. Tappan, 5 Cush. (Mass.) 104; Morris v. McCamey, 9 Ga. 160; Hall v. Kitson, 4 Chandl. (Wis.) 20. Evidence which shows the injury to be trespass will not support case; Dillingham v. Snow, 5 Mass. 560; Burdick v. Worrall, 4 Barb. (N. Y.) 596; Scott v. Bay, 3 Md. 431.

The plea of not guilty raises the general issue; Henion v. Morton, 2 Ashm. (Pa.) 150. Under this plea almost any matter may be given in evidence, except the statute of limitations; the rule is modified in actions for slander and a few other instances; 1 Wms. Saund. 130.

The judgment is that the plaintiff recover a sum of money ascertained by a jury for his damages sustained by the commission of the grievances complained of in the declaration; Cox v. Skeen, 24 N. C. 221, 38 Am. Dec. 691; Burdick v. Glasko, 18 Conn. 494; with costs. See Act. & Def. ch. xxxiv., as to cases in which this action will lie.

"*Case or controversy,*" as used in the judiciary act, imply the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication; Muskrat v. U. S., 219 U. S. 346, 31 Sup. Ct. 250, 55 L. Ed. 246.

Cases, in the title of an old law book, may mean moot cases or questions put by the author for the consideration of the reader; *e. g.,* Stillingfleet's "Ecclesiastical Cases . . . Stated and Resolved," 1698–1704.

CASE CERTIFIED. Where there is a difference of opinion between the judges of the circuit court, they may certify the question to the supreme court of the United States, but it must be a distinct point or proposition of law so clearly stated that it can be answered without regard to the other issues of law or fact in the case; Fire Ins. Ass'n v. Wickham, 128 U. S. 426, 9 Sup. Ct. 113, 32 L. Ed. 503; U. S. v. Perrin, 131 U. S. 55, 9 Sup. Ct. 681, 38 L. Ed. 88; U. S. v. Reilly, 131 U. S. 58, 9 Sup. Ct. 664, 33 L. Ed. 75. It must not involve the whole case and must be a question of law only; Fire Ins. Ass'n v. Wickham, 128 U. S. 426, 9 Sup. Ct. 113, 32 L. Ed. 503; nor can a case be certified in advance of a regular trial; U. S. v. Perrin, 131 U. S. 55, 9 Sup. Ct. 681, 38 L. Ed. 88.

CASE LAW. The body of law created by judicial decisions, as distinguished from law derived from statutory and other sources. See PRECEDENTS; STARE DECISIS.

CASE MADE. A statement of facts in relation to a disputed point of law, agreed to by both parties and submitted to the court *without a preceding action.* This is only found in the Code states. See De Armond v. Whitaker, 99 Ala. 252, 13 South. 613; Farthing v. Carrington, 116 N. C. 315, 22 S. E. 9; Bradford v. Buchanan, 39 S. C. 237, 17 S. E. 501.

CASE STATED. A statement of all the facts of a case, with the names of the witnesses, and a detail of the documents which are to support them. A brief.

An agreement in writing, between a plaintiff and defendant, that the facts in dispute between them are as therein agreed upon and set forth. Diehl v. Ihrie, 3 Whart. (Pa.) 143.

Some process of this kind exists, it is presumed, in all the states, for the purpose of enabling parties who agree upon the facts to dispense with a formal trial to ascertain what is already known, and secure a decision upon the law involved merely. These agreements are called also agreed cases, cases agreed on, agreed statements, etc. In chancery, also, when a question of mere law comes up, it is referred to the king's bench, or common pleas, upon a case stated for the purpose; 3 Sharsw. Bla. Com. 453, n., 6 Term 313

A case stated usually embodies a written statement of the facts in the case consented to by both parties as correct, and submitted to the court by their agreement, that a decision may be rendered upon the court's conclusions of law on the facts stated, without a trial by jury.

The facts being thus ascertained, it is left for the court to decide for which party is the law. As no writ of error lies on a judgment rendered on a case stated; Dane, Abr. c. 137, art. 4, § 7; it is usual in the agreement to insert a clause that the case stated shall be considered in the nature of special verdict. In that case, a writ of error lies on the judgment which may be rendered upon it. But a writ of error will also lie on a judgment on a case stated, when the parties have agreed to it; Fuller v. Trevoir, 8 S. & R. (Pa.) 529; and it is usual to include such a provision.

There must be a pending action, in which the case is stated; Smith v. Eline, 4 D. R. (Pa.) 490; it must state all the facts; and cannot refer to outside documents; Hemphill v. Yerkes, 132 Pa. 545, 19 Atl. 342, 19 Am. St. Rep. 607; the court must decide on the case stated, not on the report of a master subsequently appointed; Frailey v. Legion of Honor, 132 Pa. 578, 20 Atl. 684; and cannot

go outside of the case stated in deciding it; Northampton Co. v. Ry. Co., 148 Pa. 282, 23 Atl. 895; Mutchler v. City of Easton, 148 Pa. 441, 23 Atl. 1109; Com. v. Howard, 149 Pa. 302, 24 Atl. 308; if no right of appeal is reserved, the decision of the court is final; Com. v. Callahan, 153 Pa. 625, 25 Atl. 1000.

Where a controversy is submitted to a court upon a case stated, but which fails to recite that it is submitted for its opinion on the law and judgment, the court is without jurisdiction to render judgment; Tyson v. Bank, 77 Md. 412, 26 Atl. 520, 23 L. R. A. 161. Where an agreed statement was made by the parties under a mistake of facts, it was a proper subject of amendment; Levy v. Sheehan, 3 Wash. St. 420, 28 Pac. 748.

CASE SYSTEM. A method of teaching or studying the science of the law by a study of the cases historically, or by the inductive method. It was introduced in the Law School of Harvard University in 1869–70 by Christopher C. Langdell, Dane Professor of Law. It is usually based upon printed collections of selected cases arranged chronologically under appropriate titles. The system is not necessarily based upon the exclusive use of cases, but the cases are made the basis of instruction. Text-books may be used for the purpose of reference and collateral reading, and are so used by many teachers under this system. It has been very generally adopted in law schools.

The reasons for the adoption of this system of instruction are given in a paper read before the Section of Legal Education of the American Bar Association in 1894 by Professor W. A. Keener, formerly of the Law School of Harvard University.

"1. That law, like other applied sciences, should be studied in its application, if one is to acquire a working knowledge thereof. 2. That this is entirely feasible for the reason that while the adjudged cases are numerous the principles controlling them are comparatively few. 3. That it is by the study of cases that one is to acquire the power of legal reasoning, discrimination and judgment, qualities indispensable to the practising lawyer. 4. That the study of cases best develops the power to analyze and to state clearly and concisely a complicated state of facts, a power which, in no small degree, distinguished the good from the poor and indifferent lawyer. 5. That the system, because of the study of fundamental principles, avoids the danger of producing a mere case lawyer, while it furnishes, because the principles are studied in their application to facts, an effectual preventive of any tendency to mere academic learning. 6. That the student, by the study of cases, not only follows the law in its growth and development, but thereby acquires the habit of legal thought, which can be acquired only by the study of cases, and which must be acquired by him either as a student, or after he has become a practitioner, if he is to attain any success as a lawyer. 7. That it is the best adapted to exciting and holding the interest of the student, and is, therefore, best adapted to making a lasting impression upon his mind. 8. That it is a method distinctly productive of individuality in teaching and of a scientific spirit of investigation, independence, and self-reliance on the part of the student." Reprinted in 28 Am. L. Rev. 709.

See also 24 *id.* 211; 27 *id.* 801; 12 Harv. L. Rev. 203, 418; 9 *id.* 169; 14 *id.* 258; 27 Am. L. Reg. 416; Report of Amer. Bar Assoc. 1895, 1896.

CASH. That which circulates as money, including bank bills, but not mere bills receivable. The provision of the limited partnership acts requiring "actual cash payment" by the special partner is not complied with by the delivery to the firm of promissory notes, which are received and treated as cash; Pierce v. Bryant, 5 Allen (Mass.) 91; nor of credits, Van Ingen v. Whitman, 62 N. Y. 513; nor of post-dated checks, Durant v. Abendroth, 69 N. Y. 148, 25 Am. Rep. 158; though regular checks of third parties, conceded to represent cash, have been allowed; Hogg v. Orgill, 34 Pa. 344.

Cash price is the price of articles paid for in cash at the time of purchase, in distinction from the barter and credit prices. A sale for cash is a sale for money in hand; Steward v. Scudder, 24 N. J. L. 101.

CASH-BOOK. A book in which a merchant enters an account of all the cash he receives or pays. An entry of the same thing ought to be made, under the proper dates, in the journal. The object of the cash-book is to afford a constant facility to ascertain the true state of a man's cash. Pardessus, n. 87.

CASH REGISTER. In a prosecution for selling liquor on certain days, cash register records were held inadmissible to sustain the testimony of a party to the transaction that liquor had not been sold; Cullinan v. Moncrief, 90 App. Div. 538, 85 N. Y. Supp. 745. They are not books of account, but memoranda made by a party in his own interest. See note in 13 Yale L. J. 397.

CASHIER. An officer of a moneyed institution, or of a private person or firm, who is entitled by his office to take care of the cash or money of such institution, person, or firm.

The cashier of a bank is usually intrusted with all the funds of the bank, its notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives, directly, or through subordinate officers, all moneys and notes of the bank; delivers up all discounted notes and

other securities; signs drafts on corresponding banks, and, with the president, the notes payable on demand issued by the bank; and, as an executive officer of the bank, transacts much of its general business. He is the chief executive officer of the bank; Morse, Bank. § 152; Minor v. Bank, 1 Pet. (U. S.) 46, 7 L. Ed. 47; Bissell v. Bank, 69 Pa. 415. He is the custodian of its money, securities, books, and valuable papers; Mason v. Moore, 73 Ohio St. 275, 76 N. E. 932, 4 L. R. A. (N. S.) 597, 4 Ann. Cas. 240. He may borrow money for the use of the bank and pledge notes owned by it as security for the loan; Citizens' Bank v. Bank, 126 Ky. 169, 103 S. W. 249, 11 L. R. A. (N. S.) 598, 128 Am. St. Rep. 282. He may certify checks; Merchants' Nat. Bank v. Bank, 10 Wall. (U. S.) 604, 19 L. Ed. 1008. He will bind the bank by his contract to pay commissions for the disposal of its land through a broker, but which, through a mistake in identity, the bank does not own; Arnold v. Bank, 126 Wis. 362, 105 N. W. 828, 3 L. R. A. (N. S.) 580.

He need not be a stockholder; indeed, some bank charters prohibit him from owning stock in the bank. He usually gives security for the faithful discharge of his trusts. It is his duty to make reports to the proper state officer (in banks incorporated under the national bank act to the comptroller of the currency; U. S. R. S. § 5210) of the condition of the bank, as provided by law.

In general, the bank is bound by the acts of the cashier within the scope of his authority, express or implied; Minor v Bank, 1 Pet. (U. S.) 46, 70, 7 L. Ed. 47; Fleckner v. Bank, 8 Wheat. (U. S.) 361, 5 L. Ed. 631; Merchants' Nat. Bank v. Bank, 10 Wall. (U. S.) 604, 19 L. Ed. 1008; Wild v. Bank, 3 Mas. 505, Fed. Cas. No. 17,646; Matthews v. Nat. Bank, 1 Holmes 396, Fed. Cas. No. 9,286; Pendleton v. Bank, 1 T. B. Monr. (Ky.) 179; Davenport v. Stone, 104 Mich. 521, 62 N. W. 722, 53 Am. St. Rep. 467. It is bound by his act in drawing checks in its name, though with the intent to apply the proceeds to his own use; Phillips v. Bank, 67 Hun (N. Y.) 378, 22 N. Y. Supp. 254; Lowndes v. Bank, 82 Conn. 8, 72 Atl. 150, 22 L. R. A. (N. S.) 408. He may endorse to himself and sue on a note payable to the bank; Young v. Hudson, 99 Mo. 102, 12 S. W. 632. But the bank is not bound by a declaration of the cashier not within the scope of his authority; as if, when a note is about to be discounted by the bank, he tells a person that he will incur no responsibility by becoming an indorser on such note; Bank of U. S. v. Dunn, 6 Pet. (U. S.) 51, 8 L. Ed. 316; see West St. Louis Sav. Bank v. Bank, 95 U. S. 557, 24 L. Ed. 490; President, etc., of Salem Bank v. Bank, 17 Mass. 1, 9 Am. Dec. 111; State Bank at Elizabeth v. Chetwood, 8 N. J. L. 1; Bank of Kentucky v. Bank, 1 Pars. Eq. Cas. (Pa.) 240. He has no authority to accept certificates of the capital stock of an insurance company in payment of a debt due the bank; Bank of Commerce v. Hart, 37 Neb. 197, 55 N. W. 631, 20 L. R. A. 780, 40 Am. St. Rep. 479. He may not accept a new note, so as to discharge a surety on the first note; Gray v. Bank, 81 Md. 631, 32 Atl. 518. He may not give away, surrender, or release the bank's securities; 1 Dan. Neg. Inst. § 395; Morse, Banks & Bankg. § 169.

Where a cashier does acts on behalf of a bank which are not against public policy or criminal, when once executed in whole or part, they are binding on the bank, as it cannot enjoy the benefits and escape the liabilities; Owens v. Stapp, 32 Ill. App. 653; a cashier of a bank has authority to have the paper of the bank rediscounted, in the usual course of business; Davenport v. Stone, 104 Mich. 521, 62 N. W. 722, 53 Am. St. Rep. 467. Merely by virtue of his office, he has no implied power to receive money for interest in advance on a note owned by the bank, and to agree to extend the time of payment, thus discharging an indorser from liability; Bank of Ravenswood v. Wetzel, 58 W. Va. 1, 50 S. E. 886, 70 L. R. A. 305, 6 Ann. Cas. 48; Vanderford v. Bank, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129 (a case under the negotiable instrument law). When the cashier of a bank instituted an action in the name of the bank commenced by capias issued on his affidavit, alleging his connection with the bank, it will be presumed that he has authority to do so; Wachmuth v. Bank, 96 Mich. 426, 56 N. W. 9, 21 L. R. A. 278. A banking corporation, whose charter does not otherwise provide, may be represented by its cashier in transactions outside of his ordinary duties, without his authority to do so being in writing, or appearing in the records of the proceedings of the directors, and where the cashier has so acted for a series of years without objection, the bank is estopped to deny his authority; Martin v. Webb, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49.

The mere notification by the cashier to his individual creditor that he has placed the amount of the debt to the latter's credit on the books of the bank, followed by the honoring of his check for a portion of the amount, does not charge the bank with responsibility for the credit; Langlois v. Gragnon, 123 La. 453, 49 South. 18, 22 L. R. A. (N. S.) 414.

He has no authority to bind the bank by a pledge of its credit to secure a discount of his own notes for the benefit of a corporation in which he was a stockholder; State Nat. Bank v. Bank, 66 Fed. 691, 14 C. C. A. 61; nor has he authority to sell property belonging to the bank; Greenawalt v. Wil-

son, 52 Kan. 109, 34 Pac. 403; nor has he power to bind the bank to pay the draft of a third person on one of its customers, to be drawn at a future day, when it expects to have a deposit from him sufficient to cover it; Flannagan v. Bank, 56 Fed. 959, 23 L. R. A. 836; nor to assign collaterals belonging to himself, which were given to secure a loan to another person for the cashier's benefit; Merchants' Nat. Bank v. Demere, 92 Ga. 735, 19 S. E. 38.

The power of a bank cashier to transfer notes and securities held by the bank can be questioned only by the bank or its representative; Haugan v. Sunwall, 60 Minn. 367, 62 N. W. 398.

See NATIONAL BANK; DIRECTORS; AGENT.

In Military Law. To deprive a military officer of his office. See Art. of War, art. 14.

CASSARE. To quash; to render void; to break. Du Cange.

CASSATION. In French Law. A decision emanating from the sovereign authority, by which a decree or judgment in the court of last resort is set aside or annulled. See COUR DE CASSATION.

CASSETUR BREVE (Lat. that the writ be quashed). A judgment sometimes entered against a plaintiff at his request when, in consequence of allegations of the defendant, he can no longer prosecute his suit with effect.

The effect of such entry is to stop proceedings, and exonerate the plaintiff from liability for future costs, leaving him free to sue out new process; 3 Bla. Com 303. See Gould, Pl. c. 5, § 139; 5 Term 634.

CAST. A term used in connection with the imposition upon a party litigant of costs in the suit: A is cast for the costs of the case.

CASTELLORUM OPERATIO. In Old English Law. Service or labor done by inferior tenants for the building and upholding of castles and public places of defence.

Towards this some gave their personal service, and others, a contribution of money or goods. This was one branch of the *trinoda necessitas;* 1 Bla. Com. 263, from which no lands could be exempted under the Saxons; though immunity was sometimes allowed after the conquest; Kennett, Paroch. Ant. 114; Cowell.

CASTIGATORY. An engine used to punish women who have been convicted of being common scolds. It is sometimes called the trebucket, tumbrel, ducking-stool, or cucking-stool. This barbarous punishment has perhaps never been inflicted in the United States; James v. Com., 12 S. & R. (Pa.) 225.

CASTING-VOTE. The privilege which the presiding officer possesses of deciding a question where the body is equally divided. It sometimes signifies the single vote of a person who never votes except in the case of a tie; sometimes the double vote of a person who first votes with the rest, and then upon a tie creates a majority by giving a second vote; Christian's note to 1 Bla. Com. 18. The vice-president of the United States, as president of the senate, has the casting-vote when that body is equally divided, but cannot vote at any other time; Const. I. 3. This is a provision frequently made, though in some cases the presiding officer, after giving his vote with the other members, is allowed to decide the question in case of a tie; People v. Church, 48 Barb. (N. Y.) 603.

A casting vote neither exists in corporations or elsewhere, unless it is expressly given by statute or charter, or, what is equivalent, exists by immemorial usage; and in such cases it cannot be created by a by-law; 6 T. R. 732; see 2 B. & Ad. 704.

See MEETING.

CASTRATION. The act of gelding. When this act is maliciously performed upon a man, it is a mayhem, and punishable as such, although the sufferer consented to it; 2 Bish. Cr. Law §§ 1001, 1008. By the ancient law of England the crime was punished by retaliation, *membrum pro membro;* Co. 3d Inst. 118. It is punished in the United States, generally, by fine and imprisonment The civil law punished it with death; Dig 74. 8. 4. 2. For the French law, vide Code Pénal art. 316. The consequences of castration, when complete, are impotence and sterility; 1 Beck, Med. Jur. 72.

Voluntary castration after marriage is no ground of divorce; Berger v. Berger, 23 Pa. Co. Ct. R. 232.

CASU CONSIMILI. See CONSIMILI CASU.

CASU PROVISO (Lat. in the case provided for). A writ of entry framed under the provisions of the statute of Gloucester (6 Edw. I.) c. 7, which lay for the benefit of the reversioner when a tenant in dower alienes in fee or for life.

It seems to have received this name to distinguish it from a similar writ framed under the provisions of the statute Westm. 2d (13 Edw. I.) c. 24, where a tenant by curtesy had alienated as above, and which was known emphatically as the writ *in consimili casu.*

The writ is now practically obsolete. Fitzh. Nat. Brev. 205; Dane, Abr. Index.

CASUAL EJECTOR. The person supposed to perform the fictitious ouster of the tenant of the demandant in an action of ejectment. See EJECTMENT.

CASUALTY. Inevitable accident. Unforeseen circumstances not to be guarded against by human agency, and in which man takes no part. Story, Bailm. § 240; 1 Pars. Contr. 543; 2 Whart. Negl. 8th ed. *159, 160. See 17 C. B. N. S. 51; Waldeck v. Ins. Co. 56 Wis. 98, 14 N. W. 1.

CASUALTY INSURANCE. See INSURANCE.

CASUS FŒDERIS (Lat.). **In International Law.** A case within the stipulations of a treaty of alliance.

The question whether, in case of a treaty of alliance, a nation is bound to assist its ally in war against a third nation, is determined in a great measure by the justice or injustice of the war. If manifestly unjust on the part of the ally, it cannot be considered as *casus fœderis*. Grotius, b. 2, c. 25; Vattel, b. 2, c. 12, § 168.

See 1 Kent 49.

In Commercial Law. The case or event contemplated by the parties to a contract, or stipulated for by it, or coming within its terms. Black, Law Dict.

CASUS FORTUITUS (Lat.). An inevitable accident. A loss happening in spite of all human effort and sagacity. 3 Kent 217, 300; Whart. Negl. §§ 113, 553.

It includes such perils of the sea as strokes of lightning, etc. A loss happening through the agency of rats was held an unforeseen, but not an inevitable, accident. Bullard v. Ins. Co., 1 Curt. C. C. 148, Fed. Cas. No. 2,122. The happening of a *casus fortuitus* excuses shipowners from liability for goods conveyed; 3 Kent 216; L. R. 1 C. P. D. 143.

CASUS MAJOR (Lat.). An unusual accident. Story, Bailm. § 240.

CASUS OMISSUS (Lat.). A case which is not provided for. When such cases arise in statutes which are intended to provide for all cases of a given character which may arise, the common law governs; 5 Co. 38; 11 East 1; Cresoe v. Laidley, 2 Binn. (Pa.) 279; 2 Sharsw. Bla. Com. 260; Broom, Max. 46. A *casus omissus* may occur in a contract as well as in a statute; 2 Bla. Com. 260.

CAT. A whip sometimes used for whipping criminals. It consists of nine lashes tied to a handle, and is frequently called cat-o-nine-tails. It is used where the whipping-post is retained as a mode of punishment and was formerly resorted to in the navy.

CATALLA OTIOSA (Lat.). Dead goods, and animals other than beasts of the plow, *averia carucæ*, and sheep. 3 Bla. Com. 9; Bract. 217 *b*.

CATALLUM. A chattel.

The word is used more frequently in the plural, *catalla*, but has then the same signification, denoting all goods, movable or immovable, except such as are in the nature of fees and freeholds. Cowell; Du Cange.

CATANEUS. A tenant *in capite*. A tenant holding immediately of the crown. Spelman, Gloss.

CATCHING BARGAIN. An agreement made with an heir expectant for the purchase of his expectancy at an inadequate price.

In such cases the heir is, in general, entitled to relief in equity, and may have the contract rescinded upon terms of redemption; 1 Vern. 167, 320, n.; 2 Cox 80; 2 Ch. Cas. 136; 1 P. Wms. 312; 1 Cro. Car. 7; 2 Atk. 133; 2 Swanst. 147; L. R. 8 Ch. Ap. 484; L. R. 10 Eq. 641. It has been said that all persons dealing for a reversionary interest are subject to this rule; but it may be doubted whether the course of decisions authorizes so extensive a conclusion, and whether, in order to constitute a title to relief, the reversioner must not combine the character of heir; 2 Swanst. 148, n. See 1 Ch. Pr. 112, 113, n., 458, 826, 838, 839. A mere hard bargain is not sufficient ground for relief.

The English law on this subject was altered by stat. 31 and 32 Vic. c. 4. Before that act slight inadequacy of consideration was sufficient to set the contract aside; under the act only positive unfairness was relieved against; Bisph. Eq. § 221. Under the Moneylenders' Act, 1900, the courts have power to re-open catching bargains where the interest is excessive and the transaction is unconscionable, and where the interest is excessive and the transaction is such that a court of equity would give relief; [1906] A. C. 469; [1903] 1 K. B. 705; [1906] 1 K. B. 79, where 75 per cent. was held reasonable under the circumstances. This act does not include pawnbrokers, registered building or loan societies, banking or insurance companies, etc. Money lenders are subjected to having their contracts judicially varied in the interest of borrowers, but the rights of *bona fide* assignees or holders for value without notice may not be affected. Money lenders are obliged to register. Bellot, Bargains with Money-Lenders. See Chesterfield v. Janssen, 1 Lead. Cas. in Eq. 773, and notes. The contract may be for a loan, sale, annuity, or mortgage; 16 Ves. 512; L. R. 10 Ch. Ap. 389; 26 Beav. 644; Butler v. Duncan, 47 Mich. 94, 10 N. W. 123, 41 Am. Rep. 711.

CATCHPOLE. A name formerly given to a sheriff's deputy, or to a constable, or other officer whose duty it is to arrest persons. He was a sort of sergeant. The word is not now in use as an official designation; Minshew.

CATER COUSIN. A very distant relation. Bla. Law Tracts 6.

CATHEDRAL. A tract set apart for the service of the church.

After the establishment of Christianity, the emperors and other great men gave large tracts of land whereon the first places of public worship were erected,—which were called *cathedræ*, cathedrals, *sees*, or seats, from the clergy's residence thereon. And when churches were afterwards built in the country, and the clergy were sent out from the cathedrals to officiate therein, the cathedral or head seat remained to the bishop, with some of the chief of the clergy as his assistants.

CATHOLIC EMANCIPATION ACT. The act 10 Geo. IV. c. 7. This act relieves from disabilities and restores all civil rights to Roman Catholics, except that of holding ecclesiastical offices and certain high state of-

fices. The previous legislation which by gradual stages led up to the final removal of these disabilities is to be found in the acts of 18 Geo. III. c. 60; 31 Geo. III. c. 32; and 43 Geo. III. c. 7. 2 Steph. Com. 721.

CATTLE. A collective name for domestic quadrupeds generally, including not only the bovine tribe, but horses, asses, mules, sheep, goats, and swine. Web. Dict.; Decatur Bank v. Bank, 21 Wall. (U. S.) 299, 22 L. Ed. 560.

A railroad engineer cannot take chances of an animal's getting off the track, where he has an opportunity of avoiding all possibility of an injury; Elmsley v. R. Co. (Miss.) 10 South. 41. It is immaterial whether the stock was legally at large or not, where the road is not fenced: Terre Haute & I. R. Co. v. Schaefer, 5 Ind. App. 86, 31 N. E. 557; but where not legally at large and the company is under no legal obligation to fence its road, it will only be responsible for gross, wanton, or wilful negligence in causing injury to stock; Windsor v. R. Co., 45 Mo. App. 123. See Ohio & M. Ry. Co. v. Gross, 41 Ill. App. 561. The law does not presume negligence from the mere fact that stock was killed or injured by a railroad company; Eddy v. Lafayette, 49 Fed. 798, 1 C. C. A. 432; See ANIMALS; RUNNING AT LARGE.

CATTLE GATE. A customary proportionate right of pasture enjoyed in common with others. The right is measured not by the number of cattle to be pastured, but by reference to the rights of others and the whole amount of pasture. 34 E. L. & Eq. 511; 1 Term 137.

CATTLE GUARDS. See FENCE.

CAUCUS. See ELECTION.

CAUSA (Lat.). A cause; a reason.

A condition; a consideration. Used of contracts, and found in this sense in the Scotch law also. Bell, Dict.

It cannot be considered that *consideration* was borrowed from equity as a modification of the Roman "causa." Prof. J. B. Ames in 3 Sel. Essays in Anglo-Amer. Leg. Hist. 279. Practically it covers somewhat wider ground than the modern "Consideration Executed," but it has no generic notion corresponding to it, at least none coextensive with the notion of contract; Poll. Contr. 74.

A suit; an action pending. Used in this sense in the old English law.

Property. Used thus in the civil law in the sense of *res* (a thing). *Non porcellum, non agnellum nec alia causa* (not a hog, not a lamb, nor other thing). Du Cange.

By reason of.

Causa proxima. The immediate cause.

Causa remota. A cause operating indirectly by the intervention of other causes.

Causa causans. The inducing or immediate cause.

In its general sense, *causa* denotes anything operating to produce an effect. Thus, it is said, *causa causantis causa est causati* (the cause of the thing causing is the cause of the thing caused). Marble v. City of Worcester, 4 Gray (Mass.) 398; 4 Campb. 284. In law, however, only the direct cause is considered. See 9 Co. 60; 12 Mod. 639; CAUSA PROXIMA NON REMOTA SPECTATUR; CONTRACTS.

CAUSA JACTITATIONIS MARITAGII (Lat.). A form of action which anciently lay against a party who boasted or gave out that he or she was married to the plaintiff, whereby a common reputation of their marriage might ensue. 3 Bla. Com. 93. See JACTITATION OF MARRIAGE.

CAUSA MATRIMONII PRÆLOCUTI (Lat.). A writ lying where a woman has given lands to a man in fee-simple with the intention that he shall marry her, and he refuses so to do within a reasonable time, upon suitable request. Cowell. Now obsolete. 3 Bla. Com. 183, n.

CAUSA MORTIS DONATIO. See DONATIO MORTIS CAUSA.

CAUSA PROXIMA NON REMOTA SPECTATUR (Lat.). The direct and not the remote cause is considered.

In many cases important questions arise as to which, in the chain of acts tending to the production of a given state of things, is to be considered the responsible cause. It is not merely distance of place or of causation that renders a cause remote. The cause nearest in the order of causation, without any efficient concurring cause to produce the result, may be considered the direct cause. In the course of decisions of cases in which it is necessary to determine which of several causes is so far responsible for the happening of the act or injury complained of, what is known as the doctrine of proximate cause is constantly resorted to in order to ascertain whether the act, omission, or negligence of the person whom it is sought to hold liable was in law and in fact responsible for the result which is the foundation of the action.

The rule was formulated by Bacon, and his comment on it is often cited: "It were infinite for the law to judge the cause of causes, and their impulsions one of another: therefore it contenteth itself with the immediate cause; and judgeth of acts by that, without looking to any further degree;" Max. Reg. 1. Its subsequent development has resulted rather in its application to new conditions than in deviation from the principle as originally stated. Proximate cause, it may be generally stated, is such adequate and efficient cause as, in the natural order of events, and under the particular circumstances surrounding the case, would necessarily produce the event; and this having been discovered, is to be deemed the true cause, unless some new cause not incidental to, but independent of, the first, shall be found to intervene between it and the first. Sh. & Redf. Neg. § 10; Marble v. City of

Worcester, 4 Gray (Mass.) 412; Story, J., in Peters v. Ins. Co., 14 Pet. (U. S.) 99, 10 L. Ed. 371; Alexander v. Town of New Castle, 115 Ind. 51, 17 N. E. 200; State v. R. R., 52 N. H. 528; Webb's Poll. Torts 29. It is a cause which in natural sequence, undisturbed by any independent cause, produces the result complained of; Behling v. Pipe Lines, 160 Pa. 359, 28 Atl. 777, 40 Am. St. Rep. 724; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256; Putnam v. R. Co., 55 N. Y. 108, 14 Am. Rep. 190; Taylor v. Baldwin, 78 Cal. 517, 21 Pac. 124; and the result must be the natural and probable consequence such as ought to have been foreseen as likely to flow from the act complained of; Ewing v. R. Co., 147 Pa. 44, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709; McDonald v. Snelling, 14 Allen (Mass.) 290, 92 Am. Dec. 768; Pilmer v. Traction Co., 14 Ida. 327, 94 Pac. 432, 15 L. R. A. (N. S.) 254, 125 Am. St. Rep. 161; Kreigh v. Westinghouse, Church, Kerr & Co., 152 Fed. 120, 81 C. C. A. 338, 11 L. R. A. (N. S.) 684.

Two elements go to make up proximate cause: 1. The act must be the efficient cause of the injury; 2. The result must be one which might reasonably have been anticipated when the negligent act was committed; Goodlander Mill Co. v. Oil Co., 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583; Cole v. Sav. & Loan Soc., 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416; Kreigh v. Church, 152 Fed. 120; 81 C. C. A. 338, 11 L. R. A. (N. S.) 684; Teis v. Min. Co., 158 Fed. 260, 85 C. C. A. 478, 15 L. R. A. (N. S.) 893; Hoag v. R. Co., 85 Pa. 293, 27 Am. Rep. 653; Hartman v. Clarke, 104 App. Div. 62, 93 N. Y. Supp. 314; Seith v. Electric Co., 241 Ill. 252, 89 N. E. 425, 24 L. R. A. (N. S.) 978, 132 Am. St. Rep. 204.

From a legal point of view it is said to be of two kinds: 1. As in insurance cases; 2. Responsibility for a wrongful act, whether in tort or contract; 15 Harv. L. Rev. 566, where it is said: "The fundamental difference between these classes is that in the former investigation ceases when the nearest cause adequate to produce the result in question has been discovered, while in the latter the object is to connect the circumstances which are the subject of the action with a responsible human will." *id.*; see Gilson v. Canal Co., 36 Am. St. Rep. 807, note.

Where a train was forty-five minutes late when a gust of wind threw it from the track and injured a passenger, it was held that though the train would have escaped the gust of wind had it been on time, yet the accident was neither the natural nor probable consequence of the delay; McClary v. R. Co., 3 Neb. 44, 19 Am. Rep. 631. When a horse hitched to a defective hitching-post was frightened by the running away of another horse, and broke the post and ran over a person in the street, the latter could not recover against the owner of the post for the defect in the post as the cause of the injury; City of Rockford v. Tripp, 83 Ill. 247, 25 Am. Rep. 381. Negligently setting fire to grass on the property of another may be found to be the proximate cause of the death of one burned whilst attempting to extinguish it; Illinois Cent. R. Co. v. Siler, 229 Ill. 390, 82 N. E. 362, 15 L. R. A. (N. S.) 819, 11 Ann. Cas. 368. Exposure to cold was held the proximate cause of injury to the health of one who, although ill at the time, would not have suffered seriously but for such exposure; Louisville & N. R. Co. v. Daugherty, 108 S. W. 336, 32 Ky. L. Rep. 1392, 15 L. R. A. (N. S.) 740. The escape of oil from a tank near a river bank was held the proximate cause of injury caused by the oil to boats lower down; Brennan Construction Co. v. Cumberland, 29 App. D. C. 554, 15 L. R. A. (N. S.) 535, 10 Ann. Cas. 865. Where a railroad company obstructed a railroad crossing and delayed a physician, held that his patient had a right of action against it if she suffered by the delay; Terry v. R. Co. (Miss.) 60 South. 729. Permitting a road to remain out of repair so that fire apparatus is hindered in responding to an alarm is not the proximate cause of the destruction of the property by fire; Hazel v. Owensboro, 99 S. W. 315, 30 Ky. L. Rep. 627, 9 L. R. A. (N. S.) 235.

The question of proximate cause is said to be determined, not by the existence or non-existence of intervening events, but by their character and the natural connection between the original act or omission and the injurious consequences. When the intervening cause is set in operation by the original negligence, such negligence is still the proximate cause; Seith v. Electric Co., 241 Ill. 252, 89 N. E. 425, 24 L. R. A. (N. S.) 978, 132 Am. St. Rep. 204. If the party guilty of the first act of negligence might have anticipated the intervening cause, the connection is not broken; Seith v. Electric Co., 241 Ill. 252, 89 N. E. 425, 24 L. R. A. (N. S.) 978, 132 Am. St. Rep. 204; Missouri Pac. R. Co. v. Columbia, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399; Smith v. Tel. Co., 113 Mo. App. 429, 87 S. W. 71; Citizens Telephone Co. of Texas v. Thomas, 45 Tex. Civ. App. 20, 99 S. W. 879. Any number of causes and effects may intervene, and if they are such as might with reasonable diligence have been foreseen, the last result is to be considered as the proximate result. But whenever a new cause intervenes, which is not a consequence of the first wrongful cause, which is not under control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence, and except for which the final injurious consequence could not have happened, then such injurious consequence must be deemed too remote; Atchison, T. & S. F. R. Co. v. Stanford, 12 Kan. 354, 15 Am. Rep. 362; Kreigh

v. Westinghouse, Church, Kerr & Co., 152 Fed. 120, 81 C. C. A. 338, 11 L. R. A. (N. S.) 684. Gas was negligently permitted to remain in a mine. A workman was overcome by the gas, and, in removing him to the surface, his leg was broken in the elevator. The gas-filled mine was not the proximate cause of the broken leg; Teis v. Smuggler Min. Co., 158 Fed. 260, 85 C. C. A. 478, 15 L. R. A. (N. S.) 893.

The cases in which the original wrongdoer is still liable, though independent acts of other persons may have intervened, are classified generally by Prescott F. Hall in 15 Harv. L. Rev. 541, as:

1. Acts directly malicious; Laidlaw v. Sage, 158 N. Y. 73, 52 N. E. 679, 44 L. R. A. 216 (where an explosion was held the proximate cause, though the person injured by it was forced by another into the position of danger). Taylor v. Hayes, 63 Vt. 475, 21 Atl. 610; Isham v. Dow's Estate, 70 Vt. 588, 41 Atl. 585, 45 L. R. A. 87, 67 Am. St. Rep. 691. One who violates a duty owed to others or commits a tortious or wrongfully negligent act is liable, not only for those injuries which are the direct and immediate consequences of his act, but for such consequential injuries as, according to common experience, are likely to, and in fact do, result from his act; Smethurst v. Barton Square Church, 148 Mass. 261, 19 N. E. 387, 2 L. R. A. 695, 12 Am. St. Rep. 550 (snow from a roof fell on a horse causing it to start and thereby injure a passer-by).

2. Acts such as wilful misrepresentation and false warranties. Of this class of cases is Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455 (where a druggist carelessly labelled a deadly poison as a harmless medicine); where a druggist labelled extract of belladonna as extract of dandelion; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; where naphtha was sold for oil; Wellington v. Oil Co., 104 Mass. 64; or poisonous food; Bishop v. Weber, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715; or a proprietary medicine containing ingredients harmful to one using it according to its directions; Blood Balm Co. v. Cooper, 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. Rep. 324; or a beverage represented to be harmless, but containing bits of broken glass; Watson v. Brewing Co., 124 Ga. 121, 52 S. E. 152, 1 L. R. A. (N. S.) 1178, 110 Am. St. Rep. 157; or where a manufacturer sold a defective article knowing it to be defective, though there was no privity of contract between the person injured and the manufacturer; Schubert v. Clark Co., 49 Minn. 331, 51 N. W. 1103, 15 L. R. A. 818, 32 Am. St. Rep. 559; Woodward v. Miller, 119 Ga. 618, 46 S. E. 847, 64 L. R. A. 932, 100 Am. St. Rep. 188; Holmvik v. Self-feeder Co., 98 Minn. 424, 108 N. W. 810.

3. Acts conclusively presumed to be malicious, such as violations of statutes. Where liability for personal injury is imposed by statute on counties, etc., or persons for defective highways, bridges, etc., the innocent intervening act of a third person will not discharge the first wrong-doer from his responsibility; Hayes v. Hyde Park, 153 Mass. 514, 27 N. E. 522, 12 L. R. A. 249.

Generally it is held that a company maintaining overhead wires is liable for injuries resulting from their fall notwithstanding an intervening act of a third person who attempts to remove them. This is usually on the ground that the company should have foreseen that some person would interfere with such wires; Citizens' Telephone Co. of Texas v. Thomas, 45 Tex. Civ. App. 20, 99 S. W. 879; Neal v. R. Co., 3 Pennewill (Del.) 467, 53 Atl. 338; Smith v. Telephone Co., 113 Mo. App. 429, 87 S. W. 71; Dannenhower v. Telegraph Co., 218 Pa. 216, 67 Atl. 207; Kansas City v. Gilbert, 65 Kan. 469, 70 Pac. 350; but where a wire fell to the ground and was knocked by a policeman with his club towards the sidewalk, the intervening act of the policeman was held the proximate cause of injury to one who caught the wire; Seith v. Electric Co., 241 Ill. 252, 89 N. E. 425, 24 L. R. A. (N. S.) 978, 132 Am. St. Rep. 204. And the negligence of a telephone company in maintaining a pole in a dangerous position until it fell across a highway was held not the proximate cause of an accident, when it was set back in the hole by passers-by and insecurely propped, afterwards falling and killing the daughter of the plaintiff; Harton v. Telephone Co., 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. (N. S.) 956, 14 Ann. Cas. 390.

Where a manufacturer undertook to supply a boiler which would stand a working pressure of one hundred pounds and at a less pressure the boiler exploded in consequence of the defective construction of a hinge, thereby injuring the buyer's employees, and rendering such buyer liable in damages to them, it was held that though the buyer might have discovered the defect by inspection, yet he was entitled to recover from the manufacturer, as, even if his conduct be called want of ordinary care, it was induced by the warranty or representations of the manufacturer; Boston Woven Hose & Rubber Co. v. Kendall, 178 Mass. 232, 59 S. E. 657, 51 L. R. A. 781, 86 Am. St. Rep. 478. In [1895] 1 Q. B. 857, and [1895] 2 Q. B. 650, it is intimated that the injured workman could have recovered against the manufacturer in the first place. In the Massachusetts case it is said that there are difficulties in holding one liable in damages when the tort of another has intervened between his act and the consequences complained of, but that in some cases there may be a recovery, citing Nashua Iron & Steel Co. v. R. Co., 62 N. H. 159.

The manufacturer or vendor of a tool machine or appliance which is not in its nature intrinsically dangerous is not ordinarily liable for defects therein to one not in privity with him; Heizer v. Mfg. Co., 110 Mo. 605, 19 S. W. 630, 15 L. R. A. 821, 33 Am. St. Rep. 482; Heindirk v. Elevator Co., 122 Ky. 675, 92 S. W. 608, 5 L. R. A. (N. S.) 1103; but a well recognized exception to this rule is where the thing is eminently dangerous to human life; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; as where circulars sent out by a bottler of aërated water indicated his knowledge that the bottles were liable to explode, and the evidence tended to show that the tests applied by him to the bottles sent out were not adequate to justify the conclusion that they would not burst under customary usage, with the knowledge of which defendants might reasonably be chargeable; Torgesen v. Schultz, 192 N. Y. 156, 84 N. E. 956, 18 L. R. A. (N. S.) 726, 127 Am. St. Rep. 894.

A contractor, after the completion and delivery of possession of a building and its acceptance by the owner, is not liable to a stranger to the contract for injuries resulting from defects in the construction of the building; Curtin v. Somerset, 140 Pa. 70, 21 Atl. 244, 12 L. R. A. 322, 23 Am. St. Rep. 220, where the court said, quoting from Whart. Neg. 439, "There must be causal connection between the negligence and the hurt, and such causal connection is interrupted by the interposition between the negligence and the hurt of any independent human agency; Miner v. McNamara, 81 Conn. 690, 72 Atl. 138, 21 L. R. A. (N. S.) 477; Fitzmaurice v. Fabian, 147 Pa. 199, 23 Atl. 444; Fowles v. Briggs, 116 Mich. 425, 74 N. W. 1046, 40 L. R. A. 528, 72 Am. St. Rep. 537, where a shipper of lumber negligently loaded was held not liable for injury to a brakeman, after it had become the duty of the railroad company to provide for the inspection of the car.

The manufacturer and seller of a side saddle to a husband was held to be under no duty to the wife, for whose use he knows it to have been purchased, for its defective construction; Bragdon v. Perkins-Campbell Co., 87 Fed. 109, 30 C. C. A. 567, 66 L. R. A. 924. The leading case is Winterbottom v. Wright, 10 M. & W. 109, where the defendant had contracted with the postmaster-general to provide a mail coach and keep it in repair. He was held not liable to an employee of one who contracted with the postmaster-general to provide horses and coachmen for the purpose of carrying the mail.

Where the defendant sold gunpowder to a child, and the parents took charge of it and let the child have some, the sale was held too remote as a cause of injury to the child by an explosion; Carter v. Towne, 103 Mass. 507; on the other hand an injury from a railway accident, having been the direct cause of a diseased condition which resulted in paralysis, was held to be the proximate cause of the latter; Bishop v. R. Co., 48 Minn. 26, 50 N. W. 927; but where by reason of injury in a collision a passenger became disordered in mind and body and eight months after committed suicide, in a suit for damages against the railroad company it was held that his own act was the proximate cause of his death; Scheffer v. R. Co., 105 U. S. 249, 26 L. Ed. 1070. A woman's illness, caused by fright from shooting a dog in her presence, is not a result reasonably to be anticipated; Renner v. Canfield, 36 Minn. 90, 30 N. W. 435, 1 Am. St. Rep. 654.

If two causes operate at the same time to produce a result which might be produced by either, they are concurrent causes, and in such case each is a proximate cause, but if the two are successive and unrelated in their operation, one of them must be proximate and the other remote; Herr v. City of Lebanon, 149 Pa. 222, 24 Atl. 207, 16 L. R. A. 106, 34 Am. St. Rep. 603. When there is no order of succession in time, when there are two concurrent causes of a loss, the predominating efficient one must be regarded as the proximate when the damage done by each cannot be distinguished; Howard Fire Ins. Co. v. Transp. Co., 12 Wall. (U. S.) 194, 20 L. Ed. 378 (a marine insurance case). See the reporter's note of Mr. J. C. Carter's argument for appellant. As an illustration of concurrent causes, where lumber was negligently piled, and remained a long time in that condition, and was caused to fall by the negligence of a stranger, the negligence in piling concurring with the negligence of the stranger, was the direct and proximate cause; Pastene v. Adams, 49 Cal. 87.

The question as to what is the proximate cause of an injury is ordinarily not one of science or of legal knowledge, but of fact for the jury to determine in view of the accompanying circumstances, all of which must be submitted to the jury, who must determine whether the original cause is by continuous operation linked to each successive fact; Lehigh Valley R. Co. v. McKeen, 90 Pa. 122, 35 Am. Rep. 644; Milwaukee, etc., R. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256; a finding that the burning of the plaintiff's mill and lumber was the unavoidable consequence of the burning of the defendant's elevator, is in effect a finding that there was no intervening and independent cause between the negligent conduct of defendant and injury to plaintiff; *id.* The doctrine under consideration finds its most frequent application in *fire and marine insurance;* L. R. 4 Q. B. 414; L. R. 4 C. P. 206; L. R. 5 Ex. 204; Nelson v.

Ins. Co., 8 Cush. (Mass.) 477, 54 Am. Dec. 770; Paine v. Smith, 2 Duer (N. Y.) 301; Mathews v. Ins. Co., 11 N. Y. 9; Montgomery v. Ins. Co., 16 B. Monr. (Ky.) 427; Western Ins. Co. v. Cropper, 32 Pa. 351, 75 Am. Dec. 561; General Mut. Ins. Co. v. Sherwood, 14 How. (U. S.) 351, 14 L. Ed. 452; in cases of *tort founded on negligence;* 5 C. & P. 190; L. R. 4 C. P. 279; L. R. 8 Q. B. 274; 3 M. & R. 105; Cuff v. R. R. Co., 35 N. J. L. 17, 10 Am. Rep. 205; Fairbanks v. Kerr, 70 Pa. 86, 10 Am. Rep. 664; Metallic Compression Casting Co. v. R. Co., 109 Mass. 277, 12 Am. Rep. 689; in *measure of damages* and in *highway cases;* 15 Harv. L. Rev. 541, which see for a thorough review of the history of this doctrine; Webb's Poll. Torts 29, 566; Howe, Civ. L. 201.

See NEGLIGENCE.

CAUSA REI (Lat.). **In Civil Law.** Things accessory or appurtenant. All those things which a man would have had if the thing had not been withheld. Du Cange; 1 Mackeldey, Civ. Law 55.

CAUSARE (Lat. to cause). To be engaged in a suit; to litigate; to conduct a cause. Used in the old English and in the civil law.

CAUSATION. See CAUSA PROXIMA.

CAUSATOR (Lat.). A litigant; one who takes the part of the plaintiff or defendant in a suit.

CAUSE (Lat. *causa*). **In Civil Law.** The consideration or motive for making a contract. Dig. 2. 14. 7; Toullier, liv. 3, tit. 3, c. 2, § 4; 1 Abb. 28.

In Pleading. Reason; motive.

In a replication *de injuria*, for example, the plaintiff alleges that the defendant of his own wrong and *without the cause* by him, etc., where the word *cause* comprehends all the facts alleged as an excuse or reason for doing the act. 8 Co. 67; 11 East 451; 1 Chit. Pl. 535.

In Practice. A suit or action. Any question, civil or criminal, contested before a court of justice. Wood, Civ. Law 301. It was held to relate to civil actions only, and not to embrace *quo warranto;* 5 E. & B. 1. See Logan v. Small, 43 Mo. 254; 3 Q. B. 901.

CAUSE OF ACTION. In Practice. Matter for which an action may be brought.

A cause of action is said to accrue to any person when that person first comes to a right to bring an action. There is, however, an obvious distinction between a cause of action and a right, though a cause of action generally confers a right. Thus, statutes of limitation do not affect the cause of action, but take away the right. A cause of action implies that there is some person in existence who can bring suit and also a person who can lawfully be sued; Douglas v. Beasley, 40 Ala 148; Parker v. Enslow, 102 Ill. 272, 40 Am. Rep. 588. See Parish v. Ward, 28 Barb. (N. Y.) 330; 4 Bing. 704; Graham v. Scripture, 26 How. Pr. (N. Y.) 501.

When a wrong has been committed, or a breach of duty has occurred, the cause of action has accrued, although the claimant may be ignorant of it; 3 B. & Ald. 288, 626; 5 B. & C. 259; 4 C. & P. 127. A cause of action does not accrue until the existence of such a state of things as will enable a person having the proper relations to the property or persons concerned to bring an action; 5 B. & C. 360; 8 D. & R. 346; 4 Bingh. 686.

"A cause of action consists of those facts as to two or more persons entitling at least some one of them to a judicial remedy of some sort against the other, or others, for the redress or prevention of a wrong. It is essential to the existence of such facts that there should be a right to be violated and a violation thereof. Since those two elements constitute a cause of action, and to satisfy the statute [Code pleading statute as to joinder of action] they must arise out of one or more circumstances called a transaction, the latter is to be viewed as something distinct from the cause of action itself, else the latter could not arise out of the former." Emerson v. Nash, 124 Wis. 369, 102 N. W. 921, 70 L. R. A. 326, 109 Am. St. Rep. 944.

Every judicial action has in it certain necessary elements—a primary right belonging to the plaintiff and a corresponding primary right devolving upon the defendant; the wrong done by the defendant, which consists of a breach of such primary right and duty; a remedial right in plaintiff and a remedial duty upon the defendant, and, finally, the remedy or relief itself. Of these the primary right and duty and the delict or wrong constitute the cause of action; Wildman v. Wildman, 70 Conn. 700, 41 Atl. 1. Stated in brief, a cause of action may be said to consist of a right belonging to the plaintiff and some wrongful act or omission done by defendant by which that right has been violated. Pom. Rem. § 453.

It comprises every fact necessary to the right to the relief prayed for; McAndrews v. R. Co., 162 Fed. 856, 89 C. C. A. 546. In United States v. Land Co., 192 U. S. 355, 24 Sup. Ct. 266, 48 L. Ed. 476, it was said by Holmes, J.: "The whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time; he cannot even split up his claim (1 Salk. 11; Trask v. R. Co., 2 Allen (Mass.) 331; Freem. Judge [4th Ed.] § 238, 241) and, a *fortiori*, he cannot divide the grounds of recovery;" and this language is quoted in Northern Pac. R. Co. v. Slaght, 205 U. S. 132, 27 Sup. Ct. 446, 51 L. Ed. 742.

Where a party brings an action for a part only of the entire indivisible demand and recovers judgment, he cannot subsequently sue for another part of the same demand; Baird v. U. S., 96 U. S. 432, 24 L. Ed. 703.

This rule applies to the foreclosure of a mortgage on several tracts of land; if the mortgagee forecloses as to a portion of the land, he waives his lien as to the rest; Mascarel v. Raffour, 51 Cal. 242. So of a

vendor having a lien for the purchase money on lands; if he enforces the lien as to a portion of the land, he may not bring a second suit; Day v. Preskett, 40 Ala. 624. And it was held in Codwise v. Taylor, 4 Sneed (Tenn.) 346, that if he proceeded to enforce his lien for a portion of the money which is due, he exhausts his remedy as to the rest of the land for that portion of the debt afterwards maturing.

But a defendant may not split his counterclaim, using part of it as a *defense* and then sue on the *other part*; Palm's Adm'rs v. Howard, 102 S. W. 267, 31 Ky. Law Rep. 316; *id.*; 102 S. W. 1199, 31 Ky. Law Rep. 814. A suit on a bond and a suit on its coupons are on different causes of action; Presidio County v. Bond & Stock Co., 212 U. S. 58, 29 Sup. Ct. 237, 53 L. Ed. 402. The words "arising out of the same cause of action" in United States admiralty rule 53 are used in a more general sense as meaning the same transaction, dispute or subject matter; United Transp. & Lighterage Co. v. Transp. Line, 185 Fed. 388, 107 C. C. A. 442, following Vianello v. The Credit Lyonnais, 15 Fed. 637.

CAUSIDICUS. A speaker or pleader. See ADVOCATE.

CAUTIO, CAUTION. In Civil Law. Security given for the performance of any thing. A bond whereby the debtor acknowledges the receipt of money and promises to pay it at a future day.

In French Law. The person entering into an obligation as a surety.

In Scotch Law. A pledge, bond, or other security for the performance of an obligation, or completion of the satisfaction to be obtained by a judicial process. Bell, Dict.

CAUTIO FIDEJUSSORIA. Security by means of bonds or pledges entered into by third parties. Du Cange.

CAUTIO PIGNORATITIA. A pledge by a deposit of goods.

CAUTIO PRO EXPENSIS. Security for costs or expenses.

This term is used among the civilians, Nov. 112, c. 2, and generally on the continent of Europe In nearly all the countries of Europe, a foreign plaintiff, whether resident or not, is required to give caution *pro expensis:* that is, security for costs In some countries this rule is modified, and, when such plaintiff has real estate or a commercial or manufacturing establishment within the state, he is not required to give such caution. Fœlix, *Droit Intern. Privé*, n. 106.

CAUTIO USUFRUCTUARIA. Security, which tenants for life give, to preserve the property rented free from waste and injury. Ersk. Inst. 2. 9. 59.

CAUTION JURATORY. Security given by oath. That which a suspender swears is the best he can afford in order to obtain a suspension. Ersk. Pr. 4. 3. 6.

CAUTIONARY BOND. See BOND.

CAUTIONARY JUDGMENT. Where an action in tort was pending and the plaintiff feared the defendant would dispose of his real property before judgment, a cautionary judgment was entered with a lien on the property; Seisner v. Blake, 13 Pa. Co. Ct. R. 333; so in an action on a note against a religious association, where it was alleged that the defendant was endeavoring to sell its real estate before judgment on the note; Witmer & Dundore v. Port Treverton Church, 17 Pa. Co. Ct. R. 38.

CAUTIONER. A surety; a bondsman. One who binds himself in a bond with the principal for greater security. He is still a cautioner whether the bond be to pay a debt or whether he undertake to produce the person of the party for whom he is bound. Bell, Dict.

CAVEAT (Lat. let him beware). A notice not to do an act, given to some officer, ministerial or judicial, by a party having an interest in the matter.

It is a formal caution or warning not to do the act mentioned, and is addressed frequently to prevent the admission of wills to probate, the granting letters of administration, etc. See Wms. Ex. 581.

1 Burn, Eccl. Law 19, 263; Nelson, Abr.; Dane, Abr.; Ayliffe, *Parerg.;* 3 Bla. Com. 246; 2 Chit. Pr. 502, note *b*; 3 Redf. Wills 119; 4 Brew. Pr. 3974; Poph. 133; 1 Sid. 371; In re Road, 8 N. J. L. 139. See WILL.

Filing a caveat to the probate of a will does not of itself constitute a "contest" of a will; In re McCahan's Estate, 221 Pa. 188, 70 Atl. 711.

In Patent Law. A legal notice to the patent office that the caveator claims to be the inventor of a particular device, in order to prevent the issue of a patent on it to any other person without notice to the caveator. It gives no advantage to the caveator over any rival claimant, but only secures to him an opportunity to establish his priority of invention.

It is filed in the patent office under statutory regulations; U. S. R. S. § 4902. The principal object of filing it is to obtain for an inventor time to perfect his invention without the risk of having a patent granted to another person for the same thing. The practice was abolished by act of June 10, 1910.

It is also used to prevent the issue of land patents; Harper v. Baugh, 9 Gratt. (Va.) 508; and where surveys are returned to the land office, and marked "in dispute," this entry has the effect of a *caveat* against their acceptance; Hughes v. Stevens, 43 Pa. 197.

CAVEAT EMPTOR (Lat. let the purchaser take care). In every sale of real property, a purchaser's right to relief at law or in equity on account of defects or incumbrances in or upon the property sold depends solely upon the covenants for title which he has received; 2 Sugd. Vend. 425; Co. Litt. 384 *a*,

Butl. note; 3 Swanst. 651; Hodges v. Saunders, 17 Pick. (Mass.) 475; Redwine v. Brown, 10 Ga. 311; Dorsey v. Jackman, 1 S. & R. (Pa.) 42, 7 Am. Dec. 611; unless there be fraud on the part of the vendor; 3 B. & P. 162; Abbott v. Allen, 2 Johns. Ch. (N. Y.) 519, 7 Am. Dec. 554; Miles v. Williamson, 24 Pa. 142; Etheridge v. Vernoy, 70 N. C. 713; Tuck v. Downing, 76 Ill. 71; Beale v. Seiveley, 8 Leigh (Va.) 658; Sutton v. Sutton, 7 Gratt. (Va.) 238, 56 Am. Dec. 109; Butler v. Miller, 15 B. Monr. (Ky.) 627; Allen v. Hopson, Freem. Ch. (Miss.) 276; Nance v. Elliott, 38 N. C. 408; Maney v. Porter, 3 Humphr. (Tenn.) 347; Brandt v. Foster, 5 Ia. 293; Rice v. Burnet, 39 Tex. 177; and consult Rawle, Cov. for Title, 5th ed. § 319. This doctrine applies to a sale made under a decree foreclosing a mortgage, and the purchaser cannot rely upon statements made by the officer conducting the sales; Norton v. Loan & Trust Co., 35 Neb. 466, 53 N. W. 481, 18 L. R. A. 88, 37 Am. St. Rep. 441.

In sales of personal property substantially the same rule applies, and is thus stated in Story, Sales, 3d ed. § 348: The purchaser buys at his own risk, unless the seller gives an express warranty, or unless the law implies a warranty from the circumstances of the case or the nature of the thing sold, or unless the seller be guilty of fraudulent misrepresentation or concealment in respect to a material inducement to the sale; Benj. Sales, § 611; Barnard v. Kellogg, 10 Wall. (U. S.) 383, 19 L. Ed. 987; Gaylord Mfg. Co. v. Allen, 53 N. Y. 515; Porter v. Bright, 82 Pa. 441; Mixer v. Coburn, 11 Metc. (Mass.) 559, 45 Am. Dec. 230; Dean v. Morey, 33 Ia. 120; Roseman v. Canovan, 43 Cal. 110; Armstrong v. Bufford, 51 Ala. 410; Biggs & Co. v. Perkins, 75 N. C. 397. It is the settled doctrine of English and American law that the purchaser is required to notice such qualities of the goods purchased as are reasonably supposed to be within the reach of his observation and judgment. Under the civil law there was on a sale for a fair price an implied warranty of title and that the goods sold were sound, but under the common law there is a clear distinction between the responsibility of the seller as to title and as to quality; the former he warranted, the latter, if the purchaser had opportunity to examine, he did not; 2 Kent 478; Pothier, *Cont. de Vente*, No. 184; See MISREPRESENTATION; CONCEALMENT; SALES; WARRANTY.

This doctrine does not apply in an action for damages for inducing one by false representations to take an assignment of a lease executed by one who had no title to the land; Cheney v. Powell, 88 Ga. 629, 15 S. E. 750. It was applied where the buyer of cows was a competent judge and had ample time, before buying, for inspection; Dorsey v. Watkins, 151 Fed. 340.

Consult Rawle, Covenants for Title; Benjamin, Sales; Story, Sales; 2 Kent 478; Leake, Cont. 198; 1 Story, Equity; Sugden, Vendors & P.

CAVEATOR. One who files a caveat.

CAYAGIUM. A toll or duty paid the king for landing goods at some quay or wharf. The barons of the Cinque Ports were free from this duty. Cowell.

CEAPGILD. Payment of an animal. An ancient species of forfeiture. Cowell.

CEDE. To assign; to transfer. Applied to the act by which one state or nation transfers territory to another.

CEDENT. An assignor. The assignor of a chose in action. Kames, Eq. 43.

CEDULA. In Spanish Law. A written obligation, under private signature, by which a party acknowledges himself indebted to another in a certain sum, which he promises to pay on demand or on some fixed day.

In order to obtain judgment on such an instrument, it is necessary that the party executing it should acknowledge it in open court, or that it be proved by two witnesses who saw its execution.

The citation affixed to the door of an absconding offender, requiring him to appear before the tribunal where the accusation is pending.

CELEBRATION OF MARRIAGE. The solemn act by which a man and woman take each other for husband and wife, conformably to the rules prescribed by law.

CELIBACY. The state or condition of life of a person not married.

CEMETERY. A place set apart for the burial of the dead. Cemeteries are regulated in England and many of the United States by statute.

After ground has once been devoted to this object it can be applied to secular purposes only with the sanction of the legislature; L. R. 4 Q. B. 407; Sohier v. Church, 109 Mass. 1.

An abandoned cemetery, from which all the bodies had not been removed, cannot be sold; Ritter v. Couch (W. Va.) 76 S. E. 428, 42 L. R. A. (N. S.) 1216. A cemetery association holds the fee of lands purchased for the purposes of the association. The persons to whom lots are conveyed for burial purposes take only an easement—the right to use their lots for such purposes; Buffalo City Cemetery v. Buffalo, 46 N. Y. 503; People v. Trustees of St. Patrick's Cathedral, 21 Hun (N. Y.) 184; Washb. Easem. 604; Sohier v. Church, 109 Mass. 21; Price v. Church, 4 Ohio 515; it resembles the grant of a pew in a church; Jones v. Towne, 58 N. H. 462, 42 Am. Rep. 602; Sohier v. Church, 109 Mass. 1. It is a mere (exclusive) usufructuary right, subject to the conditions of the charter and by-laws of the cemetery company; Roanoke Cemetery Co. v. Goodwin, 101 Va. 605, 44 S. E. 769. It is in the nature of an easement; *id.*; so is the right to burial in a particular burial vault; 22 Beav.

596; capable of being created by deed only; 8 B. & C. 288; but it can be created by prescription; Hook v. Joyce, 94 Ky. 450, 22 S. W. 651, 21 L. R. A. 96. It has been held to be a license; Buffalo City Cemetery v. Buffalo, 46 N. Y. 503; Page v. Symonds, 63 N. H. 17, 56 Am. Rep. 481. A statute directing a removal of bodies, without providing compensation to the lot owners, is constitutional; Went v. Church of Williamsburgh, 80 Hun 266, 30 N. Y. Supp. 157. In the absence of a deed, or certificate equivalent thereto, they are mere licensees; 8 B. & C. 288. Non-residence does not divest an heir at law of an easement in a burial lot while the gravestones of his parents remain; Hook v. Joyce, 94 Ky. 450, 22 S. W. 651, 21 L. R. A. 96.

Their rights cease when the cemetery is vacated, as such, by authority of law; Partridge v. Church, 39 Md. 631; Craig v. Church, 88 Pa. 42, 32 Am. Rep. 417; and the owner of a lot in which no interments have been made, loses all use of it by the passage of a law making interments therein unlawful; Kincaid's Appeal, 66 Pa. 411, 5 Am. Rep. 377. An act declaring it unlawful to open a public street through a cemetery does not prevent one who has laid out a cemetery from dedicating a strip along the edge of it which he still owns for a public alley, it not abridging the rights of parties to whom lots had been sold; Du Bois Cemetery Co. v. Griffin, 165 Pa. 81, 30 Atl. 840.

A cemetery association has the right to limit all interments to the family of the lot owner and their relatives; Farelly v. Cemetery Ass'n, 44 La. Ann. 28, 10 South. 386.

The property of cemetery associations is usually exempt from taxation; Woodlawn Cemetery v. Inhabitants of Everett, 118 Mass. 354; People v. Cemetery Co., 86 Ill. 336, 29 Am. Rep. 32; People v. Pratt, 129 N. Y. 68, 29 N. E. 7; and this exemption has been held to include immunity from claims for municipal improvements; Olive Cemetery Co. v. City of Philadelphia, 37 Leg. Int. (Pa.) 264. See 1 Washb. R. P. 9; Washb. Easem. 515; Cooley, Tax. 203; but it is held that it would not be relieved from paying an assessment for street improvements; Lima v. Cemetery Ass'n, 42 Ohio St. 128, 51 Am. Rep. 809; Alexander v. City Council, 5 Gill (Md.) 396, 46 Am. Dec. 630; Boston Seamen's Friend Society v. Boston, 116 Mass. 181, 17 Am. Rep. 153; President, etc., of City of Paterson v. Society, 24 N. J. L. 385; People v. Cemetery Co., 86 Ill. 336, 29 Am. Rep. 32; Sheehan v. Hospital, 50 Mo. 155, 11 Am. Rep. 412.

A lot owner may maintain an action of trespass against one who wrongfully trespasses upon it; Smith v. Thompson, 55 Md. 5, 39 Am. Rep. 409; Gowen v. Bessey, 94 Me. 114, 46 Atl. 792; it has been held that he may even sue the owner of the fee for such wrongful act; Hoff v. Olson, 101 Wis. 1181, 76 N. W. 1121, 70 Am. St. Rep. 903; Bessemer Land & Improvement Co. v. Jenkins, 111 Ala. 135, 18 South. 565, 56 Am. St. Rep. 26. He may enjoin the cemetery association from preventing a member of his family from being buried in the family lot; Wright v. Cemetery Corp., 112 Ga. 884, 38 S. E. 94, 52 L. R. A. 521; or from removing the ashes of the dead; Beatty v. Kurtz, 2 Pet. (U. S.) 566, 7 L. Ed. 521; or may obtain an order to compel the association to keep the grounds in good order and maintain the whole as a cemetery; Clark v. Cemetery Co., 69 N. J. Eq. 636, 61 Atl. 261.

An injunction may issue against the lot owner and the cemetery association to prevent the burial of a dog; Hertle v. Riddell, 127 Ky. 623, 106 S. W. 282, 15 L. R. A. (N. S.) 796, 128 Am. St. Rep. 364.

A purchaser of a lot must look to the charter and by-laws of the corporation, they being part of his contract of purchase. When the by-laws provide that "this cemetery is set apart for the burial of the white race," a negro may not be buried therein: Hertle v. Riddell, 127 Ky. 623, 106 S. W. 282, 15 L. R. A. (N. S.) 796, 128 Am. St. Rep. 364; People v. Cemetery Co., 258 Ill. 36, 101 N. E. 219. One who purchased a lot in a distinctively Roman Catholic cemetery takes it with the tacit understanding that he will not be allowed to use it for the burial of one not a member of that church; People v. Trustees of St. Patrick's Cathedral, 21 Hun (N. Y.) 184; Dwenger v. Geary, 113 Ind. 106, 14 N. E. 903. But, where a lot was sold to a colored man for burial purposes, the corporation was not allowed afterwards to change its by-laws so as to exclude him and his family from the right of burial therein; Mt. Moriah Cemetery Ass'n v. Com., 81 Pa. 235, 22 Am. Rep. 743.

Where a testator devised to trustees a lot of ground for burial of the dead of his family, without any fund for its care, and the lot fell into disuse, the Orphans' Court may decree its sale and apply the proceeds in part to buying a lot in another cemetery, removing the dead, marking the graves or caring for the lot in the future and may divide the remainder among the heirs of the testator, but with no part for an elaborate monument to the testator; Young's Estate, 224 Pa. 570, 73 Atl. 941. The residue is distributable as real estate; Young's Estate, 20 Pa. D. R. 686.

See DEAD BODY; CHARITABLE USES (as to a legacy to keep a lot in order).

CENEGILD. In Saxon Law. A pecuniary mulct or fine paid to the relations of a murdered person by the murderer or his relations. Spelman, Gloss.

CENNINGA. A notice given by a buyer to a seller that the things which had been sold were claimed by another, in order that he

might appear and justify the sale. Blount; Whishaw.

The exact significance of this term is somewhat doubtful. It probably denoted notice, as defined above. The finder of stray cattle was not always entitled to it; for Spelman says, "As to strange (or stray) cattle, no one shall have them but with the consent of the hundred of tithingmen; unless he have one of these, we cannot allow him any *cenninga* (I think notice)." Spelman, Gloss.

CENS. **In Canadian Law.** An annual payment or due reserved to a seigneur or lord, and imposed merely in recognition of his superiority. Guyot, Inst. c. 9.

The land or estate so held is called a *censive;* the tenant is a *censitarie.* It was originally a tribute of considerable amount, but became reduced in time to a nominal sum. It is distinct from the rentes. The *cens* varies in amount and in mode of payment. Payment is usually in kind, but may be in silver; 2 Low. C. 40.

CENSARIA. A farm, or house and land, let at a standing rent. Cowell.

CENSO. **In Spanish and Mexican Law.** An annuity; a ground rent. The right which a person acquires to receive a certain annual pension, in consideration of the delivery to another of a determined sum of money or of an immovable thing. Civil Code Mex. art. 3206; Black, Dict.; Trevino v. Fernandez, 13 Tex. 655.

CENSO RESERVATIO. **In Spanish and Mexican Law.** The right to receive from another an annual pension by virtue of having transferred land to him by full and perfect title. Trevino v. Fernandez, 13 Tex. 655.

CENSUS. An official reckoning or enumeration of the inhabitants and wealth of a country.

The census of the United States is taken every tenth year, in accordance with the constitution; and many of the states have made provisions for a similar decennial reckoning at intervening periods.

The act of July 2, 1909, provides for the 13th and subsequent censuses. The period of three years beginning July 1st next preceding the census, is designated as the decennial census period and the reports must be completed and published within that period.

Certified copies of census returns are admissible in evidence upon the question of the age of a citizen deceased since the return was made; Priddy v. Boice, 201 Mo. 309, 99 S. W. 1055, 9 L. R. A. (N. S.) 718, 119 Am. St. Rep. 762, 9 Ann. Cas. 874; but the record does not import absolute verity; Western Cherokee Indians v. U. S., 27 Ct. Cl. 1.

The courts take judicial notice of the results of a census; State v. Braskamp, 87 Ia. 588, 54 N. W. 532; People v. Williams, 64 Cal. 87, 27 Pac. 939; Guldin v. Schuylkill County, 149 Pa. 210, 24 Atl. 171; Hawkins v. Thomas, 3 Ind. App. 399, 29 N. E. 157; State v. County Court, 128 Mo. 427, 30 S. W. 103; *contra*, People v. Rice, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836.

CENSUS REGALIS. The royal property (or revenue).

CENT (Lat. *centum*, one hundred). A coin of the United States, weighing forty-eight grains, and composed of ninety-five per centum of copper and of tin and zinc in such proportions as shall be determined by the Director of the Mint. Act of Feb. 12, 1873, s. 13. See Rev. Stat. section 3515.

Previous to the act of congress just cited, the cent was composed wholly of copper. By the act of April 2, 1792, Stat. at Large, vol. 1, p. 248, the weight of the cent was fixed at eleven penny-weights, or 264 grains; the half cent in proportion. Afterwards, namely, on the 14th of January, 1793, it was reduced to 208 grains, the half-cent in proportion. 1 U. S. Stat. at Large, 299 In 1796 (Jan. 26), by the proclamation of President Washington, who was empowered by law to do so, act of March 3, 1795, sect. 8, 1 U. S. Stat. at Large, 440, the cent was reduced in weight to 168 grains; the half-cent in proportion. It remained at this weight until the passage of the act of Feb. 21, 1857, which provided for a weight of seventy-eight grains and an alloy of eighty-eight per centum of copper and twelve of nickel. The same act directs that the coinage of half-cents should cease By the coinage act of Feb. 12, 1873, the weight and alloy were fixed as above stated. The first issue of cents from the national mint was in 1793, and has been continued every year since, except 1815. But in 1791 and 1792 some experimental pieces were struck, among which was the so-called Washington cent of those years.

CENTENA. See HUNDRED.

CENTESIMA (Lat. *centum*). **In Roman Law.** The hundredth part.

Usuriæ centesimæ. Twelve *per cent. per annum;* that is, a hundredth part of the principal was due each month,—the month being the unit of time for which the Romans reckoned interest. 2 Bla. Com. 462, n.

CENTRAL CRIMINAL COURT. A court in England (erected in 1834) which is the court of assize and of quarter sessions for the city of London and its liberties and the court of assize for the counties of London and Middlesex, and parts of Essex, Kent and Surrey. It has jurisdiction over all offences committed on the high seas or within the jurisdiction of the admiralty and offences committed outside its jurisdiction, sent to it by the King's Bench Division under a writ of certiorari. It consists of the lord chancellor, the judges of the High Court, the lord mayor, the aldermen, recorder, and common serjeant of the city of London, and two commissioners.

Twelve sessions at least are held every year, at the Old Bailey. The important cases are heard in a session of the court presided over by two of the judges of the High Court. The less important cases are tried by either the recorder or common serjeant. Odger, C. L. 986.

CENTUMVIRI (Lat. one hundred men). The name of a body of Roman judges.

Their exact number was one hundred and five, there being selected three from each of the thirty-five tribes comprising all the citizens of Rome. They constituted, for ordinary purposes, four tribunals; but some cases (called *centumvirales causæ*) required the judgment of all the judges. 3 Bla Com. 515.

CENTURY. One hundred. One hundred years.

The Romans were divided into *centuries*, as the English were formerly divided into hundreds.

CEORL. A tenant at will of free condition, who held land of the thane on condition of paying rent or services.

A freeman of inferior rank occupied in husbandry. Spelman, Gloss.

Those who tilled the outlands paid rent; those who occupied or tilled the inlands, or demesne, rendered services. Under the Norman rule, this term, as did others which denoted workmen, especially those which applied to the conquered race, became a term of reproach, as is indicated by the popular signification of churl. Cowell; Spelman, Gloss. See 1 Poll. & Maitl. 8; 2 *id.* 458.

CEPI (Lat.). I have taken. It was of frequent use in the returns of sheriffs when they were made in Latin; as, for example, *cepi corpus et* B. B. (I have taken the body and discharged him on bail bond); *cepi corpus et est in custodia* (I have taken the body and it is in custody); *cepi corpus et est languidus* (I have taken the body and he is sick).

CEPIT (Lat. *capere*, to take; *cepit*, he took or has taken). A form of replevin which is brought for carrying away goods merely. Wells, Repl. § 53; Cummings v. Vorce, 3 Hill (N. Y.) 282. *Non detinet* is not the proper answer to such a charge; Davis v. Calvert, 17 Ark. 85. And see Ford v. Ford, 3 Wis. 399. Success upon a *non cepit* does not entitle the defendant to a return of the property; Douglass v. Garrett, 5 Wis. 85. A plea of *non cepit* is not inconsistent with a plea showing property in a third person; Smith v. Morgan, 8 Gill (Md.) 133.

A technical word necessary in an indictment for larceny. The charge must be that the defendant *took* the thing stolen with a felonious design. Bacon, Abr. *Indictment*, G., 1.

CEPIT ET ABDUXIT (Lat.). He took and led away. Applicable in a declaration in trespass or indictment for larceny where the defendant has taken away a living chattel.

CEPIT ET ASPORTAVIT (Lat.). He took and carried away. Applicable in a declaration in trespass or an indictment for larceny where the defendant has carried away goods without right. 4 Bla. Com. 231. See CARRYING AWAY; LARCENY.

CEPIT IN ALIO LOCO (Lat. he took in another place). A plea in replevin, by which the defendant alleges that he took the thing replevied in another place than that mentioned in the declaration; 1 Chit. Pl. 490; 2 *id.* 558; Rast. Entr. 554, 555; Morris, Repl. 141; Wells, Repl. § 707. It is the usual plea where the defendant intends to avow or justify the taking to entitle himself to a return.

CERT MONEY. The head-money given by the tenants of several manors yearly to the lords, for the purpose of keeping up certain inferior courts. Called in the ancient records *certum letæ* (leet money). Cowell.

CERTAINTY. In Contracts. Distinctness and accuracy of statement.

A thing is certain when its essence, quality, and quantity are described, distinctly set forth, etc. Dig. 12, 1. 6. It is uncertain when the description is not that of an individual object, but designates only the kind. La. Civ. Code, art. 3522, no. 8; 5 Co. 121.

If a contract be so vague in its terms that its meaning cannot be certainly collected, and the statute of frauds preclude the admissibility of parol evidence to clear up the difficulty; 5 B. & C. 583; or parol evidence cannot supply the defect, then neither at law nor in equity can effect be given to it; 1 R. & M. 116. If it is impossible to ascertain any definite meaning, such agreement is necessarily void; [1892] Q. B. 478. As to uncertainty of contract see Davie v. Min. Co., 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357; Van Schaick v. Van Buren, 70 Hun 575, 24 N. Y. Supp. 306.

It is a maxim of law that that is certain which may be made certain: *id certum est quod certum reddi potest;* Co. Litt. 43. For example, when a man sells the oil he has in his store at so much a gallon, although there is uncertainty as to the quantity of oil, yet, inasmuch as it can be ascertained, the maxim applies, and the sale is good. See, generally, Story, Eq. § 240; Mitf. Eq. Pl., Jeremy ed. 41.

In Pleading. Such clearness and distinctness of statement of the facts which constitute the cause of action or ground of defence that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give the judgment. 2 B. & P. 267; Co. Litt. 303; Com. Dig. *Pleader*. See Giroux Amalgamator Co. v. White, 21 Or. 435, 28 Pac. 390.

Certainty to a common intent is attained by a form of statement in which words are used in their ordinary meaning, though by argument or inference they may be made to bear a different one. See 2 H. Bla. 530; Andr. Steph. Pl. 384.

Certainty to a certain intent in general is attained when the meaning of the statute may be understood upon a fair and reasonable construction without recurrence to possible facts which do not appear; 1 Wms. Saund. 49; Spencer v. Southwick, 9 Johns. (N. Y.) 317; Fuller v. Hampton, 5 Conn. 423.

Certainty to a certain intent in particular is attained by that technical accuracy of statement which precludes all argument, inference, and presumption against the party pleading. When this certainty is required, the party must not only state the facts of his case in the most precise way, but add to them such as show that they are not to be

controverted, and, as it were, anticipate the case of his adversary; Lawes, Pl. 54.

The last description of certainty is required in estoppels; Co. Litt. 303; 2 H. Bla. 530; Dougl. 159; and in pleas which are not favored in law, as alien enemy; 8 Term 167; Russel v. Skipwith, 6 Binn (Pa.) 247. See Clarke v. Morey, 10 Johns. (N. Y.) 70. With respect to an indictment, it is laid down that "an indictment ought to be certain to every intent, and without any intendment to the contrary;" Cro. Eliz. 490; and the charge contained in it must be sufficiently explicit to support itself; for no latitude of intention can be allowed to include anything more than is expressed; 2 Burr. 1127; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; U. S. v. Simmons, 96 U. S. 360, 24 L. Ed. 819; State v. Stiles, 40 Ia. 148; State v. Philbrick, 31 Me. 401; Com. v. Terry, 114 Mass. 263; State v. Fancher, 71 Mo. 460; State v. Messenger, 58 N. H. 348.

These definitions, which have been adopted from Coke, have been subjected to severe criticism, but are of some utility in drawing attention to the different degrees of exactness and fulness of statement required in different instances. Less certainty is required where the law presumes that the knowledge of the facts is peculiarly in the opposite party; 8 East 85; 13 *id.* 112; 3 Maule & S. 14; People v. Dunlap, 13 Johns. (N. Y.) 437.

Less certainty than would otherwise be requisite is demanded in some cases, to avoid prolixity of statement; 2 Wms. Saund. 117, n. 1. See, generally, 1 Chit. Pl.

CERTIFICANDO DE RECOGNITIONE STAPULÆ. In English Law. A writ commanding the mayor of the staple to certify to the lord chancellor a statute staple taken before him where the party himself detains it, and refuses to bring in the same. There is a like writ to certify a statute merchant and in divers other cases. Reg. Orig. 148; Black, Dict.

CERTIFICATE. A writing made in any court, and properly authenticated, to give notice to another court of anything done therein.

A writing by which testimony is given that a fact has or has not taken place.

Certificates are either *required by law*, as an insolvent's certificate of discharge, an alien's certificate of naturalization, which are evidence of the facts therein mentioned; or *voluntary*, which are given of the mere motion of the party giving them, and are in no case evidence. Com. Dig. *Chancery* (T. 5); 1 Greenl. Ev. § 498; 2 Willes 549.

There were anciently various modes of trial commenced by a certificate of various parties, which took the place of a writ in a common-law action. See Com. Dig. *Certificate*.

By statute, the certificates of various officers may be made evidence, in which case the effect cannot be extended by including facts other than those authorized; 1 Maule & S. 599; U. S. v. Buford, 3 Pet. (U. S.) 12, 29, 7 L. Ed. 585; Arnold v. Tourtellot, 13 Pick. (Mass.) 172; Stewart v. Allison, 6 S. & R. (Pa.) 324, 9 Am. Dec. 433; Governor v. Bell, 7 N. C. 331; Exchange & Banking Co. of New Orleans v. Boyce, 3 Rob. (La.) 307. An officer who has made a defective certificate of a married woman's acknowledgment cannot correct the defect after the expiration of his term; Griffith v. Ventress, 91 Ala. 366, 8 South. 312, 11 L. R. A. 193, 24 Am. St. Rep. 918; nor can he contradict his own certificate by testifying to fraud and coercion on the part of the husband toward the wife; Hockman v. McClanahan, 87 Va. 33, 12 S. E. 230. A certificate of acknowledgment is a judicial act, and in the absence of fraud conclusive of material facts stated in it; Cover v. Manaway, 115 Pa. 338, 8 Atl. 393, 2 Am. St. Rep. 552; Citizen's Saving & Loan Ass'n v. Heiser, 150 Pa. 514, 24 Atl. 733; but only of facts required by statute to be included in it, and therefore not that the wife of the grantor was of full age; Williams v. Baker, 71 Pa. 476. See RETURN; NOTARY; ACKNOWLEDGMENT; STOCK.

CERTIFICATE OF ASSIZE. A writ granted for the re-examination or retrial of a matter passed by assize before justices. Fitzh. Nat. Brev. 181 It is now entirely obsolete. 3 Bla. Com. 389. Consult, also, Comyns, Dig. *Assize* (B, 27, 28).

CERTIFICATE OF COSTS. See JUDGE'S CERTIFICATE.

CERTIFICATE OF DEPOSIT. A written statement from a bank that the party named therein has deposited the amount of money specified in the certificate and that the same is held subject to his order in accordance with the terms thereof.

When payable at a future date, with interest till due, for the use of a person named or to his order, upon return of the certificate, it is a negotiable promissory note; Miller v. Austen, 13 How. (U. S.) 218, 14 L. Ed. 119; Bull v. Bank, 123 U. S. 105, 8 Sup. Ct. 62, 31 L. Ed. 97; In re Baldwin's Estate, 170 N. Y. 160, 63 N. E. 62, 58 L. R. A. 124; Poorman v. Mills, 35 Cal. 118, 95 Am. Dec. 90; Lynch v. Goldsmith, 64 Ga. 42; Beardsley v. Webber, 104 Mich. 88, 62 N. W. 173; Bank of Saginaw v. Title & Trust Co., 105 Fed. 491; Forrest v. Trust Co., 174 Fed. 345. This has been substantially followed in all the states except Pennsylvania, where it has always been held otherwise, if the certificate contains no express promise to pay; Patterson v. Poindexter, 6 W. & S. (Pa.) 227, 40 Am. Dec. 554; and this was recognized to be the law in Pennsylvania as late as 1909; Forrest v. Trust Co., 174 Fed. 345, where the court followed the rule of Miller v. Austen, 13 How. (U. S.) 218, 14 L. Ed. 119; and expressed the opinion that such certificates

were negotiable under the Negotiable Instruments Act enacted in Pennsylvania, as well as under the general commercial law.

CERTIFICATE OF REGISTRY. A certificate that a ship has been registered as the law requires. 3 Kent 149. Under the United States statutes, "every alteration in the property of a ship must be indorsed on the certificate of registry, and must itself be registered." Unless this is done, the ship or vessel loses its national privileges as an American vessel; 1 Pars. Sh. & Adm. 50. The English statutes make such a transfer void. Stat. 3 & 4 Will. IV, c. 54; 17 & 18 Vict. c. 104; Abb. Sh. (13th ed.) 925.

The registry is not a document required by the law of nations as expressive of a ship's national character; 4 Taunt. 367; and is at most only *prima facie* evidence of ownership; U. S. v. Brune, 2 Wall. Jr. 264, Fed. Cas. No. 14,677; Newb. Adm. 176, 312; Lincoln v. Wright, 23 Pa. 76, 62 Am. Dec. 316; Brooks v. Minturn, 1 Cal. 481; 33 E. L. & Eq. 204. The registry acts are to be considered as forms of local or municipal institution for purposes of public policy; 3 Kent 149.

CERTIFIED CHECK. A check which has been recognized by the proper officer as a valid appropriation of the amount of money therein specified to the person therein named, and which bears upon itself the evidence of such recognition. See CHECK.

CERTIFIED PUBLIC ACCOUNTANT. A term applied to trained accountants who examine the books of accounts of corporations and others and report upon them. See AUDITOR.

CERTIORARI. A writ issued by a superior to an inferior court of record, or other tribunal or officer, exercising a judicial function, requiring the certification and return to the former of some proceeding then pending, or the record and proceedings in some cause already terminated, in cases where the procedure is not according to the course of the common law.

The extensive use of this writ and the lack of precise judicial definition of the public bodies and proceedings to which it is applicable lend interest to the early common law definitions, which are of value since the use of the writ is still usually regulated by common law principles and precedents.

The most frequently quoted common law definitions are those of Fitzherbert and Bacon, by the first of which the writ lies in the case of records of the courts, the treasury, sheriffs, coroners, commissioners, escheators; F. N. B. 554 A. He includes among forms given one to the mayor and sheriff of London in case of indictment and attachment and one to the mayor and sheriffs of York in assize of fresh force sued out before them without writ; *id.* 554 E, 557 L. Bacon uses only the general terms, "judges or officers of inferior courts"; Bac. Abr. 162; but in an enumeration of instances entitled "to what court it lies" he puts an "inquisition taken by a sheriff . . . and the verdict and judgment thereon," which were quashed on the ground that, no notice appearing, the record did not show jurisdiction, and on objection that the writ did not, he was answered that "there can be no doubt of that if it is not prohibited by the act of Parliament"; *id.* 168, citing 4 Burr. 2244. It was said that "the substance of this (Bacon's) definition has never been departed from, except where the statute has broadened the scope of the writ"; In re Dance, 2 N. D. 184, 49 N. W. 733, 33 Am St. Rep 768. The English Court of Appeal says that "certiorari is a writ in aid of justice, and is the apt means of preventing the infliction or continuance of wrong from any assumption or excess of jurisdiction", 2 L. R. (K. B.) 318; it is matter of discretion, not of right, *id.*

Blackstone refers only to it as a means of removing criminal causes from an inferior court to the King's Bench, as the supreme court of criminal jurisdiction; 4 Bla. Com. 265; or cases of Peers to the House of Lords; *id.* 321; or after summary order in a lower court which might be quashed or confirmed; *id.* 272. It might be granted at the instance of either prosecution or defendant, in the former case as matter of right, in the latter as matter of discretion, *id.* 321.

The function of the writ is to secure the correction of errors of a judicial nature in the proceedings of inferior courts or in the decisions of special tribunals, commissioners, magistrates and officers exercising judicial powers affecting the property or rights of a citizen, who act in a summary way, and not according to the course of the common law, and it also applies in many cases to the proceedings of municipal corporations It has also been allowed when the power is ministerial but necessarily connected with judicial action; People v. Hill, 65 Barb. (N Y.) 170; In re Nichols, 6 Abb. N. C. (N. Y.) 474. The writ is issued in two classes of cases. (1) Where the inferior court has exceeded its jurisdiction; (2) where it has proceeded illegally and there is no appeal or writ of error; White v. Wagar, 185 Ill 195, 57 N. E. 26, 50 L. R. A. 60, quoting Hyslop v. Finch, 99 Ill. 171.

"Official acts, executive, legislative, administrative or ministerial in their nature or character, were never subject to review by *certiorari*. The writ could be issued only for the purpose of reviewing some judicial act," People v. Brady, 166 N. Y. 44, 47, 59 N. E 701; St. Louis, S F. & T. Ry. Co. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. —. In some states the writ has been abolished by statute so far as the common law name is concerned, but the remedy is preserved under the new statutory name of "writ of review"; but this term and the old one mean precisely the same remedy, except so far as it may be modified by statute; People v. County Judge, 40 Cal. 479; Sutherlin v. Roberts, 4 Or. 388, Southwestern Telegraph & Telephone Co. v. Robinson, 48 Fed. 771, 1 C. C. A. 91. So where, by statute, appellate proceedings are to be taken by appeal in all cases theretofore covered by error, appeal or certiorari, but the right of review is not changed in extent, it was held that the appeal was in effect a common law *certiorari*, and the right to issue a *certiorari* remained the same as before; Rand v King, 131 Pa 641, 19 Atl. 806; so an appeal in a habeas corpus case is equivalent to a certiorari and brings up only the record, Com. v. Superintendent of Philadelphia County Prison, 200 Pa. 401, 69 Atl. 916, 21 L. R. A. (N. S.) 939.

The writ lies in most of the states to remove from the lower courts proceedings which are created and regulated by statute merely, for the purpose of revision: Com. v. West Boston Bridge, 13 Pick. (Mass.) 195; Bath Bridge & Turnpike Co. v. Magoun, 8 Greenl. (Me.) 293; Bob v. State, 2 Yerg. (Tenn.) 173; Williamson v. Carnan, 1 G. & J. (Md.) 196; Adams v. Newfane, 8 Vt. 271; People v. Lawrence, 54 Barb. (N. Y.) 589, John v. State, 1 Ala. 95; People v. Supervisors, 8 Cal. 58; In re Robinson's Estate, 6 Mich. 137; Board of Com'rs of Hillsboro v.

Smith, 110 N. C. 417, 14 S. E. 972; Miller v. Trustees, 88 Ill. 27; and to complete the proceedings when the lower court refuses to do so, upon erroneous grounds; Anonymous, 2 N. C. 302; Auditor v. Woodruff, 2 Ark. 73, 33 Am. Dec. 368; and to correct errors in law; McAllilley v. Horton, 75 Ala. 491; Rawson v. McElvaine, 49 Mich. 194, 13 N. W. 513; Lapan v. Cumberland County Com'rs, 65 Me. 160; Conover v. Davis, 48 N. J. L. 112, 2 Atl. 667. In England; 13 E. L. & Eq. 129; 9 L. R. Q. B. 350; and in some states; State v. Stone, 3 H. & McH. (Md.) 115; State v. Hunt, 1 N. J. L. 287; People v. Vermilyea, 7 Cow. (N. Y.) 141; Com. v. McGinnis, 2 Whart. (Pa.) 117; State v. Washington, 6 N. C. 100; John v. State, 1 Ala. 95; Kenney v. State, 5 R. I. 385; the writ may also be issued to remove criminal causes to a superior court; Har. Certiorari 8. But see Winn v. State, 10 Ohio 345. It also lies where a probate court proceeds without jurisdiction in admitting a claim against an estate; Durham v. Field, 30 Ill. App. 121; or where the court has jurisdiction but makes an order exceeding its power; State v. County Court, 45 Mo. App. 387. It is also given by statute to review the acts and powers of official boards and officers; Haven v. County Com'rs, 155 Mass. 467, 29 N. E. 1083; State v. City of Ashland, 71 Wis. 502, 37 N. W. 809.

The writ has been used to review the proceedings of courts-martial; Rathbun v. Sawyer, 15 Wend. (N. Y.) 451; of canal appraisers charged with acting without notice; Fonda v. Canal Appraisers, 1 Wend. (N. Y.) 288; of commissioners of appeal in cases of taxation; State v. Falkinburge, 15 N. J. L. 320; of commissioners of highways; Lawton v. Com'rs of Highways, 2 Cal. (N. Y.) 179; or where a void order was made by them; Fitch v. Com'rs of Highways, 22 Wend. (N. Y.) 132; a municipal assessment for a local improvement departing essentially from the statutory method; People v. Rochester, 21 Barb. (N. Y.) 656; common council of a city in laying out a new street; State v. City of Fond du Lac, 42 Wis. 287. It has also been issued upon the refusal to grant a writ of habeas corpus on the ground of want of jurisdiction; People v. Mayer, 16 Barb. (N. Y.) 362; and upon the discharge of a complaint under the act abolishing imprisonment for debt on the ground of want of proof; Learned v. Duval, 3 Johns. Cas. (N. Y.) 141. It may issue at the suit of a taxpayer and voter to test the legality of an act uniting highway districts by the trustees of the township; Dunham v. Fox, 100 Ia. 131, 69 N. W. 436.

The supreme court may issue writs of certiorari in all proper cases, and will do so when the circumstances imperatively demand that form of interposition, to correct excesses of jurisdiction, and in furtherance of justice. In re Chetwood, 165 U. S. 443, 17 Sup. Ct. 385, 41 L. Ed. 782.

To warrant a *certiorari* the act must be plainly judicial and not executive or legislative; People v. N. Y., 2 Hill (N. Y.) 14; accordingly it was refused in case of a corporate resolution appropriating land for a public square; *id;* and of an order of a board of health adjudging a question of nuisance; 15 Wend. 255; 21 Barb. 656.

It is used also as an auxiliary process to obtain a full return to other process, as when, for example, the record of an inferior court is brought before a superior court by appeal, writ of error, or other lawful mode, and there is a manifest defect or suggestion of diminution, to obtain a perfect transcript and all papers; Stewart v. Ingle, 9 Wheat. (U. S.) 526, 6 L. Ed. 151; Colden v. Knickerbacker, 2 Cow. (N. Y.) 38; Stewart v. Court of County Com'rs, 82 Ala. 209, 2 South. 270; Smick v. Opdycke, 12 N. J. L. 85; Colerick v. Hooper, 3 Ind. 316, 56 Am. Dec. 505; State v. Reid, 18 N. C. 382, 28 Am. Dec. 572; Thatcher v. Miller, 11 Mass. 414; Scott v. Hall, 2 Munf. (Va.) 229; Franklin Academy v. Hall, 16 B. Monr. (Ky.) 472; Carter v. Douglass, 2 Ala. 499; Clements v. Hahn, 1 Col. 490. It does not issue as a matter of right on mere suggestion of defects in the record, but the application must be supported by proof; State v. Orrick, 106 Mo. 111, 17 S. W. 176, 329.

The office of the writs of certiorari and mandamus is often much the same. It is the practice of the U. S. supreme court, upon a suggestion of any defect in the transcript of the record sent up to that court upon a writ of error, to allow a special certiorari, requiring the court below to certify more fully. Fowler v. Lindsey, 3 Dall. (U. S.) 411, 1 L. Ed. 658, Barton v. Petit, 7 Cra. (U. S.) 288, 3 L. Ed. 347; Stimpson v. R. Co., 3 How. (U. S.) 553, 11 L. Ed. 722; U. S. v. Adams, 9 Wall. (U. S.) 661, 19 L. Ed. 808. Relief may also be had in the U. S. Circuit Court of Appeals on allegation of diminution in the record sent up from the circuit court, as provided by rule 18, Blanks v. Klein, 49 Fed. 1, 1 C. C. A. 254. The same result might also be effected by a writ of mandamus. The two remedies are, when addressed to an inferior court of record, from a superior court, requiring the return of a record, much the same. But where diminution of the record is suggested in the inferior court, and the purpose is to obtain a more perfect *record*, and not merely a more perfect *copy* or *transcript*, it is believed that the writ of mandamus is the appropriate remedy.

In many of the states, the writ produces the same result in proceedings given by statute, such as the proceedings for obtaining damages under the mill acts, highway acts, pauper laws, etc., as the writ of error does when the proceedings are according to the course of the common law. Where the lower court is to be required to proceed in a cause, a writ of procedendo or mandamus is the proper remedy.

The writ is generally said to issue only after final judgment of the inferior court or tribunal whose proceedings are to be reviewed; Patterson v. United States, 2 Wheat. (U. S.) 221, 4 L. Ed. 224; People v. Railroad Com'rs, 160 N. Y. 202, 54 N. E. 697; Lynde v. Noble, 20 Johns. (N. Y.) 80;

Wallace v. Jameson, 179 Pa. 94, 36 Atl. 145; Case of Road from Bough Street, 2 S. & R. 419; Vaughn v. Marshall, 1 Houst. (Del.) 348; Stewart v. State, 98 Ga. 202, 25 S. E. 424; Meads v. Copper Mines, 125 Mich. 456, 84 N. W. 615; People v. Lindsay, 1 Idaho, 401; State v. Valliant, 123 Mo. 524, 27 S. W. 379, 28 S. W. 586; State v. Gill, 137 Mo. 627, 39 S. W. 81; Glennon v. Burton, 144 Ill. 551, 33 N. E. 23; Gauld v. Board of Sup'rs, 122 Cal. 18, 54 Pac. 272; Culver v. Travis, 108 Mich. 640, 66 N. W. 575; where the reason for the rule is thus stated: "The writ of certiorari is a writ of review. Its office is to bring up for review *final* determinations and adjudications of inferior tribunals, boards or officers exercising judicial functions, where there is no appeal, nor any plain, speedy and adequate remedy. The writ is necessarily founded on a final determination. Were the rule otherwise a writ might issue at any step in the proceedings of the inferior tribunal, although such tribunal might, were the point presented, decide that it had no jurisdiction in the matter submitted to it. This would be the exercise of original jurisdiction by the court issuing the writ and not a review of the determination of the inferior tribunal. The matter complained of would be, not that the tribunal had exceeded, but that it was about to exceed, its jurisdiction." As the writ relates back to the first day of the term, it will not issue to review a case not pending at that time; Womer v. R. Co., 37 W. Va. 287, 16 S. E. 488.

The English rule is different in civil cases, and the writ is usually issued before the final determination; 7 D. & R. 769; 13 L. J. Q. B. 149; 8 Ont. L. J. 277; 2 Ont. L. J. N. S. 277; 3 U. C. Q. B. O. S. 149. In one state at least it is held that the writ may issue, in the case of municipal corporations, before final decision; State v. City Council of Camden, 47 N. J. L. 64, 54 Am. Rep. 117

Under the act of March 2, 1833, providing for the removal by *certiorari* of suits in state courts against revenue officers, the writ from the United States circuit court to a state court will stay all proceedings; State v. Circuit Judge, 33 Wis. 127. And under the removal act of 1875, if the state court decides to retain jurisdiction in a removable case, a *certiorari* may be resorted to to obtain a transfer of the record; U. S. R. S. 1 Supp. 84.

It does not lie to enable the superior court to revise a decision upon matters of fact; People v. Board of Fire Com'rs, 100 N. Y. 82, 2 N. E. 613; Appeal of Yeager, 34 Pa. 176; Beach v. Mullin, 34 N. J. L. 343; Farmington River Water Power Co. v. County Com'rs, 112 Mass. 206; Lapan v. Cumberland County Com'rs, 65 Me. 160; Low v. R. Co., 18 Ill. 324; Frederick v. Clark, 5 Wis. 191; Central Pac. R. Co. v. Placer County, 46 Cal. 667; Farmers' & Merchants' Bank v. Board of Equalization, 97 Cal. 318, 32 Pac. 312; North & South St. R. Co. v. Spullock, 88 Ga. 283, 14 S. E. 478; Herbert v. Curtis, 55 N. J. L. 87, 25 Atl. 386; State v. Whitford, 54 Wis. 150, 11 N. W. 424; Shearous v. Morgan, 111 Ga. 858, 36 S. E. 927; State v. Judge, 41 La. Ann. 179, 6 South. 18; nor matters resting in the discretion of the judge of the inferior court; Inhabitants of New Marlborough v. County Com'rs, 9 Metc. (Mass.) 423; Roston v. Morris, 25 N. J. L. 173; Brown v. Board of Sup'rs, 124 Cal. 274, 57 Pac. 82; State v. Judge, 43 La. Ann. 825, 9 South. 639; People v. Board of Fire Com'rs, 82 N. Y. 358; Hall v. Oyster, 168 Pa. 399, 31 Atl. 1007; Sunberg v. District Court of Linn County, 61 Ia. 597, 16 N. W. 724; Huffaker v. Boring, 8 Ala. 87; Matter of Saline County Subscription, 45 Mo. 52, 100 Am. Dec. 337; 3 El. & Bl. 529; 8 Ont. 651, 12 Can. Sup. Ct. 111; 29 Nova Scotia 521; unless by special statute; Starr v. Trustees of Village of Rochester, 6 Wend. (N. Y.) 564; In re Hayward, 10 Pick. (Mass.) 358; Independence v. Pompton, 9 N. J. L. 209; or where palpable injustice has been done; Duggen v. McGruder, Walk. (Miss.) 112, 12 Am. Dec. 527; Fonda v. Canal Appraisers, 1 Wend. (N. Y.) 288; Com. v. Coombs, 2 Mass. 489; State v. Smith, 101 Mo. 174, 14 S. W. 108; Bostick v. Palmer, 79 Ga. 680, 4 S. E. 319; Lapan v. County Com'rs, 65 Me. 160; Ex parte Schmidt, 24 S. C. 363.

It does not lie where the errors are formal merely, and not substantial; 8 Ad. & E. 413; Patrick v. McKernon, 5 How. (Miss.) 578; Furbush v. Cunningham, 56 Me. 184; Hermann v. Butler, 59 Ill. 225; nor where substantial justice has been done though the proceedings were informal; Criswell v. Richter, 13 Tex. 18; Knapp v. Heller, 32 Wis. 467; City of Charlestown v. Middlesex County Com'rs, 109 Mass. 270; Hyslop v. Finch, 99 Ill. 171; State v. Kemen, 61 Wis. 494, 21 N. W. 530; nor where the proceedings are not void on their face and show no arbitrary action on the part of the trial judge; Williams v. District Court, 45 La. Ann. 1295, 14 South. 57.

Under the statute authorizing all writs not specifically provided for the federal courts have power to issue writs of certiorari in proper cases; American Construction Co. v. R. Co., 148 U. S. 372, 13 Sup. Ct. 158, 37 L. Ed. 486; In re Tampa Suburban R. Co., 168 U. S. 583, 18 Sup. Ct. 177, 42 L. Ed. 589.

Certiorari will not lie as a substitute for an appeal from an interlocutory order of a superior court; Guilford County v. Georgia Co., 109 N. C. 310, 13 S. E. 861; nor to review an appealable order; In re McConnell, 74 Cal. 217, 15 Atl. 746. The evidence cannot be reviewed upon certiorari; Com. v.

Gillespie, 146 Pa. 546, 23 Atl. 393; nor rulings on the admission of evidence; Lord v. Wirt, 96 Mich. 415, 56 N. W. 7.

The court may deal only with questions of law and cannot say what the court should have done if the facts had been different; Beach v. Mullin, 34 N. J. L. 343; Inhabitants of Plymouth v. Plymouth County Com'rs, 16 Gray (Mass.) 341; nor can it determine questions of fact depending on evidence arising outside of the record; Hayford v. City of Bangor, 102 Me. 340, 66 Atl. 731, 11 L. R. A. (N. S.) 940; nor are such facts to be considered in determining the propriety of the writ; U. S. Standard Voting Machine Co. v. Hobson, 132 Ia. 38, 109 N. W. 458, 7 L. R. A. (N. S.) 512, 119 Am. St. Rep. 539, 10 Ann. Cas. 972. The evidence forms no part of the record, and in the absence of anything in the record to establish the contrary, it will be presumed that the evidence was sufficient to sustain the finding; De Rochebrune v. Southeimer, 12 Minn. 78 (Gil. 42); People v. Dawell, 25 Mich. 251, 12 Am. Rep. 260; whatever the evidence tended to show is treated as proved; *id.*

Certiorari may issue in criminal cases in aid of *habeas corpus* to review proceedings before a commissioner on commitments; In re Martin, 5 Blatchf. 303, Fed. Cas. No. 9,151 (but not to review his decision on the facts; In re Stupp, 12 Blatchf. 501, Fed. Cas. No. 13,563); or to the circuit court to ascertain from its proceedings whether that court has exceeded its authority; Ex parte Lange, 18 Wall. (U. S.) 163, 21 L. Ed. 872 (citing the prior cases); Ex parte Virginia, 100 U. S. 343; 25 L. Ed. 676; State v. Johnson, 103 Wis. 625, 79 N. W. 1081, 51 L. R. A. 33.

A court of exclusively appellate jurisdiction cannot issue a certiorari to pass over an intermediate appellate court; Carr v. Tweedy, Hempst. 287, Fed. Cas. No. 2,440a. The common law writ does not lie with respect to proceedings subsequent to appeal or writ of error; U. S. v. Young, 94 U. S. 258, 24 L. Ed. 153.

It is granted or refused in the discretion of the superior court; Lees v. Childs, 17 Mass. 352; Huse v. Grimes, 2 N. H. 210; People v. McCarthy, 102 N. Y. 642, 8 N. E. 85; State v. Blauvett, 34 N. J. L. 261; Freeman v. Oldham's Lessee, 4 T. B. Monr. (Ky.) 420; Flourney v. Payne, 28 Ark. 87; West River Bridge Co. v. Dix, 16 Vt. 446; Livingston v. Livingston, 24 Ga. 379; L. R. 5 Q. B. 466; Welch v. County Court, 29 W. Va. 63, 1 S. E. 337; Ex parte Hitz, 111 U. S. 766, 4 Sup. Ct. 698, 28 L. Ed. 592; Board of Supervisors v. Magoon, 109 Ill. 142; and the application must disclose a proper case upon its face; 8 Ad. & E. 43; Lees v. Childs, 17 Mass. 351; Cullen v. Lowery, 2 Harr. (Del.) 459; Willis v. Dun, Wright (Ohio) 130; Hartsfield v. Jones, 49 N. C. 309; Redmond v. Anderson, 18 Ark. 449; Russell v. Pickering, 17 Ill. 31; Mays v. Lewis, 4 Tex. 1; McMurray v. Milan, 2 Swan (Tenn.) 176.

As stated *supra*, the doctrine that *certiorari* will not lie where there is an appeal is characterized as "the rule" to that effect. That this is too broad a generalization will readily appear from an examination of the numerous cases, which are collected in a very full note on "Exceptions to the Rule" in 50 L. R. A. 787. The note is appended to two cases in the same court, each decided by a divided court, which will illustrate the difficulty of the question. In one it was stated as the general rule that *certiorari* will not lie to correct mere errors of a tribunal having jurisdiction, in the rightful exercise of that jurisdiction, where there is an appeal by means of which those errors may be corrected; State v. Shelton, 154 Mo. 670, 55 S. W. 1008, 50 L. R. A. 798. In the other case it was said that that statement of the law was too broad, and that, to bar the writ, the remedy by appeal must be adequate to meet the necessities of the case and must be equally beneficial, speedy and sufficient; State v. Guinotte, 156 Mo. 513, 57 S. W. 281, 50 L. R. A. 787. It is doubtful if a general rule can be formulated to apply to all cases, and, with reference to any given state of the facts, the authorities must be critically examined. It may however be said that it should not issue where there is another adequate remedy; People v. Board of Health, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 522; In re Randall, 11 Allen (Mass.) 472; State v. Probate Court, 72 Minn. 434, 75 N. W. 700; Oyster v. Bank, 107 Ia. 89, 77 N. W. 523; Ex parte Howard-Harrison Iron Co., 130 Ala. 185, 30 South. 400; In re Tampa Suburban R. Co., 168 U. S. 583, 18 Sup. Ct. 177, 42 L. Ed. 589; Watson v. City of Plainfield, 60 N. J. L. 260, 37 Atl. 615; Kern's Adm'r v. Foster, 16 Ohio, 274; 9 Ad. & El. 540; 33 N. Brunsw. 80; 20 Nova Scotia 283; 17 Quebec Super. Ct. 383. And though as stated by Bacon (*supra*) it may issue out of chancery, it cannot be used for the review of decrees in equity alleged to be void for want of power; In re Tampa Suburban R. Co., 168 U. S. 583, 18 Sup. Ct. 177, 42 L. Ed. 589; In re Haney, 14 Wis. 417; Gilliland v. Sellers' Adm'rs, 2 Ohio St. 223; "nor can *certiorari* be made to operate as an injunction, and restrain a tribunal from acting beyond its jurisdiction, however well grounded may be the apprehension in that respect;" Glennon v. Burton, 144 Ill. 551, 33 N. E. 23.

The common law remedy has been successfully invoked where statutes provided that the decision of the inferior tribunal should be final and conclusive, upon the theory that it is an inherent part of the judicial power of the superior court and cannot be taken away without express negative words; Murfree v. Leeper, 1 Overt (Tenn.); Ritter v. Kunkle, 39 N. J. L. 259; and even where the statute

directed that no *certiorari* should issue to remove proceedings had in pursuance of it, the writ may be used to ascertain whether the proceedings have been invoked in pretence of the statutory authority and are therefore not in pursuance, but in derogation, of it; Ackerman v. Taylor, 8 N. J. L. 305; *id.*, 9 N. J. L. 65. Possibly the New York Court of Appeals may have come near to the formulation of a general rule in saying that a common law *certiorari* can only be availed of to review when there is no other adequate remedy; in other cases it will be confined to its original and appropriate office, to enable a court of review to determine whether the inferior tribunal proceeded within its jurisdiction; People v. Betts, 55 N. Y. 600, which is cited in Harris v. Barber, 129 U. S. 371, 9 Sup. Ct. 314, 32 L. Ed. 697, and the language of which is quoted in People v. Feitner, 51 App. Div. 196, 64 N. Y. Supp. 675. The last case was a *certiorari* to the secretary of state for granting a charter for a name claimed to be already in use. The court quashed the writ, saying that the existing company had a remedy in equity, but if the charter had been refused there might be no other remedy.

The judgment is either that the proceedings below be quashed or that they be affirmed; Har. Certiorari 38, 49; Marshall v. Hill, 8 Yerg. (Tenn.) 102; Kincaid v. Smith, *id.* 218; Com. v. Turnpike Corporation, 5 Mass. 423; Hall v. State, 12 G. & J. (Md.) 329; Weigand v. Malatesta, 6 Coldw. (Tenn.) 362; see McAllilley v. Horton, 75 Ala. 491; Hamilton v. Harwood, 113 Ill. 154; Taylor v. Gay, 20 Ga. 77; Bandlow v. Thieme, 53 Wis. 57, 9 N. W. 920; either wholly or in part; Com. v. Turnpike Corp. 5 Mass. 420; Nichol v. Patterson, 4 Ohio 200; Bronson v. Mann, 13 Johns. (N. Y.) 461. See, also, Beck v. Knabb, 1 Overt. (Tenn.) 58; Henry v. Heritage, 3 N. C. 38. The costs are discretionary with the court; Myers v. Town of Pownal, 16 Vt. 426; Chance v. Haley, 6 Ind. 367; but at common law neither party recovers costs; Low v. Rogers, 8 Johns. (N. Y.) 321; Com. v. Ellis, 11 Mass. 465; State v. Leavitt, 3 N. H. 44; Nichol v. Patterson, 4 Ohio 200; and the matter is regulated by statute in some states; Atkinson v. Crossland, 4 Watts (Pa.) 451; Hinchman v. Cook, 20 N. J. L. 271. See MANDAMUS; PROCEDENDO. Consult 4 Bla. Com. 262, 265.

By the act of congress of March 3, 1891, establishing circuit courts of appeal, § 6, it is provided that in any case in which the decision of that court is final a certiorari may issue from the supreme court to bring up the record to that court for "its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." 1 U. S. Comp. Stat. 550. At the first term of the supreme court after the passage of this act, upon an application for a *certiorari*, it was said that "it is evident that it is solely questions of gravity and importance" that should be certified up to the supreme court either by the action of the circuit courts of appeals or by requirement of the supreme court upon *certiorari;* In re Lau Ow Bew, 141 U. S. 583, 12 Sup. Ct. 43, 35 L. Ed. 868, where although it was said the jurisdiction should be exercised sparingly and with great caution, the writ was issued to determine the effect of the Chinese exclusion acts. The rule thus early laid down was reiterated in several subsequent cases illustrating what the court considered cases of sufficient "gravity and importance."

"While the power is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only where the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of the nation in its internal or external relations demands such exercise." Forsyth v. Hammond, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 1095.

It was held that a case which could otherwise be finally determined by that court may, under the statute, be removed from the circuit court of appeals on *certiorari* at any time during its pendency there; but where there is merely private interest involved it will not be done where there has been no final judgment; *id.*, citing to this express point Chicago & N. W. Ry. Co. v. Osborne, 146 U. S. 354, 13 Sup. Ct. 281, 36 L. Ed. 1002, which is sometimes incorrectly referred to as holding that the Supreme Court has no power to remove by *certiorari* before final judgment. While the supreme court may require a case to be certified up at any stage, particularly when the question of jurisdiction is involved, it should not be done to review an interlocutory decree "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause"; American Const. Co. v. Ry. Co., 148 U. S. 372, 13 Sup. Ct. 158, 37 L. Ed. 486. The writ may issue after the mandate has gone down from the circuit court of appeals; The Conqueror, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937. It may issue to an inferior state court when the highest state court has refused jurisdiction; Western Union Telegraph Co. v. Hughes, 203 U. S. 505, 27 Sup. Ct. 162, 51 L. Ed. 294.

The decisions upon applications for this writ indicate the construction which it has placed upon the phrase used by it in the first case, "questions of gravity and importance." These words are evidently applied only to

cases of public and not private interest and importance. For example, the writ was issued to settle the construction of a treaty and immigration laws; The Three Friends, 166 U. S. 1, 17 Sup. Ct. 495, 41 L. Ed. 897; to review a case of habeas corpus finally determined by the circuit court of appeals; Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340; to settle questions of jurisdiction of the bankruptcy court; Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; to secure a uniform construction of the bankruptcy act; Holden v. Stratton, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116; or of a tariff act; The Conqueror, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937; to determine whether a judge who made an order was disqualified to sit in the circuit court of appeals on the review of it; American Const. Co. v. Ry. Co., 148 U. S. 372, 13 Sup. Ct. 158, 37 L. Ed. 486; to prevent conflict of decision between federal and state courts within the same territorial jurisdiction; Forsyth v. Hammond, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 1095; to avoid a possible question of jurisdiction upon a writ of error; Montana Min. Co. v. Min. Co., 204 U. S. 204, 27 Sup. Ct. 254, 51 L. Ed. 444; and when there have been conflicting decisions of different circuit courts of appeals; Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 Sup. Ct. 652, 53 L. Ed. 1034.

On the other hand the writ has been refused where the court of appeals has reversed proceedings putting a railroad company in the hands of a receiver; American Const. Co. v. Ry. Co., 148 U. S. 372, 13 Sup. Ct. 158, 37 L. Ed. 486; where questions of the state law of *res judicata* and of master and servant were considered not of sufficient "gravity and general importance"; In re Woods, 143 U. S. 202, 12 Sup. Ct. 417, 36 L. Ed. 125; in a case of where the circuit court of appeals was found to have no jurisdiction, and had rendered no decision except to certify that question; Good Shot v. U. S., 179 U. S. 87, 21 Sup. Ct. 33, 45 L. Ed. 101; or where the issue is a mere technicality and the essential rights of the parties are not involved; Smith v. Vulcan Iron Works, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810.

While under section 6 of the Circuit Court of Appeals Act *certiorari* can only be issued when a writ of error cannot lie, it will not be issued merely because the writ of error will not lie, but only where the case is one of gravity, or where there is conflict between decisions of state and federal courts or between federal courts of different circuits, or something affecting the relations of this nation with foreign nations or of general interest to the public; Fields v. U. S., 205 U. S. 292, 27 Sup. Ct. 543, 51 L. Ed. 807.

A certiorari may be allowed when a case has been improperly brought up on a writ of error and the record filed in the latter may be treated as a proper return; Security Trust Co. v. Dent, 187 U. S. 237, 23 Sup. Ct. 61, 47 L. Ed. 158. When a case is removed to it under the act of 1891, the entire record is before the supreme court, which has power to decide the case; Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 257, 30 Sup. Ct. 505, 54 L. Ed. 757.

See UNITED STATES COURTS; BILL OF CERTIORARI.

CERTIORARI FACIAS. Cause to be certified. The command of a writ of certiorari.

CERVISARII (*cervisia*, ale). Among the Saxons, tenants who were bound to supply drink for their lord's table. Cowell.

CERVISIA. Ale. *Cervisarius.* An ale-brewer; an ale-house keeper. Cowell.

CESIONARIO. In Spanish Law. An assignee. White, New Recop. 304.

CESSAVIT PER BIENNIUM (Lat. he has ceased for two years). An obsolete writ, which could formerly have been sued out when the defendant had for two years *ceased* or neglected to perform such service or to pay such rent as he was bound to do by his tenure, and had not upon his lands sufficient goods or chattels to be distrained. Fitzh. N. B. 208. It also lay where a religious house held lands on condition of performing certain spiritual services which it failed to do. 3 Bla. Com. 232.

CESSET EXECUTIO (Lat. let execution stay). The formal order for a stay of execution, when proceedings in court were conducted in Latin. See EXECUTION.

CESSET PROCESSUS (Lat. let process stay). The formal order for a stay of process or proceedings, when the proceedings in court were conducted in Latin. See 2 Dougl. 627; 11 Mod. 231.

CESSIO BONORUM (Lat. a transfer of property). In Civil Law. An assignment of his property by a debtor for the benefit of his creditors.

Such an assignment discharged the debtor to the extent of the property ceded only, but exempted him from imprisonment. Dig. 2. 4. 25; 48. 19. 1; Nov. 4. 3. See La. Civ. Code 2166; Golis v. His Creditors, 2 Mart. N. S. (La.) 108; Richards v. His Creditors, 5 Mart. N. S. (La.) 290; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. Ed. 529; 1 Kent 422.

CESSION (Lat. *cessio*, a transfer). In Civil Law. An assignment. The act by which a party transfers property to another. See CESSIO BONORUM.

In Ecclesiastical Law. A surrender. When an ecclesiastic is created bishop, or when a parson takes another benefice, without dis-

pensation, the first benefice becomes void by a legal cession or surrender. Cowell.

In Government Law. The transfer of land by one government to another.

France ceded Louisiana to the United States, by the treaty of Paris, of April 30, 1803; Spain made a cession of East and West Florida, by the treaty of Feb. 22, 1819. Cessions have been severally made to the general government of a part of their territory by New York, Virginia, Massachusetts, Connecticut, South Carolina, North Carolina, and Georgia. See Gordon, Dig. art. 2236–2250.

It is the usage of civilized nations, when territory is ceded, to stipulate for the property rights of its inhabitants; U. S. v. Chaves, 159 U. S. 452, 16 Sup. Ct. 57, 40 L. Ed. 215.

In case of a cession to the United States, the laws of the ceded country inconsistent with the constitution and laws of the United States, so far as applicable, would cease to be of obligatory force; but otherwise the municipal laws of the foreign country continue; Municipality of Ponce v. Church, 210 U. S. 310, 28 Sup. Ct. 737, 52 L. Ed. 1068.

Annexation is an act of state, and any obligation assumed under a treaty to that effect, either to the ceding sovereign or to individuals, is not one which municipal courts are authorized to enforce; [1899] A. C. 572.

CESTUI QUE TRUST. He for whose benefit another person is seised of lands or tenements or is possessed of personal property.

He who has a right to a beneficial interest in and out of an estate the legal title to which is vested in another. 2 Wash. R. P. *163.

He may be said to be the equitable owner; Will. R. P. 188; 1 Spence, Eq. Jur. 497; Inhabitants of Orleans v. Inhabitants of Chatham, 2 Pick. (Mass.) 29; is entitled, therefore, to the rents and profits; may transfer his interest, subject to the provisions of the instrument creating the trust; 1 Spence, Eq. Jur. 507; 2 Washb. R. P. 195; and may ordinarily mortgage his interest; Perrine v. Newell, 49 N. J. Eq. 57, 23 Atl. 492; may defend his title in the name of his trustee; 1 Cruise, Dig. tit. 12, c. 4, § 4; but has no legal title to the estate, as he is merely a tenant at will if he occupies the estate; 2 Ves. Sen. Ch. 472; 16 C. B. 652; 1 Washb. R. P. 88; and may be removed from possession in an action of ejectment by his own trustee; Lew. Trust. 8th ed. *677; Hill, Trust. 274; Mordecai v. Parker, 14 N. C. 425; Russell v. Lewis, 2 Pick. (Mass.) 508; he cannot sue for damages to trust lands unless the trustee refuses to protect the rights of the beneficiary; Lindheim v. R. Co., 68 Hun 122, 22 N. Y. Supp. 685. Where the trustee neglects to defend the legal title to trust property, the beneficiary may sue to remove a cloud on the title; President, etc., of Bowdoin College v. Merritt, 54 Fed. 55. See TRUST; BENEFICIARY; SPENDTHRIFT TRUST.

CESTUI QUE USE. He for whose benefit land is held by another person.

He who has a right to take the profits of lands of which another has the legal title and possession, together with the duty of defending the same and to direct the making estates thereof; Tudor, Lead. Cas. 252; 2 Bla. Com. 330. See 2 Washb. R. P. 95; USE.

CESTUI QUE VIE. He whose life is the measure of the duration of an estate. 1 Washb. R. P. 88.

CHAFEWAX. An officer in chancery who fits the wax for sealing to the writs, commissions, and other instruments there made to be issued out. He is probably so called because he warms (*chaufe*) the wax.

CHAFFERS. Anciently signified wares and merchandise; hence the word *chaffering*, which is yet used for buying and selling, or beating down the price of an article. The word is used in stat. 3 Edw. III. c. 4.

CHALDRON. A measure of capacity, equal to fifty-eight and two-thirds cubic feet, nearly. Cowell.

CHALLENGE. A request by one person to another to fight a duel. No particular form of words is necessary to constitute a challenge, and it may be oral or written; State v. Perkins, 6 Blackf. (Ind.) 20; Ivey v. State, 12 Ala. 276; State v. Strickland, 2 Nott & McC. (S. C.) 181; Com. v. Pope, 3 Dana (Ky.) 418. Sending a challenge is a high offence at common law, and indictable as tending to a breach of the peace; Hawk. Pl. Cr. b. 1, c. 3, § 3; Com. v. Tibbs, 1 Dana (Ky.) 524; State v. Gibbons, 4 N. J. L. 40; State v. Dupont, 2 McCord (S. C.) 334; State v. Taylor, 1 Const. (S. C.) 107; State v. Farrier, 8 N. C. 487; State v. Perkins, 6 Blackf. (Ind.) 20; Com. v. Lambert, 9 Leigh (Va.) 603. He who carries a challenge is also punishable by indictment; Clark, Cr. L. 340; U. S. v. Shackelford, 3 Cra. C. C. 178, Fed. Cas. No. 16,260. In most of the states, this barbarous practice is punishable by special laws. 2 Bish. Cr. Law, § 312. And in a large number of them by their constitutions the giving, accepting, or knowingly carrying a challenge, deprives the party of the right to hold any office of honor or profit in the commonwealth.

In most of the civilized nations, challenging another to fight is a crime, as calculated to destroy the public peace; and those who partake in the offence are generally liable to punishment. In Spain, it is punished by loss of offices, rents, and honors received from the king, and the delinquent is incapable to hold them in future; Aso & M. Inst. b. 2, t.

19, c. 2, § 6. See, generally, Joy, Chall.; 1 Russ. Cr. 275; 2 Bish. Cr. Law, chap. xv.; Com. v. Hart, 6 J. J. Marsh. (Ky.) 120; State v. Taylor, 1 Const. (S. C.) 107; In re Leigh, 1 Munf. (Va.) 468.

In Practice. An exception to the jurors who have been arrayed to pass upon a cause on its trial. See 2 Poll. & Maitl. 619, 646.

An exception to those who have been returned as jurors. Co. Litt. 155 *b*.

The most satisfactory derivation of the word is that adopted by Webster and Crabb, from *call*, challenge implying a calling off. The word is also used to denote exceptions taken to a judge's capacity on account of interest; Bank of North America v. Fitzsimons, 2 Binn. (Pa.) 454; Pearce v. Affleck, 4 *id.* 349; and to the sheriff for favor as well as affinity, Co. Litt. 158 *a;* Munshower v. Patton, 10 S. & R. (Pa.) 336, 13 Am. Dec. 673. The right is not allowed to enable the prisoner to select such jurors as he may wish, but to select just and impartial ones; State v. Jones, 97 N. C. 469, 1 S. E. 680

Challenges are of the following classes:—

To the array. Those which apply to all the jurors as arrayed or set in order by the officer upon the panel. Such a challenge is, in general, founded upon some error or manifest partiality committed in obtaining the panel, and which, from its nature, applies to all the jurors so obtained. These are not allowed in the United States generally; U. S. v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16,-134; Thomas v. State, 5 How. (Miss.) 20; the same end being attained by a motion addressed to the court, but are in some states; Bowman v. State, 41 Tex. 417; Boles v. State, 24 Miss. 445; Quinebaug Bank v. Tarbox, 20 Conn. 510; Peck v. Freeholders of Essex County, 21 N. J. L. 656; Pringle v. Huse, 1 Cow. (N. Y.) 432; Cowgill v. Woodeu, 2 Blackf. (Ind.) 332; Rolland v. Com., 82 Pa. 306, 22 Am. Rep. 758. The challenge must be based upon objection to all the jurors composing the panel; Clears v. Stanley, 34 Ill. App. 338. Mere irregularity in drawing a jury is not sufficient cause to sustain a challenge to the array; Nealon v. People, 39 Ill. App. 481; nor is the fact that a challenge to the array has been sustained for bias and prejudice of the officer summoning them and few of the same jurors are on the second venire; People v. Vincent, 95 Cal. 425, 30 Pac. 581; nor is the fact that one of the men named on the special venire is dead and another removed from the county; State v. Whitt, 113 N. C. 716, 18 S. E. 715; Smith v. Smith, 52 N. J. L. 207, 19 Atl. 255. It was a good ground of challenge to the array that no persons of African descent were selected as jurors but all such were excluded because of their race and color, on affidavit of the prisoner to that effect, no evidence having been adduced *pro* or *con;* Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567.

For cause. Those for which some reason is assigned.

These may be of various kinds, unlimited in number, may be to the array or to the poll, and depend for their allowance upon the existence and character of the reason assigned.

To the favor. Those challenges to the poll for cause which are founded upon reasonable grounds to suspect that the juror will act under some undue influence or prejudice, though the cause be not so evident as to authorize a principal challenge; Co. Litt. 147 *a*, 157 *a;* Bacon, Abr. *Juries*, E, 5; Shoeffler v. State, 3 Wis. 823. Such challenges are at common law decided by triors, and not by the court. See TRIORS; Cancemi v. People, 16 N. Y. 501; Mann v. Glover, 14 N. J. L. 195. But see Milan v. State, 24 Ark. 346; Costigan v. Cuyler, 21 N. Y. 134; Weston v. People, 6 Hun (N. Y.) 140.

Peremptory. Those made without assigning any reason, and which the court must allow. The number of these in trials for felonies was, at common law, thirty-five; 4 Bla. Com. 354; but, by statute, has been reduced to twenty in most states, and is allowed in criminal cases only when the offence is capital; Thorn. Juries 119; U. S. v. Cottingham, 2 Blatchf. 470, Fed. Cas. No. 14,872; Hayden v. Com., 10 B. Monr. (Ky.) 125; Fouts v. State, 8 Ohio St. 98; see Schumaker v. State, 5 Wis. 324; State v. Cadwell, 46 N. C. 289; Todd v. State, 85 Ala. 339, 5 South. 278. The prosecuting officer may exercise his right of peremptory challenge of a juror at any time previous to the acceptance of the jury by the defendant; State v. Haines, 36 S. C. 504, 15 S. E. 555; in civil cases the right is not allowed at all; 9 Exch. 472; 2 F. & F. 137; U. S. v. Cottingham, 2 Blatchf. 470, Fed. Cas. No. 14,872; or, if allowed, only to a very limited extent; How v. Canal Co., 5 Harr. (Del.) 245; Cleveland, P. & A. R. Co. v. Stanley, 7 Ohio St. 155; Waterford & W. Turnpike v. People, 9 Barb. (N. Y.) 161; Quinebaug Bank v. Tarbox, 20 Conn. 510; Wyatt v. Noble, 8 Blackf. (Ind.) 507; Lewis v. Detrich, 3 Ia. 216. Unless given by statute no right exists; Brown v. R. Co., 86 Ala. 206, 5 South. 195. The rule that a juror shall be accepted or challenged and sworn as soon as his examination is completed is not objectionable as embarrassing the exercise of the right of peremptory challenge; St. Clair v. U. S., 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936. In the federal courts in trials for treason or capital cases, the accused has twenty and the United States five peremptory challenges; U. S. R. S. § 819. The act granting peremptory challenges to the government in criminal cases has not taken away the right to conditional or qualified challenges when permitted in a state, or where it has been adopted by a federal court as a rule or by special order. The exercise of the right is under the supervision of the court, which should not permit it to be used unreasonably or so as to prejudice the defendant. It is not an unreasonable exercise

of the privilege where, notwithstanding its exercise, neither the government nor the defendant had exhausted all their peremptory challenges; Sawyer v. U. S., 202 U. S. 150, 26 Sup. Ct. 575, 50 L. Ed. 972.

The allowance of peremptory challenges in excess of the statutory provision is not ground for reversal, where no prejudice to the opposite party appears; Stevens v. R. Co., 26 R. I. 90, 58 Atl. 492, 66 L. R. A. 465. The number of peremptory challenges allowed varies much in the different states. See 12 A. & E. Encyc. 346, 347, n. 3, for state statutes on the subject.

To the poll. Those made separately to each juror to whom they apply. Distinguished from those to the array.

Principal. Those made for a cause which when substantiated is of itself sufficient evidence of bias in favor of or against the party challenging. Co. Litt. 156 *b*. See 3 Bla. Com. 363; 4 *id.* 353. They may be either to the array or to the poll; Co. Litt. 156 *a, b.*

The importance of the distinction between principal challenges and those to the favor is found in the case of challenges to the array or of challenges to the poll for favor or partiality. All other challenges to the poll must, it seems, be principal. The distinctions between the various classes of challenges are of little value in modern practice, as the court generally determine the qualifications of a juror upon suggestion of the cause for challenge, and examination of the juror upon oath when necessary See TRIORS.

The *causes* for challenge are said to be either *propter honoris respectum* (from regard to rank), which do not exist in the United States; *propter defectum* (on account of some defect), from personal objections, as alienage, infancy, lack of statutory requirements; *propter affectum* (on account of partiality), from some bias or partiality either actually shown to exist or presumed from circumstances; *propter delictum* (on account of crime), including cases of legal incompetency on the ground of infamy; Co. Litt. 155 *b et seq.*

These causes include, amongst others, *alienage;* Hollingsworth v. Duane, Wall. C. C. 147, Fed. Cas. No. 6,618; but see Queen v. Hepburn, 2 Cra. 3, Fed. Cas. No. 11,503; *incapacity* resulting from age, lack of statutory qualifications; Montague v. Com., 10 Gratt. (Va.) 767; see State v. Garig, 43 La. Ann. 365; *partiality* arising from near relationship; March v. R. Co., 19 N. H. 372; Balsbaugh v. Frazer, 19 Pa. 95; Jaques v. Com., 10 Gratt. (Va.) 690; State v. Perry, 44 N. C. 330; Hardy v. Sprowle, 32 Me. 310; Quinebaug Bank v. Leavens, 20 Conn. 87, 50 Am. Dec. 272; Paddock v. Wells, 2 Barb. Ch. (N. Y.) 331; Trullinger v. Webb, 3 Ind. 198; Moody v. Griffin, 65 Ga. 304; see State v. Walton, 74 Mo. 270; Wirlbach's Ex'r v. Bank, 97 Pa. 543, 39 Am. Rep. 821; an *interest* in the result of the trial; Fleming v. State, 11 Ind. 234; Page v. R. Co., 21 N. H. 438; Peck v. Freeholders, 21 N. J. L. 656; Houston & T. C. Ry. Co. v. Terrell, 69 Tex. 650, 7 S. W. 670; but it should be a direct pecuniary interest; Phillips v. State, 29 Ga. 105; *conscientious scruples* as to finding a verdict of conviction in a capital case; U. S. v. Wilson, 1 Baldw. 78, Fed. Cas. No. 16,730; White v. State, 16 Tex. 206; Hyde v. State, 16 Tex. 445, 67 Am. Dec. 630; People v. Tanner, 2 Cal. 257; Williams v. State, 3 Ga. 453; Lewis v. State, 9 Smedes & M. (Miss.) 115; Martin v. State, 16 Ohio 364; People v. Majors, 65 Cal. 148, 3 Pac. 597, 52 Am. Rep. 295; Kennedy v. State, 19 Tex. App. 618; see Gates v. People, 14 Ill. 433; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *membership* of societies, under some circumstances; 13 Q. B. 815; People v. Reyes, 5 Cal. 347; Com. v. Livermore, 4 Gray (Mass.) 18; *citizenship* in a municipality interested in the case; Cramer v. Burlington, 42 Ia. 315; Fulweiler v. St. Louis, 61 Mo. 479; Gibson v. Wyandotte, 20 Kan. 156; Goshen v. England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; but see Kendall v. Albia, 73 Ia. 241, 34 N. W. 833; acting as an employé of one of the parties; Louisville R. Co. v. Mask, 64 Miss. 738, 2 South. 360; Gunter v. Mfg. Co., 18 S. C. 263, 44 Am. Rep. 573; Central R. Co. v. Mitchell, 63 Ga. 173; *bias* indicated by *declarations* of wishes or opinions as to the result of the trial; State v. Spencer, 21 N. J. L. 196; Busick v. State, 19 Ohio 198; Blake v. Millspaugh, 1 Johns. (N. Y.) 316; Davis v. Walker, 60 Ill. 452; Winnesheik Ins. Co. v. Schueller, *id.* 465; O'Mara v. Com., 75 Pa. 424; Scranton v. Stewart, 52 Ind. 68; or *opinions* formed or expressed as to the guilt or innocence of one accused of crime; Meyer v. State, 19 Ark. 156; Marsh v. State, 30 Miss. 627; Sutton v. Albatross, 2 Wall. Jr. 333, Fed. Cas. No. 13,645; Moses v. State, 10 Humphr. (Tenn.) 456; Neely v. People, 13 Ill. 685; Trimble v. State, 2 G. Greene (Ia.) 404; Busick v. State, 19 Ohio 198; Monroe v. State, 5 Ga. 85; see State v. Fox, 25 N. J. L. 566; Baker v. State, 15 Ga. 498; Rice v. State, 7 Ind. 332; Van Blaricum v. People, 16 Ill. 364, 63 Am. Dec. 316; People v. McCauley, 1 Cal. 379; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Smith v. Com., 7 Gratt. (Va.) 593; Baldwin v. State, 12 Mo. 223; State v. Potter, 18 Conn. 166; but if opinion is based on newspaper report or rumor, and the juror says he can give an impartial decision on the evidence, he is competent; People v. Cochran, 61 Cal. 548; Walker v. State, 102 Ind. 502, 1 N. E. 856; Thayer v. Min. Co., 105 Ill. 547; State v. Dugay, 35 La. Ann. 327; State v. Green, 95 N. C. 611; Ulrich v. People, 39 Mich. 245; Weston v. Com., 111 Pa. 251, 2 Atl. 191. A juror may be asked whether his "political affiliations or party predilections tend to bias his judgment either for or against the defendant"; Connors v. U. S., 158 U. S. 408, 15 Sup. Ct. 951, 39 L. Ed. 1033.

Who may challenge. Both parties, in civil

as well as in criminal cases, may challenge, for cause; and equal privileges are generally allowed both parties in respect to peremptory challenges; but see Tharp v. Feltz's Adm'r, 6 B. Monr. (Ky.) 15; Shoeffler v. State, 3 Wis. 823; Pfomer v. People, 4 Park. Cr. Cas. (N. Y.) 586; and after a juror has been challenged by one party and found indifferent, he may yet be challenged by the other; Williams v. State, 32 Miss. 389, 66 Am. Dec. 615. A juror has no right to challenge himself, and though a good cause of challenge subsists, yet, if neither party will take advantage of it, the court cannot reject him; Denn v. Pissant, 1 N. J. L. 220; but see Gilliam v. Brown, 43 Miss. 641.

The time to make a challenge is between the appearance and swearing of the jurors; Thompson v. Com., 8 Gratt. (Va.) 637; State v. Patrick, 48 N. C. 443; Lewis v. Detrich, 3 Ia. 216; McFadden v. Com., 23 Pa. 12, 62 Am. Dec. 308; Jackson v. Pittsford, 8 Blackf. (Ind.) 194; Williams v. State, 3 Ga. 453; State v. Bunger, 14 La. Ann. 461; State v. Anderson, 4 Nev. 265; Woodward v. Dean, 113 Mass. 297; but see Haynes v. Crutchfield, 7 Ala. 189; U. S. v. Morris, 1 Curt. C. C. 23, Fed. Cas. No. 15,815; Burns v. State, 80 Ga. 544, 7 S. E. 88; Thorp v. Deming, 78 Mich. 124, 43 N. W. 1097; the fact that a panel has been passed by a party as satisfactory will not prevent him from challenging one of the jurors so passed at any time before he is sworn; Silcox v. Lang, 78 Cal. 118, 20 Pac. 297; Daniels v. State, 88 Ala. 220, 7 South. 337. See Mayers v. Smith, 121 Ill. 442, 13 N. E. 216; Boteler v. Roy, 40 Mo. App. 234. A challenge for cause should be made before the juror is sworn; People v. Duncan, 8 Cal. App. 186, 96 Pac. 414; but the court may permit it before the jury is completed; People v. Schmitz, 7 Cal. App. 330, 94 Pac. 407, 419, 15 L. R. A. (N. S.) 717; so also peremptory challenges may be made before the juror is sworn; State v. Delliso, 75 N. J. L. 808, 69 Atl. 218.

It is a general rule at common law that no challenge can be made till the appearance of a full jury; 4 B. & Ald. 476; Taylor v. R. Co., 45 Cal. 323; on which account a party who wishes to challenge the array may pray a *tales* to complete the number, and then make his objection. Challenges to the array, where allowed, must precede those to the poll; and the right to the former is waived by making the latter; Co. Litt. 158 *a*; Bacon, Abr. *Juries*, E, 11; People v. Roberts, 6 Cal. 214; Weeping Water Electric Light Co. v. Haldeman, 35 Neb. 139, 52 N. W. 892; but see Clinton v. Englebrecht, 13 Wall. (U. S.) 434, 20 L. Ed. 659. In cases where peremptory challenges are allowed, a juror unsuccessfully challenged for cause may subsequently be challenged peremptorily; 4 Bla. Com. 356; 6 Term 531; 4 B. & Ald. 476. See Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

Manner of making. Challenges to the array must be made in writing; People v. Doe, 1 Mich. 451; Suttle v. Batie, 1 Ia. 141; but challenges to the poll are made orally and generally by the attorney's or party's saying, "Challenge," or "I challenge," or "We challenge;" 1 Chit. Cr. Law 533–541; 4 Hargr. St. Tr. 740; Trials per Pais 172; Cro. Car. 105. See State v. Knight, 43 Me. 11; Zimmerly v. Road Com'rs, 25 Pa. 134; Rolland v. Com., 82 Pa. 306, 22 Am. Rep. 758.

The guaranty in the constitution of a trial by jury does not prevent legislation as to the manner of selecting jurors or allowing peremptory challenges to the state; State v. Ward, 61 Vt. 153, 17 Atl. 483. See JURY, *sub-tit. Qualifications.*

CHAMBER. A room in a house. There may be an estate of freehold in a chamber as distinct and separate from the ownership of the rest of the house; 1 Term 701; Co. Litt. 48 *b*; Loring v. Bacon, 4 Mass. 576; Proprietors of South Congregational Meeting-house v. City of Lowell, 1 Metc. (Mass.) 538; Cheeseborough v. Green, 10 Conn. 318, 26 Am. Dec. 396; and ejectment will lie for a deprivation of possession; 1 Term 701; Otis v. Smith, 9 Pick. (Mass.) 293; though the owner thereof does not thereby acquire any interest in the land; Stockwell v. Hunter, 11 Metc. (Mass.) 448, 45 Am. Dec. 220. See Brooke, Abr. *Demand* 20; Aldrich v. Parsons, 6 N. H. 555; Wusthoff v. Dracourt, 3 Watts (Pa.) 243; 3 Leon. 210.

Consult Washburn; Preston, Real Property.

CHAMBER OF ACCOUNTS. **In French Law.** A sovereign court, of great antiquity, in France which took cognizance of and registered the accounts of the king's revenue: nearly the same as the English court of exchequer. Encyc. Brit.

CHAMBER OF COMMERCE. A society of the principal merchants and traders of a city, who meet to promote the general trade and commerce of the place. Some of these are incorporated, as in Philadelphia. Similar societies exist in all the large commercial cities, and are known by various names, as, Board of Trade, etc.

CHAMBERS. The private room of the judge. Any hearing before a judge which does not take place during a term of court or while the judge is sitting in court, or an order issued under such circumstances, is said to be *in chambers.* The act may be an official one, and the hearing may be in the court-room; but if the court is not in session, it is still said to be done *in chambers.* See IN CAMERA; OPEN COURT.

CHAMPART. **In French Law.** The grant of a piece of land by the owner to another, on condition that the latter would deliver to

him a portion of the crops. 18 Toullier, n. 182.

CHAMPERTOR. One who makes pleas or suits, or causes them to be moved, either directly or indirectly, and sues them at his proper costs, upon condition of having a part of the gain. Stat. 33 Edw. I. stat. 2.

One who is guilty of champerty.

CHAMPERTY (Lat. *campum partire*, to divide the land). A bargain with a plaintiff or defendant in a suit, for a portion of the land or other matter sued for, in case of a successful termination of the suit which the champertor undertakes to carry on at his own expense. See 19 Alb. L. J. 468; Nickels v. Kane's Adm'r, 82 Va. 309; 7 Bing. 369.

Champerty differs from maintenance chiefly in this, that in champerty the compensation to be given for the service rendered is a part of the matter in suit, or some profit growing out of it; 4 Bla. Com., Chase's ed. 905, n. 8; Wheeler v. Pounds, 24 Ala. 472; Lathrop v. Bank, 9 Metc. (Mass.) 489; Barnes v. Strong, 54 N. C. 100; Arden v. Patterson, 5 Johns. Ch. (N. Y.) 44; Meeks v. Dewberry, 57 Ga. 263, Hayney v. Coyne, 10 Heisk. (Tenn.) 339, Coleman v. Billings, 89 Ill. 183; while in simple maintenance the question of compensation does not enter into the account, 2 Bish. Cr. Law § 131, Quigley v. Thompson, 53 Ind. 317.

The offence was indictable at common law; 4 Bla. Com. 135; Thurston v. Percival, 1 Pick. (Mass.) 415; Brown v. Beauchamp, 5 T. B. Monr. (Ky.) 413, 17 Am. Dec. 81; Douglas v. Wood's Lessee, 1 Swan. (Tenn.) 393; 8 M. & W. 691; see L. R. 8 Q. B. 112; 2 App. Cas. 186; 4 L. R. Ir. 43; Key v. Vattier, 1 Ohio 132; Wright v. Meek, 3 G. Greene (Ia.) 472; Newkirk v. Cone, 18 Ill. 449; Danforth v. Streeter, 28 Vt. 490; McMullen v. Guest, 6 Tex. 275; and is in some of the states by statute; Low v. Hutchinson, 37 Me. 196; Sedgwick v. Stanton, 14 N. Y. 289; Thompson v. Reynolds, 73 Ill. 11; Davis v. Sharron, 15 B. Monr. (Ky.) 64; Stoddard v. Mix, 14 Conn. 12; Richardson v. Rowland, 40 Conn. 565; Bentinck v. Franklin, 38 Tex. 458; Duke v. Harper, 2 Mo. App. 1. Champerty avoids contracts into which it enters; Martin v. Clarke, 8 R. I. 389, 5 Am. Rep. 586. A common instance of champerty, as defined and understood at common law, is where an attorney agrees with a client to collect by suit at his own expense a particular claim or claims in general, receiving a certain proportion of the money collected; Dumas v. Smith, 17 Ala. 305; Key v. Vattier, 1 Ohio 132; 4 Dowl. 304; or a percentage thereon; Lathrop v. Bank, 9 Metc. (Mass.) 489; 2 Bish. Cr. Law § 132; Kelly v. Kelly, 86 Wis. 170; 56 N. W. 637; and see Ogden v. Des Arts, 4 Duer (N. Y.) 275; Major's Ex'r v. Gibson, 1 Pat. & H. (Va.) 48; Newkirk v. Cone, 18 Ill. 449; Davis v. Sharron, 15 B. Monr. (Ky.) 64; Poe v. Davis, 29 Ala. 676; Evans v. Bell, 6 Dana (Ky.) 479; Lytle v. State, 17 Ark. 608; Backus v. Byron, 4 Mich. 535; Martin v. Clarke, 8 R. I. 389, 5 Am. Rep. 586; Fetrow v. Merriwether, 53 Ill. 275; Harmon v. Brewster, 7 Bush (Ky.) 355.

The tendency of modern decisions is, while departing from the unnecessary severity of the old law, at the same time to preserve the principle which defeats the mischief to which the old law was directed. It has been the disposition of courts to look not so much to technical distinctions, and by treating statutes on the subject as declaratory of the common law, to deal with the subject with more flexibility, keeping in view the real object of the policy to restrain what was defined by Knight Bruce, L. J., to be "the traffic of merchandizing in quarrels, of huckstering in litigious discord;" 1 D. M. & G. 680, 686. In this spirit, the common-law rule relative to champerty and maintenance is no longer recognized in many states; Nickels v. Kane's Adm'r, 82 Va. 309; Brown v. Begne, 21 Or. 260, 28 Pac. 11, 14 L. R. A. 745, 28 Am. St. Rep. 752; Byrne v. R. Co., 55 Fed. 44; but in New York by statute it is unlawful for an attorney to give or promise a consideration for placing in his hands a claim for injuries against a railroad company; Code C. P. 678; Oishei v. Lazzarone, 61 Hun 623, 15 N. Y. Supp. 933. Where an attorney agrees to prosecute an action for damages and advance all costs because of the poverty of the plaintiff, taking a contingent fee of a portion of the amount recovered, it is not void for champerty; Dunne v. Herrick, 37 Ill. App. 180; nor is a contract to pay for services of an attorney contingent entirely upon success; Lewis v. Brown, 36 W. Va. 1, 14 S. E. 444; Mumma's Appeal, 127 Pa. 474, 18 Atl. 6; Omaha & R. V. R. Co. v. Brady, 39 Neb. 27, 57 N. W. 767; Lewis v. Brown, 36 W. Va. 1, 14 S. E. 444 (and see Elliott v. Rubel, 132 Ill. 9, 23 N. E. 400); Fowler v. Callan, 102 N. Y. 395, 7 N. E. 169; Winslow v. R. Co., 71 Ia. 197, 32 N. W. 330; Belding v. Smythe, 138 Mass. 530; Phelps v. Park Com'rs, 119 Ill. 626, 10 N. E. 230; Aultman v. Waddle, 40 Kan. 195, 19 Pac. 730; Stevens v. Sheriff, 76 Kan. 124, 90 Pac. 799, 11 L. R. A. (N. S.) 1153; Taylor v. Bemiss, 110 U. S. 42, 3 Sup. Ct. 441, 28 L. Ed. 64; if unconscionable, it will not be upheld; Muller v. Kelly, 125 Fed. 212, 60 C. C. A. 170. A committee of the Pennsylvania Bar Association (1908, 1909) and one of the New York State Bar Association (1909) have reported strongly against contingent fees. The purchase by attorneys of rights of action, for the purpose of bringing suit thereon, is commonly prohibited in law, on grounds of public policy; Chase's Bla. Com. 905, n. 8; and an agreement that the client shall receive a certain amount out of the sum recovered, and that all above that shall belong to the attorney, is champertous; Dahms v. Sears, 13 Or. 47, 11 Pac. 891; Silverman v. R. Co., 141 Fed. 382; but such an agreement for collection without suit is not champertous; Burnham v. Heselton, 84 Me. 578, 24 Atl. 955.

A contract by an attorney to pay witness

fees out of a contingent fee to be allowed him for successful services in a suit is champertous; Barngrover v. Pettigrew, 128 Ia. 533, 104 N. W. 904, 2 L. R. A. (N. S.) 260, 111 Am. St. Rep. 206, and so is a contract stipulating that the client shall not compromise or settle his claim without the consent of the attorney; Davy v. Ins. Co., 78 Ohio St. 256, 85 N. E. 504, 17 L. R. A. (N. S.) 443, 125 Am. St. Rep. 694. Some cases have held that an attorney is under absolute disability to purchase from his client the subject of his retainer; 12 Ir. Eq. 1; West v. Raymond, 21 Ind. 305; such purchases have been held in other cases to be presumptively void; Stubinger v. Frey, 116 Ga. 396, 42 S. E. 713; Roby v. Colehour, 135 Ill. 300, 25 N. E. 777; or to be voidable at the option of the client; Lane v. Black, 21 W. Va. 617; they will be closely scrutinized by the court; Mitchell v. Colby, 95 Ia. 202, 63 N. W. 769; Barrett v. Ball, 101 Mo. App. 288, 73 S. W. 865; but they will not be set aside if they were "open, honest and in every way fair to the client"; Vanasse v. Reid, 111 Wis. 303, 87 N. W. 192. Many cases have refused to hold the attorney to be under an absolute disability in this respect; Handlin v. Davis, 81 Ky. 34; Cox v. Delmas, 99 Cal. 104, 33 Pac. 836; Klein v. Borchert, 89 Minn. 377, 95 N. W. 215. The attorney, to sustain such a purchase, must establish the utmost good faith and fairness and adequacy of consideration and that he gave full information and disinterested advice to the client; Byrne v. Jones, 159 Fed. 321, 90 C. C. A. 101; Dunn v. Record, 63 Me. 17; Day v. Wright, 233 Ill. 218, 84 N. E. 226; he must prove *uberrima fides;* Young v. Murphy, 120 Wis. 49, 97 N. W. 496; this rule has been applied to purchases made after the relation has terminated; 33 Beav. 133; Barrett v. Ball, 101 Mo. App. 288, 73 S. W. 865.

A contract by one not acting as attorney, for a specific consideration, to defeat the probate of a will, is void as a species of champerty or maintenance; Cochran v. Zachery, 137 Ia. 585, 115 N. W. 486, 16 L. R. A. (N. S.) 235, 126 Am. St. Rep. 307, 15 Ann. Cas. 297; but an agreement by one having a claim against a decedent's estate to do everything proper and legitimate to aid the heirs in recovering the estate in consideration that they would pay his claim is not void as champerty or maintenance; Smith v. Hartsell, 150 N. C. 71, 63 S. E. 172, 22 L. R. A. (N. S.) 203.

In England contingent fees to solicitors are void by a statute of 1870. They are unknown in the case of barristers.

In England, in New York, and probably most of the states, the purchase of land, pending a suit concerning it, is champerty; and if made with knowledge of the suit and not pursuant to a previous agreement, it is void; 4 Kent 449; Bowling's Heirs v. Roark (Ky.) 24 S. W. 4; Sneed v. Hope (Ky.) 30 S. W. 20; Snyder v. Church, 70 Hun 428, 24 N. Y. Supp. 337; this doctrine, established by the English statutes, Westm. 1, c. 25, Westm. 2, c. 49, and 28 Edw. I. c. 11, became part of the common law, and either as such or by statutory adoption became engrafted upon the law of almost all the states. The principle extends to the purchase of any cause of action, as a patent which has been infringed; Keiper v. Miller, 68 Fed. 627; unpaid promissory notes; Hamilton v. Gray, 67 Vt. 233, 31 Atl. 315, 48 Am. St. Rep. 811. In Pennsylvania a person may convey an interest in lands held adversely to him; Murray's Estate, 13 Pa. Co. Ct. 70.

See BUYING TITLES.

The champerty of the plaintiff is no defence in the action concerning which the contract was made. A railroad company sued for an overcharge cannot defend by showing that the plaintiff made a champertous contract with his attorney to induce the company to accept the overcharge and then sue for the penalty; Railway Co. v. Smith, 60 Ark. 221, 29 S. W. 752; nor is such defence good in actions for personal injuries; Omaha & R. V. Ry. Co. v. Brady, 39 Neb. 27, 57 N. W. 767; nor can a purchaser of a disputed title defend against a prior unrecorded deed to plaintiff's attorney for one-half of the land, on the ground that the latter was given under a champertous contract; Chamberlain v. Grimes, 42 Neb. 701, 60 N. W. 948; and generally the objection that a contract is champertous cannot be set up by a stranger to it or in defence of a suit brought under it; Ashurst v. Peck, 101 Ala. 499, 14 South. 541; Pennsylvania Co. v. Lombardo, 49 Ohio St. 1, 29 N. E. 573, 14 L. R. A. 785; Gilkeson Sloss Commission Co. v. Bond, 44 La. Ann. 841, 11 South. 220; Euneau v. Rieger, 105 Mo. 659, 16 S. W. 854.

An attorney suing as "administrator" to recover for a death by wrongful act may be guilty of a champertous agreement with the beneficiaries, which may be pleaded as a defence to the suit under a statute investing the courts with equity powers for the purpose of discovering and preventing the offence; Byrne v. R. Co., 55 Fed. 44. For an analysis of the cases, see Wald's Poll. Cont. 293.

As to agreements between attorney and client regarding fees in divorce cases, see DIVORCE; ATTORNEY; ETHICS, LEGAL.

As to conditional fees in Roman Law, see ADVOCATI.

CHAMPION. He who fights for another, or who takes his place in a quarrel. One who fights his own battles. Bracton, l. 4, t. 2, c. 12.

CHANCE. See ACCIDENT.

CHANCE-MEDLEY. A sudden affray. This word is sometimes applied to any kind of homicide by misadventure, but in strictness it is applicable to such killing only as

happens in defending one's self. 4 Bla. Com. 184.

CHANCELLOR. An officer appointed to preside over a court of chancery, invested with various powers in the several states.

There is a chancellor for the state in Delaware, and also, with vice-chancellors, in New Jersey, and in Alabama, Mississippi, and Tennessee there are district chancellors elected by the people. Under the federal system and in the other states the powers and jurisdiction of courts of equity are administered by the same judges who hold the common-law courts.

The title is also used in some of the dioceses of the Protestant Episcopal Church in the United States to designate a member of the legal profession who gives advice and counsel to the bishop and other ecclesiastical authorities.

In Scotland, this title is given to the foreman of the jury. Bisph. Eq. 7.

An officer bearing this title is to be found in some countries of Europe, and is generally invested with extensive political authority. It was finally abolished in France in 1848. The title and office of chancellor came to us from England.

See 1 Spence, Eq. Jur.; 4 Viner, Abr. 374; Woodd. Lect. 95.

For the history of the office, see CANCELLARIUS.

In England the title is borne by several functionaries, thus:

Lord High Chancellor of Great Britain. This has been the title of his office since the Union with Scotland (in effect May 1, 1707). He is appointed by the Crown, by the delivery to him of the Great Seal of the United Kingdom, and verbally addressing him by the title. It is usual to appoint the person recommended by the Prime Minister, from such members of the bar as hold or have held the office of Attorney or Solicitor General. There is no qualification for the office, except that none but a Protestant can be appointed. 7 Halsb. Laws of Eng. 56. He holds office during pleasure, and as a member of the Cabinet and under the usage accepts or retires from office with the political party to which he belongs. He is expressly excepted from the term of office during good behavior provided for the judges in the Judicature Acts. He is a member of the Privy Council, probably by prescription; also prolocutor or speaker of the House of Lords by prescription. He is not necessarily a peer, and if not, he cannot address the House of Lords. He is custodian of the Great Seal, except when it is entrusted to a Lord Keeper, or is in commission. He is head of the judicial administration of England and is responsible for the appointment of judges of the High Court, except the Chief Justice, who is appointed by the Prime Minister. He appoints County Court judges (except where the whole of the County Court district lies within the Duchy of Lancaster). He advises the Crown as to nominating Justices of the Peace. He is President of the High Court of Justice, and of the Chancery Division of the High Court and an *ex officio* member of the Court of Appeals, and presiding officer thereof.

Lord Chancellors Since 1660.

1660	Lord Clarendon.
1667	Lord Keeper (Sir Orlando Bridgman).
1672	Lord Shaftesbury.
1673	Lord Nottingham.
1682	Lord Keeper Guilford.
1685	Lord Keeper Guilford.
1685	Lord Jeffreys.
1687	Lord Commissioner Meynard and others.
1690	Lord Commissioner Trevor and others.
1693	Lord Somers (John Somers).
1700	Lord Keeper Wright (Nathan Wright).
1702	Lord Keeper Wright.
1705	Lord Cowper (Earl Cowper).
1710	Lord Harcourt.
1714	Lord Harcourt.
1714	Lord Cowper.
1718	Lord Macclesfield (Thomas Parker).
1725	Lord King (Peter King).
1727	Lord King.
1733	Lord Talbot (Charles Talbot).
1737	Lord Hardwicke (Philip Yorke).
1757	Lord Keeper Henley (Robert Henley).
1760	Lord Northington.
1766	Lord Camden (Charles Pratt).
1770	Charles Yorke.
1771	Lord Apsley, Earl Bathurst (Henry Bathurst).
1778	Lord Thurlow (Edward Thurlow).
1783	Lord Thurlow.
1793	Lord Loughborough (Alexander Wedderburn)
1801	Lord Eldon (John Scott)
1806	Lord Erskine (Thomas Erskine).
1807	Lord Eldon.
1820	Lord Eldon.
1827	Lord Lyndhurst (John Singleton Copley).
1830	Lord Brougham (Henry Brougham).
1834	Lord Lyndhurst.
1836	Lord Cottenham (Charles Christopher Pepys)
1837	Lord Cottenham.
1841	Lord Lyndhurst.
1846	Lord Cottenham.
1850	Lord Truro (Thomas Wilde).
1852	Lord St. Leonards (Edward Burtenshaw Sugden).
1852	Lord Cranworth (Robert Mousey Rolfe).
1858	Lord Chelmsford (Frederick Thesiger).
1859	Lord Campbell (John Campbell).
1861	Lord Westbury (Richard Bethell).
1865	Lord Cranworth.
1866	Lord Chelmsford
1868	Lord Cairns (Hugh McCalmont Cairns).
1868	Lord Hatherly (Wm. Page-Wood).
1872	Lord Selborne (Roundell Palmer).
1874	Lord Cairns.
1880	Lord Selborne.
1885	Lord Halsbury (Hardinge Stanley Giffard).
1886	Lord Herschell (Farrer Herschell).
1886	Lord Halsbury.
1892	Lord Herschell.
1895	Lord Halsbury.
1905	Lord Loreburn (Robert Threshie Reid).
1912	Lord Haldane (Richard Burdon Haldane).

There is a Lord Chancellor of Ireland, but none in Scotland since the Union.

The Chancellor of the Duchy of Lancaster, who presides over the court of the duchy, to judge and determine controversies relating to lands holden of the king in right of the Duchy of Lancaster.

The Chancellor of the Exchequer is an officer who formerly sat in the court of ex-

chequer, and, with the rest of the court, ordered things for the king's benefit. Cowell. This part of his functions is now practically obsolete; the chancellor of the exchequer is now known as the minister of state who has control over the national revenue and expenditure. 2 Steph. Com. 467.

The Chancellor of a Diocese is the officer appointed to assist a bishop in matters of law, and to hold his consistory courts for him. 1 Bla. Com. 382; 2 Steph. Com., 11th ed. 684.

The Chancellor of a University, who is the principal officer of the university. His office is for the most part honorary.

CHANCELLORS' COURTS IN THE TWO UNIVERSITIES. Courts of local jurisdiction, resembling borough courts, in and for the two Universities of Oxford and Cambridge in England. 3 Bla. Com. 83. These are courts subsisting under ancient charters granted to these universities and confirmed by act of parliament. If the defendant be a member of the University of Oxford resident within its limits, the suit must be in this court, although the plaintiff is not connected with the university or resident there, and although the cause of action did not arise within its limits; Odgers, C. L. 1030, citing 16 Q. B. D. 761. The rule at Cambridge is the same, except that the privilege cannot be claimed if any person not a member of the university be a party. The University of Oxford claims a similar privilege in criminal matters when any member of the university, resident within its limits, is defendant or prosecutor; Odgers, C. L. 1030; 4 Inst. 227; Rep. *t.* Hardw. 341; 2 Wils. 406; 12 East 12; 13 *id.* 635; 15 *id.* 634; 10 Q. B. 292. This privilege of exclusive jurisdiction was granted in order that the students might not be distracted from their studies and other scholastic duties by legal process from distant courts.

The most ancient charter containing this grant to the University of Oxford was 28 Hen. III. A. D. 1244, and the privileges thereby granted were confirmed and enlarged by every succeeding prince down to Hen. VIII., in the 14th year of whose reign the largest and most extensive charter of all was granted, and this last-mentioned charter is the one now governing the privileges of that university. A charter somewhat similar to that of Oxford was granted to Cambridge in the third year of Elizabeth. And subsequently was passed the statute of 13 Eliz. c. 29, whereby the legislature recognized and confirmed all the charters of the two universities, and those of the 14 Henry VIII. and 3 Eliz. by name (13 Eliz. c. 29); 16 Q. B. D. 761 (Oxford), 12 East 12 (Cambridge), which act established the privileges of these universities without any doubt or opposition.

It is to be observed, however, that the privilege can be claimed only on behalf of members who are defendants, and when an action in the High Court is brought against such member the university enters a *claim of conusance*, that is, claims the cognizance of the matter, whereupon the action is withdrawn from the High Court and transferred to the University Court; 16 Q. B. D. 761.

Procedure in these courts was usually regulated according to the laws of the civilians, subject to specific rules made by the vice-chancellor, with the approval of three of his Majesty's judges. See (as to Oxford) 25 & 26 Vict. c 26, § 12. Under the charter of Henry VIII. the chancellor and vice-chancellor and the deputy of such vice-chancellor are justices of the peace for the counties of Oxford and Berks, which jurisdiction was confirmed in them by 49 & 50 Vict. c. 31; 3 Steph. Com. 325.

The judge of the chancellor's court at Oxford was a vice-chancellor, with a deputy or assessor. An appeal lay from his sentence to delegates appointed by the congregation, thence to delegates appointed by the house of convocation, and thence, in case of any disagreement only, to judges delegates appointed by the crown under the great seal in chancery; 3 Steph. Com., 11th ed. 325.

CHANCER. To adjust according to principles of equity, as would be done by a court of chancery. Cent. Dict.

The practice indicated by the word arose in parts of New England at a time when the courts had no equity jurisdiction, and were sometimes compelled to act upon equitable principles; as by restraining the enforcement of the penalty of a bond beyond what was equitable.

In Inhabitants of Machiasport v. Small, 77 Me. 109, and Lewiston v. Gagne, 89 Me. 395, 36 Atl. 629, 56 Am. St. Rep. 432, bonds were "chancered" after judgment had been entered for the penalty. The court will "chancer" a bond upon a writ of scire facias; Colt v. Eaton, 1 Root (Conn.) 524; a court of bankruptcy may "chancer" a bond given for the release of a bankrupt; In re Appel, 163 Fed. 1002, 90 C. C. A. 172, 20 L. R. A. (N. S.) 76 (C. C. A., 1st Cir.). Under a statute, the penalty of a recognizance to prosecute a writ of error was "chancered" after execution had been returned satisfied; James v. Smith, 1 Tyler (Vt.) 128. See Vt. Stat. 1894, §§ 2035–2038. In the absence of a statute "chancering" was refused in Philbrick v. Buxton, 40 N. H. 384.

The practice of "chancering" is a very old one. A forfeiture could be "chancered" under a law of 1699; Phœnix Mut. Life Ins. Co. v. Clark, 59 N. H. 561. Adjudged cases in 1630–1692 may be found in the Records of the Court of Assistants of Massachusetts Bay Colony. The early laws of Massachusetts provided for "chancering" the forfeiture of any penal bond; Acts of 1692, 1693, 1697, 1698, 1699; and bonds and mort-

gages were frequently "chancered" by special act; 10 Acts and Resolves of Massachusetts Bay, 403, 676; 11 *id.* 585; 13 *id.* 244; 16 *id.* 95. In Rhode Island an act of 1746 provided for "chancerizing" the forfeiture "where any penalty is forfeited, or conditional estate recovered, or equity of redemption sued for, whether judgment is confessed or otherwise obtained."

Chancer is defined in the New Dictionary as to "tax" (an account or bill of costs) but there seems to be no authority for this.

CHANCERY. See COURT OF CHANCERY.

CHANNEL. The bed in which the main stream of a river flows, and not the deep water of the stream, as followed in navigation. Dunlieth & Dubuque Bridge Co. v. Dubuque County, 55 Ia. 558, 8 N. W. 443. The main channel is that bed of the river over which the principal volume of water flows. St. Louis & St. P. Packet Co. v. Bridge Co., 31 Fed. 757.

By act of congress of Sept. 19, 1890, U. S. R. S. 1 Supp. 800, any alteration or modification of the channel of any navigable water of the United States, by any construction, excavation, or filling, or in any other manner without the approval of the secretary of war, is prohibited. For the construction of this act, see U. S. v. Burns, 54 Fed. 351.

CHANTRY. A church or chapel endowed with lands for the maintenance of priests to say mass daily for the souls of the donors. *Termes de la Ley;* Cowell.

CHAPELRY. The precinct of a chapel; the same thing for a chapel that a parish is for a church. *Termes de la Ley;* Cowell.

CHAPELS. Places of worship. They may be either *private* chapels, such as are built and maintained by a private person for his own use and at his own expense, or *free* chapels, so called from their freedom or exemption from all ordinary jurisdiction, or chapels *of case*, which are built by the mother-church for the ease and convenience of its parishioners, and remain under its jurisdiction and control.

CHAPTER. **In Ecclesiastical Law.** A congregation of clergymen.

Such an assembly is termed *capitulum*, which signifies a little head: it being a kind of head, not only to govern the diocese in the vacation of the bishopric, but also for other purposes. Coke, Litt. 103.

CHARACTER. The possession by a person of certain qualities of mind or morals, distinguishing him from others.

In Evidence. The opinion generally entertained of a person derived from the common report of the people who are acquainted with him; his reputation. Kimmel v. Kimmel, 3 S. & R. (Pa.) 336, 8 Am. Dec. 655; Boynton v. Kellogg, 3 Mass. 192, 3 Am. Dec. 122; 3 Esp. 236; Tayl. Ev. 328, 329.

A clear distinction exists between the strict meaning of the words character and reputation. Character is defined to be the assemblage of qualities which distinguish one person from another, while reputation is the opinion of character generally entertained; Worcester, Dict. **This distinction, however, is not regarded either in the statutes or in the decisions of the courts; thus, a libel is said to be an injury to character; the character of a witness for veracity is said to be impeached; evidence is offered of a prisoner's good character;** Abbott, Law Dict. See Leverich v. Frank, 6 Or 213; Powers v Leach, 26 Vt. 278. **The word character is therefore used in the law rather to express what is properly signified by reputation.**

The moral character and conduct of a person in society may be used in proof before a jury in three classes of cases; *first*, to afford a presumption that a particular person has not been guilty of a criminal act; *second*, to affect the damages in particular cases, where their amount depends on the reputation and conduct of any individual; and, *third*, to impeach or confirm the veracity of a witness.

Where the guilt of an accused person is doubtful, and the character of the supposed agent is involved in the question, a presumption of innocence arises from his former conduct in society, as evidenced by his general reputation; since it is not probable that a person of known probity and humanity would commit a dishonest or outrageous act in the particular instance. But where it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things and beyond common experience—it is so manifest that the offence, if perpetrated, must have been influenced by motives not frequently operating upon the human mind—that evidence of reputation and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusations of a lower grade. Against facts strongly proved, good character cannot avail. It is therefore in smaller offences, in such as relate to the actions of daily and common life, as when one is charged with pilfering and stealing, that evidence of a high character for honesty will satisfy a jury that the accused is not likely to yield to so slight a temptation. People v. Ryder, 151 Mich. 187, 114 N. W. 1021. In such case, where the evidence is doubtful, proof of character may be given with good effect. But still, even with regard to the higher crimes, evidence of good character, though of less avail, is competent evidence to the jury, and a species of evidence which the accused has a right to offer. But it behooves one charged with an atrocious crime, like murder, to prove a high character, and by strong evidence, to make it counterbalance a strong amount of proof on the part of the prosecution. It is the privilege of the accused to put his character in issue, or not. Lewis v. State, 93 Miss. 697, 47 South. 467. If he does, and offers evidence of good character, then the prosecution may give evidence to rebut and

counteract it. But it is not competent for the prosecution to give in proof the bad character of the defendant, unless he first opens that line of inquiry by evidence of good character; Per Shaw, C. J., Com. v. Webster, 5 Cush. (Mass.) 325, 52 Am. Dec. 711. See 1 Campb. 460; 2 St. Tr. 1038; State v. Wells, 1 N. J. L. 424, 1 Am. Dec. 211; Nash v. Gilkeson, 5 S. & R. (Pa.) 352; Gregory v. Thomas, 2 Bibb (Ky.) 286, 5 Am. Dec. 608; Grannis v. Branden, 5 Day (Conn.) 260, 5 Am. Dec. 143; Humphrey v. Humphrey, 7 Conn. 116; Fowler v. Ins. Co., 6 Cow. (N. Y.) 673, 16 Am. Dec. 460; Jeffries v. Harris, 10 N. C. 105; Felsenthal v. State, 30 Tex. App. 675, 18 S. W. 644; State v. Ellwood, 17 R. I. 763, 24 Atl. 782; Carter v. State, 36 Neb. 481, 54 N. W. 853; Smothers v. City of Jackson, 92 Miss. 327, 45 South. 982.

Where, in a criminal trial, no evidence has been offered, there is a presumption of good character, as to which the jury should, on his request, be instructed; it is error for the court to comment unfavorably upon the character of the accused; Mullen v. U. S., 106 Fed. 895, 46 C. C. A. 22; and a prosecuting officer may not appeal to the jury to assume that his character was bad, because he had produced no evidence to the contrary; Lowdon v. U. S., 149 Fed. 673, 79 C. C. A. 361; Gater v. State, 141 Ala. 10, 37 South. 692; McQuiggan v. Ladd, 79 Vt. 90, 64 Atl. 503, 14 L. R. A. (N. S.) 689; People v. Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718, 22 L. R. A. (N. S.) 650, 12 Ann. Cas. 745.

In a trial for rape there is no presumption, in the absence of proof to the contrary, that the defendant was of good character. Addison v. People, 193 Ill. 405, 62 N. E. 235.

On the trial of an indictment for homicide, evidence offered generally to prove that the deceased was well known, and understood to be a quarrelsome, riotous, and savage man, is inadmissible; 1 Whart. Cr. L. § 641; see Perry v. State, 94 Ala. 25, 10 South. 650; Com. v. Straesser, 153 Pa. 451, 26 Atl. 17; but for the purpose of showing that the homicide was justifiable on the ground of self-defence, proof of the character of the deceased may be admitted, if it is also shown that the prisoner was influenced by his knowledge thereof in committing the deed; Marts v. State, 26 Ohio St. 162; Garner v. State, 28 Fla. 113, 9 South. 835, 29 Am. St. Rep. 232; but in a civil action for damages for homicide which defendant alleges was committed in self-defence evidence of good character was held not admissible; Morgan v. Barnhill, 118 Fed. 24, 55 C. C. A. 1. The general reputation of the deceased as a violent and dangerous person is presumptive proof of knowledge of decedent's character; Trabune v. Com. (Ky.) 17 S. W. 186. Unless the character of the deceased is attacked, it is clearly not admissible for the prosecution to prove its peaceableness; Davis v. People, 114 Ill. 86, 29 N. E. 192. Good character will not avail one if the crime has been proven beyond a reasonable doubt; People v. Sweeney, 133 N. Y. 609, 30 N. E. 1005; Hathcock v. State, 88 Ga. 91, 13 S. E. 959; Kistler v. State, 54 Ind. 400; People v. Jassino, 100 Mich. 536, 59 N. W. 230; *contra*, Com. v. Cate, 220 Pa. 138, 69 Atl. 322, 123 Am. St. Rep. 683. It is erroneous to instruct a jury that evidence of good character can only be considered when the question of guilt or innocence is in doubt; Rowe v. U. S., 97 Fed 779, 38 C. C. A. 496; State v. Dickerson, 77 Ohio St. 34, 82 N. E. 969, 122 Am. St. Rep. 479, 11 Ann. Cas. 1181. In a criminal case the defendant has the right to prove his reputation for honesty and truth; Browder v. State, 30 Tex. App. 614, 18 S. W. 197; though he be indicted for murder by poisoning, he can show his reputation for peace and quietude; Hall v. State, 132 Ind. 317, 31 N. E. 536.

In a prosecution for theft, the accused may prove his reputation for honesty and integrity, but not particular acts; Leonard v. State, 53 Tex. Cr. R. 187, 109 S. W. 149; nor special traits or particular instances not bearing on the peculiar nature of the crime charged; Arnold v. State, 131 Ga. 494, 62 S. E. 806. Proof of previous occupations and of family history is inadmissible; State v. Clem, 49 Wash. 273, 94 Pac. 1079. It is competent for a witness to testify that he has never heard the reputation of the defendant questioned; State v. McClellan, 79 Kan. 11, 98 Pac. 209, 17 Ann. Cas. 106; Foerster v. U. S., 116 Fed. 860, 54 C. C. A. 210, but proof that he has never before been arrested or accused of crime is incompetent; State v. Marfaudille, 48 Wash. 117, 92 Pac. 939, 14 L. R. A. (N. S.) 346, 15 Ann. Cas. 584.

It is proper to cross-examine a witness who has testified to the defendant's reputation for peace and quiet, as to how many men she had heard he had shot; People v. Laudiero, 192 N. Y. 304, 85 N. E. 132.

In an action by a locomotive engineer for injury resulting from a collision, evidence that he frequently had slept at his post, and run by stations where he should have stopped, was properly excluded; Missouri, K. & T. R. Co. v. Johnson, 92 Tex. 380, 48 S. W. 568.

In some instances, evidence in disparagement of character is admissible, not in order to prove or disprove the commission of a particular fact, but with a view to damages. In actions for criminal conversation with the plaintiff's wife, evidence may be given of the wife's general bad reputation for want of chastity, and even of particular acts of adultery committed by her previous to her intercourse with the defendant; Whart. Ev. 51; Bull. N. P. 27, 296; 12 Mod. 232;

3 Esp. 236; and a wife who has confessed her adultery cannot prove previous good conduct; State v. Foster, 136 Ia. 527, 114 N. W. 36. See Ligon v. Ford, 5 Munf. (Va.) 10. As to the statutory use of the word "character," see Carpenter v. People, 8 Barb. (N. Y.) 603; People v. Kenyon, 5 Park. Cr. C. (N. Y.) 254; Andre v. State, 5 Ia. 389, 68 Am. Dec. 708; Boak v. State, 5 Ia. 430; State v. Prizer, 49 Ia. 531, 31 Am. Rep. 155.

In actions for slander or libel, the law is well settled that evidence of the previous general character of the plaintiff, before and at the time of the publication of the slander or libel, is admissible, under the general issue, in mitigation of damages. The ground of admitting such evidence is that a person of disparaged fame is not entitled to the same measure of damages as one whose character is unblemished. And the reasons which authorize the admission of this species of evidence under the general issue alike exist, and require its admission, where a justification has been pleaded but the defendant has failed in sustaining it; Stone v. Varney, 7 Metc. (Mass.) 86, 39 Am. Dec. 762; where the decisions are collected and reviewed; Hamer v. McFarlin, 4 Denio (N. Y.) 509; Bowen v. Hall, 20 Vt. 232; Steinman v. McWilliams, 6 Pa. 170; Eifert v. Sawyer, 2 Nott & McC. (S. C.) 511, 10 Am. Dec. 633. When evidence is admitted touching the general reputation of a person, it is manifest that it is to be confined to matters in reference to the nature of the charge against him; Douglass v. Tousey, 2 Wend. (N. Y.) 352, 20 Am. Dec. 616. See People v. Cowgill, 93 Cal. 596, 29 Pac. 228.

In an action for damages for assault and battery it is error to admit evidence of defendant's good character; Pokriefka v. Mackurat, 91 Mich. 399, 51 N. W. 1059; Sturgeon v. Sturgeon, 4 Ind. App. 232, 30 N. E. 805.

The party against whom a witness is called may disprove the facts stated by him, or may examine other witnesses as to his general character; but they will not be allowed to speak of particular facts or parts of his conduct; Bull. N. P. 296; State v. Rose, 47 Minn. 47, 49 N. W. 404. For example, evidence of the general character of a prosecutrix for a rape may be given, as that she was a street-walker; but evidence of specific acts of criminality cannot be admitted; 3 C. & P. 589. And see Cadwell v. State, 17 Conn. 467; Low v. Mitchell, 18 Me. 372; Commonwealth v. Murphy, 14 Mass. 387; 5 Cox, Cr. Cas. 146. The regular mode is to inquire whether the witness under examination has the means of knowing the former witness's general character, and whether, from such knowledge, he would believe him on his oath; 4 St. Tr. 693; 4 Esp. 102; Knode v. Williamson, 17 Wall. (U. S.) 586, 21 L. Ed. 670. In answer to such evidence against character, the other party may cross-examine the witness as to his means of knowledge and the grounds of his opinion, or he may attack such witness's general character, and by fresh evidence support the character of his own; 2 Stark. 151, 241; Stark. Ev. pt. 4, 1753 to 1758; 1 Phill. Ev. 229. A party cannot give evidence to confirm the good character of a witness, unless his general character has been impugned by his antagonist; Braddee v. Brownfield, 9 Watts (Pa.) 124; State v. Cooper, 71 Mo. 436; Fitzgerald v. Goff, 99 Ind. 28; Turner v. Commonwealth, 86 Pa. 74, 27 Am. Rep. 683; Atwood v. Dearborn, 1 Allen (Mass.) 483, 79 Am. Dec. 755.

See note in 14 L. R. A. (N. S.) 689.

CHARGE. A duty or obligation imposed upon some person. A lien, incumbrance, or claim which is to be satisfied out of the specific thing or proceeds thereof to which it applies

To impose such an obligation; to create such a claim.

To accuse.

The distinctive significance of the term rests in the idea of obligation directly bearing upon the individual thing or person to be affected, and binding him or it to the discharge of the duty or satisfaction of the claim imposed Thus, charging an estate with the payment of a debt is appropriating a definite portion to the particulor purpose; charging a person with the commission of a crime is pointing out the individual who is bound to answer for the wrong committed; charging a jury is stating the precise principles of law applicable to the case immediately in question. In this view, a charge will, in general terms, denote a responsibility peculiar to the person or thing affected and authoritatively imposed, or the act fixing such responsibility.

In Contracts. An obligation, binding upon him who enters into it, which may be removed or taken away by a discharge. *Termes de la Ley.*

An undertaking to keep the custody of another person's goods.

An obligation entered into by the owner of an estate, which binds the estate for its performance. Comyns, Dig. *Rent*, c. 6; 2 Ball & B. 223.

In Devises. A duty imposed upon a devisee, either personally, or with respect to the estate devised. It may be the payment of a legacy or sum of money or an annuity, the care and maintenance of a relative or other person, the discharge of an existing lien upon land devised or the payment of debts, or, in short, the performance of any duty or obligation which may be lawfully imposed as a condition of the enjoyment of the bounty of a testator. A charge is not an interest in, but a lien upon, lands; Potter v. Gardner, 12 Wheat. (U. S.) 498, 6 L. Ed. 706; Thayer v. Finnegan, 134 Mass. 62, 45 Am. Rep. 285; Appeal of Walter, 95 Pa. 305; 1 Ves. & B. 260; it will not be divested by a sheriff's sale; Rohn v. Odenwelder, 162 Pa. 346, 29 Atl. 899.

Where a charge is personal, and there are no words of limitation, the devisee will generally take the fee of the estate devised; 4 Kent 540; 2 Bla. Com. 108; Jackson v. Mer-

rill, 6 Johns. (N. Y.) 185, 5 Am. Dec. 213; Wait v. Belding, 24 Pick. (Mass.) 139; but he will take only a life estate if it be upon the estate generally; 14 Mees. & W. 698; Gardner v. Gardner, 3 Mas. 209, Fed. Cas. No. 5,227; Wright v. Denn, 10 Wheat. (U. S.) 231, 6 L. Ed. 303; Jackson v. Martin, 18 Johns. (N. Y.) 35; McLellan v. Turner, 15 Me. 436; Lithgow v. Kavenagh, 9 Mass. 161; Spraker v. Van Alstyne, 18 Wend. (N. Y.) 200; unless the charge be greater than a life estate will satisfy; 6 Co. 16; 4 Term 93; Olmsted v. Harvey, 1 Barb. (N. Y.) 102; Wait v. Belding, 24 Pick. (Mass.) 138; 1 Washb. R. P. 59. See 9 L. R. A. 584, n., LEGACY.

In Equity Pleading. An allegation in the bill of matters which disprove or avoid a defence which it is alleged the defendant is supposed to pretend or intend to set up. Story, Eq. Pl. § 31.

It is frequently omitted, and this the more properly, as all matters material to the plaintiff's case should be fully stated in the stating part of the bill; Cooper, Eq. Pl. 11; 1 Dan. Ch. Pr. 372, 1883, n.; 11 Ves. Ch. 574. See 2 Hare, Ch. 264.

In Practice. The instructions given by the court to the grand jury or inquest of the county, at the commencement of their session, in regard to their duty.

The exposition by the court to a petit jury of those principles of the law which the latter are to apply in order to render such a verdict as will, in the state of facts proved at the trial to exist, establish the legal rights of the parties to the suit.

It formerly preceded the addresses of counsel to the jury; Thayer, Evid.; and that is still the practice in the federal district court in Maryland. It usually includes a summing up of the facts.

The essential idea of a charge is that it is authoritative as an exposition of the law, which the jury are bound by their oath and by moral obligations to obey; Com. v. Porter, 10 Metc. (Mass.) 285-287; Pierce v. State, 13 N. H. 536; Townsend v. State, 2 Blackf. (Ind.) 162; Davenport v. Com., 1 Leigh (Va.) 588, Montee v. Com., 3 J. J. Marsh (Ky.) 150; 21 How. St. Tr. 1039; Kane v. Com., 89 Pa. 522, 33 Am. Rep. 787. See 5 South. L. Rev. 352; 1 Crim. L. Mag. 51; 3 id. 484. This is the rule in the federal courts; Sparf v. U. S., 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343; Alabama; Pierson v. State, 12 Ala. 153; Arkansas; Pleasant v. State, 13 Ark. 360; Sweeney v. State, 35 Ark. 585; California; People v. Anderson, 44 Cal. 65; Kentucky, Com. v. Van Tuyl, 1 Metc. 1, 71 Am. Dec. 455; Maine; State v. Wright, 53 Me. 336; Massachusetts; Com. v. Porter, 10 Metc. 286; Com. v. Anthes, 5 Gray 185; Michigan; People v. Mortimer, 48 Mich. 37, 11 N. W. 776; Mississippi; Bangs v. State, 61 Miss. 363; Missouri; Hardy v. State, 7 Mo. 607; Nebraska, Parrish v. State, 14 Neb. 60, 15 N. W. 357; New Hampshire; Pierce v. State, 13 N. H. 536; New York, People v. Bennett, 49 N. Y. 141; North Carolina; State v. Peace, 46 N. C. 251; Ohio; Adams v. State, 29 Ohio St. 412; Pennsylvania; Com. v. McManus, 143 Pa. 64, 21 Atl. 1018, 22 Atl. 761, 14 L. R. A. 89; South Carolina; State v. Drawdy, 14 Rich. 87; Texas; Pharr v. State, 7 Tex. App. 472. By statute, in some states, the jury are constituted judges of the law as well as of the facts in criminal cases,—an arrangement which assimilates the duties of a judge to those of the moderator of a town-meeting or of the preceptor of a class of law-students, besides subjecting successive criminals to a code of laws varying as widely as the impulses of successive juries can differ. It is so in Georgia; Oneil v. State, 48 Ga. 66; Illinois; Board of Super's of Clay County v. Plant, 42 Ill. 331; Indiana; Anderson v. State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; Louisiana; State v. Ford, 37 La. Ann. 444; Maryland; Forwood v. State, 49 Md. 531; Tennessee; Nelson v. State, 2 Swan 237; and Vermont; State v. Croteau, 23 Vt. 14, 54 Am. Dec. 90. Even in these states, however, the courts have tried to escape from this doctrine, and have of late years practically nullified it in many instances. See Habersham v. State, 56 Ga. 61; Bell v. State, 57 Md. 108; Mullinix v. People, 76 Ill. 211; State v. Ford, 37 La. Ann. 449; State v. Hopkins, 56 Vt. 263. The charge frequently and usually includes a *summing up* of the evidence, given to show the application of the principles involved; and in English practice the term *summing up* is used instead of charge. Though this is customary in many courts, the judge is not bound to sum up the facts, Thomps. Charging Jurics § 79, State v. Morris, 10 N. C. 390. But if he do sum up he must present all the material facts; Parker v. Donaldson, 6 W & S. (Pa.) 132; Merchants' Bank of Macon v. Bank, 1 Ga. 428, 44 Am. Dec. 665. This is the practice in the courts of the United States; United States Exp. Co. v. Kountze Bros., 8 Wall. 342, 19 L. Ed. 457.

It should be a clear and explicit statement of the law applicable to the condition of the facts; Finch's Ex'rs v. Elliot, 11 N. C. 61; Cannon v. Alsbury, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709; Williams v. Cheesebrough, 4 Conn. 356; Van Hoesen v. Van Alstyne, 3 Wend. (N. Y.) 75; Com. v. White, 10 Metc. (Mass.) 14; Com. v. Porter, 10 Metc. (Mass.) 263; Coleman v. Roberts, 1 Mo. 97; Jenness v. Parker, 24 Me. 289; Lett v. Horner, 5 Blackf. (Ind.) 296; Whiteford v. Burckmyer & Adams, 1 Gill (Md.) 127, 39 Am. Dec. 640; People v. Murray, 72 Mich. 10, 40 N. W. 29. The defendant in a criminal case is entitled to a full statement of the law from the court; Bird v. U. S., 180 U. S. 356, 21 Sup. Ct. 403, 45 L. Ed 570. The charge should add such comments on the evidence as are necessary to explain its application; Ware v. Ware, 8 Greenl. (Me.) 42; Kinloch v. Palmer, 1 Mill, Const. (S. C.) 216; Nieman v. Ward, 1 W. & S. (Pa.) 68; Wyley v. Stanford, 22 Ga. 385 (though in some states the court is prohibited by law from charging as to matters of fact, "but may state the testimony and the law;" *e. g.*, California, Tennessee, South Carolina, Georgia, Massachusetts, etc.); and may include an opinion on the weight of evidence; Mitchell v. Harmony, 13 How. (U. S.) 115, 14 L. Ed. 75; 2 M. & G. 721; Cook v. Brown, 34 N. H. 460; Swift v. Stevens, 8 Conn. 431; Dunlap v. Patterson, 5 Cow. (N. Y.) 243; Hinson v. King, 50 N. C. 393; though the rule is otherwise in some states; Frame v. Badger, 79 Ill. 441; Wannack v. Mayor, etc., of City of Macon, 53 Ga. 162; Jenkins v. Tobin, 31 Ark. 307; Barnett v. State, 83 Ala. 40, 3 South. 612; State v. Huffman, 16 Or. 15, 16 Pac. 640; People v. Gastro, 75 Mich. 127, 42 N. W. 937; but should not undertake to decide the facts; Fightmaster v.

Beasly, 7 J. J. Marsh. (Ky.) 410; Sullivan v. Enders, 3 Dana (Ky.) 66; Beekman v. Bemus, 7 Cow. (N. Y.) 29; Planters' Bank of Prince George's County v. Bank, 10 Gill & J. (Md.) 346; State v. Lynott, 5 R. I. 295; unless in the entire absence of opposing proof; Chase v. Breed, 5 Gray (Mass.) 440; Nichols v. Goldsmith, 7 Wend. (N. Y.) 160; Rippey v. Friede, 26 Mo. 523; Jones' Ex'rs v. Mengel, 1 Pa. 68. A United States court may express an opinion upon the facts; Lovejoy v. U. S., 128 U. S. 171, 9 Sup. Ct. 57, 32 L. Ed. 389; Sorenson v. R. Co., 36 Fed. 166. In federal courts the trial judge may express his opinion on the facts, while leaving them to the jury; this power is not controlled by state statutes forbidding judges to express any opinion on the facts; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. Ed. 257. It is improper to instruct which of two conflicting theories of the evidence the jury shall accept; Mitchell v. State, 94 Ala. 68, 10 South. 331. The presiding judge may express to the jury his opinion as to the weight of evidence. He is under no obligation to recapitulate all the items of the evidence, nor even all bearing on a single question; Allis v. U. S., 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91.

Failure to give instructions not asked for is not error; Winn v. State, 82 Wis. 571, 52 N. W. 775; People v. Ahern, 93 Cal. 518, 29 Pac. 49; Mead v. State, 53 N. J. L. 601, 23 Atl. 264; Small v. Williams, 87 Ga. 681, 13 S. E. 589. A request to charge is properly refused though embodying correct principles, where there is no evidence to support it; Bostic v. State, 94 Ala. 45, 10 South. 602; Com. v. Cosseboom, 155 Mass. 298, 29 N. E. 463; Page v. Alexander, 84 Me. 84, 24 Atl. 584; Frost v. Lumber Co., 3 Wash. 241, 28 Pac. 354, 915; Everitt v. Walker, 109 N. C. 132, 13 S. E. 860; Guernsey v. Greenwood, 88 Ga. 446, 14 S. E. 709; Floyd v. Efron, 66 Tex. 221, 18 S. W. 497; Kitchen v. McCloskey, 150 Pa. 376, 24 Atl. 688, 30 Am. St. Rep. 811; New York & C. Mining Co. v. Fraser, 130 U. S. 611, 9 Sup. Ct. 665, 32 L. Ed. 1031; City of Rock Island v. Cuinely, 126 Ill. 408, 18 N. E. 753; Spoonemore v. State, 25 Tex. App. 358, 8 S. W. 280. A request to charge may be disregarded when the court has already fully instructed the jury on the point. The court should refuse to charge upon a purely hypothetical statement of facts calculated to mislead the jury; White v. Van Horn, 159 U. S. 3, 15 Sup. Ct. 1027, 40 L. Ed. 55. A judge is not bound to charge a jury in the exact words proposed to him by counsel, and there is no error if he instructs the jury correctly and substantially covers the relevant rules of law suggested; Cunningham v. Springer, 204 U. S. 647, 27 Sup. Ct. 301, 51 L. Ed. 662, 9 Ann. Cas. 897.

Erroneous instructions in matters of law which might have influenced the jury in forming a verdict are a cause for a new trial; Lane v. Crombie, 12 Pick. (Mass.) 177; West v. Anderson, 9 Conn. 107, 21 Am. Dec. 737; Doe v. Paine, 11 N. C. 64, 15 Am. Dec. 507; even though on hypothetical questions; Etting v. Bank, 11 Wheat. (U. S.) 59, 6 L. Ed. 419; Yarborough v. Tate, 14 Tex. 483; People v. Roberts, 6 Cal. 214; on which no opinion can be required to be given; Jordan v. James, 5 Ohio, 88; Mitchell v. Mitchell, 11 Gill & J. (Md.) 388; Pollard v. Teel, 25 N. C. 470; Smith v. Sasser, 50 N. C. 388; Dunlap v. Robinson, 28 Ala. 100; Whitaker v. Pullen, 3 Humphr. (Tenn.) 466; Nicholas v. State, 6 Mo. 6; Whitney v. Goin, 20 N. H. 354; Hammat v. Russ, 16 Me. 171; Miller v. Gorman, 5 Blackf. (Ind.) 112; McDaniel v. State, 8 Smedes & M. (Miss.) 401, 47 Am. Dec. 93; Hicks' Adm'x v. Bailey, 16 Tex. 229; Raver v. Webster, 3 Ia. 509, 66 Am. Dec. 96; McDougald v. Bellamy, 18 Ga. 411; but the rule does not apply where the instructions could not prejudice the cause; Johnson v. Blackman, 11 Conn. 342; U. S. v. Wright, 1 McLean, 509, Fed. Cas. No. 16,775; Rhett v. Poe, 2 How. (U. S.) 457, 11 L. Ed. 338. See Miller v. State, 3 Wyo. 657, 29 Pac. 136. Any decision or declaration by the court upon the law of the case, made in the progress of the cause, and by which the jury are influenced and the counsel controlled, is considered within the scope and meaning of the term "instructions;" Hillard, New Trials 255.

Where on a trial for murder defendant's counsel asks the court to give its charge in writing, and after complying it gives orally other and additional charges, it is cause for new trial; Willis v. State, 89 Ga. 188, 15 S. E. 32.

When an instruction to the jury embodies several propositions of law, to some of which there are no objections, the party objecting must point out specifically to the trial court the part to which he objects, in order to avail himself of the objection; Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624.

"But no charge delivered by a trial court is to be judged by the same standards as a statement of law carefully elaborated and deliberately pronounced by a court of appeals, sitting *in banc*. It serves a very different office. It is to call the attention of twelve men unfamiliar with legal distinctions to whatever is necessary and proper to guide them to a right decision in a particular case, and to nothing more. To make almost any rule of law intelligible to the ordinary juror, it must be expressed in a few words. Qualifications and exceptions which the case does not call for are worse than useless, and those which are requisite it may be better to supply later, by a separate statement. A charge must be taken as a whole in determining its natural effect." Per

Baldwin, J., in Sturdevant's Appeal, 71 Conn. 392, 42 Atl. 70.

See Thompson, Charging Juries.

CHARGEABLE. This word in its ordinary acceptation, as applicable to the imposition of a duty or burden, signifies capable of being charged, subject, or liable to be charged, or proper to be charged, or legally liable to be charged. Walbridge v. Walbridge, 46 Vt. 625.

CHARGÉ D'AFFAIRES. CHARGÉ DES AFFAIRES. In International Law. The title of a diplomatic representative or minister of an inferior grade, to whose care are confided the affairs of his nation. The term is usually applied to a secretary of legation or other person in charge of an embassy or legation during a vacancy in the office or temporary absence of the ambassador or minister.

He has not the title of minister, and is generally introduced and admitted through a verbal presentation of the minister at his departure, or through letters of credence addressed to the minister of state of the court to which he is sent. He has the essential rights of a minister; 1 Kent 39, n.; Du Pont v. Pichon, 4 Dall. (U. S.) 321, 1 L. Ed. 851. The term *chargé des affaires* is sometimes restricted to a chargé d'affaires *ad interim*, who is not accredited from one Foreign Office to another, but who is merely in temporary charge of the affairs of the mission.

CHARGES. The expenses which have been incurred in relation either to a transaction or to a suit. Thus, the *charges* incurred for his benefit must be paid by a hirer; the defendant must pay the *charges* of a suit. In relation to actions, the term includes something more than the costs, technically so called.

CHARITABLE USES, CHARITIES. Gifts to general public uses, which may extend to the rich as well as the poor. Camden, Ld. Ch. in Ambl. 651; adopted by Kent, Ch., Coggeshall v. Pelton, 7 Johns. Ch. (N. Y.) 294, 11 Am. Dec. 471; Lyndhurst, Ld. Ch., in 1 Ph. Ch. 191; and U. S. Supreme Court in Perin v. Carey, 24 How. (U. S.) 506, 16 L. Ed. 701; Bisp. Eq. § 124; Franklin v. Armfield, 2 Sneed (Tenn.) 305.

Gifts to such purposes as are enumerated in the act 43 Eliz. c. 4, or which, by analogy, are deemed within its spirit or intendment. Boyle, Char. 17.

Such a gift was defined by Mr. Binney to be "whatever is given for the love of God or for the love of your neighbor, in the catholic and universal sense—given from these motives, and to these ends—free from the stain or taint of every consideration that is personal, private, or selfish." Vidal v. Girard, 2 How. (U. S.) 128, 11 L. Ed. 205; approved in Price v. Maxwell, 28 Pa. 35, and Ould v. Hospital, 95 U. S. 311, 24 L. Ed. 450.

Lord MacNaghten said in [1891] A. C. 531: Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads.

They had their origin under the Christian dispensation, and were regulated by the Justinian Code. Code Just. l. 3, *De Episc. et Cler.*; Domat, b. 2, t. 2, § 6, 1, b. 4, t. 2, § 6, 2, 1 Eq. Cas. Abr. 96; Mr. Binney's argument on the Girard will, p. 40; Chastel on the Charity of the Primitive Churches, b. 1, c. 2, b. 2, c. 10; *Codex, donationem piarum, passim.* Under that system, donations for pious uses which had not a regular and determined destination were liable to be adjudged invalid, until the edicts of Valentinian III. and Marcian declared that legacies in favor of the poor should be maintained even if legatees were not designated. Justinian completed the work by sweeping all such general gifts into the coffers of the church, to be administered by the bishops. The doctrine of pious uses seems to have passed directly from the civil law into the law of England, Inglis v. Sailor's Snug Harbor, 3 Pet (U. S.) 100, 139, 7 L. Ed 617, Howe, Studies in the Civil Law 68. It would seem that, by the English rule before the statute, general and indefinite trusts for charity, especially if no trustees were provided, were invalid. If sustainable, it was under the king's prerogative, exercising in that respect a power analogous to that of the ordinary in the disposition of *bona vacantia* prior to the Statute of Distributions; F. Moore 882, 890; Duke, Char. Uses 72, 362, 1 Vern 224, note, 1 Eq. Cas. Abr. 96, pl. 8; 1 Ves Sen 225; Hob. 136; Chittenden v. Chittenden, 1 Am L. Reg. 545. The main purpose of the stat. 43 Eliz c 4 was to define the uses which were charitable, as contradistinguished from those which, after the Reformation in England, were deemed superstitious, and to secure their application, Shelf. Mortm 89, 103. The objects enumerated in the statute were, "Relief of aged, impotent and poor people; maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; repairs of bridges, ports, havens, causeways, churches, seabanks and highways; education and preferment of orphans, relief, stock or maintenance for houses of correction; marriage of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed, relief or redemption of prisoners or captives, aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes."

Subsequently it appears that this statute, as a mode of proceeding, fell into disuse, although under its influence and by its mere operation many charities were upheld which would otherwise have been void; Shelf. Mortm. 378, 379, and notes; Gallego's Ex'rs v Attorney General 3 Leigh (Va.) 470, 24 Am. Dec 650; Nelson, *Lex Test.* 137; Boyle, Char. 18 *et seq.*; 1 Burn, Eccl. Law, 317 *a.* Under this statute, courts of chancery are empowered to appoint commissioners to superintend the application and enforcement of charities; and if, from any cause, the charity cannot be applied precisely as the testator has declared, such courts exercise the power in some cases of appropriating it, according to the principles indicated in the devise, as near as they can to the purpose expressed. And this is called an application *cy pres*; 3 Washb. R. P. 514. See CY PRES.

There is no need of any particular persons or objects being specified; the generality and indefiniteness of the object constituting the charitable character of the donation; Boyle, Char. 23. A charitable use, when neither law nor public policy forbids,

may be applied to almost anything that tends to promote the well-doing and well-being of man; Perry, Trusts, § 687.

They embrace gifts to the poor of every class, including poor relations, where the intention is manifest; Soohan v. City of Philadelphia, 33 Pa. 9; Franklin v. Armfield, 2 Sneed (Tenn.) 305; Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. Ed. 629; Allen v. McKean, 1 Sumn. 276, Fed. Cas. No. 229; Chapin v. School District No. 2, 35 N. H. 445; 7 Ch. D. 714; for the poor of a county, "who by timely assistance may be kept from being carried to the poor house;" State v. Griffith, 2 Del. Ch. 392; Griffith v. State, *id.* 421; for the poor, though the distribution of the fund is private and to private persons; Bullard v. Chandler, 149 Mass. 532, 21 N. E. 951, 5 L. R. A. 104; for every description of college and school; Stevens v. Shippen, 28 N. J. Eq. 487; City of Cincinnati v. McMicken, 6 Ohio C. C. 188; Dodge v. Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; Bedford v. Bedford's Adm'r, 99 Ky. 273, 35 S. W. 926; Handley v. Palmer, 103 Fed. 39, 43 C. C. A. 100; Howe v. Wilson, 91 Mo. 45, 3 S. W. 390, 60 Am. Rep. 226 (that the state provides free education for children will not render a private bequest for the same purpose void; Tincher v. Arnold, 147 Fed. 665, 77 C. C. A. 649, 7 L. R. A. (N. S.) 471, 8 Ann. Cas. 917); to all institutions for the advancement of the Christian religion; Alexander v. Slavens, 7 B. Monr. (Ky.) 351; Gibson v. Armstrong, 7 B. Monr. (Ky.) 481; White v. Attorney General, 39 N. C. 19, 44 Am. Dec. 92; Appeal of Domestic & Foreign Missionary Society, 30 Pa. 425; to all churches; Inhabitants of Princeton v. Adams, 10 Cush. (Mass.) 129; In Case of St. Mary's Church, 7 S. & R. (Pa.) 559; Johnson v. Mayne, 4 Ia. 180; Conklin v. Davis, 63 Conn. 377, 28 Atl. 537; foreign missions; Kinney v. Kinney's Ex'r, 86 Ky. 610, 6 S. W. 593; for the education of two young men for all coming time for the Christian ministry; Field v. Seminary, 41 Fed. 371; the advancement of Christianity among the infidels; 1 Ves. Jr. 243; the benefit of ministers of the gospel; Trustees of Cory Universalist Society at Sparta v. Beatty, 28 N. J. Eq. 570; for distributing Bibles and religious tracts; Winslow v. Cummings, 3 Cush. (Mass.) 358; Pickering v. Shotwell, 10 Pa. 23; chapels, hospitals and orphan asylums; Soohan v. City of Philadelphia, 33 Pa. 9; Fink v. Fink's Ex'r, 12 La. Ann. 301, Attorney General v. Society, 8 Rich. Eq. (S. C.) 190; Second Religious Society of Boxford v. Harriman, 125 Mass. 321; even when discrimination is made in favor of members of one religious denomination; Burd Orphan Asylum v. School District, 90 Pa. 21; Trustees v. Gutherie, 86 Va. 125, 10 S. E. 318, 6 L. R. A. 321; dispensaries; Beekman v. People, 27 Barb. (N. Y.) 260; public libraries; Crerar v. Williams, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454; Minns v. Billings, 183 Mass. 126, 66 N. E. 593, 5 L. R. A. (N. S.) 686, 97 Am. St. Rep. 420; and the like; Shotwell v. Mott, 2 Sandf. Ch. (N. Y.) 46; Jackson v. Phillips, 14 Allen (Mass.) 539; 2 Sim. & S. 594; 7 H. L. Cas. 124; friendly societies; 32 Ch. D. 158; the Salvation Army; 34 Ch. D. 528; educational trusts; [1895] 1 Ch. 367; a volunteer corps; [1894] 3 Ch. 265; for the furtherance of the principles of food reform as advocated by certain named vegetarian societies; [1898] 1 Ir. R. 431; 21 T. L. R. 295; any religious society; [1893] 2 Ch. 41 (but not a Dominican convent, for the promotion of private prayer by its own members; *id.* 51); a society for the prevention of cruelty to animals; Minns v. Billings, 183 Mass. 126, 66 N. E. 593, 5 L. R. A. (N. S.) 686, 97 Am. St. Rep. 420 (but not for the maintenance of animals; so also 35 C. C. R. 545); 41 Ch. D. 552; [1895] 2 Ch. 501; a drinking fountain for horses; In re Estate of Graves, 242 Ill. 23, 89 N. E. 672, 24 L. R. A. (N. S.) 283, 134 Am. St. Rep. 302, 17 Ann. Cas. 137; to repair a sea dyke; 38 Ch. D. 507; to provide a scholarship; [1895] 1 Ch. 480; to repair a churchyard; 33 Ch. D. 187; to form a fund for pensioning old and worn-out clerks of a certain firm; 48 W. R. 300; to recompense such persons as shall annually ring a peal of bells in a designated parish to commemorate the restoration of the monarchy to England; [1906] 2 Ch. 184; to establish a cemetery; Hunt v. Tolles, 75 Vt. 48, 52 Atl. 1042; or maintain one; Rollins v. Merrill, 70 N. H. 436, 48 Atl. 1088 (*contra*, In re Corle, 61 N. J. Eq. 409, 48 Atl. 1027); (but not to repair a tomb; L. R. 4 Eq. 521; Kelly v. Nichols, 18 R. I. 62, 25 Atl. 840, 19 L. R. A. 413; nor to erect a monument to a parent; 35 C. C. R. 505; nor to keep a testator's clock in repair; Kelly v. Nichols, 17 R. I. 306, 21 Atl. 906; nor for the purpose of cleaning a painting every four years; 70 L. J. Ch. 42; nor to encourage sport; [1895] 2 Ch. 649; nor a bequest to general public purposes; Cresson's Appeal, 30 Pa. 437; as supplying water or light to towns, building roads and bridges, keeping them in repair, etc.; Town of Hamden v. Rice, 24 Conn. 350;) and to the advancement of religion and other charitable purposes general in their character; Derby v. Derby, 4 R. I. 414; Fink v. Fink's Ex'r, 12 La. Ann. 301; Hullman v. Honcomp, 5 Ohio St. 237; Brendle v. German Reformed Congregation, 33 Pa. 415; Bethlehem Borough v. Fire Co., 81 Pa. 445; Lewis' Estate, 152 Pa. 477, 25 Atl. 878; Sweeney v. Sampson, 5 Ind. 465; L. R. 10 Eq. 246; L. R. 1 Eq. 585; L. R. 4 Ch. App. 309; L. R. 20 Eq. 483; Holmes v. Coates, 159 Mass. 226, 34 N. E. 190; Hadden v. Dandy, 51 N. J. Eq. 154, 26 Atl. 464, 32 L. R. A. 625; [1893] 2 Ch. 41; Union Pac. R. Co. v. Artist, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581; Tudor, Char. Tr.; or a devise may be made to a municipal

corporation for charitable uses; Vidal v. Girard, 2 How. (U. S.) 128, 11 L. Ed. 205; Barkley v. Donnelly, 112 Mo. 561, 19 S. W. 305; Skinner v. Harrison Tp., 116 Ind. 139, 18 N. E. 529, 2 L. R. A. 137; and a city may refuse to accept such a bequest; Dailey v. City of New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69.

In determining whether or not a gift is charitable, courts will consider the nature of the gift, rather than the motives of the donor; In re Smith's Estate, 181 Pa. 109, 37 Atl. 114.

When a testator creates a trust which is invalid because it is one which the law will not permit to be carried out, the trust fails; Fairchild v. Edson, 154 N. Y. 199, 48 N. E. 541, 61 Am. St. Rep. 609; Jackson v. Phillips, 14 Allen (Mass.) 539; Campbell's Heirs v. McArthur, 4 N. C. 557; State v. Griffith, 2 Del. Ch. 392; Zeisweiss v. James, 63 Pa. 465, 3 Am. Rep. 558; De Camp v. Dobbins, 31 N. J. Eq. 671.

A bequest for a religious purpose is *prima facie* a bequest for a charitable purpose; [1893] 2 Ch. 41. In England bequests for masses for the repose of the testator's soul are void as being for superstitious uses; 2 Drew. 417; 2 Myl. & K. 684. In the United States they have been held good charitable trusts; Petition of Schouler, 134 Mass. 426; Appeal of Seibert, 18 W. N. C. (Pa.) 276; Hoeffer v. Clogan, 171 Ill. 462, 49 N. E. 527, 40 L. R. A. 730, 63 Am. St. Rep. 241. In New York, though they were held charitable, they were held void for want of a specific legatee; Holland v. Alcock, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420; Gilman v. McArdle, 99 N. Y. 451, 2 N. E. 464. In Alabama the gift was held not charitable; Festorazzi v. Church, 104 Ala. 327, 18 South. 394, 25 L. R. A. 360, 53 Am. St. Rep. 48; so in California; In re Lennon's Estate, 152 Cal. 327, 92 Pac. 870, 125 Am. St. Rep. 58, 14 Ann. Cas. 1024. Such a bequest was upheld, not as a charity, but as an expenditure directed by the testator for services rendered to him; Moran v. Moran, 104 Ia. 216, 73 N. W. 617, 39 L. R. A. 204, 65 Am. St. Rep. 443. It is upheld, not as a charitable, but as a religious use; Appeal of Rhymer's, 93 Pa. 142, 39 Am. Rep. 736. Money given by his followers to the founder of a church constitutes a trust fund; Holmes v. Dowie, 148 Fed. 634. If given "for poor souls," it is a public charity, not being restricted to designated persons; Ackerman v. Fichter (Ind.) 101 N. E. 493.

In Ireland gifts for masses are generally held good charitable bequests; Ir. R. 2 Eq. 321. They were held not to be bequests for any purpose merely charitable, within the exception of a statute imposing a legacy duty; 11 Ir. R. 10 C. L. 104; 21 L. R. Ir. 480. Such a bequest was held not to be an attempt to create a perpetuity; 21 L. R. Ir. 138; but that it is such was held in 25 L. R. Ir. 388; [1896] 1 Ir. 418; and that the gift was void for the want of a definite *cestui que trust* was held in Ir. R. 11 Eq. 433.

A charitable devise may become void for uncertainty as to the beneficiary; Society of the Most Precious Blood v. Moll, 51 Minn. 277, 53 N. W. 648; Brennan v. Winkler, 37 S. C. 457, 16 S. E. 190; Yingling v. Miller, 77 Md. 104, 26 Atl. 491; Johnson v. Johnson, 92 Tenn. 559, 23 S. W. 114, 22 L. R. A. 179, 36 Am. St. Rep. 104; Simmons v. Burrell, 8 Misc. 388, 28 N. Y. Supp. 625. The decision that the appropriation for the World's Columbian Exposition was a charitable use; U. S. v. Exposition, 56 Fed. 630; was reversed by the circuit court of appeals, which held that, being made for the benefit of a local corporation, it did not constitute a charitable trust, although aiding a great public enterprise; World's Columbian Exposition v. U. S., 56 Fed. 654, 6 C. C. A. 58.

When the purposes of a charity may be best sustained by alienating the specific property bequeathed and investing the proceeds in a different manner, a court of equity has jurisdiction to direct such sale and investment, taking care that no deviation of the gift be permitted; City of Newark v. Stockton, 44 N. J. Eq. 179, 14 Atl. 630; Peter v. Carter, 70 Md. 139, 16 Atl. 450.

Charities in England were formerly interpreted, sustained, controlled, and applied by the court of chancery, in virtue of its general jurisdiction in equity, aided by the stat. 43 Eliz. c. 4 and the prerogative of the crown; the latter being exercised by the lord chancellor, as the delegate of the sovereign acting as *parens patriæ;* Spence, Eq. Jur. 439, 441; Bartlet v. King, 12 Mass. 537, 7 Am. Dec. 90. The subject has since been regulated by various statutes; the Charitable Trusts Act of 1853, 16 & 17 Vict. c. 137, amended by various subsequent acts down to 1894; Tud. Char. Tr. part iii.; 3d ed. By the Toleration Act, 1 Wm. & M. c. 18, charitable trusts for promoting the religious opinions of Protestant Dissenters have been held valid; 2 Ves. Sen. 273. Roman Catholics share in their benefits; 2 & 3 Will. IV. c. 115; and Jews, by 9 & 10 Vict. c. 59, § 2.

The weight of judicial authority in England was in favor of the doctrine which, as will be seen, prevails in this country, that equity exercised an inherent jurisdiction over charitable uses independently of the statute of Elizabeth; that the statute did not create, but was in aid of, the jurisdiction. In support of this conclusion are found such judges as Ld. Ch. Northington, in 1 Eden 10; Amb. 351; Sir Jos. Jekyll, in 2 P. Wms. 119; Ld. Ch. Redesdale, in 1 Bligh 347; Ld. Ch. Hardwicke, in 2 Ves. Sr. 327; Ld. Keeper Finch, in 2 Lev. 167; Ld. Ch. Sugden, in 1 Dr. & W. 258; Ld. Ch. Somers, in 2 Vern. 342; Ld. Ch. Eldon, in 1 Bligh 358, and 7 Ves. 36; Wilmot, C. J., in Wilmot's Notes 24; Ld. Ch. Lyndhurst, in Bligh 335; and Sir John Leach, in 1 Myl. & K. 376.

The stat. 43 Eliz. c. 4 has not been re-enacted or strictly followed in the United States. In some states it has been adopted by usage; but, with several striking exceptions, the decisions of the English Chancery upon trusts for charity have furnished the rule of adjudication in our courts, without particular reference to the fact that the most remarkable of them were only sustainable under the peculiar construction given to certain phrases in the statute; Boyle, Char. 18. The opinion prevailed extensively in this country that the validity of charitable endowments and the jurisdiction of courts of equity in such cases depended upon that statute. In the case of the Baptist Association v. Hart, 4 Wheat. (U. S.) 1, 4 L. Ed. 499, the court adopted that view and accepted the conclusion that there was at common law no jurisdiction of charitable uses exercised in chancery, although in afterwards reviewing that decision an effort was made to distinguish the case by the two features that such cases are not recognized by the law of Virginia, where it arose, and that it was a donation to trustees incapable of taking, with beneficiaries uncertain and indefinite; Vidal v. Girard, 2 How. (U. S.) 128, 11 L. Ed. 205. These views were assailed in 1833 by Baldwin, J. (Magill v. Brown, Bright. 346, Fed. Cas. No. 8,952), in 1835 in Burr's Ex'rs v. Smith, 7 Vt. 241, 29 Am. Dec. 154, and in 1844 by Mr. Binney in the Girard will case in Vidal v. Girard, 2 How. (U. S.) 128, 11 L. Ed. 205. In that case there was furnished a memorandum of fifty cases extracted from the then recently published chancery calendars, in which the jurisdiction had been exercised prior to the stat. of 43 Eliz. (2 How. [U. S.] 155, note); and although the accuracy of this list was challenged by Mr. Webster in argument; (*id.* 179 note), the court, per Story, J., accepted it to "establish, in the most satisfactory and conclusive manner," the conclusion stated. Baldwin, J., also enumerated forty-six cases of the enforcement of such trusts independently of the statute; Magill v. Brown, Bright. 346, Fed. Cas. No. 8,952. The doctrine was fully adopted by the United States supreme court in the Girard will case, and has been since adhered to; Ould v. Hospital, 95 U. S. 304, 24 L. Ed. 450. It is now conceded as settled that courts of equity have an inherent and original jurisdiction over charities, independent of the statute; Perry, Trusts § 694; Tappan v. Deblois, 45 Me. 122; Chambers v. St. Louis, 29 Mo. 543; Paschal v. Acklin, 27 Tex. 173; State v. Griffith, 2 Del. Ch. 392; Griffith v. State, *id.* 421, 463; Kronshage v. Varrell, 120 Wis. 161, 97 N. W. 928.

In Virginia and New York, that statute, with all its consequences, seems to have been repudiated; Gallego's Ex'rs v. Attorney General, 3 Leigh (Va.) 450, 24 Am. Dec. 650; Cottman v. Grace, 112 N. Y. 299, 19 N. E. 839, 3 L. R. A. 145. So in North Carolina, Connecticut, Maryland, and the District of Columbia; McAuley v. Wilson, 16 N. C. 276, 18 Am. Dec. 587; Griffin v. Graham, 8 N. C. 96, 9 Am. Dec. 619; Bridges v. Pleasants, 39 N. C. 26, 44 Am. Dec. 94; Greene v. Dennis, 6 Conn. 293, 16 Am. Dec. 58; White v. Fisk, 22 Conn. 31; Dashiell v. Attorney General, 5 Harr. & J. (Md.) 392, 9 Am. Dec. 572; *id.*, 6 Harr. & J. (Md.) 1; Wilderman v. Baltimore, 8 Md. 551; Halsey v. Church, 75 Md. 275, 23 Atl. 781; Ould v. Hospital, 95 U. S. 304, 24 L. Ed. 450. In Georgia, Illinois, Indiana, Iowa, Kentucky, Massachusetts, Rhode Island, Vermont, and perhaps some other states, the English rule is acted on; McCord v. Ochiltree, 8 Blackf. (Ind.) 15; Baptist Church v. Church, 18 B. Monr. (Ky.) 635; Beall v. Fox, 4 Ga. 404; Going v. Emery, 16 Pick. (Mass.) 107, 26 Am. Dec. 645; Derby v. Derby, 4 R. I. 414; Fink v. Fink's Ex'r, 12 La. Ann. 301; Burr's Ex'rs v. Smith, 7 Vt. 241, 29 Am. Dec. 154; Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. (U. S.) 1, 4 L. Ed. 499; Vidal v. Girard's Ex'rs, 2 How. (U. S.) 127, 11 L. Ed. 205; Perin v. Carey, 24 How. (U. S.) 465, 16 L. Ed. 701; Crerar v. Williams, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454. See Gilman v. Hamilton, 16 Ill. 225; Dickson v. Montgomery, 1 Swan (Tenn.) 348. While not in force as a statute in Pennsylvania, it is embodied as to its principles in the common law of that state; Fire Ins. Patrol v. Boyd, 120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745; Dulles's Estate, 218 Pa. 162, 67 Atl. 49, 12 L. R. A. (N. S.) 1177. Connecticut has a substitute statute for that of 43 Eliz., passed in 1684, which is more strict than the English law in that it requires certainty in the person to be benefited or at least a certain and definite class of persons, with an ascertained mode of selecting them; Adge v. Smith, 44 Conn. 60, 26 Am. Rep. 424.

It is said that charitable uses are favorites with courts of equity; the construction of all instruments, when they are concerned, is liberal in their behalf; Ould v. Hospital, 95 U. S. 313, 24 L. Ed. 450; and even the rule against perpetuities is relaxed for their benefit; *id.*; [1891] 3 Ch. 252; Woodruff v. Marsh, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346; Bisph. Eq. § 133; Perin v. Carey, 24 How. (U. S.) 495, 16 L. Ed. 701; Brown v. Baptist Society, 9 R. I. 177; *contra*, Bascom v. Albertson, 34 N. Y. 584. See also Gray, Perp. § 589. But if a gift to charity is made to depend on a condition precedent, the event must occur within the rule against perpetuities; [1894] 3 Ch. 265; except where the event is the divesting of another charity; [1891] 3 Ch. 252.

An immediate gift to charity is valid, although the particular application of the fund directed by the will may not of necessity take effect within any assignable limit of time, or may never take effect at all, except on the

occurrence of events in their essence contingent and uncertain; while on the other hand, a gift in trust for charity which is conditional upon a future and uncertain event is subject to the same rules as any other estate depending on its coming into existence upon a condition precedent; 74 L. J. Ch. 354; [1905] 1 Ch. 669, 92 L. T. 715.

A gift may be made to a charity not *in esse* at the time; *id.;* Perry, Trusts § 736; Dodge v. Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103. See Booth v. Baptist Church, 126 N. Y. 215, 28 N. E. 238; Hayes v. Pratt, 147 U. S. 557, 13 Sup. Ct. 503, 37 L. Ed. 279. And a gift for specific charitable purposes will not fail for want of trustees; Sears v. Chapman, 158 Mass. 400, 33 N. E. 604, 35 Am. St. Rep. 502; Municipality of Ponce v. Roman Catholic Apostolic Church, 210 U. S. 296, 28 Sup. Ct. 737, 52 L. Ed. 1068. See Dammert v. Osborn, 140 N. Y. 30, 35 N. E. 407.

Generally, the rules against accumulations do not apply; Perry, Trusts § 738; Odell v. Odell, 10 Allen (Mass.) 1; City of Philadelphia v. Girard's Heirs, 45 Pa. 9, 84 Am. Dec. 470; as accumulations for charity, for a longer period than is allowed by the rule against perpetuities will be upheld; Brigham v. Hospital, 126 Fed. 796; St. Paul's Church v. Attorney General, 164 Mass. 188, 41 N. E. 231. A bequest of money to be accumulated until the fund, with any additions from other sources, should suffice to pay the state debt, was held void as exceeding the limitation of the rule against remoteness and accumulations; Russell v. Trust Co., 171 Fed. 161.

Where there is no trustee appointed or none capable of acting, the trust will be sustained, and a trustee appointed; 3 Hare 191; Inglis v. Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 7 L. Ed. 617. In New York a certain designated beneficiary was essential to the creation of a valid trust and the *cy pres* doctrine formerly was not accepted; see Power v. Cassidy, 79 N. Y. 602, 35 Am. Rep. 550, said to reach the limit of uncertainty in that state, and In re O'Hara's Will, 95 N. Y. 418, 47 Am. Rep. 53, and Holland v. Alcock, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420, commenting on that case and reasserting the general rule in New York as stated; Tilden v. Green, 130 N. Y. 29, 28 N. E. 880, 14 L. R. A. 33, 27 Am. St. Rep. 487; a bequest in which the beneficiary is not designated and the selection thereof is delegated to trustees with complete discretionary power was held invalid, and the uncertainty as to beneficiaries could not be cured by anything done by the trustees to execute it; *id.*

But by New York Laws of 1893, c. 701, it is provided that if in an instrument creating a gift, grant, devise, or bequest there is a trustee named to execute the same, the legal title to the property shall vest in such trustee, and if no trustee be named, the title shall vest in the supreme court; Bowman v. Domestic & Foreign Missionary Society, 182 N. Y. 498, 75 N. E. 535; Allen v. Stevens, 161 N. Y. 122, 55 N. E. 568. The effect of this act is to restore the ancient doctrine of charitable uses and trusts as a part of the laws of New York; *id.;* to confer all power over charitable trusts and trustees on the supreme court and to require the attorney general to represent the beneficiaries in cases within the statute as was the practice in England; Rothschild v. Goldenberg, 58 App. Div. 499, 69 N. Y. Supp. 523.

A testamentary gift for a charity to an unincorporated association afterwards incorporated is sometimes sustained; as when the devise does not vest until after the incorporation; Plymouth Soc. of Milford v. Hepburn, 57 Hun 161, 10 N. Y. Supp. 817; but otherwise the incapacity to take cannot be cured by subsequent incorporation or amendment; Lougheed v. Dykeman's Baptist Church and Soc., 129 N. Y. 211, 29 N. E. 249, 14 L. R. A. 410 and note. A devise to a charity, however, is held valid where future incorporation is provided for or contemplated; *id.;* Field v. Theological Seminary, 41 Fed. 371; Trustees of Storrs Agricultural School v. Whitney, 54 Conn. 342, 8 Atl. 141; Miller v. Chittenden, 4 Ia. 252; Swasey v. Bible Soc., 57 Me. 523; Burrill v. Boardman, 43 N. Y. 254, 3 Am. Rep. 694; Kinnaird v. Miller's Ex'r, 25 Gratt. (Va.) 107. Under the civil law, a similar rule seems to have prevailed, and gifts for pious uses might be made to a legal entity to be established by the state after the testator's death; Mackeldy, Civ. Law § 157; Inglis v. Sailor's Snug Harbor, 3 Pet. (U. S.) 100, 7 L. Ed. 617; Milne's Heirs v. Milne's Ex'rs, 17 La. 46; Howe, Studies in the Civil Law 68.

A legacy to a corporation for general corporate purposes is in some cases held to create a trust; De Camp v. Dobbins, 29 N. J. Eq. 36; 1 Dr. & War. 258; President, etc., of Harvard College v. Society, 3 Gray (Mass.) 280; in others not a trust but a gift with conditions annexed as to its expenditure; Woman's Foreign Missionary Society of Methodist Episcopal Church v. Mitchell, 93 Md. 199, 48 Atl. 737, 53 L. R. A. 711; In re Griffin's Will, 167 N. Y. 71, 60 N. E. 284; Bird v. Merklee, 144 N. Y. 544, 39 N. E. 645, 27 L. R. A. 423.

A gift to a perpetual institution not charitable is not necessarily bad. The gift is good if it is not subject to any trust that will prevent the existing members of the association from dealing with it as they please, or if it can be construed as a gift to or for the benefit of the individual members of the association. If the gift is one which by the terms of it, or which by reason of the constitution of the association in whose favor it is made, tends to a perpetuity, the gift is bad; 70 L. J. Ch. 631; [1901] 2 Ch. 110.

A gift to a society the object of which was

the employment of its funds for mutual benevolences among its members and their families was held not a charitable use under the common law of Pennsylvania or the statute of Elizabeth; Babb v. Reed, 5 Rawle (Pa.) 151, 28 Am. Dec. 650; Swift's Ex'rs v. Society, 73 Pa. 362.

In England a devise or bequest for benevolent purposes is held to be too indefinite and therefore void; 3 Mer. 17; 9 Ves. 399; but though wider than charity in legal signification; Norris v. Thomson's Ex'rs, 19 N. J. Eq. 307; its meaning may be narrowed by the context; De Camp v. Dobbins, 31 N. J. Eq. 695. Any act of kindness, forethought, good will, or friendship may properly be described as benevolent; Suter v. Hilliard, 132 Mass. 413, 42 Am. Rep. 444; and it has been held that whatever may be the meaning of the word when used alone in a bequest in connection with charity, it is synonymous with it; Saltonstall v. Sanders, 11 Allen (Mass.) 446. A fund for providing oysters for benchers at one of the Inns of Court, however benevolent, would hardly be called charitable; [1891] A. C. 580. A gift to an archbishop of property to be used as he "may judge most conducive to the good of religion in this diocese," is not a gift for "religious purposes" and is invalid; 106 L. T. 394 (P. C.). A bequest to executors to distribute the property among benevolent objects is not too indefinite to be permitted to stand; Dulles's Estate, 218 Pa. 162, 67 Atl. 49, 12 L. R. A. (N. S.) 1177.

Legacies to pious or charitable uses are not, by the law of England, entitled to a preference in distribution; although such was the doctrine of the civil law. Nor are they in the United States, except by special statutes.

In jurisdictions which have adopted the statute of uses, or which accept the doctrine of original jurisdiction in equity, trusts otherwise valid, especially when in aid of religious, educational, or charitable objects, are not void because of lack of corporate capacity in the beneficiary; Appeal of Evangelical Ass'n, 35 Pa. 316; Conklin v. Davis, 63 Conn. 377, 28 Atl. 537; Tappan v. Deblois, 45 Me. 122; Lewis v. Curnutt, 130 Ia. 423, 106 N. W. 914; Burbank v. Whitney, 24 Pick. (Mass.) 146, 35 Am. Dec. 312; Parker v. Cowell, 16 N. H. 149; Mason's Ex'rs v. M. E. Church, 27 N. J. Eq. 47.

In Evangelical Ass'n's Appeal, supra, it was held that a bequest to an unincorporated religious society, not upon any defined charity, or for any specified charitable use, was valid; in such case it is necessary only to name the legatee; such a society can take without any direction that the legacy (or gift) should be expended for charity purposes; its own character determines the character of the gift. Strong, J. (a great authority on this law), in delivering the opinion of the court, cited 3 Russ. 142, where it was held that in a bequest to a purely charitable corporation the court will decree payment without requiring that a scheme be settled for its distribution; also, 1 Sim. & Stu. 43, where a legacy to an unincorporated charitable institution, to become part of its general funds, was upheld. See also Burr's Ex'rs v. Smith, 7 Vt. 241, 29 Am. Dec. 154. He also cited with disapproval the statement to the contrary in 1 Jarm. Wills 193. The case also held that it makes no difference that the members of such society are largely non-residents.

A devise for the benefit of an unincorporated association of individuals unnamed, which may increase and add to its number, or lose by death or withdrawal, and the membership of which is not known, and is indeterminate, is held void for uncertainty; Miller v. Ahrens, 150 Fed. 644. In jurisdictions in which the statute of Elizabeth is not a part of the existing laws, only incorporated bodies can take charitable bequests; Mount v. Tuttle, 183 N. Y. 358, 76 N. E. 873, 2 L. R. A. (N. S.) 428; Kain v. Gibboney, 101 U. S. 362, 25 L. Ed. 813 (where the opinion was also by Strong, J., then a member of that court); Fifield v. Van Wyck, 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745; Lane v. Eaton, 69 Minn. 141, 71 N. W. 1031, 38 L. R. A. 669, 65 Am. St. Rep. 559; Rhodes v. Rhodes, 88 Tenn. 637, 13 S. W. 590.

Where the association is not charitable, the gift is void within the doctrine of Morice v. Bishop of Durham, 9 Ves. 399: "There can be no trust over the exercise of which this court will not assume a control; for an uncontrollable power of disposition would be ownership, not trust. If there be a clear trust, but for uncertain objects, the property that is the subject of the trust is undisposed of; and the benefit of such trust must result to those to whom the law gives the ownership in default of disposition by the owner. But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object. There must be somebody in whose favor the court can decree a performance." This doctrine was applied where the gift was for the use and benefit of a convent, not charitable but religious; 11 L. R. Ir. 236; to an individual with the condition that he spend his time in retirement and constant devotion; L. R. 12 Eq. 574.

Where a statute declares void a gift by will to a charity if made within less than 30 days of the death, a gift to a trust company to take effect if a legacy to charities should be void under the act, was held void because it was clearly made to carry out the bequest to the charities designated in the will; In re Stirk's Estate, 232 Pa. 98, 81 Atl. 187.

See, generally, 3 Washburn, Real Prop. 687, 690; Boyle, Char.; Duke, Char. Uses; 2 Kent 361; 4 *id.* 616; 2 Ves. Ch. 52, 272; 6 *id.* 404; 7 *id.* 86; Ambl. 715; 2 Atk. 88;

Barr v. Weld, 24 Pa. 84; Mayor, etc., of Philadelphia v. Elliott, 3 Rawle (Pa.) 170; Witman v. Lex, 17 S. & R. (Pa.) 88, 17 Am. Dec. 644; Gass & Bonta v. Wilhite, 2 Dana (Ky.) 170, 26 Am. Dec. 446; McCartee v. Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 18 Am. Dec. 516; Kniskern v. Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439; Yates v. Yates, 9 Barb. (N. Y.) 324; Voorhees v. Church, 17 Barb. (N. Y.) 104; Brett, Lead. Cas. Mod. Eq.; Trustees of McIntire Poor School v. Canal & Mfg. Co., 9 Ohio 203, 34 Am. Dec. 436; Hullman v. Honcomp, 5 Ohio St. 237; Town of Hamden v. Rice, 24 Conn. 350; Cincinnati v. White, 6 Pet. (U. S.) 435, 8 L. Ed. 452; Pawlet v. Clark, 9 Cra. (U. S.) 331, 3 L. Ed. 735; Dwight's argument, Rose will case; Dwight's Charity Cases; a full article on Jurisdiction of the Court of Chancery to Enforce Charitable Uses, 1 Am. L. Reg. (N. S.) 129, 321, 385; Dashiell v. Attorney-General, 5 Harr. & J. (Md.) 392, 9 Am. Dec. 577. See 31 Am. L. Reg. 123, 235, and 5 Harv. L. Rev. 389, for discussion of the Tilden will case, cited *supra;* 15 *id.* 509; and also Potter will case, Houston v. Townsend, 1 Del. Ch. 421, 12 Am. Dec. 109, in which the arguments are very fully reported and the authorities collected on both sides of the questions involved in this title.

Usually a charitable corporation is not liable in damages for personal injuries resulting from the torts of its officers and agents; Abston v. Academy, 118 Tenn. 24, 102 S. W. 351, 11 L. R. A. (N. S.) 1179; Fire Ins. Patrol v. Boyd, 120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745; Gable v. Sisters of St. Francis, 227 Pa. 254, 75 Atl. 1087, 136 Am. St. Rep. 879; Farrigan v. Pevear, 193 Mass. 147, 78 N. E. 855, 7 L. R. A. (N. S.) 481, 118 Am. St. Rep. 484, 8 Ann. Cas. 1109; Powers v. Hospital, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372; Leavell v. Asylum, 122 Ky. 213, 91 S. W. 671, 4 L. R. A. (N. S.) 269, 12 Ann. Cas. 827; Thornton v. Franklin Square House, 200 Mass. 465, 86 N. E. 909, 22 L. R. A. (N. S.) 486. But a public charitable reformatory is held liable to one whom it imprisons against her consent and without lawful authority; Gallon v. House of Good Shepherd, 158 Mich. 361, 122 N. W. 631, 24 L. R. A. (N. S.) 286, 133 Am. St. Rep. 387; a hospital is not exempt from liability for negligent injury to an employee merely because it was founded by property given for charitable purposes; Hewett v. Hospital, 73 N. H. 556, 64 Atl. 190, 7 L. R. A. (N. S.) 496. So a hospital which is an adjunct to a medical school and conducted for profit is liable for negligent injury to an employee; University of Louisville v. Hammock, 127 Ky. 564, 106 S. W. 219, 14 L. R. A. (N. S.) 784, 128 Am. St. Rep. 355; as is one maintained by a railroad company for its employees to which they are obliged to contribute; Phillips v. R. Co., 211 Mo. 419, 111 S. W. 100, 17 L. R. A. (N. S.) 1167, 124 Am. St. Rep. 786, 14 Ann. Cas. 742; and a religious corporation is liable to one injured in repairing its property, through the negligence of its servants in furnishing unsafe scaffolding; Bruce v. Central M. E. Church, 147 Mich. 230, 110 N. W. 951, 10 L. R. A. (N. S.) 74, 11 Ann. Cas. 150. Its property cannot be sold under execution on a judgment rendered for the nonfeasance, misfeasance or malfeasance of its agents or trustees; Fordyce v. Ass'n, 79 Ark. 550, 96 S. W. 155, 7 L. R. A. (N. S.) 485.

A religious or charitable corporation is not exempt from liability for negligent injury to one coming upon its premises to perform service for it; Hordern v. Salvation Army, 199 N. Y. 233, 92 N. E. 626, 32 L. R. A. (N. S.) 62, 139 Am. St. Rep. 889; Kellogg v. Church Charity Foundation, 203 N. Y. 191, 96 N. E. 406, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913A, 883; Mulchey v. Religious Society, 125 Mass. 487; Hewett v. Hospital Aid Ass'n, 73 N. H. 556, 64 Atl. 190, 7 L. R. A. (N. S.) 496; Bruce v. Central Methodist Episcopal Church, 147 Mich. 230, 110 N. W. 951, 10 L. R. A. (N. S.) 74, 11 Ann. Cas. 150; Powers v. Hospital, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372; but such corporation is not liable for the negligent injury to a beneficiary by one of its servants; Gable v. Sisters of St. Frances, 227 Pa. 254, 75 Atl. 1087, 136 Am. St. Rep. 879; Parks v. Northwestern University, 218 Ill. 381, 75 N. E. 991, 2 L. R. A. (N. S.) 556, 4 Ann. Cas. 103; McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529; Cunningham v. Sheltering Arms, 135 App. Div. 178, 119 N. Y. Supp. 1033; Powers v. Hospital, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372; though the beneficiary be a patient in a hospital paying for the treatment received; nor will an inmate of a reform school be permitted to recover from the institution; Corbett v. Industrial School, 177 N. Y. 16, 68 N. E. 997; nor is such corporation liable where an inmate who partly pays for his care by work is killed in the course of it while directed by a competent servant; Cunningham v. Sheltering Arms, 61 Misc. 501, 115 N. Y. Supp. 576.

See FOREIGN CHARITIES; CY PRES; PERPETUITIES.

CHARTA. A charter or deed in writing. Any signal or token by which an estate was held.

CHARTA CHYROGRAPHATA. An indenture. The two parts were written on the same sheet, and the word chyrograph written between them in such a manner as to divide the word in the separation of the two parts of the indenture.

CHARTA COMMUNIS. An indenture.

CHARTA PARTITA. A charter-party.

CHARTA DE UNA PARTE. A deed poll. A deed of one part.

Formerly this phrase was used to distin-

guish a *deed poll*—which is an agreement made by one party only; that is, only one of the parties does any act which is binding upon him—from a deed *inter partes*. Co. Litt. 229. See DEED POLL.

CHARTA DE FORESTA (written *Carta de Foresta*). A collection of the laws of the forest, made in the reign of Hen. III.

The *charta de foresta* was called the Great Charter of the woodland population, nobles, barons, freemen, and slaves, loyally granted by Henry III. early in his reign (A. D. 1217). Inderwick, King's Peace 159; Stubb's Charters 347. There is a difference of opinion as to the *original* charter of the forest similar to that which exists respecting the true and original Magna Carta (*q. v.*), and for the same reason, viz., that both required repeated confirmation by the kings, despite their supposed inviolability. This justifies the remark of recent historians as to the great charter that "this theoretical sanctity and this practical insecurity are shared with 'the Great Charter of Liberties' by the Charter of the Forest which was issued in 1217." 1 Poll. & Maitl. 158. It is asserted with great positiveness by Inderwick that no forest charter was ever granted by King John, but that Henry III. issued the charter of 1217 (which he puts in the third year of the reign, which, however, only commenced Oct. 28, 1216), in pursuance of the promises of his father; and Lord Coke, referring to it as a charter on which the lives and liberties of the woodland population depended, says that it was confirmed at least thirty times between the death of John and that of Henry V.; 4 Co. Inst. 303.

Webster, under the title Magna Charta, says that the name is applied to the charter granted in the 9th Hen. III. and confirmed by Edw. I. Prof. Maitland, in speaking of Magna Carta, refers to "the sister-charter which defined the forest law" as one of the four documents which, at the death of Henry III., comprised the written law of England. 1 Soc. England 410. Edward I. in 1297 confirmed "the charter made by the common consent of all the realm in the time of Henry III. to be kept in every point without breach." Inderwick, King's Peace 160; Stubb's Charters 486. The Century Dictionary refers to this latter charter of Edw. I. as *the* Charter of the Forest; but it was, as already shown, only a confirmation of it, and a comparison of the authorities leaves little if any doubt that the date was as above stated and the history as here given. Its provisions may be found in Stubb's Charters and they are summarized by Inderwick, in his recent work above cited. See FOREST LAWS.

CHARTEL. A challenge to single combat. Used at the period when trial by single combat existed. Cowell.

CHARTER. A grant made by the sovereign either to the whole people or to a portion of them, securing to them the enjoyment of certain rights. 1 Story, Const. § 161; 1 Bla. Com. 108.

A charter differs from a constitution in this, that the former is granted by the sovereign, while the latter is established by the people themselves: both are the fundamental law of the land.

A deed. The written evidence of things done between man and man. Cowell. Any conveyance of lands. Any sealed instrument. Spelman. See Co. Litt. 6; 1 Co. 1; F. Moore 687.

An act of a legislature creating a corporation.

The charter of a corporation consists of its articles of incorporation taken in connection with the law under which it was organized; Chicago Open Board of Trade v. Bldg. Co., 136 Ill. App. 606.

The name is ordinarily applied to government grants of powers or privileges of a permanent or continuous nature, such as incorporation, territorial dominion or jurisdiction. Between private persons it is also loosely applied to deeds and instruments under seal for the conveyance of lands. Cent. Dict.

It is to be strictly construed; Rockland Water Co. v. Water Co., 80 Me. 544, 15 Atl. 785, 1 L. R. A. 388; Oregon, R. & Nav. Co. v. Ry. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837; East Line & R. R. Ry. Co. v. Rushing, 69 Tex. 306, 6 S. W. 834. The reservation by the legislature of power to repeal a charter cannot give authority to take away or destroy property lawfully acquired or created under the charter; People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684. A charter may be taken under the power of eminent domain; Appeal of Philadelphia & Gray's Ferry Pass. R. Co., 102 Pa. 123. See FORFEITURE.

As to the power of the state to alter, amend or repeal a charter, see IMPAIRING OBLIGATIONS OF A CONTRACT.

The early history of the genesis of the corporation, particularly of municipal corporations, is elaborated in a paper by A. M. Eaton in Am. Bar. Ass'n Rep. (1902) 292, 322, in which it is said: "The facts of history now known, and many of which were unknown to Coke, show that charters were granted by lords of manors, lay and spiritual, as well as by kings holding manors as of their own demesne and not acting in the exercise of any royal prerogative, to towns and boroughs confirming the continued enjoyment of 'liberties' in the future as they had already been long enjoyed in the past. Sometimes additional new 'liberties' were added, and afterwards similar brand-new charters were granted, relating only to future enjoyment of such 'liberties' similar to those already long enjoyed by the old towns and boroughs. In return for these grants the townspeople agreed at first, each one severally, to render his feudal dues (or rent in place thereof); then a group of the principal townsmen or burghers became responsible for the whole sum, and finally the town itself became thus liable for the fee-ferm rent. There was no intention on either part to form a corporation, indeed neither knew what a corporation was; for the name did not exist, but the thing itself was being gradually evolved."

BLANK CHARTER. A document given to the agents of the crown in the reign of Richard II., with power to fill up as they pleased.

CHARTER OF PARDON. In English Law. An instrument under the great seal by which a pardon is granted to a man for a felony or other offence. Black, L. Dict.

See FRANCHISE.

CHARTER-LAND. In English Law. Land formerly held by deed under certain rents and free services. It differed in nothing from free socage land; and it was also called bookland. 2 Bla. Com. 90.

CHARTER-PARTY. A contract of affreightment, by which the owner of a ship or other vessel lets the whole or a part of her to a merchant or other person for the conveyance of goods, on a particular voyage, in consideration of the payment of freight.

The term is derived from the fact that the contract which bears this name was formerly written on a card *(charta-partita)*, and afterwards the card was cut into two parts from top to bottom and one part was delivered to each of the parties, which was produced when required, and by this means counterfeits were prevented. Abb Ship. 175. Pothier, *Traité de Charte-partie*, gives this explanation taken from Boerius: "It was formerly usual in England and Aquitaine to reduce contracts into writing on a chart, divided afterwards into two parts from top to bottom, of which each of the contracting parties took one, which they placed together and compared when they had occasion to know the terms of their contract."

It is in writing not generally under seal, in modern usage; 1 Pars. Adm. & Sh. 270; In re Cloherty, 2 Wash. 145, 27 Pac. 1064; Brown v. Ralston, 4 Rand. (Va.) 504; but may be by parol; Ben. Adm. 287; Taggard v. Loring, 16 Mass. 336, 8 Am. Dec. 140; Muggridge v. Eveleth, 9 Metc. (Mass.) 233; The Phebe, Ware 263, Fed. Cas. No. 11,061; The Tribune, 3 Sumn. 144, Fed. Cas. No. 14,171. It should contain, *first*, the name and tonnage of the vessel; see Johnson v. Miln, 14 Wend. (N. Y.) 195; Ashburner v. Balchen, 7 N. Y. 262; *second*, the name of the captain; 2 B. & Ald. 421; *third*, the names of the vessel-owner and the freighter; *fourth*, the place and time agreed upon for the loading and discharge; *fifth*, the price of the freight; Kleine v. Catara, 2 Gall. 61, Fed. Cas. No. 7,869; *sixth*, the demurrage or indemnity in case of delay; 9 C. & P. 709; Clendaniel v. Tuckerman, 17 Barb. (N. Y.) 184; Lacombe v. Waln, 4 Binn. (Pa.) 299; Brown v. Ralston, 9 Leigh (Va.) 532; Towle v. Kettell, 5 Cush. (Mass.) 18; *seventh*, such other conditions as the parties may agree upon; 13 East 313; Bee 124. The owner who signs a charter-party impliedly warrants that the vessel is commanded by competent officers; Tebo v. Jordan, 67 Hun 392, 22 N. Y. Supp. 156. One of the conditions implied in a charter-party is that the vessel will commence the voyage with reasonable diligence; waiting four months violates the contract; Olsen v. Hunter-Benn & Co., 54 Fed. 530.

It may either provide that the charterer hires the whole capacity and burden of the vessel,—in which case it is in its nature a contract whereby the owner agrees to carry a cargo which the charterer agrees to provide,—or it may provide for an entire surrender of the vessel to the charterer, who then hires her as one hires a house, and takes possession in such a manner as to have the rights and incur the liabilities which grow out of possession. See 8 Ad. & E. 835; Palmer v. Gracie, 4 Wash. C. C. 110, Fed. Cas. No. 10,692; Hooe v. Groverman, 1 Cra. (U. S.) 214, 2 L. Ed. 86; Lyman v. Redman, 23 Me. 289; Clarkson v. Edes, 4 Cow. (N. Y.) 470; The Volunteer, 1 Sumn. 551, Fed. Cas. No. 16,991; Ruggles v. Bucknor, 1 Paine 358, Fed. Cas. No. 12,115. If the object sought can be conveniently accomplished without a transfer of the vessel, the courts will not be inclined to consider the contract as a demise of the vessel; U. S. v. Cassedy, 2 Sumn. 583, Fed. Cas. No. 14,745; Sweatt v. R. Co., 3 Cliff. 339, Fed. Cas. No. 13,684; Hooe v. Groverman, 1 Cra. (U. S.) 214, 2 L. Ed. 86; Reed v. U. S., 11 Wall. (U. S.) 591, 20 L. Ed. 220; Work v. Leathers, 97 U. S. 379, 24 L. Ed. 1012.

When a ship is chartered, this instrument serves to authenticate many of the facts on which the proof of her neutrality must rest, and should therefore be always found on board chartered ships; 1 Marsh. Ins. 407.

Unqualified charter-parties are to be construed liberally as mercantile contracts, and one who has thereby charged himself with an obligation must make it good unless prevented by the act of God, the law, or the other party; The B. F. Bruce, 50 Fed. 118. A charter-party controls a bill of lading in case of conflict between them; Ardan S. S. Co. v. Theband, 35 Fed. 620. In construing a charter-party, matter expunged from a printed form may be considered in determining the intention of the parties; One Thousand Bags of Sugar v. Harrison, 53 Fed. 828, 4 C. C. A. 34. See INTERPRETATION. Quarantine regulations which interfere with the charter engagements of a vessel are fairly within the clause excepting liability for results caused by restraints of successor; The Progreso, 50 Fed. 835, 2 C. C. A. 45.

CHARTERED ACCOUNTANT. See AUDITOR.

CHARTIS REDDENDIS (Lat. for returning charters). A writ which lay against one who had charters of feoffment intrusted to his keeping, which he refused to deliver. Reg. Orig. 159. It is now obsolete.

CHASE. The liberty or franchise of hunting, oneself, and keeping protected against all other persons, beasts of the chase within a specified district, without regard to the ownership of the land. 2 Bla. Com. 414.

The district within which such privilege is to be exercised.

A chase is a franchise granted to a subject, and hence is not subject to the *forest* laws; 2 Bla. Com. 38. It differs from a park, because it may be another's ground, and is not enclosed. It is said by some to be smaller than a forest and larger than a park. *Termes de la Ley.* But this seems to be a customary incident, and not an essential quality.

The act of acquiring possession of animals *feræ naturæ* by force, cunning, or address.

The hunter acquires a right to such animals by occupancy, and they become his property; 4 Toullier, n. 7. No man has a right to enter on the lands of another for the purpose of hunting, without his consent; 14 East 249; Pothier, *Propriété*, pt. 1, c. 2, a. 2.

CHASTE. In the seduction statutes it means actual virtue in conduct and principle. One who falls from virtue and afterwards reforms is chaste within the meaning of the statutes; Wood v. State, 48 Ga. 288, 15 Am. Rep. 664; Andre v. State, 5 Ia. 389, 68 Am. Dec. 708; Carpenter v. People, 8 Barb. (N. Y.) 603; Boyce v. People, 55 N. Y. 644; Wilson v. State, 73 Ala. 527.

CHASTITY. That virtue which prevents the unlawful commerce of the sexes.

A woman may defend her chastity by killing her assailant. See SELF-DEFENCE.

Sending a letter to a married woman soliciting her to commit adultery is an indictable offence; State v. Avery, 7 Conn. 266, 18 Am. Dec. 105. See Shannon v. Com., 14 Pa. 226. In England, and perhaps elsewhere, the mere solicitation of chastity is not indictable; 2 Chit. Pr. 478. Words charging a woman with a violation of chastity are actionable in themselves, because they charge her with a crime punishable by law, and of a character to degrade and disgrace her, and exclude her from society; Frisbie v. Fowler, 2 Conn. 707; Brown v. Nickerson, 5 Gray (Mass.) 2; Heard, Lib. & Sl. § 36; Brooker v. Coffin, 5 Johns. (N. Y.) 190, 4 Am. Dec. 337; Gosling v. Morgan, 32 Pa. 275; but not so in the District of Columbia; Pollard v. Lyon, 91 U. S. 225, 23 L. Ed. 308. See LIBEL; PROMISE OF MARRIAGE.

CHATTEL (Norm. Fr. *goods*, of any kind). Every species of property, movable or immovable, which is less than a freehold.

In the *Grand Coutumier* of Normandy it is described as a mere movable, but is set in opposition to a fief or *feud;* so that not only goods, but whatever was not a *feud* or fee, were accounted chattels; and it is in this latter sense that our law adopts it. 2 Bla. Com. 385.

Real chattels are interests which are annexed to or concern real estate: as, a lease for years of land. And the duration of the lease is immaterial, whether it be for one or a thousand years, provided there be a certainty about it and a reversion or remainder in some other person. A lease to continue until a certain sum of money can be raised out of the rents is of the same description; and so in fact will be found to be any other interest in real estate whose duration is limited to a time certain beyond which it cannot subsist, and which is, therefore, something less than a freehold. A lease giving the exclusive privilege for a term of years of boring and digging for oil and other minerals is also a chattel; Brown v. Beecher, 120 Pa. 590, 15 Atl. 608.

Personal chattels are properly things movable, which may be carried about by the owner; such as animals, household stuff, money, jewels, corn, garments, and everything else that can be put in motion and transferred from one place to another; 2 Kent 340; Co. Litt. 48 *a*; 4 Co. 6; In re Gay, 5 Mass. 419; Brewster v. Hill, 1 N. H. 350.

Chattels, whether real or personal, are treated as personal property in every respect, and, in case of the death of the owner, usually belong to the executor or administrator, and not to the heir at law. There are some chattels, however, which, as Chancellor Kent observes, though they be movable, yet are necessarily attached to the freehold: contributing to its value and enjoyment, they go along with it in the same path of descent or alienation. This is the case with deeds, and other papers which constitute the muniments of title to the inheritance; the shelves and family pictures in a house; and the posts and rails of an enclosure. It is also understood that pigeons in a pigeon-house, deer in a park, and fish in an artificial pond go with the inheritance, as heirlooms to the heir at law. But fixtures, or such things of a personal nature as are attached to the realty, whether for a temporary purpose or otherwise, become chattels, or not, according to circumstances; Mitch. R. P. 21. See FIXTURES; 2 Kent 342; Co. Litt. 20 *a*, 118; 12 Price 163; 11 Co. 50 *b*; Bacon, Abr. *Baron*, etc. C, 2; Dane, Abr. Index; Com. Dig. *Biens*, A.

CHATTEL INTEREST. An interest in corporeal hereditaments less than a freehold. 2 Kent 342.

There may be a chattel interest in real property, as in case of a lease; Stearns, Real Act. 115. A term for years, no matter of how long duration, is but a chattel interest, unless declared otherwise by statute. The subject is treated in 1 Washburn, R. P. 310.

CHATTEL MORTGAGE. A transfer of personal property as security for a debt or obligation in such form that upon failure of the mortgagor to comply with the terms of the contract, the title to the property will be in the mortgagee. Thomas, Mort. 427.

An absolute pledge, to become an absolute interest if not redeemed at a fixed time. Cortelyou v. Lansing, 2 Caines, Cas. (N. Y.) 200, per Kent, Ch.

Strictly speaking, a conditional sale of a chattel as security for the payment of a debt or the performance of some other obligation. Jones, Chat. Mort. § 1. The condition is that the sale shall be void upon the performance of the condition named. If the condition be not performed, the chattel is irredeemable at law; but it may be otherwise in equity or by statute; *id.* The title is fully vested in the mortgagee and can be defeated only by

the due performance of the condition; upon a breach, the mortgagee may take possession and treat the chattel as his own; *id.;* Porter v. Parmly, 34 N. Y. Sup. Ct. 398. See Flanders v. Thomas, 12 Wis. 413.

At common law a chattel mortgage may be made without writing; it is valid as between the parties; Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290. A verbal chattel mortgage is valid between the parties; Gilbert v. Vall, 60 Vt. 261, 14 Atl. 542; Stearns v. Gafford, 56 Ala. 544; Bardwell v. Roberts, 66 Barb. (N. Y.) 433; Bates v. Wiggin, 37 Kan. 44, 14 Pac. 442, 1 Am. St. Rep. 234; Carroll Exch. Bank v. Bank, 50 Mo. App. 92; and as to third parties with notice; Sparks v. Wilson, 22 Neb. 112, 34 N. W. 111; *contra,* Lazarus v. Bank, 72 Tex. 359, 10 S. W. 252; Knox v. Wilson, 77 Ala. 309; and even as against third parties if accompanied by possession in the mortgagee; Bardwell v. Roberts, 66 Barb. (N. Y.) 433; but delivery is not essential in all cases to the validity of a chattel mortgage; Morrow v. Turney's Adm'r, 35 Ala. 131; but see Bardwell v. Roberts, 66 Barb. (N. Y.) 433. It differs from a *pledge* in that in case of a mortgage the title is vested in the mortgagee, subject to defeasance upon the performance of the condition; while in the case of a pledge, the title remains in the pledgor, and the pledgee holds the possession for the purposes of the bailment; White v. Cole, 24 Wend. (N. Y.) 116; Conner v. Carpenter, 28 Vt. 237; Day v. Swift, 48 Me. 368; Heyland v. Badger, 35 Cal. 404; Badlam v. Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202; Sims v. Canfield, 2 Ala. 555. By a mortgage the title is transferred; by a pledge, the possession; Jones, Mort. § 4.

Upon default, in cases of pledge, the pledgor may recover the chattel upon tendering the amount of the debt secured; but in case of a mortgage, upon default the chattel, at law, belongs to the mortgagee; Porter v. Parmly, 43 How. Pr. (N. Y.) 445. In equity he may be held liable to an account; Stoddard v. Denison, 38 *id.* 296. Apart from statutes, no special form is required for the creation of a chattel mortgage. A bill of sale absolute in form, with a separate agreement of defeasance, constitute together a mortgage, as between the parties; Carpenter v. Snelling, 97 Mass. 452; Taber v. Hamlin, 97 Mass. 489, 93 Am. Dec. 113; Davis v. Hubbard, 38 Ala. 185; Polhemus v. Trainer, 30 Cal. 685; Soell v. Hadden, 85 Tex. 182, 19 S. W. 1087; State v. Bell, 2 Mo. App. 102; or a note with an endorsement on the back that at any time the maker agreed to make a chattel mortgage; Riddle v. Norris, 46 Mo. App. 512. And in equity, the defeasance may be subsequently executed; Locke's Ex'r v. Palmer, 26 Ala. 312. A parol defeasance is not good in law; Harper v. Ross, 10 Allen (Mass.) 332; Bryant v. Crosby, 36 Me. 562, 58 Am. Dec. 767; Montany v. Rock, 10 Mo. 506; *contra,* Fuller v. Parrish, 3 Mich. 211; but it is in equity; Coe v. Cassidy, 72 N. Y. 133; Laeber v. Langhor, 45 Md. 477; Stokes v. Hollis, 43 Ga. 262; National Ins. Co. v. Webster, 83 Ill. 470; Bartel v. Lope, 6 Or. 321; Hurford v. Harned, 6 Or. 363; even as to third parties with notice; Omaha Book Co. v. Sutherland, 10 Neb. 334, 6 N. W. 367. See Conway v. Iron Co., 33 Neb. 454, 50 N. W. 326. The question whether a bill of sale was intended as a chattel mortgage is for the jury; King v. Greaves, 51 Mo. App. 534.

In a *conditional sale,* the purchaser has merely a right to purchase, and no debt or obligation exists on the part of the vendor; this distinguishes such a sale from a mortgage; Weathersly v. Weathersly, 40 Miss. 462, 90 Am. Dec. 344; Gomez v. Kamping, 4 Daly (N. Y.) 77.

Where there is an absolute sale and a simultaneous agreement of resale, the tendency is to consider the transaction a mortgage; Barnes v. Holcomb, 12 Sm. & M. (Miss.) 306; Fowler v. Stoneum, 11 Tex. 478, 62 Am. Dec. 490; Folsom v. Fowler, 15 Ark. 280; but not when the intention of the parties is clearly otherwise; Forkner v. Stuart, 6 Gratt. (Va.) 197; Bracken v. Chaffin, 5 Humph. (Tenn.) 575.

It is not necessary that a written chattel mortgage should be under seal; Gerrey v. White, 47 Me. 504; Sherman v. Fitch, 98 Mass. 59; Ping. Chat. Mort. 45; Gibson v. Warden, 14 Wall. (U. S.) 244, 20 L. Ed. 797; Sweetzer v. Mead, 5 Mich. 107.

A chattel mortgage of a crop must designate the land; W. L. Hurley & Sons v. Ray, 160 N. C. 376, 76 S. E. 234.

At *common law* a mortgage can be given only of chattels actually in existence, and belonging to the mortgagor actually or potentially; Pierce v. Emery, 32 N. H. 484; Roy v. Goings, 6 Ill. App. 162; Looker v. Peckwell, 38 N. J. L. 253; Williams v. Briggs, 11 R. I. 476, 23 Am. Rep. 518; Cook v. Corthell, 11 R. I. 482, 23 Am. Rep. 518; Bouton v. Haggart, 6 Dak. 32, 50 N. W. 197; and even though the mortgagor may afterwards acquire title, the mortgage is bad against subsequent purchasers and creditors; but it is otherwise between the parties; Ludwig v. Kipp, 20 Hun (N. Y.) 265; claims for money not yet earned may be the subject of a chattel mortgage; Sandwich Mfg. Co. v. Robinson, 83 Ia. 567, 49 N. W. 1031, 14 L. R. A. 126, and an elaborate note thereto.

In *equity* the rule is different; the mortgage, though not good as a conveyance, is valid as an executory agreement; the mortgagor is considered as a trustee for the mortgagee; Williams v. Briggs, 11 R. I. 476, 23 Am. Rep. 518; 10 H. L. Cas. 191; Mitchell v. Winslow, 2 Sto. 630, Fed. Cas. No. 9,073; Beall v. White, 94 U. S. 382, 24 L. Ed. 173; Schuelenburg & Boeckler v. Martin, 2

Fed. 747; Ellett v. Butt, 1 Woods, 214, Fed. Cas. No. 4,384; Perry v. White, 111 N. C. 197, 16 S. E. 172. But see Moody v. Wright, 13 Metc. (Mass.) 17, 46 Am. Dec. 706; Hunter v. Bosworth, 43 Wis. 583. Under this principle all sorts of future interests in chattels may be mortgaged; Jones, Chat. Mort. § 174.

The crops of specified land or the future young of animals could at one time be sold or mortgaged on the ground that seller had potential possession and passed legal title; Hob. 132, but the English Sale of Goods Act, § 5, provides that where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell goods. No exception is made in favor of property which at common law was the subject of potential possession. This seems to change the rule in England. The mere agreement to mortgage personalty subsequently to be acquired gave the mortgagee a lien upon the property; 10 H. L. Cas. 191; [1903] 2 K. B. 367. It is essential that the mortgagee shall have actually advanced his money; 13 App. Cas. 523.

Mortgages of future acquired chattels where the mortgagor is in possession are held invalid against an attachment or levy by creditors; American Surety Co. v. Mfg. Co., 100 Fed. 40; Tatman v. Humphrey, 184 Mass. 361, 68 N. E. 844, 63 L. R. A. 738, 100 Am. St. Rep. 562; Francisco v. Ryan, 54 Ohio St. 307, 43 N. E. 1045, 56 Am. St. Rep. 711; Girard Trust Co. v. Mellor, 156 Pa. 579, 27 Atl. 662; *contra*, Riddle v. Dow, 98 Ia. 7, 66 N. W. 1066, 32 L. R. A. 811; Cunningham v. Woolen Mills, 69 N. J. Eq. 710, 61 Atl. 372. The general rule is that a chattel mortgagee has title, and so a mortgage on animals covers the increase, though not mentioned in the mortgage on the property, *partus sequitur ventrem;* Northwestern Nat. Bank v. Freeman, 171 U. S. 620, 19 Sup. Ct. 36, 43 L. Ed. 307; but in those states where such a mortgage gives only a lien, then it is limited to the property actually described; Demers v. Graham, 36 Mont. 402, 93 Pac. 268, 14 L. R. A. (N. S.) 431, 122 Am. St. Rep. 384, 13 Ann. Cas. 97; *contra*, First Nat. Bank v. Investment Co., 86 Tex. 636, 26 S. W. 488. See 19 Harv. L. Rev. 557, by Samuel Williston.

A chattel mortgage on growing crops, given as security for a note and for future advances and merchandise sold, is valid; Souza v. Lucas (Cal.) 100 Pac. 115.

The registration statutes simply provide a substitute for change of possession. Between the parties, a change of possession is unnecessary; if there is a change of possession, registration is not required; Morrow v. Reed, 30 Wis. 81; Janvrin v. Fogg, 49 N. H. 340; Fordice v. Gibson, 129 Ind. 7, 28 N. E. 303. At common law an unrecorded chattel mortgage is *prima facie* fraudulent and void as to creditors, where there is no change of possession, but such presumption may be rebutted; Pyeatt v. Powell, 51 Fed. 551, 2 C. C. A. 367; Frankhouser v. Worrall, 51 Kan. 404, 32 Pac. 1097; See Frost v. Mott, 34 N. Y. 253; Kleine v. Katzenberger, 20 Ohio St. 110, 5 Am. Rep. 630.

Possession by the mortgagee cures defects in the form of the mortgage, or its execution; Springer v. Lipsis, 209 Ill. 261, 70 N. E. 641; Farmers' & Merchants' Bank v. Orme, 5 Ariz. 304, 52 Pac. 473; so of defects in acknowledgment when possession is taken before a third party's lien attaches; Garner v. Wright, 52 Ark. 385, 12 S. W. 785, 6 L. R. A. 715; and so as to the affidavit accompanying the mortgage; Chicago Title & Trust Co. v. O'Marr, 18 Mont. 568, 46 Pac. 809, 47 Pac. 4; and as to any insufficiency in the description of the chattels; Frost v. Bank, 68 Wis. 234, 32 N. W. 110; Kelley v. Andrews, 102 Ia. 119, 71 N. W. 251. But if the mortgage is not recorded and is thereby invalid, it is not validated by the mortgagee's possession as to the mortgagor's creditors whose debts were created or whose rights attached after execution and before possession taken; In re Bothe, 173 Fed. 597, 97 C. C. A. 547; Stephens v. Perrine, 143 N. Y. 476, 39 N. E. 11. Where the mortgagee takes contemporaneous possession and retains it, recording is not essential; Fordice v. Gibson, 129 Ind. 7, 28 N. E. 303; Brockway v. Abbott, 37 Wash. 263, 79 Pac. 924; and, though not recorded, a chattel mortgage is good against all the world if, after condition broken, the mortgagee takes possession; Garrison v. Carpet Co., 21 Okl. 643, 97 Pac. 978, 129 Am. St. Rep. 799.

A mortgage not filed under the statute is good against a subsequent bill of sale made by the mortgagor after the mortgagee was in possession; Smith v. Connor (Tex.) 46 S. W. 267. So of a subsequent chattel mortgage made by the mortgagor; National Bank of Metropolis v. Sprague, 21 N. J. Eq. 530; and an attachment subsequently levied against the mortgagor; Baldwin v. Flash, 59 Miss. 61; Isenberg v. Fansler, 36 Kan. 402, 13 Pac. 573.

The English Bill of Sales Acts only required written chattel mortgages to be recorded, but they need not be written. The mortgage statutes on recording are collected in Jones, Chattel Mortgages, § 190 et seq. Some make the mortgagor's place of residence the place of record; others the place where the property is situated at the time; others require them to be refiled every year, and so on. In general, innocent third parties will prevail over the holder of a chattel mortgage or conditional bill of sale, unless the instrument has been recorded or the goods have been delivered; Funk v. Paul, 64 Wis. 35, 24 N. W. 419, 54 Am. Rep. 576. As a general rule, where a judgment is not

a lien upon personal property, a mortgage recorded after judgment, but before execution, has priority; Jones, Chatt. Mortg. § 245d. It is held that where a mortgage is not recorded nor possession taken by the mortgagee, it is good as against general, but not judgment, creditors; Stephens v. Meriden Britannia Co., 160 N. Y. 180, 54 N. E. 781, 73 Am. St. Rep. 678. A mortgagee who has not taken possession or recorded his mortgage immediately cannot protect himself against the mortgagor's creditors; Roe v. Meding, 53 N. J. Eq. 350, 30 Atl. 587, 33 Atl. 394.

An unrecorded chattel mortgage is valid against a general assignment by the mortgagor for his creditors; Jones, Chatt. Mortg. § 244; but is invalid as to a receiver of the mortgagor because he represents creditors; In re Wilcox & Howe Co., 70 Conn. 220, 39 Atl. 163; Fidelity Trust Co. v. Clay Co., 7(N. J. Eq. 550, 67 Atl. 1078 (there being creditors whose debts are a lien upon the chattels); *contra;* Berline Machine Works v. Trust Co., 60 Minn. 161, 61 N. W. 1131; Ryder v. Ryder, 19 R. I. 188, 32 Atl. 919.

Where statutes provide that a mortgage of chattels shall be void unless the mortgage is filed or there shall be an actual and continued change of possession, it is essential that such provisions be strictly complied with; Buckstaff Bros. Mfg. Co. v. Snyder, 54 Neb. 538, 74 N. W. 863; McTaggart v. Rose, 14 Ind. 230. See Mower v. McCarthy, 79 Vt. 142, 64 Atl. 578, 7 L. R. A. (N. S.) 418, 118 Am. St. Rep. 942.

The removal of the mortgaged chattels from the county where the mortgage on them was recorded does not require it to be recorded in the new place; Jones, Chatt. Mortg. § 260; National Bank of Commerce v. Jones, 18 Okl. 555, 91 Pac. 191, 12 L. R. A. (N. S.) 311, 11 Ann. Cas. 1041.

Statutes regulating chattel mortgages exist in all of the states except Louisiana.

Under the old Bankrupt Act it was held that a bankrupt assignee took only the debtor's title to goods in the case of an unrecorded mortgage; Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816; and so in England; 12 M. & W. 855. The rule was generally otherwise in insolvency; Jones, Chatt. Mortg. § 242. The present Bankrupt Act (§ 67 a) provides that liens which are invalid against creditors shall be invalid against the trustee. See Knapp v. Trust Co., 216 U. S. 545, 30 Sup. Ct. 412, 54 L. Ed. 610. It leaves open to the individual states to allow the acquisition of a lien by the mortgagee by taking possession at any time before actual bankruptcy, and it is immaterial that possession is taken with the mortgagor's consent; Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956; Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577.

A chattel mortgage void by a state statute as to creditors of the mortgagor, for want of change of possession, is invalid as to his trustees in bankruptcy.

A chattel mortgage with power of sale and a deed of trust are practically one and the same instrument, as understood in the District of Columbia; Hunt v. Ins. Co., 196 U. S. 47, 25 Sup. Ct. 179, 49 L. Ed. 381.

No mortgage of a *vessel* is valid against third parties without notice, unless recorded in the office of the collector of customs of the port where the vessel is enrolled; Rev. Stat. § 4192, etc. As between parties and those who have notice, registration is not required; Moore v. Simonds, 100 U. S. 145, 25 L. Ed. 590; Best v. Staple, 61 N. Y. 71; The John T. Moore, 3 Wood 61, Fed. Cas. No. 7,430. As to Extraterritoriality of Chattel Mortgages, see CONFLICT OF LAWS.

See MORTGAGE.

CHAUD-MEDLEY (Fr. *chaud*, hot). The killing of a person in the heat of an affray.

It is distinguished by Blackstone from chance-medley, an accidental homicide. 4 Bla. Com. 184. The distinction is said to be, however, of no great importance. 1 Russ. Cr. 660. Chance-medley is said to be the killing in self-defence, such as happens on a sudden rencounter, as distinguished from an accidental homicide. *Id.*

CHEAT. "Deceitful practices in defrauding or *endeavoring* to defraud another of his known right, by some *wilful device*, contrary to the plain rules of common honesty." Hawk. Pl. Cr. b. 2, c. 23, § 1.

The fraudulent obtaining the property of another by any deceitful and illegal practice or token (short of felony) which affects or may affect the public.

In order to constitute a cheat or indictable fraud, there must be a prejudice received; and such injury must affect the public welfare, or have a tendency so to do; 2 East, Pl. Cr. 817; 1 Deacon, Cr. Law 225.

It seems to be a fair result of the cases, that a cheat, in order to be indictable at common law, must have been public in its nature, by being calculated to defraud numbers, or to deceive or injure the public in general, or by affecting the public trade or revenue, the public health, or being in fraud of public justice, etc. And the other cases to be found in the books, of cheats apparently private which have been yet held to be indictable at common law, will, upon examination, appear to involve considerations of a public nature also, or else to be founded in conspiracy or forgery. Thus, it is not indictable for a man to obtain goods by false verbal representations of his credit in society, and of his ability to pay for them; Com. v. Warren, 6 Mass. 72; or to violate his contract, however fraudulently it be broken; Com. v. Hearsey, 1 Mass. 137; or fraudulently to deliver a less quantity of amber than was contracted for and represented; 2 Burr. 1125; 1 W. Bla. 273; or to receive good barley to grind, and to return instead a musty mixture of barley and oat-

meal; 4 Maule & S. 214. See 2 East, Pl. Cr. 816; People v. Babcock, 7 Johns. (N. Y.) 201, 5 Am. Dec. 256; Com. v. Morse, 2 Mass. 138; Cross v. Peters, 1 Greenl. (Me.) 387, 10 Am. Dec. 78; Hill v. State, 1 Yerg. (Tenn.) 76, 24 Am. Dec. 441; Republica v. Powell, 1 Dall. (Pa.) 47, 1 L. Ed. 31; 1 B. & H. L. Cr. Cas. 1. Refusing to return a promissory note obtained for the purpose of examination is merely a private fraud; People v. Miller, 14 Johns. (N. Y.) 371..

To cheat a man of his money or goods, by using false weights or false measures, has been indictable at common law from time immemorial; 3 Greenl. Ev. § 86; Com. v. Warren, 6 Mass. 72. See Republica v. Powell, 1 Dall. (Pa.) 47, 1 L. Ed. 31. In addition to this, the statute 33 Hen. VIII. 1, which has been adopted and considered as a part of the common law in some of the United States, and the provisions of which have been either recognized as common law or expressly enacted in nearly all of them, was directed, as appears from its title and preamble, against such persons as received money or goods by means of counterfeit letters or privy tokens in other men's names; Com. v. Warren, 6 Mass. 72; People v. Johnson, 12 Johns. (N. Y.) 292; 3 Greenl. Ev. § 86; 2 Bish. Cr. L. 145. A "privy token," within the meaning of this statute, was held to denote some real visible mark or thing, as a key, a ring, etc., and not a mere affirmation or promise. And though writings, generally speaking, may be considered as tokens, yet to be within this statute they must be such as were made in the names of third persons, whereby some additional credit and confidence might be gained to the party using them; 2 East, Pl. Cr. 826, 827.

The word "cheat" is not actionable, unless spoken of the plaintiff in relation to his profession or business; Odiorne v. Bacon, 6 Cush. (Mass.) 185; 2 Chit. Rep. 657; Rush v. Cavenaugh, 2 Pa. 187; 20 Up. Can. Q. B. 382; Ostrom v. Calkins, 5 Wend. (N. Y.) 263; Stevenson v. Hayden, 2 Mass. 406; Lucas v. Flinn, 35 Ia. 9. See DECEIT; FRAUD; FALSE PRETENSES; TOKEN; ILLITERATE.

CHECK. A written order or request, addressed to a bank or persons carrying on the business of banking, by a party having money in their hands, desiring them to pay, on presentment, to a person therein named or bearer, or to such person or order, a named sum of money. 2 Dan. Neg. Inst. 528; Blair v. Wilson, 28 Gratt. (Va.) 170; Deener v. Brown, 1 MacArth. (D. C.) 350; In re Brown, 2 Sto. 502, Fed. Cas. No. 1,985. See Chapman v. White, 6 N. Y. 412, 57 Am. Dec. 464.

A check is a bill of exchange drawn on a bank, payable on demand. Neg. Instr. Act § 185.

The chief differences between checks and bills of exchange are: *First*, a check is not due until presented, and, consequently, it can be negotiated any time before presentment, and yet not subject the holder to any equities existing between the previous parties; Cruger v. Armstrong, 3 Johns. Cas (N. Y.) 5, 9, 2 Am. Dec. 126; 9 B. & C. 388; Chit. Bills (8th ed.) 546. *Secondly*, the drawer of a check is not discharged for want of immediate presentment with due diligence; while the drawer of a bill of exchange is. The drawer of a check is only discharged by such neglect when he sustains actual damage by it, and then only *pro tanto;* Murray v. Judah, 6 Cow. (N. Y.) 484; Mohawk Bank v. Broderick, 10 Wend. (N. Y.) 306; Little v. Bank, 2 Hill (N. Y.) 425. See Case v. Morris, 31 Pa. 100. *Thirdly*, the death of the drawer of a check rescinds the authority of the banker to pay it; while the death of the drawer of a bill of exchange does not alter the relations of the parties; 3 M & G. 571-573. *Fourthly*, checks, unlike bills of exchange, are always payable without grace; Woodruff v. Bank, 25 Wend. (N. Y.) 673, Merchants' Bank of New York v. Woodruff, 6 Hill (N. Y.) 174. See a discussion of this subject, 4 Kent (Lacey's ed.) note on p. 571 of the index, commenting upon opinion of Cowen, J., in Harker v. Anderson, 21 Wend. (N. Y.) 372.

Checks are in use only between banks and bankers and their customers, and are designed to facilitate banking operations. It is of their very essence to be payable on demand, because the contract between the banker and customer is that the money is payable on demand; Harker v. Anderson, 21 Wend. (N. Y.) 372; In re Brown, 2 Sto. 502, Fed. Cas. No. 1,985; Merchants' Nat. Bank v. Bank, 10 Wall. (U. S.) 647, 19 L. Ed. 1008; Wood River Bank v. Bank, 36 Neb. 744, 55 N. W. 239.

As between the holder of a check and the indorser it is required that due diligence be used in presenting them; Lewis, Hubbard & Co. v. Supply Co., 59 W. Va. 75, 52 S. E. 1017, 4 L. R. A. (N. S.) 132; Start v. Tupper, 81 Vt. 19, 69 Atl. 151, 15 L. R. A. (N. S.) 213, 130 Am. St. Rep. 1015; and it should be protested in order to fix the liability of indorsers; 3 Kent (Lacey's ed.) 88; but it is not necessary to use diligence in presenting an ordinary check, in order to charge the drawer, unless he has received damage by the delay; Buckner v. Finley, 2 Pet. (U. S.) 586, 7 L. Ed. 528; Little v. Bank, 2 Hill (N. Y.) 425; Daniels v. Kyle, 1 Ga. 304; 2 M. & R. 401; Syracuse, B. & N. Y. R. Co. v. Collins, 57 N. Y. 641; Purcell v. Allemong, 22 Gratt. (Va.) 743; Taylor v. Sip, 30 N. J. L. 284; Stewart v. Smith, 17 Ohio St. 82; Morrison v. McCartney, 30 Mo. 183; Cork v. Bacon, 45 Wis. 192, 30 Am. Rep. 712; Montelius v. Charles, 76 Ill. 303. If not presented for payment within a reasonable time after issue, the drawer will be discharged from liability thereon to the extent of the loss caused by the delay; Neg. Instr. Act § 186. Where one deposits a check in his bank and it is collected and credited, it is equivalent to payment to him in the ordinary course as though presented to another bank and paid over the counter; American Nat. Bank of Nashville, Tenn., v. Miller, 229 U. S. 517, 33 Sup. Ct. 883, 57 L. Ed. ——.

In common with other kinds of negotiable paper, they must contain an order to pay money, and words of negotiability. This enables a *bona fide* holder for value to col-

lect the money without regard to the previous history of the paper; Swift v. Tyson, 16 Pet. (U. S.) 1, 10 L. Ed. 865; Coddington v. Bay, 20 Johns. (N. Y.) 637, 11 Am. Dec. 342; Bank of Mobile v. Brown, 42 Ala. 108.

They must be properly signed by the person or firm keeping the account at the banker's, as it is part of the implied contract of the banker that only checks so signed shall be paid. The words "Agt. Glass Buildings" added to the signature of a check used for paying an individual debt of the agent, are enough to put the person receiving it on inquiry as to his authority to use the fund for such purpose; Gerard v. McCormick, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234, and note reviewing cases.

Post-dated checks are payable on the day of their date, although negotiated beforehand. See Taylor v. Sip, 30 N. J. L. 284; Mohawk Bank v. Broderick, 10 Wend. (N. Y.) 304; In re Brown, 2 Sto. 502, Fed. Cas. No. 1,985. Where all the parties to a check reside in the same place, the holder has until the day following its date or receipt by him in which to present it.

A check, of itself, does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check; Neg. Instr. Act § 189; Doherty v. Watson, 29 W. N. C. (Pa.) 32.

CERTIFIED CHECKS. Checks are not to be accepted, but presented at once for payment. There is a practice, however, of marking checks "good," by the banker, which fixes his responsibility to pay that particular check when presented, and amounts, in fact, to an acceptance; Merchants' Nat. Bank v. Bank, 10 Wall. (U. S.) 648, 19 L. Ed. 1008. Such a marking is called certifying; and checks so marked are called certified checks. See Meads v. Bank, 25 N. Y. 143, 82 Am. Dec. 331; Seventh Nat. Bank v. Cook, 73 Pa. 483, 13 Am. Rep. 751. The bank thereby becomes the principal debtor; First Nat. Bank of Jersey City v. Leach, 52 N. Y. 350, 11 Am. Rep. 708; Merchants' Nat. Bank v. Bank, 10 Wall. (U. S.) 648, 19 L. Ed. 1008; Morse, Banks & Banking 414; to the holder, not the drawer; Girard Bank v. Bank, 39 Pa. 92, 80 Am. Dec. 507; Metropolitan Nat. Bank of Chicago v. Jones, 137 Ill. 634, 27 N. E. 533, 12 L. R. A. 492, 31 Am. St. Rep. 403; Minot v. Russ, 156 Mass. 458, 31 N. E. 489, 16 L. R. A. 510, 32 Am. St. Rep. 472; First Nat. Bank v. Whitman, 94 U. S. 343, 24 L. Ed. 229; and the statute of limitation does not run until demand made; Girard Bank v. Bank, 39 Pa. 92, 80 Am. Dec. 507; and the certifying after delivery at payee's instance takes the amount thereof out of the hands of the maker, and any loss by the insolvency of the bank falls on the payee; Continental Nat. Bank of Chicago v. Cornhouser & Co., 37 Ill. App. 475; Minot v. Russ, 156 Mass. 458, 31 N. E. 489, 16 L. R. A. 510, 32 Am. St. Rep. 472; where the holder of a check procures it to be accepted or certified, the drawer and all endorsers are discharged from liability thereon; Neg. Instr. Act § 188; but where certified to at maker's request he is not discharged from liability; Born v. Bank, 123 Ind. 78, 24 N. E. 173, 7 L. R. A. 442, 18 Am. St. Rep. 312; Bickford v. Bank, 42 Ill. 238, 89 Am. Dec. 436; Mutual Nat. Bank v. Rotgé, 28 La. Ann. 933, 26 Am. Rep. 126; Randolph Nat. Bank v. Hornblower, 160 Mass. 401, 35 N. E. 850.

The bank cannot refuse to pay because notified not to pay by the drawer; Freund v. Bank, 12 Hun (N. Y.) 537; even where it had been stolen and the holder acquired it three years after certification; *id.;* nor generally can it set up that the check was forged, or that the drawer has no funds; Espy v. Bank, 18 Wall. (U. S.) 621, 21 L. Ed. 947. In New York, it is held that certifying a check warrants only the signature, and not the terms of the check; Security Bank of New York v. Bank, 67 N. Y. 458, 23 Am. Rep. 129. See First Nat. Bank of Chicago v. Bank, 40 Ill. App. 640; *contra,* Louisiana Nat. Bank v. Bank, 28 La. Ann. 189, 26 Am. Rep. 92. The certification is in effect merely an acceptance, and creates no trust in favor of the holder of the check, and gives no lien on any particular portion of the assets of the bank; People v. Bank, 77 Hun 159, 28 N. Y. Supp. 407. It has, however, been held that a certified check operates as an assignment of the funds to meet it, and makes the bank liable to the holder; Blake v. Savings Bank Co., 79 Ohio 189, 87 N. E. 73, 20 L. R. A. (N. S.) 290, 128 Am. St. Rep. 684, 16 Ann. Cas. 210. See *supra.*

Certification is equivalent to an acceptance; Neg. Instr. Act § 187.

A statement by a bank officer that the drawer's check was "good," or "all right," will not constitute an acceptance of the check; Espy v. Bank, 18 Wall. (U. S.) 604, 21 L. Ed. 947; but a parol acceptance has been held sufficient; Pope v. Bank, 59 Barb. (N. Y.) 226. A bank is not bound to accept by telegram the checks or drafts of its depositors, although it be in possession of funds to pay; First Nat. Bank of Atchison v. Bank, 74 Kan. 606, 87 Pac. 746, 8 L. R. A. (N. S.) 1148, 118 Am. St. Rep. 340, 11 Ann. Cas. 281. One relying on a telegram as an acceptance should see to it that the language used will, at least fairly, mean that; Myers v. Bank, 27 Ill. App. 254. See Bank of Springfield v. Bank, 30 Mo. App. 271, holding that a parol statement by a bank that a check is good is not equivalent to a certification; nor does it release the holder from the duty of proper diligence in presentment for payment. It binds the bank to nothing more than that the statement was true at the time when it was made. But where the inquiry was, "Will you pay

J. T.'s check on you for $22,000? Answer," and the answer was, "J. T. is good. Send on your paper," it was held an acceptance; North Atchison Bank v. Garretson, 51 Fed. 168, 2 C. C. A. 145. And, generally, where the party inquiring takes the check in reliance upon such statement and for a valuable consideration, the bank will be liable; Leach v. Hill, 106 Ia. 171, 76 N. W. 667; Farmers' & Merchants' Bank v. Dunbier, 32 Neb. 487, 49 N. W. 376; Henrietta Nat. Bank v. Bank, 80 Tex. 648, 16 S. W. 321, 26 Am. St. Rep. 773.

A bank receiving a check for collection is negligent in sending it to the drawee bank, although it is the only bank in the place; Winchester Mill Co. v. Bank, 120 Tenn. 225, 111 S. W. 248, 18 L. R. A. (N. S.) 441; Minneapolis S. & D. Co. v. Bank, 76 Minn. 136, 78 N. W. 980, 44 L. R. A. 504, 77 Am. St. Rep. 609; Bank of Rocky Mount v. Floyd, 142 N. C. 187, 55 S. E. 95; American Exchange Nat. Bank v. Bank, 71 Mo. App. 451; Wagner v. Crook, 167 Pa. 259, 31 Atl. 576, 46 Am. St. Rep. 672. But that such negligence on the part of the forwarding bank will not make it liable where there are no funds to the credit of the drawer, or where the drawee bank is insolvent, is held in some cases; Carson, Pirie, Scott & Co. v. Fincher, 129 Mich. 687, 89 N. W. 570, 95 Am. St. Rep. 449; First Nat. Bank v. Bank, 12 Tex. Civ. App. 318, 34 S. W. 458. In Farmer's Bank & Trust Co. v. Newland, 97 Ky. 465, 31 S. W. 38, it was said that when a customer deposits checks with a bank, for collection at a distant point, he must know the bank cannot send one of its agents to make the collection. He is presumed to know the method employed by banks in making such collections. He has made the bank his agent for that purpose, and he does it with the implied understanding that the bank will follow the customary method. And where it was shown to be a universal custom to send checks directly to the drawee bank for collection, the custom was held to amount to a good presentment for payment; Kershaw v. Ladd, 34 Or. 375, 56 Pac. 402, 44 L. R. A. 236; Wilson v. Bank, 187 Ill. 222, 58 N. E. 250, 52 L. R. A. 632. But such a custom was held unreasonable and bad; Farley Nat. Bank v. Pollock & Bernheimer, 145 Ala. 321, 39 South. 612, 2 L. R. A. (N. S.) 194, 117 Am. St. Rep. 44, 8 Ann. Cas. 370.

The rule is well settled that a drawee accepts or pays at his peril a forged bill in the hands of a holder in due course; 3 Burr. 1354; for the reason that as between two persons of equal equities, one of whom must suffer, the one having legal title should prevail; 4 H. L. R. 229; 16 *id.* 514; *contra*, First Nat. Bank of Lisbon v. Bank, 15 N. D. 299, 108 N. W. 546, 10 L. R. A. (N. S.) 49, 125 Am. St. Rep. 588.

A bank which receives for deposit a check on which the payee's indorsement has been forged, and collects its amount and pays it over to the depositor, is liable to the payee; Farmer v. Bank, 100 Tenn. 187, 47 S. W. 234; Buckley v. Bank, 35 N. J. L. 400, 10 Am. Rep. 249.

An unrestricted indorsement of a draft is a representation that the signature of the drawer is genuine, upon which the drawee may rely, so that in case it proves to be a forgery he may recover back the money paid upon the draft to the indorser; Ford & Co. v. Bank, 74 S. C. 180, 54 S. E. 204, 10 L. R. A. (N. S.) 63, 114 Am. St. Rep. 986, 7 Ann. Cas. 744.

The depositor owes a duty to the bank to use due diligence in examining the returned pass books and vouchers. If he or his clerk intrusted with the examination uses such diligence, whether it results in the discovery of the forgery or not, the depositor can recover from the bank the sums paid out; Frank v. Bank, 84 N. Y. 213, 38 Am. Rep. 501. If, however, the examining clerk is the forger and conceals the result of the examination from the depositor, the bank will not be liable; First Nat. Bank of Birmingham v. Allen, 100 Ala. 476, 14 South. 335, 27 L. R. A. 426, 46 Am. St. Rep. 80; Leather Mfrs. Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811; Dana v. Bank, 132 Mass. 156; Myers v. Bank, 193 Pa. 1, 44 Atl. 280, 74 Am. St. Rep. 672. When the depositor has knowledge that his forged check has been paid by the bank, he must promptly give notice to the bank in order to hold it liable for the loss; McNeely Co. v. Bank, 221 Pa. 588, 70 Atl. 588, 20 L. R. A. (N. S.) 79; Myers v. Bank, 193 Pa. 1, 44 Atl. 280, 74 Am. St. Rep. 672; Critten v. Bank, 171 N. Y. 228, 63 N. E. 969, 57 L. R. A. 529; U. S. v. Bank, 45 Fed. 163. But the depositor's delay is not a defence unless the bank shows some injury caused thereby; Murphy v. Bank, 191 Mass. 159, 77 N. E. 693, 114 Am. St. Rep. 595; Janin v. Bank, 92 Cal. 14, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82; Third Nat. Bank of City of New York v. Bank, 76 Hun 475, 27 N. Y. Supp. 1070; *contra*, McNeely Co. v. Bank, 221 Pa. 588, 70 Atl. 891, 20 L. R. A. (N. S.) 79.

To entitle one who, by mistake, has paid out money on a forged endorsement of a check or other commercial paper, to recover back the same, notice must, within a reasonable time after discovery, be given to the party receiving such payment; National Exchange Bank v. U. S., 151 Fed. 402, 80 C. C. A. 632; 3 Kent 85, Holmes' note; but this does not apply to the payment to a bank of a pension check by the sub-treasury upon a forged endorsement; U. S. v. Bank, 214 U. S. 302, 29 Sup. Ct. 665, 53 L. Ed. 1006, 16 Ann. Cas. 1184.

Crossed Checks. The practice of crossing checks originated at the clearing house, the clerks of the different bankers who did busi-

ness there having been accustomed to write across the checks the names of their employers, so as to enable the clearing house clerks to make up their accounts. It afterwards became a common practice to cross checks which were not intended to go through the clearing house, with the name of a banker or with "& Co.," and a custom or usage grew up in regard to this also; 7 Exch. 389, which held the practice of crossing checks to be a safeguard to the owner and not to restrict their negotiability.

A check is said to be specially crossed when the name of a bank or banking firm is written across the face of the check (it is then payable only to the bank indicated), and it is said to be generally crossed when the words "and company" or any abbreviation thereof, usually "& Co.," between two parallel transverse lines are written across the check (it must then be paid only to some bank). Another form of the general crossing is recognized by the later English statutes which consists merely of two parallel transverse lines across the face of the checks without any words; Farmers' Bank v. Johnson, King & Co., 134 Ga. 486, 68 S. E. 85, 30 L. R. A. (N. S.) 697, 137 Am. St. Rep. 242.

Crossed checks in England are now governed by the Bill of Exchange Act of 1882, providing that where a banker in good faith and without negligence receives payment from a customer of a crossed check, and the customer has no title, or a defective title thereto, the banker shall not incur any liability to the true owner of the check by reason only of having received such payment; [1903] A. C. 240, affirming [1902] 1 K. B. 242; [1904] 2 K. B. 465.

The effect of crossing a check with the name of a banker means a direction to the drawee, by the owner, to pay it only through the banker; disregard of this direction would be evidence of negligence if payment were made to one who was not the lawful owner; 7 Exch. 389. By 19 & 20 Vict. c. 25, this custom was made statutory; 1 Q. B. Div. 31.

In the United States the system of "crossed checks," strictly so called, is unknown. But of late the germ of a similar custom has begun to manifest itself. Occasionally checks have stamped or written upon them some form of words which is intended to secure their payment exclusively through the Clearing House.

Where a check was stamped at the time it was drawn with the words "payable through (a named bank) at current rate," it was held a material part of the direction, and the drawee bank was not required to pay the check when not presented through the bank thus named; Farmers' Bank v. Johnson, King & Co., 134 Ga. 486, 68 S. E. 85, 30 L. R. A. (N. S.) 697, 137 Am. St. Rep. 242.

There is a practice of writing across checks "memorandum," or "mem." They are given thus, not as an ordinary check, but as a memorandum of indebtedness; and between the original parties this seems to be their only effect. In the hands of a third party, for value, they have, however, all the force of checks without such word of restriction; Franklin Bank v. Freeman, 16 Pick. (Mass.) 535; Dykers v. Bank, 11 Paige (N. Y.) 612; Story, Pr. Notes § 499. See INDORSEMENT.

Giving a check is not payment unless the check is paid; Cromwell v. Lovett, 1 Hall (N. Y.) 64; Franklin v. Vanderpool, 1 Hall (N. Y.) 88; L. R. 10 Ex. 153; Small v. Mining Co., 99 Mass. 277; Sweet v. Titus, 4 Hun (N. Y.) 639; Heartt v. Rhodes, 66 Ill. 351; Patton's Adm'rs v. Ash, 7 S. & R. (Pa.) 116. But a tender was held good when made by a check contained in a letter, requesting a receipt in return, which the plaintiff sent back, demanding a larger sum, without objecting to the nature of the tender; and receiving a check marked "good" is payment; 2 Dan. Neg. Inst. 559. See PAYMENT.

CHECK BOOK. A book containing blanks for checks.

These books are so arranged as to leave a margin, called by merchants a *stump*, or *stubb*, when the check is filled out and torn off. Upon these stumps a memorandum is made of the date of the check, the payee, and the amount; and this memorandum, in connection with the evidence of the party under oath, is evidence of the facts there recorded.

CHECK ROOM. The owner of property lost while in a railroad check room can recover without proof of negligence on the part of the railroad company; Terry v. Ry., 81 S. C. 279, 62 S. E. 249, 18 L. R. A. (N. S.) 295.

CHECQUE. See CHECK.

CHEMICAL ANALYSIS. The court takes judicial notice that to analyze a beverage requires not only learning and skill in chemistry, but instruments and appliances not in common use; State v. Powell, 141 N. C. 780, 53 S. E. 515, 6 L. R. A. (N. S.) 477.

CHEMIN (Fr.). The road wherein every man goes; the king's highway. Called in law Latin *via regia*. *Termes de la Ley;* Cowell; Spelman, Gloss.

CHEMIST. See APOTHECARY; DRUGGIST.

CHEROKEE NATION. One of the Civilized Indian tribes. See INDIAN; INDIAN TRIBE.

CHEVAGE. A sum of money paid by villeins to their lords in acknowledgment of their villenage.

It was paid to the lord in token of his being chief or head. It was exacted for permission to marry, and also permission to remain without the dominion of the lord. When paid to the king, it was called subjection. *Termes de la Ley;* Co. Litt. 140 *a;* Spelman, Gloss.

CHEVANTIA. A loan, or advance of money on credit.

CHEVISANCE (Fr. agreement). A bargain or contract. An unlawful bargain or contract.

CHICKASAW NATION. One of the Civilized Indian tribes. See INDIAN; INDIAN TRIBE.

CHIEF. One who is put above the rest. Principal. The best of a number of things.

Declaration in chief is a declaration for the principal cause of action. 1 Tidd, Pr. 419.

Examination in chief is the first examination of a witness by the party who produces him. 1 Greenl. Ev. § 445.

Tenant in chief was one who held directly of the king. 1 Washb. R. P. *19.

CHIEF BARON. The title of the chief justice of the English court of exchequer. 3 Bla. Com. 44.

CHIEF JUDGE. In some states the presiding judge is thus styled, as in the New York Court of Appeals and the Maryland Court of Appeals. The term is also used in 1 Tyler (Vt.) with "assistant" judge for the *puisne*.

CHIEF JUSTICE. The presiding or principal judge of a court.

CHIEF JUSTICIAR. See JUSTICIAR.

CHIEF LORD. The immediate lord of the fee. Burton, R. P. 317.

CHIEF PLEDGE. The borsholder, or chief of the borough. Spelman, Gloss.

CHILD. The son or daughter, in relation to the father or mother.

Illegitimate children are bastards. *Legitimate children* are those born in lawful wedlock. *Natural children* are illegitimate children. *Posthumous children* are those born after the death of the father.

Children born in lawful wedlock, or within a competent time afterwards, are presumed to be the issue of the father, and follow his condition; but this presumption may be repelled by the proof of such facts tending to establish non-intercourse as may satisfy a jury to the contrary; Field, Inf. 40; 3 C. & P. 215, 427; 13 Ves. Ch. 58; Cross v. Cross, 3 Paige, Ch. (N. Y.) 139, 23 Am. Dec. 778; Com. v. Shepherd, 6 Binn. (Pa.) 286, 6 Am. Dec. 449; Barden v. Barden, 14 N. C. 548. See Blackburn v. Crawford, 3 Wall. (U. S.) 175, 18 L. Ed. 186. See ACCESS. Those born out of lawful wedlock follow the condition of the mother.

The term *children* does not, ordinarily and properly speaking, comprehend grandchildren, or issue generally; yet sometimes that meaning is given to it in cases of necessity; 6 Co. 16; 14 Ves. 576; Adams v. Law, 17 How. (U. S.) 417, 15 L. Ed. 149; McGuire v. Westmoreland, 36 Ala. 594; Thomson v. Ludington, 104 Mass. 193. And it has been held to signify the same as issue, in cases where the testator, by using the terms children and issue indiscriminately, showed his intention to use the former term in the sense of issue, so as to entitle grandchildren, etc., to take under it; 1 Ves. Sen. Ch. 196; Mowatt v. Carow, 7 Paige, Ch. (N. Y.) 328, 32 Am. Dec. 641; Ruff v. Rutherford, 1 Bail. Eq. (S. C.) 7; Dickinson v. Lee, 4 Watts (Pa.) 82, 28 Am. Dec. 684; 3 Greenl. Cruise, Dig. 213. See Walker v. Williamson, 25 Ga. 549; Appeal of Castner, 88 Pa. 478.

It is a rule of decision in England that the word "children" means legitimate children; 7 Ves. 458; 31 Ch. D. 542; L. R. 7 H. L. 568; and such is the general rule in this country; Gardner v. Heyer, 2 Paige (N. Y.) 11; Heater v. Van Auken, 14 N. J. Eq. 159; Thompson v. McDonald, 22 N. C. 463; Gates v. Seibert, 157 Mo. 254, 57 S. W. 1065, 80 Am. St. Rep. 625; In re Scholl's Will, 100 Wis. 650, 76 N. W. 616; Bealafeld v. Slaughenhaupt, 213 Pa. 565, 62 Atl. 1113; although illegitimate children may be considered as included by express designation or necessary implication; Stewart v. Stewart, 31 N. J. Eq. 398; Collins v. Hoxie, 9 Paige (N. Y.) 81; Bennett v. Toler, 15 Grat. (Va.) 588, 78 Am. Dec. 638; Morton's Estate v. Morton, 62 Neb. 420, 87 N. W. 182; and when the term is used in a will, there must be evidence to be collected from the will itself, or extrinsically, to show affirmatively that the testator intended that his illegitimate children should take, or they will not be included; 1 V. & B. 422; 4 Kent 346, 414, 419; 6 H. L. 265; Palmer v. Horn, 84 N. Y. 516. See BASTARD.

The question whether the term "child" can include "twins" is said not to have been raised in any English case, in 70 Alb. L. J. 2, where an interesting foreign case is noted, but no decision is stated. No American case on the point has been found.

Posthumous children inherit, in all cases, in like manner as if they had been born in the lifetime of the intestate and had survived him; 2 Greenl. Cruise, Dig. 135; 4 Kent 412. See 2 Washb. R. P. 439, 699.

In Pennsylvania; act of 1836, p. 250; and in some other states; Rhode Island, Rev. Stat. tit. xxiv. c. 154, § 10; Bancroft v. Ives, 3 Gray (Mass.) 367; the will of their fathers or mothers in which no provision is made for them is revoked, as far as regards them, by operation of law; Coates v. Hughes, 3 Binn. (Pa.) 498; Barnes v. Barker, 5 Wash. 390, 31 Pac. 976. In Iowa a will is revoked by the birth of a child after its execution; Ware v. Wisner, 50 Fed. 310. See, as to the law of Virginia on this subject, Armistead v. Dangerfield, 3 Munf. (Va.) 20, 5 Am. Dec. 501.

An elaborate statute known as the Children's Act, 1908, was passed December 21, 1908, in England to consolidate and amend the law on that subject. It consists of 134 sections covering the divisions of infant life

protection, prevention of cruelty to children, juvenile smoking, reformatory and industrial schools, juvenile offenders and miscellaneous and general provisions; L. R. 46 Stat. 453.

See AGE; IN VENTRE SA MERE. As to their competency as witnesses, see WITNESS. And see PARENT AND CHILD.

The courts construe these laws liberally as within the police powers of a state and they are generally upheld, the rule having been laid down that the courts will not interfere with the legislative action in regard to such regulations; In re Weber, 149 Cal. 392, 86 Pac. 809. Statutes have been held constitutional forbidding the employment of children under twelve years of age in factories; Starnes v. Mfg. Co., 147 N. C. 556, 61 S. E. 525, 17 L. R. A. (N. S.) 602, 15 Ann. Cas. 470; of children under fourteen years of age in factories; In re Spencer, 149 Cal. 396, 86 Pac. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105; Bryant v. Hardware Co., 76 N. J. L. 45, 69 Atl. 23; City of New York v. Chelsa Jute Mills, 43 Misc. 266, 88 N. Y. Supp. 1085; under sixteen years of age in factories; People v. Taylor, 124 App. Div. 434, 108 N. Y. Supp. 796; or in coal mines; Collett v. Scott, 30 Pa. Super. Ct. 430; or the employment of minors under sixteen years of age over ten hours a day or over six days a week; State v. Shorey, 48 Or. 396, 86 Pac. 881, 24 L. R. A. (N. S.) 1121; or girls under fourteen years of age as dancers or in theaters; People v. Ewer, 141 N. Y. 129, 36 N. E. 4, 25 L. R. A. 794, 38 Am. St. Rep. 788. Other cases in which statutes limit the hours which women and children may be employed are Stehle v. Mach. Co., 220 Pa. 617, 69 Atl. 1116, 14 Ann. Cas. 122; Com. v. Mfg. Co., 120 Mass. 383; and see generally as to the constitutionality of such laws; 65 L. R. A. 33, note, and 12 L. R. A. (N. S.) 1130, note.

The question has been much discussed whether one employing a child under the statutory age may set up contributory negligence or assumption of risk to defeat liability for personal injury. In New York, reversing the lower court, it was held error to exclude testimony on the question of contributory negligence, and to hold as a matter of law that the question could not be considered; Lee v. Mfg. Co., 115 App. Div. 589, 101 N. Y. Supp. 78. It is held that contributory negligence could not be set up; American Car & Foundry Co. v. Armentraut, 214 Ill. 509, 73 N. E. 766; Lenahan v. Min. Co., 218 Pa. 311, 67 Atl. 642, 12 L. R. A. (N. S.) 461, 120 Am. St. Rep. 885; Inland Steel Co. v. Yedinak, 172 Ind. 423, 87 N. E. 229, 139 Am. St. Rep. 389; Nairn v. Biscuit Co., 120 Mo. App. 144, 96 S. W. 679. In other cases, it is held that contributory negligence is a question for the jury, with due consideration of the tender age of the child; Queen v. Iron Co., 95 Tenn. 458, 32 S. W. 460, 30 L. R. A. 82, 49 Am. St. Rep. 935; Morris v. Stanfield, 81 Ill. App. 264; Sterling v. Carbide Co., 142 Mich. 284, 105 N. W. 755. In Marino v. Lehmaier, 173 N. Y. 530, 66 N. E. 572, 61 L. R. A. 811, it was held that a child of a forbidden age was not, as a matter of law, chargeable with contributory negligence or with assumption of risk. In that case it was also decided that the fact that a penalty was prescribed by the act did not prevent the injured child from having an action for damages. The defense of contributory negligence was also allowed in the case of a child employed in violation of the statute where he was shown to be familiar with the construction of the machine by which he was injured; Borck v. Bolt & Nut Works, 111 Mich. 129, 69 N. W. 254; and in another case it was held error not to have withdrawn the case from the jury, although the plaintiff was employed in violation of the statute; Beghold v. Auto Body Co., 149 Mich. 14, 112 N. W. 691, 14 L. R. A. (N. S.) 609.

In North Carolina, before the enactment of the statute, it was held that in an action by a child of nine years for injury the evidence as to the youth, inexperience and ignorance of the child, the failure of the company to instruct him was properly left to the jury on the question of the negligence of the company and the contributory negligence of the infant employé; Fitzgerald v. Furniture Co., 131 N. C. 637, 42 S. E. 946, where the legislation on the subject up to that time is summarized. After the passage of a state statute on the subject the employment of the child in violation of the statute was held to be evidence of negligence to be submitted to the jury, as also the question of contributory negligence; Rolin v. Tobacco Co., 141 N. C. 300, 53 S. E. 891, 7 L. R. A. (N. S.) 335, 8 Ann. Cas. 638.

The violation of a statute forbidding the employment of children under a certain age, or at certain specified work, or specifying conditions to be complied with, is negligence *per se*, in an action by the child for injury; American Car & Foundry Co. v. Armentraut, 214 Ill. 509; Nickey v. Steuder, 164 Ind. 189, 73 N. E. 117; Brower v. Locke, 31 Ind. App. 353, 67 N. E. 1015; Queen v. Iron Co., 95 Tenn. 458, 32 S. W. 460, 30 L. R. A. 82, 49 Am. St. Rep. 935; Cooke v. Mfg. Co., 33 Hun (N. Y.) 351; Woolf v. Nauman Co., 128 Ia. 261, 103 N. W. 785; Sterling v. Carbide Co., 142 Mich. 284, 105 N. W. 755.

But in Perry v. Tozer, 90 Minn. 431, 97 N. W. 137, 101 Am. St. Rep. 416, it was held that while employment in violation of the statute was *prima facie* evidence of negligence, it might be rebutted by proof of due care or of contributory negligence, the violation of a statute merely shifting the burden of proof. In Breckenridge v. Reagan, 22 Ohio C. C. 71, the employment in violation of a statute was held "some evidence" of negligence.

CHILDWIT (Sax.). A power to take a fine from a bondwoman gotten with child without the lord's consent.

By custom in Essex county, England, every reputed father of a bastard child was obliged to pay a small fine to the lord. This custom is known as childwit. Cowell.

CHILTERN HUNDREDS. The offices of steward or bailiff of His Majesty's three Chiltern Hundreds of Stoke, Desborough, and Bonenham; or the steward of the Manor of Northsted. These offices have sometimes been refused, but they are ordinarily given to any member of the House of Commons who applies for them as a means of ceasing to be a member of the House, an office which cannot be resigned; but which becomes vacant upon the acceptance of any other office by a member. The office is retained until the appointment is revoked to make way for the appointment of another holder. The practice began about 1750. The offices of steward of the Manor of East Hendred and Hempholme were last used for this purpose in 1840 and 1865 respectively. Chiltern Hundreds is an appointment under the hand and seal of the Chancellor of the Exchequer. In 1861, and since, the words "reposing especial trust and confidence," etc., were omitted. May, Parl. Pr. 642.

CHIMIN. See CHEMIN.

CHIMINAGE. A toll for passing on a way through a forest; called in the civil law *pedagium*. Cowell. See Co. Litt. 56 *a;* Spelman, Gloss.; *Termes de la Ley;* Baldwin's Ed. of Britton, 63.

CHIMINUS. The way by which the king and all his subjects and all under his protection have a right to pass, though the property of the soil of each side where the way lieth may belong to a private man. Cowell.

CHIMNEY MONEY. See HEARTH MONEY; FUMAGE.

CHINA. By Act of June 30, 1906, a "United States Court for China" is created to which is given the jurisdiction formerly exercised by consuls and ministers, except as mentioned in the title CONSULAR COURTS. It is held by one judge appointed by the President, with the consent of the Senate (salary $8000, term of office ten years). It sits at Shanghai, and, at stated periods, at Canton, Tientsin and Hankan. An appeal to it lies from all consular courts of China (and of Korea so long as the right of extraterritoriality shall obtain in favor of the United States). It has supervisory control over consuls and vice-consuls in respect of the estates of decedents in China.

Its procedure is in accordance, so far as practicable, with that prescribed by the Revised Statutes for consular courts in China, but it may modify and supplement such rules. Its jurisdiction is exercised in accordance with treaties and law of the United States, and where these are deficient or unsuitable, then in accordance with the common law and the law established by United States courts.

An appeal lies to the Circuit Court of Appeals of the Ninth Circuit and appeals and writs of error may be taken thence to the Supreme Court in the same class of cases as those in which they are permitted in cases coming to the former court from the District Court.

See CHINESE.

CHINESE. Stringent laws for the entire exclusion of Chinese from the United States have been passed in the Pacific states, many of which have been decided to be unconstitutional; as is an ordinance that every male person imprisoned in the county jail should have his hair cut short; Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546. A statute forbidding the employment of Chinamen on public works, etc., is void, as contravening the Burlingame treaty and the 14th amendment; Baker v. Portland, 5 Sawy. 566, Fed. Cas. No. 777; In re Tiburcio Parrott, 1 Fed. 481. So is an act forbidding Chinamen to fish for the purpose of sale; In re Ah Chong, 2 Fed. 733. But a state law forbidding the exhumation of dead bodies and their removal, without a permit, is not invalid when applied to the removal of bodies of Chinamen who have been buried in California; it is a merely sanitary regulation; In re Wong Yung Quy, 2 Fed. 624.

The convention between the United States and China of 1894 provided that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens; 28 Stat. L. 1211.

Teachers, officials, students, etc., have the privilege of coming to and residing in the United States on presentation of a certificate from their government, or the government where they last resided visèd by the diplomatic or consular representative of the United States in the country or port whence they departed. Upon application for admission this certificate is *prima facie* evidence of the facts set forth therein. One cannot be deported unless there is evidence to overcome the legal effect of the certificate; Liu Hop Fong v. U. S., 209 U. S. 453, 28 Sup. Ct. 576, 52 L. Ed. 888.

The regulations of the treasury department of Dec. 8, 1900, governing the privilege of transit by Chinese laborers across the territory of the United States which require that evidence be produced which shall satisfy the collector of customs that a *bona fide* transit only was intended were authorized by the provision of the treaty with China of

March 17, 1894 (28 Stat. L. 1211) that Chinese laborers shall continue to enjoy such privilege of transit, subject to such regulations by the government of the United States as may be necessary to prevent abuse of the privilege; Fok Yung Yo v. U. S., 185 U. S. 296, 22 Sup. Ct. 686, 46 L. Ed. 917; Lee Lung v. Patterson, 186 U. S. 168, 22 Sup. Ct. 795, 46 L. Ed. 1108.

Chinese persons born out of the United States, remaining subjects of China, are entitled to the protection of and owe allegiance to the United States so long as they are permitted by the United States to reside here, and are subject to the jurisdiction thereof in the same sense as all other aliens residing in the United States; Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; Lau Ou Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340; Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; Lem Moon Sing v. U. S., 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082; Wong Wing v. U. S., 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890.

The failure of a Chinese laborer to register, as required by act of Congress, May 5, 1892, is held not to be excused by the fact that after the commencement of the time allowed for registration, but before its expiration, he was convicted and imprisoned for crime; U. S. v. Ah Poing, 69 Fed. 972.

Act of Nov. 3, 1893 (exclusion act), applies to Chinese persons who, having left the country before its passage, afterwards sought to return; Lew Jim v. U. S., 66 Fed. 953, 14 C. C. A. 281. A Chinaman, who during half his time is engaged in cutting and sewing garments for sale by a firm of which he is a member, is not a merchant within the exclusion act; Lai Moy v. U. S., 66 Fed. 955, 14 C. C. A. 283.

The Chinese exclusion acts cannot control the meaning or impair the effect of the constitutional amendment but must be construed and executed in subordination to its provisions; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890; and the right of the United States as exercised by and under these acts, to exclude or expel from the country persons of the Chinese race, born in China and continuing to be subjects thereof, though having acquired a commercial domicil in the United States, has been upheld, for reasons applicable to all aliens alike, and inapplicable to citizens of whatever race or color; Chae Chan Ping v. U. S., 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068; Nishimura Ekiu v. U. S., 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146; Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; Lem Moon Sing v. U. S., 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082; Wong Wing v. U. S., 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140. A Chinaman, within the United States who resists deportation on the ground that he is an American born citizen may not be deported until the right to do so has been ascertained; Moy Suey v. U. S., 147 Fed. 697, 78 C. C. A. 85. It was considered that the case was radically different from that of a Chinese citizen who left the United States and was excluded on his return, in which case it was held that the decision of the immigration officers was final unless reversed by the Secretary of Commerce and Labor, and was not reviewable by the federal courts; U. S. v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040.

The constitutionality of the power of the Secretary, in cases where the alienage is admitted, is settled; Nishimura Ekiu v. U. S., 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146; and also that one who claims citizenship cannot resort to the courts before prosecuting an appeal to the Secretary; U. S. v. Sing Tuck, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917; as a citizen could not be excluded from the country except as a punishment for crime; In re Sing Tuck, 126 Fed. 386; Lee Sing Far v. U. S., 94 Fed. 834, 35 C. C. A. 327; it may reasonably be contended that the determination of this constitutional right is a judicial and not an executive function, and therefore it is a question whether the decision of an executive official upon it is due process of law; Japanese Immigrant Case, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721.

By section 3 of the Geary Act the burden of proving affirmatively his right to remain in the country rests upon a Chinaman who has been arrested for being here illegally and the act raising this presumption of guilt is valid; U. S. v. Chun Hoy, 111 Fed. 899, 50 C. C. A. 57; the presumption, it is said, should be viewed under the rule of evidence as to facts peculiarly within the knowledge of the accused; 11 Y. L. J. 262; and its harshness arose mainly from the penalty imposed by section 4; In re Sing Lee, 54 Fed. 334; Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905, which section was held unconstitutional; U. S. v. Wong Dep Ken, 57 Fed. 206.

See CHINA.

CHIPPINGAVEL. A toll for buying and selling. A tax imposed on goods brought for sale. Whishaw; Blount.

CHIRGEMOTE (spelled, also, *Chirchgemote, Circgemote, Kirkmote;* Sax. *circgemote*, from *circ, ciric*, or *cyric*, a church, and *gemot*, a meeting or assembly).

In Saxon Law. An ecclesiastical court or assembly (*forum ecclesiasticum*); a synod; a meeting in a church or vestry. Blount; Spelm. Gloss.; Hen. I. cc. 4, 8; Co. 4th Inst. 321; Cunningh. Law Dict.

CHIROGRAPH (Lat. *chirographa*). A deed or public instrument in writing.

Chirographs were anciently attested by the subscription and crosses of witnesses. Afterwards, to

prevent frauds and concealments, deeds of mutual covenant were made in a *script* and *rescript*, or in a part and counter-part: and in the middle, between the two copies, they drew the capital letters of the alphabet, and then tallied, or cut asunder in an indented manner, the sheet or skin of parchment, one of which parts being delivered to each of the parties were proved authentic by matching with and answering to one another. Deeds thus made were denominated *syngrapha* by the canonists, because that word, instead of the letters of the alphabet or the word *chirographum*, was used. 2 Bla. Com. 296. This method of preventing counterfeiting, or of detecting counterfeits, is now used, by having some ornament or some word engraved or printed at one end of certificates of stocks, checks, and a variety of other instruments, which are bound up in a book, and, after they are executed, are cut asunder through such ornament or word. See SYNGRAPH; INDENT.

The last part of a fine of land.

It is called, more commonly, the foot of the fine. It is an instrument of writing, beginning with these words: "This is the final agreement," etc. It concludes the whole matter, reciting the parties, day, year, and place, and before whom the fine was acknowledged and levied Cruise, Dig. t. 35, c. 2, s 52

In Civil and Canon Law. An instrument written out and subscribed by the hands of the king or prince. An instrument written out by the parties and signed by them.

The Normans, destroying these *chirographa*, called the instruments substituted in their place *charta* (charters), and declared that these *charta* should be verified by the seal of the signer with the attestation of three or four witnesses. Du Cange; Cowell.

CHIVALRY, COURT OF. See COURT OF CHIVALRY.

CHIVALRY, TENURE BY. Tenure by knight-service. Co. Litt.

CHOCTAW NATION. See INDIAN TRIBE.

CHOPS. The mouth of a harbor. Stats. of Mass. 1882, p. 1288.

CHOSE (Fr. *thing*). Personal property.

Choses in possession. Personal things of which one has possession.

Choses in action. See that title.

CHOSE IN ACTION. A right to receive or recover a debt, or money, or damages for breach of contract, or for a tort connected with contract, but which cannot be enforced without action. Comyns, Dig. *Biens.*

It is difficult to find out the exact meaning of the expression; the meaning attributed to it has been explained from time to time; 30 Ch. D. 282, 276, 277; 11 App. Cas. 439, where Lord Blackburn said that the phrase has been used "accurately or inaccurately, as including all personal chattels that are not in possession." It now includes all personal chattels which are not in possession; 11 App. Cas. 440. It includes an annuity; 3 Mer. 86, unless charged on land; 14 Sim. 76; consols; 1 Ves. Jun. 198; shares; 11 A. & E. 205; a ticket in a Derby sweepstakes; 8 Q. B. 134; all debts and all claims for damages for breach of contract; Bushnell v. Kennedy, 9 Wall. (U. S.) 387, 19 L. Ed. 736; open accounts or unliquidated accounts; Sere v. Pitot, 6 Cra. (U. S.) 332, 3 L. Ed. 240; Wilkinson v. Wilkinson, 2 Curt. 582, Fed. Cas. No. 17,677; contracts for the delivery of chattels or money; Bushnell v. Kennedy, 9 Wall. (U. S.) 387, 19 L. Ed. 736; certificates of deposit; Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500; a check on a bank; L. R. 6 Eq. 198; a personal right not reduced into possession but recoverable by a suit at law; 2 Kent 351; a mere right of action as to a chattel, not in actual possession; Yerby v. Lynch, 3 Gratt. (Va.) 494.

It is one of the qualities of a chose in action that at common law it is not assignable; 10 Co. 47; Gardner v. Adams, 12 Wend. (N. Y.) 297; 1 Cra. (U. S.) 367. In Bracton's day it went to the heir, and he, not the executor, sued for the debts due to a dead man. This naturally led to difficulties, and the courts gradually yielded to the pressure of necessity and without a statute, so momentous a change was made as that, early in the time of Edward I., the chancery had framed and the king's court had upheld writs of debt for and against executors; 2 Poll. & Maitl. 344. It was Coke's idea that the origin of the rule against assignment of choses in action was the "wisdom and policy of the founders of our law," in discouraging maintenance and litigation, but Pollock thinks that there is no doubt that it was the logical consequence of the primitive view of a contract as creating a strictly personal obligation between creditor and debtor. See Wald, Poll. Torts 207, and note G. in App. supporting this view. In equity, from an early period, the courts have viewed the assignment of a chose in action for a valuable consideration as a contract by the assignor to permit the assignee to use his name for the purpose of recovery, and, consequently, enforce its specific performance, unless contrary to public policy; 1 P. Wms. Ch. 381; Hoppiss v. Eskridge, 37 N. C. 54; Dobyns v. McGovern, 15 Mo. 662. And now, at common law, the assignee is entitled to sue and recover in the name of the assignor, and the debtor will not be allowed, by way of defence to such suit, to avail himself of any payment to or release from the assignor, if made or obtained after notice of the assignment; 4 Term 340; Bartlett v. Pearson, 29 Me. 9; Webb v. Steele, 13 N. H. 230; Pitts v. Holmes, 10 Cush. (Mass.) 93; Blin v. Pierce, 20 Vt. 25; Caldwell v. Meshew, 44 Ark. 564. If, after notice of the assignment, the debtor expressly promise the assignee to pay him the debt, the assignee will then be entitled to sue in his own name; Crocker v. Whitney, 10 Mass. 316; Tiernan v. Jackson, 5 Pet. (U. S.) 597, 8 L. Ed. 234; Clarke v. Thompson, 2 R. I. 146; Barger v. Collins, 7 Harr. & J. (Md.) 213; Ford v. Adams, 2 Barb. (N. Y.) 349; Geer v. Archer, 2 Barb. (N. Y.) 420; Thompson v. Emery, 27 N. H. 269; but without

such express promise the assignee, except under peculiar circumstances, must proceed, even in equity in the name of the assignor; Ontario Bank v. Mumford, 2 Barb. Ch. (N. Y.) 596; Carter v. Ins. Co., 1 Johns. Ch. (N. Y.) 463; Adair v. Winchester, 7 Gill & J. (Md.) 114; Lenox v. Roberts, 2 Wheat. (U. S.) 373, 4 L. Ed. 264; or by agreement he can sue in his own name and pay over the proceeds of the sale to the assignor, in which case he becomes a trustee; Dean v. Chandler, 44 Mo. App. 338.

The English Judicature Act of 1873 provides to a certain extent for assignments of choses in action; but not every equitable assignment is within the statute [1902] 2 K. B. 196. A partial assignment of choses in action is good in equity, although the legal title remains with the assignor; Texas W. R. Co. v. Gentry, 69 Tex. 625, 8 S. W. 98.

But courts of equity will not, any more than courts of law, give effect to such assignments when they contravene any rule of law or of public policy. Thus, they will not give effect to the assignment of the half pay or full pay of an officer in the army; 1 Ball & B. 389; or of a right of entry or action for land held adversely; Hoppiss v. Eskridge, 37 N. C. 54; or of a part of a right in controversy, in consideration of money or services to enforce it; Wilhite v. Roberts, 4 Dana (Ky.) 173. Neither do the courts, either of law or of equity, give effect to the assignment of mere personal actions which die with the person; Jabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551; Oliver v. Walsh, 6 Cal. 456; Smith v. Sherman, 4 Cush. (Mass.) 408. A cause of action for deceit is assignable; Dean v. Chandler, 44 Mo. App. 338; but not for slander; Miller v. Newell, 20 S. C. 123, 47 Am. Rep. 833. But a claim of damages to property, though arising *ex delicto*, which on the death of the party would survive to his executors or administrators as assets, may be assigned; Bisp. Eq. 166; McKee v. Judd, 12 N. Y. 622, 64 Am. Dec. 515; Webber v. Quaw, 46 Wis. 118, 49 N. W. 830. The transfer of a bill of lading will pass the claim for the conversion of the goods represented by it; Dickson v. Elevator Co., 44 Mo. App. 498; Haas v. R. Co., 81 Ga. 792, 7 S. E. 629. See Smith v. Thompson, 94 Mich. 381, 54 N. W. 168. The right of vendor to bring a second suit in trespass to try title is assignable and passes to the vendee; Williams v. Bennett, 1 Tex. Civ. App. 498, 20 S. W. 856.

The assignee of a chose in action, unless it be a negotiable promissory note or bill of exchange, without notice, in general takes it subject to all the equities which subsist against the assignor; 1 P. Wms. 496; 4 Price 161; Brashear v. West, 7 Pet. (U. S.) 608, 8 L. Ed. 801; Cornish v. Bryan, 10 N. J. Eq. 146; Bishop v. Holcomb, 10 Conn. 444; Bush v. Lathrop, 22 N. Y. 535; Martin v. Richardson, 68 N. C. 255; Boardman v. Hayne, 29 Ia. 339; Lane v. Smith, 103 Pa. 415; Williams v. Neely, 134 Fed. 1, 67 C. C. A. 171, 69 L. R. A. 232; Kleeman v. Frisbie, 63 Ill. 482. But it is not subject to the equities of third persons of which he had no notice; Himrod v. Bolton, 44 Ill. App. 516. And a payment made by the debtor, even after the assignment of the debt, if before notice thereof, will be effectual; Woodbridge v. Perkins, 3 Day (Conn.) 364; Bishop v. Holcomb, 10 Conn. 444; U. S. v. Vaughan, 3 Binn. (Pa.) 394, 5 Am. Dec. 375; Warren v. Copelin, 4 Metc. (Mass.) 594.

In Pennsylvania by statute a bond is assignable and suit can be brought on it by the assignee if there are two witnesses to the assignment and in Delaware under a similar statute but one witness is now required.

To constitute an assignment, no writing or particular form of words is necessary, if the consideration be proved and the meaning of the parties apparent; Dunn v. Snell, 15 Mass. 485; Dawson v. Coles, 16 Johns. (N. Y.) 51; Kessel v. Albetis, 56 Barb. (N. Y.) 362; Shannon v. Mayor, etc., of City of Hoboken, 37 N. J. Eq. 123; Garnsey v. Gardner, 49 Me. 167; Patten v. Wilson, 34 Pa. 299; 13 Sim. Ch. 469; and therefore the mere delivery of the written evidence of debt; Cannaday v. Shepard, 55 N. C. 224; Boeka v. Nuella, 28 Mo. 180; Jones v. Witter, 13 Mass. 304; Titcomb v. Thomas, 5 Greenl. (Me.) 282; Prescott v. Hull, 17 Johns. (N. Y.) 284; the delivery being essential to the assignment; Lewis v. Mason's Adm'r, 84 Va. 731, 10 S. E. 529; Shannon v. Mayor, etc., of City of Hoboken, 37 N. J. Eq. 123; Noyes v. Brown, 33 Vt. 431; or the giving of a power of attorney to collect a debt, may operate as an equitable transfer thereof, if such be the intention of the parties; 7 Ves. Ch. 28; Bergen v. Bennett, 1 Caines Cas. (N. Y.) 18, 2 Am. Dec. 281; People v. Tioga Common Pleas, 19 Wend. (N. Y.) 73. See ASSIGNMENT.

Bills of exchange and promissory notes, in exception to the general rule, are by the law merchant transferable, and the legal as well as equitable right passes to the transferee. See BILL OF EXCHANGE; NEGOTIABLE INSTRUMENTS. In some states, by statutory provisions, bonds, mortgages, and other documents may be assigned, and the assignee receives the whole title, both legal and equitable; 2 Bouvier, Inst. 192. In New York, the code enables an assignee to maintain an action in his own name in those cases in which the right was assignable in law or in equity before the code was adopted; Purple v. R. Co., 4 Duer (N. Y.) 74.

A distinction must be made between the security or the evidence of the debt, and the thing due. A deed, a bill of exchange or a promissory note may be in the possession of the owner, but the money or damages

due on them are no less choses in action. This distinction is to be kept in view. The chose in action is the money, damages or thing owing. The bond or note is but the evidence of it. There can in the nature of things be no present possession of a thing which lies merely in action; 1 Bouv. Inst. p. 191; First Nat. Bank v. Holland, 99 Va. 495, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898.

In the absence of fraudulent transfer or such other fraud as would positively impede an action at law and proceeding in garnishment, equity will not subject the choses in action of the debtor to the payment of his debts; Hall v. Imp. Co., 143 Ala. 464, 39 South. 285, 2 L. R. A. (N. S.) 130, 5 Ann. Cas. 363.

See ASSIGNMENT; SITUS; GIFT; 20 L. J. R. 113.

CHOSEN FREEHOLDERS. See BOARD OF FREEHOLDERS.

CHRISTIAN. One who believes in or assents to the truth of the doctrines of Christianity, as taught by Jesus Christ in the New Testament. It does not include Mohammedans, Jews, Pagans, or infidels; Hale v. Everett, 53 N. H. 9, 16 Am. Rep. 82.

CHRISTIAN NAME. The baptismal name as distinct from the surname. A Christian name may consist of a single letter. Wharton. See NAME.

CHRISTIAN SCIENCE. In Pennsylvania a charter was refused to an organization of Christian Scientists on the ground that to recognize their doctrines was against the public policy of the state; In re First Church of Christ, Scientist, 205 Pa. 543, 55 Atl. 536, 63 L. R. A. 411, 97 Am. St. Rep. 753; but in Illinois they have been incorporated; People v. Gordon, 194 Ill. 560, 62 N. E. 858, 88 Am. St. Rep. 165.

The consent of a patient to be treated by a Christian Scientist healer will preclude holding him liable in damages for failure to effect a cure, although that method of treatment is illegal by state law; Spead v. Tomlinson, 73 N. H. 46, 59 Atl. 376, 68 L. R. A. 432. In Maine, a Christian Scientist was held entitled to recover for his services. The defense set up that it was delusion and charlatanry being considered immaterial, as defendant had chosen the treatment and promised to pay for it; Wheeler v. Sawyer (Me) 15 Atl. 67.

While the practice of Christian Science is not a practice of medicine as usually and generally understood, yet being a treatment for mental and bodily ailments, such practice is a violation of the state laws for the protection of the public health; State v. Buswell, 40 Neb. 158, 58 N. W. 728, 24 L. R. A. 68; *contra*, State v. Mylod, 20 R. I. 632, 40 Atl. 753, 41 L. R. A. 428. It has been held that to give treatments for a fee is practicing medicine; State v. Marble, 72 Ohio St. 21, 73 N. E. 1063, 70 L. R. A. 835, 106 Am. St. Rep. 570, 2 Ann. Cas. 898, where an act regulating such practice is considered a valid exercise of the police power and not void as discriminating against Christian Science in not making special provision for those who wish to practice it.

Under a municipal ordinance imposing a penalty on physicians for not reporting contagious diseases, the evidence must show that a Christian Scientist who attended the person knew that he was afflicted with such disease; Kansas City v. Baird, 92 Mo. App. 204.

A belief in Christian Science, ascribing to it certain miraculous powers of curing disease, is not sufficient evidence of insane delusions to avoid a will; In re Brush, 35 Misc. 689, 72 N. Y. Supp. 421.

A conviction of a father for wilfully omitting, without lawful excuse, to furnish medical attendance for his minor son, was upheld; Owens v. State, 6 Okl. Cr. 110, 116 Pac. 345, 36 L. R. A. (N. S.) 633, Ann. Cas 1913B, 1218.

See an article in 10 Va. L. Reg 285.

CHRISTIANITY. The religion established by Jesus Christ.

Christianity has been judicially declared to be a part of the common law of Pennsylvania; Updegraph v. Com., 11 S. & R. (Pa.) 394; Guardians of the Poor v. Greene, 5 Binn. (Pa.) 555; (cited in U. S. v. Laws, 163 U. S. 263, 16 Sup. Ct. 998, 41 L. Ed. 151); see Zeisweiss v. James, 63 Pa. 465, 3 Am. Rep. 558; of New York, People v. Ruggles, 8 Johns. 291, 5 Am. Dec. 335; of Connecticut, 2 Swift, System 321; of Delaware, State v. Chandler, 2 Harr. 553; of Massachusetts, 7 Dane, Abr. c. 219, a. 2, 19. See Com. v. Kneeland, 20 Pick. (Mass.) 206. To write or speak contemptuously and maliciously against it is an indictable offence; Odg. Lib. & Sl. 450; Cooper, Libel 59, 114. See 5 Jur. 529; People v. Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335; Com. v. Kneeland, 20 Pick. (Mass.) 206. "This is a religious people, not Christianity with an established church and tithes and spiritual courts; but Christianity with liberty of conscience to all men." U. S. v. Laws, 163 U. S. 263, 16 Sup. Ct. 998, 41 L. Ed. 151.

Archbishop Whately, in his preface to the Elements of Rhetoric, says, "It has been declared, by the highest legal authorities, that 'Christianity is part of the law of the land,' and, consequently, any one who impugns it is liable to prosecution. What is the precise meaning of the above legal maxim I do not profess to determine, having never met with any one who could explain it to me; but evidently the mere circumstance that we have religion by law established does not of itself imply the illegality of arguing against that religion." It seems difficult, says an accomplished writer (Townsend, St. Tr. vol. ii. p. 389), to render more intelligible a maxim which has perplexed so learned a critic. Christianity was pronounced to be part of the common law, in contradistinction to the ecclesiastical law, for the purpose of proving that the temporal courts, as

well as the courts spiritual, had jurisdiction over offences against it. Blasphemies against God and religion are properly cognizable by the law of the land, as they disturb the foundations on which the peace and good order of society rest, root up the principle of positive laws and penal restraints, and remove the chief sanction for truth, without which no question of property could be decided and no criminal brought to justice. Christianity is part of the common law, as its root and branch, its majesty and pillar—as much a component part of that law as the government and maintenance of social order. The inference of the learned archbishop seems scarcely accurate, that all who impugn this part of the law must be prosecuted. It does not follow, because Christianity is part of the law of England, that every one who impugns it is liable to prosecution. The manner of and motives for the assault are the true tests and criteria. Scoffing, flippant, railing comments, not serious arguments, are considered offences at common law, and justly punished, because they shock the pious no less than deprave the ignorant and young. The meaning of Chief Justice Hale cannot be expressed more plainly than in his **own words. An information** was exhibited against one Taylor, for uttering blasphemous expressions too horrible to repeat. Hale, C. J., observed that "such kind of wicked, blasphemous words were not only an offence to God and religion, but a crime against the laws, state, and government, and therefore punishable in the court of King's Bench. For, to say religion is a cheat, is to subvert all those obligations whereby civil society is preserved; that Christianity is part of the laws of England, and to *reproach* the Christian religion is to speak in subversion of the law." Ventr. 293. To remove all possibility of further doubt, the English commissioners on criminal law, in their sixth report, p. 83 (1841), have thus clearly explained their sense of the celebrated passage: "The meaning of the expression used by Lord Hale, that 'Christianity was parcel of the laws of England,' though often cited in subsequent cases, has, we think, been much misunderstood. It appears to us that the expression can only mean either that, as a great part of the securities of our legal system consist of judicial and official oaths sworn upon the Gospels, Christianity is closely interwoven with our municipal law, or that the laws of England, like all municipal laws of a Christian country, must, upon principles of general jurisprudence, be subservient to the positive rules of Christianity. In this sense, Christianity may justly be said to be incorporated with the law of England, so as to form parcel of it; and it was probably in this sense that Lord Hale intended the expression should be understood. At all events, in whatever sense the expression is to be understood, it does not appear to us to supply any reason in favor of the rule that arguments may not be used **against it; for it is not criminal to speak or write** either against the common law of England, generally, or against particular portions of it, provided it be not done in such a manner as to endanger the public peace by exciting forcible resistance; so that the statement that Christianity is parcel of the law of England, which has been so often urged in justification of laws against blasphemy, however true it may be as a general proposition, certainly furnishes no additional argument for the propriety of such laws." If blasphemy mean a railing accusation, then it is, and ought to be, forbidden; Heard, Lib. & Sl. § 338. See Vidal v. Girard, 2 How. (U. S.) 127, 197, 11 L. Ed. 205; Updegraph v. Com., 11 S. & R. (Pa.) 394; People v. Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335; Shover v. State, 10 Ark. 259; State v. Chandler, 2 Harr. (Del.) 553, 569; 21 Am. L. Reg. 201, 333, 537. See Cooley, Const. Lim.

Christianity is a part of the common law; the existence of God has always been assumed in English Law. See J. B. Thayer, Leg. Essays 325.

CHURCH. A society of persons who profess the Christian religion. Den v. Bolton, 12 N. J. L. 206, 214; Stebbins v. Jennings, 10 Pick. (Mass.) 193; German Reformed Church v. Com., 3 Pa. 282; St. Johns Church v. Hanns, 31 Pa. 9.

The place where such persons regularly assemble for worship. Blair v. Odin, 3 Tex. 288.

The term church includes the chancel, aisles, and body of the church. Hamm. N. P. 204; Blair v. Odin, 3 Tex. 288. By the English law, the terms church or chapel, and church-yard, are expressly recognized as in themselves correct and technical descriptions of the building and place, even in criminal proceedings; 8 B. & C. 25; 1 Salk. 256; 11 Co. 25 *b*; 2 Esp. 5, 28.

Burglary may be committed in a church, at common law; 3 Cox, Cr. Cas. 581.

The church of England is not a corporation aggregate; but the church in any particular place is so considered, for the purposes at least of receiving a gift of lands; Town of Pawlet v. Clark, 9 Cra. (U. S.) 292, 3 L. Ed. 735; Lockwood v. Weed, 2 Conn. 287; Stone v. Griffin, 3 Vt. 400; Wilson v. Presbyterian Church, 2 Rich. Eq. (S. C.) 192. See Rice v. Osgood, 9 Mass. 44; Sawyer v. Baldwin, 11 Pick. (Mass.) 495; Proprietors of Town of Shapleigh v. Pilsbury, 1 Greenl. (Me.) 288; Blair v. Odin, 3 Tex. 288; African Methodist Bethel Church v. Carmack, 2 Md. Ch. Dec. 143.

As to the right of succession to glebe lands, see Terrett v. Taylor, 9 Cra. (U. S.) 43, 3 L. Ed. 650; Town of Pawlett v. Clark, 9 Cra. (U. S.) 292, 3 L. Ed. 735; Mason v. Muncaster, 9 Wheat. (U. S.) 468, 6 L. Ed. 131; or other church property, see Wheaton v. Gates, 18 N. Y. 395. As to the power of a church to make by-laws, etc., under local statutes, see Com. v. Cain, 5 S. & R. (Pa.) 510; German Reformed Church v. Com., 3 Pa. 282; Vestry of St. Luke's Church v. Mathews, 4 Des. (S. C.) 578, 6 Am. Dec. 619; Perrin v. Granger, 30 Vt. 595; Farnsworth v. Storrs, 5 Cush. (Mass.) 412. Acquiescence in and use of a constitution for over 50 years makes it valid and binding on the society; Schlichter v. Keiter, 156 Pa. 119, 27 Atl. 45, 22 L. R. A. 161; Bear v. Heasley, 98 Mich. 279, 57 N. W. 270, 24 L. R. A. 615.

See RELIGIOUS SOCIETY.

A municipal corporation may stipulate, under its charter authority to contract for a water supply, that churches be furnished with water free of charge; Independent School Dist. of Le Mars v. Water & Light Co., 131 Ia. 14, 107 N. W. 944, 10 L. R. A. (N. S.) 859. In a statute limiting the height of buildings the exception of churches does not deprive owners of private property of the equal protection of the laws; Cochran v. Preston, 108 Md. 220, 70 Atl. 113, 23 L. R. A. (N. S.) 1163, 129 Am. St. Rep. 432, 15 Ann. Cas. 1048.

CHURCH OF ENGLAND. The act of 26 Henry VIII. recognized the king as being the only supreme head on earth of the Church of England, having the power to

correct all errors, heresies, abuses, offences, contempts and enormities.

In 1531, Henry was acknowledged by Convocation as "Protector and Supreme Head of the English Church and Clergy," "so far as the law of Christ allowed."

The Church of England is governed internally by means of its Convocation of bishops and clergy; there is one for each province, Canterbury and York. Each consists of two houses; the upper, composed of archbishops and bishops; the lower, composed of deans of every cathedral, the archdeacons with proctors elected from every chapter and two or more elected by the clergy of the diocese of the province of Canterbury, and by every archdeacon in the province of York.

The name Convocation is specifically given to the assembly of the spirituality of the realm of England. It is summoned by the metropolitan archbishops of Canterbury and of York, respectively, within their ecclesiastical provinces, pursuant to a royal writ, whenever the Parliament of the realm is summoned, and is continued or discharged, as the case may be, whenever the Parliament is prorogued or dissolved.

The present constitution of the Convocation of the Prelates and Clergy of the province of Canterbury was recognized as early as 1283 as its normal constitution, and in extorting recognition from the crown, which the clergy accomplished by refusing to attend unless summoned in lawful manner *(debito modo)* through their metropolitan, the clergy of the province of Canterbury taught the laity the possibility of maintaining the freedom of the nation against the encroachments of the royal power.

The form of the royal writ, which it is customary to issue in the present day to the metropolitan of each province, is identical in its purport with the writ issued by the crown in 1283 to the metropolitan of the province of Canterbury. The existing constitution of the Convocation of the province of Canterbury—and the same is true of the province of York—in respect of its comprising representatives of the chapters and of the beneficed clergy, in addition to the bishops and other dignitaries of the church, would thus appear to be of even more ancient date than the existing constitution of the Parliament of the realm.

It was decreed during the time of Henry VI. that the prelates and other clergy, with their servants and attendants, when called to the Convocation pursuant to the king's writ, should enjoy the same liberties and defence as when summoned to the king's Parliament.

In 1717, in pursuance of a royal writ, Convocation was prorogued and no license from the crown was granted to Convocation to proceed to business until 1861.

In 1872 Convocation was empowered by the crown to frame resolutions on the subject of public worship, which resolutions were afterwards incorporated in the Act of Uniformity Amendment Act.

To Convocation in later years has been added the House of Laymen, for both provinces, which, to a certain extent, secured the co-operation of the lay element. It is elected for every new Parliament, by Diocesan Conferences, who are in turn elected by the laity. In 1896, joint sessions of both Convocations, in conjunction with the Houses of Laymen, for consultative purposes, were held. This body is now termed the Representative Church Council and has adopted a constitution; all formal business is however, transacted in the separate Convocations.

The crown has the right to nominate to vacant sees. In cases of sees of old foundation, this is done by means of a congé d'élire; in that of all others, by letters patent. The usual selection of bishops is in the hands of the Prime Minister, but it is usual now to select those approved by public opinion.

Bishops hold their temporalities as barons, and are spiritual members of Parliament. Only twenty-six have the right to seats in the House of Lords, of which five, the two archbishops and the bishops of London, Durham and Winchester, always sit, the others taking their seats in order of seniority of confirmation. See Encycl. Brit.

The Judicial Committee of the Privy Council is the highest court of appeal in ecclesiastical cases.

The *Church of Ireland* was by the Act of Union, 1800, united with the Church of England. By the disestablishment act of 1869, this union was severed, and on January 1, 1871, the Church of Ireland became independent. The supreme governing board of the Church of Ireland is the church Synod, which meets annually. There are also twenty-three dioceses and Synods which are constituted by similar elective bodies called diocesan councils. The bishop of the diocese is chosen by the clerical and lay members of the diocesan Synod. The Primate is chosen by the House of Bishops from among their own number.

CHURCH RATE. A tribute by which the expenses of the church are to be defrayed. They are to be laid by the parishioners, in England, and may be recovered before two justices, or in the ecclesiastical court. Wharton, Dict.

CHURCH-WARDEN. An officer whose duty it is to take care of or guard the church.

They are taken to be a kind of corporation in favor of the church for some purposes: they may have, in that name, property in goods and chattels, and bring actions for them for the use and benefit of the church, but may not waste the church property, and are liable to be called to account; 3 Steph. Com. 90; 1 Bla. Com. 394; Cowell.

These officers are created in some ecclesiastical corporations by the charter, and their rights and duties are definitely explained. In England, it is said, their principal duties are to take care of the church or building, the utensils and furniture, the church-yard, certain matters of good order concerning the church and church-yard, the endowments of the church; Bacon, Abr. By the common law, the capacity of church-wardens to hold property for the church is limited to personal property; Terrett v. Taylor, 9 Cra. (U. S.) 43, 3 L. Ed. 650.

CHURL. See CEORL.

CIGARETTES. See COMMERCE.

CINQUE PORTS. The five ports of England which lie towards France.

These ports, on account of their importance as defences to the kingdom, early had certain privileges granted them, and in recompense were bound to furnish a certain number of ships and men to serve on the king's summons once in each year. "The service that the barons of the Cinque Ports acknowledge to owe; upon the king's summons, if it shall happen, to attend with their ships fifteen days at their own cost and charges, and so long as the king pleases, at his own charge;" Cowell, *Quinque Portus*. The Cinque Ports, under the ordinance of Henry III. in 1229, were Hastings, Dover Sandwich, Hythe and Romney, to which were added Winchelsea and Rye; 1 Social England 412. The two latter are sometimes reckoned ports of Sandwich; and the other of the Cinque Ports have ports appended to them in like manner. The Cinque Ports had a Lord Warden, who had a peculiar jurisdiction, sending out writs in his own name. This office is still maintained.

The first admiralty jurisdiction in somewhat modern form appears to have been committed to the Lord Warden and Bailiffs of the Cinque Ports. The constitution of these ports into a confederacy for the supply and maintenance of the navy was due to Edward the Confessor. Edward I. confirmed their charter. The last charter was in 1668. Their courts had civil, criminal, equity, and admiralty jurisdiction and were not subject to the courts at Westminster. See the charters in Jeakes' Charters of the Cinque Ports. See Inderwick's King's Peace; Les Cinque Ports, by Benoist-Lucy; COURT OF THE CINQUE PORTS.

The representatives in parliament and the inhabitants of the Cinque Ports were termed barons; Brande; Cowell; *Termes de la Ley*. And see Round, Feudal England 563.

CIPHER. See TELEGRAPH.

CIRCUIT. A division of the country in England appointed for a particular judge to visit for the trial of causes. See 3 Bla. Com. 58.

Courts are held in each of these circuits, at stated periods, by judges assigned for that purpose; 3 Steph. Com. 321. The United States is divided into nine circuits; 1 Kent 301.

The term is often applied, perhaps, to the periodical journeys of the judges through their various circuits. The judges, or, in England, commissioners of assize *nisi prius*, are said *to make their circuit;* 3 Bla. Com. 57. The custom is of ancient origin. In A. D 1170, justices in *eyre* were appointed, with delegated powers from the *Curia Regis*, being held members of that court, and directed to make the circuit of the kingdom once in seven years. See Inderwick's King's Peace 60.

Under COURTS OF ASSIZE AND NISI PRIUS will be found a list of English circuits.

CIRCUIT COURTS. Courts whose jurisdiction extends over several counties or districts, and of which terms are held in the various counties or districts to which their jurisdiction extends.

The term was applied distinctively to a class of the federal courts of the United States, of which terms are held in two or more places successively in the various circuits into which the whole country is divided for this purpose. The name was changed to district court by the Judiciary Act of March 3, 1911, in effect January 1, 1912. See UNITED STATES COURTS. In some states it applies to courts of general jurisdiction of which terms are held in the various counties or districts of the state. Such courts sit in some instances as courts of nisi prius, in others, either at nisi prius or in banc. They may have an equity as well as a common-law jurisdiction, and may be both civil and criminal courts. The systems of the various states are widely different in these respects; and reference must be had to the articles on the different states for an explanation of the system adopted in each. The term is unknown in the classification of English courts, and conveys a different idea in the various states in which it is adopted as the designation of a court or class of courts, although the constitution of such courts, in many instances, is quite analogous to that of the English courts of assize and nisi prius.

CIRCUIT COURT OF APPEALS. See UNITED STATES COURTS.

CIRCUIT JUSTICE. A justice of the Supreme Court of the United States allotted to any circuit. Act of March 3, 1911.

CIRCUITY OF ACTION. Indirectly obtaining, by means of a subsequent action, a result which may be reached in an action already pending.

This is particularly obnoxious to the law, as tending to multiply suits; Fellows v. Fellows, 4 Cow. (N. Y.) 682, 15 Am. Dec. 412.

CIRCUMSPECTE AGATIS. A royal writ (1285) dealing with lay and ecclesiastical jurisdiction which perhaps technically acquired the force of a statute. Its authenticity was doubtful. 2 Holdsw. Hist. E. L. 246. See ARTICULI CLERI.

CIRCUMSTANCES. The particulars which accompany an act. The surroundings at the commission of an act.

The facts proved are either possible or impossible, ordinary and probable or extraordinary and improbable, recent or ancient; they may have happened near us, or afar off; they are public or private, permanent or transitory, clear and simple or complicated; they are always accompanied by circumstances which more or less influence the mind in forming a judgment. And in some instances these circumstances assume the character of irresistible evidence: where, for example, a woman was found dead in a room, with every mark of having met with a violent death, the presence of another person at the scene of action was made manifest by the bloody mark of a *left* hand visible on her *left* arm; 14 How. St. Tr. 1324; Greenl. Ev. 13 *a*. These points ought to be carefully examined, in order to form a correct opinion. The first question ought to be, is the fact possible? If so, are there any circumstances which render it impossible? If the facts are impossible, the witness ought not to be credited. If, for example, a man should swear that he saw the deceased shoot himself with his own pistol, and, upon an examination of the ball which killed him, it should be found too large to enter into the pistol, the witness ought not to be credited;

1 Stark. Ev. 505; or if one should swear that another had been guilty of an impossible crime.

CIRCUMSTANTIAL EVIDENCE. See EVIDENCE.

CIRCUMSTANTIBUS. See TALES.

CITACION. **In Spanish Law.** The order of a legal tribunal directing an individual against whom a suit has been instituted to appear and defend it within a given time. It is synonymous with the term *emplazamiento* in the old Spanish law, and the *in jus vocatio* of the Roman law.

CITATIO AD REASSUMENDAM CAUSAM. **In Civil Law.** The name of a citation, which issued when a party died pending a suit, against the heir of the defendant, or, when the plaintiff died, for the heir of the plaintiff. Our bill of revivor is probably borrowed from this proceeding.

CITATION. A writ issued out of a court of competent jurisdiction, commanding a person therein named to appear on a day named and do something therein mentioned, or show cause why he should not. Proctor, Pract.

The act by which a person is so summoned or cited.

In the ecclesiastical law, the citation is the beginning and foundation of the whole cause, and is said to have six requisites, namely: the insertion of the name of the judge, of the promovert, of the impugnant, of the cause of suit, of the place, and of the time of appearance; to which may be added the affixing the seal of the court, and the name of the register or his deputy. 1 Brown, Civ. Law 453, 454; Ayliffe, Parerg. xliii. 175; Hall, Adm. Pr. 5; Merlin, *Rép.*

The process issued in courts of probate and admiralty courts. It is usually the original process in any proceeding where used, and is in that respect analogous to the writ of capias or summons at law, and the subpœna in chancery.

CITATION OF AUTHORITIES. The production of or reference to the text of acts of legislatures, treatises, or cases of similar nature decided by the courts, in order to support propositions advanced.

As the knowledge of the law is to a great degree a knowledge of precedents, it follows that there must be necessarily a frequent reference to these preceding decisions to obtain support for propositions advanced as being statements of what the law is. Constant reference to the law as it is enacted is, of course, necessary. References to the works of legal writers are also desirable for elucidation and explanation of doubtful points of law.

The civilians on the continent of Europe, in referring to the Institutes, Code, and Pandects or Digest, usually give the number, not of the book, but of the law, and the first word of the title to which it belongs; and, as there are more than a thousand of these, it is no easy task for one not thoroughly acquainted with those collections to find the place to which reference is made. The American writers generally follow the natural mode of reference, by putting down the name of the collection, and then the number of the book, title, law, and section. For example, Inst. 4. 15. 2. signifies Institutes, book 4, title 15, and section 2; Dig. 41. 9. 1. 3. means Digest, book 41, title 9, law 1, section 3; Dig. *pro dote*, or *ff pro dote*, signifies section 3, law 1, of the book and title of the Digest or Pandects entitled *pro dote*. It is proper to remark that Dig. and *ff* are equivalent: the former signifies Digest, and the latter—which is a careless mode of writing the Greek letter π, the first letter of the word πανδέκται—signifies Pandects; and the Digest and Pandects are different names for one and the same thing. The Code is cited in the same way. The Novels are cited by their number, with that of the chapter and paragraph: for example, Nov. 185. 2. 4. for *Novella Justiniani* 185, *capite* 2, *paragrapho* 4. Novels are also quoted by the collation, the title, chapter, and paragraph, as follows: *In Authentico, Collatione* 1, *titulo* 1, *cap.* 281. The Authentics are quoted by their first words, after which is set down the title of the Code under which they are placed: for example, *Authentica, cum testator. Codice ad legem fascidiam.* See Mackeldey, Civ. Law § 65; Domat, Civ. Law, Cush. ed. Appendix; DECRETALES GREGORII NONI.

Statutes of the states are here cited by giving the number of the volume (where there are more volumes than one), the name of the state (using the common geographical abbreviation), the designation of the code, and the page where the statute or provision in consideration is found: thus, 1 N. Y. Rev. Stat. 4th ed. 63. To this it is desirable to add, when regard for space allows, the chapter and section of the statute referred to.

United States statutes, and statutes of the states not included in the codified collection of the state, are cited as statutes of the year in which they were enacted, or by the proper section of the Revised Statutes.

English statutes are referred to by indicating the year of the reign in which they were enacted, the chapter and section: thus, 17 & 18 Vict. c 96, § 2, or the date or year of the act. Recent English authors are coming to give the date or the year in the text and perhaps the regnal year in a foot note.

Text-books are referred to by giving the number of the volume (if more than one), and the name of the author, with an abbreviation of the title of the work sufficiently extended to distinguish it from other works by the same author, and to indicate the class of subjects of which it treats: thus, 2 Story, Const.

Where an edition is referred to which has been prepared by other persons than the authors, or where an edition subsequent to the first is referred to, this fact is sometimes indicated, and the page, section, or paragraph of the edition cited is given: thus, Angell & A. Corp., Lothrop ed. 96; Smith, Lead. Cas., 5th Hare & W. ed. 173. The various editions of Blackstone's Commentaries, however, have the editor's name preceding the title of the book: thus Sharswood, Bla. Com.; Coleridge, Bla. Com.; wherever the reference is to a note by the editor cited; otherwise the reference is merely to Blackstone.

The earlier *reports* of the Federal courts of the United States, and of the English, Irish, and Scotch courts, are cited by the names of the reporters: thus, 3 Cra. 96; 5 East 241. In a few instances,

common usage has given a distinctive name to a series; and wherever this is the case such name has been adopted; as, Term; C. B.; Exch.

The reports of the state courts are cited by the name of the state, wherever a series of such reports has been recognized as existing: thus, 5 Ill. 63; 21 Pa. 96; and the same rule applies to citations of the reports of provincial courts: thus, 6 Low. C. 167 The later volumes of reports of the supreme court of the United States are cited by their serial number: thus, 161 U. S.

Otherwise, the reporter's name is used; thus, 5 Rawle 23, or an abbreviation of it; as 11 Pick. 23. This rule extends also to the provincial reports; and the principle is applied to the decisions of Scotch and Irish cases, except in later cases, when the official method is adopted.

Where the same reporter reports decisions in courts both of law and equity, an additional abbreviation, usually to equity reports and sometimes to law reports, indicates which series is meant: thus, 3 Ired. Eq. 87, 14 N. J. L. 42.

As to the usual mode of citing English, Scotch and Irish Reports, see Tables etc. of All Reports of Cases etc. by the Council of Law Reporting (1895), REPORTS.

For a list of abbreviations as used in this book, and as commonly used in legal books, see ABBREVIATIONS.

CITE. To summon; to command the presence of a person; to notify a person of legal proceedings against him and require his appearance thereto. See CITATION.

CITIZEN. In English Law. An inhabitant of a city. 1 Rolle, Abr. 138; 18 L. Q. Rev. 49. The representative of a city, in parliament. 1 Bla. Com. 174.

At common law a natural-born subject included every child born in England of alien parents except the child of an ambassador or diplomatic agent or of an alien enemy in hostile occupation of the place where the child was born; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890. It made no difference whether the parents were permanently or only temporarily residing in England; Cockb. Nat. 7.

In Roman Law. Under Roman law there were four methods of acquiring citizenship: 1. Every man was a citizen whose father was such before him. 2. A slave when he became a free man followed the condition of his former master. 3. Certain privileged classes by statutes could by their own acts become citizens, as by service for three years in the Roman armies, or the erection of a house in Rome worth at least 100,000 sesterces, or building a ship and for six years carrying corn to Rome. 4. By legislation such aliens as were thought fit were received into citizenship. This would now be termed naturalization.

Citizenship might be lost by reduction into slavery, capture in war, banishment and voluntary expatriation.

The net result of citizenship was that by it alone one became entitled to the protection of the laws—the *jus civile*. It was exclusive and personal, not territorial. For a discussion of the subject, see 17 L. Q. Rev. 270.

See JUS CIVITATIS.

The term *citizen* was used in Rome to indicate the possession of private civil rights, including those accruing under the Roman family and inheritance law and the Roman contract and property law. All other subjects were peregrines. But in the beginning of the 3d century the distinction was abolished and all subjects were citizens; 1 Sel. Essays in Anglo-Amer. L. H. 578.

By the Roman law the citizenship of the child followed that of the parent. The Code Napoléon changed the law of France, which until then (1807) had followed the feudal rule that citizenship was determined by birth, to the rule of the descent of blood, the *jus sanguinis* of the civil law. It has been contended that this is the true principle of international law; Vattel, b. 1, c. 19, § 212; Bar, Int. L. § 31; dissenting opinion in U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890. But the last case settled the law of the United States that mere birth within the country confers citizenship, following the rule of the English common law and denying the existence of a settled and definite rule of international law inconsistent therewith.

In American Law. One who, under the constitution and laws of the United States, has a right to vote for representatives in congress, and other public officers, and who is qualified to fill offices in the gift of the people.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside; 14th Amendment, U. S. Const.

One of the sovereign people. A constituent member of the sovereignty, synonymous with the people. Scott v. Sandford, 19 How. (U. S.) 404, 15 L. Ed. 691.

A member of the civil state entitled to all its privileges. Cooley, Const. Lim. 77. See U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. Ed. 627; Web. Cit. 48.

The provisions of the U. S. R. S. in relation to citizens are as follows:

Sec. 1992. All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States.

Sec. 1993. All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

Sec. 1994. Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen.

The term *natural-born citizen* used in the federal constitution is not therein defined.

Its meaning must be gathered from the common law; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890.

Citizens are either native-born or naturalized. Native citizens may fill any office; naturalized citizens may be elected or appointed to any office under the constitution of the United States, except the offices of president and vice-president.

The right of citizenship never descends in the legal sense, either by the common law, or under the common naturalization acts. It is incident to birth in the country, or it is given personally by statute; Pamphlet by Mr. Binney on the Alienigenæ of the United States (1853), partly published in 2 Am. L. Reg. 193 (1854). See *sub-tit.* In Roman Law, *supra.*

Generally it is presumed, at least until the contrary is shown, that every person is a citizen of the country in which he resides; Shelton v. Tiffin, 6 How. (U. S.) 163, 12 L. Ed. 387; Molyneaux v. Seymour, 30 Ga. 440, 76 Am. Dec. 662; State v. Haynes, 54 Ia. 109, 6 N. W. 156; Moore v. Wilson's Adm'rs, 10 Yerg. (Tenn.) 406; Quinby v. Duncan, 4 Harr. (Del.) 383. Where it is shown that a person was once a citizen of a foreign country even though residing in another, the presumption is, until the contrary appears, that he still remains such; Hauenstein v. Lynham, 100 U. S. 483, 25 L. Ed. 628; Ehrlich v. Weber, 114 Tenn. 711, 88 S. W. 188; Bode v. Trimmer, 82 Cal. 513, 23 Pac. 187; Charles Green's Son v. Salas, 31 Fed. 106. Evidence of foreign birth overcomes the presumption of citizenship raised by residence and raises the presumption of citizenship of the country of birth; State v. Jackson, 79 Vt. 504, 65 Atl. 657, 8 L. R. A. (N. S.) 1245.

The first clause of section 1 of the 14th Amendment of the United States Constitution for the first time recognizes and defines citizenship of the United States and makes those who are entitled to it citizens of the state in which they reside. This amendment changed the origin and character of American citizenship, or at least removed all doubt. Instead of a man's being a citizen of one of the states, he was now made a citizen of any state in which he might choose to reside because he was antecedently a citizen of the United States. Blaine, Twenty Years of Congress, vol. 2, p. 189. There is therefore a twofold citizenship under our system—federal citizenship and state citizenship; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97. One may be a citizen of the United States without being a citizen of a state, and an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen thereof, but it is only necessary that he should be born or naturalized in the United States to make him a citizen of the Union; Slaughter-House Cases, 16 Wall. (U. S.) 36, 73, 21 L. Ed. 394; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890.

The object of the amendment in respect to citizenship was to preserve equality of rights and prevent discrimination between citizens, but not radically to change the whole theory of state and federal governments and the relation of both to the people or to each other; McPherson v. Blacker, 146 U. S. 1, 13 Sup. Ct. 3, 36 L. Ed. 869. It declares that persons may be citizens of the United States without regard to their citizenship of a particular state and makes "*all persons* born within the United States and subject to its jurisdiction citizens of the United States." This language is intended to except children of "ministers, consuls, and citizens or subjects of foreign states born within the United States." In order to make a citizen of the United States also a citizen of a state, he must reside within it. This distinction becomes important in connection with the question, hereafter noted, as to what are the privileges and immunities guaranteed by the amendment; Slaughter-House Cases, 16 Wall. (U. S.) 36, 72, 21 L. Ed. 394.

The object of the clause is to protect from the hostile legislation of the states the privileges and immunities of citizens of the United States; U. S. v. Harris, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290. It applies, so far as state citizenship is concerned, only to citizens removing from one state to another; In re Hobbs, 1 Woods, 542, Fed. Cas. No. 6,550; Live Stock Dealers' & Butchers' Ass'n v. Slaughter-House Co., 1 Abb. U. S. 397, Fed. Cas. No. 8,408. The constitution had already provided in art. IV, § 2, that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." As to the scope and meaning of these words, see PRIVILEGES AND IMMUNITIES.

The 14th Amendment was not intended to impose any new restrictions upon citizenship or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption. It is declaratory in form and enabling and extending in effect. Its main purpose was to establish the citizenship of free negroes and to put it beyond doubt that all blacks as well as whites born or naturalized within the jurisdiction of the United States are citizens thereof; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394; Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664; In re Virginia, 100 U. S. 339, 25 L. Ed. 676; Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567; Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. Ed. 643; Benny v. O'Brien, 58 N. J. L. 36,

32 Atl. 696; Van Valkenburg v. Brown, 43 Cal. 43, 13 Am. Rep. 136.

The Civil Rights Act of 1866 used language very similar to that of the 14th Amendment, and Harlan, J., in a dissenting opinion quoted from the veto message of President Johnson his interpretation of its meaning: It "comprehends the Chinese of the Pacific states, Indians subject to taxation, the people called gypsies, as well as the entire race designated as blacks, persons of color, negroes, mulattoes, and persons of African blood. Every individual of those races born in the United States is made a citizen thereof;" Elk v. Wilkins, 112 U. S. 94, 114, 5 Sup. Ct. 41, 28 L. Ed. 643; see also In re Gee Hop, 71 Fed. 274.

"No white person born within the limits of the United States and subject to their jurisdiction, or born without those limits and subsequently naturalized under their laws, owes his status of citizenship to the recent amendments to the federal constitution;" Van Valkenburg v. Brown, 43 Cal. 43, 13 Am. Rep. 136.

The amendment does not give to congress power to protect by legislation the rights of state and national citizenship; Smoot v. Ry. Co., 13 Fed. 337; but it distinguishes between the two; Frasher v. State, 3 Tex. App. 263, 30 Am. Rep. 131. A person may be a citizen of the United States without being a citizen of any state; Slaughter-House Cases, 16 Wall. (U. S.) 74, 21 L. Ed. 394; U. S. v. Cruikshank, 1 Woods, 308, Fed. Cas. No. 14,897; Cully v. R. Co., 1 Hughes, 536, Fed. Cas. No. 3,466. The term *citizen* is analogous to *subject* at common law; U. S. v. Rhodes, 1 Abb. U. S. 39, Fed. Cas. No. 16,-151; Sampson v. Burgwin, 20 N. C. 21; McKay v. Campbell, 2 Sawy. 129, Fed. Cas. No. 8,840. The amendment does not confer citizenship on persons of foreign birth; Van Valkenburg v. Brown, 43 Cal. 43, 13 Am. Rep. 136. Neither Chinese nor Japanese can become citizens; In re Ah Yup, 5 Sawy. 155, Fed. Cas. No. 104; In re Look Tin Sing, 21 Fed. 905; In re Saito, 62 Fed. 126; In re Gee Hop, 71 Fed. 274; State v. Ah Chew, 16 Nev. 51, 40 Am. Rep. 488; unless born in this country of resident parents not engaged in the diplomatic service; In re Look Tin Sing, 10 Sawy. 353, 21 Fed. 905; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890.

Indians are not citizens; McKay v. Campbell, 2 Sawy. 129, Fed. Cas. No. 8,840; Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. Ed. 643; but an Indian if taxed, after tribal relations are dissolved, is a citizen; U. S. v. Elm, 23 Int. Rev. Rec. 419, Fed. Cas. No. 15,-048; and the child of a member of one of the Indian tribes within the United States is not a citizen, though born in the United States; McKay v. Campbell, 2 Sawy. 118, Fed. Cas. No. 8,840; and although the parents have given up their tribal relations they cannot become citizens until they are first naturalized; Elk v. Wilkins, 112 U. S. 94, 103, 5 Sup. Ct. 41, 28 L. Ed. 643.

Free persons of color, born in the United States, were always entitled to be regarded as citizens; U. S. v. Rhodes, 1 Abb. U. S. 28, Fed. Cas. No. 16,151; but see Dred Scott v. Sandford, 19 How. (U. S.) 393, 15 L. Ed. 691. Negroes born within the United States are citizens; U. S. v. Canter, 2 Bond 389, Fed. Cas. No. 14,719; In re Turner, Chase's Dec. 157, Fed. Cas. No. 14,247 (but not before the 14th Amendment; Dred Scott v. Sandford, 9 How. (U. S.) 393, 15 L. Ed. 691; Marshall v. Donovan, 10 Bush (Ky.) 681); but not an escaped slave residing in Canada or his children; People v. Board, 26 Mich. 51, 12 Am. Rep. 297.

A woman is a citizen; Bradwell v. Illinois, 16 Wall. (U. S.) 130, 21 L. Ed. 442; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. Ed. 627; but the amendment does not confer upon her the right to vote; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; U. S. v. Cruikshank, 1 Woods, 308, Fed. Cas. No. 14,897; U. S. v. Anthony, 11 Blatchf. 200, Fed. Cas. No. 14,459; Spencer v. Board, 1 McArthur (D. C.) 169, 29 Am. Rep. 582; Van Valkenburg v. Brown, 43 Cal. 43, 13 Am. Rep. 136; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. Ed. 627; or to practice law; Bradwell v. Illinois, *supra*.

Children born in a foreign country of American parents, who, though residing there, still claim citizenship, are citizens of the United States; Ware v. Wisner, 50 Fed. 310; so if the father only is a citizen; R. S. § 1993. The children of ambassadors and ministers at foreign courts, however, are citizens; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890; Inglis v. Sailor's Snug Harbor, 3 Pet. (U. S.) 155, 7 L. Ed. 617. A person born in this country of alien parents who were domiciled, but not naturalized here, is a citizen; Benny v. O'Brien, 58 N. J. L. 36, 32 Atl. 696; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890. The child of American parents born in a foreign country, on board an American ship of which his father was captain is a citizen of the United States; U. S. v. Gordon, 5 Blatchf. 18, Fed. Cas. No. 15,231. All children born out of the United States, who are citizens thereof and who continue to reside out of the United States, shall, in order to receive the protection of the government, be required, upon reaching the age of eighteen, to record at an American consulate their intention to become residents and remain citizens of the United States, and shall be further required to take the oath of allegiance to the United States upon attaining their majority; Act March 2, 1907. It is said that formerly a man might from the circumstances of his birth be a subject of two states at once. A child of French parents born in England owed allegiance to the King

of England. If he went to France he carried with him that allegiance. It was the distinction between the *jus soli* and the *jus sanguinis*. But by the act of 1870 the reception of a British subject into the allegiance of a foreign state extinguishes his British nationality *ipso jure;* no alien naturalized in England is to be deemed a British subject while in the country of his original allegiance so long as by the law of that country he remains a subject of it, and a man who is a British subject by the *jus soli* and a foreigner by the *jus sanguinis* may make his election between these two conditions; 18 L. Q. Rev. 47.

The act of March 2, 1907, provides that any American woman who marries a foreigner shall take the nationality of her husband. At his death, she may resume her American citizenship if abroad, by registering as an American citizen within one year with a consul of the United States or by returning to reside in the United States, or, if then residing in the United States, by continuing to reside there.

Any alien woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after his death, if she continue to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, or if she resides abroad, she may retain her citizenship by registering as such before a United States consul within one year.

In Comitis v. Parkerson, 56 Fed. 556, it is said: "Four attorney-generals of the United States have given opinions as to the effect of a female citizen marrying an alien husband. Two have held that she became an alien; two that she remained a citizen." That case held that she did not become an alien merely by her marriage, for both husband and wife intended to reside in this country.

A French woman, who has become naturalized under the statute by a marriage with an American citizen, will again become an alien, by a second marriage to a French citizen residing in this country; Pequignot v. Detroit, 16 Fed. 211. The common law did not recognize marriage as affecting in any way the nationality of the parties. An alien woman who married a British subject remained an alien, and a woman who was a British subject could not put off her allegiance by becoming the wife of an alien. This is changed by the naturalization act of 1870; 18 L. Q. R. 49.

The child born of alien parents in the United States is held to be a citizen thereof, and to be subject to duties with regard to this country which do not attach to the father; and when children of American fathers are born without the jurisdiction of the United States the country within whose jurisdiction they are born may claim them as citizens; U. S. v. Wong Kim Ark, 169 U. S. 649, 691, 18 Sup. Ct. 456, 42 L. Ed. 890. Such children are said to be born to a double character; the citizenship of the father is that of the child, so far as the laws of the country of which the father is a citizen are concerned, and within the jurisdiction of that country, but the child may owe another fealty besides that which attaches to the father. Opinions of the Executive Departments on Naturalization, Expatriation, and Allegiance (1873) 17, 18; U. S. For. Rel. 1873–74, 1191, 1192. The conclusions in the opinion above cited by Attorney-General Hoar were quoted and adopted by Secretary Bayard in 1886, when a son born of American parents in France made an application for a passport; U. S. For. Rel. 1886, 303.

It is said that the children of our citizens born abroad, and the children of foreigners born in the United States, have the right, on arriving at full age, to elect one allegiance and repudiate the other; Whart. Confl. L. §§ 10, 12. The objection has been taken that as our law provides no right of election by or for a child, as do the continental codes, the resulting dual citizenship is contrary to the theory of citizenship. But the difficulty is said to be rather apparent than real. When a child is born in America of Chinese parents, China claims him by the *jus sanguinis;* America by the *jus soli.* It is not a question whether he is an American or a Chinaman. He is both. The municipal laws being thus in conflict, his citizenship at any time will depend upon whether he is subject to the jurisdiction of the one or of the other country. The duality of citizenship is a fact, only in a third country. In China he is a Chinaman; in America, an American; 12 Harv. L. Rev. 55. See DOMICIL; RESIDENCE; NATURALIZATION; ALIEN.

Where a foreigner takes the oath declaring his intention of becoming a citizen of the United States, his minor sons thereby acquire an inchoate status as citizens, and if they attain majority before their father completes his naturalization, they are capable of becoming citizens by other means than the direct application provided for by the naturalization laws; Boyd v. Thayer, 143 U. S. 135, 12 Sup. Ct. 375, 36 L. Ed. 103; where a resident alien woman marries a naturalized citizen, under R. S. § 2172, her children residing with her are citizens; U. S. v. Kellar, 11 Biss. 314, 13 Fed. 82; Kreitz v. Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; For. Rel. 1900, 527.

Nationality is not inherited through women and an illegitimate child, born abroad of an American woman, is not a citizen of the United States; 3 Moore, Dig. Int. L. 285; but when the reputed father of an illegitimate child marries the mother and was afterwards naturalized, the child was a citizen of the United States; Dale v. Irwin, 78 Ill. 170. The fact that an unnaturalized person of foreign birth is enabled by a state statute

to vote and hold office does not make him a citizen; Lanz v. Randall, 4 Dill. 425, Fed. Cas. No. 8,080.

The *age* of the person does not affect his citizenship, though it may his political rights; 1 Abb. L. Dict. 224; nor the *sex; id.;* Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. Ed. 627; U. S. v. Reese, 92 U. S. 214, 23 L. Ed. 563; the right to vote and the right to hold office are not necessary constituents of citizenship; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. Ed. 627; Van Valkenburg v. Brown, 43 Cal. 43, 13 Am. Rep. 136.

All natives are not citizens of the United States: the descendants of the aborigines are not entitled to the rights of citizens; see *supra;* also Elk v. Wilkins, 112 U. S. 103, 5 Sup. Ct. 41, 28 L. Ed. 643. Anterior to the adoption of the constitution of the United States, each state had the right to make citizens of such persons as it pleased.

A citizen of the United States residing in any of the states is a citizen of that state; Gassies v. Ballon, 6 Pet. (U. S.) 761, 8 L. Ed. 573; Catlett v. Ins. Co., Paine 594, Fed. Cas. No. 2,517; Health v. Austin, 12 Blatch. 320, Fed. Cas. No. 6,305; Prentiss v. Barton, 1 Brock. 391, Fed. Cas. No. 11,384; Rogers v. Rogers, 1 Paige Ch. (N. Y.) 183; Smith v. Moody, 26 Ind. 299.

A person may be a citizen for commercial purposes and not for political purposes; Field v. Adreon, 7 Md. 209.

Among the rights which belong to the citizen derived from the constitution and laws of the United States are the right to vote at a federal election; In re Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; the right to remain on a homestead entry for the purpose of perfecting the title; U. S. v. Waddell, 112 U. S. 76, 5 Sup. Ct. 35, 28 L. Ed. 673; the right to protection while in custody on a charge of crime of the officers of the United States; Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; the right to furnish information to the authorities of violations of the laws of the United States; In re Quarles, 158 U. S. 532, 15 Sup. Ct. 959, 39 L. Ed. 1080; Motes v. U. S., 178 U. S. 458, 20 Sup. Ct. 993, 44 L. Ed. 1150; the right to contract outside the state for insurance on his property; Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832. But the constitution of the United States does not secure to any the right to work at a given occupation or a particular calling free from injury, oppression or interference by individual citizens; Hodges v. U. S., 203 U. S. 1, 27 Sup. Ct. 6, 51 L. Ed. 65.

All persons who deserted the naval or military service of the United States, and did not return thereto within sixty days after the issuance of the proclamation of the president, dated March 11, 1865, are deemed to have voluntarily relinquished and forfeited their rights of citizenship, and to be incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizenship thereof; R. S. § 1996.

As to citizenship as acquired by naturalization, see ALLEGIANCE; NATURALIZATION; ALIEN.

Citizenship, not residence, confers the right to sue in the federal courts; Haskell v. Bailey, 63 Fed. 873, 11 C. C. A. 476. See Reno. Non-Residents, c. vii. Corporations are citizens of the state by which they are created, irrespective of the citizenship of their members; Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. Ed. 357; National S. S. Co. v. Tugman, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 87; St. Louis & S. F. R. Co. v. James, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802; Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552. If two corporations created by different states, are consolidated each still retains its own citizenship for purposes of suit; Nashua & L. R. Corp. v. R. Co., 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. Ed. 363; Williamson v. Krohn, 66 Fed. 655, 13 C. C. A. 668. See Reno. Non-Residents, § 104. See MERGER.

There is an indisputable legal presumption that a state corporation, when sued or suing in a circuit court of the United States, is composed of citizens of the state which created it; and this presumption accompanies it when it does business in another state, and it may sue or be sued in the federal courts in such other state as a citizen of the state of its original creation; St. Louis & S. F. R. Co. v. James, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802; Barrow S. S. Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964.

A corporation is not a "citizen" within the meaning of the first clause of section 1 of the 14th Amendment; Insurance Co. v. New Orleans, 1 Woods 85, Fed. Cas. No. 7,052; Western Turf Ass'n v. Greenberg, 204 U. S. 359, 27 Sup. Ct. 384, 51 L. Ed. 520; Northwestern Nat. Life Ins. Co. v. Riggs, 203 U. S. 243, 27 Sup. Ct. 126, 51 L. Ed. 168, 7 Ann. Cas. 1104; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; but it is a person (*q. v.*). In many cases a corporation is treated as a citizen for purposes of jurisdiction; U. S. v. Transp. Co., 164 U. S. 686, 17 Sup. Ct. 206, 41 L. Ed. 599. In order to accomplish this result a curious legal fiction was created which is discussed *infra.*

It may now be considered as fairly well settled that except as to the 14th Amendment as stated *supra,* corporations are recognized as citizens by all departments of the federal government. This was done by the Supreme Court in construing an act for payment of "claims for property of citizens of the United States" taken or destroyed by Indians. It was held that the word "citizen" included corporations; U. S. v. Transp.

Co., 164 U. S. 686, 17 Sup. Ct. 206, 41 L. Ed. 599. The word has also been frequently used by Congress to include corporations; *id.*, where an instance is referred to in R. S. § 2319; the right to purchase mineral deposits in public lands is given to "citizens of the United States and those who have declared their intention to become such," and section 2321 in prescribing how citizenship shall be established, makes specific provision for the evidence required "in the case of a corporation organized under the laws of the United States or of any state or territory thereof." Again corporations are expressly recognized as citizens by the executive branch of the government in various treaties with Great Britain, Venezuela, Peru and Mexico, all referred to in the case last cited, 164 U. S. at page 689, 17 Sup. Ct. 206, 41 L. Ed. 599.

The doctrine that a corporation is a "citizen" was not accepted in the first instance, but it was treated as an association of individuals whose citizenship should control the question of federal jurisdiction; Bank of U. S. v. Deveaux, 5 Cra. (U. S.) 61, 3 L. Ed. 38, where Marshall, C. J., delivered the opinion. But this doctrine was speedily questioned and the Chief Justice regretted the decision and expressed his conviction that it was unsound in principle; Louisville, C. & C. R. Co. v. Letson, 2 How. (U. S.) 555, 11 L. Ed. 353. The case however was followed; Breithaupt v. Bank, 1 Pet (U. S.) 238, 7 L. Ed. 127; and not until after his death departed from. It was then first held that, "when a corporation exercises its powers in the state which chartered it, that is its residence, and such an averment is sufficient to give the circuit courts jurisdiction." Louisville, C. & C. R. Co. v. Letson, 2 How. (U. S.) 559, 11 L. Ed. 353. In that case the doctrine was decisively sustained that "a corporation created by and doing business in a particular state is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state as much as a natural person. Like a citizen it makes contracts, and though in regard to what it may do in some particulars, it differs from a natural person, and in this especially, the manner in which it can sue and be sued, it is substantially, within the meaning of the law, a citizen of the state which created it and where its business is done, for all the purposes of suing and being sued."

A few years after, Daniels, J., in a dissenting opinion insisted that a corporation could be in no sense a citizen, and Catron, J., in one of the majority opinions in the same case, considered that the jurisdiction in cases of corporations depended upon the citizenship of the managing officers; Rundle v. Canal Co., 14 How. 101, 14 L. Ed. 335.

Very soon after this, against strong dissent, the doctrine of the conclusive presumption from the habitat of a corporation as to the residence or citizenship of those who used its name and exercised its faculties, was pronounced; Marshall v. R. Co., 16 How. 314, 14 L. Ed. 953. This presumption was reaffirmed and both parties held estopped with respect to it; Covington Drawbridge Co. v. Shepherd, 20 How. 227, 15 L. Ed. 896; and the presumption was held to be a "legal" one, which no averment or evidence might rebut; Ohio & M. R. Co. v. Wheeler, 1 Black 286, 17 L. Ed. 130; and in Muller v. Dows, 94 U. S. 444, 24 L. Ed. 207, the court, by Strong, J., said, "A corporation itself can be a citizen of no state in the sense in which the word 'citizen' is used in the constitution of the United States," and then reiterates the doctrine of conclusive presumption as settled law. Thus the theory on which corporations were finally recognized as citizens was based upon what Baldwin, C. J., properly characterized as a legal fiction; 41 Am. L. Rev. 38. This fiction, as he says, was given definite, and as it was supposed final, shape by Taney, C. J., in Ohio & M. R. Co. v. Wheeler, 1 Black, 286, 17 L. Ed. 130, where not only was the doctrine of conclusive presumption sustained, but it was also said that "in such a suit it can make no difference whether plaintiffs sue in their own proper names or by the corporate name and style by which they are described."

The difficulties arising from the extension of corporate operations to different states necessarily caused some modification of the doctrine, and when the courts were asked to extend it so that a corporation of one state (conclusively presumed to be composed of citizens of that state) was authorized by the law of another state to do business therein, that it should be deemed to be composed of citizens of the second state with the same jurisdictional results, they said, "We are unwilling to sanction such an extension of the doctrine, which, as heretofore established, went to the very verge of judicial power," and having stated the doctrine as beginning with an assumption of fact that state corporations were composed of citizens of the state creating them and then the change of the presumption to one of law, said, "There we are content to leave it;" St. Louis & S. F. Ry. Co. v. James, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802. Finally when a case arose in which the suit was brought against a corporation by a stockholder asserting the control of the corporation by antagonistic interests, it was held that there might be proof that the stockholder was not a citizen of the state which created the corporation, and that he had a constitutional right to bring his suit in the federal court. The court said: "It is one thing to give to a corporation a status, and another thing to take from a citizen the right given

him by the constitution." Accordingly, it was considered that the presumption of citizenship of stockholders must give way to the actual fact proved that the complainant was a citizen of a different state, and that thereupon the jurisdiction attached. After quoting the phrase above cited from 161 U. S. 545, that the doctrine as then settled "went to the very verge of judicial power," it was added: "Against the further step urged by appellees we encounter the Constitution of the United States." Doctor v. Harrington, 196 U. S. 579, 25 Sup. Ct. 355, 49 L. Ed. 606. Thus in this case the court, as is said by Baldwin, C. J., in the article above cited, "marked the limits of the verge, but in such a way as practically to overrule many of their earlier decisions." The precise question decided in the last case had undoubtedly been determined differently long before, where citizens of Louisiana sued a Mississippi Bank and a plea to the jurisdiction, that two other citizens of Louisiana were among the shareholders, was sustained; Commercial & R. Bank v. Slocomb, 14 Pet. (U. S.) 60, 10 L. Ed. 354; the changed result is attributed, by Baldwin, C. J., to the fact, not that the written law had changed, but that "a new generation of judges gave it a new interpretation and twisted a new theory into an old shape," and the ease with which this was done he considers as striking evidence both of the strength of a written constitution and the futility of a written fiction.

CITY. **In England.** An incorporated town or borough which is or has been the see of a bishop. Co. Litt. 108; 1 Bla. Com. 114; Cowell. There is said, however, to be no necessary connection between a city and a see. Oxford Dict., citing Freeman.

A large town incorporated with certain privileges. The inhabitants of a city. The citizens. Worcester, Dict.

Although the first definition here given is sanctioned by such high authority, it is questionable if it is essential to its character as a city, even in England, that it has been at any time a see; and it certainly retains its character of a city after it has lost its ecclesiastical character; 1 Steph. Com. 115; 1 Bla. Com. 111, and in the United States it is clearly unnecessary that it should ever have possessed this character. Originally, this word did not signify a town, but a portion of mankind who lived under the same government—what the Romans called *civitas*, and the Greeks *πόλις*; whence the word *politeia—civitas seu reipublicæ status et administratio* Toullier, *Dr. Civ.* Fr. l. 1, t. 1, n. 202; Henrion de Pansey, *Pouvoir Municipal*, pp. 36, 37.

By cities in the Middle Ages in Germany was meant fortified places in the enjoyment of market-jurisdiction. The German as well as the French cities are a creation of the Middle Ages; there was an organic connection with the Roman town-system. Schröder, Lehrbuch des Deutchen Rechtsgeschichte 588.

CIVIL. In contradistinction to *barbarous* or *savage*, indicates a state of society reduced to order and regular government: thus, we speak of civil life, civil society, civil government, and civil liberty. In contradistinction to *criminal*, to indicate the private rights and remedies of men, as members of the community, in contrast to those which are public and relate to the government: thus, we speak of civil process and criminal process, civil jurisdiction and criminal jurisdiction.

It is also used in contradistinction to *military* or *ecclesiastical*, to *natural* or *foreign*; thus, we speak of a civil station, as opposed to a military or an ecclesiastical station; a civil death, as opposed to a natural death; a civil war, as opposed to a foreign war; Story, Const. § 789; 1 Bla. Com. 6, 125, 251; Montesquieu, Sp. of Laws, b. 1, c. 3; Rutherforth, Inst. b. 2, c. 2; *id.* c. 3; *id.* c. 8, p. 359; Heineccius, Elem. Jurisp. Nat. b. 2, ch. 6.

CIVIL ACTION. In the Civil Law.—A personal action which is instituted to compel payment, or the doing some other thing which is purely civil. Pothier, Introd. *Gen. aux Cont.* 110.

At Common Law.—An action which has for its object the recovery of private or civil rights or compensation for their infraction. See Action.

CIVIL COMMOTION. An insurrection of the people for general purposes, though it may not amount to rebellion where there is an usurped power. 2 Marsh. 793.

In the printed proposals which are considered as making a part of the contract of insurance against fire, it is declared that the insurance company will not make good any loss happening by any civil commotion

CIVIL CONTEMPT. See Contempt.

CIVIL DAMAGE ACTS. Acts passed in many of the United States which provide an action for damages against a vender of intoxicating liquors, on behalf of the wife or family of a person who has sustained injuries by reason of his intoxication. Dice v. Sherberneau, 152 Mich. 601, 116 N. W. 416, 16 L. R. A. (N. S.) 765; Bistline v. Ney Bros., 134 Ia. 172, 111 N. W. 422, 13 L. R. A. (N. S.) 1158, 13 Ann. Cas. 196.

Such an act, even if it allows an action against the owner of the property where the liquor was sold, without evidence that he authorized the sale, is constitutional; Berthoff v. O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323. See, also, Bedore v. Newton, 54 N. H. 117; Moran v. Goodwin, 130 Mass. 158, 39 Am. Rep. 443; Wightman v. Devere, 33 Wis. 570; Stanton v. Simpson, 48 Vt. 628. Where the owner of a building had no knowledge as to how his premises were used, he is nevertheless liable where his agent rents it for the sale of intoxicating liquors; Hall v. Germain, 131 N. Y. 536, 30 N. E. 591. See Keedy v. Howe, 72 Ill. 133. The act in New York creates a new right of action, viz., for injury to the "means of support;"

it is not necessary that the injury should be one remediable at common law; Volans v. Owen, 74 N. Y. 526, 30 Am. Rep. 337. Injury to means of support is not necessarily deprivation of the bare necessities of life, but any substantial subtraction from the maintenance suitable to the man's business and condition of life; Herring v. Ervin, 48 Ill. App. 369. The Indiana act is constitutional, even though the liquor-seller was licensed; Horning v. Wendell, 57 Ind. 171. So in Kehrig v. Peters, 41 Mich. 475, 2 N. W. 801. If the death of the husband can be traced to an intervening cause, the liquor-seller is not liable; Schmidt v. Mitchell, 84 Ill. 195, 25 Am. Rep. 446; Collier v. Early, 54 Ind. 559. Intoxication must be shown to have been the proximate cause of the injury; Beem v. Chestnut, 120 Ind. 390, 22 N. E. 303. Damages for injuries resulting in death cannot be recovered; Kirchner v. Myers, 35 Ohio St. 85, 35 Am. Rep. 598, 601; *contra*, Roose v. Perkins, 9 Neb. 304, 2 N. W. 715, 31 Am. Rep. 409; Hayes v. Phelan, 4 Hun (N. Y.) 733; Mead v. Stratton, 87 N. Y. 493, 41 Am. Rep. 386; Flynn v. Fogarty, 106 Ill. 263; Bedore v. Newton, 54 N. H. 117; Rafferty v. Buckman, 46 Ia. 195; but see Jackson v. Brookins, 5 Hun (N. Y.) 530; Davies v. McKnight, 146 Pa. 610, 23 Atl. 320. In some states exemplary damages can be recovered; Weitz v. Ewen, 50 Ia. 34; Gilmore v. Mathews, 67 Me. 517; Bean v. Green, 33 Ohio St. 444; *contra*, Ward v. Thompson, 48 Ia. 588. The fact that the wife had bought liquor from the defendant under compulsion, or in order to keep her husband at home, does not defeat her right; *id.*

CIVIL DEATH. That change of state of a person which is considered in the law as equivalent to death. See DEATH.

CIVIL LAW. This term is generally used to designate the Roman jurisprudence, *jus civile Romanorum.*

In its most extensive sense, the term Roman Law comprises all those legal rules and principles which were in force among the Romans, without reference to the time when they were adopted. But in a more restricted sense we understand by it the law compiled under the auspices of the Emperor Justinian, and which are still in force in many of the states of modern Europe, and to which all refer as authority or written reason.

The ancient *leges curiatæ* are said to have been collected in the time of Tarquin, the last of the kings, by a *pontifex maximus* of the name of *Sextus* or *Publius Papinius.* This collection is known under the title of *Jus Civile Papinianum;* its existing fragments are few, and those of an apocryphal character. Mackeldey § 21.

After a fierce and uninterrupted struggle between the patricians and plebeians, the latter extorted from the former the celebrated law of the *Twelve Tables*, in the year 300 of Rome. This law, framed by the decemvirs and adopted in the *comitia centuriata*, acquired great authority, and constituted the foundation of all the public and private laws of the Romans, subsequently, until the time of Justinian. It is called *Lex Decemviralis.* From this period the sources of the *jus scriptum* consisted in the *leges*, the *plebiscita*, the *senatus consulta*, and the constitutions of the emperors, *constitutiones principium;* and the *jus non scriptum* was found partly in the *mores majorum*, the *consuetudo*, and the *res judicata*, or *auctoritas rerum perpetua similiter judicatorum.* The edicts of the magistrates, or *jus honorarium*, also formed a part of the unwritten law; but by far the most prolific source of the *jus non scriptum* consisted in the opinions and writings of the lawyers—*responsa prudentium.*

The few fragments of the twelve tables that have come down to us are stamped with the harsh features of their aristocratic origin. But the *jus honorarium* established by the prætors and other magistrates, as well as that part of the customary law which was built up by the opinions and writings of the *prudentes*, are founded essentially on principles of natural justice.

Many collections of the imperial constitutions had been made before the advent of Justinian to the throne. He was the first after Theodosius who ordered a new compilation to be made. For this purpose he appointed a committee of ten lawyers, with very extensive powers; at their head was the *ex-quæstor sacri palatii*, Johannes, and among them the afterwards well-known Tribonian. His instructions were to select, in the most laconic form, all that was still of value in the existing collections, as well as in the later constitutions; to omit all obsolete matter; to introduce such alterations as were required by the times; and to divide the whole into appropriate titles. Within fourteen months the committee had finished their labors Justinian confirmed this new code, which consisted of twelve books, by a special ordinance, and prohibited the use of the older collections of rescripts and edicts. This code of Justinian, which is now called *Codex vetus*, has been entirely lost.

After the completion of this code, Justinian, in 530, ordered Tribonian, who was now invested with the dignity of *quæstor sacri palatii*, and sixteen other jurists, to select all the most valuable passages from the writings of the old jurists which were regarded as authoritative, and to arrange them, according to their subjects, under suitable heads. These commissioners also enjoyed very extensive powers, they had the privilege, at their discretion, to abbreviate, to add, and to make such other alterations as they might consider adapted to the times; and they were especially ordered to remove all the contradictions of the old jurists, to avoid all repetitions, and to omit all that had become entirely obsolete. The natural consequence of this was, that the extracts did not always truly represent the originals, but were often interpolated and amended in conformity with the existing law. Alterations, modifications, and additions of this kind are now usually called *emblemata Triboniani.* This great work is called the Pandects, or Digest, and was completed by the commissioners in three years. Within that short space of time, they had extracted from the writings of no less than thirty-nine jurists all that they considered valuable for the purpose of this compilation. It was divided into fifty books, and was entitled *Digesta sive Pandectæ juris enucleati ex omni vetere jure collecti.* The Pandects were published on the 16th of December, 533, but they did not go into operation until the 30th of that month. In confirming the Pandects, Justinian prohibited further reference to the old jurists; and, in order to prevent legal science from becoming again so diffuse, indefinite, and uncertain as it had previously been, he forbade the writing of commentaries upon the new compilation, and permitted only the making of literal translations into Greek.

In preparing the Pandects, the compilers met very frequently with controversies in the writings of the jurists. Such questions, to the number of thirty-four, had been already determined by Justinian before the commencement of the collection of the Pandects, and before its completion the decisions of this kind were increased to fifty, and were known as the fifty decisions of Justinian. These decisions were at first collected separately, and afterward embodied in the new code.

For the purpose of facilitating the study of the law, Justinian ordered Tribonian, with the assistance of Theophilus and Dorotheus, to prepare a brief system of law under the title of Institutes,

which should contain the elements of legal science. This work was founded on, and to a great extent copied from, the commentaries of Gaius, which, after having been lost for many centuries, were discovered by the great historian Niebuhr, in 1816, in a palimpsest, or re-written manuscript, of some of the homilies of St. Jerome, in the Chapter Library of Verona. What had become obsolete in the commentaries was omitted in the Institutes, and references were made to the new constitutions of Justinian so far as they had been issued at the time. Justinian published his Institutes on the 21st November, 533, and they obtained the force of law at the same time with the Pandects, December 30, 533. Theophilus, one of the editors, delivered lectures on the Institutes in the Greek language, and from these lectures originated the valuable commentaries known under the Latin title, *Theophili Antecessoris Paraphrasis Græca Institutionum Cæsarearum*. The Institutes consist of four books, each of which contains several titles.

After the publication of the Pandects and the Institutes, Justinian ordered a revision of the Code, which had been promulgated in the year 529. This became necessary on account of the great number of new constitutions which he had issued, and of the fifty decisions not included in the Old Code, and by which the law had been altered, amended, or modified. He therefore directed Tribonian, with the assistance of Dorotheus, Menna, Constantinus, and Johannes, to revise the Old Code and to incorporate the new constitutions into it. This revision was completed in the same year; and the new edition of the Code, *Codex repetitæ prælectionis*, was confirmed on the 16th November, 534, and the Old Code abolished. The Code contains twelve books subdivided into appropriate titles.

During the interval between the publication of the *Codex repetitæ prælectionis*, in 535, to the end of his reign, in 565, Justinian issued, at different times, a great number of new constitutions, by which the law on many subjects was entirely changed. The greater part of these constitutions were written in Greek, in obscure and pompous language, and published under the name of *Novellæ Constitutiones*, which are known to us as the Novels of Justinian. Soon after his death, a collection of one hundred and sixty-eight Novels was made, one hundred and fifty-four of which had been issued by Justinian, and the others by his successors.

Justinian's collections were, in ancient times, always copied separately, and afterwards they were printed in the same way. When taken together, they were indeed called, at an early period, the *Corpus Juris Civilis;* but this was not introduced as the regular title comprehending the whole body; each volume had its own title until Dionysius Gothofredus gave this general title in the second edition of his glossed *Corpus Juris Civilis*, in 1604. Since that time this title has been used in all the editions of Justinian's collections.

It is generally believed that the laws of Justinian were entirely lost and forgotten in the Western Empire from the middle of the eighth century until the alleged discovery of a copy of the Pandects at the storming and pillage of Amalfi, in 1135. This is one of those popular errors which had been handed down from generation to generation without question or inquiry, but which has now been completely exploded by the learned discussion, supported by conclusive evidence, of Savigny, in his History of the Roman Law during the Middle Ages. Indeed, several years before the sack of Amalfi the celebrated Irnerius delivered lectures on the Pandects in the University of Bologna. The pretended discovery of a copy of the Digest at Amalfi, and its being given by Lothaire II. to his allies the Pisans as a reward for their services, is an absurd fable. No doubt, during the five or six centuries when the human intellect was in a complete state of torpor, the study of the Roman Law, like that of every other branch of knowledge, was neglected; but on the first dawn of the revival of learning the science of Roman jurisprudence was one of the first to attract the attention of mankind; and it was taught with such brilliant success as to immortalize the name of Irnerius, its great professor.

Even at the present time the Roman Law, as a complete system, exercises dominion in every state in Europe except England (though not all of Continental law comes from it. Poll. & Maitl. xxxvi). The countrymen of Lycurgus and Solon are governed by it, and in the vast empire of Russia it furnishes the rule of civil conduct. In America, it is the foundation of the law of Louisiana, Canada, Mexico, and all the republics of South America. As to its influence on the common law of England there is great diversity of opinion. The subject is too large to be considered here. It has recently been treated in detail by Holdsworth (Hist. of Engl. Law).

See CODE; DIGESTS; INSTITUTES; NOVELS; BASILICA.

CIVIL LIST. An annual sum granted by the English parliament at the commencement of each reign, for the expenses of the royal household and establishment as distinguished from the general exigencies of the state. It is the provision for the crown made out of the taxes in lieu of its proper patrimony and in consideration of the assignment of that patrimony to the public use. Wharton, Dict.

CIVIL OBLIGATION. One which binds in law, and which may be enforced in a court of justice. Pothier, Obl. 173, 191.

CIVIL OFFICER. Any officer of the United States who holds his appointment under the national government, whether his duties are executive or judicial, in the highest or the lowest departments of the government, with the exception of officers of the army and navy. Rawle, Const. 213; 1 Story, Const. § 790.

The term occurs in the constitution of the United States, art. 2, sec 4, which provides that the president, vice-president, and *civil officers* of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. It has been decided that a senator of the United States is not a civil officer within the meaning of this clause of the constitution. Senate Journals, 10th January, 1799; 4 Tucker, Bla. Com. App. 57, 58; Rawle, Const. 213; Sergeant, Const. Law 376; Story, Const. § 791.

CIVIL REMEDY. The remedy which the party injured by the commission of a tortious act has by action against the party committing it, as distinguished from the proceeding by indictment, by which the wrongdoer is made to expiate the injury done to society.

In cases of treason, felony, and some other of the graver offences, this private remedy is suspended, on grounds of public policy, until after the prosecution of the wrongdoer for the public wrong; 4 Bla. Com. 363; 12 East 409; Bell's Adm'r v. Troy, 35 Ala. 184. The law is otherwise in *Massachusetts*, except, perhaps, in case of felonies punishable with death; Boardman v. Gore, 15 Mass. 333; *North Carolina*, Smith v. Weaver, 1 N. C. 141; *Ohio*, Story v. Hammond, 4 Ohio 377; *South Carolina*, Robinson v. Culp, 3 Brev. 302; *Mississippi*, Newell v. Cowan, 30 Miss. 492; *Tennessee*, Ballew v. Alexander, 6 Humph. 433; *Maine*, Belknap v. Milliken, 23 Me. 381; and *Virginia*. At common law, in cases of homicide the civil remedy is

merged in the public punishment; 1 Chit. Pr. 10. See INJURIES; MERGER; Bish. Cr. L. § 267.

CIVIL RIGHTS. A term applied to certain rights secured to citizens of the United States by the 13th and 14th Amendments to the constitution, and by various acts of congress made in pursuance thereof.

The act of April 9, 1866 ("ordinarily called the 'Civil Rights Bill';" Bradley, J., in U. S. v. Stanley, 109 U. S. 3, 16, 3 Sup. Ct. 18, 27 L. Ed. 835), provided that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are citizens of the United States; that such citizens of every race and color shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, etc., and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and be subject to like punishment, etc., and none other. This act was said by Swayne, J., to be not a penal statute but a remedial one to be construed liberally; U. S. v. Rhodes, 1 Abb. U. S. 28, Fed. Cas. No. 16,151.

This legislation was substantially replaced by the 14th Amendment which was broader in its scope, manifestly intended to vindicate those rights against individual aggression; Kentucky v. Powers, 201 U. S. 1, 26 Sup. Ct. 387, 50 L. Ed. 633, 5 Ann. Cas. 692. This amendment was finally promulgated as adopted in July, 1868 (see FOURTEENTH AMENDMENT) and thereafter Congress enacted several laws intended to enforce its provisions. The first was the act of May 31, 1870, known as the Enforcement Act (supplemented by an amending act of February 28, 1871). The purpose was to protect negro voters by requiring in sections 1 and 2 that all citizens should be accorded equal facilities without distinction of race or color; in sections 3, 4 and 5 for the punishment through federal courts of persons who violated the act; and in section 6 for punishment in like manner of conspiracies to defeat the elective franchise. There was also provided an elaborate scheme of supervision of all elections, which included members of Congress, through the federal courts, which became R. S. §§ 2011, 2012, 2016, 2017, 2021, 2022, 5515 and 5522. The power of Congress to impose this system of supervision was upheld in Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717; U. S. v. Gale, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. Ed. 857; and sections 3 and 4 of the Enforcement Act were held unconstitutional; U. S. v. Reese, 92 U. S. 214, 23 L. Ed. 563; while section 6 was, in effect, held unenforceable, as not providing for the punishment of any act punishable under the constitution and laws of the United States; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.

The next act in the series was that of April 20, 1871, known as the "Ku Klux Act." It was an effort to create both civil and criminal liability for the action of individuals against individuals; and also gave authority to the President to employ the army and navy in cases of domestic disturbance within a state and to suspend the writ of habeas corpus, and disqualified for jury service all persons involved. It also contained a remarkable section (6) making any person liable who could, by reasonable diligence, have prevented any other person from depriving individuals of the equal protection of the laws, and failed to do so. This act was practically rendered ineffective by the construction given by the Supreme Court to the power of Congress to enforce the 14th Amendment by legislation. Cases in which various provisions of it were held to be unenforceable in the cases in which it was resorted to are: U. S. v. Harris, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290; Carter v. Greenhow, 114 U. S. 317, 5 Sup. Ct. 928, 962, 29 L. Ed. 202; Bowman v. Ry. Co., 115 U. S. 611, 6 Sup. Ct. 192, 29 L. Ed. 502; Baldwin v. Franks, 120 U. S. 678, 7 Sup. Ct. 656, 763, 30 L. Ed. 766; Holt v. Mfg. Co., 176 U. S. 68, 20 Sup. Ct. 272, 44 L. Ed. 374; Giles v. Harris, 189 U. S. 475, 23 Sup. Ct. 639, 47 L. Ed. 909.

The last act of the series was that of March 1, 1875, which was pre-eminently known as the "Civil Rights Act" and consisted of five sections. Section 1 provided that all persons within the jurisdiction of the United States should be entitled to the full and equal enjoyment of the accommodations, etc., of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law and applicable alike to all citizens of whatever race or color, regardless of any previous condition of servitude. Section 2 provided for the punishment of any person who should violate the foregoing section, both criminally and by a suit for a penalty. Section 3 gave jurisdiction to the federal courts exclusively of all offenses against the act, and of suits for a penalty. Section 4 provided that no person should be excluded from service as grand or petit juror in any court of the United States or any state, on account of race, color or previous condition of servitude. Section 5 gave to the Supreme Court a right of review of all cases arising under the act.

Section 4 was declared constitutional in Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676. Sections 1 and 2 were held unconstitutional and void in the Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835, as not being authorized by either the 13th or 14th Amendments. And having been so declared unconstitutional, they were not separable as to their operation in such places as are under the exclusive jurisdiction of the national government and the statute was therefore unconstitutional in its entirety; Butts v. Merchants & Miners Transp. Co.,

230 U. S. 126, 33 Sup. Ct. 964, 57 L. Ed. 1422; The Trade Mark Cases, 100 U. S. 82, 25 L. Ed. 550.

The 13th Amendment denounces a status or condition irrespective of the manner or authority by which it is created. The prohibitions of the 14th and 15th Amendments are largely upon the acts of the states; but the 13th Amendment names no party or authority, but simply forbids slavery and involuntary servitude and grants to Congress power to enforce this prohibition by appropriate legislation; Clyatt v. U. S., 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726. Such legislation may be primary and direct in its character; *id.*

In the Civil Rights Cases the court held that although the constitution and statutes of a state may not be repugnant to the 13th Amendment, Congress, by legislation of a direct and primary character, may, in order to enforce the amendment, reach and punish individuals whose acts are in hostility to rights and privileges derived from and secured by or dependent upon that amendment; Clyatt v. U. S., 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726. The power, duty and responsibility to enforce the rights of citizens under any of the constitutional amendments rests with the state and not with the United States government; Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567. But in Hodges v. U. S., 203 U. S. 1, 27 Sup. Ct. 6, 51 L. Ed. 65, the 13th Amendment was held not to empower Congress to protect against individual interference (where a conspiracy was alleged to exclude negroes from making contracts to labor).

Prohibiting intermarriage between white persons and negroes is not interference with civil rights; State v. Gibson, 36 Ind. 389, 10 Am. Rep. 42; Plessy v. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256; nor requiring separate schools; State v. McCann, 21 Ohio St. 210; Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405; People v. Gallagher, 93 N. Y. 438, 45 Am. Rep. 232; nor requiring separate accommodations on railroad trains within the state; Louisville, N. O. & T. Ry. Co. v. State, 66 Miss. 662, 6 South. 203, 5 L. R. A. 132, 14 Am. St. Rep. 599; *id.*, 133 U. S. 587, 10 Sup. Ct. 348, 33 L. Ed. 784; Plessy v. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256; nor is the refusal of an innkeeper or keeper of a place of public amusement or proprietor of a public conveyance to accept certain classes of patrons such an interference with the civil rights of such excluded persons as to call for their constitutional protection; U. S. v. Stanley, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835; Miller v. Texas, 153 U. S. 537, 14 Sup. Ct. 874, 38 L. Ed. 812; nor are civil rights denied to a negro because the grand jury which indicted him for murder was purposely composed of white men; Gibson v. Mississippi, 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075; Smith v. Mississippi, 162 U. S. 592, 16 Sup. Ct. 900, 40 L. Ed. 1082. But see Rogers v. Alabama, 192 U. S. 226, 24 Sup. Ct. 257, 48 L. Ed. 417, where such discrimination on account of race was held a denial of rights under the 14th Amendment, the objection having been taken in the state court by motion to quash the indictment.

Congressional inaction is equivalent to a declaration that a carrier may by its regulations separate white and negro interstate passengers; Chiles v. Ry. Co., 218 U. S. 71, 30 Sup. Ct. 667, 54 L. Ed. 936, 20 Ann. Cas. 980.

Within the meaning of Civil Rights Acts, federal or state, a barber shop is not a place of public accommodation; Faulkner v. Solazzi, 79 Conn. 541, 65 Atl. 947, 9 L. R. A. (N. S.) 601, 9 Ann. Cas. 67; nor a bootblack stand; Burks v. Bosso, 180 N. Y. 341, 73 N. E. 58, 105 Am. St. Rep. 762; nor a drug store containing a soda fountain; Cecil v. Green, 161 Ill. 265, 43 N. E. 1105, 32 L. R. A. 566; nor a saloon; Kellar v. Koerber, 61 Ohio St. 388, 55 N. E. 1002; Rhone v. Loomis, 74 Minn. 200, 77 N. W. 31, changed by statute Gen. St. Minn. 1913, § 6082; nor a billiard room; Com. v. Sylvester, 13 Allen (Mass.) 247; but a barber shop cannot discriminate against a negro; Messenger v. State, 25 Neb. 674, 41 N. W. 638. A skating rink has been held a place of amusement within such a state law; People v. King, 110 N. Y. 418, 18 N. E. 245, 1 L. R. A. 293, 6 Am. St. Rep. 389; otherwise as to one carried on by the owner of the building without state or municipal license; Bowlin v. Lyon, 67 Ia. 536, 25 N. W. 766, 56 Am. Rep. 355. A race meeting is not; Grannan v. Racing Ass'n, 153 N. Y. 449, 47 N. E. 896; but a bowling alley is; Johnson v. Pop Corn Co., 24 Ohio Cir. Ct. R. 135.

The Civil Rights Act is in derogation of the common law and must be strictly construed; Grace v. Moseley, 112 Ill. App. 100; and the provision that any "person" who violates its provisions shall be amenable thereto is not restricted to natural persons, but includes corporations; Johnson v. Pop Corn Co., 24 Ohio Cir. Ct. 135.

A person operating a place of public resort, who claims the right to exclude persons indicated by conduct, dress, or demeanor to be members of a disreputable class, is liable for a mistake made in the exercise of that right; Davis v. Power Co., 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802.

U. S. R. S. § 641, U. S. Comp. Stat. 1901, pp. 520, 521, authorizes the removal of a criminal prosecution from a state to a federal court, wherever the accused is denied or cannot enforce in the state courts any right secured to him by any law providing for equal civil rights of citizens of the United States or of all persons within the jurisdiction. But the denial in summoning or impaneling jurors of any equal civil right secured by the federal constitution or laws does not, unless authorized by the state con-

stitution or laws as interpreted by its highest courts, give a right to such removal; Kentucky v. Powers, 201 U. S. 1, 26 Sup. Ct. 387, 50 L. Ed. 633, 5 Ann. Cas. 692, where there was a deliberate exclusion of Republicans from a jury selected to try the accused for the murder of a Democrat. In that case it was held that, while the decisions of the United States Supreme Court construing this section had reference to discrimination against negroes because of their race, the decisions were not intended to confine the operation of that section or of the 14th Amendment to negroes alone, but the rules announced apply equally where discrimination exists as to the white race; *id.*

Section 641, U. S. R. S., was repealed by section 297 of the Judicial Code of March 3, 1911, and is re-enacted in the same words (except the substitution of district court for circuit court) in section 31 of that code.

See EQUAL PROTECTION OF THE LAW; PRIVILEGES AND IMMUNITIES; FOURTEENTH AMENDMENT; DUE PROCESS OF LAW; REMOVAL OF CAUSES.

CIVIL SERVICE. The Civil Service Act of Congress, Jan. 16, 1883, does not delegate legislative power to the President and Civil Service Commissioners; Butler v. White, 83 Fed. 578. Under it neither the Civil Service Commission nor the President, nor both combined, can make any regulations having the effect of law; nor will courts of equity enforce them. The President can enforce such regulations by the exercise of the power of removal, and if he does not do so, courts of equity will not interfere; Flemming v. Stahl, 83 Fed. 940; nor will it enjoin the removal of government officers; White v. Berry, 171 U. S. 366, 18 Sup. Ct. 917, 43 L. Ed. 199; Morgan v. Nunn, 84 Fed. 551; Jaedicke v. U. S, 85 Fed. 373, 29 C. C. A. 199; though it may be unjustly or improperly made; nor decide the right of a party to remain in office: Marshall v. Board of Managers, 201 Ill. 9, 66 N. E. 314. The power of removal is incident to the power of appointment; Flemming v. Stahl, 83 Fed. 940. A provision in a civil service law for the removal of one who is a veteran volunteer fireman only after a hearing, which is not required in the case of one not a veteran, does not contravene the 14th Amendment; People v. Folks, 89 App. Div. 171, 85 N. Y. Supp. 1100. See OFFICER.

CIVILIAN. A doctor, professor, or student of the civil law.

CIVILITER. Civilly: opposed to *criminaliter*, or criminally.

When a person does an unlawful act injurious to another, whether with or without an intention to commit a tort, he is responsible *civiliter*. In order to make him liable *criminaliter*, he must have intended to do the wrong; for it is a maxim, *actus non facit reum nisi mens sit rea*. 2 East 104.

CIVILITER MORTUUS. Civilly dead. In a state of civil death.

In New York one sentenced to life imprisonment in the state prison is *civiliter mortuus;* Troup v. Wood, 4 Johns. Ch. (N. Y.) 228; Platner v. Sherwood, 6 Johns. Ch. (N. Y.) 118.

CIVITAS. A term in the Anglo-Saxon land books, commonly applied to Worcester, Canterbury and other such places, which are both bishop's sees and the head places of large districts. Maitland, Domesday and Beyond 183. See 17 L. Q. R. 274. It was applied by the Romans to the independent tribes or states of Gaul, and then to the chief towns of those tribes. Oxford Dict. *s. v. City.*

See CITY.

CLAIM. A challenge of the ownership of a thing which is wrongfully withheld from the possession of the claimant. Plowd. 359. See Cummings v. Lynn, 1 Dall. (U. S.) 444, 1 L. Ed. 215; Willing v. Peters, 12 S. & R. (Pa.) 177.

In a popular sense, claim is a right to claim; a just title to something in the possession or at the disposal of another. Steele v. State, 159 Ala. 9, 48 South. 673.

The owner of property proceeded against in admiralty by a suit *in rem* must present a *claim* to such property, verified by oath or affirmation, stating that the claimant by whom or on whose behalf the claim is made, and no other person, is the true and *bona fide* owner thereof, as a necessary preliminary to his making defence; 2 Conkl. Adm. 201-210.

A demand entered of record of a mechanic or material man for work done or material furnished in the erection of a building, in Pennsylvania and some other states.

The assertion of a liability to the party making it to do some service or pay a sum of money. See Prigg v. Pennsylvania, 16 Pet. (U. S.) 539, 10 L. Ed. 1060.

The possession of a settler upon the wild lands of the government of the United States; the lands which such a settler holds possession of. The land must be so marked out as to distinguish it from adjacent lands; Sargeant v. Kellogg, 5 Gilman (Ill.) 273. Such claims are considered as personalty in the administration of decedents' estates; Stewart v. Chadwick, 8 Ia. 463; are proper subjects of sale and transfer; Hill v. Smith, Morris (Ia.) 70; Freeman v. Holliday, Morris (Ia.) 80; Wilson v. Webster, Morris (Ia.) 312, 41 Am. Dec. 230; Stewart v. Chadwick, 8 Ia. 463; Turney v. Saunders, 4 Scam. (Ill) 531; the possessor being required to deduce a regular title from the first occupant to maintain ejectment; Turney v. Saunders, 4 Scam. (Ill.) 531; and a sale furnishing sufficient consideration for a promissory note; Freeman v. Holliday, Morris (Ia.) 80; Starr v. Wilson, Morris (Ia.) 438; Pierson v. David, 1 Ia. 23. An express promise to pay for improvements made by "claimants" is good, and the proper amount to be paid may be determined by the jury; Johnson v. Moulton, 1 Scam. (Ill.) 532.

CLAIM OF CONUSANCE. An intervention by a third person demanding jurisdiction of a cause which the plaintiff has commenced out of the claimant's court. Now obsolete. 3 Bla. Com. 298. See COGNIZANCE.

CLAIM PROPERTY BOND. A bond filed by a defendant in cases of replevin and of execution. Upon filing such bond in replevin the defendant is entitled to a return of the goods by the sheriff. Its use is said to have been long sanctioned by usage in Pennsylvania; Snyder v. Frankenfield, 4 Pa. Dist. R. 767. It has taken the place in replevin of the writ *de proprietate probanda;* Weaver v. Lawrence, 1 Dall. (U. S.) 156, 1 L. Ed. 79. Upon giving such bond defendant's title to the goods becomes indefeasible and the plaintiff can only look to the security for the damages which he may recover; 1 Dall. U. S. (4th Ed. by Brightly) 156, 157, note.

In the case of an execution, if a third party files such bond, the sheriff may at his peril withdraw his levy.

CLAIMANT. In Admiralty Practice. A person authorized and admitted to defend a libel brought *in rem* against property; thus, Thirty Hogsheads of Sugar, Bentzon, Claimant v. Boyle, 9 Cra. (U. S.) 191, 3 L. Ed. 701.

CLAMOR (Lat.). A suit or demand; a complaint. Du Cange; Spelman, Gloss.

In Civil Law. A claimant. A debt; any thing claimed from another. A proclamation; an accusation. Du Cange.

CLARENDON, ASSIZE OF. A statute (1166) the principal feature of which was an improvement of judicial procedure in the case of criminals. It was a part of the same scheme of reform as the Constitution of Clarendon. See James C. Carter, The Law, etc., 65.

CLARENDON, CONSTITUTIONS OF. Certain statutes made in the reign of Henry II. at a parliament held at Clarendon (A. D. 1164) by which the king checked the power of the pope and his clergy and greatly narrowed the exemption they claimed from secular jurisdiction.

Previous to this time, there had been an entire separation between the clergy and laity, as members of the same commonwealth. The clergy, having emancipated themselves from the laws as administered by the courts of law, had assumed powers and exemptions quite inconsistent with the good government of the country.

This state of things led to the enactment referred to. By this enactment all controversies arising out of ecclesiastical matters were required to be determined in the civil courts, and all appeals in spiritual causes were to be carried from the bishops to the primate, and from him to the king, but no further without the king's consent. The archbishops and bishops were to be regarded as barons of the realm, possessing the privileges and subject to the burdens belonging to that rank, and bound to attend the king in his councils. The revenues of vacant sees were to belong to the king, and goods forfeited to him by law were no longer to be protected in churches or church-yards. Nor were the clergy to pretend to the right of enforcing the payment of debts in cases where they had been accustomed to do so, but should leave all lawsuits to the determination of the civil courts. The rigid enforcement of these statutes by the king was unhappily stopped, for a season, by the fatal event of his disputes with Archbishop Becket. Fitz Stephen 27; 2 Lingard 59; 1 Hume 382; Wilkins 321; 4 Bla. Com. 422; 1 Poll. & M. 430-440, 461; 2 *id.* 196.

CLASS. A number of persons or things ranked together for some common purpose or as possessing some attribute in common.

The term is used of legatees, Swinton v. Legare, 2 McCord Eq. (S. C.) 440; of obligees in a bond; Justices of Cumberland v. Armstrong, 14 N. C. 284; and of other collections of persons; White v. Delavan, 17 Wend (N. Y.) 52; Ellis v. Kimball, 16 Pick. (Mass.) 132; Wheeler v. Philadelphia, 77 Pa. 338; 1 Ld. Raym. 708.

CLASSIFICATION IN STATUTES. As to what is proper classification of the subjects of statutes, see EQUAL PROTECTION OF THE LAW; POLICE POWERS.

CLAUSE. A part of a treaty; of a legislative act; of a deed; of a will, or other written instrument. A part of a sentence.

CLAUSULA DEROGATIVA. A clause in a will which provides that no will subsequently made is to be valid. The latter would still be valid, but there would be ground for suspecting undue influence. Grotius.

CLAUSUM. In Old English Law. Close. Closed.

A writ was either *clausum* (close) or *apertum* (open). Grants were said to be by *literæ patentæ* (open grant) or *literæ clausæ* (close grant); 2 Bla. Com. 346.

A close. An enclosure.

Occurring in the phrase *quare clausum fregit* (Rucker v. McNeely, 4 Blackf. [Ind.] 181), it denotes in this sense only realty in which the plaintiff has some exclusive interest, whether for a limited or unlimited time or for special or for general purposes; 1 Chit. Pl. 174; Austin v. Sawyer, 9 Cow. (N. Y.) 39; 6 East 606.

CLAUSUM FREGIT. See QUARE CLAUSUM FREGIT; TRESPASS.

CLEAN HANDS. It is said that a party seeking the aid of a court of equity must come into court with clean hands. It refers only to wrongful conduct in the particular acts or transactions which raise the equity he seeks to enforce; Trice v. Comstock, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176; West v. Washburn, 153 App. Div. 460, 138 N. Y. Supp. 230.

CLEAR. Free from indistinctness or uncertainty; easily understood; perspicuous, plain; free from impediment, embarrassment or accusation. Webster.

For a clear deed, see Rohr v. Kindt, 3 W. & S. (Pa.) 563, 39 Am. Dec. 53; clear title; Roberts v. Bassett, 105 Mass. 409; clear of expense; 2 Ves. & B. 341; clear of assessments; Peart v. Phipps, 4 Yeates (Pa.) 386; clear days; 14 M. & W. 120; 3 B. & Ald. 581.

CLEARANCE. A certificate given by the collector of a port, in which it is stated that

the master or commander (naming him) of a ship or vessel named and described, bound for a port named (and having on board goods described, in case the master requires the particulars of his cargo to be stated in such clearance), has entered and cleared his ship or vessel according to law.

This certificate, or clearance, evidences the right of the vessel to depart on her voyage; and clearance has therefore been properly defined as *a permission to sail.* The same term is also used to signify the act of clearing. Worcester, Dict.

By U. S. R. S. § 4197, the master of any vessel bound to a foreign port shall deliver to the collector of the district from which he sails a sworn manifest of his cargo and its value. To sail without a clearance is punishable by a fine of $500.

By R. S. § 4200, before a clearance can be granted to any foreign-bound vessel the owners, shippers or consignors of the cargo shall deliver to the collector sworn manifests of their parts of the cargo, specify the kind of goods shipped and their value, and the master of the vessel and the owners, etc., of the cargo shall subscribe an oath as to the foreign place in which such cargo is intended truly to be landed.

The collector of the port cannot refuse clearance because a ship contains contraband; Northern Pac. R. Co. v. Trading Co., 195 U. S. 439, 25 Sup. Ct. 84, 49 L. Ed. 269.

According to Boulay-Paty, *Dr. Com.* t. 2, p. 19, the clearance is imperatively demanded for the safety of the vessel; for if a vessel should be found without it at sea it may be legally taken and brought into some court for adjudication on a charge of piracy. See SHIP'S PAPERS.

CLEARANCE CARD. A letter given to an employé by a railroad company, at the time of his discharge or end of service, showing the cause of such discharge or voluntary quittance, the length of time of service, his capacity, and such other facts as would give to those concerned information of his former employment. Such a card is in no sense a letter of recommendation and in many cases might be of a form and character which the holder would hesitate and decline to present to any person to whom he was making application for employment; Cleveland, C., C. & St. L. R. Co. v. Jenkins, 174 Ill. 398, 51 N. E. 811, 62 L. R. A. 922, 66 Am. St. Rep. 296; with a full note on the question of the duty of employers to give recommendations to employés either discharged or voluntarily quitting. See BLACKLIST.

CLEARING-HOUSE. An office where bankers settle daily with each other the balance of their accounts.

The origin of the system is said to have been in Edinburgh; at least the bankers of that city so claim; but the earliest record of one (and that is not clear as to date) is that of London, founded in 1775, or possibly earlier. It was started in the alehouse of those times, the general resort of proprietors of new enterprises. The system, however, increased in usefulness so much as to require rooms, which were procured in Lombard Street, and a system was rapidly developed of exchanging checks and other securities to reduce the amount of actual money required for settlements. In this country such associations were established in New York in 1853, Boston in 1856, Philadelphia, Baltimore, and Cleveland in 1858, Worcester in 1861, Chicago in 1865, and since that date the system has extended to most of the cities in which there are several banks. They also exist in the continental countries of Europe. Most of these associations are unincorporated, but in Minnesota there is an act (March 4, 1893) for their incorporation. The Clearing-House Association of New York consists of all the incorporated banks—private bankers not being admitted, as in London. Two clerks from each bank attend at the clearing-house every morning, where one takes a position inside of a counter at a desk bearing the number of his bank, the other standing outside the counter and holding in his hand parcels containing the checks on each of the other banks received the previous day. At the sound of a bell, the outside men begin to move, and at each desk they deposit the proper parcel, with an account of its contents—until, having walked around, they find themselves at their own desk again. At the end of this process the representative of each bank has handed to the representatives of every other bank the demands against them, and received from each of the other banks their demands on his bank. A comparison of the amounts tells him at once whether he is to pay into or receive from the clearing-house a balance in money. Balances are settled daily. In London the practice of presenting checks at the clearing-house has been held a good presentment to the banker at law. It is not usual to examine the checks until they are taken to the bank, and if any are then found not good they are returned to the bank which presented them, which settles for such returned checks. In this country when a check is returned not good through the clearing-house, it is usually again presented at the bank.

To accomplish this purpose of settling daily balances was the original and still is the principal object of a clearing-house, whatever differences of method or detail may be found in different cities. The mode of proceeding in Philadelphia is described in Crane v. Clearing-House, 32 W. N. C. (Pa.) 358, and Philler v. Yardley, 62 Fed 645, 10 C. C. A. 562, 25 L. R. A. 824; and that of London in 5 Mann. & G. 348, 6 Scott, N. R. 1, 12 L. J. C. P. 113

The original purpose of a clearing-house—the exchange of paper payable by the several banks and the settlement of the daily balances between them—has undergone a gradual but very extensive expansion. In the larger cities they have become to some extent financial regulators and the medium through which in times of financial disturbance there is attained concerted action by the banks of a city. In the panic of 1893, the New York clearing-house issued "clearing-house certificates" representing the deposit of securities; these could be used by the banks to settle clearing-house balances.

Such certificates are held valid, and suit may be brought by the clearing-house committee upon notes included in the collateral deposited by a bank for the purpose of taking out certificates; Philler v. Woodfall, 32 W. N. C. (Pa.) 183; Philler v. Field, 29 W. N. C. (Pa.) 139; Philler v. Esler, 29 W. N. C. (Pa.) 258. A clearing-house due bill is an ordinary due bill from a bank "to Banks," and usually stipulates that it is good when both signed and countersigned by duly authorized officers, and to be payable only

through the clearing-house on the day after its issue. During the financial difficulties above referred to such due bills were used by the banks in payment of checks whenever practicable, being as available as cash for deposit in another bank of the same city. They are held not to be certificates of deposit but negotiable, and requiring indemnity to recover the amount due on them if lost or stolen; Dutton v. Bank, 16 Phila. (Pa.) 94.

A clearing-house association is properly sued in the names of the committee who have the entire control of its securities and business funds; Yardley v. Philler, 58 Fed. 740.

The tendency of the decisions upon the rights and liabilities of clearing-houses is to treat them with respect to the customs of the banks as merely instruments of making the exchanges, and not as liable to individual depositors or holders of paper for funds which have passed through the clearing-house in the process of exchange between banks. They are not responsible for anything except the proper distribution of money paid to settle balances, their purpose being to provide a convenient place where checks may be presented and balances adjusted; German Nat. Bank v. Bank, 118 Pa. 294, 12 Atl. 303. When a bank suspended after the morning exchanges but before the payment of the general balance due from it, which was made good by the other banks and applied by the clearing-house to the indebtedness of the suspended bank, it was held that the clearing-house was not liable to the holder of a draft on one of the other banks deposited in the suspended bank, because the draft was never in the hands of the clearing-house for collection, nor did its manager hold the proceeds thereof with knowledge of the plaintiff's rights or of the existence of the draft until demand was made upon it; Crane v. Clearing-House, 32 W. N. C. (Pa.) 358.

The rules of a clearing-house have the binding effect of law as between the banks; People v. Bank, 77 Hun 159, 28 N. Y. Supp. 407; German Nat. Bank v. Bank, 118 Pa. 294, 12 Atl. 303; Overman v. Bank, 31 N. J. L. 563; Blaffer v. Bank, 35 La. Ann. 251; but do not affect the relations between the payee of a check presented through the clearing-house for payment, and the bank on which the check is drawn; People v. Bank, 77 Hun 159, 28 N. Y. Supp. 407.

The course of business of a clearing-house is based upon the idea that the members are principals (and trusted by each other as such), and not agents of parties not members, and this renders possible the volume of business transacted; Overman v. Bank, 31 N. J. L. 563.

With respect to the effect of presentment at the clearing-house or failure to demand payment there, it has been held that presentation to the banker's clerk at the clearing-house was a presentation at the place of payment designated in a bill of exchange; 2 Campb. 596; that the failure to present a check at the clearing-house in violation of an imperative custom to do so does not discharge the drawer of the check as between the bankers and their customer; 1 Nev. & M. 541; and such failure to present is not material if presented in the ordinary way, even if the check was to have been paid if presented at the clearing-house, the latter being merely a substitute for ordinary presentation, authorized by custom but not required except as a substitute for the regular mode if that is omitted; Kleekamp v. Meyer, 5 Mo. App. 444. Sending notes to a bank through the clearing-house is but leaving them there for payment during banking hours and not a demand at the bank for immediate payment; National Exchange Bank v. Bank, 132 Mass. 147.

The right of return of paper found not good secured by the rules of the clearing-house is a special provision in compensation for payment without inspection, with an opportunity for future inspection and recall of the payment. When the opportunity is had and not availed of, the general principles of law intervene to regulate the rights and liabilities of the paying bank; National Bank of North America of Boston v. Bangs, 106 Mass. 441, 8 Am. Rep. 349. The return of such paper after its receipt through the clearing-house is not prevented by its having been marked cancelled by mistake; 1 Campb. 426; 5 Mann. & G. 348; nor by putting it on a file and entering it in the journal; German Nat. Bank v. Bank, 118 Pa. 294, 12 Atl. 303; nor by failure to return by the time fixed by rule whether caused by mistake of fact; Manufacturers' Nat. Bank v. Thompson, 129 Mass. 438, 37 Am. Rep. 376; Merchants' Nat. Bank v. Bank, 101 Mass. 281, 100 Am. Dec. 120; or not; Boylston Nat. Bank v. Richardson, 101 Mass. 287; nor in such case if the bank had through mistake given credit to the depositor; Merchants' Nat. Bank v. Bank, 139 Mass. 513, 2 N. E. 89; but a rule of the Chicago clearing-house limiting the time of return was held to constitute a binding contract, and the right to recover back a payment made by mistake and discovered within fifteen minutes was denied and the Massachusetts rule criticised; Preston v. Bank, 23 Fed. 179.

When there is no rule and no uniform custom, payment at the clearing-house is provisional, to become complete when payment is made in the ordinary course of business, and if not so made to be treated as payment under a mistake of fact, and with the same rights of reclamation as if made without a clearing-house; National Exchange Bank v. Bank, 132 Mass. 147. The rules may be waived; Stuyvesant Bank v. Banking Ass'n, 7 Lans. (N. Y.) 197.

A bank not a member, in sending checks through the clearing-house, is bound by its action under its rules in returning payment made by mistake; *id.;* but a bank not a member is not bound by the clearing-house rules as to the time of returning checks not good, in case of a check sent by it through a bank which was a member; such a case is governed by the ordinary principles applicable to it and not by the clearing-house rules; Overman v. Bank, 31 N. J. L. 563.

When the drawee bank received a forged check through the clearing-house as genuine and failed to return it or to discover the forgery for several days, the bank which took the check and sent it to the clearing-house could not be held liable for negligence in receiving it from a stranger and sending it through the clearing-house without notice; Commercial & Farmers' Nat. Bank of Baltimore v. Bank, 30 Md. 11, 96 Am. Dec. 554.

In London there is also a railway clearing-house.

See National City Bank v. Bank, 101 N. Y. 595, 5 N. E. 463; 25 L. R. A. 824, note.

See INSOLVENT.

CLEMENTINES. The collection of decretals or constitutions of Pope Clement V., which was published, by order of John XXII., his successor, in 1317.

The death of Clement V., in 1314, prevented him from publishing this collection, which is properly a compilation as well of the epistles and constitutions of this pope as of the decrees of the council of Vienna, over which he presided. The Clementines are divided into five books, in which the matter is distributed nearly upon the same plan as the decretals of Gregory IX. See Dupin, *Bibliothèque.*

CLERGY. The name applicable to ecclesiastical ministers as a class.

Clergymen were exempted by the emperor Constantine from all civil burdens. Baronius, *ad ann.* 319, § 30. Lord Coke says, 2 Inst. 3, ecclesiastical persons have more and greater liberties than other of the king's subjects, wherein to set down all would take up a whole volume of itself. In the United States the clergy is not established by law.

CLERGY, BENEFIT OF. See BENEFIT OF CLERGY.

CLERGYABLE. Allowing of, or entitled to, the benefit of clergy (*privilegium clericale*). Used of persons or crimes. 4 Bla. Com. 371. See BENEFIT OF CLERGY.

CLERICAL ERROR. An error made by a clerk in transcribing or otherwise. This is always readily corrected by the court. An error, for example, in the teste of a *fi. fa.;* Baker v. Smith, 4 Yeates (Pa.) 185; Berthon v. Keeley, *id.* 205; or in the teste and return of a *vend. exp.;* or in a certificate of a notary; Schwarz v. Baird, 100 Ala. 154, 13 South. 947; or where an action is begun by one plaintiff and is afterwards amended by adding additional parties, the entering of judgment in favor of "the plaintiff" instead of "the plaintiffs" is a clerical error and amendable on appeal; Shoemaker v. Knorr, 1 Dall. (U. S.) 197, 1 L. Ed. 97; or in writing Dowell for McDowell; Peddle v. Hollinshead, 9 S. & R. (Pa.) 284. See 8 Co. 162 *a;* Citizens' Bank v. Farwell, 56 Fed. 570, 6 C. C. A. 24; Storke v. Storke, 99 Cal. 621, 34 Pac. 339. An error is amendable where there is something to amend by, and this even in a criminal case; Benner v. Frey, 1 Binn. (Pa.) 367; 12 Ad. & E. 217; for the party ought not to be harmed by the omission of the clerk; Jack v. Eales, 3 Binn. (Pa.) 102; even of his signature, if he affixes the seal; McCormick v. Meason, 1 S. & R. (Pa.) 97. Where a clerical error has crept into a decree, the court will rectify it, though the decree has been passed and entered; Hovey v. McDonald, 109 U. S. 157, 3 Sup. Ct. 136, 27 L. Ed. 888; but not after the term without notice, especially where the condition of the parties has changed; Wetmore v. Karrick, 205 U. S. 141, 27 Sup. Ct. 434, 51 L. Ed. 745.

CLERICI DE CURSU. See CURSITOR.

CLERICUS (Lat.). **In Civil Law.** Any one who has taken orders in church, of whatever rank; monks. A general term including bishops, subdeacons, readers, and cantors. Du Cange. Used, also, of those who were given up to the pursuit of letters, and who were learned therein. Also of the amanuenses of the judges or courts of the king. Du Cange.

In English Law. A secular priest, in opposition to a regular one. Kennett, Paroch. Ant. 171. A clergyman or priest; one in orders. *Nullus clericus nisi causidicus* (no clerk but what is a pleader). 1 Bla. Com. 17. A freeman, generally. One who was charged with various duties in the king's household. Du Cange.

CLERICUS MERCATI HOSPITII REGIS. The clerk of the market at the king's gate. An honorable office pertinent to the ancient custom of holding markets in the suburbs of the king's court. In early times he witnessed the parties' verbal contracts. At a later date he adjudicated in its prices of commodities; he inquired as to all weights and measures; he measured land; and had the power to send bakers and others to the pillory. Inderwick, The King's Peace.

CLERK. In Commercial Law. A person in the employ of a merchant, who attends only to a part of his business, while the merchant himself superintends the whole. He differs from a factor in this, that the latter wholly supplies the place of his principal in respect to the property consigned to him. Pardessus, *Droit Comm.* n. 38; 1 Chit. Pr. 80.

In Ecclesiastical Law. Any individual who is attached to the ecclesiastical state and has submitted to the tonsure. One who has been ordained. 1 Bla. Com. 388. A clergyman. 4 Bla. Com. 367.

In Offices. A person employed in an office,

public or private, for keeping records or accounts.

His business is to write or register, in proper form, the transactions of the tribunal or body to which he belongs. Some clerks, however, have little or no writing to do in their offices: as the clerk of the market, whose duties are confined chiefly to superintending the markets. This is a common use of the word at the present day, and is also a very ancient signification, being derived, probably, from the office of the *clericus*, who attended, amongst other duties, to the provisioning the king's household. See Du Cange.

A person serving a practising solicitor under binding articles in England, for the purpose of being admitted to practice as a solicitor. See CLERKSHIP.

In New England, used to designate a corporation official who performs some of the duties of a secretary.

CLERK OF THE CROWN. An officer whose duty it is to issue writs for election for members of Parliament, upon the warrant of the Lord Chancellor and to deliver to the House of Commons the list of members returned (elected); to certify the election of Scotch and Irish peers; and to perform duties formerly performed by the Clerk of the Hanaper. He is Permanent Secretary of the Lord Chancellor's Office, House of Lords.

CLERK OF THE PEACE. An officer of Courts of Quarter Sessions in England.

CLERK OF THE TABLE. An official of the British House of Commons who advises the speaker on all questions of order.

CLERKSHIP. The period which must be spent by a law-student in the office of a practising attorney before admission to the bar. 1 Tidd, Pr. 61. Under the present rules he must serve as a clerk to a practising solicitor under binding articles for from three to five years; Odgers, C. L. 1431. For the earlier history of clerkships at law, see Report of Amer. Bar Assoc., 1911 (Section of Leg. Educ.).

CLIENT. In Practice. One who employs and retains an attorney or counsellor to manage or defend a suit or action to which he is a party, or to advise him about some legal matters. See ATTORNEY-AT-LAW.

CLOGGING THE EQUITY OF REDEMPTION. See EQUITY OF REDEMPTION.

CLOSE. An interest in the soil. Doctor & Stud. 30; 6 East 154; 1 Burr. 133; or in trees or growing crops. Clap v. Draper, 4 Mass. 266, 3 Am. Dec. 215; Stewart v. Doughty, 9 Johns. (N. Y.) 113.

In every case where one man has a right to exclude another from his land, the law encircles it, if not already inclosed, with an imaginary fence, and entitles him to a compensation in damages for the injury he sustains by the act of another passing through his boundary—denominating the injurious act a breach of the inclosure; Hamm. N. P. 151; Doctor & Stud. dial. 1, c. 8, p. 30; Worrall v. Rhoads, 2 Whart. (Pa.) 430, 30 Am. Dec. 274.

In considering the cases in which trespass might be supported for an injury to land (for breaking the close) it is laid down that the term *close*, being technical, signifies the *interest* in the soil, and not merely an inclosure in the common acceptance of that term. It lies, however temporary the tenant's interest, and though it be merely in the profits of the soil as *vesturæ terræ* or *herbagii pasturæ;* Co. Litt. 4 *b;* 5 East 480; 6 *id.* 606; 5 T. R. 535; *prima tonsura;* 7 East 200; chase for warren, etc.; 2 Salk. 637; if it be in exclusion of others; 2 Bla. Rep. 1150; 8 M. & S. 499. So it lies by one having a right to take off grass; 6 East 602; or after a tenancy expires, a right to emblements; Stewart v. Doughty, 9 Johns. (N. Y.) 108; or by one having the right to cut timber trees; Clap v. Draper, 4 Mass. 266, 3 Am. Dec. 215.

Ejectment will not lie for a close; 11 Co. 55; Cro. Eliz. 235; Ad. Ej. 24. See CLAUSUM.

CLOSE COPIES. Copies which might be written with any number of words on a sheet. Office copies were to contain only a prescribed number of words on each sheet.

CLOSE HAULED. The arrangement of a vessel's sails when she endeavors to make progress in the nearest direction possible towards that point of the compass from which the wind blows. 6 El. & Bl. 771; Black, L. Dict.

CLOSE ROLLS. Rolls containing the record of the close writs *(literæ clausæ)* and grants of the king, kept with the public records. 2 Bla. Com. 346. See LETTERS CLOSE; ROLLS.

CLOSE SEASON. A time of the year when the taking of game is prohibited by statute. See FENCE MONTH.

CLOSE WRITS. Writs directed to the sheriff instead of to the lord. 3 Reeve, Hist. Eng. Law 45. Writs containing grants from the crown to particular persons and for particular purposes, which, not being intended for public inspection, are closed up and sealed on the outside, instead of being open and having the seal appended by a strip of parchment. 2 Bla. Com. 346; Sewall, Sher. 372.

CLOSED COURT. A term sometimes used to designate the Common Pleas Court of England when only serjeants could argue cases, which practice persisted until 1833.

CLOSING A CONTRACT. An expression used in New York to indicate the settlement or carrying out of a contract.

CLOTURE (Fr.). The procedure in deliberative assemblies whereby debate is closed. Introduced in the English parliament in the session of 1882. Wharton. It is generally

effected by moving the previous question. See Roberts, Rules of Order §§ 20, 58 *a*. This motion is not recognized in the senate of the United States.

CLOUD ON TITLE. See BILL TO QUIET POSSESSION AND TITLE.

CLUB. An incorporated or unincorporated association of persons for purposes of a social, literary, or political nature or the like. The latter is not a partnership; 2 M. & W. 172; 87 L. T. 571. No member becomes liable as such to pay to the society or any one else any money except the amount required by the rules; *id.;* [1903] A. C. 139.

The by-laws of a club constitute a contract between the members and the club. A member's resignation, to be effectual, must comply with the by-laws; Boston Club v. Potter, 212 Mass. 23, 98 N. E. 614, Ann. Cas. 1913C, 397.

A club organized for various sports voted, by a majority, to abolish pigeon shooting; held, that it was within its power; [1906] 1 Ch. 480.

See RESIGNATION; AMOTION; LIQUOR LAWS.

CO-ADMINISTRATOR. One who is administrator with one or more others. See ADMINISTRATOR.

CO-ASSIGNEE. One who is assignee with one or more others. See ASSIGNMENT.

CO-EXECUTOR. One who is executor with one or more others. See EXECUTOR.

CO-RESPONDENT. Any person called upon to answer a petition or other proceeding, but now chiefly applied to a person charged with adultery with the husband or wife, in a suit for divorce, and made jointly a respondent to the suit. See DIVORCE.

COADJUTOR. The assistant of a bishop. An assistant.

COADUNATIO. A conspiracy. 9 Coke 56.

COAL NOTE. A species of promissory note authorized by 3 Geo. II. c. 26, §§ 7, 8, which, having these words expressed therein, namely, "value received in coals," is to be protected and noted as an inland bill of exchange.

COAST. The margin of a country bounded by the sea. This term includes the natural appendages of the territory which rise out of the water, although they are not of sufficient firmness to be inhabited or fortified. Shoals perpetually covered with water are not, however, comprehended under the name of coast. The small islands situate at the mouth of the Mississippi, composed of earth and trees drifted down by the river, which are not of consistency enough for supporting life, and are uninhabited, though resorted to for shooting birds, form a part of the coast.

COCKET. A seal appertaining to the king's custom-house. Reg. Orig. 192. A scroll or parchment sealed and delivered by the officers of the custom-house to merchants as an evidence that their wares are customed. Cowell; Spelman, Gloss. See 7 Low. C. 116. The entry office in the custom-house itself. A kind of bread said by Cowell to be hard-baked; sea-biscuit; a measure. See WASTEL.

CODE (Lat. *Codex*, the stock or stem of a tree—originally the board covered with wax, on which the ancients originally wrote). A body of law established by the legislative authority of the state, and designed to regulate completely, so far as a statute may, the subject to which it relates.

From the rude beginning, expressed in the derivation of the word, there developed the somewhat diversified signification which it has acquired in jurisprudence. It has been used to describe a collection of pre-existing laws arranged and classified into a logical system, or one intended to be such, without the interpolation of new matter, and also a declaration of the law composed partly of such materials as might be at hand from all sources,—statutes, adjudications, customs,—supplemented by such amendments, alterations, and additions as seemed to the lawgivers to be required to constitute a complete system and adapt it to the purpose of its adoption, or promulgation.

This mixed character, it may probably be asserted with confidence, is essential to the existence of a code as the term is now understood, and has entered more or less into the composition of every body of laws known as such in history.

The idea of a code involves that of the exercise of the legislative power in its promulgation; but the name has been loosely applied also to private compilations of statutes.

The subject of codes and the kindred topics of legal reform have received great attention from the jurists and statesmen of the present century. Probably no subject in the domain of law has been the occasion of more extended and earnest discussion than the relative merits of the Code system as it is understood by jurists, and that which is considered and treated on both sides of the controversy as its antithesis, a body of law partly written and partly unwritten, finding its beginnings in customs gradually ripening into customary law, seeking later expression in statutes and passing through a period of judicial interpretation and modification by being fitted, as it were, into successive cases, with sufficiently varying facts to produce that flexibility which is needed for final crystallization into a body of rules and principles sufficiently well settled as to have attained the dignity of a well ordered system. Of the one the Roman Law is the illustration unrivalled in history, as is the English Common Law of the other. While, however, these do represent two distinct and well defined systems of the development of law, the thoughtful and impartial reader of what is written by the ardent advocates of each, assuming as many of them do that the adoption of the one is the exclusion of the other, may find himself inclining to the conclusion that in dealing with this as with most juridical questions, an entirely one-sided view will leave much to be desired. It may be permissible to question whether these two systems are essentially distinct and antagonistic types, or different methods employ-

ed in and essential to the evolution of municipal law as a whole, and of the science of jurisprudence in its widest sense. It is true that there are recorded in history proposals to form a code of laws *de novo* having relation only to the future and disregarding the past, but this has been properly regarded as the visionary dream of the enthusiast rather than the matured conclusion of a judicious lawgiver. It is hardly to be questioned that no code has ever taken its place as an instrument of legal administration into which there did not enter as a substantial constituent a body of existing common law, and that every body of unwritten law on a given subject is tending towards ultimately finding its expression in what is tantamount to a code, whether called by that name or not. Indeed, if dry technicalities of definition be avoided, it is hardly an exaggeration to say that there are single decisions of English or American judges, such, for example, as Coggs v. Bernard, which may not be inaptly termed a code or codification of the law on the subject to which they relate, and which come to be recognized as such with authority which could hardly be increased by legislative affirmation. The difficulty of making a hard and fast line between the two systems is quite well shown by all the attempts to define precisely the word code. A judicious writer, after a review of the historical codes, concludes that substantially they are of three kinds; and his classification is not only satisfactory in itself but admirably illustrates what has been said.

"*First.*—The classification of statutes of force systematically arranged, according to subject-matter, without amendment, alteration, or interpolation of new law, the only change being in the correction of errors of expression, repetitions, superfluities, and contradictions, compressed into as small a space as possible, which, when done, will leave the laws in letter and in spirit just as they *were*.

"*Second.*—The same as the first in form, but going further and making such amendments as are deemed necessary to harmonize and perfect the existing system.

"*Third.*—To take a yet greater latitude, and, without changing the existing *system* of laws, to add new laws, and to repeal old laws, both in harmony with it, so that the code will meet *present* exigencies, and so far as possible provide for the future; and this is *real* codification." To these statements the writer adds a fourth, "wholly impracticable and even visionary," which is "to disregard at will *existing* laws, and make a system substantially *new*," such as the author deems best and wisest. Paper of Judge Clark, Rep't Ga. St. Bar Ass'n, 1890.

There is unquestionably a strong tendency towards codification in a general sense, which manifests itself in the tendency to general revisions of federal and state statutes, the adoption of codes of procedure by name in several of them, and in fact though not in name in many others, the codes of India, and not the least in the growing interest in an active discussion of the subject. If this interest leads to action wisely tempered with a due regard for the proper functions of written and unwritten law, and freedom from extreme views and the effort to accomplish the impossible task of reducing all law to the unyielding forms of statutory enactment, it will undoubtedly be fruitful of good results.

When it is considered how rapidly statutes accumulate as time passes, it is obvious that great convenience will be found in having the statute law in a systematic body, arranged according to subject-matter, instead of leaving it unorganized, scattered through the volumes in which it was from year to year promulgated. Revision to this extent is very frequent, and is what is usually accomplished in the Revised Statutes of many states which are inartificially termed codes. Of this general character were the Revised Statutes of the United States; *infra*. When the transposition of the statutes from a chronological to a scientific order is undertaken, more radical changes immediately propose themselves. These are of two classes: *first*, amendments for the purpose of harmonizing the inconsistencies which such an arrangement brings to notice, and supplying defects; *second*, the introduction into the system of all other rules which are recognized as the unwritten or common law of the state. The object of the latter class of changes is to embody in one systematic enactment all that is thenceforth to be regarded as the law of the land. It is this attempt which is usually intended by the distinctive term codification.

The first two of the questions thus indicated may be deemed as settled, by general concurrence, in favor of the expediency of such changes; and the process of the collection of the statute law in one general code, or in a number of partial codes or systematic statutes, accompanied by the amendments which such a revision invites, is a process which for some years has been renovating the laws of England and the United States. Although at the same time something has been done, especially in this country, towards embodying in these statutes principles which before rested in the common or report law, yet the feasibility of doing this completely, or even to any great extent, must be deemed an open question. It has been discussed with great ability by Bentham, Savigny, Thibaut, and others. It is undeniable that, however successfully a code might be supposed to embody all existing and declared law, so as to supersede previous sources, it cannot be expected to provide prospectively for all the innumerable cases which the diversity of affairs rapidly engenders, and there must soon come a time when it must be studied in the light of numerous explanatory decisions.

Real codification involves the most intimate and exhaustive knowledge not only of the statute law to be included, but also of the judicial interpretation and construction of it, and from the moment of the adoption of a code it begins to be the subject of a new series of decisions which are required to interpret, modify, and explain it and adapt it to modern conditions and the facts of cases of new impression, as is and always has been the case with respect to the adaptation of the ancient rules of the common law to modern conditions. In doing this the necessity for and opportunity of judicial legislation are infinite, and with the multiplicity of courts and jurisdictions the difficulties of preserving a system founded on reason are far greater than they were even a very few years ago. And this consideration is strongly urged in favor of the code system. On the other hand, that the law of master and servant, which was founded on such relations as the coachman and the blacksmith's striker, should have been applied with so little friction to the railroad and the factory, is hardly less wonderful than the development of the common carrier of the post road and van to the telephone company, and these rapid transformations may serve as the basis of an argument that no civil code can be framed with sufficient wisdom to provide for the constantly changing conditions of life and business.

In addition to the considerations herein mentioned as bearing upon the subject, Lord Chief Justice Russell, in his address before the American Bar Association (Report 1896), in disapproving of the proposal to codify international law, mentions and illustrates a very fundamental objection to the codification of branches of the law not yet definitely reduced to fixed rules. His observations approach very nearly the suggestion of a striking and effective limitation of the extent to which codification should go beyond the scientific revision of statute law, and in the direction of including law settled by decision and not by statute. Some branches of the law are admirably adapted to complete codification, some others are not yet, and others again by their nature never can or will be.

Judge Redfield points out clearly the well known objections to codification: "This is one of the great excellencies of the unwritten law above a written code. The general principles of the former are allowed to embrace new cases as they arise, without regard to the enumerations already made under it; while the latter having been reduced to formal definitions, necessarily excludes all cases not anticipated at the time these definitions were made." 12 Amer. L. Reg. N. S. 185. On the other hand it is said that the opposition thereto of many English

lawyers "is supported, if not justified, by the fear that the courts would put a narrow construction on the articles of a Code." 14 L. Q. R. 9.

"However much we may codify the law into a series of seemingly self-sufficient propositions, those propositions will be but a phase in a continuous growth. To understand their growth fully, to know how they will be dealt with by judges trained in the past which the law embodies, we must ourselves know something of that past. The history of what the law has been is necessary to the knowledge of what the law is." O. W. Holmes, The Common Law, 27.

See 2 Sel. Essays in Anglo-Amer. Leg. Hist., by Charles M. Hepburn, on the Historical Development of Code Pleading (1897).

The discussions on this subject have called attention to a subject formerly little considered, but which is of fundamental importance to the successful preparation of a code—the matter of statutory expression. There is no species of composition which demands more care and precision than that of drafting a statute. The writer needs not only to make his language intelligible, he must make it incapable of misconstruction. When it has passed to a law, it is no longer his intent that is to be considered, but the intent of the words which he has used, and that intent is to be ascertained under the strong pressure of an attempt of the advocate to win whatever possible construction may be most favorable to his cause. The true safeguard is found not in the old method of accumulating synonyms and by an enumeration of particulars, but rather—as is shown by those American codes of which the Revised Statutes of New York and the revision of Massachusetts are admirable specimens—by concise but complete statement of the full principle in the fewest possible words, and the elimination of description and paraphrase by the separate statement of necessary definitions. One of the rules to which the New York revisers generally adhered, and which they found of very great importance, was to confine each section to a single proposition. In this way the intricacy and obscurity of the old statutes were largely avoided. The reader who wishes to pursue this interesting subject will find much that is admirable in Coode's treatise on Legislative Expression (Lond. 1845) (reprinted in Brightly's Purdon's Digest, Penna.). The larger work of Gael (Legal Composition, Lond. 1810) is more especially adapted to the wants of the English profession.

GREAT BRITAIN. There has not been in England any general codification in the modern sense.

There were some early English so-called codes which were of the former character. The first code in England appears to have been about the year 600 by Athelbert, king of the Kentings. His laws have come down to us only in a copy made after the Norman Conquest. They consist of ninety brief sentences. In the end of the 7th century the west Saxons had written laws,—the laws of Ine. The next legislator is Alfred the Great, about two centuries later. Later came the code of Cnute. 1 Social England 165.

These are merely of historical interest. But in recent years there has been in England as elsewhere an interest in the subject of the arrangement, classification, and simplification of the law which found expression not only in words but in legislative action. The necessity for some reform, and the conditions which have forced the subject upon the attention of the English Bar and Parliament, are well expressed by Mr. Crackanthorpe in his address before the Amer. Bar Assoc. (1896):

"We have in our libraries a number of monographs, dealing with the subheads of Law in the most minute detail—books on Torts and Contracts, on Settlements and Wills, on Purchases and Sales, on Specific Performance, on Negotiable Instruments, and so forth. We have also many valuable compendia, or institutional treatises, dealing with the Law as a whole. Each and all of these, however, bear witness to the disjointed character of our Jurisprudence. The numerous monographs overlap and jostle each other, like so many rudderless boats tossing at random on the surface of a wind-swept lake, while the institutional treatises, in their endeavor to be exhaustive, fail in point of logical arrangement, just as a vessel overladen with a mixed cargo fails to get it properly stowed away in the hold. Some day, perhaps, we shall produce a Corpus Juris which will reduce our legal wilderness to order, and, by grubbing up the decayed trees, enable us to discern the living forest. We have already digested with success portions of our civil law, notably that relating to bills of exchange and a part of that relating to partnership and trusts. These experiments are likely to be renewed from time to time, and I doubt not that ultimately we shall have a civil code as complete as that which has just been promulgated in Germany. At present we have not even a criminal code such as you have in the State of New York and as is to be found in most continental countries, all that has been done in that direction being to pass five consolidating statutes dealing with larceny and a few other common offences."

In addition to those mentioned the partial codes thus far adopted in England include the Bills of Sale Act, the Employers' Liability Act, and others, and the India code is the result of a very successful effort to codify specific titles of the common law, and it is now constantly referred to in common-law jurisdictions as the best considered expression of the rules of the common law on subjects covered by it at the time of its adoption. In addition to the partial or special English codes referred to, the course which the discussion upon codification has taken in that country has led to the systematic collection and revision of statutes upon particular subjects. Under the direction of Lord Cairns, the statutes of England from 1 Henry III. have been systematically revised by a committee, and published as the "Revised Statutes."

In other British dependencies there have been movements in the direction of codification more pronounced in some instances than those in England. In Hong Kong and at the Straits Settlements codes of civil procedure were adopted on the lines of the New York code, which was also utilized in the Indian code.

The English Judicature Acts of 1873 and 1875 accomplished many of the reforms in the line of simplification. Its chief merit was the fusion of law and equity.

UNITED STATES. In this country the subject has received no less attention and has presented obstacles of less magnitude. Codes and revisions have been enacted as follows:

The Revision of Federal Statutes in 1873, which went into effect June 22, 1874, was by act of congress declared to constitute the law of the land; the pre-existing laws were thereby repealed, and ceased to be of

effect. By subsequent acts of congress, certain errors in this revision were corrected. A new edition of the Revision of 1873 was authorized by acts of March 2, 1877, and March 9, 1878; this is not a new enactment, but merely a new publication; it contains a copy of the Revision of 1873, with certain specific alterations and amendments made by subsequent enactments of the 43d and 44th congresses, incorporated according to the judgment and discretion of the editor, under the authority of the acts providing for his appointment. These alterations, or amendments, were merely indicated by italics and brackets. The act of March 9, 1878, provides that the edition of 1878 shall be legal evidence of the laws therein contained in all the courts of the United States, and of the several states and territories, "but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by congress since the first day of December, 1873."

The supplement of 1881 is official to a limited extent. The provisions in regard to it are as follows: "The publication herein authorized shall be taken to be *prima facie* evidence of the laws therein contained in all the courts of the United States, and of the several states and territories therein; but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by congress: *Provided*, that nothing herein contained shall be construed to change or alter any existing law;" 21 Stat. L. 388. See Wright v. U. S., 15 Ct. Cl. 80, where the subject is explained by Richardson, J., one of the compilers. Volume I, Supplement to the Revised Statutes, contains all the permanent general laws enacted from the passage of the Revised Statutes in 1874, to and including the fifty-first congress, which expired in 1891, and supersedes Vol. I., prepared under resolution of June 7, 1880. The publication is *prima facie* evidence of the laws therein contained in all of the courts of the United States. Vol. II. of the Supplement contains the general laws of the fifty-second and subsequent congresses.

The laws of the United States relating to the judiciary were enacted into the Judicial Code, March 3, 1911, and went into effect January 1, 1912; those relating to crimes were enacted into the Criminal Code, March 4, 1909, and went into effect January 1, 1910.

COLONIAL CODES. Of these there were several adopted in the colonies prior to the Revolution.

In 1665 a code prepared by Lord Chancellor Clarendon, called the "Duke's Laws," was promulgated and went into operation at Long Island and West Chester, New York. Afterwards its provisions slowly made their way in New York and the other provinces.

It was an attempt to state the law relating to the rights of persons and property, and of procedure both civil and criminal.

The Massachusetts colony, in March, 1634, appointed a committee to revise the law. Other committees were appointed in 1635 and 1637. Maryland adopted a code in 1639. In Massachusetts in 1641, a code of laws was adopted which was called "The Liberties of the Massachusetts Colony in New England." Connecticut adopted a code in 1650, chiefly copied from the Massachusetts code. Virginia appears to have adopted a body of laws in 1611, and in 1656 their laws were reduced into one volume.

STATE CODES. New York is the pioneer in the work of codification. In that state the first act relating to procedure after the organization of state government was passed March 16, 1778. Various other acts were passed between 1801 and 1813. In 1813 there was a general revision of the law, and the subject of practice of the law. In 1828 the revisers collected into one act the various provisions relating to practice in all the courts which was made a part of the Revised Statutes. It is said that this part of the Revised Statutes constituted the first code of civil procedure in New York. It embraced nearly all the practice in all the courts and has been the basis of subsequent code revision. In 1848 the "Code of Procedure" was adopted. David Dudley Field, the eminent writer on this subject, had begun his work on law reform in 1839. In 1848 a commission of which he was chairman produced the "Code of Procedure," containing 391 sections, which was adopted in that year. This code was largely amended in 1849, and has received frequent amendments at various times since that year.

The laws of Pennsylvania were extensively revised in 1833–1836, upon the Report of Commissioners appointed by the legislature, William Rawle, Joel Jones and Thomas I. Wharton.

Codification has proceeded in many states, especially in procedure. The list of states cannot be given here.

The enactment of uniform laws on special branches of the law, in many states and in England, is a movement towards codification upon proper lines. The act on Negotiable Instruments has been passed in nearly all the states; the Warehouse Receipt Act, the Sales Act, Bills of Lading Act and the Stock Transfer Act have been passed in many states.

In Louisiana, the civil law prevails and there are complete codes framed thereunder. One feature of the Louisiana code should be carefully noted. Art. 21 declares that "in all civil matters where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably an appeal is to be made to natural law and reason, or received usages, where

positive law is silent." This code was adopted in 1824 and took effect in 1825, the revision of 1870 being the same code, with the slavery provisions omitted, and with such amendments as had previously been made. It is said that the power above quoted has never been exercised except to furnish a remedy or mode of procedure.

FOREIGN COUNTRIES. On the continent of Europe the systems of law are generally founded upon the civil law, and each country has its own code, which is usually an adaptation in whole or in part of Roman Law. These codes are different in character, falling within sometimes one and sometimes another of the classes above enumerated, as they were intended to be scientific collections and classifications of existing law or to exclude new legislation.

The modern codes of Europe were preceded by periods of codification, such as that which Maine designates the "era of codes," in which, throughout the world, so far as the sphere of Roman and Hellenic influence extended, there appeared codes of the class of which The Twelve Tables is the conspicuous example; Maine, Anc. L. 2, 13; and the many codes of the Middle Ages based upon Roman law modified by local customs. There were also a great number of codes of maritime law, which in its nature was, and still is, well adapted to this exact form of expression, many of which are collected in the Black Book of the Admiralty, which has been said to contain all maritime codes known at the time. Below are briefly referred to the best known codes, ancient and modern.

AMALPHITAN TABLE. Amalphi, on the Adriatic Sea, is said to have had a Maritime Court in the 10th century presided over by the consuls of the sea. A manuscript containing the ordinances of the Maritime Court of Amalphi was discovered in the Imperial Library at Vienna in 1843. And has been called by that name. Its date is the 11th century. Printed in Black Book of the Admiralty, Vol. IV. See The Scotia, 14 Wall. (U. S.) 170, 20 L. Ed. 822.

AUSTRIAN. *The Civil Code* was promulgated July 7, 1810. The first part of it was published and submitted to the Universities and the courts of justice, and some parts having been found wholly unsuited to the purpose, were by his successor abrogated. It is founded in a great degree upon the Prussian. *The Penal Code* (1852) is said to adopt to some extent the characteristics of the French Penal Code.

The civil code originated in an ordinance issued by Maria Theresa in 1753, the avowed objects being to provide for uniformity of the law in the provinces and digest the existing law. The result was unsatisfactory and another commission authorized Counsellor Harten to construct a code, of which the conditions prescribed are quite worthy of repetition. They were: 1. To abstain from doctrinal development. 2. To have in view contestations of the most frequent occurrence. 3. To be clear in expression. 4. To be governed by natural equity rather than the principles of the Roman Law. 5. To simplify the laws and to refrain from too much subtlety in details.

BURGUNDIAN. The *Lex Romana Burgundionum* seems to be the law-book that Gundobad promised to his Roman subjects. He died in 516. They were East Germans scattered among the Roman provincials. Rules in it were taken from the three Roman *codices*, from the current abridgments of imperial constitutions and from the works of Gaius and Paulus. Little that is good has been said of it. Maitland, in 1 Sel. Essays in Anglo-Amer. Leg. Hist. 14.

CONSOLATO DEL MARE. A code of maritime law of high antiquity and great celebrity.

A collection of the customs of the sea observed in the Consular Court of Barcelona. It received many additions and acquired the name of the "Consulate" early in the 15th century. The Book of the Consulate was printed at Barcelona in the Catalan tongue in 1494 and was drawn up by the notary of the Consular Court for the use of the Consuls of the sea at Barcelona. It dates back to the 14th century. T. C. Mears in Roscoe, Adm. Jur. (3d ed.); Sir Travers Twiss, in 2 Black Book of Adm. Lord Mansfield quotes from it as containing a valuable body of maritime law; 2 Burr. 889. Lord Stowell refers to it in 1 C. Rob. 43, and 1 Dods. 116. The edition of Pardessus, in his *Collection de Lois Maritimes* (vol. 2), is deemed the best. There is also a French translation by Boucher, Paris, 1808. See also, Reddie, Hist. of Mar. Com. 171; Marvin's Leg. Bibl.; J. Duer, Ins.; 7 N. A. Rev 330.

CHINA. Ta Ching Lu Li (literally, Statute Laws and Usages of the Great Ching Dynasty), generally known as the Penal Code. Compiled in 1647. A remarkable collection of imperial proclamations, philosophical dissertations, positive laws and procedure both civil and penal from remotest times. There is an English translation by G. T. Staunton, 1810, London.

EGYPT. Code of International Tribunals of "Mixed Courts." See MIXED TRIBUNALS. These are codes of substantive law and procedure in civil and criminal matters closely following the Code Napoléon. See "The Law Affecting Foreigners in Egypt" by J. H. Scott, 1907, London; Hertslet, Commercial Treaties, vol. XIV, p. 303.

FRENCH CODES. The chief French codes of the present day are five in number, sometimes known as *Les Cinq Codes*. They were in great part the work of Napoleon, and the first in order bears his name. They are all frequently printed in one duodecimo volume. These codes do not embody the whole French law, but minor codes and a number of scattered statutes must also be resorted to upon special subjects.

Code Civil, or *Code Napoléon*, is composed of thirty-six laws, the first of which was passed in 1803 and the last in 1804, which united them all in one body, under the name of *Code Civil des Français*.

The first steps towards its preparation were taken in 1793, but it was not prepared till some years subsequently, and was finally thoroughly discussed in

all its details by the Court of Cassation, of which Napoleon was president and in the discussions of which he took an active part throughout. In 1807 a new edition was promulgated, the title *Code Napoléon* being substituted. In the third edition (1816) the old title was restored; but in 1852 (the Second Empire) it was again displaced by that of Napoleon and after the Republic came in, in 1870, it again became the Code Civil.

Under Napoleon's reign it became the law of Holland, of the Confederation of the Rhine, Westphalia, Bavaria, Italy, Naples, Spain, etc. It has undergone great amendment by laws enacted since it was established. It is divided into three books. Book 1, Of Persons and the enjoyment and privation of civil rights. Book 2, Property and its different modifications. Book 3, Different ways of acquiring property. Prefixed to it is a preliminary title, Of the Publication, Effects, and Application of Laws in General.

One of the most perspicuous and able commentators on this code is Toullier, frequently cited in this work.

There is an English translation by Cachard and a later one by Wright.

Writing from the standpoint of a common-law lawyer, James C. Carter (the Law, etc., 303) refers to the Code Napoléon, so far as establishing a system of law certain, easy to be learned and easy to be administered, as a failure, citing Amos, An English Code, as holding the same view. For a history of it, see 40 Amer. L. Rev. 833, by U. M. Rose; 49 Amer. L. Reg. (o. s.) 127, by W. W. Smithers.

Code de Procédure Civil. That part of the code which regulates civil proceedings.

It is divided into two parts. Part First consists of five books: the first of which treats of justices of the peace, the second, of inferior tribunals, the third, of royal (or appellate) courts; the fourth, of extraordinary means of proceeding; the fifth, of the execution of judgments. Part Second is divided into three books, treating of various matters and proceedings special in their nature.

Code de Commerce. The code for the regulation of commerce.

This code was enacted in 1807. Book 1 is entitled, Of Commerce in General. Book 2, Maritime Commerce. The whole law of this subject is not embodied in this book. Book 3, Failures and Bankruptcy. This book was very largely amended by the law of 28th May, 1838. Book 4, Of Commercial Jurisdiction,—the organization, jurisdiction and proceedings of commercial tribunals. This code is, in one sense, a supplement to the *Code Napoléon*, applying the principle of the latter to the various subjects of commercial law. Sundry laws amending it have been enacted since 1807. Pardessus is one of the most able of its expositors. See Goirand, Code of Commerce.

Code d'Instruction Criminelle. The code regulating procedure in criminal cases, taking that phrase in a broad sense.

Book 1 treats of the police; Book 2, of the administration of criminal justice. It was enacted in 1808 to take effect with the Penal Code in 1811.

Code Pénal. The penal or criminal code.

Enacted in 1810. Book 1 treats of penalties in criminal and correctional cases, and their effects; Book 2, of crimes and misdemeanors, and their punishment; Book 3, offences against the police regulations, and their punishment. Important amendments of this code have been made by subsequent legislation.

CODE MILITAIRE. The military code, substantive and procedural, for the army. Promulgated in 1857.

There is also a *Code Forestier;* and the name code has been inaptly given to some private compilations on other subjects.

GENTOO CODE. A translation of the laws of the Hindus made during the administration of Warren Hastings as Governor-General of India, and prior to the translation of the Institutes of Manu.

The formulation of Hindu law in those institutes *(q. v. supra)* had the same effect in India as had always resulted from the written expression of the law. There was gradually formed a new body of law consisting of decisions and opinions of learned men upon the construction of written law closely resembling the body of law which was engrafted upon the Institutes of Justinian. The translation of those laws in the Gentoo code was followed by a further digest under the authority of the English government, so that a very complete body of Hindu law grew up, which discloses a system of procedure resembling in a marked degree that of the present day, comprising,—a complaint, a summons or citation, an appearance, a hearing of both parties, the presence of attorneys, and a law of evidence and method of examining witnesses.

There seems also to have been in India in very early times a system of natural arbitration by neighbors, probably the earliest effort at an administration of justice and resembling the ancient county court of the Saxons. See Manu, *infra.*

GERMAN CODE. In the current which swept over Europe during the sixteenth century, substituting, as Professor Sohm phrases it, "the revived spirit of antiquity for mediæval conceptions and ideas," Germany participated in the changes which took place in all departments of science. Then the Roman law was "received" in that country, and from that time it has been a controlling factor in the jurisprudence of the countries which form the German Empire. In certain territorial limits over which the Prussian Landrecht (see PRUSSIAN CODE) held sway "the formal validity of the *Corpus Juris Civilis* has been expressly set aside," but even there "the force of Roman principles of law has nevertheless remained substantially unimpaired within large departments of German jurisprudence." Particularly is the science of the Roman private law imbedded in the German jurisprudence, and indeed the existence of law as a science in Germany dates from the introduction of the Roman law. There were no preconceived ideas with which to conflict, and it was accepted by a national intellect unprejudiced by any preconceived ideas. See Prussian Code, *infra.*

The completion of twenty-five years of the life of the Empire has been made the occasion of the construction and promulgation of a new German code which has been in the course of preparation for several years. It is an example for the most part of antecedent laws, though of an arrangement novel in various respects. The civil code, having passed the Reichstag and received the approval of the emperor, was duly promulgated August 19, 1896, to go into effect January 1, 1900, at the same time with other special codes, including those of Civil Procedure (1877), Insolvency, Assignments, Arbitrations, and the like. See Guide to Law of Germany, published by the Library of Congress (1912).

There is an English translation of "The

Civil Code of the German Empire" by Walter Loewy, published by a joint Committee of Pennsylvania Bar Association and University of Pennsylvania, 1909.

F. W. Maitland said of the Civil Code: "Never yet, I think, has so much first-rate brain power been put into any actual legislation;" 3 Collected Papers 474.

GREGORIAN. An unofficial compilation of the rescripts of the Roman emperors. It is said to have been made in the Orient perhaps about A. D. 295. Maitland in 14 L. Q. R. 15. It is not now extant.

The Theodosian Code, which was promulgated nearly a century afterwards, was a continuation of this and of the collection of Hermogenes. The chief interest of all these collections is in their relation to their great successor the Justinian Code.

GUIDON DE LA MER. A collection of sea laws drawn up towards the close of the 16th century, probably at the instance of the merchants of Rouen.

HAMMURABI, CODE OF. A collection of decisions in the civil courts and adapted to general use in Babylonia, about 2250 B. C. It was discovered in the Acropolis of Susa. A translation by C. H. W. Jones was published in 1903.

HANSE TOWNS, LAWS OF THE. A code of maritime law established by the Hanseatic towns. See HANSEATIC LEAGUE.

It was first published in German, at Lubec, in 1597. In an assembly of deputies from the several towns, held at Lubec, May 23, 1614, it was revised and enlarged. The text, with a Latin translation, was published with a commentary by Kuricke; and a French translation has been given by Cleirac in *Us et Coutumes de la Mer* An English version may be found in 1 Peters, Adm. xciii, and in 30 Fed. Cas. 1197.

HENRI (French). The best-known of several collections of ordinances made during the sixteenth, seventeenth, and eighteenth centuries, the number of which in part both formed the necessity and furnished the material for the *Code Napoléon*.

HENRI (Haytien). A very judicious adaptation from the *Code Napoléon* for the Haytiens. It was promulgated in 1812 by Christophe (Henri I.).

HERMOGENIAN. An unofficial compilation made in the fourth century, supplementary to the code of Gregorius. It is not now extant. It is said to have been made in the Orient, perhaps between A. D. 314 and 324, but these dates are uncertain. Maitland in 14 L. Q. R. 15.

JAPAN. In 1880 a Penal Code and a Code of Penal Procedure were adopted, in 1890 a Commercial Code (revised in 1899), and in 1893 a Civil Code, became effective. There is an English translation of the Civil Code by L. H. Loenholm, Tokio, 1906, 3d ed., and another with annotations by J. E. de Becker, London, 1910. There is an English translation of the Commercial Code by Yang Yin Hang published in 1911 by the University of Pennsylvania. The principles are derived from German and French sources, with the former predominating in the Commercial, and the latter in the Civil, Code.

JUSTINIAN CODE. A collection of imperial ordinances compiled by order of the emperor Justinian.

All the judicial wisdom of the Roman civilization which is of importance to the American lawyer is embodied in the compilations to which Justinian gave his name, and from which that name has received its lustre. Of these, first in contemporary importance, if not first in magnitude and present interest, was the Code. In the first year of his reign he commanded Tribonian, a statesman of his court, to revise the imperial ordinances. The first result, now known as the *Codex Vetus*, is not extant. It was superseded a few years after its promulgation by a new and more complete edition. Although it is this alone which is now known as the Code of Justinian, yet the Pandects and the Institutes which followed it are a part of the same system, declared by the same authority; and the three together form one codification of the law of the Empire. The first of these works occupied Tribonian and nine associates fourteen months. It is comprised in twelve divisions or books, and embodies all that was deemed worthy of preservation of the imperial statutes from the time of Hadrian down. The Institutes is an elementary treatise prepared by Tribonian and two associates upon the basis of a similar work by Gaius, a lawyer of the second century.

The Pandects, which were made public about a month after the Institutes, were an abridgment of the treatises and the commentaries of the lawyers. They were presented in fifty books. Tribonian and the sixteen associates who aided him in this part of his labors accomplished this abridgment in three years. It has been thought to bear obvious marks of the haste with which it was compiled, but it is the chief embodiment of the Roman law, though not the most convenient resort for the modern student of that law.

Tribonian found the law, which for fourteen centuries had been accumulating, comprised in two thousand books, or—stated according to the Roman method of computation—in three million sentences. It is probable that this matter, if printed in law volumes such as are now used, would fill from three to five hundred volumes. The comparison, to be more exact, should take into account treatises and digests, which would add to the bulk of the collection more than to the substance of the material. The commissioners were instructed to extract a series of plain and concise laws, in which there should be no two laws contradictory or alike. In revising the imperial ordinances, they were empowered to amend in substance as well as in form.

The codification being completed, the emperor decreed that no resort should be had to the earlier writings, nor any comparison be made with them. Commentators were forbidden to disfigure the new with explanations, and lawyers were forbidden to cite the old. The imperial authority was sufficient to sink into oblivion nearly all the previously existing sources of law; but the new statutes which the emperor himself found it necessary to establish, in order to explain, complete, and amend the law, rapidly accumulated throughout his long reign. These are known as the "Novels." The Code, the Institutes, the Pandects, and the Novels, with some subsequent additions, constitute the *Corpus Juris Civilis*. See CIVIL LAW.

Among English translations of the Institutes are that by Cooper (Phila. 1812; N. Y. 1841)—which is regarded as a very good one—and that by Sandars (Lond. 1853), which contains the original text also, and copious references to the Digests and Code. Among the modern French commentators are Ortolan and Pasquiere.

LIVINGSTON'S CODE. Edward Livingston, one of the commissioners who prepared the Louisiana Code, prepared and presented to

congress a draft of a penal code for the United States; which, though it was never adopted, is not unfrequently referred to in the books as stating principles of criminal law.

MARINE ORDINANCES OF LOUIS XIV. See ORDONNANCE DE LA MARINE, *infra.*

MANU, INSTITUTES OF. A code of Hindu law, of great antiquity, which still forms the basis of Hindu jurisprudence (Elphinstone's Hist. of India, p. 83), and is said also to be the basis of the laws of the Burmese and of the Laos. Buckle, Hist. of Civilization, vol. 1, p. 54, note, 70. "It undoubtedly enshrines many genuine observances of the Hindu race, but the opinion of the best contemporary orientalists is that it does not, as a whole, represent a set of rules ever actually administered in Hindustan. It is, in great part, an ideal picture of that which, in the view of the Brahmins, *ought* to be the law." Maine, Anc. Law 16.

This code contains simple rules for regulating the trial of ordinary actions; the number and competency of witnesses and sufficiency of evidence; methods of procedure in court and the judgment and its enforcement. There is no indication of such an office as the attorney, as the judge is required to examine witnesses and parties; there is also a summary of the customary law.

The institutes of Manu are, in point of the relative progress of Hindu jurisprudence, a recent production; Maine, Anc. Law 17, though ascribed to the ninth century B. C. A translation will be found in the third volume of Sir William Jones's Works. See, also, Gentoo Code, *supra;* HINDU LAW.

MOSAIC CODE. The code proclaimed by Moses for the government of the Jews, B. C. 1491.

One of the peculiar characteristics of this code is the fact that, whilst all that has ever been successfully attempted in other cases has been to change details without reversing or ignoring the general principles which form the basis of the previous law, that which was chiefly done here was the assertion of great and fundamental principles in part contrary and in part perhaps entirely new to the customs and usages of the people. These principles have given the Mosaic Code vast influence in the subsequent legislation of other nations than the Hebrews. The topics on which it is most frequently referred to as an authority in our law are those of marriage and divorce, and questions of affinity and of the punishment of murder and seduction.

ORDONNANCE DE LA MARINE. A code of maritime law promulgated by Louis XIV.

It was promulgated in 1681, and with great completeness embodied all existing rules of maritime law, including insurance. Kent pronounces it a monument of the wisdom of the reign of Louis "far more durable and more glorious than all the military trophies won by the valor of his armies." Its compilers are unknown. An English translation is found in 2 Peter's Adm. Dec., appendix; also in 20 Fed. Cas. 1203. The ordinance has been at once illustrated and eclipsed by Valin's commentaries upon it.

OLERON, LAWS OR ROLLS OF. The chief code of maritime law of the Middle Ages, which takes its name from the island of Oleron.

Both the French and the English claim the honor of having originated this code,—the former attributing its compilation to the command of Queen Eleanor, Duchess of Guienne, near which province the island of Oleron lies; the latter ascribing its promulgation to her son, Richard I. An English writer considers that the greater part of it is probably of older date, and was merely confirmed by Richard; 1 Soc. Eng. 313. He, without doubt, caused it to be improved, if he did not originate it, and he introduced it into England. He did at Chinon, in 1190, issue ordinances for the government of the navy which have been fairly described as the basis of our modern articles of war, and what they did for the navy, the code of Oleron, to which they were allied, did for the merchant service. After much learned discussion all are agreed now that the home of these judgments was Southern France; Studer, Oak Book of Southampton, Vol. II. Twiss considers that they were judgments of the Mayor's Court of Oleron. Other writers hold the view that they were a compilation of customs. Some additions were made to this Code by King John. It was promulgated anew in the reign of Henry III., and again confirmed in the reign of Edward III., at which time they had acquired the status of laws. There is a translation in 1 Pet. Adm. Dec. The text will be found in the Black Book of the Admiralty. The French version, with Cleirac's commentary, is contained in *Us et Coutumes de la Mer.* Studer's work, *supra,* discusses the subject at length, giving the various extant MSS. together with a critical translation of the text with variorum notes. The subjects upon which it is now valuable are much the same as those of the *Consolato del Mare.*

OSTROGOTHIC. The code promulgated by Theodoric, king of the Ostrogoths, at Rome, A. D. 500. It was founded on the Roman law.

PRUSSIAN CODE. *Allgemeines Landrecht.* The former code of 1751 was not successful, and the Grand Chancellor de Cocceji was charged by Frederick II. with the duty of codifying the law of Prussia; he died in 1735, and afterwards the work was arrested by the seven years' war, but was resumed in 1780, under Frederic II., and a project was prepared by Dr. Carmer and Dr. Volmar, which was submitted to the *savans* of Europe and to the royal courts. After long and thorough discussion, the present code was finally promulgated and put in force June 1, 1794, by Frederick William, and then for the first time all Europe was united under one system of law. It is known also as the Code Frederic. See German code, *supra.*

RHODIAN LAWS. A maritime code adopted by the people of Rhodes, and in force among the nations upon the Mediterranean nine or ten centuries before Christ. There is reason to suppose that the collection under this title in Vinnius is spurious, and, if so, the code is not extant. See Marsh. on Ins. b. 1, c. 4, p. 15.

SPAIN. This country, even more than France, has developed the Roman Law to its modern state in which it now divides the world with the English Common Law. The earliest codification, *Fuero Juzgo* or *Forum Judicum,* known to us as the *Visigothic Code,* appeared about 650 and embraced the Visigothic traditions that were first reduced to writing by Euric, in the latter half of the fifth century, the original of which is lost, and also much of the *Breviarium Alarici-anum,* composed largely of the Justinian and Theodosian Codes and promulgated early in the sixth century by Alaric II. The Com-

parative Law Bureau of the American Bar Association in 1910 published a translation by S. P. Scott who says in the preface that it is "the most remarkable monument of legislation which ever emanated from a semi-barbarian people and the only essential memorial of greatness or erudition bequeathed by the Goths to posterity."

Fuero Real or *Fuero de las Leyes*, a collection of laws and usages of the Castilian monarchy as well as Roman doctrines was promulgated by Alfonso X, the Wise, in 1255, and is considered an important monument of Spanish jurisprudence. It is in course of translation by S. P. Scott for the Comparative Law Bureau.

Las Siete Partidas (The Seven Parts) was also the product of Alfonso X, having been begun in 1256 and published in 1263, as *Libro de las Leyes*. The final popular title was not officially given to it until 1347, by Alfonso XI. Embracing the laws and customs contained in former codes, this was also a work of wisdom and philosophy and the most complete treatise of jurisprudence that had been published up to that time. It is still the authority of last resort wherever Spanish law once dominated. A translation has been made by S. P. Scott for the Comparative Law Bureau and is about to be published.

In 1507, under Phillip II, *La Nueva Recopilacion* was sanctioned and *La Novisima Recopilacion* was decreed in force on July 15, 1805, and while collections of laws, they were clearly utilitarian measures to create order in a vast mass of systemless legislation conflicting with the older but controlling codes.

The modern *Civil Code* had its origin in the Constitutional Cortes of Cadiz which in 1810, by special commission, undertook to codify the most important branches of the law; after many idle intervals it was completed and promulgated in Spain July 24, 1889. By decree of July 31, 1889, it was extended to Cuba, Porto Rico and the Philippine Islands. It has been translated by the War Department of the United States and also by Clifford S. Walton in his work "Civil Law in Spain and Spanish America," 1900. In its conciseness, scientific classification and underlying doctrines it shows the influence of the Romans, the Visigoths and the Moors.

Other modern codes and the years of their adoption are as follows: Civil Procedure, 1881; Criminal Code, 1870; Criminal Procedure, 1882; Commercial Code, 1885, and Military Code, 1890.

SPANISH AMERICA. While all these countries rest their jurisprudence on *Las Siete Partidas;* see LAS PARTIDAS; each one has its Civil and Commercial Codes; the countries, codes and dates of adoption are as follows: *Argentine Republic*, Commercial Code, 1890; Civil Code, effective 1871 (there is an English translation by Frank L. Joannini, published by the Comparative Law Bureau of the American Bar Association, 1914); *Bolivia*, Commercial Code, 1891; *Brazil*, Commercial Code 1850, Civil Code 1891; *Colombia*, Civil Code effective 1893, Commercial Code 1886–87; *Chili*, Civil Code 1857, Commercial Code 1865; *Costa Rica*, Commercial Code 1853, Civil Code effective 1888; *Ecuador*, Civil Code 1887, Commercial Code, 1878; *Guatemala*, Civil Code 1877, Commercial Code 1877; *Honduras*, Civil Code, effective 1899; *Mexico*, Civil Code 1884, Commercial Code 1889; *Peru*, Civil Code, effective 1852 (English translation by Frank L. Joannini, published by the Comparative Law Bureau of the American Bar Association, 1914); *Salvador*, Civil Code 1880, Commercial Code 1880, effective 1882; *Uruguay*, Civil Code 1895; *Venezuela*, Civil Code, effective 1896.

SWITZERLAND. On January 1, 1912, a Civil Code became effective and is the latest and most scientific work of its kind. It was drawn by Dr. Eugene Huber and was promulgated officially in French, German and Italian. An English translation by Robert P. Shick and Charles Wetherill is published by the Comparative Law Bureau of the American Bar Association (1914).

THEODOSIAN. A code compiled by a commission of eight under the direction of Theodosius the Younger.

It comprises the edicts and rescripts of sixteen emperors, embracing a period of one hundred and twenty-six years. It was promulgated in the Eastern Empire in 438, and quickly adopted, also, in the Western Empire. The great modern expounder of this code is Gothofredus (Godefroi). The results of modern researches regarding this code are well stated in the Foreign Quar. Rev. vol. 9, 374.

TRANI, ORDINANCES AND CUSTOMS OF THE SEA OF. Published in 1063, and said to be the most ancient body of maritime laws in existence. Its 32 articles consist of a series of decisions made by the maritime consuls of the guild of navigators at Trani, a city on the Adriatic Sea, in the 11th century. Printed in Black Book of the Admiralty, Vol. IV. "It was no 'code' in our modern sense of that term. It was only a more or less methodic collection of modern statutes." Maitland, 1 Sel. Essays in Anglo-Amer. Leg. Hist. 12 (14 L. Q. R. 16).

TWELVE TABLES. Laws of ancient Rome.

They arose out of the discontent of the plebs; after a long struggle decemoirs were appointed to draft a body of general laws (B. C. 449-451). Their draft was enacted into a statute. It was neither a code, nor, in the main, new law, but rather a concise and precise statement of the most important among the ancient customs of the people. It was the germ of the Roman law, and as late as Cicero boys learned it by heart. See Bryce, Rome & England (1 Sel. Essays in Anglo-Amer. Leg. Hist. 333). See fragment of the law of the Twelve Tables, in Cooper's Justinian 656; Gibbon's Rome c. 44; Maine, Anc. Law 2.

VISIGOTHIC. *Lex Romana Visigothorum.* See *supra*, sub-title SPAIN.

WISBY, LAWS OF. A concise but comprehensive code of maritime law, established by the "merchants and masters of the magnificent city of Wisby."

The port of Wisby, now in ruins, was situated on the northwestern coast of Gottland, on the Baltic sea. It was the capital of the island, and the seat of an extensive commerce, of which the chief relic and the most significant record is this code. It is a mooted point whether this code was derived from the laws of Oleron, or that from this; but the similarity of the two leaves no doubt that one was the offspring of the other. It was of great authority in the northern parts of Europe. *"Lex Rhodia navalis,"* says Grotius, *"pro jure gentium in illo mare Mediterraneo vigebat; sicut apud Gallium leges Oleronis, et apud omnes transrhenanos leges Wisbuenses." De Jure B.* lib. 2, c. 3. It is still referred to on subjects of maritime law. An English translation will be found in 1 Pet. Adm. Dec.; also in the Black Book of the Admiralty and 30 Fed. Cas. 1189.

The main additions to the above title, referring to recent codes or publication of new editions of the older codes, have been prepared for this work by William W. Smithers, of the Philadelphia Bar, Secretary of the Comparative Law Bureau of the American Bar Association (organized August 28, 1907), of which Simeon E. Baldwin, Founder of the American Bar Association, was also a Founder and has been the Director. The work of the Bureau has been of great public value and promises even greater results.

Publishers announce the publication of "The Commercial Laws of the World" in thirty-five volumes.

In a learned address before the American Bar Association (Annual Report, 1886), upon "Codification, the Natural Result of the Evolution of the Law," Mr. Semmes, one of the most earnest advocates of the merits of the civil law and the code system, sketches the history of the codes of Europe and the relation of the civil to the common law and in conclusion says:

"The history of codification teaches that the task of preparing a code of laws is difficult, that its proper execution is a work of years, to be entrusted, not to a deciduous committee of fugitive legislators, but to a permanent commission of the most enlightened and cultivated jurists, whose project, prior to adoptfon, should be subjected to rigid and universal criticism."

CODEX (Lat.). A volume or roll. The code of Justinian, See CODE.

CODICIL. Some addition to, or qualification of, a last will and testament.

This term is derived from the Latin *codicillus*, which is a diminutive of *codex*, and in strictness imports a little code or writing,—a little will. In the Roman Civil Law, codicil was defined as an act which contains dispositions of property in prospect of death, without the institution of an heir or executor. Domat, Civil Law, p. ii. b. iv. tit. i. s. 1; Just. *De Codic.* art. i. s. 2. So, also, the early English writers upon wills define a codicil in much the same way. "A codicil is a just sentence of our will touching that which any would have done after their death, without the appointing of an executor." Swinb. Wills, pt. i. s. 5, pl. 2. But the present definition of the term is that first given. 1 Wills, Exrs. 8; Swinb. Wills, pt. i. s. v. pl. 5.

Under the Roman Civil Law, and also by the early English law, as well as the canon law, all of which very nearly coincided in regard to this subject, it was considered that no one could make a valid will or testament unless he did name an executor, as that was of the essence of the act. This was attended with great formality and solemnity, in the presence of seven Roman citizens as witnesses, *omni exceptione majores.* Hence a codicil is there termed an unofficious, or unsolemn, testament. Swinb. Wills, pt. i. s. v. pl. 4; Godolph, pt. i. c. 1, s. 2; *id.* pt. i. c. 6, s. 2; Plowd. 185; where it is said by the judges, that "without an executor a will is null and void," which has not been regarded as law, in England, for the last two hundred years, probably.

The office of a codicil under the civil law seems to have been to enable the party to dispose of his property, in the near prospect of death, without the requisite formalities of executing a will (or testament, as it was then called). Codicils were strictly confined to the disposition of property; whereas a testament had reference to the institution of an heir or executor, and contained trusts and confidences to be carried into effect after the decease of the testator. Domat, b. iv. tit. i.

In the Roman Law there were two kinds of codicils: the one, where no testament existed, and which was designed to supply its place as to the disposition of property, and which more nearly resembled our *donatio causa mortis* than anything else now in use; the other, where a testament did exist, had relation to the testament, and formed a part of it and was to be construed in connection with it. Domat, p. ii. b. iv. tit. i. s. i. art v. It is in this last sense that the term is now universally used in the English law, and in the American states where the common law prevails.

Codicils owe their origin to the following circumstance. Lucius Lentulus, dying in Africa, left codicils, confirmed by anticipation in a will of former date, and in those codicils requested the Emperor Augustus, by way of *fidei commissum,* or trust, to do something therein expressed. The emperor carried this will into effect, and the daughter of Lentulus paid legacies which she would not otherwise have been legally bound to pay. Other persons made similar *fidei commissa,* and then the emperor, by the advice of learned men whom he consulted, sanctioned the making of codicils, and thus they became clothed with legal authority. Inst. 2. 25; Bowy. Com. 155.

All codicils are part of the will, and are to be so construed; 17 Sim. 108; 16 Beav. 510, 2 Ves. Sen. Ch. 242; 4 Y. & C. Ch. 160; Wilkes v. Harper, 3 Sandf. Ch. (N. Y.) 11; 4 Kent 531. See Gelbke v. Gelbke, 88 Ala. 427, 6 South. 834; Burhans v. Haswell, 43 Barb. (N. Y.) 424; and executed with the same formalities; Schoul. Wills 359; 4 Kent 531; Tilden v. Tilden, 13 Gray (Mass.) 103.

A codicil properly executed to pass real and personal estate, and in conformity with the statute of frauds, and upon the same piece of paper with the will, operates as a republication of the will, so as to have it speak from that date; Coale v. Smith, 4 Pa. 376; Armstrong v. Armstrong, 14 B. Monr. (Ky.) 333; Brimmer v. Sohier, 1 Cush. (Mass.) 118; 3 M. & C. 359. So also it has been held that it is not requisite that the codicil should be on the same piece of paper in order that it should operate as a republication of the will; Kip v. Van Cortland, 7 Hill (N. Y.) 346; Den v. Snowhill, 23 N. J. L. 447; 1 Ves. Sen. 442; Harvy v. Chouteau, 14 Mo. 587, 55 Am. Dec. 120; but where it is on the same piece of paper, not signed, only the will proper which was signed should be admitted to probate; Smith's

Estate, 9 Pa. Co. Ct. R. 333; but see Brown's Ex'r v. Tilden, 5 Har. & J. (Md.) 371.

A codicil duly executed, and attached or referring to a paper defectively executed as a will, has the effect to give operation to the whole, as one instrument; Schoul. Wills 448; Beall v. Cunningham, 3 B. Monr. (Ky.) 390, 39 Am. Dec. 469; Haven v. Foster, 14 Pick. (Mass.) 543; 16 Ves. Ch. 167; 1 Ad. & E. 423; Matter of Hardenburg's Will, 85 Hun 580, 33 N. Y. Supp. 150. See numerous cases cited in 7 Ves. Ch. (Sumner ed.) 98; 1 Cr. & M. 42.

There may be numerous codicils to the same will. In such cases, the later ones operate to revive and republish the earlier ones; 3 Bingh. 614; 12 J. B. Moore 2. See Johns Hopkins University v. Pinckney, 55 Md. 365.

In order to set up an informally executed paper by means of one subsequently executed in due form, referring to such informal paper, the reference must be such as clearly to identify the paper; Tonnele v. Hall, 4 N. Y. 140.

A codicil which depends on the will for interpretation or execution falls, if the will be revoked; 1 Tucker 436; Jouse v. Forman, 5 Bush (Ky.) 337.

It is not competent to provide by will for the disposition of property to such persons as shall be named in a subsequent codicil, not executed according to the prescribed formalities in regard to wills; since all papers of that character, in whatever form, if intended to operate only in the disposition of one's property after death, are of a testamentary character, and must be so treated; 2 Ves. Ch. 204; 2 M. & K. 765.

So much of the will as is inconsistent with the codicil is revoked; Bosley v. Wyatt, 14 How. (U. S.) 390, 14 L. Ed. 468.

A codicil whose only provision is the appointment of an executor who had died, cannot be admitted to probate apart from the will; Pepper's Estate, 148 Pa. 5, 23 Atl. 1039. A testator executed a codicil which was described as "a codicil to my will executed some years ago," and after his death the will could not be found, but probate of the codicil was granted; [1892] Prob. 254. See WILLS.

COEMPTIO. **In Civil Law.** The ceremony of celebrating marriage by solemnities.

The parties met and gave each other a small sum of money. They then questioned each other in turn. The man asked the woman if she wished to be his *mater-familias*. She replied that she so wished. The woman then asked the man if he wished to be her *pater-familias*. He replied that he so wished. They then joined hands; and these were called nuptials by *coemptio*. Boethius, *Coemptio;* Calvinus, Lex.; Taylor, Law Gloss.

COERCION. Constraint; compulsion; force.

Direct or positive coercion takes place when a man is by physical force compelled to do an act contrary to his will: for example, when a man falls into the hands of the enemies of his country, and they compel him, by a just fear of death, to fight against it. See Grossmeyer v. U. S., 4 Ct. Cls. (U. S.) 1; Miller v. U. S., 4 Ct. Cls. (U. S.) 288; Padelford v. U. S., 4 Ct. Cls. (U. S.) 317.

Implied coercion exists where a person is legally under subjection to another, and is induced, in consequence of such subjection, to do an act contrary to his will.

As will is necessary to the commission of a crime or the making of a contract, a person actually coerced into either has no will on the subject, and is not responsible; 1 East, Pl. Cr. 225; 5 Q. B. 279; Griffith v. Sitgreaves, 90 Pa. 161. The command of a superior to an inferior; United States v. Jones, 3 Wash. C. C. 209, 220, Fed. Cas. No. 15,494; Com. v. Blodgett, 12 Metc. (Mass.) 56; Harmony v. Mitchell, 1 Blatchf. 549, Fed. Cas. No. 6,082; Mitchell v. Harmony, 13 How. (U. S.) 115, 14 L. Ed. 75; of a parent to a child; Broom, Max. 11; of a master to his servant, or a principal to his agent; Hays v. State, 13 Mo. 246; Com. v. Drew, 3 Cush. (Mass.) 279; Kliffield v. State, 4 How. (Miss.) 304; State v. Bugbee, 22 Vt. 32; do not amount to coercion.

As to persons acting under the constraint of superior power, and, therefore, not criminally amenable, the principal case is that of married women, with respect to whom the law recognizes certain presumptions. Thus, if a wife commits a felony, other than treason or homicide, or, perhaps, highway robbery, in company with her husband, the law presumes that she acted under his coercion, and, consequently, without any guilty intent, unless the fact of non-coercion is distinctly proved; Clarke, Cr. L. 77. See Com. v. Eagan, 103 Mass. 71; State v. Williams, 65 N. C. 398. This presumption appears on some occasions to have been considered conclusive, and is still practically regarded in no very different light, especially when the crime is of a flagrant character; but the better opinion seems to be that in every case the presumption may now be rebutted by positive proof that the woman acted as a free agent; and in one case that was much discussed, the Irish judges appear to have considered that such positive proof was not required, but that the question was always one to be determined by the jury on the evidence submitted to them; Jebb 93; 1 Mood. 143. It seems that a married woman cannot be convicted under any circumstances as a receiver of stolen goods, when the property has been taken by her husband and given to her by him; 1 Dearsl. 184.

Husband and wife were jointly charged with felonious wounding with intent to disfigure and to do grievous bodily harm. The jury found that the wife acted under the coercion of the husband, and that she did not

personally inflict any violence on the prosecutor. On this finding, the wife was held entitled to an acquittal; 1 Dearsl. & B. 553.

Whether the doctrine of coercion extends to any misdemeanor may admit of some doubt; but the better opinion seems to be that, provided the misdemeanor is of a serious nature, as, for instance, the uttering of base coin, the wife will be protected in like manner as in cases of felony; although it has been distinctly held that the protection does not extend to assaults and batteries or the offence of keeping a brothel; Russ. Cr. 38; 2 Lew. 229; 8 C. & P. 19, 541; Com. v. Lewis, 1 Metc. (Mass.) 151; Com. v. Neal, 10 Mass. 152, 6 Am. Dec. 105. Indeed, it is probable that in all inferior misdemeanors this presumption, if admitted at all, would be held liable to be defeated by far less stringent evidence of the wife's active co-operation than would suffice in cases of felony; 8 C. & P. 541; 2 Mood. 53.

There is coercion only when the husband is present; it does not extend to treason, murder and grave felonies; 2 C. & K. 903; it extends to the lesser felonies and most misdemeanors, and even in these the circumstances may repel the presumption of coercion; 8 C. & P. 554. If it appear that she took the leading part, his presence will not protect her; 12 Cox 45. If she acted in his absence, no presumption of coercion arises; she is a principal; Russ & Ry. 270.

A wife is not chargeable with guilt until the presumption of coercion has been removed; State v. Harvey, 130 Ia. 394, 106 N. W. 938; there is a presumption of coercion if the husband was present, but it may be rebutted; Com. v. Adams, 186 Mass. 101, 71 N. E. 78; her conduct alone at the time may suffice to overcome a presumption; *id.* Where the wife of a convicted murderer at his instigation shot the revolver, the offence was committed in the husband's presence and there was nothing to rebut the presumption of coercion; State v. Miller, 162 Mo. 253, 62 S. W. 692, 85 Am. St. Rep. 498. If it appears that the wife was not urged by the husband, but was the inciter, she is liable; People v. Ryland, 2 N. Y. Cr. R. 441. In the case of a disorderly house, they are both equally guilty; State v. Jones, 53 W. Va. 613, 45 S. E. 916.

The marriage need not be strictly proved; reputation is sufficient proof of marriage; but mere cohabitation is not; Odgers, C. L. 1347.

See 1 B. & H. Lead. Cr. Cas. 76; DURESS.

CO-EXECUTOR. One who is a joint executor with one or more others. See EXECUTOR.

COGNATI, COGNATES. In Civil Law. All those persons who can trace their blood to a single ancestor or ancestress.

The term is not used in the civil law as it now prevails in France. In the common law it has no technical sense; but as a word of discourse in English it signifies, generally, allied by blood, related in origin, of the same family.

Originally, the maternal relationship had no influence in the formation of the Roman family, nor in the right of inheritance. But the edict of the prætor established what was called the Prætorian succession, or the *bonorum possessio*, in favor of cognates in certain cases. Dig. 38. 8. See PATERFAMILIAS; AGNATI.

COGNATION. In Civil Law. Signifies generally the kindred which exists between two persons who are united by ties of blood or family, or both.

Civil cognation is that which proceeds alone from the ties of families, as the kindred between the adopted father and the adopted child.

Mixed cognation is that which unites at the same time the ties of blood and family, as that which exists between brothers the issue of the same lawful marriage. Inst. 3. 6; Dig. 38. 10.

Natural cognation is that which is alone formed by ties of blood; such is the kindred of those who owe their origin to an illicit connection, either in relation to their ascendants or collaterals.

COGNISANCE. See COGNIZANCE.

COGNITIONIBUS ADMITTENDIS. A writ requiring a justice or other qualified person, who has taken a fine and neglects to certify it in the court of common pleas, to do so.

COGNIZANCE (Lat. *cognitio*, recognition, knowledge; spelled, also, *Conusance* and *Cognisance*). Acknowledgment; recognition; jurisdiction; judicial power; hearing a matter judicially. See 12 Ad. & El. 259.

Of Pleas. Jurisdiction of causes. A privilege granted by the king to a city or town to hold pleas within the same. *Termes de la Ley.* It is in frequent use among the older writers on English law in this latter sense, but is seldom used, if at all, in America, except in its more general meaning. The universities of Cambridge and Oxford possess this franchise; 11 East 543; 1 W. Bla. 454; 3 Bla. Com. 298.

Claim of Cognizance (or of Conusance). An intervention by a third person, demanding judicature in the cause against the plaintiff, who has chosen to commence his action out of claimant's court. 2 Wils. 409; 2 Bla. Com. 350, n.

It is a question of jurisdiction between the two courts; Fortesc. 157; 5 Viner, Abr. 588; and not between the plaintiff and defendant, as in the case of plea to the jurisdiction, and must be demanded by the party entitled to conusance, or his representative, and not by the defendant or his attorney; 1 Chit. Pl. 403.

There are three sorts of conusance. *Tenere placita*, which does not oust another court of its jurisdiction, but only creates a concurrent one. *Cognitio placitorum*, when

the plea is commenced in one court, of which conusance belongs to aother. A conusance of exclusive jurisdiction: as, that no other court shall hold plea, etc. Hardr. 509; Bac. Abr. *Courts*, D.

In Pleading. The answer of the defendant in an action of replevin who is not entitled to the distress or goods which are the subject of the action—acknowledging the taking, and justifying it as having been done by the command of one who is so entitled. Lawes, Pl. 35. An acknowledgment made by the deforciant, in levying a fine, that the lands in question are the right of the complainant. 2 Bla. Com. 350. See Inhabitants of Sturbridge v. Winslow, 21 Pick. (Mass.) 87; Noble v. Holmes, 5 Hill (N. Y.) 194.

COGNOMEN (Lat.). A family name.

The *prænomen* among the Romans distinguished the person, the *nomen* the gens, or all the kindred descended from a remote common stock through males, while the *cognomen* denoted the particular family The *agnomen* was added on account of some particular event, as a further distinction. Thus, in the designation Publius Cornelius Scipio Africanus, Publius is the *prænomen*, Cornelius is the *nomen*, Scipio the *cognomen*, and Africanus the *agnomen*. Vicat. See Cas. *temp.* Hardw. 286; 6 Co. 65.

COGNOVIT ACTIONEM (Lat. he has confessed the cause of action. *Cognovit* alone is in common use with the same significance).

A written confession of a cause of action by a defendant, subscribed, but not sealed, and authorizing the plaintiff to sign judgment and issue execution, usually for a sum named.

COHABIT (Lat. *con* and *habere*). To live together in the same house, claiming to be married.

The word does not include in its signification, necessarily, occupying the same bed; 1 Hagg Cons. 144; Dunn v. Dunn, 4 Paige, Ch (N. Y.) 425; though the word is popularly, and sometimes in statutes, used in this latter sense; State v. Byron, 20 Mo 210, Bish Marr & Div § 506, n; Jackson v State, 116 Ind 464, 19 N. E. 330; Pruner v. Com., 82 Va. 115, Com v. Dill, 159 Mass. 61, 34 N E 84; Cannon v U S., 116 U S. 55, 6 Sup Ct. 278, 29 L. Ed. 561.

COHABITATION. It does not necessarily mean living together under the same roof; a man may be absent on business, or two married domestic servants may live with different employers, and yet be cohabiting in the broader sense; [1904] P. 389.

To live together in the same house.

Used without reference to the relation of the parties to each other as husband and wife, or otherwise. Used of sisters or other members of the same family, or of persons not members of the same family, occupying the same house; 2 Vern. 323; Bish Marr. & Div. & Sep. 506, n. See In re Yardley's Estate, 75 Pa. 207; Sullivan v. State, 32 Ark. 187.

See LASCIVIOUS COHABITATION.

COIF. A head-dress.

In England there are certain serjeants at law who are called serjeants of the coif, from the white lawn coif they wear on their heads under their small black skull-cap of silk or velvet when they are admitted to that order. It was anciently worn as a distinguishing badge. When powdered wigs were introduced, a round patch of black silk edged with white was worn on the crown of the wig as a diminutive representation of the coif and cap. See Pulling, Order of the Coif.

COIN. A piece of metal stamped with certain marks and made current at a certain value. Strictly speaking, coin differs from money as the species differs from the genus. Money is any matter, whether metal, paper, beads, or shells, which has currency as a medium in commerce. Coin is a particular species, always made of metal, and struck according to a certain process called coining. Wharton.

To fashion pieces of metal into a prescribed shape, weight, and fineness, and stamp them with prescribed devices, by authority of government, that they may circulate as money. Thayer v. Hedges, 22 Ind. 306; Griswold v. Hepburn, 2 Duvall (Ky.) 29.

Congress alone has the power to coin money; Const. U. S. Art. 1, § 7; but the states may pass laws to punish the circulation of false coin; Fox v. Ohio, 5 How. (U. S.) 410, 12 L. Ed. 213.

So long as a genuine silver coin is worn only by natural abrasion, is not appreciably diminished in weight, and retains the appearance of a coin duly issued from the mint, it is a legal tender for its original value; U. S. v. Lissner, 12 Fed. 840. See Jersey City & B. R. Co. v. Morgan, 160 U. S. 288, 16 Sup. Ct. 276, 40 L. Ed. 430.

COLD BLOOD. See COOL BLOOD.

COLIBERTUS. One who, holding in free socage, was obliged to do certain services for the lord. A middle class of tenants between servile and free, who held their freedom of tenure on condition of performing certain services. Said to be the same as the *conditionales*. Cowell.

COLLATERAL (Lat. *con*, with, *latus*, the side). That which is by the side, and not the direct line. That which is additional to or beyond a thing.

COLLATERAL ANCESTORS. Sometimes used to designate uncles and aunts and other collateral ancestors of the person spoken of, who are in fact not his ancestors. Banks v. Walker, 3 Barb. Ch. (N. Y.) 446.

COLLATERAL ASSURANCE. That which is made over and above the deed itself.

COLLATERAL CONSANGUINITY. That relationship which subsists between persons who have the same ancestors but not the same descendants,—who do not descend one from the other. 2 Bla. Com. 203.

The essential fact of consanguinity (common ancestral blood) is the same in lineal and collateral consanguinity; but the relationship is aside from the direct line. Thus, father, son, and grandson are lineally related; uncle and nephew, collaterally.

COLLATERAL ESTOPPEL. The collateral determination of a question by a court

having general jurisdiction of the subject. See Small v. Haskins, 26 Vt. 209.

COLLATERAL FACTS. Facts not directly connected with the issue or matter in dispute.

Such as are offered in evidence to establish the matters or facts in issue. Garwood v. Garwood, 29 Cal. 521; King v. Chase, 15 N. H. 16, 41 Am. Dec. 675. Facts offered in evidence at a trial to establish the issue, though not necessarily conclusive thereof. Freem. Judgm. § 258.

Such facts are inadmissible in evidence; but, as it is frequently difficult to ascertain *a priori* whether a particular fact offered in evidence will or will not clearly appear to be material in the progress of the cause, in such cases it is usual in practice for the court to give credit to the assertion of the counsel who tenders such evidence, that the facts will turn out to be material. But this is always within the sound discretion of the court. It is the duty of the counsel, however, to offer evidence, if possible, in such order that each part of it will appear to be pertinent and proper at the time it is offered; and it is expedient to do so, as this method tends to the success of a good cause.

When a witness is cross-examined as to collateral facts, the party cross-examining will be bound by the answer; and he cannot, in general, contradict him by another witness; Rosc. Cr. Ev. 139.

COLLATERAL INHERITANCE TAX. A tax levied upon the collateral devolution of property by will or under the intestate law. See TAX.

COLLATERAL ISSUE. An issue taken upon some matter aside from the general issue in the case.

Thus, for example, a plea by the criminal that he is not the person attainted when an interval exists between attainder and execution, a plea in abatement, and other such pleas, each raises a collateral issue. 4 Bla. Com. 338, 396.

COLLATERAL KINSMEN. Those who descend from one and the same common ancestor, but not from one another.

Thus brothers and sisters are collateral to each other; the uncle and the nephew are collateral kinsmen, and cousins are the same. All kinsmen are either *lineal* or *collateral*.

COLLATERAL LIMITATION. A limitation in the conveyance of an estate, giving an interest for a specified period, but making the right of enjoyment depend upon some *collateral* event; as an estate to A till B shall go to Rome. Park, Dow. 163; 4 Kent 128; 1 Washb. R. P. 215.

COLLATERAL SECURITY. A separate obligation attached to another contract to guaranty its performance. The transfer of property or of other contracts to insure the performance of a principal engagement. See Lochrane v. Solomon, 38 Ga. 292; Mervin v. Sherman, 9 Ia. 331.

The property or securities thus conveyed are also called collateral securities; 1 Pow. Mortg. 393; 2 *id.* 666, n. 871; 3 *id.* 944, 1001; Munn v. McDonald, 10 Watts (Pa.) 270. See PLEDGE; CHATTEL MORTGAGE.

COLLATERAL UNDERTAKING. A contract based upon a pre-existing debt, or other liability, and including a promise to pay, made by a third person, having immediate respect to and founded upon such debt or liability, without any new consideration moving to him. Elder v. Warfield, 7 Har. & J. (Md.) 391.

COLLATERAL WARRANTY. Warranty as to an estate made by one who was ancestor to the heir thereof, either actually or by implication of law, in respect to other property, but who could not have been so in respect to the estate in question.

Warranty made where the heir's title to the land neither was nor could have been derived from the warranting ancestor. *Termes de la Ley.*

Collateral warranty is spoken of as "a mode of common assurance." The statute of Gloucester being silent as to a collateral warranty, a warranty of a collateral ancestor, whose heir the issue in tail might be descending upon the latter, would bind him without assets by force of the common law. Therefore, by getting a collateral relation, whose heir the issue in tail was to be, to concur in the alienation and bind himself and his heirs to warranty, the statute *De Donis* was successfully evaded.

Thus, if a tenant in tail should discontinue the tail, have issue and die, and the uncle of the issue should release to the discontinuee and die without issue, this is a collateral warranty to the issue in tail. Littleton § 709. The tenant in tail having discontinued as to his issue before his birth, the heir in tail was driven to his action to regain possession upon the death of his ancestor tenant in tail; and in this action the collateral warranty came in as an estoppel. 2 Washb. R. P. 670.

The heir was barred from ever claiming the land, and, in case he had assets from the warranting ancestor, was obliged to give the warrantee other lands in case of an eviction. 4 Cruise, Dig. 436.

By the statute of Gloucester, 6 Edw. I. c. 3, tenant by the curtesy was restrained from making such warranty as should bind the heir. By a favorable construction of the statute *De Donis*, and by the statute 3 & 4 Will. IV. c. 74, tenants in tail were deprived of the power of making collateral warranty. By 11 Hen. VII. c. 20, warranty by a tenant in dower, with or without the assent of her subsequent husband, was prevented; and finally 4 & 5 Anne, c. 16, declares all warranties by a tenant for life void against the heir, unless such ancestor has an estate of inheritance in possession. See Co. Litt. 373, Butler's note [328]; Stearns, R. Act. 135, 372.

It is doubtful if the doctrine has ever prevailed to a great extent in the United States, and the statute of Anne has not been generally adopted in American statute law, although re-enacted in New York; 4 Kent *469; and in New Jersey; Den v. Crawford, 8 N. J. L. 106. It has been adopted and is in force in Rhode Island; Sisson v. Seabury, 1 Sumn. 235, Fed. Cas. No. 12,913; and in Delaware; Ford's Lessee v. Hays, 1 Harr. 50, 23 Am. Dec. 369. In Kentucky and Virginia, it seems that collateral warranty binds the heir to the extent of assets descended; Doe v. Moore, 1 Dana (Ky.) 59. In Pennsyl-

vania, the statute of Gloucester is in force, but the statute of Anne is not, and a collateral warranty of the ancestor, with sufficient real assets descending to the heirs, bars them from recovering the lands warranted; Carson v. Cemetery Co., 104 Pa. 575. See 2 Bla. Com. 301; 2 Washb. R. P. 668. If the learning of collateral warranty has been called difficult, it is simply because the law of warranty came to be turned from the purpose of its introduction,—that of protection and defence,—and fashioned into a remedy to meet an entirely different purpose. Later, collateral warranty ceased to be used for the purpose of barring estates tail, and its use could never have been universal. Rawle, Cov. for Title, secs. 8, 9. See Litt. § 709; 12 Mod. 513; Year Book 12 Edw. IV. 19; Tudor, Lead. Cas. R. P. 695; Pig. Recov. 9.

COLLATERALES ET SOCII. The former title of masters in chancery.

COLLATIO BONORUM. A collation of goods.

COLLATION. In Civil Law. The supposed or real return to the mass of the succession which an heir makes of the property he received in advance of his share or otherwise, in order that such property may be divided together with the other effects of the succession. See Succession of Thompson, 9 La. Ann. 96.

As the object of collation is to equalize the heirs, it follows that those things are excluded from collation which the heir acquired by an onerous title from the ancestor; that is, where he gave a valuable consideration for them. And, upon the same principle, if a co-heir claims no share of the estate, he is not bound to collate. *Qui non vult hereditatem non cogitur ad collationem.* It corresponds to the common law hotchpot; 2 Bla. Com. 517.

In Ecclesiastical Law. The act by which the bishop who has the bestowing of a benefice gives it to an incumbent.

Where the ordinary and patron were the same person, presentation and institution to a benefice became one and the same act; and this was called collation. Collation rendered the living full except as against the king; 1 Bla. Com. 391. An advowson under such circumstances is termed collative; 2 Bla. Com. 22.

In Practice. The comparison of a copy with its original, in order to ascertain its correctness and conformity. The report of the officer who made the comparison is also called a collation.

COLLECTOR. One appointed to receive taxes or other impositions: as, collector of taxes, collector of militia fines, etc. A person appointed by a private person to collect the credits due him.

COLLECTOR OF THE CUSTOMS. An officer of the United States, appointed for the term of four years. Rev. Stat. U. S. § 2613. His general duties are defined in § 2621.

COLLEGA. In Civil Law. One invested with joint authority. A colleague; an associate. Black, L. Dict.

COLLEGE. An organized collection or assemblage of persons. A civil corporation, society, or company, having, in general, some literary object.

The assemblage of the cardinals at Rome is called a college. The body of presidential electors is called the electoral college, although the whole body never come together.

A qualified person is *prima facie* entitled to register as a student in a university; Gleason v. University, 104 Minn. 359, 116 N. W. 650; but in Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629, Marshall, C. J., said: "No individual youth has a vested interest in the institution which can be asserted in a court of justice." Refusal of an incorporated medical college to admit negro students does not deny them any constitutional privilege, for private institutions of learning, though incorporated, may select those whom they will receive, and may discriminate on account of sex, age, proficiency in learning or otherwise; Booker v. Medical College, 156 Mich. 95, 120 N. W. 589, 24 L. R. A. (N. S.) 447.

Mandamus was held the proper remedy to remove a professor after the professorship had been abolished; People v. Medical College, 10 Abb. N. C. (N. Y.) 122; or to prevent an application on behalf of a colored boy to be admitted; State v. Maryland Institute, 87 Md. 643, 41 Atl. 126; or to compel the admission of a woman as a student in a law college; Foltz v. Hoge, 54 Cal. 28; or to compel the admission of a doctor to the College of Physicians; 4 Burr. 2186. But it will not lie, on the relation of a medical college, to compel the State Board of Medical Examiners to recognize it as a medical institution in good standing; State v. Coleman, 64 Ohio St. 377, 60 N. E. 568, 55 L. R. A. 105.

A college cannot dismiss a student without cause; Booker v. College, 156 Mich. 95, 120 N. W. 589, 24 L. R. A. (N. S.) 447; mandamus to reinstate a student who has been expelled has generally been refused; Dunn's Case, 9 Pa. C. C. 417; a college may forbid its students to join a secret society, and a student who does so may be expelled; People v. College, 40 Ill. 186. Where a college degree was withheld from a student who had satisfactorily passed his examinations, mandamus was refused in State v. Medical College, 128 Wis. 7, 106 N. W. 116, 3 L. R. A. (N. S.) 1115, 116 Am. St. Rep. 21, 8 Ann. Cas. 407; People v. School, 68 Hun 118, 22 N. Y. Supp. 663; *contra*, People v. Medical College, 60 Hun 107, 14 N. Y. Supp. 490, affirmed in 128 N. Y. 621, 28 N. E. 253, it appearing that the refusal was merely arbitrary; and so in State v. Medical College, 81 Neb. 533, 116 N. W.

294, 17 L. R. A. (N. S.) 930. The reason for granting the writ is usually a so-called contractual relation arising between college and student on matriculation; but such relation was denied in 31 Law Jour. 119, where an action for breach of contract was brought. The better view is said in England to be that the sole jurisdiction to settle such questions rests in the visitor to the college or university, and not in the courts; 33 L. J. Rep. (Ch.) 625. Mandamus will not lie to compel a college to issue a diploma; State v. Medical College, 128 Wis. 7, 106 N. W. 116, 3 L. R. A. (N. S.) 1115, 116 Am. St. Rep. 21, 80 Ann. Cas. 407. A diploma is not necessary to granting of a degree, for a vote that a degree be conferred on a person invests him with such degree *ipso facto;* Wright v. Lanckton, 19 Pick. (Mass.) 288.

An instructor's relation with a school is ordinarily a purely contractual one; Butler v. Regents of University, 32 Wis. 124; Trustees of University v. Walden, 15 Ala. 655; Board of Regents v. Mudge, 21 Kan. 223.

In the absence of a statute providing the manner for the dissolution of a college corporation, it may dissolve itself by a voluntary surrender of its franchise; People v. College, 38 Cal. 166; and while a palpable misuse of the powers is ground for its dissolution; State v. College Co., 63 Ohio St. 341, 58 N. E. 799, 52 L. R. A. 365; a partial decay of one department, caused by students refusing to take that special course, would not be ground for forfeiture; State v. College, 32 Ohio St. 487. A statute providing that credit for certain purposes is not to be given to students who are minors attending a college, unless the assent of some officer of the college be obtained, is a proper exercise of legislative functions; Soper v. College, 1 Pick. (Mass.) 177, 11 Am. Dec. 159; Morse v. State, 6 Conn. 9; 18 Q. B. 647.

The board of regents of a state college cannot exact a fee of students to be used for maintenance of the Y. M. C. A. or Y. W. C. A.; Connell v. Gray, 33 Okl. 591, 127 Pac. 417, 42 L. R. A. (N. S.) 336.

Notwithstanding the agreement of a university to educate five boys without cost, to be appointed annually by the mayor of a city, in consideration of exemption from taxes, it may charge a free student a laboratory fee to cover material actually used and destroyed by him in the laboratory courses; City of New Orleans v. Board of Adm'rs, 123 La. 550, 49 South. 171.

In a suit for injuries suffered at a university foot ball game by the collapse of the seats, the game being under the auspices of a university athletic association, it was held that it was a branch of the university; George v. Athletic Ass'n, 107 Minn. 424, 120 N. W. 750.

One who conducts a business college in Philadelphia without the authority to confer degrees will be restrained from describing his school as a university; it appearing that by the use of the name "University of Philadelphia" persons intending to correspond with the "University of Pennsylvania" were misled, the latter institution was entitled to protection against the use of the word "university"; Com. v. Banks, 198 Pa. 397, 48 Atl. 277. A business college is not entitled to exemption from taxation as a general educational institution; Parsons Business College v. City of Kalamazoo, 166 Mich. 305, 131 N. W. 553, 33 L. R. A. (N. S.) 921.

See DEGREE.

COLLEGE FRATERNITIES. Individual members of a college fraternity may enjoin the unauthorized withdrawal of the charter of the chapter to which they belong; the membership would remain to them in spite of the withdrawal. The fact that a college has not the proper material for the maintenance of a Greek letter fraternity is no ground for the withdrawal of its fraternity charter by the head council, where there is no provision in the constitution or by-laws authorizing such withdrawal, except for a violation of the rules and usages of the fraternity. A disclosure by charter members of the constitution of a Greek letter fraternity and of certain secrets relative to an attempt by the grand council to withdraw a charter was not such a violation of the constitution and by-laws as would authorize the fraternity to forfeit their charter, where such violation was rendered necessary by the fraternity itself. Heaton v. Hull, 51 App. Div. 126, 64 N. Y. Supp. 279. See 42 Am. L. Rev. 170.

COLLEGIUM (Lat. *colligere*, to collect) **In Civil Law.** A society or assemblage of those of the same rank or honor. An army. A company, in popular phrase. The whole order of bishops. Du Cange.

Collegium illicitum. One which abused its right, or assembled for any other purpose than that expressed in its charter.

Collegium licitum. An assemblage or society of men united for some useful purpose or business, with power to act like a single individual.

All *collegia* were *illicita* which were not ordained by a decree of the senate or of the emperor; 2 Kent 269.

A corporation.

COLLIERY, COALERY. A coal mine, coal pit, or place where coals are dug, with the engines and machinery used in discharging the water and raising the coal. Webster.

Colliery is a collective compound including many things, and is not limited to the lease and fixtures of a tunnel, drift, shaft, slope, or vein from which the coal is mined; Carey v. Bright, 58 Pa. 85.

COLLISION. The act of ships or vessels striking together, or of one vessel running against or foul of another.

It may happen *without fault*, no blame being imputable to those in charge of either vessel. In such case, in the English, American, and French courts, each party must bear his own loss; Pardessus, *Droit Comm.* p. 4, t. 2, c. 2, § 4; General Mutual Ins. Co. v. Sherwood, 14 How. (U. S.) 352, 14 L. Ed. 452; 1 Pars. Sh. & Adm. 525.

A collision by *inevitable accident* is when a collision is caused exclusively by natural causes, without any fault on the part of the owners or those in charge; The Sea Gull, 23 Wall. (U. S.) 169, 23 L. Ed. 90; Killam v. Eri, 3 Cliff. 456, Fed. Cas. No. 7,765; Sampson v. U. S., 12 Ct. Cl. 480. It must appear that neither vessel was in fault; Sterling v. The Jennie Cushman, 3 Cliff. 636, Fed. Cas. No. 13,375. Where the captain and crew, except the second mate, were taken sick, and a collision occurred, through the absence of a lookout, it was held to be inevitable accident; The Southern Home, 8 Reporter 389, Fed. Cas. No. 13,187. See also The F. W. Gifford, 7 Biss. 249, Fed. Cas. No. 5,166.

It may happen by *mutual fault*, that is, by the misconduct, fault, or negligence of those in charge of both vessels; The C. R. Stone, 49 Fed. 475; The Brinton, 50 Fed. 581; The T. B. Van Houten, 50 Fed. 590; The Riversdale, 53 Fed. 286; The Allen Green, 60 Fed. 459, 9 C. C. A. 73. In such case, neither party has relief at common law; 3 Kent 231; 3 C. & P. 528; Barnes v. Cole, 21 Wend. (N. Y.) 188; Hartfield v. Roper, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273; Brown v. Maxwell, 6 Hill (N. Y.) 592, 41 Am. Dec. 771; Parker v. Adams, 12 Metc. (Mass.) 415, 46 Am. Dec. 694 (though now otherwise in England by the Judicature Act 1873); but the maritime courts aggregate the damages to both vessels and their cargoes, and then divide the same equally between the two vessels; 3 Kent 232; The Teutonia, 23 Wall. (U. S.) 84, 23 L. Ed. 44; The Clara, 49 Fed. 765; The State of California, 49 Fed. 172, 1 C. C. A. 224; The Bolivia, 49 Fed. 169, 1 C. C. A. 221; Fristad v. The Premier, 51 Fed. 766; The Marion, 56 Fed. 271; The Manitoba, 122 U. S. 97, 7 Sup. Ct. 1158, 30 L. Ed. 1095. See 1 Swab. 60. Where two tugs and two scows in tow by one of them are all in fault, each is liable for an equal share of the damages, even though more than one be owned by the same person; The Eugene F. Moran, 212 U. S. 466, 29 Sup. Ct. 339, 53 L. Ed. 600. Where the collision is by intentional wrong of both parties, the libel will be dismissed; The R. L. Maybey, 4 Blatch. 88, Fed. Cas. No. 11,870.

It may happen by *inscrutable fault*, that is, by the fault of those in charge of one or both vessels and yet under such circumstances that it is impossible to determine who is in fault. In such case the American courts of admiralty and the European maritime courts formerly adopted the rule of an equal division of the aggregate damage; The Comet, 1 Abb. U. S. 451, Fed. Cas. No. 3,050; The Scioto, 2 Ware (Davels 365) 360, Fed. Cas. No. 12,508; Flanders, Mar. Law, 296. The English courts have refused a remedy in admiralty; 2 Hagg. Adm. 145; 6 Thornt. 240; and see The Kallisto, 2 Hugh. 128, Fed. Cas. No. 7,600; but it has now been decided by a vast preponderance of authority that there can be no recovery or partial recovery unless fault be affirmatively shown; The Jumna, 149 Fed. 173, 79 C. C. A. 119, following The Clara, 102 U. S. 200, 26 L. Ed. 145; The Sunnyside, 91 U. S. 208, 23 L. Ed. 302.

It may happen *by the fault* of those belonging to one of the colliding vessels, without any fault being imputable to the other vessel. In such case the owners of the vessel in fault must bear the damage which their own vessel has sustained, and are liable as well as their master to a claim for compensation from the owners of the other vessel for the damage done to her; 1 Swab. 23, 173, 200, 211; 3 W. Rob. 283; The Narragansett, 1 Blatchf. 211, Fed. Cas. No. 10,017; Vantine v. The Lake, 2 Wall. Jr. 52, Fed. Cas. No. 16,878; Smith v. Condry, 1 How. (U. S.) 28, 11 L. Ed. 35; Williamson v. Barrett, 13 How. (U. S.) 101, 14 L. Ed. 68; although wilfully committed by the master; Ralston v. State Rights, Crabbe 22, Fed. Cas. No. 11,540; Dusar v. Murgatroyd, 1 Wash. C. C. 13, Fed. Cas. No. 4,199; Dias v. The Revenge, 1 Wash. C. C. 262, Fed. Cas. No. 3,877. But see 1 W. Rob. 399; 2 *id.* 502; Wright v. Wilcox, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507.

Where one vessel, clearly shown to be guilty of a fault adequate in itself to have caused a collision, seeks to impugn the other vessel, there is a presumption in favor of the latter, which can only be rebutted by clear proof of a contributing fault, and this principle is peculiarly applicable to a vessel at anchor, complying with regulations concerning lights and receiving injuries, through the fault of a steamer in motion; The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943. If a cargo be damaged by collision between two vessels, the owner may pursue both vessels or either, or the owners or both, or either; and in case he proceeds against one only, and both are held in fault, he may recover his entire damages of the one sued; In re Eastern Dredging Co., 182 Fed. 179; The Beaconsfield, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. Ed. 993.

These four classes of cases are noted in 2 Dods. 85, by Lord Stowell.

Full compensation is, in general, to be made in such cases for the loss and damage which the prosecuting party has sustained by the fault of the party proceeded against:

2 W. Rob. 279; including all damages which are fairly attributable exclusively to the act of the original wrong-doer, or which may be said to be the direct consequence of his wrongful act; 3 W. Rob. 7, 282; 11 M. & W. 228; 1 Swab. 200; The Narragansett, 1 Blatchf. 211, Fed. Cas. No. 10,017; Vantine v. The Lake, 2 Wall. Jr. 52, Fed. Cas. No. 16,878; Smith v. Condry, 1 How. (U. S.) 28, 11 L. Ed. 35; The Catharine, 17 How. (U. S.) 170, 15 L. Ed. 233; The Anna W., 201 Fed. 58, 119 C. C. A. 396.

As to limited liability of owners, see SHIP.

For the prevention of collisions, certain rules have been adopted (see NAVIGATION RULES) which are binding upon vessels approaching each other from the time the necessity for precaution begins, and continue to be applicable, as the vessels advance, so long as the means and opportunity to avoid the danger remain; New York & L. U. S. Mail S. S. Co. v. Rumball, 21 How. 372, 16 L. Ed. 144. But, whatever may be the rules of navigation in force at the place of collision, it is apparent that they must sometimes yield to extraordinary circumstances, and cannot be regarded as binding in all cases. Thus, if a vessel necessarily goes so near a rock, or the land, that by following the ordinary rules she would inevitably go upon the rock, or get on shore or aground, no rule should prevail over the preservation of property and life; 1 W. Rob. 478, 485; 4 J. B. Moore 314; The Maggie J. Smith, 123 U. S. 349, 8 Sup. Ct. 159, 31 L. Ed. 175; Belden v. Chase, 150 U. S. 674, 14 Sup. Ct. 264, 37 L. Ed. 1218; but obedience to the rules is not a fault, even if a different course would have prevented a collision, and the necessity must be clear and the emergency sudden and alarming before an act of disobedience can be excused; Belden v. Chase, 150 U. S. 674, 14 Sup. Ct. 264, 37 L. Ed. 1218. No vessel should unnecessarily incur the probability of a collision by a pertinacious adherence to the rule of navigation; 1 W. Rob. 471, 478; Hawkins v. Steamboat Co., 2 Wend. (N. Y.) 452; and if it was clearly in the power of one of the vessels which came into collision to have avoided all danger by giving way, she will be held bound to do so, notwithstanding the rule of navigation; 6 Thornt. Adm. 600, 607; Lane v. The A. Denike, 3 Cliff. 117, Fed. Cas. No. 8,045.

All navigation rules pertinent to a given situation are to be construed together, and while each of two approaching vessels has the right to expect the other to navigate in accordance with the rules or a passing agreement, when it becomes evident that either is not doing so, it is the duty of the other to navigate accordingly and take such measures as may seem necessary to avoid a collision; U. S. v. Erie R. Co., 172 Fed. 50, 96 C. C. A. 538. But a vessel is not required to depart from the rule when she cannot do so without danger; Biggs v. Barry, 2 Curt. C. C. 363, Fed. Cas. No. 1,402; Crockett v. The Isaac Newton, 18 How. 581, 15 L. Ed. 492.

There must be a lookout properly *stationed and kept;* and under circumstances of special danger, two; The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943; and the absence of such a lookout is *prima facie* evidence of negligence; St. John v. Paine, 10 How. (U. S.) 557, 13 L. Ed. 537; Whitridge v. Dill, 23 How. (U. S.) 448, 16 L. Ed. 581; The Scioto, Davels, 359, Fed. Cas. No. 12,508; The Coe F. Young, 49 Fed. 167, 1 C. C. A. 219; The Nellie Clark, 50 Fed. 585. The rule requiring a lookout admits of no exception on account of size in favor of any craft capable of committing injury; The Marion, 56 Fed. 271. The absence of a lookout is not material where the presence of one would not have availed to prevent a collision; The Blue Jacket, 144 U. S. 371, 12 Sup. Ct. 711, 36 L. Ed. 469. A sailing vessel is entitled to assume that a steam vessel approaching her is being navigated with a proper lookout; The Coe F. Young, 49 Fed. 167, 1 C. C. A. 219. By the International Code, rule 8, lights also must be kept; the rule was formerly otherwise in regard to vessels on the high seas; 2 W. Rob. 4; The Delaware v. The Osprey, 2 Wall. Jr. 268, Fed. Cas. No. 3,763. See NAVIGATION RULES; The Genesee Chief v. Fitzhugh, 12 How. (U. S.) 443, 13 L. Ed. 1058; Haney v. Packet Co., 23 How. (U. S.) 287, 16 L. Ed. 562; The Emily, 1 Blatchf. 236, Fed. Cas. No. 4,452; The Santa Claus, 1 Blatchf. 370, Fed. Cas. No. 12,326; Carsley v. White, 21 Pick. (Mass.) 254, 32 Am. Dec. 259; Simpson v. Hand, 6 Whart. (Pa.) 324, 36 Am. Dec. 231; The Havilah, 50 Fed. 331, 1 C. C. A. 519; The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943. Stu. Adm. Law. C. 222, 242; 1 Thornt. Adm. 592; 6 *id.* 176; 7 *id.* 507; 2 W. Rob. 377; 3 *id.* 7, 49, 190; 1 Swab. 20, 233.

The injury to an insured vessel occasioned by a collision is a loss within the ordinary policy of insurance; 4 Ad. & E. 420; 6 N. & M. 713; Peters v. Ins. Co., 14 Pet. (U. S.) 99, 10 L. Ed. 371; General Mut. Ins. Co. v. Sherwood, 14 How. (U. S.) 352, 14 L. Ed. 452; Nelson v. Ins. Co., 8 Cush. (Mass.) 477, 54 Am. Dec. 776; but when the collision is occasioned by the fault of the insured vessel, or the fault of both vessels, the insurer is not ordinarily liable for the amount of the injury done to the other vessel which may be decreed against the vessel insured; 4 Ad. & E. 420; 7 E. & B. 172; 40 E. L. & Eq. 54; Mathews v. Ins. Co., 11 N. Y. 9; General Mut. Ins. Co. v. Sherwood, 14 How. (U. S.) 352, 14 L. Ed. 452, and cases cited; but some policies now provide that the insurer shall be liable for such a loss; 40 E. L. & Eq. 54; 7 E. & B. 172.

Damage caused to one vessel by striking

upon another vessel's anchor, is within a policy of marine insurance providing against collisions between vessels; [1901] 2 K. B. 792.

See Matsunami, Collisions between Warships and Merchant Vessels.

When the collision was without fault on either side, and occurred in a foreign country, where, in accordance with the local law, the damages were equally divided between the colliding vessels, the amount of the decree against the insured vessel for its share of the damages suffered by the other vessel was held recoverable under the ordinary policy; Peters v. Ins. Co., 14 Pet. (U. S.) 99, 10 L. Ed. 371.

The fact that the libellants in a collision case had received satisfaction from the insurers for the vessel destroyed, furnishes no ground of defence for the respondent; The Monticello v. Mollison, 17 How. (U. S.) 152, 15 L. Ed. 68.

Improper speed on the part of a steamer in a dark night, during thick weather, or in the crowded thoroughfares of commerce, will render such vessel liable for the damages occasioned by a collision; and it is no excuse for such dangerous speed that the steamer carries the mail and is under contract to convey it at a greater average speed than that complained of; 3 Hagg. Adm. 414; McCready v. Goldsmith, 18 How. (U. S.) 89, 15 L. Ed. 288; The New York v. Rea, 18 How. (U. S.) 223, 15 L. Ed. 359; Sampson v. United States, 12 Ct. Cls. (U. S.) 480; The Manistee, 7 Biss. 35, Fed. Cas. No. 9,028; The Majestic, 48 Fed. 730, 1 C. C. A. 78; Fabre v. Steamship Co., 53 Fed. 288, 3 C. C. A. 534; The Bolivia, 49 Fed. 169, 1 C. C. A. 221; The Laurence, 54 Fed. 542, 4 C. C. A. 501; The Fulda, 52 Fed. 400; The Trave, 55 Fed. 117; The Britannia, 153 U. S. 130, 14 Sup. Ct. 795, 38 L. Ed. 660; The Nacoochee, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687.

As between a steamer and a sailing vessel, the former must keep out of the way of the latter; The Java, 14 Blatch. 524, Fed. Cas. No. 7,233; The Free State, 91 U. S. 200, 23 L. Ed. 299; The Blue Jacket, 144 U. S. 371, 12 Sup. Ct. 711, 36 L. Ed. 469; The Nacoochee, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687; The Havana, 54 Fed. 411; The Robert Holland, 59 Fed. 200; as between a vessel in motion and one at anchor, with proper lights, the former is ordinarily liable for a collision; The Lady Franklin, 2 Low. 220, Fed. Cas. No. 7,984; The J. W. Everman, 2 Hugh. 17, Fed. Cas. No. 7,591. Where a vessel is moored for the night according to custom along a well-known dock and not projecting beyond the wharf, if run into by a steamer in the fog, she is not at fault because she had no light set and sounded no gongs; The Express, 48 Fed. 323. A vessel at anchor in a fairway must take precautions commensurate with the danger she presents to shipping; The Europe, 175 Fed. 596.

A sailing vessel beating in the vicinity of a steam vessel is not obliged to run out her tack, provided her going about is not calculated to mislead or embarrass the steam vessel; The Coe F. Young, 49 Fed. 167, 1 C. C. A. 219.

An inexperienced oarsman is guilty of negligence in attempting to cross the path of a steamboat but a short distance in front of it; Sekerak v. Jutte, 153 Pa. 117, 25 Atl. 994. As to collisions due to the fault of a pilot, see PILOTAGE.

A cause of collision, or *collision and damage*, as it is technically called, is a suit *in rem* in the admiralty.

In the United States courts it is commenced by the filing of a libel and the arrest of the vessel to the mismanagement or fault of which the injury is imputed. In the English admiralty the suit is commenced by the arrest of the vessel and the filing of a petition. In England, the judge is usually assisted at the hearing of the cause by two of the Masters or Elder Brethren of Trinity House, or other experienced shipmasters, whose opinions upon all questions of professional skill involved in the issue are usually adopted by the court; 1 W. Rob. 471; 2 *id.* 225; 2 Chit. Genl. Pr. 514.

In the American courts of admiralty, the judge usually decides without the aid or advice of experienced shipmasters acting as assessors or advisers of the court; but the evidence of such shipmasters, *as experts*, is sometimes received in reference to questions of professional skill or nautical usage. Such evidence is not, however, admissible to establish a usage in direct violation of those general rules of navigation which have been sanctioned and established by repeated decisions; Wheeler v. The Eastern State, 2 Curt. C. C. 141, Fed. Cas. No. 17,494; The Clement, 2 Curt. C. C. 363, Fed. Cas. No. 2,879.

When a party sets up circumstances as the basis of exceptions to the general rules of navigation, he is held to strict proof; 1 W. Rob. 157, 182, 478; 6 Thornt. 607; 5 *id.* 170; 3 Hagg. Adm. 321; and courts of admiralty lean against such exceptions; 11 N. Y. Leg. Obs. 353. The admissions of a master of one of the colliding vessels subsequently to the collision are admissible in evidence; 5 E. L. & Eq. 556; and the masters and crew are admissible as witnesses; 2 Dods. 83; 2 Hagg. Adm. 145; 3 *id.* 321, 325; 1 Conkl. 384.

The general rules in regard to costs in collision cases, in the admiralty courts, are that if only one party is to blame, he pays the costs of both; if neither is to blame, and the party prosecuting had apparent cause for proceeding, each party pays his own costs, but in the absence of apparent or probable cause the libel will be dismissed with costs; if both parties are to blame, the costs of both are equally divided, or, more generally, each party is left to pay his own costs. But costs in admiralty are always in the discretion of the court, and will be given or withheld in particular cases without regard to these general rules, if the equity of the case requires a departure from them; 2 W. Rob. 213, 244; 5 Jur. 1067; 2 Conkl. 438

"In case of collision on the high seas between ships of different nationalities, the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted, governs. The Belgenland, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; In re State Steamship Co., 60 Fed. 1018. This rule is subject to two qualifications: (1) Persons in charge of either ship would not be open to blame for following sailing directions and rules of navigation prescribed by their own government; The Scotia, 14 Wall. [U. S.] 170, 20 L. Ed. 822. (2) If the maritime law, as administered by the nations to which the ships respectively belong, is the same in respect of a particular matter, it will, if duly proved, be followed in respect of such matter, though it differ from the maritime law as understood in the country of the litigation; The Scotland, 105 U. S. 24, 26 L. Ed. 1001." Moore's notes to Dicey, Conflict of Laws, 670. See Meili, Internat. Civil and Comm. L. 524.

See FOG; LIEN; NAVIGATION RULES.

COLLISTRIGIUM. The pillory.

COLLOCATION. In French Law. The act by which the creditors of an estate are arranged in the order in which they are to be paid according to law.

The order in which the creditors are placed is also called collocation. 2 Low. C. 9, 139.

COLLOQUIUM. A general averment in an action for slander connecting the whole publication with the previous statement. 1 Stark. Sl. 431; Heard, Lib. & Sl. 228; or stating that the whole publication applies to the plaintiff, and to the extrinsic matters alleged in his declaration. 1 Greenl. Ev. § 417.

An averment that the words were spoken "of or concerning" the plaintiff, where the words are actionable in themselves. 6 Term 162; Ellis v. Kimball, 16 Pick. (Mass.) 132; Cro. Jac. 674; or where the injurious meaning which the plaintiff assigns to the words results from some extrinsic matter, or of and concerning, or with reference to, such matter; Bloss v. Tobey, 2 Pick. (Mass.) 328; Carter v. Andrews, 16 Pick. (Mass.) 1; 11 M. & W. 287.

An averment that the words in question are spoken of or concerning some usage, report, or fact which gives to words otherwise indifferent the peculiar defamatory meaning assigned to them. Shaw, C. J., Carter v. Andrews, 16 Pick. (Mass.) 6.

Whenever words have the slanderous meaning alleged, not by their own intrinsic force, but by reason of the existence of some extraneous fact, this fact must be averred in a traversable form, which averment is called the *inducement*. There must then be a *colloquium* averring that the slanderous words were spoken of or concerning this fact. Then the word "meaning," or *innuendo*, is used to connect the matters thus introduced by averments and *colloquia* with the particular words laid, showing their identity and drawing what is then the legal inference from the whole declaration, that such was, under the circumstances thus set out, the meaning of the words used. Per Shaw, C. J., Carter v. Andrews, 16 Pick. (Mass.) 6. By the Com. L. Proc. Act (1852) in England the colloquium has been rendered unnecessary. See INNUENDO; Odger, Lib. & Sl.

COLLUSION. An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law.

Collusion and fraud of every kind vitiate all acts which are infected with them, and render them void. See 3 Hagg. Eccl. 130, 133; McKay v. Williams, 67 Mich. 547, 35 N. W. 159, 11 Am. St. Rep. 597; Winter v. Truax, 87 Mich. 324, 49 N. W. 604, 24 Am. St. Rep. 160; 2 Greenl. Ev. § 51; Bousquet, Dict. *Abordage.*

In Divorce Law. An agreement between a husband and wife that one of them will commit or appear to commit a breach of matrimonial duties in order that the other may obtain a remedy at law as for a real injury. 2 Wait, Act. & Def. 591; 2 Lev. & Tr. 302; L. R. 1 P. & M. 121. See Reed v. Reed, 86 Mich. 600, 49 N. W. 587; Belz v. Belz, 33 Ill. App. 105. Such an agreement is a fraud upon the court where the remedy is sought; Hopkins v. Hopkins, 39 Wis. 167; and will bar a divorce; L. R. 1 P. & M. 121; 2 Bish. Mar. Div. & Sep. 251.

"The authorities are uniform in holding that any contract between the parties, having for its object the dissolution of the marriage contract, or facilitating that result, such as an agreement by the defendant in the pending action for divorce to withdraw his or her opposition and to make no defense, is void as *contra bonos mores*, and any note given in consideration thereof is void." Adams v. Adams, 25 Minn. 72; Weeks v. Hill, 38 N. H. 199. This was quoted by Sulzberger, J., in Pletz v. Pletz, 20 Dist. R. (Pa.) 311. The fact that defendant voluntarily appears, without service, and makes no defense, is not of itself collusion, but the court will, in such case, narrowly examine the evidence; Lyon v. Lyon, 13 Dist. Rep. (Pa.) 623. A mere mutual desire to be divorced will not defeat the granting of the decree when there is no collusion between the parties for the purpose of making evidence; Taylor v. Taylor, 35 Pa. Co. Ct. 385. In Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, while the husband and wife were living apart, the husband told the wife that if she would not contest divorce proceedings he would make provision for her support. The court, in holding that a bond for such provision was not discharged in bankruptcy, said that it might be considered as in the nature of an ordinary alimony decree.

COLONIAL LAWS. The laws of a colony.

In the United States the term is used to designate the body of law in force in the colonies of America at the time of the com-

mencement of our independence, which was, in general, the common law of England, with such modifications as the colonial experience had introduced. The colonial law is thus a transition state through which our present law is derived from the English common law.

In England the term colonial law is used with reference to the present colonies of that realm. See COLONY.

COLONUS (Lat.). **In Civil Law.** A serf attached to the soil and whose descendants so continued. Whilst the *coloni* were not really *servi*, and in many respects were held to be *ingenui*, they were not permitted to remove from the place on which they were born into this status. They paid rent to the owner of the land and generally in kind. Those who were *coloni liberi* had well-ascertained rights of property as against the owner of the land, and were subject to few other obligations; while another class, called *censiti*, had no property, and what they might acquire was acquired for the master. Howe, Civ. L. (2d ed.) 152.

It is thought by Spence not improbable that many of the *ceorls* were descended from the *coloni* brought over by the Romans. The names of the *coloni* and their families were all recorded in the archives of the colony or district. Hence they were called *adscriptitii*. 1 Spence, Eq. Jur. 51.

COLONY. A union of citizens or subjects who have left their country to people another, and remain subject to the mother-country. U. S. v. The Nancy, 3 Wash. C. C. 287, Fed. Cas. No. 15,854.

A tract of territory subordinate to the inhabitants of a different tract of country, and ruled by authorities wholly or in part responsible to the main administration, instead of to the people of their own region. quoted by J. B. Thayer (Legal Essays 166) from Prof. Hart.

In conquered or ceded countries, their laws remain in force until changed, but where a colony is planted in an uninhabited country, the colonists carry with them all the English laws that are applicable to their condition; 1 Steph. Com. 62.

The country occupied by the colonists.

A colony differs from a possession or a dependency. See DEPENDENCY.

A province of Canada is not a British colony or dependency; [1911] 2 Ch. 58.

See Burge, Colonial Laws, by Renton & Phillimore.

COLOR. In Pleading. An apparent but legally insufficient ground of action admitted to subsist in the opposite party by the pleading of one of the parties to an action. 3 Bla. Com. 309; 4 B. & C. 547. To give color is to give the plaintiff credit for having an apparent or *prima facie* right of action, independent of the matter introduced to destroy it, in order to introduce new matter in avoidance of the declaration. It was necessary that all pleadings in confession and avoidance should give color. See 3 Bla. Com. 309, n.; 1 Chit. Pl. 531.

Express color is a feigned matter pleaded by the defendant, from which the plaintiff seems to have a good cause, whereas he has in truth only an appearance or color of cause. Bacon, Abr. *Trespass*, I, 4; 1 Chit. Pl. 530. It was not allowed in the plaintiff to traverse the colorable right thus given; and it thus became necessary to answer the plea on which the defendant intended to rely.

Implied color is that which arises from the nature of the defence; as where the defence consists of matter of law, the facts being admitted but their legal sufficiency denied by matters alleged in the plea. 1 Chit. Pl. 528; Steph. Pl. 206.

By giving color the defendant could remove the decision of the case from before a jury and introduce matter in a special plea, which would otherwise oblige him to plead the general issue; 3 Bla. Com. 309.

The colorable right must be plausible or afford a supposititious right such as might induce an unlearned person to imagine it sufficient, and yet it must be in legal strictness inadequate to defeat the defendant's title as shown in the plea; Comyns, Dig. *Pleading;* Kellw. 1036; 1 Chit. Pl. 531; 4 Dane, Abr. 552; Archb. Pl. 211.

COLOR OF OFFICE. A pretence of official right to do an act made by one who has no such right. 9 East 364. Such person must be at least a *de facto* officer; Burrall v. Acker, 23 Wend. (N. Y.) 606, 35 Am. Dec. 582.

An act wrongfully done by an officer, under the pretended authority of his office, and grounded upon corruption, to which the office is a mere shadow of color. Griffiths v. Hardenbergh, 41 N. Y. 464.

COLOR OF TITLE. In Ejectment. An apparent title to land founded upon a written instrument, such as a deed, levy of execution, decree of court, or the like. 3 Wait, Act. & Def. 17; Brooks v. Bruyn, 35 Ill. 394. Torrey v. Forbes, 94 Ala. 135, 10 South. 320. Color of title, for the purpose of adverse possession under the statute of limitations, is that which has the semblance or appearance of title, legal or equitable, but which, in fact, is no title; Sharp v. Furnace Co., 100 Va. 27, 40 S. E. 103; that which is a title in appearance, but not in reality; Wood v. Conrad, 2 S. D. 334, 50 N. W. 95; Dickens v. Barnes, 79 N. C. 490; Cameron v. U. S., 148 U. S. 301, 13 Sup. Ct. 595, 37 L. Ed. 459; Lindt v. Uihlein, 116 Ia. 48, 89 N. W. 214; an apparent right; Newlin v. Rogers, 6 Kan. App. 910, 51 Pac. 315; a title *prima facie* good; Farley v. Smith, 30 Ala. 38; Converse v. R. Co., 195 Ill. 204, 62 N. E. 887.

A writing upon its face professing to pass title, but which does not do so, either from

a want of title in the person making it, or from the defective conveyance used; a title that is imperfect, but not so obviously so that it would be apparent to one not skilled in the law; Williamson v. Tison, 99 Ga. 792, 26 S. E. 766; Head v. Phillips, 70 Ark. 432, 68 S. W. 878; Bloom v. Straus, 70 Ark. 483, 69 S. W. 549, 72 S. W. 563.

It has been held to be wholly immaterial how imperfect or defective the writing may be, considered as a deed; if it is in writing, and defines the extent of the claim, it is a sign, semblance or claim of title; Street v. Collier, 118 Ga. 470, 45 S. E. 294; Mullan's Adm'r v. Carper, 37 W. Va. 215, 16 S. E. 527; that strictly speaking it cannot rest in parol, see Armijo v. Armijo, 4 N. M. (Gild.) 57, 13 Pac. 92.

A state grant of land, included in an older grant, is color of title; Weaver v. Love, 146 N. C. 414, 59 S. E. 1041; so of a writing signed by the heirs of an owner of lands allotting them to two of their number and relinquishing their own right thereto; Henry v. Brown, 143 Ala. 446, 39 South. 325; and a patent, whether good against the sovereign or void; Bogardus v. Trinity Church, 4 Sandf. Ch. (N. Y.) 633; and a record of proceedings in partition; Lindsay v. Beaman, 128 N. C. 189, 38 S. E. 811.

Color of title and claim of right are not synonymous terms; Herbert v. Hanrick, 16 Ala. 581. "Claim of title" does not necessarily include "color of title"; Allen v. Mansfield, 108 Mo. 343, 18 S. W. 901. To constitute color of title, there must be a paper title; but claim of title may rest wholly in parol; Hamilton v. Wright, 30 Ia. 480. It has been held that, to give color of title, a conveyance must describe the property; Packard v. Moss, 68 Cal. 123, 8 Pac. 818; Wood v. Conrad, 2 S. D. 334, 50 N. W. 95; that it must designate a specified interest in the land; Etowah, etc., Mining Co. v. Parker, 73 Ga. 53; Wilson v. Johnson, 145 Ind. 40, 38 N. E. 38, 43 N. E. 930.

A tax deed, though void for failure to comply with the statutes, affords color of title; Lantry v. Parker, 37 Neb. 353, 55 N. W. 962; City of Chicago v. Middlebrooke, 143 Ill. 265, 32 N. E. 457; Van Gunden v. Iron Co., 52 Fed. 838, 3 C. C. A. 294. To give color, the conveyance, etc., must be good in form, and profess to convey the title and be duly executed; La Frombois v. Jackson, 8 Cow. (N. Y.) 589, 18 Am. Dec. 463; Latta v. Clifford, 47 Fed. 614; Irey v. Markey, 132 Ind. 546, 32 N. E. 309; but a deed to a tenant in possession from one who has no title to the land is insufficient as a basis for adverse possession; McRoberts v. Bergman, 132 N. Y. 73, 30 N. E. 261. A conveyance void on its face is not sufficient; Moore v. Brown, 11 How. (U. S.) 424, 13 L. Ed. 751; Marsh v. Weir, 21 Tex. 97. An entry is by color of title when it is made under a *bona fide* and not pretended claim of title existing in another; McCall v. Meely, 3 Watts (Pa.) 72. A quit-claim deed is sufficient color of title to support a plea of title by limitation; Parker v. Newberry, 83 Tex. 428, 18 S. W. 815. The deed, or color of title, under which a person takes possession of land, serves to define specifically the boundaries of his claims; Ellicott v. Pearl, 10 Pet. (U. S.) 412, 9 L. Ed. 475. When a disseisor enters upon and cultivates part of a tract, he does not thereby hold possession of the whole tract constructively, unless this entry was by color of title by specific boundaries to the whole tract; color of title, is valuable only so far as it indicates the extent of the disseisor's claim; Ege v. Medlar, 82 Pa. 99. See Allen v. Mansfield, 108 Mo. 343, 18 S. W. 901; Sholl v. Coal Co., 139 Ill. 21, 28 N. E. 748. A person taking lands under a judicial sale, though void, has color of title; Irey v. Mater, 134 Ind. 238, 33 N. E. 1018; Mullan's Adm'r v. Carper, 37 W. Va. 215, 16 S. E. 527.

See 15 L. R. A. (N. S.) 1178, note; ADVERSE POSSESSION.

COLORADO. One of the United States of America, being the twenty-fifth state admitted into the Union.

The territory of which it is composed was ceded by the treaties with France in 1803, and Mexico in 1848. The enabling act was approved March 3, 1875, and the state was finally admitted August 1, 1876. The Constitution was adopted in Convention March 14, 1876, and ratified July 1, 1876. It was amended in 1902. See CALIFORNIA; LOUISIANA Jan. 22, 1913, article XXI added to the Constitution providing for recall from office of public officials, and section 1, article VI, amended by providing for the recall of decisions and section 6, article XX, amended by giving home rule to cities and towns.

COLORE OFFICII. By color of office.

COLORED PERSON. This term generally refers to one of the negro race.

There is no legal technical signification to this phrase which the courts are bound judicially to know; Pauska v. Daus, 31 Tex. 74. See NEGRO.

COLT. An animal of the horse species, whether male or female, not more than four years old. Russ. & R. 416.

COMBAT. The form of a forcible encounter between two or more persons or bodies of men; an engagement or battle. A duel.

COMBINATION. A union of men for the purpose of violating the law. See STRIKE; BOYCOTT; RESTRAINT OF TRADE; CONSPIRACY.

A union of different elements. A patent may be taken out for a new combination of existing machines; Moody v. Fiske, 2 Mas. 112, Fed. Cas. No. 9,745. See PATENTS.

COMBUSTIO DOMORUM. Arson. 4 Bla. Com. 272.

COMBUSTIO PECUNIÆ. Burning of money; the ancient method of testing mixed and corrupt money paid into the exchequer, by melting it down. Black, L. Dict.

COMES. In Pleading. A word used in a plea or answer which indicates the presence in court of the defendant.

In a plea, the defendant says, "And the said C D, by E F, his attorney, *comes*, and defends," etc. The word comes, *venit*, expresses the appearance of the defendant in court. It is taken from the style of the entry of the proceedings on the record, and formed no part of the *viva voce* pleading. It is, accordingly, not considered as, in strictness, constituting a part of the plea; 1 Chit. Pl. 411; Steph. Pl. 432.

COMES (Lat. *comes*, a companion). An earl. A companion, attendant, or follower.

By Spelman the word is said to have been first used to denote the companions or attendants of the Roman proconsuls when they went to their provinces. It came to have a very extended application, denoting a title of honor generally, always preserving this generic signification of companion of, or attendant on, one of superior rank.

Among the Germans the comites accompanied the kings on their journeys made for the purpose of hearing complaints and giving decisions They acted in the character of assistant judges. Tacitus *de Mor. Germ* cap. 11, 12; 1 Spence, Eq. Jur. 66; Spelman, Gloss Among the Anglo-Saxons, the *comites* were the great vassals of the king, who attended, as well as those of inferior degree, at the great councils or courts of their kings. The term included also the vassals of those chiefs, 1 Spence, Eq. Jur. 42. *Comitatus*, county, is derived from *comes*, the earl or earlderman to whom the government of the district was intrusted. This authority he usually exercised through the *vice-comes*, or *shire reeve* (whence our *sheriff*). The *comites* of Chester, Durham, and Lancaster maintained an almost royal state and authority; and these counties have obtained the title of palatine, 1 Bla. Com. 116, COUNTY PALATINE The title of earl or comes has now become a mere shadow, as all the authority is exercised by the sheriff *(vice-comes)*; 1 Bla. Com. 398.

COMITAS (Lat.). Courtesy; comity. An indulgence or favor granted another nation, as a mere matter of indulgence, without any claim of right made.

COMITATUS (Lat. from *comes*). A county. A shire. The portion of the country under the government of a *comes* or count. 1 Bla. Com. 116.

An earldom. Earls and counts were originally the same as the *comitates*. 1 Ld. Raym. 13.

The county court, of great dignity among the Saxons. 1 Spence, Eq. Jur. 42, 66.

The retinue which accompanied a Roman proconsul to his province. Du Cange. A body of followers; a prince's retinue. Spelman, Gloss.

The *comitatus* was the personal following of professional warriors. Taylor, Jurispr. 216.

COMITES. Persons who are attached to a public minister. As to their privileges, see Respublica v. De Longchamps, 1 Dall. (Pa.) 117, 1 L. Ed. 59; U. S. v. Benner, Baldw. 240, Fed. Cas. No. 14,568; AMBASSADOR.

COMITIA (Lat.). The public assemblies of the Roman people at which all the most important business of the state was transacted, including in some cases even the trial of persons charged with the commission of crime. Anthon, Rom. Antiq. 51.

COMITIA CALATA. A session of the *comitia curiata* for the purpose of *adrogation*, the confirmation of wills, and the adoption by an heir of the sacred rites which followed the inheritance.

COMITIA CENTURIATA (called, also, *comitia majora*). An assemblage of the people voting by centuries. The people acting in this form elected their own officers, and exercised an extensive jurisdiction for the trial of crimes. Anthon, Rom. Antiq. 52.

COMITIA CURIATA. An assemblage of all adult male citizens. In these assemblies no one of the *plebs* could vote. They were held for the purpose of confirming matters acted on by the senate, for electing certain high officers, and for carrying out certain religious observances. A majority of the votes of the curiæ (see CURIA) determined the result after the roll of each curia had been determined by a majority of its members. Taylor, Jurispr. 56.

COMITIA TRIBUTA. Assemblies to create certain inferior magistrates, elect priests, make laws, and hold trials. Their power was increased very materially subsequently to their first creation, and the range of subjects acted on became much more extensive than at first. Anthon, Rom. Antiq. 62; 1 Kent 518.

COMITY. A term designating the practice by which one court follows the decision of another court on a like question, though not bound by the law of precedents to do so. The question most frequently arises among the federal courts of different circuits.

The importance of securing uniformity in the law as administered in the several circuits in patent cases is so great that a decision of a court of co-ordinate jurisdiction should be followed by this court in every case where the question as presented can fairly be regarded as doubtful; Gormley & Jeffery Fire Co. v. U. S. Agency, 177 Fed. 691, 101 C. C. A. 479; Pratt v. Wright, 65 Fed. 99; Enterprise Mfg. Co. v. Deisler, 46 Fed. 855.

A decision of the circuit court and the circuit court of appeals, derived from the official reports upon the point in issue (profits in a patent case) would be of controlling weight in another circuit court of appeals both on the ground of comity and also as adjudications entitled to the greatest respect; Taft, C. J., in National Folding-Box & Paper Co. v. Novelty Co., 95 Fed. 996.

A circuit court should, in the orderly administration of the law, follow the ruling of a circuit court of appeals in another circuit; Coxe, J., in Hale v. Hilliker, 109 Fed. 273; but the courts of one circuit are not controlled by the views of a patent taken by the courts of another circuit, nor absolved from an independent examination of the questions

involved; Archbald, J., in Cimiotti Unhairing Co. v. Fur Refining Co., 120 Fed. 672; the district court may decline to follow the weight of authority in the lower federal courts; McPherson, J., in U. S. v. Exp. Co., 119 Fed. 240.

The circuit court of appeals will follow the decision of another circuit court of appeals unless under especially exceptional circumstances; Pittsburgh Rys. Co. v. Sullivan, 166 Fed. 750, 92 C. C. A. 429; U. S. v. F. A. Marsily & Co., 165 Fed. 186, 91 C. C. A. 220; In re Baird, 154 Fed. 215; Gill v. Austin, 157 Fed. 234, 84 C. C. A. 677.

"Comity is not a rule of law, but one of practice, convenience and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question. But its obligation is not imperative. . . . Comity persuades; but it does not command. It declares not how a case shall be decided, but how it may with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so the judge is bound to determine them according to his own convictions. . . . It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law." Mast, Foos & Co. v. Mfg. Co., 177 U. S. 485, 488, 20 Sup. Ct. 708, 44 L. Ed. 856.

Where questions on an important patent had been decided in two circuits, the Supreme Court felt itself "bound to defer somewhat to this unanimity of opinion on the part of so many learned and distinguished judges"; Hobbs v. Beach, 180 U. S. 389, 21 Sup. Ct. 409, 45 L. Ed. 586.

In the seventh circuit decisions in patent cases in other circuits will not be followed, but each case will stand on its own merits; Welsbach Light Co. v. Gaslight Co., 100 Fed. 648.

There is no statute or common law rule by which one court is bound to abide by the decisions of another court of equal rank. It does so simply for what may be called comity among judges. There is no common law or statutory rule to oblige a court to bow to its own decisions; it does so on the ground of judicial comity; (1884) 9 P. D. 98, per Brett, M. R.

The doctrine has no application to foreign corporations. It "was not established for the purpose of giving to any state an unlimited power to dispose of the franchise of acting in a corporate capacity in other states. To obtain a charter for the purpose of evading the laws of a foreign state, under cover of the rule of comity, would be a fraud upon the state granting the charter; and to attempt to act under such charter in a foreign state would be a fraud upon the latter;" National Lead Co. v. Paint Store Co., 80 Mo. App. 247, 271.

It would seem that the use of the term "comity" in connection with cases where a court of one state under the rule of the conflict of laws adjudicates a case upon the law of another state is not correct. When a case involves a transaction in another jurisdiction and is properly decided upon the law of that other jurisdiction, under well settled rules of the conflict of laws, the law of that other jurisdiction is applied as a matter of right, and not upon the ground of comity.

Of this use of the term Mr. Dicey says: "The term 'comity,' as already pointed out, is open to the charge of implying that the judge, when he applies foreign law to a particular case, does so as a matter of caprice or favor."

Cases such as the following may perhaps illustrate another class not included in either of the above classes: "A court of equity in one state may enjoin parties from proceeding in a court of law in another state; but on principles of courtesy, and perhaps of policy, this power should not be exercised where the court of law has a concurrent jurisdiction, which was first assumed and exercised over the subject matter, unless there should exist some peculiar equitable ground for so doing." Bank of Bellows Falls v. R. Co., 28 Vt. 470.

COMITY OF NATIONS. The most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter, and it is inadmissible when it is contrary to its known policy, or prejudicial to its interests. In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless repugnant to its policy, or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation which is administered and ascertained in the same way and guided by the same reasoning by which all other principles of the municipal law are ascertained and guided. Story, Confl. L. § 38.

COMMANDER-IN-CHIEF. The president is made commander-in-chief of the army and navy of the United States and of the militia when in actual service, by art. ii. § 2 of the constitution.

COMMANDITE. In French Law. A partnership in which some furnish money, and others furnish their skill and labor in place of capital. A special or limited partnership.

Those who embark capital in such a partnership are bound only to the extent of the capital so invested; Guyot, *Rép. Univ.*

The business being carried on in the name of

some of the partners only, it is said to be just that those who are unknown should lose only the capital which they have invested, from which alone they can receive an advantage. Under the name of limited partnerships, such arrangements are now allowed by many of the states; although no such partnerships are recognized at common law. Troubat, Lim. Partn. cc. 3, 4.

The term includes a partnership containing *dormant* rather than *special* partners. Story, Partn. § 109.

COMMENCEMENT OF A DECLARATION. That part of the declaration which follows the venue and precedes the circumstantial statement of the cause of action. It formerly contained a statement of the names of the parties, and the character in which they sue or are sued, if any other than their natural capacity; of the mode in which the defendant had been brought into court, and a brief statement of the form of action. In modern practice, however, in most cases, little else than the names and character of the parties is contained in the commencement.

COMMENDA. In French Law. The delivery of a benefice to one who cannot hold the legal title, to keep and manage it for a time limited and render an account of the proceeds. Guyot, *Rép. Univ.*

In Mercantile Law. An association in which the management of the property was intrusted to individuals. Troubat, Lim. Partn. c. 3, § 27.

COMMENDAM. In Ecclesiastical Law. The appointment of a suitable clerk to hold a void or vacant benefice or church living until a regular pastor be appointed. Hob. 144; Latch 236.

In Louisiana. A species of limited partnership.

It is formed by a contract, by which one person or partnership agrees to furnish another person or partnership a certain amount, either in property or money, to be employed by the person or partnership to whom it is furnished, in his or their own name or firm, on condition of receiving a share in the profits in the proportion determined by the contract, and of being liable to losses and expenses to the amount furnished, and no more. A similar partnership exists in France. *Code de Comm.* 26, 33, Sirey, 12, pt. 2, p. 25. He who makes this contract is called, in respect to those to whom he makes the advance of capital, a partner *in commendam*. La. Civ. Code, art. 2811.

See also Mitchell, in 3 Sel. Essays, Anglo-Amer. L. H. 183.

COMMENDATORS. In Ecclesiastical Law. Secular persons upon whom ecclesiastical benefices are bestowed. So called because they are commended and intrusted to their oversight. They are merely trustees.

COMMENDATORY LETTERS. In Ecclesiastical Law. Such as are written by one bishop to another on behalf of any of the clergy or others of his diocese travelling thither, that they may be received among the faithful; or that the clerk may be promoted; or necessaries administered to others. Wharton.

COMMENDATUS. In Feudal Law. One who by voluntary homage puts himself under the protection of a superior lord. Cowell; Spelman, Gloss.

COMMERCE. The various agreements which have for their object facilitating the exchange of the products of the earth or the industry of man, with an intent to realize a profit. Pardessus, *Dr. Com.* n. 1. Any reciprocal agreements between two persons, by which one delivers to the other a thing, which the latter accepts, and for which he pays a consideration: if the consideration be money, it is called a sale; if any other thing than money, it is called exchange or barter. Domat, *Dr. Pub.* liv. 1, tit. 7, s. 1, n. 2.

"Commerce among the several states comprehends traffic, intercourse, trade, navigation, communication, the transit of persons and the transmission of messages by telegraph—indeed, every species of commercial intercourse among the several states, but not to that commerce 'completely internal, which is carried on between man and man, in a state, or between different parts of the same state, and which does not extend to or affect other states.'" Harlan, J., in Adair v. U. S., 208 U. S. 161, 177, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764.

It has been frequently said by the Supreme Court that commerce includes intercourse, though usually the term is qualified as "commercial intercourse"; Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. Ed. 23; U. S. v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; Welton v. Missouri, 91 U. S. 275, 280, 23 L. Ed. 347; Pensacola Telegraph Co. v. Western Telegraph Co., 96 U. S. 1, 9, 24 L. Ed. 708; Mobile County v. Kimball, 102 U. S. 691, 702, 26 L. Ed. 238 (where the phrase is "intercourse and traffic"); Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 241, 20 Sup. Ct. 96, 44 L. Ed. 136; Lindsay & P. Co. v. Mullen, 176 U. S. 126, 20 Sup. Ct. 325, 44 L. Ed. 400; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 470, 14 Sup. Ct. 1125, 38 L. Ed. 1047; Lottery Case, 188 U. S. 321, 346, 23 Sup. Ct. 321, 47 L. Ed. 492. The first expression of this was by Marshall, C. J., in Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. Ed. 23; quoted by Fuller, C. J., in U. S. v. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; and characterized by White, J., as a "luminous definition" in Northern Securities Co. v. U. S., 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, to the effect that commerce is something more than traffic; "it is intercourse; it describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse." This has been practically, if not literally, quoted in all the cases cited. There is nothing in the decisions to define or limit so broad a term as intercourse, except the word com-

mercial, usually attached to it. As it is hardly likely that the courts intended to say that commerce is intercourse in the sense in which it is defined "communication between persons or places"; Cent. Dict.; it is probable that the word was not intended to be used to express more than such intercourse as is connected with traffic and transportation with foreign countries or between the states.

"The word 'commerce' is undoubtedly, in its usual sense, a larger word than 'trade,' in its usual sense. Sometimes 'commerce' is used to embrace less than 'trade' and sometimes 'trade' is used to embrace as much as 'commerce.' They are . . . in this statute (Sherman Act) synonymous;" U. S. v. Patterson, 55 Fed. 605, 639.

"The term 'commerce' comprehends more than a mere exchange of goods; it embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land;" In re Second Employers' Liability Cases, 223 U. S. 1, 46, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; the "movement of persons as well as of property;" Hoke v. U. S., 227 U. S. 308, 33 Sup. Ct. 281, 43 L. R. A. (N. S.) 906.

"Transportation of passengers and freight from one state to another, or through more than one state to another, or through more than one state, whether by land or water, is commerce within the meaning of" the commerce clause, "and the words of the grant comprehend every species of commercial intercourse, and the power is complete in itself, and may be exercised to its utmost extent without limitations other than such as are prescribed in the Constitution;" Sweatt v. R. Co., 3 Cliff. (U. S.) 339, 350, Fed. Cas. No. 13,684.

It includes navigation and the control of all navigable waters of the United States; Gilman v. Philadelphia, 3 Wall. (U. S.) 713, 724, 18 L. Ed. 96; quoted in Scranton v. Wheeler, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126, as well as the improvement of harbors, bays and rivers; *id.*, quoting Mobile County v. Kimball, 102 U. S. 691, 26 L. Ed. 238.

Commerce is not a technical legal conception, but a practical one drawn from the course of business; Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182.

"Nothing is more complex than commerce"; 6 Webster's Wks. 8.

Retail trade as well as wholesale is included in the idea of commerce; Guckenheimer v. Sellers, 81 Fed. 1000.

Commerce takes its character as interstate or foreign when it is actually shipped or started in the course of transportation to another state or to a foreign country; Railroad Commission of Louisiana v. Ry. Co., 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. —; Reid v. R. Co., 153 N. C. 490, 69 S. E. 618. It does not end on the arrival of the train at the terminal, but the breaking up of the train and removal of goods to other trains is part of it; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. —; it continues until the delivery to the consignee; Barrett v. New York, 183 Fed. 793; *id.*, 189 Fed. 268, where in two hearings it was held that an express company taking goods from a steamer or railroad and transporting them through the street of the city to the consignee is still engaged in interstate commerce. The transportation to be effective under the commerce clause takes effect at the time when it "commences its final movement for transportation" out of the state; Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715; Diamond Match Co. v. Ontonagon, 188 U. S. 82, 23 Sup. Ct. 266, 47 L. Ed. 394; in both of which cases the property was to remain within the state of departure until it was convenient to transport it; but in Ogilvie v. Crawford County, 7 Fed. 745, where it was stored awaiting transportation it was protected from taxation; Ogilvie v. Crawford County, 7 Fed. 745; and to the same effect is Standard Oil Co. v. Bachelor, 89 Ind. 1.

The decisions in cases arising under the federal Employers' Liability Act involve interesting questions as to when a workman is engaged in interstate commerce, and the test is said to be—"is the work in question a part of the interstate commerce in which the carrier is engaged?" Pedersen v. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. —, citing many cases. In that case it was held that one carrying materials (bolts or rivets) to be used in repairing an instrumentality of interstate commerce (a bridge) was engaged in such commerce, although injured by an intrastate train; so also was an engineer while taking his engine from the roundhouse to the track on which were cars to be hauled by him in interstate commerce; Johnson v. Southern P. Co., 196 U. S. 1, 21, 25 Sup. Ct. 158, 49 L. Ed. 363; Lamphere v. R. & Nav. Co., 196 Fed. 336, 116 C. C. A. 156. See EMPLOYERS' LIABILITY ACT.

Contracts generally seem not to be subject to the commerce clause. It is said by a text-writer on the subject that to bring them within its scope some other element must be involved such as "transportation of property or transmission of intelligence, as by telegraph"; Cooke, Com. Cl. § 6.

Insurance is not commerce; Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. Ed. 357; Fire Ass'n of Philadelphia v. New York, 119 U. S. 110, 7 Sup. Ct. 108, 30 L. Ed. 342; Noble v. Mitchell, 164 U. S. 367, 17 Sup. Ct. 110, 41 L. Ed. 472; New York Life Ins. Co. v. Cravens, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116; New York Life Ins. Co. v. Deer Lodge County, 231 U. S. —, 34 Sup. Ct. 167, 58 L. Ed. —, decided Dec. 15, 1913, but not yet officially reported; nor are contracts for per-

sonal services between persons in different states; Williams v. Fears, 179 U. S. 270, 21 Sup. Ct. 128, 45 L. Ed. 186; Smith v. Jackson, 103 Tenn. 673, 54 S. W. 981, 47 L. R. A. 416; though Boothe v. King, 71 Ala. 499, seems *contra*.

Congress has power by the constitution to regulate commerce with foreign nations and among the several states, and with the Indian tribes; Const. U. S. Art. I, § 8; 1 Kent 431; Story, Const. § 1052.

The power conferred upon congress by the above clause is exclusive, so far as it relates to matters within its purview which are national in their character, and admit of a requisite uniformity of regulation affecting all the states. That clause was adopted in order to secure such uniformity against discriminating state legislation.

Such power is not restricted by state authority; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; but a state statute, which conflicts with the actual exercise of the powers of congress, must give way to the supremacy of the national authority; Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508.

The power to regulate commerce with the Indian tribes which is included in the commerce clause may cover sales and transportation entirely within a state; U. S. v. Holliday, 3 Wall. (U. S.) 407, 18 L. Ed. 182 (which was outside of any reservation); or by an Indian to another; U. S. v. Shaw-Mux, 2 Sawy. 364, Fed. Cas. 16,268; but not a sale to an Indian who had acquired citizenship; In re Heff, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848; and see Farrell v. U. S., 110 Fed. 942, 49 C. C. A. 183, which must be considered as overruled by the Supreme Court case. Under the protection of this clause a state tax on goods of a trader with the Indians was void; Foster v. Board of County Com'rs, 7 Minn. 140 (Gil. 84); but a contract between a state and Indians was not; In re Narragansett Indians, 20 R. I. 715, 40 Atl. 347.

The Constitutional Power of Regulation. The power of congress to regulate foreign commerce is complete in itself and no individual has a vested right to trade with foreign nations otherwise than subject to the power of congress to determine what and on what terms articles may be imported; Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; while every instrumentality of domestic commerce is subject to state control, every instrumentality of interstate commerce may be reached and controlled by national authority, so far as to compel it to respect the rules for such commerce lawfully established by congress; Northern Securities Co. v. U. S., 193 U. S. 350, 24 Sup. Ct. 436, 48 L. Ed. 679.

The right to carry on interstate commerce is not derived from the state but is a constitutional right of every citizen of the United States, and congress alone can limit the right of corporations to engage in it; Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; Ludwig v. Telegraph Co., 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423; Pullman Co. v. Kansas, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378, where it was also held that a company doing interstate business does not require permission of the state to enter it.

The power of congress over interstate commerce includes not only imposing regulations but insuring their efficiency; Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

In the Second Employers' Liability Case, 223 U. S. 1, 46, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44 (opinion by Van Devanter, J.), the court enunciated six distinct propositions as having become "so firmly settled as no longer to be open to dispute," with respect to the construction and enforcement of the federal power to regulate interstate commerce and to enact such legislation as might be necessary for that purpose:

"1. The term 'commerce' comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land.

"2. The phrase 'among the several states' marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more states and commerce which is confined to a single state and does not affect other states, the power to regulate the former being conferred upon congress and the regulation of the latter remaining with the states severally.

"3. 'To regulate,' in the sense intended, is to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large.

"4. This power over commerce among the states, so conferred upon congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce.

"5. Among the instruments and agents to which the power extends are the railroads over which transportation from one state to another is conducted, the engines and cars by which such transportation is affected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employés.

"6. The duties of common carriers in respect of the safety of their employés, while both are engaged in commerce among the states, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce and therefore are within the range of this power."

In the Covington Bridge Case, Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962, the Supreme Court cases with respect to the power of the states over commerce have been divided into three classes, which division is repeated in Southern R. Co. v. Reid, 222 U. S. 424, 32 Sup. Ct. 140, 56 L. Ed. 257:

First, those in which the power of the state is exclusive. (Cases in which this power may be exercised by the states are enumerated *infra* under the subtitle "*When the State Power is Exclusive.*")

Second, those in which the states may act in the absence of legislation by congress. In the case cited, it is said that these cases embrace what may be termed "concurrent jurisdiction," but it does not appear that such jurisdiction ever exists, because the power of the states is terminated instantly by legislation of congress on the subject. (See *infra*, under subtitle "*State Action Valid in Case of Non-Action by Congress.*")

Third, cases in which the action of congress is exclusive and the states cannot act at all. (See *infra*, under subtitle "*When the Power of Congress is Exclusive.*")

Neither this, nor in fact any other, classification of cases is satisfactory, nor is there any one of them which has been uniformly adhered to by the Supreme Court.

It may probably be fairly stated as the result of the decisions on the commerce clause that while the states have exclusive jurisdiction of certain local matters, which are controlled by virtue of its reserved police power, and they have also exclusive control of intrastate commerce, the clause of the constitution under consideration gives to congress absolute control of interstate and foreign commerce, to become at its will exclusive of all other authority. Upon many subjects affecting this commerce, the states do legislate and their statutes are held valid, but this is solely because congress has not acted, and once it does so, the power of the state ends. State legislation is not forbidden in matters either local in their operation, or intended to be mere aids to commerce, for which special regulations can more effectually provide, such as harbors, pilotage, beacons, buoys, and other improvements of harbors, bays, and rivers within a state, if their free navigation be not thereby impaired; congress by its inaction in such matters virtually declares that till it deems best to act, they may be controlled by the states; County of Mobile v. Kimball, 102 U. S. 691, 26 L. Ed. 238, per Field, J. As to certain subjects the power of congress is exclusive, and the states cannot interfere in any case, and the line of distinction is plainly marked. The cases in which the state may act so long as congress does not, are those which relate to matters of local concern, and which do not require a general uniform regulation applying to the whole country; Rhea v. R. Co., 50 Fed. 16; Cardwell v. Bridge Co., 113 U. S. 205, 5 Sup. Ct. 423, 28 L. Ed. 959. On the other hand, as to all matters affecting interstate commerce, directly or indirectly, national in character and requiring a uniform system or regulation throughout the country, the power of congress to regulate them is exclusive. This in brief seems to be the result of the decisions, which will be found cited in this title under the various subdivisions of the subject. The distinction between cases where the state may or may not act in case of non-action by congress, is well expressed in Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, to this effect: The power to regulate it between the states is a unit, but the states may legislate with regard to it in view of local needs and circumstances where particular subjects within its operation do not require the application of a general or uniform system, but where the subject does require a uniform system, as between the states, the power is exclusively in congress and cannot be encroached upon by the states. In that very leading case it was held that the right of importation of intoxicating liquors from one state to another includes the right of sale in the original packages at the place where the importation terminates; so also; Lyng v. Michigan, 135 U. S. 161, 10 Sup. Ct. 725, 34 L. Ed. 150.

It is to be noted, however, in connection with this classification of the cases, that there are many instances in which congress does act upon that intrastate commerce which is primarily within the control of the states, particularly in the case of railroads. The operation of a purely intrastate train may be so bound up with the operation of interstate trains or instrumentalities of interstate commerce, that in substance their operation is one and the same thing, and necessarily the subject of one and the same source of regulation. Of such a character are, e. g. examination of eyesight of employés, character of switches, of rails, of interlocking devices, all of which, and the like, are so connected with the operation of the railroad as an entirety, that they constitute but a single subject of governmental regulation, which, as it cannot go to both state and general government, goes, of course, when it acts, to the latter; Wabash R. Co. v. U. S., 168 Fed. 1, 93 C. C. A. 393, where the Safety Appliance Act of March 2, 1903, is held constitutional and to apply to all carriers of interstate commerce, whether

the cars and trains are operated between points in the same state, are empty, or the traffic carried is wholly intrastate. The movement of a car on a private switch used for transporting cars in interstate commerce is within the operation of that act; Gray v. R. Co., 197 Fed. 874; and so also is one used between points in the same state by a carrier engaged in interstate commerce; U. S. v. Ry. Co., 164 Fed. 347.

The commercial clause includes authority to regulate navigation in aid of commerce and to make improvements in navigable waters, such as building a lighthouse in the bed of a stream or requiring navigators of a stream to follow a prescribed course, or directing the water of a navigable stream from one channel to another; South Carolina v. Georgia, 93 U. S. 4, 23 L. Ed. 782. See also U. S. v. Duluth, 1 Dill. 469, Fed. Cas. No. 15,001.

Congress may construct or authorize the construction of railroads across the states and territories; California v. R. Co., 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150; and highways, including canals, and outside of state lines; Wilson v. Shaw, 204 U. S. 24, 27 Sup. Ct. 233, 51 L. Ed. 351, where the power of congress to construct the Panama Canal was affirmed.

The powers conferred upon congress to regulate commerce among the several states, are not confined to the instrumentalities of commerce known or in use when the constitution was adopted, but keep pace with the progress of the country, and adapt themselves to new developments of time and circumstances. Accordingly, the power of regulation is applied to much subject-matter unknown at the date of the adoption of the constitution. In addition to those things commonly understood to be included in the definitions of commerce, *supra*, it has been extended to sleeping and parlor cars; Allen v. Pullman Co., 191 U. S. 171, 24 Sup. Ct. 39, 48 L. Ed. 134; refrigerator cars; Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149, 20 Sup. Ct. 631, 44 L. Ed. 708; express companies; Osborne v. Florida, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. Ed. 586; telegraph and telephone; Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; Western Union Telegraph Co. v. Missouri, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. Ed. 1116; business correspondence schools; International Text Book Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 24 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; a herd of sheep driven from one state across another to a point in a third for shipment; Kelley v. Rhoads, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. Ed. 359; natural gas, after severance from the ground; Haskell v. Gas Co., 224 U. S. 217, 32 Sup. Ct. 442, 56 L. Ed. 738; State v. Gas & Mining Co., 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579; the transmission of lottery tickets between states; Lottery Case, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492. As to goods, intrastate carriage *in transitu* to another state, is interstate commerce; The Daniel Ball, 10 Wall. (U. S.) 557, 19 L. Ed. 999; the ultimate destination prevails; Houston Direct Nav. Co. v. Ins. Co., 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, 59 Am. St. Rep. 17; if the shipment partially intrastate is *bona fide* it is not interstate, but otherwise if a mere subterfuge to benefit *pro tanto* by reduced state rates; Gulf, C. & S. F. Ry. Co. v. Texas, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540.

Interstate commerce by sea is of a national character and within the exclusive power of congress; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200; and so is transportation from a point in one state to or through another or other states, and it is commerce among the states even as to the part of the journey within the state; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244. Where the railroad runs for a few miles out of a state and back the carriage is interstate commerce; Hanley v. Ry. Co., 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333; so of a vessel between two ports of the same state passing more than a marine league from shore; Pacific Coast S. S. Co. v. R. Com'rs, 18 Fed. 10. Prior to the decision of the Supreme Court, the state courts were divided; Sternberger v. R. Co., 29 S. C. 510, 7 S. E. 836, 2 L. R. A. 105, agreeing with it, and State v. Telegraph Co., 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570, *contra*; it was, however, held that when a passenger (whose ultimate destination is to a place in another state) purchases a ticket to a point within the state and then another to his destination, his first purchase was intrastate commerce to which state rates apply; Kansas City S. R. Co. v. Brooks, 84 Ark. 233, 105 S. W. 93.

A grain elevator engaged in the business of storing grain in the course of interstate transportation is not engaged in interstate commerce; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 619; People v. Miller, 84 App. Div. 174, 82 N. Y. Supp. 582, where Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247, and Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, were cited with the comment that in each of them the point was a minor one and did not receive full consideration, and upon that point they had been much criticized. So it was held that coal mined in one state and sent into another to await shipment to purchasers was not exempt from state taxation as subject-matter of interstate commerce; Lehigh & Wilkes-Barre Coal Co. v. Borough of Junction, 75 N. J. L. 922, 68 Atl. 806, 15 L. R. A. (N. S.) 514.

The commodities clause of the Hepburn Act, *q. v.*, is a regulation of commerce with-

in the power of congress to enact, and its power to regulate interstate commerce does not require that the regulation should apply to all commodities alike, nor does an exception of one invalidate it; U. S. v. Delaware & H. Co., 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836.

The Employers' Liability Act of June 11, 1906, providing that every common carrier engaged in trade and commerce in the District of Columbia or in the territories or between the several states shall be liable for the death or injury of any of its employés which may result from the negligence of any of its officers, agents or employés was held to be a regulation of intrastate as well as of interstate commerce, and therefore one beyond the power of congress to enact; Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, four Justices dissenting. As to the case of the Second Employers' Liability Act of 1908, see *supra*.

Transportation in and out of the state is interstate commerce. A railroad entirely in a state, but a connecting link of interstate roads, is engaged in interstate commerce; Houston Direct Nav. Co. v. Ins. Co., 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, 59 Am. St. Rep. 17; but an interstate shipment (in this case, of car load lots) on reaching the point designated in the original contract of transportation ceases to be an interstate shipment, and its further transportation to another point within the same state, on the order of the consignee, is controlled by the law of the state and not by the interstate commerce act; Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540. Shipments of lumber on local bills of lading from one point in a state to another point in the same state destined from the beginning for export, are foreign and not intrastate commerce; De Bary & Co. v. Louisiana, 227 U. S. 108, 33 Sup. Ct. 239, 57 L. Ed. —; following Southern Pac. Terminal Co. v. Commerce Commission, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310; Railroad Commission of Ohio v. R. Co., 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004; distinguishing Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540.

When the Power of Congress is Exclusive. The power of congress over interstate commerce "is necessarily exclusive whenever the subject-matter is national in its character and properly admits of only one uniform system," and in such cases non-action by congress is equivalent to a declaration that it shall be free and untrammelled; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 336, 7 Sup. Ct. 1118, 30 L. Ed. 1200; Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347; Robbins v. Taxing Dist., 120 U. S. 489, 498, 7 Sup. Ct. 592, 30 L. Ed. 694; where it was said that if selling goods by sample needs regulation, it must obviously be based on a uniform system applicable to the whole country, and congress alone can do it; Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; Bowman v. R. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; Crandall v. Nevada, 6 Wall. (U. S.) 35, 18 L. Ed. 745, where it was held that the states have no right to tax interstate commerce although they may tax the instruments of such commerce in like manner as other property of the same description. Such a regulation, national in its nature, is the requirement of a bond of indemnity from passengers arriving from foreign ports; Henderson v. New York, 92 U. S. 259, 23 L. Ed. 543; or the payment of a tax on each such passenger; Smith v. Turner, 7 How. (U. S.) 283, 12 L. Ed. 702 (but the requirement of a list of passengers, with ages, occupations, etc., is a police regulation within the power of the state; New York v. Miln, 11 Pet. [U. S.] 103, 9 L. Ed. 648); so also the transportation of persons or merchandise "is in its nature national, admitting of but one regulating power"; Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; Bowman v. R. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; Sloman v. Moebs Co., 139 Mich. 334, 102 N. W. 854; Richter v. Poppenhausen, 42 N. Y. 374; Greek-American Sponge Co. v. Drug Co., 124 Wis. 469, 102 N. W. 888, 109 Am. St. Rep. 961; though the delivery is made by an agent, residing in the state, of the non-resident seller; Kehrer v. Stewart, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663; whether the sale is made directly to the customer or to a retailer; *id.*; imported goods in unbroken original packages are not subject to state taxation; In re Doane, 197 Ill. 376, 64 N. E. 377; State v. Board of Assessors, 46 La. Ann. 145, 15 South. 10, 49 Am. St. Rep. 318; but merchandise consigned by non-resident sellers to and stored by a warehouseman, awaiting future sale and delivery, is not protected from local assessment as interstate commerce; Merchants' Transfer Co. v. Board of Review, 128 Ia. 732, 105 N. W. 211, 2 L. R. A. (N. S.) 662, 5 Ann. Cas. 1016.

As to matters under the exclusive power of congress, national in their character and requiring general and not local rules of regulation, the fact that congress has not legislated does not make it lawful for the states to do so. Such inaction shows only that no restrictions are to be put upon commerce in that direction. The right to legislate is exclusively vested in congress; and when congress legislates on a subject within its exclusive power a state loses control of any right it may have had to apply the police power to it, even though the federal act is not to take effect until a future period; Northern Pac. Ry. Co. v. Washington, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. Ed. 237.

The course of decisions, mainly in the United States Supreme Court, covers a great variety of subjects with which the state

legislatures have attempted to deal in the enactment of statutes which have been held unconstitutional because they interfered with the exclusive power of congress conferred by the commerce clause of the constitution. Among the statutes which have thus fallen under the ban of the final authority on the subject is one imposing a burdensome condition upon a shipmaster as a prerequisite for landing his passengers, with the alternative of the payment of a small sum for each of them; Henderson v. New York, 92 U. S. 259, 23 L. Ed. 543; one regulating the arrival of passengers from a foreign port and authorizing an executive officer to include passengers of certain classes at his discretion; Chy Lung v. Freeman, 92 U. S. 275, 23 L. Ed. 550; which the court considered as having been enacted mainly to exclude Chinese immigration, and to go far beyond the legitimate state action of excluding pauper or convict immigrants. See also In re Ah Fong, 3 Sawy. 144, Fed. Cas. No. 102. But a statute is not invalid where the detention is for the purpose of disinfection by the order of a state board of health; Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. Ed. 678; Minneapolis, St. P. & S. S. M. R. Co. v. Milner, 57 Fed. 276. So statutes are unconstitutional which require the payment of a license tax by commercial travellers selling goods manufactured in other states, but not by those selling goods manufactured in the state itself; Brennan v. Titusville, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; Webber v. Virginia, 103 U. S. 344, 26 L. Ed. 565; Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347; Asher v. Texas, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368; Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; McCall v. California, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. Ed. 391; McClellan v. Pettigrew, 44 La. Ann. 356, 10 South. 853; Overton v. City of Vicksburg, 70 Miss. 558, 13 South. 226; Hurford v. State, 91 Tenn. 669, 20 S. W. 201 (but not when the same tax is levied upon peddlers selling goods made in or out of the state; Howe Mach. Co. v. Gage, 100 U. S. 676, 25 L. Ed. 754; or which were part of the mass of property in the state; Emert v. Missouri, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430; and see Tiernan v. Rinker, 102 U. S. 123, 26 L. Ed. 103); so of an act requiring importers of foreign goods to take out a license in the exercise of a power of taxation; Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. Ed. 678; and a state law which requires a party to take out a license for carrying on interstate commerce; Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649; a city ordinance laying wharf fees upon vessels laden with products of other states, which are not exacted from vessels laden with products of the home state; Guy v. Baltimore, 100 U. S. 434, 25 L. Ed. 743; a state tonnage tax on foreign vessels; Cannon v. New Orleans, 20 Wall. (U. S.) 577, 22 L. Ed. 417; levied to defray quarantine expenses; Peete v. Morgan, 19 Wall. (U. S.) 581, 22 L. Ed. 201; otherwise of a tax for city purposes levied upon a vessel owned by a resident of the city which is not imposed for the privilege of trading; Wheeling, P. & C. Transp. Co. v. Wheeling, 99 U. S. 273, 25 L. Ed. 412; The North Cape, 6 Biss. 505, Fed. Cas. No. 10,316; granting a telegraph company exclusive right to maintain telegraph lines in such state as contrary to the Act of July 24, 1866, which practically forbids the state to exclude from its borders a telegraph company building its lines in pursuance of this act of congress; Pensacola Telegraph Co. v. Telegraph Co., 96 U. S. 1, 24 L. Ed. 708; an attempt to regulate transmission of telegraphic messages into other states and their delivery; Western Union Telegraph Co. v. Pendleton, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187; as telegraphic communications carried on between different states are interstate commerce; Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; a statute providing for inspection of sea-going vessels arriving at a port and of damaged goods found thereon by a state officer, with a view to furnishing official evidence to the parties immediately concerned, and when goods are damaged to provide for their sale; Foster v. Master & Wardens of New Orleans, 94 U. S. 246, 24 L. Ed. 122; and one prohibiting the driving of cattle from another state into the state during certain months; Hannibal & St. J R. Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527, one regulating the rates on interstate traffic; Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244.

A state law, requiring the master of every vessel in the foreign trade to pay a certain sum to a state officer for every passenger brought from a foreign country into the state, is void; Smith v. Turner, 7 How. (U. S.) 283, 12 L. Ed. 702. No state can grant an exclusive monopoly for the navigation of any portion of the waters within its limits upon which commerce is carried on under coasting licenses granted under the authority of congress: Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. Ed. 23; the rights here in controversy were the exclusive right to navigate the Hudson river with steam vessels. See also, on this point, Gilman v. Philadelphia, 3 Wall. (U. S.) 713, 18 L. Ed. 96; The Daniel Ball, 10 Wall. (U. S.) 557, 19 L. Ed. 999; Craig v. Kline, 65 Pa. 399, 3 Am. Rep. 636. But a state law granting to an individual an exclusive right to navigate the upper waters of a stream which is wholly within the limits of a state, separated from tide waters by falls impassable for purposes of navigation, and not forming a part of a continuous track of navigation between two or more states, or with a foreign country, is not invalid; Veazie v. Moor, 14 How. (U. S.)

568, 14 L. Ed. 545; and see McReynolds v. Smallhouse, 8 Bush (Ky.) 447. A statute forbidding common carriers to bring intoxicating liquors into the state without being furnished with a certificate that the consignee was authorized to sell intoxicating liquors in the county is invalid; Bowman v. Ry. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700. And so is an act taxing a corporation of another state, owning a railroad which is a link in an interstate line, for the privilege of keeping an office in the state; Norfolk & W. R. Co. v. Com., 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394. And a tax on persons and property received and landed within one state after being transported from another was held a tax upon interstate commerce and a regulation thereof upon a matter which is within the exclusive power of congress; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158.

When the State Power is Exclusive. The states may authorize the construction of highways, turnpikes, railways and canals between points in the same states and regulate the tolls thereof; Baltimore & O. R. Co. v. Maryland, 21 Wall. (U. S.) 456, 22 L. Ed. 678; the building of bridges over nonnavigable streams and regulate the navigation of the strictly internal waters of the state, such as do not by themselves, or by connection with other waters, form a continuous highway over which commerce is or may be carried on with other states or foreign countries; Veazie v. Moor, 11 How. (U. S.) 568, 14 L. Ed. 545; The Montello, 11 Wall. (U. S.) 411, 20 L. Ed. 191; *id.*, 20 Wall. (U. S.) 430, 22 L. Ed. 391; and this rule obtains even if goods or passengers, over such highways between points in the same state, may have an ultimate destination in other states, and, to a *slight* extent the state regulations may be said to interfere with interstate commerce; Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244; the states may also exact a bonus or even a portion of the earnings of such corporation as a condition to the grant of its charter; Society for Savings v. Coite, 6 Wall. (U. S.) 594, 18 L. Ed. 897; Provident Inst. for Savings v. Massachusetts, 6 Wall. (U. S.) 611, 18 L. Ed. 907; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. (U. S.) 632, 18 L. Ed. 904; Baltimore & O. R. Co. v. Maryland, 21 Wall. (U. S.) 456, 22 L. Ed. 678; Ashley v. Ryan, 153 U. S. 436, 14 Sup. Ct. 865, 38 L. Ed. 773. The power to enact police regulations relating exclusively to intrastate trade cannot be interfered with by congress; U. S. v. De Witt, 9 Wall. (U. S.) 41, 19 L. Ed. 593; Patterson v. Kentucky, 97 U. S. 501, 24 L. Ed. 1115; State v. R. Co., 152 Wis. 341, 140 N. W. 70; U. S. v. Vassar, 5 Wall. (U. S.) 462, 470, 471, 18 L. Ed. 497. The remarks of Chase, C. J., in this case contain the substance of the whole doctrine: "Over this (the internal) commerce and trade, congress has no power of regulation or any direct control. This power belongs exclusively to the states. No interference by congress with the business of citizens transacted within a state is warranted by the constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a state is plainly repugnant to the exclusive power of the state over the same subject."

Regulation of intrastate commerce belongs to the state subject to the condition that prescribed rates must not be so unreasonably low as to deprive the carrier of his property without due process of law; Smyth v. Ames, 169 U. S. 466, 526, 18 Sup. Ct. 418, 42 L. Ed. 819. See RATES.

It was at one time thought that the admiralty jurisdiction of the United States did not extend to contracts of affreightment between ports of the United States, though the voyage were performed upon navigable waters of the United States; Allen v. Newberry, 21 How. (U. S.) 244, 16 L. Ed. 110. But later adjudications have ignored this distinction as applied to those waters; The Belfast, 7 Wall. (U. S.) 624, 641, 19 L. Ed. 266; The Lottawanna, 21 Wall. (U. S.) 558, 587, 22 L. Ed. 654; Lord v. Steamship Co., 102 U. S. 541, 26 L. Ed. 224.

Under this power the states may also prescribe the form of all commercial contracts, as well as the terms and conditions upon which the internal trade of the state may be carried on: United States v. Steffens, 100 U. S. 82, 25 L. Ed. 550.

State statutes affecting interstate commerce have been sustained as follows: One directed against color blindness; Nashville, C. & St. L. R. v. Alabama, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352; requiring interstate locomotive engineers to obtain a license after a qualifying examination, and imposing a penalty for operating without such license; Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; forbidding a contract limiting liability for injury; Chicago, M. & St. P. Ry. Co. v. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; Peirce v. Van Dusen, 78 Fed. 693, 24 C. C. A. 280, 69 L. R. A. 705; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268; requiring telegraph companies to receive dispatches and to transmit and deliver them with due diligence, as applied to messages from outside the state; Western Union Telegraph Co. v. James, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105; forbidding the running of freight trains on Sunday; Hennington v. Georgia, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; requiring railroad companies to fix their rates annually for the transportation of passengers and freight and to post a printed copy of such rates at all their stations; Chicago

& N. W. Ry. Co. v. Fuller, 17 Wall. (U. S.) 560, 21 L. Ed. 710; forbidding the consolidation of parallel or competing lines of railways; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849; regulating the heating of passenger cars and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853; requiring track connections and facilities for the interchange of cars and traffic at railroad intersections; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194. A statute regulating receipts for deposits of money is not a burden on, or regulation of, interstate commerce, simply because such receipts are likely to be transmitted to other states or foreign countries; Engel v. O'Malley, 219 U. S. 128, 31 Sup. Ct. 190, 55 L. Ed. 128. The Arkansas "Full Crew" act is not unconstitutional under the commerce clause, congress not having acted in regard thereto; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 31 Sup. Ct. 275, 55 L. Ed. 290.

The line of distinction between an interference with commerce and a mere police regulation is sometimes exceedingly dim and shadowy. Undoubtedly, congress may go beyond the general regulations of commerce which comprise its exclusive jurisdiction and descend to minute directions which will exclude the exercise of state power as to matters covered by them. It may establish police regulations, as well as the states, as to matters of which it is given control by the constitution, but generally the police power being better exercised by the local authorities, and the power to arrest collision residing in the national courts, the regulations of congress seldom exclude the establishment of others by the state covering many particulars; Cooley, Const. Lim. 731. See Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200.

It was said by Strong, J., in Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 473, 24 L. Ed. 527, that "the police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the federal constitution, it is the duty of the courts to guard vigilantly against any needless intrusion." This language was quoted with approval by Matthews, J., in Bowman v. R. Co., 125 U. S. 465, 492, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700.

The doing of interstate business by one engaged also in local commerce is not a bar to state regulation or taxation; Osborne v. State, 33 Fla. 162, 14 South. 588, 25 L. R. A. 120, 39 Am. St. Rep. 99.

The commerce clause is not violated by a state statute prohibiting the manufacture and sale of adulterated goods; Crossman v. Lurman, 192 U. S. 189, 24 Sup. Ct. 234, 48 L. Ed. 401; nor by a state tax on cab service; New York v. Knight, 192 U. S. 21, 24 Sup. Ct. 202, 48 L. Ed. 325; nor by a tax on nonresident managers of meat packing houses, construed by the highest state court to apply only to selling to local customers from stock of original packages not as a mere incident of interstate commerce; Kehrer v. Stewart, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663; nor a tax on foreign corporations engaged in carrying passengers or merchandise upon their gross receipts outside of the state; State Tax on Railway Gross Receipts, 15 Wall. (U. S.) 284, 21 L. Ed. 164; Indiana v. Exp. Co., 7 Biss. 227, Fed. Cas. No. 7,021; nor by a shipment of buggies (by a foreign manufacturer) either complete or in packages of parts put together and peddled about the state by an agent who was held liable to an occupation tax; Saulsbury v. State, 43 Tex. Cr. R. 90, 63 S. W. 568, 96 Am. St. Rep. 837. A state may, in the absence of federal legislation on the subject, reasonably regulate the hours of labor of employés on interstate railroads; State v. R. Co., 36 Mont. 582, 93 Pac. 945, 15 L. R. A. (N. S.) 134, 13 Ann. Cas. 144. It may adopt regulations to prevent the spread of diseases among plants; Ex parte Hawley, 22 S. D. 23, 115 N. W. 93, 15 L. R. A. (N. S.) 138

The constitutional provision does not apply to regulations as to life-preservers, boiler inspections, etc., on steamboats which confine their business to ports wholly within a state; The Thomas Swan, 6 Ben. 42, Fed. Cas. No. 13,931; nor to any commerce entirely within a state; The Daniel Ball v. U. S., 10 Wall. (U. S.) 557, 19 L. Ed. 999; Lehigh Val. R. Co. v. Pennsylvania, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 10 Sup. Ct. 348, 33 L. Ed. 784; nor to a condition in a railroad charter granted by a state that the company shall pay a part of its earnings to the state, from time to time, as a bonus; Baltimore & O. R. Co. v. Maryland, 21 Wall. (U. S.) 456, 22 L. Ed. 678; nor to a state law prescribing regulations for warehouses, carrying on business within the state exclusively, notwithstanding they are used as instruments of interstate traffic; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; nor to a law of Virginia by which only such persons as are not citizens of that state are prohibited from planting oysters in a soil covered by her tidewaters. Subject to the paramount right of navigation, each state owns the beds of all tide-waters within its jurisdiction, and may appropriate them to be used by its own citizens; McCready v. Virginia, 94 U. S. 391, 24

L. Ed. 248. It does not forbid a state from enacting, as a police regulation, a law prohibiting the manufacture and sale of intoxicating liquors; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989; nor the sale of oleomargarine brought from another state; Com. v. Paul, 148 Pa. 559, 24 Atl. 78; Com. v. Schollenberger, 156 Pa. 201, 27 Atl. 30, 22 L. R. A. 155, 36 Am. St. Rep. 32; Com. v. Huntley, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839; though in original packages; In re Scheitlin, 99 Fed. 272; or imposing a license tax upon travelling salesmen selling liquor in quantities of less than five gallons, the statute having been held by the highest court of the state to be a police regulation and not a taxing act; Delamater v. South Dakota, 205 U. S. 93, 27 Sup. Ct. 447, 51 L. Ed. 724 (where it was said that such an act is within the purview of, and not in conflict with, the Wilson Act); or a state act prescribing maximum rates of transportation within the state; Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155, 24 L. Ed. 94; and see Peik v. Chicago & N. W. R. Co., 94 U. S. 164, 24 L. Ed. 97; Cooley, Const. L. 75. Nor is a city ordinance, exacting a license fee, for the maintenance of its office in the city, from an express company doing business beyond the limits of a state, invalid; Osborne v. Mobile, 16 Wall. (U. S.) 479, 21 L. Ed. 470; nor a tax on telegraph poles erected within a city; St. Louis v. Telegraph Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; Philadelphia v. Cable Co., 67 Hun 21, 21 N. Y. Supp. 556; nor a statute requiring locomotive engineers to be licensed after examination, it being a valid exercise of the police power; Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; see Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352; nor one forbidding dealing in futures on margins; State v. Beatty (Miss.) 60 South. 1016; nor prohibiting shipment or sale of unripe fruits; Sligh v. Kirkwood (Fla.) 61 South. 185; nor prescribing the effect of domestic indorsements on foreign bills of lading; Roland M. Baker Co. v. Brown, 214 Mass. 196, 100 N. E. 1025.

A city ordinance providing that only rock dressed within the state should be used in any city public works was held valid; Allen v. Labsap, 188 Mo. 692, 87 S. W. 926, 3 Ann. Cas. 306, considered as sound in 19 Harv. L. Rev. 70; and criticized in 61 Cent. L. J. 65. Railroad cars engaged in interstate commerce may be attached under an execution issued out of a state court; Davis v. Ry. Co., 217 U. S. 157, 30 Sup. Ct. 463, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907. In Stone v. Trust Co., 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636, it was held that the right of the state to limit charges of a railroad company could not be granted away by giving to the company the right from time to time to fix and regulate their charges, and that a state was not foreclosed of its right to act upon the reasonableness of the charges and to regulate them for business within the state. A state statute requiring a carrier to settle within a specified time claims for loss or damages is not, in the absence of legislation by congress, an unwarrantable interference with interstate commerce, and is constitutional; Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 30 Sup. Ct. 378, 54 L. Ed. 411. See Morris v. Express Co., 146 N. C. 167, 59 S. E. 667, 15 L. R. A. (N. S.) 983. And so is one providing that a railroad is liable for damages from fire; McCandless v. R. Co., 38 S. C. 103, 16 S. E. 429, 18 L. R. A. 440. See FIRE. So also are municipal ordinances, in the exercise of police power, prohibiting the sale of a commodity, otherwise than in original packages, as intoxicating liquor; Duluth Brewing & Malting Co. v. Superior, 123 Fed. 353, 59 C. C. A. 481; or perishable market produce sold in railroad depots; State v. Davidson, 50 La. Ann. 1297, 24 South. 324, 69 Am. St. Rep. 478.

The principles regulating the police power of the states in its relation to the commerce clause are well defined in Reid v. Colorado, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108, where it was said in substance that the United States constitution gives no one a right to introduce into a state, against its will, live stock affected by a contagious disease. Congress not having assumed charge of the matter as involved in interstate commerce, a state may protect its people, but it must not go beyond the necessities of the case nor unreasonably burden the exercise of privileges secured by the constitution.

State Action Valid in Case of Non-Action by Congress. There is a class of cases in which the state may act so long as congress does not, as detailed in County of Mobile v. Kimball, *supra*. The question whether nonaction by congress "is conclusive of its intention that the subject shall be free from all positive regulation, or that, until it positively interferes, such commerce may be left to be freely dealt with by the respective states," is to be determined in each case as it arises; Bowman v. Ry. Co., 125 U. S. 465, 483, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700.

In this class of cases have been included: Laws for the regulation of pilots; Cooley v. Board of Wardens, etc., 12 How. (U. S.) 299, 13 L. Ed. 996; Pacific Mail S. S. Co. v. Joliffe, 2 Wall. (U. S.) 450, 17 L. Ed. 805; In re McNiel, 13 Wall. (U. S.) 236, 20 L. Ed. 624; Wilson v. McNamee, 102 U. S. 572, 26 L. Ed. 234; quarantine and inspection laws and the policing of harbors; Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 203, 6 L. Ed. 23 New York v. Miln, 11 Pet. (U. S.) 102, 9 L. Ed 648; Morgan's Louisiana & T. R. & S. S. Co v. Board of Health, 118 U. S. 455, 6 Sup. Ct 1114, 30 L. Ed. 237; the improvement of navigable channels; Mobile County v. Kimball

102 U. S. 691, 26 L. Ed. 238; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442; Huse v. Glover, 119 U. S. 543, 7 Sup. Ct. 313, 30 L. Ed. 487; the regulation of wharfs, piers, and docks; Cannon v. New Orleans, 20 Wall. (U. S.) 577, 22 L. Ed. 417; Keokuk Northern Line Packet Co. v. Keokuk, 95 U. S. 80, 24 L. Ed. 377; Northwestern Union Packet Co. v. St. Louis, 100 U. S. 423, 25 L. Ed. 688; Parkersburg & O. R. Transp. Co. v. Parkersburg, 107 U. S. 691, 2 Sup. Ct. 732, 27 L. Ed. 584; Ouachita & M. R. Packet Co. v. Aiken, 121 U. S. 444, 7 Sup. Ct. 907, 30 L. Ed. 976; the establishment of ferries; Conway v. Taylor's Ex'r, 1 Black (U. S.) 603, 17 L. Ed. 191; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 211, 14 Sup. Ct. 1087, 38 L. Ed. 962; Marshall v. Grimes, 41 Miss. 27; Chilvers v. People, 11 Mich. 43; and dams: Willson v. Marsh Co., 2 Pet. (U. S.) 245, 7 L. Ed. 412; Neaderhouser v. State, 28 Ind. 257; Woodman v. Mfg. Co., 1 Biss. 546, Fed. Cas. No. 17,978; Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884; acts giving a right of action against the owners of a vessel engaged in interstate traffic for the death of a passenger caused by the negligence of those in charge of the vessel; Sherlock v. Alling, 93 U. S. 99, 23 L. Ed. 819; forbidding the sale of plumage, skin or body of any non-game bird, whether captured or killed within or without the state; In re Schwartz, 119 La. 290, 44 South. 20, 121 Am. St. Rep. 516; acts for preventing the spread of disease among plants and trees whether grown or sold within or without the state and transported and sold for planting within the state; Ex parte Hawley, 22 S. D. 23, 115 N. W. 93, 15 L. R. A. (N. S.) 138.

The state may authorize the building of dams and bridges over navigable waters, notwithstanding the fact that they may, to some extent, interfere with the navigation of the stream; Willson v. Black-Bird Creek Marsh Co., 2 Pet. (U. S.) 245, 7 L. Ed. 412; Cardwell v. Bridge Co., 113 U. S. 205, 5 Sup. Ct. 423, 28 L. Ed. 959; Pound v. Turck, 95 U. S. 459, 24 L. Ed. 525. If the stream is one over which the regulation of congress extends, the question arises whether the bridge will interfere with navigation or not; it is not necessarily unlawful if properly built, and if the general traffic of the country will be benefited rather than injured by its construction. There are many cases in which a bridge may be vastly more important than the navigation of the stream which it crosses. It may be said that a state may authorize such constructions, provided they do not constitute a material obstruction to navigation; and each case depends upon its own particular facts. The decision of the state legislature is not conclusive; the final decision rests with the federal courts, who may cause the structure to be abated if it be found to obstruct unnecessarily the traffic on the stream; Cooley, Const. Lim. 738, 739, 740; Pennsylvania v. Bridge Co., 13 How. (U. S.) 518, 14 L. Ed. 249; see also Columbus Ins. Co. v. Bridge Ass'n, 6 McLean 70, Fed. Cas. No. 3,046; Columbus Ins. Co. v. Curtenius, 6 McLean 209, Fed. Cas. No. 3,045; Jolly v. Draw-Bridge Co., 6 McLean 237, Fed. Cas. No. 7,441; Board of Com'rs of St. Joseph County v. Pidge, 5 Ind. 13; Rhea v. R. Co., 50 Fed. 16; State v. Leighton, 83 Me. 419, 22 Atl. 380; Luxton v. Bridge Co., 153 U. S. 525, 14 Sup. Ct. 891, 38 L. Ed. 808; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962. See BRIDGE. The state has also the power to regulate the speed and general conduct of vessels navigating its waters, provided such regulations do not conflict with regulations prescribed by congress for foreign commerce, or commerce among the states; Cooley, Const. Lim. 740; People v. Jenkins, 1 Hill (N. Y.) 469, 470.

Of this class of cases, it was said by Mr. Justice Curtis in Cooley v. Board of Wardens, 12 How. (U. S.) 299, 318, [13 L. Ed. 996]: "If it were admitted that the existence of this power in congress, like the power of taxation, is compatible with the existence of a similar power in the states, then it would be in conformity with the contemporary exposition of the constitution (Federalist No. 32), and with the judicial construction given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such power to congress did not imply a prohibition on the states to exercise the same power; that it is not the mere existence of such a power, but its exercise by congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional regulations." See, also, Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 193, 4 L. Ed. 529. But even in the matter of building a bridge, if congress chooses to act, its action necessarily supersedes the action of the state; Pennsylvania v. Bridge Co., 18 How. (U. S.) 421, 15 L. Ed. 435. As a matter of fact, the building of bridges over waters dividing two states is now usually done by congressional sanction. See NAVIGABLE WATERS.

Under this power the state may also tax the instruments of interstate commerce as it taxes other similar property, provided such tax is not laid upon the commerce itself. Brown, J., in Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962.

But wherever such laws, instead of being of local nature and only affecting interstate commerce incidentally, are national in their character, the non-action of congress indicates its will that such commerce shall be free and untrammelled, and the case falls within the class wherein the jurisdiction of

congress is exclusive; Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; Bowman v. Ry. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962, and *supra*.

This contingent right of action by the states may sometimes be exercised by the courts as well as by legislatures, as where there has been no action by congress or the interstate commerce commission, a state court may by mandamus compel a railroad company doing interstate business to afford equal switching service to its shippers notwithstanding the cars in regard to which the service is claimed would eventually be engaged in interstate commerce; Missouri Pac. Ry. Co. v. Flour Mills Co., 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. 352.

The Wilson Act (see LIQUOR) provides that intoxicating liquors transported into any state or territory shall be subject to the laws thereof enacted under the police power "upon arrival in such state." In construing this act it has been held that the interstate commerce is not ended until the goods are moved from the station platform to the freight warehouse, if sent by express; Rhodes v. Iowa, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088; State v. Intoxicating Liquors, 102 Me. 206, 66 Atl. 393, 11 L. R. A. (N. S.) 550; that they are not subject to seizure while in the hands of the express company; Adams Exp. Co. v. Iowa, 196 U. S. 147, 25 Sup. Ct. 185, 49 L. Ed. 424; that delivery to the consignee is necessary to constitute arrival in the state; Heymann v. Ry. Co., 203 U. S. 270, 27 Sup. Ct. 104, 51 L. Ed. 178, 7 Ann. Cas. 1130; and that this phrase means actual, not implied, delivery; U. S. v. Building Co., 206 U. S. 120, 27 Sup. Ct. 676, 51 L. Ed. 983; Adams Exp. Co. v. Kentucky, 206 U. S. 138, 27 Sup. Ct. 608, 51 L. Ed. 992; that an agreement of the local express agent to hold for a few days a C. O. D. shipment to suit the convenience of the consignee in paying did not affect the transaction as interstate commerce; American Exp. Co. v. Kentucky, 206 U. S. 139, 27 Sup. Ct. 609, 51 L. Ed. 993; State v. Intoxicating Liquors, 101 Me. 430, 64 Atl. 812. In State v. Holleyman, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567, before the United States Supreme Court decisions, it was held that liquor received in another state and taken to its destination in a buggy did not "arrive" until both buggy and liquor arrived with the purchaser at his home in the state. Cases which held otherwise, decided prior to the United States Supreme Court decisions and of course overruled by them, are In re Langford, 57 Fed. 570; Southern Exp. Co. v. State, 114 Ga. 226, 39 S. E. 899; State v. Intoxicating Liquors, 95 Me. 140, 49 Atl. 670; State v. Intoxicating Liquors, 96 Me. 415, 52 Atl. 911. An article in 22 Green Bag 10, on "Liquor in Interstate Relations" suggests that, to give effect to state laws, congress may either repeal all legislation recognizing liquors as the subject of interstate commerce, or explicitly recognize that, for the purpose of giving effect to state prohibitory legislation, they are not to be regarded as such.

State Action Held Invalid. Any "state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom does encroach upon the exclusive power of congress"; Rae v. Loan & Guaranty Co., 176 U. S. 126, 20 Sup. Ct. 341, 44 L. Ed. 398; Lindsay & P. Co. v. Mullen, 176 U. S. 147, 20 Sup. Ct. 325, 44 L. Ed. 400; quoting Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244, where it was held that a long and short haul clause in a state statute was invalid as applied to interstate commerce. The following are invalid: A state statute requiring carriers by water to give all persons, without distinction of race or color, equal rights and privileges in all parts of the vessel, it being in effect a regulation of conduct through the entire voyage while assuming to regulate it while passing through the state; Hall v. De Cuir, 95 U. S. 485, 24 L. Ed. 547 (but not one which only applies to passengers carried within the state; Louisville R. Co. v. Mississippi, 133 U. S. 587, 10 Sup. Ct. 348, 33 L. Ed. 784); or any penal statute which interferes with commerce; Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455; as an act requiring the license of a pedlar of tea, the growth of a foreign country. A statute is invalid which under pretense of protecting the public health imposes a direct burden on interstate commerce; Com. v. Moore, 214 Mass. 19, 100 N. E. 1071; and so is a statute, ostensibly a license tax, but in fact a regulation of commerce; Voight v. Wright, 141 U. S. 62, 11 Sup. Ct. 855, 35 L. Ed. 638 (where the provision that flour brought into a state and offered for sale should be reviewed and have the Virginia inspection mark on it, was held discriminating and unconstitutional, such inspection not being required for flour manufactured in the state); Brimmer v. Rebman, 138 U. S. 78, 11 Sup. Ct. 213, 34 L. Ed. 862 (where there was a license tax on the sale of western meat, accompanied by burdensome regulations not imposed on the sale of meat produced in the state); and a license tax on photographers, etc., does not affect the shipment from a corporation in another state of pictures and frames to be put together and delivered by its agent, who is free from license tax; Caldwell v. North Carolina, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336.

A state statute penalizing shipments of liquor C. O. D. and making the place of delivery the place of sale is invalid; Adams Express Co. v. Kentucky, 206 U. S. 129, 27 Sup. Ct. 606, 51 L. Ed. 987. Liquor is a

recognized article of commerce and a state law denying the right to send it from one state to another is unconstitutional; Vance v. Vandercook Co., 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100, followed in Adams Express Co. v. Kentucky, 214 U. S. 218, 29 Sup. Ct. 633, 53 L. Ed. 972; Louisville & N. R. Co. v. Brewing Co., 223 U. S. 70, 32 Sup. Ct. 189, 56 L. Ed. 355; in both which cases it is also held that transportation is not completed until delivery to the consignee, and under the Wilson Act (*q. v.*) it is not subject to regulation under state laws until such delivery. See *supra.*

A burden imposed upon interstate commerce cannot be sustained simply because the statute imposing it applies to the people of all the states, including the enacting one; Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455, where a statute requiring inspection within twenty-four hours before slaughtering of all animals killed for food, was held unconstitutional.

While a state may confer power on an administrative agency to make reasonable regulations as to the place, time and manner of the delivery of merchandise, any regulation which directly burdens interstate commerce is a regulation thereof and unconstitutional; McNeill v. R. Co., 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142, where the regulation was an order requiring a railroad company to deliver cars from another state to the consignee on a private siding beyond its own right of way; but where congress and the interstate commerce commission have not acted, the state may compel a railroad company to give equal switching facilities to all customers, even if affecting cars to be used in interstate commerce; Missouri Pac. R. Co. v. Mills Co., 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. 352.

Other cases of invalid state action were: Assessment by a state for taxation of property in original packages before incorporation into the mass of property; May v. New Orleans, 178 U. S. 496, 20 Sup. Ct. 976, 44 L. Ed. 1165; and taxation of tea imported from a foreign country, and stored in a government warehouse in the original unbroken package; Siegfried v. Raymond, 190 Ill. 424, 60 N. E. 868.

A state has no power to interfere with an interstate commerce train if thereby a direct burden is imposed upon interstate commerce, as by a police regulation requiring the stoppage of a train at certain stations; Mississippi R. Com. v. R. Co., 203 U. S. 335, 27 Sup. Ct. 90, 51 L. Ed. 209; Cleveland, C. C. & St. L. Ry. Co. v. Illinois, 177 U. S. 514, 20 Sup. Ct. 722, 44 L. Ed. 868; or regulations of master and servant, applicable to those actually engaged in the operation of interstate commerce after congress had acted upon the subject; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 28 Sup. Ct. 121, 52 L. Ed. 230; Johnson v. Southern Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363; Schlemmer v. R. Co., 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681.

The Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, have been reported since this title was prepared. It might be cited as an authority confirming almost every legal proposition above stated as established by the authorities, and the opinion of the court by Mr. Justice Hughes may be referred to as a thorough and exhaustive discussion of the whole subject of interstate commerce.

The special point decided arose out of the contention that, even admitting that the rates prescribed by the state were reasonable, as a regulation of intrastate commerce, as applied to cities on the state's boundary or to places within competitive districts crossed by the state line, nevertheless the rates disturbed the relation previously existing between interstate and intrastate rates, thus imposing a direct burden upon interstate commerce and creating discriminations as against localities in other states. In reply to this contention, it was held that the authority of the state to prescribe reasonable charges for intrastate transportation is statewide, unless limited by the exercise of the constitutional power of congress, which is not confined to a part of the state, but extends throughout its limits—to cities adjacent to its boundaries as well as to those in the interior; and a restriction of the authority of the state must be by virtue of the actual exercise of the federal control and not by reason of a dormant federal power that has not been exerted.

See INTERSTATE COMMERCE COMMISSION; CONSTITUTION OF UNITED STATES.

COMMERCE CLAUSE. See COMMERCE; ORIGINAL PACKAGE; CONSTITUTION OF THE UNITED STATES.

COMMERCE COURT. See UNITED STATES COURTS.

COMMERCE, DEPARTMENT OF. See DEPARTMENTS.

COMMERCIA BELLI. Agreements entered into by belligerents, either in time of peace to take effect in the event of war, or during the war itself, by which arrangement is made for non-hostile intercourse. They may take the form of armistices, truces, capitulations, cartels, passports, safe-conducts, safeguards. 1 Kent 159; 2 Opp. 274. See separate titles.

Contracts between citizens of one belligerent and those of another, or between citizens of one belligerent and the other belligerent. They may take the form of ransom bills (*q. v.*), bills of exchange drawn by prisoners of war, or receipts for requisitions. 1 Kent 104.

COMMERCIAL AGENCY. A person, firm, or corporation engaged in the business of

collecting information as to the financial standing, ability, and credit of persons engaged in business and reporting the same to subscribers or to customers applying and paying therefor. "They have become vast and extensive factors in modern commercial transactions for furnishing information to retail jobbers as well as to wholesale merchants. The courts are bound to know judicially that no vendor of goods at wholesale can be regarded as a prudent business man if he sells to a retail dealer, upon a credit, without first informing himself through these mediums of information of the financial standing of the customer, and the credit to which he is fairly entitled;" Furry v. O'Connor, 1 Ind. App. 573, 28 N. E. 103. See also Eaton, Cole & Burnham Co. v. Avery, 83 N. Y. 31, 38 Am. Rep. 389; Holmes v. Harrington, 20 Mo. App. 661.

How far the agency may contract against its own negligence. An exception is made to some extent in favor of such agencies to the rule against stipulations by a person against liability for his own negligence. The agency usually contracts that their agents shall be considered as the agents of their patrons, and that they shall not be liable for the negligence of their agents. Where in an action upon such a contract the plaintiff contended that under it the agency was protected only against gross and not against ordinary negligence, it was held otherwise; Duncan v. Dun, 7 W. N. C. (Pa.) 246, Fed. Cas. No. 4,134.

Under a contract that the actual correctness of the information was in no manner guaranteed, the agency was not liable for loss occasioned to a subscriber by the wilful and fraudulent act of a sub-agent in furnishing false information; Dun v. Bank, 58 Fed. 174, 7 C. C. A. 152, 23 L. R. A. 687, reversing City Nat. Bank v. Dun, 51 Fed. 160. Where the inquiry was made concerning a grocer and the agency reported concerning the wrong person, who had the same name and was a grocer and saloon keeper, the plaintiff could not recover from the agency the value of goods sold on the strength of the report, the evidence being held to show that there was not such gross negligence as would render the agency liable; Xiques v. Bradstreet Co., 70 Hun 334, 24 N. Y. Supp. 48; but such a contract does not protect the agency from an error made in the publication of its books of reference giving the financial responsibility of merchants and others, and upon which a subscriber of the agency relied in selling goods and suffered a loss, and in such case it is unnecessary to thus establish the insolvency of the purchaser by suit before suing the agency; Crew v. Bradstreet Co., 134 Pa. 161, 19 Atl. 500, 7 L. R. A. 661, 19 Am. St. Rep. 681.

When reports are privileged and when libellous. Such an agency is a lawful business when lawfully conducted, but is not exempt from liability for false and defamatory publications when other citizens would not be exempt. Its communications to a person interested in the information are privileged even if false, if made in good faith and without malice, but if communicated to its subscribers generally they are not privileged; Bradstreet Co. v. Gill, 72 Tex. 115, 9 S. W. 753, 2 L. R. A. 405, 13 Am. St. Rep. 768; Kingsbury v. Bradstreet Co., 116 N. Y. 211, 22 N. E. 365; Woodruff v. Bradstreet Co., 116 N. Y. 217, 22 N. E. 354, 5 L. R. A. 555; Pollasky v. Minchener, 81 Mich. 280, 46 N. W. 5, 9 L. R. A. 102, 21 Am. St. Rep. 516; Mitchell v. Bradstreet Co., 116 Mo. 226, 22 S. W. 358, 724, 20 L. R. A. 138, 38 Am. St. Rep. 592; State v. Lonsdale, 48 Wis. 348, 4 N. W. 390; Trussell v. Scarlett, 18 Fed. 214; King v. Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622; Erber v. R. G. Dun & Co., 4 McCrary 160, 12 Fed. 526; Johnson v. Bradstreet Co., 77 Ga. 172, 4 Am. St. Rep. 77. See also 3 Montreal, Q. B. 83; 18 Can. S. C. 222. The contract of the agency to furnish information to all its subscribers, including those who have no special interest in it, is no defence to an action for libel; King v. Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622; nor was the fact that the information was given by printed signs of which each subscriber had the key; Sunderlin v. Bradstreet, 46 N. Y. 188, 7 Am. Rep. 322; the matter is privileged if communicated to the proper person by a clerk or agent as well as by the proprietor of the agency; King v. Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622; Erber v. R. G. Dun & Co., 12 Fed. 526; (but see Beardsley v. Tappan, 5 Blatchf. 497, Fed. Cas. No. 1,189, and Tappan v. Beardsley, 10 Wall. 427, 19 L. Ed. 974, criticised in the two cases just cited;) or if specially reported upon proper occasion to subscribers having special interest in them, though not applied for by such subscribers; Locke v. Bradstreet Co., 22 Fed. 771; but if a subscriber apply for special information from the agency, a false denunciation of the person inquired about, coupled with the report, is actionable; Brown v. Durham, 3 Tex. Civ. App. 244, 22 S. W. 868. So also are statements at first privileged but repeated and persisted in when known to be false, or, if otherwise privileged, made maliciously; Erber v. R. G. Dun & Co., 12 Fed. 526; or if made recklessly and without due care and caution in making inquiry; Locke v. Bradstreet Co., 22 Fed. 771; Bradstreet Co. v. Gill, 72 Tex. 115, 9 S. W. 753, 2 L. R. A. 405, 13 Am. St. Rep. 768; Lowry v. Vedder, 40 Minn. 475, 42 N. W. 542.

The publication and circulation to subscribers in daily reports of the execution of a chattel mortgage was not libellous; Newbold v. J. M. Bradstreet & Son, 57 Md. 38, 40 Am. Rep. 426; *contra*, King v. Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622; nor was that of a copy of a judgment, with

a note that the judgment was paid the same day; 8 Ir. Rep. 349; but in a similar case when the judgment was so paid, but it was not so stated, the publication was held libellous; 16 Ir. Rep. C. L. 298; and so also is a false publication of a trader that a judgment had been rendered; 22 Q. B. 134. And where the action was for publishing that a judgment had been rendered when only a verdict had been returned, it was held proper to ask a witness to the effect of such statement, whether if he had known the actual fact his conduct would have been the same; Hessel v. Bradstreet Co., 141 Pa. 501, 21 Atl. 659.

The burden of proof is upon the agency to show privilege *prima facie*, and after its character is established the burden is on the plaintiff to show malice; Erber v. R. G. Dun & Co., 12 Fed. 526; Ormsby v. Douglass, 37 N. Y. 477; and it is matter of law for the court to determine whether the matter published is libellous *per se;* Woodruff v. Bradstreet Co., 35 Hun (N. Y.) 16.

An action for libel may be brought by a person whose name is published in a book containing a list of delinquent debtors, distributed to subscribers, manifestly for coercing the payment of claims, who is denied credit because of such publication, or by one to whom a letter is sent in an envelope on which is printed the name of an association and a statement that it is an organization for the purpose of collecting bad debts; Muetze v. Tuteur, 77 Wis. 236, 46 N. W. 123, 9 L. R. A. 86, 20 Am. St. Rep. 115.

A report of a mercantile agency, alleging that plaintiff had made a general assignment for the benefit of creditors, is not privileged, where it appears that plaintiff had assigned only to secure the endorsement of a note; Douglass v. Dalsley, 114 Fed. 628, 52 C. C. A. 324, 57 L. R. A. 475; but if the mistake could not have been avoided by reasonable care, the report is privileged, but if it was the result of carelessness, the privilege is lost; *id.* Communications though made in good faith by a commercial agency to a subscriber containing defamatory statements of plaintiff's character, are not privileged; [1908] A. C. 390. A complaint that a mercantile agency report alleging that plaintiff's account with the bank was "not classed as an entirely desirable one," and averred to be false and malicious, was held good on demurrer; Mower-Hobart Co. v. R. G. Dun & Co., 131 Fed. 812.

Effect of fraudulent representations by vendee to agency upon vendor who relies upon them. An action for deceit will lie against persons or corporations making false representations of pecuniary responsibility to an agency in order to obtain credit and defraud those who may rely upon the reports; Carroll Exchange Bank v. Bank, 50 Mo. App. 94; Eaton, Cole & Burnham Co. v. Avery, 83 N. Y. 31, 38 Am. Rep. 389; Tindle v. Birkett, 171 N. Y. 520, 64 N. E. 210, 89 Am. St. Rep. 822, reversing 57 App. Div. 450, 67 N. Y. Supp. 1017; Eaton, Cole & Burnham Co. v. Avery, 18 Hun (N. Y.) 44; in such action the statements falsely made to the agency are admissible, *if relied on* by the vendee; Furry v. O'Connor, 1 Ind. App. 573, 28 N. E. 103; or if approved by him after being written out by the agency, but not if not known to the vendor until after the sale; Robinson v. Levi, 81 Ala. 134, 1 South. 554; Mooney v. Davis, 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425. A contract for the sale of goods to the person making such representations, who proves to be insolvent at the time of making them and of the sale, may be rescinded and possession of the goods recovered; Mooney v. Davis, 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425; Cook v. Harrington, 31 Mo. App. 199; Hinchman v. Weeks, 85 Mich 535, 48 N. W. 790; Lindauer v. Hay, 61 Ia. 667, 17 N. W. 98; Gainesville Nat. Bank v. Bamberger, 77 Tex. 48, 13 S. W. 959, 19 Am. St. Rep. 738; In re Epstein, 109 Fed. 874; it is enough if he had not reasonable grounds for believing them to be true; In re Roalswick, 110 Fed. 639; but where there were no representations other than those obtained by the agency from the seller, a fraudulent intent on the part of the vendee to use the agency as an instrument of fraud must be clearly shown; Victor v. Henlien, 33 Hun (N. Y.) 549; Dieckerhoff v. Brown (Md.) 2 Atl. 723; Macullar v. McKinley, 99 N. Y. 353, 2 N. E. 9. The vendor may show that he refused to make the sale until he received the report of the agency, and the agent may show his business methods; Hinchman v. Weeks, 85 Mich. 535, 48 N. W. 790. The right to rescind the sale is not affected by a refusal of the vendee to give further statements of his condition, as the original one is presumed to continue if not recalled by the agency; Claflin v. Flack, 13 N. Y. Supp. 269; but if the vendee has made subsequent reports showing an impaired responsibility, the vendor must take all the reports into consideration, and not only on the original one; but the vendee is not required to make subsequent reports unless he actually becomes insolvent or knows that he will soon be; Cortland Mfg. Co. v. Platt, 83 Mich. 419, 47 N. W. 330; reports made six weeks before the sale may be relied on; 20 Mo. App. 173; but not those made from five to seven months before; Zucker v. Karpeles, 88 Mich. 413, 50 N. W. 373; Macullar v. McKinley, 99 N. Y. 353, 2 N. E. 9. A financial statement to a commercial agency is a continuing representation for a reasonable time that the facts therein stated are true; In re Kyte, 174 Fed. 867.

How affected by the statute of frauds. With respect to the liability of the agency for representations not made in writing when the liability was contested, on the ground that the contract was within the statute of

frauds, there is not a satisfactory result to be found in decisions; but it has been held that the action was upon the original contract with the customer, which was by no statute required to be written; U. C. 39 Q. B. 551; (reversed on other points and doubted on this; 1 Ont. App. 153;) and also that the action was sustainable on the original contract to furnish accurate statements, in response to inquiry respecting any persons; Sprague v. Dun, 12 Phila. (Pa.) 310.

No remedy in equity against publication. An injunction will not be granted to restrain the agency from the publication of matter injurious to the standing of the plaintiff, there being no jurisdiction in equity unless there is a breach of trustor or contract involved; Raymond v. Russell, 143 Mass. 295, 9 N. E. 544, 58 Am. Rep. 137; Burwell v. Jackson, 9 N. Y. 544.

See LIBEL; PRIVILEGED COMMUNICATION.

COMMERCIAL COURT. A name commonly applied in English practice to the trial of commercial causes in London and Liverpool before judges of the High Court. It is said to be "a mere piece of convenience in the arrangement of business"; [1895] 2 Ch. 491.

COMMERCIAL LAW. A phrase employed to denote those branches of the law which relate to the rights of property and relations of persons engaged in commerce.

This term denotes more than the phrase "maritime law," which is sometimes used as synonymous, but which more strictly relates to shipping and its incidents.

As the subjects with which commercial law, even as administered in any one country, has to deal are dispersed throughout the globe, it results that commercial law is less local and more cosmopolitan in its character than any other great branch of municipal law; and the peculiar genius of the common law, in adapting recognized principles of right to new and ever-varying combinations of facts, has here found a field where its excellence has been most clearly shown. The various systems of commercial law have been well contrasted by Leone Levi in his collection entitled "Commercial Law, its Principles and Administration, or the Mercantile Law of Great Britain compared with the Codes and Laws of Commerce of all the Important Mercantile Countries of the Modern World, and with the Institutes of Justinian;" London, 1850-52; a work of great interest both as a contribution to the project of a mercantile code and as a manual of present use.

As to the rule in the federal courts, see Swift v. Tyson, 16 Pet. (U. S.) 1, 10 L. Ed. 865; Carpenter v. Ins. Co., 16 Pet. (U. S.) 511, 10 L Ed. 1044; Burgess v. Seligman, 107 U. S. 33, 2 Sup. Ct. 10, 27 L. Ed. 359, where Bradley, J., says, "Where the law has not been settled, it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law." See UNITED STATES COURTS.

COMMERCIAL PAPER. Negotiable paper given in due course of business, whether the element of negotiability be given it by the law merchant or by statute. In re Sykes, 5 Biss. 113, Fed. Cas. No. 13,708. See NEGOTIABLE INSTRUMENTS.

COMMERCIAL TRAVELLER. A travelling salesman who simply exhibits samples of goods kept for sale by his principal, and takes orders from purchasers for such goods, which goods are afterwards to be delivered by the principal to the purchasers, and payment for the goods is to be made by the purchaser to the principal on such delivery. City of Kansas v. Collins, 34 Kan. 436, 8 Pac. 865; State v. Miller, 93 N. C. 511, 53 Am. Rep. 469. An order solicited by and given to such salesman does not constitute a sale, either absolute or conditional, of the goods ordered, but is a mere proposal, to be accepted or not, as the principal may see fit; McKindly v. Dunham, 55 Wis. 515, 13 N. W. 485, 42 Am. Rep. 740; Clark v. Smith, 88 Ill. 298.

An agent who sells by sample and on credit, and is not intrusted with the possession of the goods to be sold, has no implied authority to receive payment, and payment to him will not discharge the purchaser; Butler v. Dorman, 68 Mo. 302, 30 Am. Rep. 795; Law v. Stokes, 32 N. J. L. 250, 90 Am. Dec. 655; Seiple v. Irwin, 30 Pa. 513; Kornemann v. Monaghan, 24 Mich. 36.

Even if he has power to collect accounts, receiving checks payable to his principal, no authority to endorse such checks will be implied; Jackson v. Bank, 92 Tenn. 154, 20 S. W. 802, 18 L. R. A. 663, 36 Am. St. Rep. 81; nor authority to bind his principals on a contract for advertising his business in a newspaper; Tarpey v. Bernheimer, 16 N. Y. Supp. 870.

It has been held that possession of the goods by a commercial traveller who sells them is evidence of authority to collect therefor; Bailey v. Pardridge, 134 Ill. 188, 27 N. E. 89; John Hutchinson Mfg. Co. v. Henry, 44 Mo. App. 263; Cross v. Haskins, 13 Vt. 536.

Where a drummer sold his samples and converted the proceeds, it was held, in the absence of evidence of the custom or usage of the drummer's disposition of samples, that the principals were not bound by the sale; Kohn v. Washer, 64 Tex. 131, 53 Am. Rep. 745; but where such sale is ratified, the payment to the agent is ratified also; Bailey v. Pardridge, 134 Ill. 188, 27 N. E. 89.

The drummer may hire a carriage upon the credit of his principals if necessary; Bentley v. Doggett, 51 Wis. 224, 8 N. W. 155, 37 Am. Rep. 827; Huntley v. Mathias, 90 N. C. 101, 47 Am. Rep. 516, where the principals were held liable for the drummer's tort in overdriving a horse.

COMMISSARIA LEX. A principle of the Roman law relative to the forfeiture of contracts. It is not unusual to restrict a sale

upon credit, by a clause in the agreement that if the buyer should fail to make due payment the seller might rescind the sale. In the meantime, however, the property was the buyer's and at his risk. A debtor and his pledgee might also agree that if the debtor did not pay at the day fixed, the pledge should become the absolute property of the creditor. 2 Kent 583. This was abolished by a law of Constantine. Cod. 8. 35. 3.

COMMISSARY. An officer whose principal duties are to supply an army, or some portion thereof, with provisions.

The subsistence department of the army shall consist of one commissary-general of subsistence, with the rank of brigadier-general; two assistant commissaries-general of subsistence, with the rank of lieutenant-colonel of cavalry; eight commissaries of subsistence, with the rank of major of cavalry, and sixteen commissaries of subsistence, with the rank of captain of cavalry. U. S. Rev. Stat. § 1140 Their duties are defined in the following sections

An official to whom the bishop of a diocese sometimes delegated jurisdiction in his Consistory Court over certain parts of the diocese. 1 Holdsw. Hist. L. 369.

COMMISSION (Lat. *commissio;* from *committere*, to intrust to).

An undertaking without reward to do something for another, with respect to a thing bailed. Rutherforth, Inst. 105.

A body of persons authorized to act in a certain matter. 5 B. & C. 850.

The act of perpetrating an offence.

An instrument issued by a court of justice, or other competent tribunal, to authorize a person to take depositions, or do any other act by authority of such court or tribunal, is called a commission.

Letters-patent granted by the government, under the public seal, to a person appointed to an office, giving him authority to perform the duties of his office. The commission is not the appointment, but only evidence of it, and, as soon as it is signed and sealed, vests the office in the appointee. Marbury v. Madison, 1 Cra. (U. S.) 137, 2 L. Ed. 60; State v. Billy, 2 N. & McC. (S. C.) 357. See Talbot v. Simpson, 1 Pet. C. C. 191, Fed. Cas. No. 13,730; U. S. v. Vinton, 2 Sumn. 209, Fed. Cas. No. 16,624; Scofield v. Lounsbury, 8 Conn. 109. In this sense it is much used in Great Britain; the great seal is sometimes placed in commission by the crown in the hands of one or more persons; judges assigned to certain duties are appointed thereto by commission; the royal assent to bills in parliament is usually given by commissioners appointed for the purpose.

In Common Law. A sum allowed, usually a certain per cent. upon the value of the property involved, as compensation to a servant or agent for services performed. See COMMISSIONS.

COMMISSION GOVERNMENT. A method of municipal government in which the legislative power is in the hands of a few persons.

Constitutional provisions dividing government into legislative, executive and judicial departments are held to apply to state and not to local governments, and not to affect a law providing a commission plan of city government; State v. Ure, 91 Neb. 31, 135 N. W. 224. The legislature has the power to allow the electors of all cities in the same class to adopt or reject the commission plan of government; *id.;* such method is constitutional; State v. City of Mankato, 117 Minn. 458, 136 N. W. 264, 41 L. R. A. (N. S.) 111.

An act authorizing certain cities to adopt this form of government only becomes effective in cities which may adopt it by vote, and does not violate state constitutions prohibiting special or local legislation in matters affecting the incorporation of cities, etc.; People v. Edmands, 252 Ill. 108, 96 N. E. 914.

An act authorizing the government of certain cities by commission at their option is not violative of the constitution as an unwarranted delegation of legislative power; State v. Tausick, 64 Wash. 69, 116 Pac. 651, 35 L. R. A. (N. S.) 802; Eckerson v. Des Moines, 137 Ia. 452, 115 N. W. 177; City of Jackson v. State (Miss.) 59 South. 873. To the same effect, Bryan v. Voss, 143 Ky. 422, 136 S. W. 884.

COMMISSION MERCHANT. As this term is used, it is synonymous with the legal term "factor," and means one who receives goods, chattels, or merchandise, for sale, exchange, or other disposition, and who is to receive a compensation for his services, to be paid by the owner or derived from the sale of the goods. Perkins v. State, 50 Ala. 154. See AGENCY; FACTORS.

COMMISSION OF ASSIZE. In English Practice. A commission which formerly issued from the king, appointing certain persons as commissioners or judges of assize to hold the assizes in association with discreet knights during those years in which the justices in eyre did not come.

Other commissions were added to this, which has finally fallen into complete disuse. See COURTS OF ASSIZE AND NISI PRIUS.

COMMISSION OF LUNACY. A writ issued out of chancery, or such court as may have jurisdiction of the case, directed to a proper officer, to inquire whether a person named therein is a lunatic or not. 1 Bouvier, Inst. n. 382.

COMMISSION OF REBELLION. In English Law. A writ formerly issued out of chancery to compel an attendance. It was abolished by the order of August 8, 1841.

COMMISSIONED OFFICER. A person in the United States military service of or above the rank of second lieutenant. Davis, Mil. L. 26.

COMMISSIONER. See COMMISSION.

COMMISSIONER OF PATENTS. The title given by law to the head of the patent office. Prior to 1836 the business of that office was under the immediate charge of a clerk in the state department, who was generally known as the superintendent of the patent office. He performed substantially the same duties which afterwards devolved upon the commissioner, except that he was not required to decide upon the patentability of any contrivance for which a patent was sought, inasmuch as the system of examinations had not then been introduced and the applicant was permitted to take out his patent at his own risk.

Under the existing acts he hears appeals from the examiners in chief, and an appeal lies from his decision in interference cases to the Court of Appeals. Act of Feb. 9, 1893. See PATENTS; PATENT OFFICE, EXAMINERS IN.

COMMISSIONER, UNITED STATES. An officer appointed by the United States District Court in each district, in place of Commissioners of the Circuit Court. The court may appoint such number and in such districts as it deems best. They hold for four years, subject to removal by the court. No person can be both a District Court clerk (or deputy) and commissioner without the approval of the Attorney-General. Act of May 28, 1896. A commissioner in proceedings under R. S. § 1014, does not hold a "court"; Todd v. U. S., 158 U. S. 278, 15 Sup. Ct. 889, 39 L. Ed. 982; and he is in no constitutional sense a judge; Rice v. Ames, 180 U. S. 371, 378, 21 Sup. Ct. 406, 45 L. Ed. 577. He is a mere ministerial officer, who while acting as a committing magistrate in such proceedings exercises duties which are judicial in character; U. S. v. Jones, 134 U. S. 483, 10 Sup. Ct. 615, 33 L. Ed. 1007; U. S. v. Ewing, 140 U. S. 142, 11 Sup. Ct. 743, 35 L. Ed. 388; but he cannot punish for contempt committed in his presence; Ex parte Perkins, 29 Fed. 900; In re Mason, 43 Fed. 510.

COMMISSIONER OF WOODS AND FORESTS. An officer created by act of parliament of 1817, to whom was transferred the jurisdiction of the chief justices of the forest. Inderwick, The King's Peace.

COMMISSIONERS OF BAIL. Officers appointed by some courts to take recognizances of bail in civil cases.

COMMISSIONERS OF DEEDS. Officers appointed by the governors of many of the states, resident in another state or territory, empowered to take acknowledgments, administer oaths, etc., to be used in the state from which they derive their appointment. They have, for the most part, all the powers of a notary public, except that of protesting negotiable paper. Rap. & Lawr. Law Dict.

COMMISSIONERS OF HIGHWAYS. Officers having certain powers and duties concerning the highway, within the limits of their jurisdiction. They are usually three in number. In some of the states they are county officers, and their jurisdiction is coextensive with the county. In others, as in New York, Michigan, Illinois, and Wisconsin, they are town or township officers. They have power to establish, alter, and vacate highways; and it is their duty to cause them to be kept in repair.

COMMISSIONERS OF SEWERS. A court of record of special jurisdiction in England.

It was a temporary tribunal, erected by virtue of a commission under the great seal, which formerly was granted *pro re natâ* at the pleasure of the crown, but afterwards at the discretion and nomination of the lord chancellor, lord treasurer, and chief justices, pursuant to the statute of sewers. 23 Hen. VIII. c. 5.

Its jurisdiction was to overlook the repairs of the banks and walls of the sea-coast and navigable rivers and the streams communicating therewith, and was confined to such county or particular district as the commission should expressly name. The commissioners might take order for the removal of any annoyances or the safeguard and conservation of the sewers within their commission, either according to the laws and customs of Romney Marsh, or otherwise, at their own discretion. They were also to assess and collect taxes for such repairs and for the expenses of the commission. They might proceed with the aid of a jury or upon their own view; 3 Bla. Com. 73; Crabb, Hist. E. L. 469.

COMMISSIONS. Compensation allowed to agents, factors, executors, trustees, receivers, and other persons who manage the affairs of others, in recompense for their services.

The *right* to such allowance may either be the subject of a special contract, may rest upon an implied contract to pay *quantum meruit*, or may depend upon statutory provisions; 7 C. & P. 584; 9 *id.* 559.

The right does not generally accrue till the completion of the services; 4 C. & P. 289; 7 Bingh. 99; Sibbald v. Bethlehem Iron Co., 83 N. Y. 378, 38 Am. Rep. 441; and see 10 B. & C. 438; and does not then exist unless proper care, skill, and perfect fidelity have been employed; 3 Campb. 451; 9 Bingh. 287; Dodge v. Tileston, 12 Pick. (Mass.) 328; McDonald v. Maltz, 94 Mich. 172, 53 N. W. 1058, 34 Am. St. Rep. 331; Smith v. Tripis, 2 Tex. Civ. App. 267, 21 S. W. 722; and the services must not have been illegal nor against public policy; 3 B. & C. 639; Armstrong v. Toler, 11 Wheat. (U. S.) 258, 6 L. Ed. 468.

Brokers. The broker is entitled to a fair and reasonable opportunity to perform his

obligations, subject to the right of the seller to sell independently, but, that having been granted to him, the right of the principal to terminate his authority is unrestricted, except only that he may not do it in bad faith, and as a mere device to escape commissions; Sibbald v. Iron Co., 83 N. Y. 378, 38 Am. Rep. 441; Crowe v. Trickey, 204 U. S. 228, 27 Sup. Ct. 275, 51 L. Ed. 454 (where the death of the principal was held to terminate the broker's authority though he had found the purchaser, and the sale was afterwards completed by the administrator); Fulty v. Wimer, 34 Kan. 576, 9 Pac. 316; Wilson v. Sturgis, 71 Cal. 226, 16 Pac. 772; Ropes v. Rosenfeld's Sons, 145 Cal. 679, 79 Pac. 354; that the owner sold the property after the expiration of the contract period and that such sale was, to some extent, aided by the broker's efforts, does not give the broker a right to commissions; Donovan v. Weed, 182 N. Y. 43, 74 N. E. 563; Kelly v. Marshall, 172 Pa. 396, 33 Atl. 690.

Where the purchaser's refusal to complete the transaction is due to the fact that the seller's title is defective, the broker may nevertheless recover his commissions; Hammond v. Crawford, 66 Fed. 425, 14 C. C. A. 109; Phelps v. Prusch, 83 Cal. 626, 23 Pac. 1111; Davis v. Laurence, 52 Kan. 383, 34 Pac. 1051; Stange v. Gosse, 110 Mich. 153, 67 N. W. 1108; Yoder v. Randol, 16 Okl. 308, 83 Pac. 537, 3 L. R. A. (N. S.) 576; Gilder v. Davis, 137 N. Y. 504, 33 N. E. 599, 20 L. R. A. 398; Parker v. Walker, 86 Tenn. 566, 8 S. W. 391; Birmingham Land & Loan Co. v. Thompson, 86 Ala. 146, 5 South. 473; so he may recover where he has found a purchaser ready and willing to complete the contract, though the sale fails because the vendor has been mistaken in the identity of the lands he offered for sale; Arnold v. Bank, 126 Wis. 362, 105 N. W. 828, 3 L. R. A. (N. S.) 580.

Financial inability of the purchaser to perform his contract to purchase real estate does not deprive the broker of his commissions; Moore v. Irwin, 89 Ark. 289, 116 S. W. 662, 20 L. R. A. (N. S.) 1168, 131 Am. St. Rep. 97; the broker's contract is to effect a bargain, and if he produces a responsible customer, ready to contract, his principal cannot defeat his right to commissions by capriciously refusing to make the contract. The proof of the responsibility of the intending purchaser is required, not because the broker contracts to guarantee responsibility, but to show that the failure to make the contract was not the fault of the broker; Alt v. Doscher, 186 N. Y. 566, 79 N. E. 1100; Leuschner v. Patrick (Tex.) 103 S. W. 664; Wray v. Carpenter, 16 Colo. 271, 27 Pac. 248, 25 Am. St. Rep. 265; Parker v. Estabrook, 68 N. H. 349, 44 Atl. 484; Stewart v. Fowler, 53 Kan. 537, 36 Pac. 1002; Jenkins v. Hollingsworth, 83 Ill. App. 139.

On the contrary, it is held in some cases that, to entitle a broker to his commissions, he must produce a party capable of becoming, and who ultimately becomes, the purchaser; that it is not sufficient that a contract of sale is executed between the parties and a portion of the price paid, where there is a forfeiture of the contract because of the financial inability of the purchaser; Riggs v. Turnbull, 105 Md. 135, 66 Atl. 13, 8 L. R. A. (N. S.) 824, 11 Ann. Cas. 783. Where a broker procures a purchaser of street railway bonds, who refuses to complete his contract because of their invalidity, he may not recover his commissions, if he knew such customer never intended to take and pay for them, but meant to negotiate their sale to other parties for a higher price; Berg v. R. Co. (Tex.) 49 S. W. 921.

Where he knows, or has reason to believe, that his purchaser is unable to complete his contract, the broker cannot recover commissions; Burnham v. Upton, 174 Mass. 408, 54 N. E. 873; Butler v. Baker, 17 R. I. 582, 23 Atl. 1019, 33 Am. St. Rep. 897; Boysen v. Frink, 80 Ark. 258, 96 S. W. 1056; Little v. Herzinger, 34 Utah, 337, 97 Pac. 639. Even though the broker did not have the exclusive agency, if he were in fact the procuring cause of the purchase, he is entitled to commissions, though a sale was made by the owner in ignorance of the broker's instrumentality in procuring the purchaser; Kiernan v. Bloom, 91 App. Div. 429, 86 N. Y. Supp. 899; Southwick v. Swavienski, 114 App. Div. 681, 99 N. Y. Supp. 1079; Craig v. Wead, 58 Neb. 782, 79 N. W. 718; Tyler v. Parr, 52 Mo. 249; Adams v. Decker, 34 Ill. App. 17; Graves v. Bains, 78 Tex. 92, 14 S. W. 256; but that under such circumstances no right to commissions is acquired is held in Quist v. Goodfellow, 99 Minn. 509, 110 N. W. 65, 8 L. R. A. (N. S.) 153, 9 Ann. Cas. 431; Anderson v. Smythe, 1 Colo. App. 253, 28 Pac. 478.

A broker is entitled to commission if up to a certain time he was the middleman, though the contract was afterwards completed without his instrumentality; 8 C. & P. 1; [1907] 2 Ir. R. K. B. 212.

The *amount* of such commissions is generally a percentage on the sums paid out or received. When there is a usage of trade at the particular place or in the particular business, the amount of commissions allowed to auctioneers, brokers, and factors is regulated by such usage, in the absence of special agreement; 10 B. & C. 438; Story, Ag. § 326; where there is no agreement and no custom, the jury may fix the commission on a *quantum meruit;* 9 C. & P. 620; Mangum v. Ball, 43 Miss. 288, 5 Am. Rep. 488.

The amount which executors, etc., are to receive is frequently fixed by statute, subject to modification in special cases by the proper tribunal; Van Buren v. Ins. Co., 12 Barb. (N. Y.) 671. In the absence of statutory provision, commissions cannot be allowed to executors for services in partition-

ing real estate, and allotting and transferring the same; Bruce v. Lorillard, 62 Hun 416, 16 N. Y. Supp. 900. Where the executor has failed to keep accounts and to make investments according to the directions in the will, and by his negligence has involved the estate in litigation, he will not be allowed commissions; Brewster v. Demarest, 48 N. J. Eq. 559, 23 Atl. 271. The entire commissions are not properly exigible before the administration is terminated; Succession of Sparrow, 40 La. Ann. 484, 4 South. 513. An executor is not entitled to commissions on his own indebtedness to the estate; In re Hoffer's Estate, 156 Pa. 473, 27 Atl. 11. In England, no commissions are allowed to executors or trustees; 1 Vern. Ch. 316; 4 Ves. Ch. 72, n.; 9 Cl. & F. 111; even where he carries on the testator's business by his direction; 6 Beav. 371. See the cases in all the states in 2 Perry, Trusts § 918, note.

In case the factor guaranties the payment of the debt, he is entitled to a larger compensation (called a *del credere* commission) than is ordinarily given for the transaction of similar business where no such guaranty is made; Paley, Ag. 88.

See EXECUTORS AND ADMINISTRATORS; PRINCIPAL AND AGENT; REAL ESTATE BROKERS.

COMMISSIONS FOR REGULATION OF CORPORATIONS. See PUBLIC SERVICE CORPORATIONS.

COMMITMENT. The warrant or order by which a court or magistrate directs a ministerial officer to take a person to prison.

The act of sending a person to prison by means of such a warrant or order. Skinner v. White, 9 N. H. 204.

A commitment should be in writing under the hand and seal of the magistrate, and should show his authority and the time and place of making it; Lough v. Millard, 2 R. I. 436; Somervell v. Hunt, 3 Harr. & McH. (Md.) 113; State v. Caswell, T. U. P. Charlt. (Ga.) 280; In re Burford, 3 Cra. (U. S.) 448, 2 L. Ed. 495. It must be made in the name of the United States or of the commonwealth or people, as required by the constitution of the United States or of the several states.

It should be directed to the keeper of the prison, and not generally to carry the party to prison; 2 Stra. 934; 1 Ld. Raym. 424. It should describe the prisoner by his name and surname, or the name he gives as his.

It ought to state that the party has been charged on oath; People v. Miller, 14 Johns. (N. Y.) 371; In re Burford, 3 Cra. (U. S.) 448, 2 L. Ed. 495; but see Com. v. Jackson, 2 Va. Cas. 504; State v. Killet, 2 Bail. (S. C.) 290; and should mention with convenient certainty the particular crime charged against the prisoner; In re Burford, 3 Cra. (U. S.) 448, 2 L. Ed. 495; 11 St. Tr. 304, 318; Day v. Day, 4 Md. 262; Young v. Com., 1 Rob. (Va.) 744; Ex parte Rohe, 5 Ark. 104; In re Howard, 26 Vt. 205; but a defect in describing the offence is immaterial if it is sufficiently described in the order endorsed on the deposition; Ex parte Estrado, 88 Cal. 316, 26 Pac. 209. It should point out the place of imprisonment, and not merely direct that the party be taken to prison; 2 Stra. 934; 1 Ld. Raym. 424.

It may be for further examination, or final. If final, the command to the keeper of the prison should be to keep the prisoner "until he shall be discharged by due course of law," when the offence is not bailable; see Washburn v. Belknap, 3 Conn. 502; 29 E. L. & E. 134; when it is bailable, the gaoler should be directed to keep the prisoner in his "said custody for want of sureties, or until he shall be discharged by due course of law." When the commitment is not final, it is usual to commit the prisoner "for further hearing."

The word commit in a statute has a technical meaning, and a warrant which does not direct an officer to commit a party to prison but only to receive him into custody and safely keep him for further examination, is not a commitment; Gilbert v. U. S., 23 Ct. Cl. 218.

COMMITTEE. One or more members of a legislative body, to whom is specially referred some matter before that body, in order that they may examine into it and report to the body which delegated this authority to them.

The minority of a committee to which a corporate power has been delegated, cannot bind the majority, or do any valid act, in the absence of any special provision otherwise; Brown v. District of Columbia, 127 U. S. 579, 8 Sup. Ct. 1314, 32 L. Ed. 262.

A guardian appointed to take charge of the person or estate of one who has been found to be *non compos mentis*.

For committee of the person, the next of kin is usually selected; and, in case of the lunacy of a husband or wife, the one who is of sound mind is entitled, unless under very special circumstances, to be the committee of the other; Shelf. Lun. 137, 140. It is the duty of such a person to take care of the lunatic.

For committee of the estate, the heir at law is favored. Relations are preferred to strangers; but the latter may be appointed; Shelf. Lun. 144. It is the duty of such committee to administer the estate faithfully and to account for his administration. He cannot, in general, make contracts in relation to the estate of the lunatic, or bind it, without a special order of the court or authority that appointed him.

COMMITTING MAGISTRATE. See MAGISTRATE; JUSTICE OF THE PEACE.

COMMITTITUR PIECE. In English Law. An instrument in writing, on paper or parch-

ment, which charges a person already in prison, in execution at the suit of the person who arrested him.

COMMIXTION. In Civil Law. A term used to signify the act by which goods are mixed together.

The matters which are mixed are dry or liquid. In the commixtion of the former, the matter retains its substance and individuality; in the latter, the substance no longer remains distinct. The commixtion of liquid is called *confusion* (*q. v.*), and that of solids a mixture. *Lec. Elém. du Dr. Rom.* §§ 370, 371; Story, Bailm. § 40; 1 Bouvier, Inst. n. 506.

COMMODATE. In Scotch Law. A gratuitous loan for use. Erskine, Inst. b. 3, t. 1, § 20; 1 Bell, Com. 225. The implied contract of the borrower is to return the thing borrowed in the same condition as received.

Judge Story regrets that this term has not been adopted, as mandate has been from *mandatum*. Story, Bailm § 221. Ayliffe, in his Pandects, has gone further and terms the bailor the *commodant*, and the bailee the *commodatory*, thus avoiding those circumlocutions which, in the common phraseology of our law, have become almost indispensable. Ayliffe, *Pand* b. 4, t. 16, p. 517. Brown, in his Civil Law, vol. 1, 352, calls the property loaned "*commodated* property."

COMMODATO. In Spanish Law. A contract by which one person lends gratuitously to another some object not consumable, to be restored to him in kind at a given period.

COMMODATUM. A contract by which one of the parties binds himself to return to the other certain personal chattels which the latter delivers to him to be used by him without reward; loan for use. See BAILMENT.

COMMODITIES CLAUSE. The act of Congress, June 29, 1906, provides that it shall be unlawful for any railroad company to transport commodities (excepting timber and its manufactured products) manufactured, mined or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary or intended for its use in its business; U. S. v. R. Co., 220 U. S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458.

Stock ownership in a bona fide corporation, irrespective of the extent of such ownership, does not preclude the railroad company from transporting such commodities; U. S. v. Delaware & H. Co., 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836; unless it uses its power as a stockholder to obliterate all distinctions between the two corporations; U. S. v. R. Co., 220 U. S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458.

See COMMERCE; COMMON CARRIERS; RAILROADS.

COMMODITY. Commodity is a broader term than merchandise, and may mean almost any description of article called movable or personal estate. Shuttleworth v. State, 35 Ala. 415; State v. Henke, 19 Mo. 225. Labor is not a commodity; Rohlf v. Kasemeier, 140 Ia. 182, 118 N. W. 276, 23 L. R. A. (N. S.) 1285.

COMMODORE. A grade in the United States navy, superior to a captain. Omitted from the active list. Act of March 3, 1899.

COMMON. An incorporeal hereditament, which consists in a profit which one man has in connection with one or more others in the land of another. Trustees of Western University of Pennsylvania v. Robinson, 12 S. & R. (Pa.) 32; Van Rensselaer v. Radcliff, 10 Wend. (N. Y.) 647, 25 Am. Dec. 582; Livingston v. Ten Broeck, 16 Johns. (N. Y.) 14, 8 Am. Dec. 287; Leyman v. Abeel, 16 Johns. (N. Y.) 30; Thomas v. Inhabitants of Marshfield, 10 Pick. (Mass.) 364; 3 Kent 403.

Common of digging, or common in the soil, is the right to take for one's own use part of the soil or minerals in another's lands; the most usual subjects of the right are sand, gravel, stones and clay. It is of a very similar nature to common of estovers and of turbary. Elton, Com. 109; Black, L. Dict.

Common of estovers is the liberty of taking necessary wood, for the use of furniture of a house or farm, from another man's estate. This right is inseparably attached to the house or farm, and is not apportionable. If, therefore, a farm entitled to estovers be divided by the *act of the party* among several tenants, neither of them can take estovers, and the right is extinguished; 2 Bla. Com. 34; Plowd. 381; Van Rensselaer v. Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582. It is to be distinguished from the right to estovers which a tenant for life has in the estate which he occupies. See ESTOVERS.

Common of pasture is the right of feeding one's beast on another's land. It is either appendant, appurtenant, because of vicinage, or in gross.

Common of piscary is the liberty of fishing in another man's water. 2 Bla. Com. 34. See FISHERY.

Common of shack. The right of persons occupying lands, lying together in the same common field, to turn out their cattle after harvest, or where lands were fallow, to feed promiscuously in that field; Steph. Com., 623; 1 B. & Ald. 710.

Common of turbary is the liberty of digging turf in another man's ground. Common of turbary can only be appendant or appurtenant to a house, not to lands, because turves are to be spent in the house; 4 Co. 37; 3 Atk. 189; Noy 145; 7 East 127.

The taking seaweed from a beach is a commonable right in Rhode Island; Knowles v. Nichols, 2 Curt. C. C. 571, Fed. Cas. No. 7,897; Kenyon v. Nichols, 1 R. I. 106; Hall v. Lawrence, 2 R. I. 218, 57 Am. Dec. 715; In Virginia there are statutory provisions concerning the use of all unappropriated

lands on the Chesapeake Bay, on the shore of the sea, or of any river or creek, and the bed of any river or creek in the eastern part of the commonwealth, ungranted and *used as common;* Va. Code, c. 62, § 1.

In most of the cities and towns in the United States, there are considerable tracts of land appropriated to public use. These commons were generally laid out with the cities or towns where they are found, either by the original proprietors or by the early inhabitants. See PARKS.

Where land thus appropriated has been accepted by the public, or where individuals have purchased lots adjoining land so appropriated, under the expectation excited by its proprietors that it should so remain, the proprietors cannot resume their exclusive ownership; Abbott v. Mills, 3 Vt. 521, 23 Am. Dec. 222; Emerson v. Wiley, 10 Pick. (Mass.) 310; Stiles v. Curtis, 4 Day (Conn.) 328; Proctor v. Ferebee, 36 N. C. 144, 36 Am. Dec. 34; Carr v. Wallace, 7 Watts (Pa.) 394. And see Mansfield v. Hawkes, 14 Mass. 440; Rogers v. Goodwin, 2 Mass. 475; White v. Smith, 37 Mich. 291; Emerson v. Thompson, 2 Pick. (Mass.) 475; Trustees of Western University v. Robinson, 12 S. & R. (Pa.) 32; State v. Trask, 6 Vt. 355, 27 Am. Dec. 554.

COMMON APPENDANT. Common of pasture appendant is a right annexed to the possession of land, by which the owner thereof is entitled to feed his beasts on the wastes of the manor. It can only be claimed by prescription: so that it cannot be pleaded by way of custom; 1 Rolle, Abr. 396; 6 Coke 59. It is regularly annexed to arable land only, and can only be claimed for such cattle as are necessary to tillage, as horses and oxen to plough the land, and cows and sheep to manure it; 2 Greenl. Cruise, Dig. 4, 5; Van Rensselaer v. Radcliff, 10 Wend. (N. Y.) 647, 25 Am. Dec. 582. Common appendant may by usage be limited to any certain number of cattle; but where there is no such usage, it is restrained to cattle *levant* and *couchant* upon the land to which it is appendant; Digb. R. P. 156; 2 M. & R. 205; 2 Dane, Abr. 611, § 12. It may be assigned; and by assigning the land to which it is appended, the right passes as a necessary incident to it. It may be apportioned by granting over a parcel of the land to another, either for the whole or a part of the owner's estate; 4 Co. 36; 8 *id.* 78. It may be extinguished by a release of it to the owner of the land, by a severance of the right of common, by unity of possession of the land, or by the owner of the land, to which the right of common is annexed, becoming the owner of any part of the land subject to the right; Bell v. R. Co., 25 Pa. 161, 64 Am. Dec. 687; Livingston v. Ten Broeck, 16 Johns. (N. Y.) 14, 8 Am. Dec. 287; Cro. Eliz. 592.

Common of estovers or of piscary, which may also be appendant, cannot be apportioned; 8 Co. 78. But see Hall v. Lawrence, 2 R. I. 218, 57 Am. Dec. 715.

COMMON APPURTENANT. Common appurtenant differs from common appendant in the following particulars, viz.: it may be claimed by grant or prescription, whereas common appendant can only arise from prescription; it does not arise from any connection of tenure, nor is it confined to arable land, but may be claimed as annexed to any kind of land; it may be not only for beasts usually commonable, such as horses, oxen, and sheep, but likewise for goats, swine, etc.; it may be severed from the land to which it is appurtenant, it may be commenced by grant; and an interrupted usage for twenty years is evidence of a grant. In most other respects commons appendant and appurtenant agree; 2 Greenl. Cruise, Dig. 5; 30 E. L. & Eq. 176; 15 East 108.

COMMON BECAUSE OF VICINAGE. The right which the inhabitants of two or more contiguous townships or vills have of intercommoning with each other. It ought to be claimed by prescription, and can only be used by cattle *levant* and *couchant* upon the lands to which the right is annexed; and cannot exist except between *adjoining* townships, where there is no intermediate land; Co. Litt. 122 *a*; 4 Co. 38 *a*; 7 *id.* 5; 10 Q. B. 581, 589, 604; Smith v. Floyd, 18 Barb. (N. Y.) 523.

COMMON IN GROSS. A right of common which must be claimed by deed or prescription. It is a personal and not a prædial right. It has no relation to land, but is annexed to a man's person, and may be for a certain or indefinite number of cattle. It cannot be aliened so as to give the entire right to several persons to be enjoyed by each in severalty. And where it comes to several persons by operation of law, as by descent, it is incapable of division among them, and must be enjoyed jointly. Common appurtenant for a limited number of cattle may be granted over, and by such grant becomes common in gross; Co. Litt. 122 *a*, 164 *a*; 5 Taunt. 244; Leyman v. Abeel, 16 Johns. (N. Y.) 30; 2 Bla. Com. 34.

See Viner, Abr. *Common;* Bacon, Abr. *Common;* Com. Dig. *Common;* 2 Bla. Com. 34; 2 Washb. R. P.; Williams, Rights of Common (1880); 3 Holdsw. Hist. E. L. 120.

COMMON APPEARANCE. Where the defendant in an action after due service of process on him has removed from the jurisdiction without having entered an appearance, or cannot be found, the plaintiff may file a common appearance and enter a rule on defendant to plead. This is by stat. 12 Geo. II., c. 29, and is the practice in Pennsylvania; 1 Troub. & Haly, Pr. 159; Bender v. Ryan, 9 W. N. C. (Pa.) 144; and in replevin under the act of 1901.

COMMON ASSURANCES. Deeds which make safe or assure to a man the title to his estate, whether they are deeds of conveyance or to charge or discharge.

COMMON BAIL. Fictitious sureties.

In the fictitious proceedings by which the King's Bench extended its jurisdiction of ordinary civil suits, if the defendant did not appear to the Bill of Middlesex or the Latitat, he was in contempt; this, too, was fictitious; the plaintiff was allowed to enter an appearance for the defendant, with John Doe and Richard Roe as sureties. This was "common bail." See BILL OF MIDDLESEX.

COMMON BAR. A plea to compel the plaintiff to assign the particular place where the trespass has been committed. Stepn. Pl., And. ed. 351. It is sometimes called a blank bar.

COMMON BARRATRY. See BARRATRY.

COMMON BENCH. The ancient name for the court of common pleas. See BENCH; BANCUS COMMUNIS.

COMMON CARRIERS. One whose business, occupation, or regular calling it is to carry chattels for all persons who may choose to employ and remunerate him Dwight v. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; Fish v. Chapman, 2 Ga. 353, 46 Am. Dec. 393; Schoul. Bailm. § 345; Naugatuck R. Co. v. Button Co., 24 Conn. 479.

The definition includes carriers by land and water. They are, on the one hand, stagecoach and omnibus proprietors, railroad and street railway companies; Spellman v. Transit Co., 36 Neb. 890, 55 N. W. 270, 20 L. R. A. 316, 38 Am. St. Rep. 753; truckmen, wagoners, and teamsters, carmen and porters; and express companies, whether such persons undertake to carry goods from one portion of the same town to another, or through the whole extent of the country, or even from one state or kingdom to another. And, on the other hand, this term includes the owners and masters of every kind of vessel or water-craft who set themselves before the public as the carriers of freight of any kind for all who choose to employ them, whether the extent of their navigation be from one continent to another or only in the coasting trade or in river or lake transportation, or whether employed in lading or unlading goods or in ferrying, with whatever mode of motive power they may adopt; Story, Bailm. § 494; 2 Kent 598, 599; Redf. Railw. § 124; 1 Salk. 249; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; Knox v. Rives, 14 Ala. 261, 48 Am. Dec. 97; Liverpool & G. W. Steam Co. v. Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed 788; Robertson v. Kennedy, 2 Dana (Ky.) 431, 26 Am. Dec. 466; Dibble v. Brown, 12 Ga. 217, 56 Am. Dec. 460. An oil pipe line company is a common carrier; Giffin v. Pipe Lines, 172 Pa. 580, 33 Atl. 578.

General truckman are common carriers; Jackson Architectural Iron Works v. Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432. Telegraph or telephone companies formerly were held not to be common carriers; Tyler v. Telegraph Co., 60 Ill. 421, 14 Am. Rep. 38; Leonard v. Telegraph Co., 41 N. Y. 544, 1 Am. Rep. 446; Passmore v. Telegraph Co., 78 Pa. 238; Breese v. Telegraph Co., 45 Barb. (N. Y.) 274; Western Union Tel. Co. v. Fontaine, 58 Ga. 433; but were subject to the rules governing common carriers and others engaged in like public employment; Delaware & A. Telegraph & Telephone Co. v. Delaware, 50 Fed. 677, 2 C. C. A. 1; Primrose v. Telegraph Co., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883.

The term "common carrier," as used in the Interstate Commerce Act and its amendments, includes express and sleeping car companies, telegraph, telephone and cable companies (both wire and wireless), and pipe lines. See TELEGRAPH COMPANIES; TELEPHONE COMPANIES.

The liability of the owner of a tug-boat to his tow is not that of a common carrier; Hays v. Millar, 77 Pa. 238, 18 Am. Rep. 445; Caton v. Rumney, 13 Wend. (N. Y.) 387; The New Philadelphia, 1 Black (U. S.) 62, 17 L. Ed. 84; White v. The Mary Ann, 6 Cal. 462, 65 Am. Dec. 523.

And although the carrier receives the goods as a forwarder only, yet if his contract is to transport and to deliver them at a specified address, he is liable as a common carrier; Nashua Lock Co. v. R. Co., 48 N. H. 339, 2 Am. Rep. 242.

Common carriers are responsible for all loss or damage during transportation, from whatever cause, except the act of God or the public enemy; 2 Ld. Raym. 909, 918; 1 Salk. 18 and cases cited; 25 E. L. & Eq. 595; 2 Kent 597, 598; Turney v. Wilson, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 515; Murphy v. Staton, 3 Munf. (Va.) 239; McArthur v. Sears, 21 Wend. (N. Y.) 190; McCall v. Brock, 5 Strob. (S. C.) 119; Faulkner v. Wright, Rice (S. C.) 108; New Brunswick Steamboat Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 394; Harris v. Rand, 4 N. H. 259, 17 Am. Dec. 421; Christenson v. Express Co., 15 Minn. 279 (Gil. 208), 2 Am. Rep. 122; South & N. A. R. Co. v. Wood, 66 Ala. 167, 41 Am. Rep. 749; Inman & Co. v. R. Co., 159 Fed. 960. The act of God is held to extend only to such inevitable accidents as occur without the intervention of man's agency; McArthur v. Sears, 21 Wend. (N. Y.) 190; which could not be avoided by the exercise of due skill and care; Hart v. Allen, 2 Watts (Pa.) 114; Memphis & C. R. Co. v. Reeves, 10 Wall. (U. S.) 176, 19 L. Ed. 909; but where freight cars are stopped by a flood and the contents stolen, the loss is not due to inevitable accident, act of God,

or insurrection; Lang v. R. Co., 154 Pa. 342. See ACT OF GOD.

The carrier is not responsible for losses occurring from natural causes, such as frost, fermentation, evaporation, or natural decay of perishable articles, or the natural and necessary wear in the course of transportation, or the shipper's carelessness, provided the carrier exercises all reasonable care to have the loss or deterioration as little as practicable; Bull. N. P. 69; 2 Kent 299; Story, Bailm. § 492 *a*; Warden v. Greer, 6 Watts (Pa.) 424; Redf. Railw. § 141; Jordan v. Exp. Co., 86 Me. 225, 29 Atl. 980; The Guiding Star, 53 Fed. 936; International & G. N. R. Co. v. Hynes, 3 Tex. Civ. App. 20, 21 S. W. 622; Goodman v. Nav. Co., 22 Or. 14, 28 Pac. 894. See Wabash St. L. & P. Ry. Co. v. Jaggerman, 115 Ill. 407, 4 N. E. 641; Fox v. R. Co., 148 Mass. 220, 19 N. E. 222, 1 L. R. A. 702. But a carrier which receives perishable goods for through transportation is bound to furnish cars adapted to preserve them during the journey, and cannot escape its duty by delegating to an independent contractor the task of furnishing and icing a refrigerator car; St. Louis, I. M. & S. R. Co. v. Renfroe, 82 Ark. 143, 100 S. W. 889, 10 L. R. A. (N. S.) 317, 118 Am. St. Rep. 58; damp weather and delays incident to railway traffic are no excuse for failure properly to ice cars; C. C. Taft Co. v. Exp. Co., 133 Ia. 522, 110 N. W. 897.

In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy when she begins her voyage, and his undertaking is not discharged because the want of fitness is the result of latent defects; The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644.

Carriers, both by land and water, when they undertake the general business of carrying every kind of goods, are bound to carry for all who offer; and if they refuse, without just excuse, they are liable to an action; Dwight v. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; Pomeroy v. Donaldson, 5 Mo. 36; Hale v. Navigation Co., 15 Conn. 539, 39 Am. Dec. 398; Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7,258; Sewall v. Allen, 6 Wend. (N. Y.) 335; Citizens' Bank v. Steamboat Co., 2 Sto. 16, Fed. Cas. No. 2,730; L. R. 1 C. P. 423; Piedmont Mfg. Co. v. R. Co., 19 S. C. 353; New Jersey Steam Nav. Co. v. Bank, 6 How. (U. S.) 344, 12 L. Ed. 465; 30 L. J. Q. B. 273.

A common carrier is bound to treat all shippers alike and may be compelled to do so by mandamus; Missouri Pac. R. Co. v. Flour Mills Co., 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. 352; State v. Ry. Co., 52 La. Ann. 1850, 28 South. 284; it cannot lawfully reject some goods and afterwards receive and transport others when at the time of refusal there is room for the rejected goods; Ocean S. S. Co. of Savannah v. Supply Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A. (N. S.) 867, 127 Am. St. Rep. 265, 15 Ann. Cas. 1044. It must furnish cars when requested by a shipper, and if unable to do so must advise the shipper of that fact; Di Giorgio Importing & Steamship Co. v. R. Co., 104 Md. 693, 65 Atl. 425, 8 L. R. A. (N. S.) 108; but at common law there is no duty to furnish sufficient cars for transportation beyond its own line of road; Gulf, C. & S. F. R. Co. v. State, 56 Tex. Civ. App. 353, 120 S. W. 1028. The Hepburn Act (June 29, 1906) made it the duty of interstate carriers to furnish cars; this invalidated all state laws on the same subject; Chicago, R. I. & P. R. Co. v. Elevator Co., 226 U. S. 426, 33 Sup. Ct. 174, 57 L. Ed. 284, reversing Hardwick Farmers' Elevator Co. v. R. Co., 110 Minn. 25, 124 N. W. 819, 19 Ann. Cas. 1088; Yazoo & M. V. R. Co. v. Grocery Co., 227 U. S. 1, 33 Sup. Ct. 213, 55 L. Ed. ——. But the business of a common carrier may be restricted within such limits as he may deem expedient, if an individual, or which may be prescribed in its grant of powers, if a corporation, and he is not bound to accept goods out of the line of his usual business. But should the carrier accept goods not within the line of his business, he assumes the liability of a common carrier as to the specific goods accepted; Farmers' & Mechanics' Bank v. Transp. Co., 23 Vt. 186, 56 Am. Dec. 68; Hays v. Mouille, 14 Pa. 48; Bennett v. Dutton, 10 N. H. 481; Powell v. Mills, 30 Miss. 231, 64 Am. Dec. 158; New York C. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. Ed. 627; Sewall v. Allen, 6 Wend. (N. Y.) 335; Kimball v. R. Co., 26 Vt. 248, 62 Am. Dec. 567. The carrier may require freight to be paid in advance; but in an action for not carrying, it is only necessary to allege a readiness to pay freight; 8 M. & W. 372; Galena & C., U. R. Co. v. Rae, 18 Ill. 488, 68 Am. Dec. 574; Knox v. Rives, 14 Ala. 249, 48 Am. Dec. 97. It is not required to prove or allege a tender, if the carrier refuse to accept the goods for transportation. The carrier is entitled to a lien upon the goods for freight; 2 Ld. Raym. 752; and for advances made to other carriers; White v. Vann, 6 Humphr. (Tenn.) 70, 44 Am. Dec. 294; Bissel v. Price, 16 Ill. 408; Palmer v. Lorillard, 16 Johns. (N. Y.) 356; Boggs v. Martin, 13 B. Monr. (Ky.) 243. The consignor is *prima facie* liable for freight; but the consignee may be liable when the consignor is his agent, or when the title is in him and he accepts the goods; 3 Bingh. 383; Merian v. Funck, 4 Den. (N. Y.) 110; New York & Harve Steam Nav. Co. v. Young, 3 E. D. Sm. (N. Y.) 187. A shipper must pay the combined rates over connecting railroads existing at the time of the shipment, and he cannot take advantage of a reduction, while the goods are in transit over the first road, if there are no joint through rates; Payne

v. Atchison, T. & S. F. R. Co., 12 Int. St. Com. Rep. 190.

Common carriers may qualify their common-law responsibility by special contract; 4 Coke 83; 1 Ventr. 238; Story, Bailm. § 549; New York C. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. Ed. 627; Michigan C. R. Co. v. Mfg. Co., 16 Wall. (U. S.) 318, 21 L. Ed. 297; Empire Transp. Co. v. Oil Co., 63 Pa. 14, 3 Am. Rep. 515; Indianapolis, D. & W. R. Co. v. Forsythe, 4 Ind. App. 326, 29 N. E. 1138. A carrier cannot exact as a condition precedent that a shipper must sign a contract in writing limiting the common law liability; Atchison, T. & S. F. R. Co. v. Dill, 48 Kan. 210, 29 Pac. 148; Missouri, K. & T. R. Co. of Texas v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565. A contract to qualify the common-law liability may be shown by proving a notice, brought home to and assented to by the owner of the goods or his authorized agent, wherein the carrier stipulates for a qualified liability; 8 M. & W. 243; New Jersey Steam Nav. Co. v. Bank, 6 How. (U. S.) 344, 12 L. Ed. 465; Dorr v. Nav. Co., 11 N. Y. 491, 62 Am. Dec. 125; Laing v. Colder, 8 Pa. 479, 49 Am. Dec. 533; Swindler v. Hilliard, 2 Rich. (S. C.) 286, 45 Am. Dec. 732; Reno v. Hogan, 12 B. Monr. (Ky.) 63, 54 Am. Dec. 513; Farmers' & Mechanics' Bank v. Transp. Co., 23 Vt. 186, 56 Am. Dec. 68; Barney v. Prentiss, 4 Har. & J. (Md.) 317, 7 Am. Dec. 670. A carrier may for a consideration limit its common law liability; Simmons Hardware Co. v. Ry. Co., 140 Mo. App. 130, 120 S. W. 663; a mere agreement to carry is not a sufficient consideration; Burgher v. R. Co., 139 Mo. App. 62, 120 S. W. 673; the limitation must be made by special contract; Central of Georgia Ry. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170, 4 Ann. Cas. 128; and no contract will be implied from any condition in a bill of lading unless clearly brought to the shipper's attention at the time of shipment; Baltimore & O. R. Co. v. Doyle, 142 Fed. 669, 74 C. C. A. 245. In the case of passage tickets for an ocean voyage a limitation with regard to baggage liability covers a loss occasioned by negligence although not expressly provided for; Tewes v. S. S. Co., 186 N. Y. 151, 78 N. E. 864, 8 L. R. A. (N. S.) 199, 9 Ann. Cas. 909. A contract by a carrier limiting his liability for negligence is governed by the *lex loci contractus;* Fairchild v. R. Co., 148 Pa. 527, 24 Atl. 79.

But the carrier cannot contract against his own negligence or the negligence of his employés and agents; Muser v. Exp. Co., 1 Fed. 382; Welch v. R. Co., 41 Conn. 333; New York C. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. Ed. 627; Adams Exp. Co. v. Sharpless, 77 Pa. 516; Inman v. R. Co., 129 U. S. 128, 9 Sup. Ct. 249, 32 L. Ed. 612; Liverpool & G. W. Steam Co. v. Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; The Edwin I. Morrison, 153 U. S. 199, 14 Sup. Ct. 823, 38 L. Ed. 688; L. R. 2 App. Cas. 792; South & N. A. R. Co. v. Henlein, 56 Ala. 368; Merchants' Despatch Transp. Co. v. Theilbar, 86 Ill. 71; Wright v. Gaff, 6 Ind. 416; Ohio & M. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; Hoadley v. Transp. Co., 115 Mass. 304, 15 Am. Rep. 106; Levering v. Ins. Co., 42 Mo. 88, 97 Am. Dec. 320. In the absence of legislation by congress a state may impose upon common carriers even in interstate business a liability for their negligence, a contract to the contrary notwithstanding; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268; usually a common carrier cannot limit its liability for loss due to its negligence; Central of Georgia R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170, 4 Ann. Cas. 128; Ohio & M. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; Russell v. R. Co., 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. Rep. 214; Baltimore & O. S. W. Ry. Co. v. Voigt, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560; Pittsburgh, C., C. & St. L. Ry. Co. v. Mahoney, 148 Ind. 196, 46 N. E. 917, 47 N. E. 464, 40 L. R. A. 101, 62 Am. St. Rep. 503; even though a reduced rate based on a limited valuation of the property has been approved by the state commission; Everett v. R. Co., 138 N. C. 68, 50 S. E. 557, 1 L. R. A. (N. S.) 985; this rule does not apply outside of the performance of its duties as a common carrier; Santa Fé, P. & P. Ry. Co. v. Const. Co., 228 U. S. 177, 33 Sup. Ct. 474, 57 L. Ed. —; where a gratuitous pass containing a condition absolving the company from negligence is issued by a carrier by sea, there can be no recovery for the carrier's negligence; [1900] P. D. 161. The reasons for the rule forbidding a contract against its own negligence fail as to persons riding on pass; Griswold v. R. Co., 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115; Rogers v. Steamboat Co., 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491; Quimby v. R. Co., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; Kinney v. R. Co., 34 N. J. L. 513, 3 Am. Rep. 265; Wells v. R. Co., 24 N. Y. 181; Muldoon v. R. Co., 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794, 38 Am. St. Rep. 901. The carrier is liable for injuries to the shipper's servants resulting from defects in a car furnished by it; Chicago, I. & L. R. Co. v. Pritchard, 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. (N. S.) 857; and likewise if the defects injure the property received by it, although the car is in fact the property of another corporation; Ladd v. R. Co., 193 Mass. 359, 79 N. E. 742, 9 L. R. A. (N. S.) 874, 9 Ann. Cas. 988.

Railroad companies, steamboats, and all other carriers who allow express companies to carry parcels and packages on their cars, or boats, or other vehicles, are liable as common carriers to the owners of goods for all loss or damage which occurs, without re-

gard to the contract between them and such express carriers; New Jersey Steam Nav. Co. v. Bank, 6 How. (U. S.) 344, 12 L. Ed. 465; Farmers' & Mechanics' Bank v. Transp. Co., 23 Vt. 186, 56 Am. Rep. 68; American Exp. Co. v. Ogles, 36 Tex. Civ. App. 407, 81 S. W. 1023.

A carrier is not liable for the loss of a mail package through the negligence of its employé, being in that employment not a carrier, but a public agent of the United States; Bankers' Mutual Casualty Co. v. Ry. Co., 117 Fed. 434, 54 C. C. A. 608, 65 L. R. A. 397. But where the carrier transports cars of an express company under a special contract, a clause exempting the carrier from liability is valid; Baltimore & O. S. Ry. Co. v. Voigt, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560.

Railways, steamboats, packets, and other common carriers of passengers, although not liable for injuries to their passengers without their fault, are nevertheless responsible for the baggage of such passengers intrusted to their care as common carriers of goods; and such responsibility continues for a reasonable time after the goods have been placed in the warehouse or depot of the carrier, at the place of destination, for delivery to the passenger or his order; 2 B. & P. 416; Powell v. Myers, 26 Wend. (N. Y.) 591; Bennett v. Dutton, 10 N. H. 481; Dill v. R. Co., 7 Rich. (S. C.) 158, 62 Am. Dec. 407. See Galveston, H. & S. A. Ry. Co. v. Smith, 81 Tex. 479, 17 S. W. 133.

Where baggage was stored with a carrier as warehouseman after its arrival by railroad, the burden is on the owner to show negligence; Yazoo & M. V. R. Co. v. Hughes, 94 Miss. 242, 47 South. 662, 22 L. R. A. (N. S.) 975. If a carrier maintains a check room and limits its liability for articles checked, such limitation is good, but the carrier is liable as an insurer for the limited amount; Terry v. Southern Ry., 81 S. C. 279, 62 S. E. 249, 18 L. R. A. (N. S.) 295.

See BAGGAGE.

The responsibility of common carriers begins upon the delivery of the goods for immediate transportation. A delivery at the usual place of receiving freight, or to the employés of the company in the usual course of business, is sufficient; Merriam v. R. Co., 20 Conn. 354, 52 Am. Dec. 344; 2 M. & S. 172; Gregory v. Ry. Co., 46 Mo. App. 574; Railway Co. v. Neel, 56 Ark. 279, 19 S. W. 963; Rogers v. Wheeler, 52 N. Y. 262; Illinois Cent. R. Co. v. Smyser & Co., 38 Ill. 354, 87 Am. Dec. 301; but where carriers have a warehouse at which they receive goods for transportation, and goods are delivered there not to be forwarded until some event occur, the carriers are, in the meantime, only responsible as depositaries; Moses v. R. R., 24 N. H. 71, 55 Am. Dec. 222; and where goods are received as wharfingers, or warehousers, or forwarders, and not as carriers, liability will be incurred only for ordinary negligence; Platt v. Hibbard, 7 Cow. (N. Y.) 497. A carrier may make reasonable regulations governing the manner and place in which it will receive articles which it professes to carry, and these regulations may be changed on reasonable notice to the public; Robinson v. R. Co., 129 Fed. 753, 64 C. C. A. 281; proof of delivery of property to the carrier in sound condition and of its re-delivery at the end of the route in damaged condition is sufficient to sustain a recovery; Duncan v. R. Co., 17 N. D. 610, 118 N. W. 826, 19 L. R. A. (N. S.) 952. Where goods are injured because of insecure packing or boxing, the carrier is not liable; Goodman v. O. R. & N. Co., 22 Or. 14, 28 Pac. 894; but where it does not appear that they were received as in bad order, or that they were so in fact, the presumption is that they were in good order; Henry v. Banking Co., 89 Ga. 815, 15 S. E. 757. Where there was less than a carload of goods, and there was no agreement on the part of the carrier to transport them in a ventilated car, although it was requested by the carrier that they should be so shipped, it was held that the carrier was not liable for the loss of perishable goods; Davenport Co. v. R. Co., 173 Pa. 398, 34 Atl. 59.

The responsibility of the carrier terminates after the arrival of the goods at their destination and a reasonable time has elapsed for the owner to receive them in business hours. After that, the carrier may put them in a warehouse, and is only responsible for ordinary care; Thomas v. R. Corp., 10 Metc. (Mass.) 472, 43 Am. Dec. 444; Smith v. Railroad, 27 N. H. 86, 59 Am. Dec. 364; 2 M. & S. 172. Where goods are delivered to the consignee in violation of instructions not to deliver without a bill of lading, the company is liable to the shipper for loss thereby sustained; Foggan v. R. Co., 61 Hun 623, 16 N. Y. Supp. 25. The delivery of goods from a ship must be according to the custom of the port, and such delivery will discharge the carrier of his responsibility; Constable v. S. S. Co., 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903.

Notice to the consignee of the arrival of goods and a reasonable time to remove them are necessary to reduce the liability of the carrier to that of a warehouseman; Roythress v. R. Co., 148 N. C. 391, 62 S. E. 515, 18 L. R. A. (N. S.) 427; and where goods are stolen after notice to the consignee, but before a reasonable time for removal has elapsed, the carrier is liable; Burr v. Express Co., 71 N. J. L. 263, 58 Atl. 609. The test of reasonable time for the removal of goods which changes a carrier to a warehouseman is whether the consignee exercised reasonable diligence to ascertain when the goods had arrived or would arrive, and to remove them after he had received, or, with reasonable care, would have received notice;

Lewis v. R. Co., 135 Ky. 361, 122 S. W. 184, 25 L. R. A. (N. S.) 938, 21 Ann. Cas. 527. Three and a half months was held more than reasonable time; Norfolk & W. R. Co. v. Mill. Co., 109 Va. 184, 63 S. E. 415; eighteen days after notice was mailed; Southern R. Co. v. Machine Co., 165 Ala. 436, 51 South. 779. Where baggage was left over night, the carrier's liability, if any, for its loss, was that of a warehouseman; Campbell v. R. Co., 78 Neb. 479, 111 N. W. 126. One and a half business days is sufficient to terminate the liability of the carrier as such; United Fruit Co. v. Transportation Co., 104 Md. 567, 65 Atl. 415, 8 L. R. A. (N. S.) 240, 10 Ann. Cas. 437; a carrier whose liability has become that of a warehouseman is liable as a bailee for hire unless it notifies the owner that it will no longer hold the property as warehouseman; Brunson & Boatwright v. R. Co., 76 S. C. 9, 56 S. E. 538, 9 L. R. A. (N. S.) 577.

On unconditional consignments the carrier must treat the consignee as the absolute owner until he receives notice to the contrary; Pratt v. Express Co., 13 Idaho, 373, 90 Pac. 341, 10 L. R. A. (N. S.) 499, 121 Am. St. Rep. 268; where the consignee takes the goods from the carrier's possession without its knowledge or consent, the carrier is not justified for its failure to comply with an order of the shipper diverting the consignment; Atchison, T. & S. F. R. Co. v. Schriver, 72 Kan. 550, 84 Pac. 119, 4 L. R. A. (N. S.) 1056; but there is no liability where the carrier permits inspection of the goods at the point of destination in consequence of which the consignor, who was also the consignee, was prevented from making a sale thereof; Dudley v. Ry. Co., 58 W. Va. 604, 52 S. E. 718, 3 L. R. A. (N. S.) 1135, 112 Am. St. Rep. 1027.

Where goods are so marked as to pass over successive lines of railways, or other transportation having no partnership connection in the business of carrying, the successive carriers are only liable for damage or loss occurring during the time the goods are in their possession for transportation; Nashua Lock Co. v. R. Co., 48 N. H. 339, 2 Am. Rep. 242; Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. (U. S.) 129, 22 L. Ed. 827; Van Santvoord v. St. John, 6 Hill (N. Y.) 158; Hood v. R. Co., 22 Conn. 502; Nutting v. R. Co., 1 Gray (Mass.) 502; Dunbar v. Ry. Co., 36 S. C. 110, 15 S. E. 357, 31 Am. St. Rep. 860; Church v. R. Co., 1 Okl. 44, 29 Pac. 530; Alabama G. S. R. Co. v. Mt. Vernon Co., 84 Ala. 175, 4 South. 356; Central R. Co. v. Hasselkus, 91 Ga. 384, 17 S. E. 838, 44 Am. St. Rep. 37; Erie R. Co. v. Wilcox, 84 Ill. 240, 25 Am. Rep. 451; Louisville & N. R. Co. v. Campbell, 7 Heisk. (Tenn.) 257; Beard v. R. Co., 79 Ia. 531, 44 N. W. 803; Kyle v. R. Co., 10 Rich. (S. C.) 382, 70 Am. Dec. 231. A carrier may stipulate that it shall be released from liability after goods have left its road; Texas & P. R. Co. v. Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56; McCarn v. Ry. Co., 84 Tex. 352, 19 S. W. 547, 16 L. R. A. 39, 31 Am. St. Rep. 51; Coles v. R. Co., 41 Ill. App. 607; Gulf, C. & S. F. R. Co. v. Clarke, 5 Tex. Civ. App. 547, 24 S. W. 355. The English courts hold the first carrier, who accepts goods marked for a place beyond his route, responsible for the entire route, unless he stipulates expressly for the extent of his own route only; 8 M. & W. 421; 3 E. L. & Eq. 497; 18 *id.* 553, 557; 7 H. L. 194.

Where one of the carriers has contracted clearly and unequivocally to deliver goods at their destination, *i. e.*, to carry them over the whole route, his liability will continue until final delivery; Converse v. Transp. Co., 33 Conn. 178; Pennsylvania R. Co. v. Berry, 68 Pa. 272; Stewart v. R. Co., 3 Fed. 768; Gray v. Jackson, 51 N. H. 9, 12 Am. Rep. 1; Ohio & M. R. Co. v. McCarthy, 96 U. S. 258, 24 L. Ed. 693; Erie Ry. Co. v. Wilcox, 84 Ill. 239, 25 Am. Rep. 451. See 9 L. R. A. 833, note; Newell v. Smith, 49 Vt. 255; Jennings v. R. Co., 127 N. Y. 438, 28 N. E. 394; but the carrier upon whose line the damage or loss has occurred will also be liable; Laughlin v. Ry. Co., 28 Wis. 209, 9 Am. Rep. 493; Brintnall v. R. Co., 32 Vt. 665. Where the connecting carrier refuses or unreasonably delays to accept goods, the original carrier while so holding them is a carrier, and the liability as such continues until they are warehoused; Bennitt v. Ry. Co., 46 Mo. App. 656.

A contract to transport goods from or to points not on the carrying line, and without the state by which it is incorporated, is held to be good; Perkins v. R. Co., 47 Me. 573, 74 Am. Dec. 507; Noyes v. R. Co., 27 Vt. 110; Weed v. R. Co., 19 Wend. (N. Y.) 534; Redf. Railw. Cases 110; Nashua Lock Co. v. R. Co., 48 N. H. 339, 2 Am. Rep. 242; *contra*, Naugatuck R. Co. v. Button Co., 24 Conn. 468.

At common law a carrier, unless there is a special contract is only bound to carry over its own line and deliver to a connecting carrier; Gulf, C. & S. F. Ry. Co. v. State, 56 Tex. Civ. App. 353, 120 S. W. 1028. If it accepts goods marked for a point beyond its own line, it is bound to carry and deliver them at that place; Wabash R. Co. v. Thomas, 222 Ill. 337, 78 N. E. 777, 7 L. R. A. (N. S.) 104; and when it has so contracted, all connecting lines are its agents, for whose default it is responsible; Schwartz v. R. Co., 155 Cal. 742, 103 Pac. 196; and if loss occurs through the negligence of the connecting carrier or while in its possession the original carrier is liable; Whitnack v. R. Co., 82 Neb. 464, 118 N. W. 67, 19 L. R. A. (N. S.) 1011, 130 Am. St. Rep. 692; St. Louis, I. M. & S. Ry. Co. v. Randle, 85 Ark. 127, 107 S. W. 669; the interchange of traffic between two connecting carriers is, in the absence of statutory pro-

vision, a matter of contract, and the courts have no power to compel such interchange of traffic; Central Stock Yards Co. v. R. Co., 118 Fed. 113, 55 C. C. A. 63, 63 L. R. A. 213, affirmed in Central Stock Yards Co. v. R. Co., 192 U. S. 568, 24 Sup. Ct. 339, 48 L. Ed. 565; when goods arrive at the end of the original carrier's line, it is the duty of such carrier to deliver them to the succeeding carrier or notify it of their arrival; Texas & P. R. Co. v. Reiss, 183 U. S. 621, 22 Sup. Ct. 252, 46 L. Ed. 358; in the absence of such notice, the original carrier is not relieved of his liability as insurer; *id.* If the original carrier still continues to have control over the goods and has a choice as between connecting carriers, his liability is not terminated until actual delivery of the goods to one of the connecting carriers; Texas & P. R. Co. v. Callender, 183 U. S. 632, 22 Sup. Ct. 257, 46 L. Ed. 362. The original carrier's duty is not discharged by tendering the goods in an unfit condition whether such condition arises from an injury received in its possession or from some unusual cause; Buston v. R. Co., 116 Fed. 235, affirmed in 119 Fed. 808, 56 C. C. A. 320; the receipt of perishable goods involves the duty of the carrier to provide a refrigerator car and to ice it properly, not only on its own line, but on the connecting carrier's route; Pennsylvania R. Co. v. Produce Co., 111 Md. 356, 73 Atl. 571. If the connecting carrier negligently detains goods at the connecting point until they are overtaken by a flood, the original carrier is still liable for the loss; Wabash R. Co. v. Sharpe, 76 Neb. 424, 107 N. W. 758, 124 Am. St. Rep. 823; a shipper may demand delivery of the goods at the connecting point of two routes by paying the charges of the first carrier; Wente v. R. Co., 79 Neb. 179, 115 N. W. 859, 15 L. R. A. (N. S.) 756.

The Carmack Amendment to the Interstate Commerce Act makes a carrier liable for loss beyond its own lines when goods are received for interstate transportation. It is a valid exercise of the commerce power; Atlantic Coast Line R. Co. v. Mills, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7; but it was not decided there whether a carrier can be compelled to accept goods for transportation beyond its own lines.

The agents of railway and steamboat companies, will bind their principals to the full extent of the business intrusted to their control, whether they follow their instructions or not; Philadelphia & R. R. Co. v. Derby, 14 How. (U. S.) 468, 483, 14 L. Ed. 502. See Jennings v. R. Co., 127 N. Y. 438, 28 N. E. 394. Nor will it excuse the company because the servant or agent acted wilfully in disregard of his instructions; Weed v. R. Co., 5 Duer (N. Y.) 193; Redf. Railw. § 137, and cases cited in notes.

A common carrier has power to make reasonable regulations governing the manner and place in which it will receive goods for transportation and also may change such regulations upon reasonable notice to the public; Robinson v. R. Co., 129 Fed. 753, 64 C. C. A. 281; Platt v. Lecocq, 158 Fed. 723, 85 C. C. A. 621, 15 L. R. A. (N. S.) 558. It may require reasonable assurance of the character of the goods, and also provide for a reasonable inspection; Adams Express Co v. Com., 129 Ky. 420, 112 S. W. 577, 18 L. R. A. (N. S.) 1182.

A stipulation in a bill of lading limiting the time within which claims for damage may be presented is valid, provided the time fixed is reasonable; Nashville, C. & St. L. R. R. v. H. M. Long & Son, 163 Ala. 165, 50 South. 130; but a stipulation of ten days is not reasonable with regard to injuries to live stock; Wabash R. Co. v. Thomas, 222 Ill. 337, 78 N. E. 777, 7 L. R. A. (N. S.) 104.

Transportation of animals is common carriage; Swiney v. Exp. Co., 144 Ia. 342, 115 N. W. 212; and the carrier is bound to care for and feed them in transit; Toledo, W. & W. R. Co. v. Hamilton, 76 Ill. 393; Peck v. R. Co., 138 Ia. 187, 115 N. W. 1113, 16 L. R. A. (N. S.) 883, 128 Am. St. Rep. 185. A common carrier is absolutely liable for the destruction by fire of animals while in its possession; Stiles, Gaddie & Stiles v. R Co., 129 Ky. 175; a carrier of live stock is liable only for the negligence of its servants, but not as insurer; Cash v. Wabash R. Co., 81 Mo. App. 109; Rick v. Wells Fargo Co., 39 Utah, 130, 115 Pac. 991; he is not liable for loss due to the natural propensities and habits of the stock; Texas Cent. R. Co. v. Hunter & Co., 47 Tex. Civ. App. 190, 104 S. W. 1075; Summerlin v. Ry., 56 Fla. 687, 47 South. 557, 19 L. R. A. (N. S.) 191, 131 Am. St. Rep. 164; where trained bears while in transit injure a person, the carrier is not liable; Molloy v. Starin, 191 N. Y. 21, 83 N. E. 588, 16 L. R. A. (N. S.) 445, 14 Ann. Cas. 57. It is the duty of the carrier to provide a safe pen for unloading stock at a junction point; El Paso & N. E. R. Co. v. Lumbley, 56 Tex. Civ. App. 418, 120 S. W. 1050; and they must be kept in a reasonably safe condition; St. Louis & S. F. R. Co. v. Beets, 75 Kan. 295, 89 Pac. 683, 10 L. R. A. (N. S.) 571. If the carrier accept live stock for transportation, he is bound to exercise at least ordinary care; German v. R. Co., 38 Ia. 127; Gulf, C. & S. F. Ry. Co. v. Ellison, 70 Tex. 491, 7 S. W. 785; St. Louis, I. M. & S. Ry. Co. v. Jones (Tex.) 29 S. W. 695; Duvenick v. R. Co., 57 Mo. App. 550; Norfolk & W. R. Co. v. Harman, 91 Va. 601, 22 S. E. 490, 44 L. R. A. 289, 50 Am. St. Rep. 855; Schaeffer v. R. Co., 168 Pa. 209, 31 Atl. 1088, 47 Am. St. Rep. 884; Gulf, C. & S. F. Ry. Co. v. Wilm, 9 Tex. Civ. App. 161, 28 S. W. 925; Crow v. R. Co., 57 Mo App. 135. The burden of proof is on the carrier to show that loss or injury to live

stock resulted from an excepted cause, when shipped under special contract, containing exemptions from liability; Johnson v. R. Co., 69 Miss. 191, 11 South. 104, 30 Am. St. Rep. 534.

Under the act of congress of June 29, 1906, common carriers by land and water carrying live stock in interstate commerce are forbidden to confine them more than 28 consecutive hours "without unloading the same in a humane manner into properly equipped pens for rest, water and feeding, for a period of at least 5 consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight," except that sheep need not be unloaded in the night time, and it is provided that upon the written request of the owner, etc., of a particular shipment, separate from any bill of lading or other railroad form, the time of confinement may be extended to 36 hours.

Animals so unloaded shall be properly fed and watered either by the owner or custodian, or, in case of his default, by the carrier at the reasonable expense of the owner or custodian, for which the carrier shall have a lien upon the animals, but the owner or shipper shall have the right to furnish food if he so desires. Section 3 provides that where animals are carried in such way that they have proper food, water, space and opportunity to rest, they need not be unloaded.

A railroad company which delivers the cars to a connecting carrier within the 28 hours is relieved from responsibility; U. S. v. Southern Pac. Co., 157 Fed. 459; Missouri, K. & T. Ry. Co. v. U. S., 178 Fed. 15, 101 C. C. A. 143.

That the company had made proper rules requiring employees to comply with the act is no defense; U. S. v. Atlantic Coast Line R. Co., 173 Fed. 764, 98 C. C. A. 110; nor is pressure of business; U. S. v. Union Pac. R. Co., 169 Fed. 65, 94 C. C. A. 433. It is no defense that the violation was by reason of the oversight of a train dispatcher, contrary to the rules and orders; Montana Cent. Ry. Co. v. U. S., 164 Fed. 400, 90 C. C. A. 388.

An accidental or unavoidable cause, as mentioned in the act, which cannot be anticipated or avoided, etc., is one which cannot be avoided by that degree of care which the law requires of every one under the circumstances of the particular case; Missouri, K. & T. R. Co. v. U. S., 178 Fed. 15, 101 C. C. A. 143.

Failure to provide unloading stations, congested traffic, conditions reasonably to be anticipated from past experience, and breakdowns resulting from negligent operation and omission to furnish properly equipped and inspected cars, etc., are not accidental or unavoidable causes which will relieve the carrier; U. S. v. R. Co., 166 Fed. 160. A company must know how long a connecting line has kept animals without food or water and must learn such fact at its peril; U. S. v. Stockyards Co., 181 Fed. 625. The question of compliance with the act of congress of the written request for the extension of the period of confinement is for the court; Missouri, K. & T. Ry. Co. v. U. S., 178 Fed. 15, 101 C. C. A. 143.

The act is not criminal; it does not require proof of malevolent purpose, but only that animals were knowingly and intentionally confined beyond the prescribed period; U. S. v. Stockyards Co., 162 Fed. 556.

There is a separate offense as to each lot of cattle shipped simultaneously as soon as the prescribed time expires as to each lot, regardless of the number of shippers, trains or cars. The aggregate sum of the possible penalties is the amount in dispute for jurisdictional purposes; Baltimore & O. S. W. R. Co. v. U. S., 220 U. S. 94, 31 Sup. Ct. 368, 55 L. Ed. 384.

The carrier has an insurable interest in the goods, both in regard to fire and marine disasters, measured by the extent of his liability for loss or damage; Chase v. Ins. Co., 12 Barb. (N. Y.) 595.

The carrier is not bound, unless he so stipulate, to deliver goods by a particular time, or to do more than to deliver in a reasonable time under all the circumstances attending the transportation; 5 M. & G. 551; Broadwell v. Butler, 6 McLean 296, Fed. Cas. No. 1,910; Wibert v. R. Co., 12 N. Y. 245. See 15 W. R. 792; L. R. 9 C. P. 325; McLaren v. R. Co., 23 Wis. 138; Illinois Central R. Co. v. Waters, 41 Ill. 73; Dawson v. R. Co., 79 Mo. 296. The implied agreement of a common carrier is to deliver at the destination within a reasonable time; Chicago & Alton R. Co. v. Kirby, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033; Missouri Pac. Ry. Co. v. Implement Co., 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 6 L. R. A. (N. S.) 1058, 117 Am. St. Rep. 468, 9 Ann. Cas. 790; interference by strikers excuses delay; Sterling v. R. Co., 38 Tex. Civ. App. 451, 86 S. W. 655; but where the carrier's facilities were overtaxed by an unusual press of business, which it knew of at the time of the shipment, the consequent delay in delivery is not excused; Yazoo & M. V. R. Co. v. Blum Co., 88 Miss 180, 40 South. 748, 10 L. R. A. (N. S.) 432; for failure to deliver promptly theatrical scenery and properties, the carrier is liable for the value of the ordinary earnings, less the expenses which the owner has saved by inability to exhibit; Weston v. R. Co., 190 Mass. 298, 76 N. E. 1050, 4 L. R. A. (N. S.) 569, 112 Am. St. Rep. 330, 5 Ann. Cas. 825. A carrier is liable for delay if it knows and does not disclose the probability of it; Thomas v. R. Co., 63 Fed. 200; at least as held by some courts, when the shipper does not know

the circumstances; Nelson v. R. Co., 28 Mont. 297, 72 Pac. 642. What is a reasonable time is to be decided by the jury; Nettles v. R. Co., 7 Rich. (S. C.) 190, 62 Am. Dec. 409; 32 L. J. Q. B. 292.

But if the carrier contract specially to deliver in a prescribed time, he must perform his contract, or suffer the damages sustained by his failure; Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142; 2 B. & P. 416; Knowles v. Dabney, 105 Mass. 437; Ball v. R. Co., 83 Mo. 574.

He is liable, upon general principles, where the goods are not delivered through his default, to the extent of their market value at the place of their destination; Hand v. Baynes, 4 Whart. (Pa.) 204, 33 Am. Dec. 54; Grieff v. Switzer, 11 La. Ann. 324; 2 B. & Ad. 932; Newell v. Smith, 49 Vt. 255; Rankin v. R. R., 55 Mo. 167. See, also, Gillingham v. Dempsey, 12 S. & R. (Pa.) 183; Ringgold v. Haven, 1 Cal. 108.

Receipt of goods and failure to deliver raises a presumption against the carrier; Everett v. R. Co., 138 N. C. 68, 50 S. E. 557, 1 L. R. A. (N. S.) 985; but the carrier is not liable for failure to deliver a carload of fruit where municipal authorities forbid the delivery on account of quarantine; Alabama & V. R. Co. v. Tirelli, 93 Miss. 797, 48 South. 962, 21 L. R. A. (N. S.) 731, 136 Am. St. Rep. 559, 17 Ann. Cas. 879.

If the goods are only damaged, or not delivered in time, the owner is bound to receive them. He will be entitled to damages, but cannot repudiate the goods and recover from the carrier as for a total loss; Shaw v. R. Co., 5 Rich. (S. C.) 462, 57 Am. Dec. 768; Scovill v. Griffith, 12 N. Y. 509; Hackett v. R. R., 35 N. H. 390; Robertson v. Steamship Co., 60 N. Y. Super. Ct. 132; Chesapeake & O. R. Co. v. Saulsbury, 126 Ky. 179, 103 S. W. 254, 12 L. R. A. (N. S.) 431.

Where a carrier is actually deceived as to the contents of a package containing intoxicating liquors, which it transports into local option territory, it cannot be punished under a statute forbidding such transportation; Adams Exp. Co. v. Com., 129 Ky. 420, 112 S. W. 577, 18 L. R. A. (N. S.) 1182; and to protect itself, it may require reasonable assurance that the goods are not contraband, and provide for a reasonable inspection when practicable; *id.*

If a shipper is guilty of fraud in misrepresenting the nature or value of the article, he forfeits his right to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the article and the risk assumed, and has tended to lessen the vigilance of the carrier; Hart v. R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; in such case he cannot hold the carrier for more than the apparent value, or the value stated by him; *id.*; Georgia S. & F. Ry. Co. v. Johnson, King & Co., 121 Ga. 231, 48 S. E. 807; Graves v. R. Co., 137 Mass. 33, 50 Am. Rep. 282; Rowan v. Wells, Fargo & Co., 80 App. Div. 31, 80 N. Y. Supp. 226. This rule has been applied to one shipping a valuable horse as a horse of ordinary value at a rate applicable to the latter; Duntley v. R. Co., 66 N. H. 263, 20 Atl. 327, 9 L. R. A. 449, 49 Am. St. Rep. 610; one concealing valuable memorandum books in clothing shipped as "worn clothing;" Savannah, F. & W. Ry. Co. v. Collins, 77 Ga. 376, 3 S. E. 416, 4 Am. St. Rep. 87; one delivering a package of the value of $234,000, and representing its value as $1,000, paying for the latter valuation; U. S. Exp. Co. v. Koerner, 65 Minn. 540, 68 N. W. 181, 33 L. R. A. 600; to one shipping jewelry in a package as household goods; Charleston & S. Ry. Co. v. Moore, 80 Ga. 522, 5 S. E. 769. It has been held that in such case the carrier is relieved from all liability; Shackt v. R. Co., 911 Tenn. 658, 30 S. W. 742, 28 L. R. A. 176; Southern Exp. Co. v. Wood, 98 Ga. 268, 25 S. E. 436. On the other hand, it has been held that, where fraud was practiced in order to get a lower rate, the carrier would not be bound by the rate given, but that in such case the carrier's liability was not lessened; Lucas v. Ry. Co., 112 Ia. 594, 84 N. W. 673; Rice v. R. Co., 3 Mo. App. 27. A mere failure of the shipper, unasked, to state the value, is not, as a matter of law, a fraud upon the carrier which defeats all right of recovery; New York, C. & H. R. R Co. v. Fraloff, 100 U. S. 24, 25 L. Ed. 531; but other cases have imposed upon the shipper the duty of disclosing to the carrier that the article is valuable; White v. Cable Co., 25 App. D. C. 361; Gilman v. Telegraph Co., 48 Misc. 372, 95 N. Y. Supp. 564. Where the value, when not stated, was, by the company's regulation, placed at $50, this limit was enforced; Magnin v. Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608. See a full note in 23 L. R. A. (N. S.) 745. But in Pennsylvania contracts limiting liability for the full value are held void; Wright v. Exp. Co., 230 Pa. 635, 79 Atl. 760, where the value was greatly in excess of the $50 limit and the bill of lading was stamped "value asked and not given."

Where an express company fixes its charges in proportion to the value of the property shipped and the shipper has knowledge of same, in case of loss, the shipper is limited to the value stated, and this is not a violation of the act of June 29, 1906, which states that a carrier in an interstate shipment cannot limit his liability; Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314.

For the authorities in the civil law on the subject of common carriers, the reader is referred to Dig. 4. 9. 1 to 7; Pothier, *Pand.* lib. 4, t. 9; Domat, liv. 1, t. 16, ss. 1 and 2; Pardessus, art. 537 to 555; *Code Civil*, art.

1782, 1786, 1952; Moreau & Carlton, *Las Partidas*, c. 5, t. 8, l. 26; Erskine, Inst. b. 2, t. 1, § 28; 1 Bell, Comm. 465; Abbott, Shipp. part 3, c. 3, § 3, note (1); 1 Voet, *Ad Pand.* lib. 4, t. 9; Merlin, Rép. *Voiture, Voiturier;* Goirand, Code of Commerce (1880) 163.

See COMMON CARRIERS OF PASSENGERS; BAGGAGE; BAILMENTS; LIEN; EXPRESS COMPANIES; PASSENGER; TICKET; SLEEPING CAR; INTERSTATE COMMERCE COMMISSION.

COMMON CARRIERS OF PASSENGERS. Common carriers of passengers are such as undertake for hire to carry all persons indifferently who may apply for passage, so long as there is room, and there is no legal excuse for refusing. Thomps. Carriers of Passengers 26, n. § 1; Vinton v. R. Co., 11 Allen (Mass.) 304, 87 Am. Dec. 714; Hollister v. Nowlen, 19 Wend. (N. Y.) 239, 32 Am. Dec. 455; Bennett v. Dutton, 10 N. H. 486; Galena & C. U. R. Co. v. Yarwood, 15 Ill. 472; Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7,258; 3 B. & B. 54.

A company owning parlor and sleeping cars, who enter into no contract of carriage with the passenger, but only give him superior accommodations, was formerly held not a common carrier; Pullman Palace Car Co. v. Smith, 73 Ill. 360, 24 Am. Rep. 258; Duval v. Palace Car Co., 62 Fed. 265, 10 C. C. A. 331, 33 L. R. A. 715. See PARLOR CARS; SLEEPING CARS. A street railway company is a common carrier of passengers and liable as such on common-law principles; Spellman v. Transit Co., 36 Neb. 890, 55 N. W. 270, 20 L. R. A. 316, 38 Am. St. Rep. 753. See STREET RAILWAYS.

Common carriers may excuse themselves when there is an unexpected press of travel and all their means are exhausted. But where it appears that there is usually a large crowd at a particular station for a particular train, it is evidence of negligence on the part of the carrier in failing to anticipate the large crowd and take precautions to protect intending passengers from injury therefrom; Kuhlen v. Ry. Co., 193 Mass. 341, 79 N. E. 815, 7 L. R. A. (N. S.) 729, 118 Am. St. Rep. 516. And see Bennett v. Dutton, 10 N. H. 486; and they may for good cause exclude a passenger: thus, they are not required to carry drunken and disorderly persons, or one affected with a contagious disease, or those who come on board to assault passengers, commit a crime, flee from justice, gamble, or interfere with the proper regulations of the carrier, and disturb the comfort of the passengers; Thurston v. R. Co., 4 Dill. 321, Fed. Cas. No. 14,019; Pearson v. Duane, 4 Wall. (U. S.) 605, 18 L. Ed. 447; O'Brien v. R. Co., 15 Gray (Mass.) 20, 77 Am. Dec. 347; Pittsburgh, C. & St. L. Ry. Co. v. Vandyne, 57 Ind. 576, 26 Am. Rep. 68; Pittsburgh & C. R. Co. v. Pillow, 76 Pa. 510, 18 Am. Rep. 424; Railway Co. v. Valleley, 32 Ohio St. 345, 30 Am. Rep. 601; or one whose purpose is to injure the carrier's business; Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7,258; Barney v. Martin, 11 Blatchf. 233, Fed. Cas. No. 1,030; but if a carrier receives a passenger, knowing that a good cause exists for his exclusion, he cannot afterwards eject him for such cause; Pearson v. Duane, 4 Wall. (U. S.) 605, 18 L. Ed. 447; Tarbell v. R. Co., 34 Cal. 616. Where one rightfully on a train as a passenger is put off, it is of itself a good cause of action against the company irrespective of any physical injury that may have resulted; New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71. It is not liable for injuries resulting from one trying to steal a ride on a freight train; Planz v. R. Co., 157 Mass. 377; 32 N. E. 356, 17 L. R. A. 835.

Passenger-carriers are not held responsible as insurers of the safety of their passengers, as common carriers of goods are. But they are bound to the very highest degree of care and watchfulness in regard to all their appliances for the conduct of their business; so that, as far as human foresight can secure the safety of passengers, there is an unquestionable right to demand it of all who enter upon the business of passenger-carriers; Spellman v. Rapid Transit Co., 36 Neb. 890, 55 N. W. 270, 20 L. R. A. 316, 38 Am. St. Rep. 753; Texas Central R. Co. v. Stuart, 1 Tex. Civ. App. 612, 20 S. W. 962; Chicago, P. & St. L. R. Co. v. Lewis, 145 Ill. 67, 33 N. E. 960; L. R. 9 Q. B. 122; 2 Q. B. D. 377; White v. R. Co., 136 Mass. 321; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141; Philadelphia & R. R. Co. v. Anderson, 94 Pa. 351, 39 Am. Rep. 787. They are liable only for injuries resulting from their negligence; [1901] A. C. 496; and such negligence must be the proximate cause of the injury; Bevard v. L. Traction Co., 74 Neb. 802, 105 N. W. 635, 3 L. R. A. (N. S.) 318. A carrier is not permitted to contract against liability for negligence, but a private carrier may, by special contract; Cleveland, C., C. & St. L. R. Co. v. Henry, 170 Ind. 94, 83 N. E. 710. Where a conductor negligently assists a passenger from the car to the station platform, the company is responsible for injuries resulting therefrom; Hanlon v. R. Co., 187 N. Y. 73, 79 N. E. 846, 10 L. R. A. (N. S.) 411, 116 Am. St. Rep. 591, 10 Ann. Cas. 366; and even carrying a passenger at reduced fare does not entitle the carrier to stipulate for an exemption from liability for negligence; Pittsburgh, C., C. & St. L. R. Co. v. Higgs, 165 Ind. 694, 76 N. E. 299, 4 L. R. A. (N. S.) 1081.

A state may by statute limit the right of recovery for injuries to certain classes of persons; Martin v. R. Co., 203 U. S. 284, 27 Sup. Ct. 100, 51 L. Ed. 184.

It is not responsible to persons board-

ing trains to assist passengers; Hill v. R. Co., 124 Ga. 243, 52 S. E. 651, 3 L. R. A. (N. S.) 432; to purchase fruit from one not in the employ of the railroad company; Peterson v. R. Co., 143 N. C. 260, 55 S. E. 618, 8 L. R. A. (N. S.) 1240, 118 Am. St. Rep. 799; or to speak to a passenger thereon; Bullock v. R. Co. (Tex.) 55 S. W. 184; and it owes no duty to them.

Where an injury occurs on cars chartered by an association or individual, the carrier is liable to a passenger thereon as in other cases; Clerc v. R. & S. S. Co., 107 La. 370, 31 South. 886, 90 Am. St. Rep. 319; Estes v. R. Co., 110 Mo. App. 725, 85 S. W. 627; Collins v. R. Co., 15 Tex. Civ. App. 169, 39 S. W. 643; and so where such a passenger has been ejected from such a train; Kirkland v. R. Co., 79 S. C. 273, 60 S. E. 668, 128 Am. St. Rep. 848. Where a train is signalled at a section house, which is not a regular stopping-place, and a person boards it without any one's knowledge, and in doing so is injured, the carrier is not liable; Georgia Pac. R. Co. v. Robinson, 68 Miss. 643, 10 South. 60.

The passenger must be ready and willing to pay such fare as is required by the established regulations of the carriers in conformity with law. But an actual tender of fare or passage-money does not seem requisite in order to maintain an action for an absolute refusal to carry, and much less is it necessary in an action for any injury sustained; 6 C. B. 775; 2 Kent 598. The rule of law is the same in regard to paying fare in advance that it is as to freight, except that, the usage in the former case being to take pay in advance, a passenger is expected to have procured his ticket before he had taken passage.

It is the carrier's duty to maintain safe stations and approaches, whether on their own premises or on another's and maintained by them; Delaware, L. & W. R. Co. v. Trautwein, 52 N. J. L. 169, 19 Atl. 178, 7 L. R. A. 435, 19 Am. St. Rep. 442; Tobin v. R. Co., 59 Me. 183, 8 Am. Rep. 415; or even where maintained by another; Colant v. R. Co., 125 Ia. 46, 99 N. W. 115, 69 L. R. A. 982; Gulf, C. & S. F. R. Co. v. Glenk, 9 Tex. Civ. App. 599, 606, 30 S. W. 278; Schlessinger v. R. Co., 49 Misc. 504, 98 N. Y. Supp. 840; Beard v. R. Co., 48 Vt. 101; but in such case it is suggested that the liability is rather for not guarding the carrier's premises so that the defective approach would not be used; 20 Harv. L. Rev. 67. If there are two approaches and one is faulty, the carrier is liable to one using it; 19 C. B. N. S. 183. In making platforms safe the care required is not the highest degree of care, but ordinary care; Pittsburgh, C., C. & St. Louis R. Co. v. Harris, 38 Ind. App. 77, 77 N. E. 1051; Chicago & N. W. Ry. Co. v. Scates, 90 Ill. 586; but they have been held to all that human sagacity and foresight can do and liable for slightest negligence; Zimmer v. R. Co., 36 App. Div. 265, 55 N. Y. Supp. 308; Baltimore & O. R. Co. v. Wightman's Adm'r, 29 Gratt. (Va.) 431, 26 Am. Rep. 384.

A carrier is liable for severe illness of a passenger caused by negligent failure to heat its cars properly; Atlantic Coast Line R. Co. v. Powell, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A. (N. S.) 769, 9 Ann. Cas. 553.

It is the duty of a steamship company running a night boat to supply berths to unobjectionable passengers in the order of application; Patterson v. S. S. Co., 140 N. C. 412, 53 S. E. 224. And they must absolutely protect passengers against the misconduct of their own servants engaged in executing the contract; New Jersey S. B. Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049; Haver v. R. Co., 62 N. J. L. 282, 41 Atl. 916, 43 L. R. A. 84, 72 Am. St. Rep. 647; but if an employé is free from liability for injury done a passenger, the carrier is also; New Orleans & N. E. R. Co. v. Jopes, 142 U. S. 18, 12 Sup. Ct. 109, 35 L. Ed. 919. Where one enters a ticket-office to buy a ticket he is entitled to the protection of a passenger, although the agent refuse to sell him a ticket; Norfolk & W. R. Co. v. Galliher, 89 Va. 639, 16 S. E. 935.

The degree of speed allowable upon a railway depends upon the condition of the road; 5 Q. B. 747.

Passenger-carriers are not responsible where the injury resulted directly from the negligence of the passenger; Baltimore & P. R. Co. v. Jones, 95 U. S. 439, 24 L. Ed. 506; Pennsylvania R. Co. v. Aspell, 23 Pa. 147, 62 Am. Dec. 323; 3 B. & Ald. 304.

It is the duty of a street railway company to stop when a passenger is about to alight and not to start again until he has done so; Washington & G. R. Co. v. Harmon, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. Ed. 284; but the act of alighting from a moving car is not negligence *per se*, regardless of attending circumstances; Duncan v. Ry. Co., 48 Mo. App. 659; McCaslin v. Ry. Co., 93 Mich. 553, 53 N. W. 724; Ober v. R. Co., 44 La. Ann. 1059, 11 South. 818, 32 Am. St. Rep. 366; Louisville, N. A. & C. R. Co. v. Johnson, 44 Ill. App. 56; but see Brown v. Barnes, 151 Pa. 562, 25 Atl. 144. A carrier is not liable, because it fails to stop a train for an intending passenger, for injury to his health, where he later procured a carriage to drive him across country on a stormy night to avoid delay in waiting for the next train; International & G. N. R. Co. v. Addison, 100 Tex. 241, 97 S. W. 1037, 8 L. R. A. (N. S.) 880.

Carriers of passengers are bound to carry for the whole route for which they stipulate, and according to their public advertisements and the general usage and custom of their business; Weed v. R. Co., 19 Wend. (N. Y.)

534; 8 E. L. & Eq. 362. The carrier's liability extends over the entire route for which he has contracted to carry, though the destination is reached over connecting lines; McElroy v. R. Co., 4 Cush. (Mass.) 400, 50 Am. Dec. 794; McLean v. Burbank, 11 Minn. 277 (Gil. 189); Candee v. R. Co., 21 Wis. 582, 94 Am. Dec. 566. But the carrier is also liable on whose line the loss or injury is suffered; Hood v. R. Co., 22 Conn. 502; Sprague v. Smith, 29 Vt. 421; Briggs v. Vanderbilt, 19 Barb. (N. Y.) 222.

Where a passenger holds a coupon ticket (not jointly issued) over connecting lines and is delayed by the negligence of a preceding carrier, a succeeding road is not bound to carry him on such ticket if it has expired; Brian v. R. Co., 40 Mont. 109, 105 Pac. 489, 20 Ann. Cas. 311; New York, L. E. & W. R. Co. v. Bennett, 50 Fed. 496, 1 C. C. A. 544; otherwise where it was a round trip ticket and the initial and last carrier were the same and the delay was by an intermediate carrier, the ticket being refused on the return by the last carrier; Stevens v. R. Co., 45 Tex. Civ. App. 196, 100 S. W. 807. Where the ticket is jointly issued, the passenger is entitled to complete his journey after the time has expired; Gulf, C. & S. F. R. Co. v. Looney, 85 Tex. 158, 19 S. W. 1039, 16 L. R. A. 471, 34 Am. St. Rep. 787. If all the lines are operated by the company selling the ticket, and the passenger commences his journey within the period, he may complete it after the ticket, by its terms has expired; Brian v. R. Co., 40 Mont. 109, 105 Pac. 489, 20 Ann. Cas. 311.

Where a passenger is carried some distance beyond his destination, and ejected against his protest, being compelled to walk back to the station, the company is liable for breach of contract; Evansville & R. R. Co. v. Kyte, 6 Ind. App. 52, 32 N. E. 1134; and so where he was injured in walking back on a dark night; Kentucky & I. Bridge & R. R. Co. v. Buckler, 125 Ky. 24, 100 S. W. 328, 8 L. R. A. (N. S.) 555, 128 Am. St. Rep. 234.

Passenger-carriers may establish reasonable regulations in regard to the conduct of passengers, and discriminate between those who conform to their rules in regard to obtaining tickets, and those who do not, —requiring more fare of the latter; Chicago, B. & Q. R. Co. v. Parks, 18 Ill. 460, 68 Am. Dec. 562; Hilliard v. Goold, 34 N. H. 230, 66 Am. Dec. 765; Stephen v. Smith, 29 Vt. 160; Com. v. Power, 7 Metc. (Mass.) 596, 41 Am. Dec. 465; State v. Overton, 24 N. J. L. 435, 61 Am. Dec. 671; 29 E. L. & Eq. 143; Crocker v. R. Co., 24 Conn. 249; Lake Erie & W. R. Co. v. Mays, 4 Ind. App. 413, 30 N. E. 1106; but a passenger is not bound to comply with the rules of a company unless they are reasonable; Central Railroad & Banking Co. v. Strickland, 90 Ga. 562, 16 S. E. 352. Passengers may be required to go through in the same train or forfeit the remainder of their tickets; Cheney v. R. R. Co., 11 Metc. (Mass.) 121, 45 Am. Dec. 190; Oil Creek & A. R. Ry. Co. v. Clark, 72 Pa. 231; State v. Overton, 24 N. J. L. 438, 61 Am. Dec. 671; Cleveland, C. & C. R. Co. v. Bartram, 11 Ohio St. 462; Gulf, C. & S. F. Ry. Co. v. Henry, 84 Tex. 678, 19 S. W. 870, 16 L. R. A. 318. The words "good this trip only" upon a ticket will not limit the undertaking of the company to any particular day or any specific train,—they relate to a journey and not to a time; and the ticket is good if used at any time within six years from its date; Pier v. Finch, 24 Barb. (N. Y.) 514; Drew v. R. Co., 51 Cal. 425. See Lundy v. R. Co., 66 Cal. 191, 4 Pac. 1193, 56 Am. Rep. 100; Auerbach v. R. Co., 89 N. Y. 281, 42 Am. Rep. 290; Gulf, C. & S. F. Ry. Co. v. Looney, 85 Tex. 158, 19 S. W. 1039, 16 L. R. A. 471, 34 Am. St. Rep. 787; but a ticket "good for this day only," or for "only two days after date," is of no validity after that date though not used; Boston & L. R. Co. v. Proctor, 1 Allen (Mass.) 267, 79 Am. Dec. 729; Gale v. R. Co., 7 Hun (N. Y.) 670. Where a passenger buys a ticket which is silent as to stop-over privileges, he may rely on the statements of the ticket agent on that subject; New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71. In determining what is a reasonable regulation the convenience of both the public and the company must be considered; Faber v. Ry. Co., 62 Minn. 433, 64 N. W. 918, 36 L. R. A. 789, where the schedule was disarranged and no notice given that the car would not proceed to its destination. It was held that the passenger could not be required to transfer to a car ahead; Burrow v. Ry. & Light Co., 12 Va. L. Reg. 763; *contra*, 37 Can. Sup. Ct. 523; but where a transfer is compelled there is a remedy for failure to provide seats in the new car; Louisville, N. O. & T. Ry. Co. v. Patterson, 69 Miss. 421, 13 South. 697, 22 L. R. A. 259; see Camden & A. R. R. Co. v. Hoosey, 99 Pa. 492, 497, 44 Am. Rep. 120. An ordinance imposing a penalty for unnecessary changes is reasonable; City of New York v. Ry. Co., 43 Misc. 29, 86 N. Y. Supp. 673. It is the duty of the carrier to give information necessary for the journey; Dwinelle v. R. Co., 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611; as of circumstances likely to cause delay; Hasseltine v. Railway, 75 S. C. 141, 55 S. E. 142, 6 L. R. A. (N. S.) 1009; and passengers have the right to rely on information given; Pennsylvania Co. v. Hoagland, 78 Ind. 203. The obligation is treated as an incident of the business; see 20 Harv. L. Rev. 232; but in England false information is dealt with as if deceit; 5 El. & Bl. 860.

Railway passengers, when required by the regulations of the company to surrender

their tickets in exchange for the conductor's checks, are liable to be expelled from the cars for a refusal to comply with such regulation, or to pay fare again; Northern R. Co. v. Page, 22 Barb. (N. Y.) 130; or for refusal to exhibit a ticket at the request of the conductor in compliance with the standing regulations of the company; Hibbard v. R. Co., 15 N. Y. 455. See TICKET.

Railway companies may exclude merchandise from their passenger trains. It is not the duty of a company to search every parcel carried by a passenger, and it is not guilty for the death of a fellow passenger resulting from an explosion of fire works carried by another; [1901] A. C. 396. The company is not bound to carry a passenger daily whose trunk or trunks contain merchandise, money, or other things known as "express matter"; 5 Am. Law Reg. 364.

COMMON CONDIDIT. See CONDIDIT, COMMON.

COMMON COUNCIL. See COUNCIL.

COMMON COUNTS. Certain general counts, not founded on any special contract, which are introduced in a declaration, for the purpose of preventing a defeat of a just right by an accidental variance in the evidence.

These are, in an action of assumpsit, counts founded on implied promises to pay money in consideration of a precedent debt, and have been variously classified. Those usually comprehended under the term are:—

1. *Indebitatus assumpsit*, which alleges a debt founded upon one of the several causes of action from which the law implies a promise to pay, and this is made the consideration for the promise to pay a sum of money equivalent to such indebtedness. This covers two distinct classes —

a. Those termed money counts, because they related exclusively to money transactions as the basis of the debt alleged:

(1) Money paid for defendant's use.
(2) Money had and received by defendant for the plaintiff's use.
(3) Money lent and advanced to defendant.
(4) Interest.
(5) Account stated.

b. Any of the usual states of fact upon which the debt may be founded, the most common being:

(1) Use and occupation.
(2) Board and lodging.
(3) Goods sold and delivered.
(4) Goods bargained and sold.
(5) Work, labor, and services.
(6) Work, labor, and materials.

2. *Quantum meruit.*
3. *Quantum valebant.*

See ASSUMPSIT.

COMMON FINE. A small sum of money paid to the lords by the residents in certain leets. Fleta; Wharton.

COMMON FISHERY. A fishery to which all persons have a right. A common fishery is different from a *common of fishery*, which is the right to fish in another's pond, pool, or river. See FISHERY.

COMMON HIGHWAY. By this term is meant a road to be used by the community at large for any purpose of transit or traffic. Hammond, N. P. 239. See HIGHWAY.

COMMON INFORMER. One who, without being specially required by law or by virtue of his office, gives information of crimes, offences, or misdemeanors which have been committed, in order to prosecute the offender; a prosecutor.

COMMON INTENT. The natural sense given to words.

It is the rule that when words are used which will bear a natural sense and an artificial one, or one to be made out by argument and inference, the natural sense shall prevail. It is simply a rule of construction, and not of addition. Common intent cannot add to a sentence words which have been omitted; 2 H. Blackst. 530. In pleading, certainty is required; but certainty to a common intent is sufficient—that is, what upon a reasonable construction may be called certain, without recurring to *possible* facts; Co. Litt. 203 *a;* Dougl. 163. See CERTAINTY.

COMMON LAW. That system of law or form of the science of jurisprudence which has prevailed in England and in the United States of America, in contradistinction to other great systems, such as the Roman or civil law.

Those principles, usages, and rules of action applicable to the government and security of persons and of property, which do not rest for their authority upon any express and positive declaration of the will of the legislature. 1 Kent 492.

The body of rules and remedies administered by courts of law, technically so called, in contradistinction to those of equity and to the canon law.

The law of any country, to denote that which is common to the whole country, in contradistinction to laws and customs of local application.

The most prominent characteristic which marks this contrast, and perhaps the source of the distinction, lies in the fact that under the common law neither the stiff rule of a long antiquity, on the one hand, nor, on the other, the sudden changes of a present arbitrary power, are allowed ascendency, but, under the sanction of a constitutional government, each of these is set off against the other, so that the will of the people, as it is gathered both from long established custom and from the expression of the legislative power, gradually forms a system—just, because it is the deliberate will of a free people—stable, because it is the growth of centuries—progressive, because it is amenable to the constant revision of the people. A full idea of the genius of the common law cannot be gathered without a survey of the philosophy of English and American history. Some of the elements will, however, appear in considering the various narrower senses in which the phrase "common law" is used.

Perhaps the most important of these narrower senses is that which it has when used in contradistinction to statute law, to designate unwritten as distinguished from written law. It is that law which derives its force and authority from the universal consent and immemorial practice of the people. It has never received the sanction of the legislature by an express act, which is the criterion by which it is distinguished from the statute law.

When it is spoken of as the *lex non scripta,* it is meant that it is law not written by authority of law. The statutes are the expression of law in a written form, which form is essential to the statute. The decision of a court which establishes or declares a rule of law may be reduced to writing and published in the reports; but this report is not the law; it is but evidence of the law; it is but a written account of one application of a legal principle, which principle, in the theory of the common law, is still unwritten. However artificial this distinction may appear, it is nevertheless of the utmost importance, and bears continually the most wholesome results. It is only by the legislative power that law can be bound by phraseology and by forms of expression. The common law eludes such bondage; its principles are not limited nor hampered by the mere forms in which they may have been expressed, and the reported adjudications declaring such principles are but the instances in which they have been applied. The principles themselves are still unwritten, and ready, with all the adaptability of truth, to meet every new and unexpected case. Hence it is said that the rules of the common law are flexible. Bell v. State, 1 Swan (Tenn.) 42; Rensselaer Glass Factory v. Reid, 5 Cow. (N. Y.) 587, 628, 632.

It naturally results from the inflexible form of the statute or written law, which has no self-contained power of adaptation to cases not foreseen by legislators, that every statute of importance becomes, in course of time, supplemented, explained, enlarged, or limited by a series of adjudications upon it, so that at last it may appear to be merely the foundation of a larger superstructure of unwritten law. It naturally follows, too, from the less definite and precise forms in which the doctrine of the unwritten law stands, and from the proper hesitation of courts to modify recognized doctrines in new exigencies, that the legislative power frequently intervenes to declare, to qualify, or to abrogate the doctrines of the common law. Thus, the written and the unwritten law, the statutes of the present and the traditions of the past, interlace and react upon each other. Historical evidence supports the view which these facts suggest, that many of the doctrines of the common law are but the common-law form of antique statutes, long since overgrown and imbedded in judicial decisions. While this process is doubtless continually going on in some degree, the contrary process is also continually going on; and to a very considerable extent, particularly in the United States, the doctrines of the common law are being reduced to the statutory form, with such modifications, of course, as the legislature will choose to make. This subject is more fully considered under the title Code, which see.

In a still narrower sense, the expression "common law" is used to distinguish the body of rules and of remedies administered by courts of law technically so called in contradistinction to those of equity administered by courts of chancery, and to the canon law, administered by the ecclesiastical courts.

In England the phrase is more commonly used at the present day in the second of the three senses above mentioned.

In this country the common law of England has been adopted as the basis of our jurisprudence in all the states except Louisiana. Many of the most valued principles of the common law have been embodied in the constitution of the United States and the constitutions of the several states; and in many of the states the common law and the statutes of England in force in the colony at the time of our independence are by the state constitution declared to be the law of the state until repealed. There is an express constitutional adoption of it in Delaware, New York, Michigan, Wisconsin, and West Virginia, and an implied adoption of it in the constitutions of Kentucky and West Virginia. It has been adopted by statute in Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Kansas, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, Pennsylvania, South Carolina, Texas, Vermont, Virginia, Washington and Wyoming. It was extended to Alabama by the ordinance of 1787 and the recognition of the latter in the state constitution; Pollard v. Hagan, 3 How. (U. S.) 212, 11 L. Ed. 565; Barlow v. Lambert, 28 Ala. 707, 65 Am. Dec. 374. It is recognized by judicial decision without any statute in Iowa; State v. Twogood, 7 Ia. 252; Mississippi; Hemingway v. Scales, 42 Miss. 1, 97 Am. Dec. 425, 2 Am. Rep. 586. See 1 Bish. Crim. Law § 15, note 4, § 45, where the rules adopted by the several states in this respect are stated. Hence, where a question in the courts of one state turns upon the laws of a sister state, if no proof of such laws is offered, it is, in general, presumed that the common law as it existed at the time of the separation of this country from England prevails in such state; Abell v. Douglass, 4 Denio (N. Y.) 305; Schurman v. Marley, 29 Ind. 458; Kermot v. Ayer, 11 Mich. 181; Mohr v. Miesen, 47 Minn. 228, 49 N. W. 862; *contra,* in Pennsylvania, in cases where that state has changed from the common law; the presumption being that the law of the sister state has made the same change, if there is no proof to the contrary. The term common law as thus used may be deemed to include the doctrine of equity; Williams v. Williams, 8 N. Y. 535; but the term is also used in the amendments to the constitution of the United States (art. 7) in contradistinction to equity, in the provision that "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The "common law" here mentioned is the common law of England, and not of any particular state; U. S. v. Wonson, 1 Gall. 20, Fed. Cas. No. 16,750; Bains v. The Catherine, 1 Baldw. 554, Fed. Cas. No. 756; Robinson v. Campbell, 3 Wheat. (U. S.) 223, 4 L. Ed. 372; Parsons v. Bedford, 3 Pet. (U. S.) 446, 7 L. Ed. 732. See Patterson v. Winn, 5 Pet. (U. S.) 241, 8 L. Ed. 108; Com. v. Leach, 1 Mass. 61; Coburn v. Harvey, 18 Wis. 147. The term is used in contradistinction to equity, admiralty, and maritime law; Parsons v. Bedford, 3 Pet. (U. S.) 446, 7 L. Ed. 732; Bains v. The Catherine, 1 Baldw. 554, Fed. Cas. No. 756.

The common law of England is not in all respects to be taken as that of the United States or of the several states: its general principles are adopted only so far as they are applicable to our situation, and the principles upon which courts discriminate between what is to be taken and what is to be left have been much the same whether the common law was adopted by constitu-

tion, statute, or decision. While no hard and fast rule can be laid down which will at once differentiate every case, a very discriminating effort was made by Chancellor Bates, in Clawson v. Primrose, 4 Del. Ch. 643, to formulate the result of the decisions and ascertain the criterion which they had in most instances applied to the subject. In this discussion, which was characterized by Professor Washburn as having great value, the conclusion reached is thus stated:

"It cannot be overlooked that, notwithstanding the broad language of the constitution ('the common law of England as well as so much of the statute law as has been heretofore adopted in practice, . . . such parts only excepted as are repugnant to the rights and privileges contained in this constitution and the declaration of rights') there were many parts of the common law of England, as it stood prior to 1776, which never have in fact been regarded by our courts as in force in this country; yet it is to be observed that the courts have not herein acted arbitrarily in adopting some parts of the common law and rejecting other parts, according to their views of the policy of particular rules or doctrine. On the contrary, those parts of the common law of England which have not been here practically administered by the courts will be found on examination to reduce themselves to two classes, resting upon grounds which render them proper to be treated as *implied* exceptions to the constitutional provision in addition to the *expressed* exception of such parts of the common law as were repugnant to the rights and privileges contained in the constitution. One of these classes of exceptions may be briefly disposed of. It embraces those parts of the rules and practice of the common law which had become superseded by long settled usages of trade, or business, or habits of dealing among our people, such as could not be unsettled or disturbed without serious inconvenience or injury. In such cases, upon the necessary maxim that *communis error facit jus*, the courts accepted these departures as practical modifications of the common law. . . .

"The other class of rules which, though parts of the common law of England, have never been administered by the courts under the constitution of 1776, embraces those parts of the common law which in the terms usually employed were, at the period of our independence, inapplicable to the existing circumstances and institutions of our people

"There is less difficulty in applying the limitation practically than in attempting to define it. I understand it as excluding those parts of the common law of England which were applicable to subjects connected with political institutions and usages peculiar to the mother country, and having no existence in the colonies, such for example as officers, dignities, advowsons, titles, etc.; also, as excluding some of the more artificial rules of the common law, springing out of the complicated system of police, revenue, and trade, among a great commercial people and not therefore applicable to the more simple transactions of the colonies or of the states in their early history; also it may be understood as excluding or modifying many rules of what is known as the common law of practice, and possibly of evidence, which the greater simplicity in our system for the administration of justice, would render unnecessary or inconvenient.

"But, on the other hand, our legislative and judicial history shows conclusively that what may be termed the common law of property was received as an entire system, subject to alterations by the legislature only. Rights of property and of person are fundamental rights necessary to be defined and protected in every civil society. The common law, as a system framed to this very end, could not be deemed inapplicable in the colonies for want of a subject matter, or as being needless or superfluous, or unacceptable, which is the true sense of the limitation in question. Certain it is, as a matter of history, that our ancestors did not so treat it."

Among the other cases in which the subject is treated are Van Ness v. Pacard, 2 Pet. (U. S.) 144, 7 L. Ed. 374; Town of Pawlet v. Clark, 9 Cra. (U. S.) 333, 3 L. Ed. 735; Lyle v. Richards, 9 S. & R. (Pa.) 330; Rensselaer Glass Factory v. Reid, 5 Cow. (N. Y.) 628; Doe v. Winn, 5 Pet. (U. S.) 241, 8 L. Ed. 108; Wheaton v. Peters, 8 Pet. (U. S.) 658, 8 L. Ed. 1055; U. S. v. Hudson, 7 Cra. (U. S.) 32, 3 L. Ed. 259; U. S. v. Coolidge, 1 Wheat. (U. S.) 415, 4 L. Ed. 124; Robinson v. Campbell, 3 Wheat. (U. S.) 223, 4 L. Ed. 372; U. S. v. Ravara, 2 Dall. (U. S.) 297, 1 L. Ed. 388; U. S. v. Worrall, 2 Dall. (U. S.) 384, 1 L. Ed. 426; Com. v. Leach, 1 Mass. 61; Boynton v. Rees, 9 Pick. (Mass.) 532; Winthrop v. Dockendorff, 3 Greenl. (Me.) 162; Colley v. Merrill, 6 Greenl. (Me.) 55; Sibley v. Williams, 3 Gill. & J. (Md.) 62; U. S. v. Coolidge, 1 Gall. (U. S.) 489, Fed. Cas. No. 14,857; State v. Danforth, 3 Conn. 114; Johnson v. Terry, 34 Conn. 260; Dawson v. Coffman, 28 Ind. 220; Powell v. Sims, 5 W. Va. 1, 13 Am. Rep. 629; Lansing v. Stone, 37 Barb. (N. Y.) 16; Barlow v. Lambert, 28 Ala. 704, 65 Am. Dec. 374. See Sampson's Discourse before the N. Y. Hist. Soc.

The adoption of the common law has been held to include the construction of common-law terms; Carpenter v. State, 4 How. (Miss.) 163, 34 Am. Dec. 116; Buckner v. Bank, 5 Ark. 536, 41 Am. Dec. 105; statutes; Com. v. Churchill, 2 Metc. (Mass.) 118; and constitutional provisions; McGinnis v. State, 9 Humph. (Tenn.) 43, 49 Am. Dec. 697; curtesy; McCorry v. King's Heirs, 3 Humph. (Tenn.) 267, 39 Am. Dec. 165; dower; Davis v. O'Ferrall, 4 G. Greene (Ia.) 168; husband and wife; Van Maren v. Johnson, 15 Cal. 308; champerty; Key v. Vattier, 1 Ohio 132; real property, title, estate, and tenures; Hemingway v. Scales, 42 Miss. 1, 97 Am. Dec. 425, 2 Am. Rep. 586; Harkness v. Sears, 26 Ala. 493, 62 Am. Dec. 742; Powell v. Brandon, 24 Miss. 343; sureties; Vidal v. Girard, 2 How. (U. S.) 127, 11 L. Ed. 205; charitable uses; Burr v. Smith, 7 Vt. 241, 29 Am. Dec. 154; Williams v. Williams, 8 N. Y. 541; Witman v. Lex, 17 S. & R. (Pa.) 88, 17 Am. Dec. 644; decedent's estates; Cutting v. Cutting, 86 N. Y. 529; remedies and practice; Straffin's Adm'r v. Newell, T. U. P. Charlt. (Ga.) 172, 4 Am. Dec. 705; U. S. v. Wonson, 1 Gall. 20, Fed. Cas. No. 16,750; Hightower v. Fitzpatrick's Heirs, 42 Ala. 597; Grande v. Foy, 1 Hemp. 105, Fed. Cas. No. 5,682a; Fisher v. Cockerell, 5 Pet. (U. S.) 253, 8 L. Ed. 114; Wiley v. Ewing, 47 Ala. 424.

In actions in the federal courts in a territory, the common law is the rule of decision, in the absence of statutes or proof of laws or customs prevailing in the territory; Pyeatt v. Powell, 51 Fed. 551, 2 C. C. A. 367. The common-law rule of decision in a federal

court is that of the state in which it is sitting; Lorman v. Clarke, 2 McLean 568, Fed. Cas. No. 8,516.

Illustrations of what it has been held not to include are the rule respecting conveyance by parol; Lindsley's Lessee v. Coats, 1 Ohio 245; but see Lavelle v. Strobel, 89 Ill. 370; shifting inheritances; Drake v. Rogers, 13 Ohio St. 21; Cox v. Matthews, 17 Ind. 367; Bates v. Brown, 5 Wall. (U. S.) 710, 18 L. Ed. 535; mere possession of land as against miners; McClintock v. Bryden, 5 Cal. 100, 63 Am. Dec. 87; newspaper communications respecting a judge considered as a contempt in England; Stuart v. People, 3 Scam. (Ill.) 404; cutting timber; Dawson v. Coffman, 28 Ind. 220; easement by use in party-wall; Ileatt v. Morris, 10 Ohio St. 523, 78 Am. Dec. 280; estates in joint tenancy; Sergeant v. Steinberger, 2 Ohio 305, 15 Am. Dec. 553; rule as to partial reversal of a judgment against an infant and another; Wilford v. Grant, Kirby (Conn.) 117; *cy prés* doctrine; Grimes' Ex'rs v. Harmon, 35 Ind. 198, 9 Am. Rep. 690; riparian rights to soil under water; Reno Smelting, Milling & Reduction Works v. Stevenson, 20 Nev. 269, 21 Pac. 317, 4 L. R. A. 60, 19 Am. St. Rep. 364; overruling Vansickle v. Haines, 7 Nev. 249; to running water; Martin v. Bigelow, 2 Aik. (Vt.) 187, 16 Am. Dec. 696; the definition of a navigable river; Fulmer v. Williams, 122 Pa. 191, 15 Atl. 726, 1 L. R. A. 603, 9 Am. St. Rep. 88; the law of waters as applied to large lakes, or to a river which is a national boundary; Champlain & St. L. R. Co. v. Valentine, 19 Barb. (N. Y.) 484.

In criminal law the common law is generally in force in the states to some extent, and while it is in some states held that no crime is punishable unless by statute, there are in many states general statutes resorting to the common law for all crimes not otherwise enumerated, and for criminal matters generally. When there is no statutory definition of a crime named, the common-law definition is generally resorted to; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; as also are its rules of evidence in criminal cases, and of practice as well as principle in the absence of statutes to the contrary; Hyde v. State, 16 Tex. 445, 67 Am. Dec. 630; and in Louisiana, although not recognized in civil matters, the common law in criminal cases is expressly adopted; State v. McCoy, 8 Rob. 545, 41 Am. Dec. 301. It has been held to prevail in the District of Columbia as to theft; State v. Cummings, 33 Conn. 260, 89 Am. Dec. 208; as to conspiracy in Maryland; State v. Buchanan, 5 Harr. & J. 358, 9 Am. Dec. 534; kidnapping in New Hampshire; State v. Rollins, 8 N. H. 550; homicide without intent to kill in Maine; State v. Smith, 32 Me. 369, 54 Am. Dec. 578; and in Tennessee; Jacob v. State, 3 Humph. 493; capacity to commit rape in New York; People v. Randolph, 2 Park. Cr. Rep. 174; but not in Ohio; Williams v. State, 14 Ohio 222, 45 Am. Dec. 536.

There is no common law of the United States, as a distinct sovereignty; Swift v. R. Co., 64 Fed. 59; Gatton v. Ry. Co. (Ia.) 63 N. W. 589; Wheaton v. Peters, 8 Pet. (U. S.) 658, 8 L. Ed. 1055; People v. Folsom, 5 Cal. 374; Forepaugh v. R. Co., 128 Pa. 217, 18 Atl. 503, 5 L. R. A. 508, 15 Am. St. Rep. 672; and therefore there are no common-law offences against the U. S.; U. S. v. Hudson, 7 Cra. (U. S.) 32, 3 L. Ed. 259; In re Greene, 52 Fed. 104; U. S. v. Lewis, 36 Fed. 449; U. S. v. Britton, 108 U. S. 199, 2 Sup. Ct. 525, 27 L. Ed. 703; U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591. There is a rare and valuable pamphlet on this subject, by St. George Tucker Campbell, of the Philadelphia Bar, which contains a full discussion of this question. For earlier cases before the question was fully settled, see U. S. v. Worrall, 2 Dall. (U. S.) 384, Fed. Cas. No. 16,766; U. S. v. Coolidge, 1 Gall. 488, Fed. Cas. No. 14,857; *id.*, 1 Wheat. (U. S.) 415, 4 L. Ed. 124. But the common law is resorted to by federal courts for definition of common-law crimes not defined by statute; U. S. v. Armstrong, 2 Curt. C. C. 446, Fed. Cas. No. 14,467; U. S. v. Coppersmith, 4 Fed. 198. See COMMERCIAL LAW.

The admiralty law is distinct from the common law and the line of demarcation is to be sought in the English decisions before the Revolution and those of the state courts prior to the constitution. See La Amistad de Rues, 5 Wheat. (U. S.) 391, 5 L. Ed. 115; Bains v. The James and Catherine, Baldw. 558, Fed. Cas. No. 756; Sawyer v. Steamboat Co., 46 Me. 400, 74 Am. Dec. 463. And as to the adoption of the English ecclesiastical law, see Le Barron v. Le Barron, 35 Vt. 365; Crump v. Morgan, 38 N. C. 91, 40 Am. Dec. 447; Perry v. Perry, 2 Paige Ch. (N. Y.) 501; Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460. New York has adopted only so much of the common law as is applicable to the circumstances of the colonies and conformable to her institutions; Cutting v. Cutting, 86 N. Y. 522; Shayne v. Publishing Co., 168 N. Y. 70, 61 N. E. 115, 55 L. R. A. 777, 85 Am. St. Rep. 654. In adopting the common law in New York, principles inconsonant with the circumstances or repugnant to the spirit of American institutions were not adopted; Barnes v. Terminal Co., 193 N. Y. 378, 85 N. E. 1093, 127 Am. St. Rep. 962.

It does not become a part of the law of a state of its own vigor, but is adopted by constitutional provision, statute or decision; Western Union Tel. Co. v. Milling Co., 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815. As to Indiana, see Sopher v. State, 169 Ind. 177, 81 N. E. 913, 14 L. R. A. (N. S.) 172, 14 Ann. Cas. 27.

"There is no body of federal common law separate and distinct from the common law

existing in the several states in the sense that there is a body of statute law enacted by congress separate and distinct from the body of statute law enacted by the several states. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of congress;" Western Union Tel. Co. v. Pub. Co., 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765, following Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 308; Wheaton v. Peters, 8 Pet. (U. S.) 591, 8 L. Ed. 1055; New York C. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. Ed. 627. There is an elaborate opinion in Murray v. Ry. Co., 62 Fed. 24, on this subject. See also 36 Amer. L. Rev. 498; 18 Harv. L. Rev. 134.

Sir F. Pollock expresses the opinion that there is a common law of the United States as distinguished from that of a state. 3 Encycl. of Laws of England 142.

In general, too, the statutes of England are not understood to be included, except so far as they have been recognized by colonial legislation, but the course pursued has been rather to re-enact such English statutes as were deemed applicable to our case. Those passed since the settlement of the particular colony are not in force, unless specially accepted by it, or expressly made to apply to it; if these were suitable to the condition of the colony they were usually accepted; Baker v. Mattocks, Quincy (Mass.) 72; Cathcart v. Robinson, 5 Pet. (U. S.) 280, 8 L. Ed. 120; Morris v. Vanderen, 1 Dall. (U. S.) 64, 1 L. Ed. 38.

There cannot be said to be a settled rule as to what date is to be fixed as determining what British statutes were received as part of the common law. Many states fix July 4, 1776. This is provided by constitution in Florida, Maryland and Rhode Island, and by statute in Kentucky; in other states 4th Jac. I. is the period named after which English statutes are not included, as Arkansas, Colorado, Illinois, Indiana, Missouri, Virginia, Wyoming (but the last four except stats. 43 Eliz. c. 6, § 2; 13 Eliz. c. 8 and 37 Hen. VIII. c. 9); McCool v. Smith, 1 Black (U. S.) 459, 17 L. Ed. 218; Scott v. Lunt, 7 Pet. (U. S.) 596, 8 L. Ed. 797; Baker's Adm'r v. Crandall, 78 Mo. 587, 47 Am. Rep. 126; Herr v. Johnson, 11 Colo. 393, 18 Pac. 342. As to English statutes in force in Pennsylvania, see Report of the Judges in Roberts, Eng. Stat.; Boehm v. Engle, 1 Dall. (U. S.) 15, 1 L. Ed. 17; Biddle v. Shippen, 1 Dall. (U. S.) 19, 1 L. Ed. 19; Respublica v. Mesca, 1 Dall. (U. S.) 73, 1 L. Ed. 42; Shewel v. Fell, 3 Yeates (Pa.) 17; *id.*, 4 Yeates (Pa.) 47; Johnson v. Hessel, 134 Pa. 315, 19 Atl. 700. Generally, it may be stated that the statutes adopted prior to the Revolution, and held applicable under rules stated, are accepted as part of the common law; Hamilton v. Kneeland, 1 Nev. 40; Sackett v. Sackett, 8 Pick. (Mass.) 309; Coburn v. Harvey, 18 Wis. 148. But see Matthews v. Ansley, 31 Ala. 20; Bogardus v. Trinity Church, 4 Paige (N. Y.) 178; Crawford v. Chapman, 17 Ohio 452; In re Lamphere, 61 Mich. 105, 27 N. W. 882. Upon the subject of English statutes as part of the common law see an able note on the whole subject of this title in 22 L. R. A. 501. By reason of the modifications arising out of our different condition, and those established by American statutes and by the course of American adjudication, the common law of America differs widely in many details from the common law of England; but the fact that this difference has not been introduced by violent changes, but has grown up from the native vigor of the system, identifies the whole as one jurisprudence.

See works of Franklin, by Sparks, vol. 4, p. 271, as to the adoption of the common law in America; see also Cooley, Const. Lim. (2d ed.) 34, n. 35; Pierce v. Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667; 2 Wait, Actions and Defences, 276; Reinsch, English Common Law in the Early American Colonies, 1 Sel. Essays in Anglo-Amer. L. H. 367; Sioussat, Extension of English Statutes to the Plantations, *id.* 416; Jenks, Teutonic Law, *id.* 49; Ed. Combinations 216; James C. Carter, The Law, etc.; O. W. Holmes, The Common Law; Gray, Sources of the Law; 23 Q. B. D. 611, where Bowen, L. J., speaks of it as "an arsenal of sound common sense."

A person has no property, no vested interest, in any rule of common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process, but the law itself, as a rule of conduct, may be changed at will . . . or the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances; Munn v. Illinois, 94 U. S. 113, 134, 24 L. Ed. 77; quoted and approved, Second Employers' Liability Cases, 223 U. S. 1, 50, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

See LAW MERCHANT.

COMMON LAW MARRIAGE. See MARRIAGE.

COMMON LAW PROCEDURE ACTS. See PROCEDURE ACTS.

COMMON NUISANCE. One which affects the public in general, and not merely some particular person. 1 Hawkins, Pl. Cr. 197 See NUISANCE.

COMMON PLEAS. The name of a court having jurisdiction generally of civil actions.

Such pleas or actions are brought by private persons against private persons, or by the government, when the cause of action is of a civil nature. In England, whence we derived this phrase, common pleas are so called to distinguish them from *pleas of the crown.*

The Court of Common Pleas in England consisted of one chief and four puisne (associate) justices. It is thought by some to have been established by king John for the purpose of diminishing the power of the *aula regis*, but is referred by some writers to a much earlier period. 8 Co. 289; 1 Poll. & Maitl. 177; *Termes de la Ley;* 3 Bla. Comm. 39. It exercised an exclusive original jurisdiction in many classes of civil cases. See 3 Sharsw. Bla. Comm. 38, n. The right of practising in this court was for a long time confined to two classes of practitioners, limited in number; see SERJEANT; but is now thrown open to the bar generally. Its jurisdiction is merged in the High Court of Justice. See COURTS OF ENGLAND

Courts of the same name exist in many states.

COMMON RECOVERY. A judgment recovered in a fictitious suit, brought against the tenant of the freehold, in consequence of a default made by the person who is last vouched to warranty in the suit, which recovery, being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee-simple in the recoverer.

A common recovery is a kind of conveyance, and is resorted to when the object is to create an absolute bar of estates tail, and of the remainders and reversions expectant on the determination of such estates. 2 Bla. Com. 357. Though it has been used in some of the states, this form of conveyance is nearly obsolete, easier and less expensive modes of making conveyances, which have the same effect, having been substituted; 2 Bouvier, Inst. nn. 2092, 2096; Frost v. Cloutman, 7 N. H. 9, 26 Am. Dec. 723, Lyle v. Richards, 9 S & R. (Pa.) 322, Stump v. Findlay, 2 Rawle (Pa.) 168, 19 Am. Dec. 632; Sharp v. Thompson, 1 Whart. (Pa.) 151; Dow v. Warren, 6 Mass. 328.

COMMON SCHOOLS. Schools for general elementary instruction, free to all the public. 2 Kent 195. See SCHOOLS.

COMMON SCOLD. One who, by the practice of frequent scolding, disturbs the neighborhood. Bish. Crim. Law § 147.

The offence of being a common scold is cognizable at common law. It is a particular form of nuisance, and was punishable by the ducking-stool at common law, in place of which punishment fine and imprisonment are substituted in the United States; Whart. Cr. L. 1442; James v. Com., 12 S. & R. (Pa.) 220. See 1 Term 748; 6 Mod. 11; 4 Rog. 90; 1 Russ. Cr. 302; Roscoe, Cr. Ev., 8th ed. 824; Baker v. State, 53 N. J. L. 45, 20 Atl. 858.

COMMON SEAL. The seal of a corporation. See SEAL.

COMMON SERJEANT. A judicial officer of the corporation of the city of London. He attends the Lord Mayor and Court of Aldermen on court days and acts as one of the judges of the Central Criminal Court. Whart.

COMMON, TENANTS IN. See ESTATE IN COMMON.

COMMON TRAVERSE. See TRAVERSE.

COMMON VOUCHEE. In common recoveries, the person who is vouched to warranty. In this fictitious proceeding the crier of the court usually performs the office of a common vouchee. 2 Bla. Com. 358.

COMMONALTY. The common people of England, as distinguished from the king and nobles.

The body of a society or corporation, as distinguished from the officers. 1 Perr. & D. 243. Charters of incorporation of the various tradesmen's societies, etc., in England are usually granted to the master, wardens, and commonalty of such corporation.

COMMONER. One possessing a right of common.

COMMONS. Those subjects of the English nation who are not noblemen. They are represented in parliament by the house of commons.

COMMONWEALTH. A word which properly signifies the common weal or public policy; sometimes it is used to designate a republican form of government. But it was used in royal times in reference to England. 17 L. Q. R. 131.

The English nation during the time of Cromwell was called The Commonwealth. It is the legal title of the states of Massachusetts, Pennsylvania, Kentucky, and Virginia.

COMMORANT. One residing in a particular town, city, or district. Barnes 162.

COMMORIENTES. Those who perish at the same time in consequence of the same calamity. See SURVIVOR; DEATH.

COMMUNE CONCILIUM. The King's Council. See PRIVY COUNCIL.

COMMUNI DIVIDUNDO. In Civil Law. An action which lies for those who have property in common, to procure a division. It lies where parties hold land in common but not in partnership. Calvinus, Lex.

COMMUNINGS. In Scotch Law. The negotiations preliminary to a contract.

COMMUNIO BONORUM (Lat.). **In Civil Law.** A community of goods.

When a person has the management of common property, owned by himself and others, not as partners, he is bound to account for the profits, and is entitled to be reimbursed for the expenses which he has sustained by virtue of the quasi-contract which is created by his act, called *communio bonorum.* Vicat; 1 Bouvier, Inst. n. 907, note.

COMMUNITY (Lat. *communis*, common). **In Civil Law.** A corporation or body politic. Dig. 3. 4.

"We can find in our law books no such terms as *corporation, body corporate, body politic*, though we may read much of *convents, chapters* and *communities.* The larg-

est term in general use is *community, commonalty* or *commune*, in Latin, *communitas* or *communa*. It is a large, vague word. . . . But we dare not translate it by *corporation*, for if, on the one hand, it is describing cities and boroughs which already are, or at least are on their way to become, corporations, it will stand equally well for counties, hundreds and townships which in the end have failed to acquire a corporate character. . . ." 1 Poll. & Maitl. Hist. E. L. 494.

In French Law. A species of partnership which a man and woman contract when they are lawfully married to each other.

Conventional community is that which is formed by express agreement in the contract of marriage.

By this contract the legal community which would otherwise subsist may be modified as to the proportions which each shall take, and as to the things which shall compose it.

Legal community is that which takes place by virtue of the contract of marriage itself.

The French system of community property was known as the dotal system. The Spanish system was the Ganancial System, *q. v.* The conquest of Mexico by the Spaniards and their acquisition of the Florida territory resulted in the introduction on American soil of the Spanish system. Louisiana, originally a French colony, was afterwards ceded to Spain when the Spanish law was introduced. It again reverted to the French and from them was acquired by the United States. The Louisiana Code has, with slight modifications, adopted the dotal system of the *Code Napoléon* as regards the separate rights of husband and wife, but as to their common property it retained the essential features of the Spanish ganancial system. Texas and California have adopted the community system of Spain and Mexico or modified it by their constitutions. New Mexico appears to have followed the Spanish law of property rights of married persons in its entirety. The community system as adopted in older community states has been adopted by Nevada, Washington, and Idaho, with certain modifications. Hence it may be said that the American community system prevails at this day in Louisiana, Texas, California, Nevada, Arizona, Washington, Idaho, Montana, and New Mexico, and in Porto Rico, and is indebted to Spain for its origin. See Ballinger, Community Property, § 6; Chavez v. McKnight, 1 N. M. 147. It is said to be the only remains in those states (except Louisiana) of the civil law.

Property (in Washington Territory) acquired during marriage with community funds became an acquêt of the community and not the sole property of the one in whose name the property was bought, although by the law existing at the time the husband was given the management, control and power of sale of such property; this right being vested in him, not because he was the exclusive owner, but because by law he was created the agent of the community. Warburton v. White, 176 U. S. 484, 20 Sup. Ct. 404, 44 L. Ed. 555.

The community embraces the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact; and of the estates which they may acquire during the marriage, either by donations made jointly to them, or through their outlay or industry as well as the fruits of the *bienes proprios* which each one brought to the matrimony, and of all that which this acquisition produced by whatever title acquired; Ballinger, Community Prop. § 5, or by purchase, or in any other similar way, even although the purchase be made in the name of one of the two, and not of both; because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase; Davidson v. Stuart, 10 La. 146; Brown v. Cobb, 10 La. 172; Clark v. Norwood, 12 La. Ann. 598. The debts contracted during the marriage enter into the community, and must be acquitted out of the common fund; but not the debts contracted before the marriage.

The husband has the right to manage and control the community property during its existence; Warburton v. White, 176 U. S. 484, 20 Sup. Ct. 404, 44 L. Ed. 555; Stockstill v. Bart, 47 Fed. 231; and hence he can alienate or encumber during coverture, even without the consent or joinder of the wife, any of the property belonging to the community; Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; Cook v. Vault Co., 104 Ky. 473, 47 S. W. 325; Moore v. Moore, 73 Tex. 383, 11 S. W. 396; Hearfield v. Bridges, 75 Fed. 47, 21 C. C. A. 212. He must act in good faith toward the wife, and if he disposes of property with intent to defraud her, his conveyance or disposal will be voidable on that ground, but a *bona fide* purchaser is protected; Lord v. Hough, 43 Cal. 581; Cotton v. Cotton, 34 La. Ann. 858; Hagerty v. Harwell, 16 Tex. 663. But in Washington the husband has no right to sell or encumber the property unless the wife joins with him; Kimble v. Kimble, 17 Wash. 75, 49 S. W. 216. In general a sale or conveyance of the property by the wife alone is absolutely void; Tryon v. Sutton, 13 Cal. 490; Humphries v. Sorenson, 33 Wash. 563, 74 Pac. 690.

The property is liable for the community debts; Succession of Kerley, 18 La. Ann. 583; Barnett v. O'Loughlin, 14 Wash. 259, 44 Pac. 267; and it is in general also liable for the husband's separate debts; Schuyler v. Broughton, 70 Cal. 282, 11 Pac. 719; Lee v. Henderson, 75 Tex. 190, 12 S. W. 981; Gund v. Parke, 15 Wash. 393, 46 Pac. 408; *contra* as to realty; Ross v. Howard, 31

Wash. 393, 72 Pac. 74. The husband usually sues alone in his own name; Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; Jordan v. Moore, 65 Tex. 363; Crow v. Van Sickle, 6 Nev. 146; Ford v. Brooks, 35 La. Ann. 157. But in Washington, since the husband and wife have equal interests in the community, all actions must be brought by the husband and wife jointly; Parke v. City of Seattle, 8 Wash. 78, 35 Pac. 594.

The community is dissolved by the death of either spouse; Thompson v. Vance, 110 La. 26, 34 South. 112; by divorce; Biggi v. Biggi, 98 Cal. 35, 32 Pac. 803, 35 Am. St. Rep. 141; (*contra*, in Porto Rico, Garrozi v. Dastas, 204 U. S. 64, 27 Sup. Ct. 224, 51 L. Ed. 369); and by a judicial decree following a suit for separation of property; Succession of Bothick, 52 La. Ann. 1863, 28 South. 458. A culpable abandonment of one spouse by the other may entitle the party abandoned to the rights in the community that follow upon its dissolution; Cullers v. James, 66 Tex. 494, 1 S. W. 314; mere voluntary separation is not sufficient; Muse v. Yarborough, 11 La. 521; nor is insanity; Succession of Bothick, 52 La. Ann. 1863, 28 South. 458.

Either surviving spouse may sell his or her interest in the absence of fraud upon the rights of others; Harvey v. Cummings, 68 Tex. 599, 5 S. W. 513; but the survivor cannot, except for the payment of community debts, alienate the interest of the heirs of the deceased spouse; Meyer v. Opperman, 76 Tex. 105, 13 S. W. 174; Blossat v. Sullivan, 21 La. Ann. 565. The general rule is that one half of the property vests in the surviving spouse and one half in the heirs of the deceased; Payne v. Payne, 18 Cal. 291; George v. Delaney, 111 La. 760, 35 South. 894; Chadwick v. Tatem, 9 Mont. 354, 23 Pac. 729; Wortman v. Vorhies, 14 Wash. 152, 44 Pac. 129.

The effects which compose the community of gains are divided into two equal portions between the heirs at the dissolution of the marriage; La. Civ. Code 2375. See Pothier, Contr.; Toullier. But the wife's interest in the community property is residuary and she is not the owner of any specific property before the debts are paid, whether to third persons or to the succession of her husband; Berthelot v. Fitch, 45 La. Ann. 389, 12 South. 625.

A right to recover damages for personal injuries, if acquired during marriage, is considered community property; Neale v. Ry. Co., 94 Cal. 425, 29 Pac. 954.

See ACQUÊTS.

COMMUTATION. The change of a punishment to which a person has been condemned into a less severe one. This can be granted only by the authority in which the pardoning power resides. See Ex parte Janes, 1 Nev. 321; In re Victor, 31 Ohio St. 206; Lee v. Murphy, 22 Gratt. (Va.) 789, 12 Am. Rep. 563.

See PRISONER.

COMMUTATIVE CONTRACT. In Civil Law. One in which each of the contracting parties gives and receives an equivalent.

The contract of sale is of this kind. The seller gives the thing sold, and receives the price, which is the equivalent. The buyer gives the price, and receives the thing sold, which is the equivalent. Such contracts are usually distributed into four classes, namely: *Do ut des* (I give that you may give); *Facio ut facias* (I do that you may do); *Facio ut des* (I do that you may give); *Do ut facias* (I give that you may do). Pothier, Obl. n. 13. See La. Civ. Code, art. 1761.

COMPACT. An agreement. A contract between parties, which creates obligations and rights capable of being enforced, and contemplated as such between the parties, in their distinct and independent characters. Story, Const. b. 3, c. 3; Rutherf. Inst. b. 2, c. 6, § 1.

The parties may be nations, states, or individuals; but the constitution of the United States declares that "no state shall, without the consent of congress, enter into agreement or compact with another state, or with a foreign power." See Marlatt v. Silk, 11 Pet. (U. S.) 1, 9 L. Ed. 609; Poole v. Fleeger, 11 Pet. (U. S.) 185, 9 L. Ed. 680; Green v. Biddle, 8 Wheat. (U. S.) 1, 5 L. Ed. 547.

COMPANIONS. In French Law. A general term, comprehending all persons who compose the crew of a ship or vessel. Pothier, Mar. Contr. n. 163.

COMPANY. An association of a number of individuals for the purpose of carrying on some legitimate business.

This term is not synonymous with partnership, though every such unincorporated company is a partnership. Usage has reserved the term to associations whose members are in greater number, their capital more considerable, and their enterprises greater, either on account of their risk or importance.

When these companies are authorized by the government, they are known by the name of corporations.

The proper signification of the word "company" when applied to a person engaged in trade, denotes those united for the same purpose or in a joint concern. It is commonly used in this sense or as indicating a partnership. Palmer v. Pinkham, 33 Me. 32.

Sometimes the word is used to represent those members of a partnership whose names do not appear in the name of the firm. See 12 Toullier 97.

COMPARATIVE JURISPRUDENCE. See JURISPRUDENCE.

COMPARATIVE NEGLIGENCE. That doctrine in the law of negligence by which the negligence of the parties is compared in the degree of "slight," "ordinary," and

"gross" negligence, and a recovery permitted notwithstanding the contributory negligence of the plaintiff, when the negligence of the plaintiff is slight and the negligence of the defendant gross, but refused when the plaintiff has been guilty of a want of ordinary care contributing to his injury; or when the negligence of the defendant is not gross, but only ordinary or slight when compared under the circumstances of the case with the contributory negligence of the plaintiff. Chicago, B. & Q. R. Co. v. R. Co., 103 Ill. 512; Calumet Iron & Steel Co. v. Martin, 115 Ill. 358, 3 N. E. 456; Rockford, R. I. & St. L. R. Co. v. Delaney, 82 Ill. 198, 25 Am. Rep. 308. This doctrine existed in the civil law, and in some instances in admiralty, but it did not exist in the states other than Illinois and Louisiana.

The doctrine of comparative negligence no longer obtains in Illinois; it must now be established in actions for personal injuries, or for death by wrongful act that the plaintiff, or the deceased, was exercising ordinary care; Imes v. R. Co., 105 Ill. App. 37; see Sluder v. Transit Co., 189 Mo. 107, 88 S. W. 648, 5 L. R. A. (N. S.) 239. It has been revived in the Federal Employer's Liability Act of 1908.

COMPATIBILITY. Such harmony between the duties of two offices that they may be discharged by one person.

COMPENSACION. In Spanish Law. The extinction of a debt by another debt of equal dignity between persons who have mutual claims on each other.

COMPENSATIO CRIMINIS. The compensation or set-off of one crime against another: for example, in questions of divorce, where one party claims the divorce on the ground of adultery of his or her companion, the latter may show that the complainant has been guilty of the same offence, and, having himself violated the contract, cannot complain of its violation on the other side. This principle is incorporated in the codes of most civilized nations. See 1 Hagg. Cons. 144; 1 Hagg. Eccl. 714; Wood v. Wood, 2 Paige, Ch. (N. Y.) 108, 2 D. & B. 64; Bishop, Marr. & D. §§ 393, 394.

COMPENSATION. In Chancery Practice. Something to be done for or paid to a person of equal value with something of which he has been deprived by the acts or negligence of the party so doing or paying.

When a simple mistake, not a fraud, effects a contract, but does not change its essence, a court of equity will enforce it, upon making compensation for the error. "The principle upon which courts of equity act," says Lord Chancellor Eldon, "is by all the authorities brought to the true standard, that though the party had not a title at law, because he had not strictly complied with the terms so as to entitle him to an action (as to time, for instance), yet if the time, though introduced (as some time must be fixed, where something is to be done on one side, as a consideration for something to be done on the other), is not of the essence of the contract, a material object, to which they looked in the first conception of it, even though the lapse of time has not arisen from accident, a court of equity will compel the execution of the contract upon this ground, that one party is ready to perform, and that the other may have a performance in substance if he will permit it;" 13 Ves. Ch. 287. See 10 *id.* 505; 13 *id.* 73, 81, 426; 6 *id.* 575; 1 Cox, Ch. 59.

In Civil Law. A reciprocal liberation between two persons who are both creditors and debtors of each other. *Est debiti et crediti inter se contributio.* Dig. 16. 2. 1.

It resembles in many respects the common-law set-off. The principal difference is that a set-off must be pleaded to be effectual; whereas compensation is effectual without any such plea. See 2 Bouvier, Inst. n. 1407.

It may be *legal*, by *way of exception*, or by *reconvention;* Blanchard v. Cole, 8 La. 158; 8 Dig. 16. 2; Code, 4. 31; Inst. 4. 6. 30; Burge, Suret. b. 2, c. 6, p. 181.

It takes place by mere operation of law, and extinguishes reciprocally the two debts as soon as they exist simultaneously, to the amount of their respective sums. It takes place only between two debts having equally for their object a sum of money, or a certain quantity of consumable things of one and the same kind, and which are equally liquidated and demandable. It takes place whatever be the *cause* of the debts, except in case, *first*, of a demand of restitution of a thing of which the owner has been unjustly deprived; *second*, of a demand of restitution of a deposit and a loan for use; *third*, of a debt which has for its cause aliments declared not liable to seizure. La. Civ. Code 2203–2208. See Dorvin v. Wiltz, 11 La. Ann. 520; Stewart v. Harper, 16 La. Ann. 181.

As to taking property, see EMINENT DOMAIN.

In Criminal Law. Recrimination, which see.

COMPERTORIUM. In the Civil Law. A judicial inquest by delegates or commissioners to find out and relate the truth of a cause. Wharton.

COMPERUIT AD DIEM (Lat. he appeared at the day). A plea in bar to an action of debt on a bail bond. The usual replication of this plea is, *nul tiel record:* that there is not any such record of appearance of the said ——. For forms of this plea, see 5 Wentworth 470; Lilly, Entr. 114; 2 Chit. Pl. 527.

When the issue is joined on this plea, the trial is by the record. See 1 Taunt. 23; Tidd, Pr. 239. And see, generally, Comyns, Dig. *Pleader* (2 W. 31); 7 B. & C. 478.

COMPETENCY. The legal fitness or ability of a witness to be heard on the trial of a cause. That quality of written or other evidence which renders it proper to be given on the trial of a cause.

There is a difference between competency and credibility. A witness may be competent, and, on examination, his story may be so contradictory and improbable that he may not be believed; on the contrary, he may be incompetent, and yet be perfectly credible if he were examined.

The court are the sole judges of the competency of a witness, and may, for the purpose of deciding whether the witness is or is not competent, ascertain all the facts necessary to form a judgment; 1 Greenl. Ev. § 426.

Prima facie every person offered is a competent witness, and must be received, unless his incompetency appears; 9 State Tr. 652.

In French Law. The right in a court to exercise jurisdiction in a particular case: as, where the law gives jurisdiction to the court when a thousand francs shall be in dispute, the court is competent if the sum demanded is a thousand francs or upwards, although the plaintiff may ultimately recover less.

COMPETENT. Able, fit, qualified; authorized or capable to act. Abb. L. Dict.; as *competent court;* 1 C. P. D. 176; *competent evidence;* Chapman v. McAdams, 1 Lea (Tenn.) 504; *competent persons*, 5 Ad. & El. 75; *competent clerk*, Porter v. Duglass, 27 Miss. 393.

COMPETENT EVIDENCE. That evidence which the very nature of the thing to be proven requires, as the production of a writing where its contents are the subject of inquiry. Chapman v. McAdams, 1 Lea (Tenn.) 504; 1 Greenl. Ev. § 2. See EVIDENCE.

COMPETENT WITNESS. One who is legally qualified to be heard to testify in a cause. In many states a will must be attested, for the purpose of passing lands, by competent witnesses.

COMPILATION. A literary production composed of the works of others and arranged in a methodical manner.

A compilation requiring, in its execution, taste, learning, discrimination, and intellectual labor, is an object of copyright (*q. v.*); as, for example, Bacon's Abridgment. Curtis, Copyr. 186. A compilation consists of selected extracts from different authors; an abridgment is a condensation of the views of an author; Story v. Holcombe, 4 McLean 314, Fed. Cas. No. 13,497.

COMPLAINANT. One who makes a complaint. A plaintiff in a suit in chancery is so called.

COMPLAINT. In Criminal Law. The allegation made to a proper officer that some person, whether known or unknown, has been guilty of a designated offence, with an offer to prove the fact, and a request that the offender may be punished. It is a technical term, descriptive of proceedings before a magistrate. Com. v. Davis, 11 Pick. (Mass.) 436.

To have a legal effect, the complaint must be supported by such evidence as shows that an offence has been committed and renders it certain or probable that it was committed by the person named or described in the complaint.

The fact that a complaint is drawn in flagrant disregard of the rules of pleading is not sufficient to support a demurrer thereto, if the allegations are susceptible of a construction that will support the action; U. S. Nat. Bank v. Bank, 18 N. Y. Supp. 758.

In Practice. The name given in New York and other states to the statement of the plaintiff's case which takes the place of the declaration in common-law pleading.

COMPOS MENTIS. See NON COMPOS MENTIS.

COMPOSITION. An agreement, made upon a sufficient consideration, between a debtor and creditor, by which the creditor accepts part of the debt due to him in satisfaction of the whole. See COMPOUNDING A FELONY.

A composition deed executed by a debtor and his creditors in due form, operates as a settlement of the original claims of such creditors and supersedes the cause of action thereon, the rights and remedies of the parties being determined thereafter by the new agreement; Brown v. Farnham, 48 Minn. 317, 51 N. W. 377. An oral agreement between several creditors and their debtor to compound and discharge their claims is valid; Halstead v. Ives, 73 Hun 56, 25 N. Y. Supp. 1058; Chemical Nat. Bank v. Kohner, 85 N. Y. 189. In an action upon a composition agreement, any creditor being a party thereto may bring a several action for damages for breach thereof; Brown v. Farnham, 55 Minn. 27, 56 N. W. 352.

COMPOSITION OF MATTER. A mixture or chemical combination of materials. The term is used in the act of congress, July 4, 1836, § 6, in describing the subjects of patents. It may include both the substance and the process, when the compound is new.

COMPOUND INTEREST. Interest upon interest; for example, when a sum of money due for interest is added to the principal, and then bears interest. This is not, in general, allowed. See INTEREST.

COMPOUNDER. In Louisiana. He who makes a composition.

An amicable compounder is one who has undertaken by the agreement of the parties to compound or settle differences between them. La. Code of Pract. art. 444.

COMPOUNDING A FELONY. The act of a party immediately aggrieved, who agrees with a thief or other felon that he will not

prosecute him, on condition that he return to him the goods stolen, or who takes a reward not to prosecute. See State v. Buckmaster, 2 Harr. (Del.) 532; Bothwell v. Brown, 51 Ill. 234; Chandler v. Johnson, 39 Ga. 85; Powell v. State, 51 Tex. Cr. R. 342, 101 S. W. 1006.

This is an offence punishable by fine and imprisonment, and at common law rendered the person committing it an accessory; Hawk. Pl. Cr. 125. And a conviction may be had though the person guilty of the original offence has not been tried; Watt v. State, 97 Ala. 72, 11 South. 901; or if no offence liable to a penalty has been committed by the person from whom the consideration is received; State v. Carver, 69 N. H. 216, 39 Atl. 973. A failure to prosecute for an assault with an intent to kill is not compounding a felony; Phillips v. Kelly, 29 Ala. 628. The accepting of a promissory note signed by a party guilty of larceny, as a consideration for not prosecuting, is sufficient to constitute the offence; Com. v. Pease, 16 Mass. 91; and the offence is committed although the consideration is for another than the one making the agreement; State v. Ruthven, 58 Ia. 121, 12 N. W. 235. The mere retaking by the owner of stolen goods is no offence, unless the offender is not to be prosecuted; Hale, Pl. Cr. 546; 1 Chit. Cr. Law 4; Clarke, Cr. L. 329; Bothwell v. Brown, 51 Ill. 234.

In an indictment for compounding a felony, it must be alleged that the felony was committed by the person with whom the corrupt agreement is made; State v. Hodge, 142 N. C. 665, 55 S. E. 626, 7 L. R. A. (N. S.) 709, 9 Ann. Cas. 563. The agreement not to prosecute being the gist of the offense, it must be clearly charged; Williams v. State, 51 Tex. Cr. 1, 100 S. W. 149. An information is insufficient if it fails to allege that the defendant intended to hinder the course of justice and allow the felon to escape unpunished; State v. Wilson, 80 Vt. 249, 67 Atl. 533. See note 20 L. R. A. (N. S.) 484.

The compounding of *misdemeanors*, as it is also a perversion or defeating of public justice, is in like manner an indictable offence at common law; Jones v. Rice, 18 Pick. (Mass.) 440, 29 Am. Dec. 612; Pearce v. Wilson, 111 Pa. 14, 2 Atl. 99, 56 Am. Rep. 243; McMahon v. Smith, 47 Conn. 221, 36 Am. Rep. 67. But the law will permit a compromise of any offence, though made the subject of a criminal prosecution, for which the injured party might recover damages in an action.

There is said to be no reported case in England for compounding a misdemeanor, but that in grave cases (perjury or rioting) it would be held an offence; such agreements in lesser cases are often sanctioned by courts, and in cases when the injured party can both sue and prosecute (especially for an assault) compromises are not illegal and will be enforced; Odgers, C. L. 202, citing L. R. 10 Ch. 297. But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it; 6 Q. B. 308; Fay v. Oatley, 6 Wis. 42; Buck v. Bank, 27 Mich. 293, 15 Am. Rep. 189; Shaw v. Reed, 30 Me. 105; Jones v. Rice, 18 Pick. (Mass.) 440, 29 Am. Dec. 612; State v. Carver, 69 N. H. 216, 39 Atl. 973.

Compounding a felony is an indictable offence. No action can be supported on any contract of which such offence is the consideration in whole or in part; Com. v. Pease, 16 Mass. 91; Mattacks v. Owen, 5 Vt. 42; Plumer v. Smith, 5 N. H. 553, 22 Am. Dec. 478; People v. Buckland, 13 Wend. (N. Y.) 592; Sneed v. Com., 6 Dana (Ky.) 338; Levy v. Ross, T. U. P. Charlt. (Ga.) 292. A receipt in full of all demands given in consideration of stifling a criminal prosecution is void; Bailey v. Buck, 11 Vt. 252. A contract which is void as compounding a felony is incapable of ratification; Stanard v. Sampson, 23 Okl. 13, 99 Pac. 796; the law leaves the parties where it finds them; it will neither aid in enforcing the contract, nor permit a recovery of the consideration; Town of Cottonwood v. Austin, 158 Ala. 117, 48 South. 345; Jourdan v. Burstow, 76 N. J. Eq. 55, 74 Atl. 124, 139 Am. St. Rep. 741.

Proceedings on a judgment by confession will be enjoined where the consideration was stifling a prosecution for forgery; Given's Appeal, 121 Pa. 260, 15 Atl. 468, 6 Am. St. Rep. 795. An injunction will be granted against action on a note given in consideration of compounding a felony; Porter v. Jones, 6 Coldw. (Tenn.) 313; 13 Sim. 513; *contra*, Adams v. Barrett, 5 Ga. 404; Allison v. Hess, 28 Ia. 388; Williams v. Englebrecht, 37 Ohio St. 383; Rock v. Mathews, 35 W. Va. 537, 14 S. E. 137, 14 L. R. A. 508.

COMPRA Y VENTA (Span.). Buying and selling. The laws of contracts arising from purchase and sale are given very fully in *Las Partidas*, part 3, tit. xviii. ll. 56.

COMPRINT. The surreptitious printing of the copy of another to the intent to make a gain thereby. Strictly, it signifies to print together. There are several statutes in prevention of this act. Jacob; Cowell.

COMPRIVIGNI (Lat.). Step-brothers or step-sisters. Children who have one parent, and only one, in common. Calvinus, Lex.

COMPROMIS (French). An agreement of arbitration. 2 Amer. J. of Int. L. 898.

COMPROMISARIUS. In Civil Law. An arbitrator.

COMPROMISE. An agreement made between two or more parties as a settlement of matters in dispute.

Such settlements are sustained at law; Poll. Contr. 180; Durham v. Wadlington, 2 Strobh. Eq. (S. C.) 258; Van Dyke v. Davis, 2 Mich. 145; and are highly favored; Zane's

Devisees v. Zane, 6 Munf. (Va.) 406; Taylor v. Patrick, 1 Bibb (Ky.) 168; Truett v. Chaplin, 11 N. C. 178; Stoddard v. Mix, 14 Conn. 12; Barlow v. Ins. Co., 4 Metc. (Mass.) 270; Hart v. Gould, 62 Mich. 262, 28 N. W. 831. The amount in question must, it seems, be uncertain; 2 B. & Ad. 889. And see Muirhead v. Kirkpatrick, 21 Pa. 237; Livingston v. Dugan, 20 Mo. 102; Wilbur v. Crane, 13 Pick. (Mass.) 284; 3 M. & W. 648. The compromise of a doubtful or disputed claim is a sufficient consideration to uphold an *assumpsit;* Cox v. Stokes, 156 N. Y. 491, 51 N. E. 316. See Battle v. McArthur, 49 Fed. 715. The compromise of a doubtful claim made in good faith is a good consideration for a promise, though it afterwards appears that the claim was wholly groundless; L. R. 5 Q. B. 449; Union Collection Co. v. Buckman, 150 Cal. 159, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609. It is not necessary that the claim settled should be one that could be successfully maintained; Neibles v. Ry. Co., 37 Minn. 151, 33 N. W. 332. Nor is necessary that there should be any doubt about the claim; it is enough if the parties consider it doubtful; City Electric Ry. Co. v. Floyd County, 115 Ga. 655, 42 S. E. 45; Bement v. May, 135 Ind. 664, 34 N. E. 327, 35 N. E. 387; or if the parties thought at the time that there was a real question between them; Alexander v. Trust Co., 106 Md. 170, 66 Atl. 836. In Pitkin v. Noyes, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218, it was held that the claim must be one which was understood by both parties to be doubtful. It is said that the question is as to the belief, in good faith, of the claimant in the validity of his claim. There must be a colorable ground for the claim; Smith v. Boruff, 75 Ind. 412; an agreement not to contest a will is not enough, if the party had no right to make a contest; Bement v. May, 135 Ind. 664, 34 N. E. 327, 35 N. E. 387. "A claim is honest if the claimant does not know that his claim is unsubstantial, or if he does not know the facts which show that his claim is a bad one;" L. R. 32 Ch. Div. 266; Grandin v. Grandin, 49 N. J. L. 514, 9 Atl. 756, 60 Am. Rep. 642. But it has been held that one may buy his peace by compromising a claim which he knows is without right; Dailey v. King, 79 Mich. 568, 44 N. W. 959. But the compromise of an illegal claim will not sustain a promise; Read v. Hitchings, 71 Me. 596; so of a note given for a gambling debt; Tyson v. Woodruff, 108 Ga. 368, 33 S. E. 981; and a note given for liquor sold without a license; Melchoir v. McCarty, 31 Wis. 252, 11 Am. Rep. 605; where, however, the illegal contract has been fully performed, a compromise may be valid; Antoine v. Smith, 40 La. Ann. 560, 4 South. 321; and where the parties have disputed claims against each other and agree to settle them, it is binding although some or all of the claims were illegal; Wilder v. R. Co., 65 Vt. 43, 25 Atl. 896; after a claim is in suit, it is said to make no difference whether it could have been maintained or not; Clark v. Turnbull, 47 N. J. L. 265, 54 Am. Rep. 157. The subject is fully treated in Armijo v. Henry, 14 N. M. 181, 89 Pac. 305, 25 L. R. A. (N. S.) 275.

Where a debtor tenders part of a disputed claim to the creditor in full satisfaction, if the latter accepts the tender, he is bound by the terms thereof; Deutmann v. Kilpatrick, 46 Mo. App. 624. An offer of settlement by plaintiff, but not accepted by defendant, does not bind either party; Clark v. Pope, 29 Fla. 238, 10 South. 586. As to a compromise of a criminal charge, see COMPOUNDING A FELONY.

An offer to pay money by way of compromise is not evidence of debt, since, as was said by Lord Mansfield, "it must be permitted to men 'to buy their peace' without prejudice to them, if the offer did not succeed; and such offers are made to stop litigation without regard to the question whether anything, or what, is due."

If the terms "buy their peace" are attended to, they will resolve all doubts on this head of evidence; Bull. N. P. 236; and the author adds an example: If A sue B for one hundred pounds, and B offer to pay him twenty pounds, it shall not be received in evidence, for this neither admits nor ascertains any debt, and is no more than saying he would give twenty pounds to get rid of the action. But if an account consist of ten articles, and B admits that a particular one is due, it is good evidence for so much.

In one of the oldest cases on the subject, Lord Kenyon declared at *nisi prius:* "Evidence of concessions made for the purpose of settling matters in dispute I shall never admit;" 3 Esp. 113, but evidence was admitted that after the action was brought the defendant called upon the plaintiff and said he was sorry that the thing had happened, and offered two hundred pounds in settlement, which was not accepted; 2 Stark. N. P. 126; and in other cases evidence of offers of compromise made, but not expressed to be without prejudice, were held to be admissible, 1 M. & W. 446, apparently in opposition to the rule laid down by Lord Mansfield and Lord Kenyon above referred to.

It may, however, be considered settled that letters or admissions containing the expression in substance that they are to be without prejudice will not be admitted in evidence; 4 C. & P. 462; L. R. 6 Ch. 827; 3 Sc. N. R. 741.

In the last case the rule is put definitely on the ground of public policy by Tindal, C. J., who said: "It is of great consequence that parties should be unfettered by correspondence entered into upon the express understanding that it is to be without prejudice," and he also declared "that where used in the letter containing the offer, the words 'without prejudice' must cover the whole correspondence." And this rule has been followed and it was held that not only the letter bearing the words "without prejudice," but also the answer thereto, which was not so guarded, was inadmissible in evidence; and to the same effect is L. R. 10 Ch. 264. It is the recognized rule in the United States that admissions made in treating for an adjustment cannot be given in evidence; Ferry v. Taylor, 33 Mo. 323; Durgin v. Somers, 117 Mass. 55; Molyneaux v. Collier, 13 Ga. 406; and in Canada; 3 Ont. 584; 11 *id.* 442. In Finn v. Tel. Co., 101 Me. 279, 64 Atl. 490, it was held that the admissibility of such evi-

dence depended upon the intention of the party seeking the compromise. If he intended it as an admission of liability, it was admissible; if he only intended it as a compromise settlement, it was not.

Verbal offers of compromise of a claim made by a defendant's solicitor are also protected and cannot be given in evidence against his client; 2 C. & K. 24; 6 C. P. 437.

An account rendered by the defendant to the plaintiff, showing a balance in the plaintiff's favor, accompanied by a letter proposing an arrangement and stating that the letter and account were without prejudice was held to be inadmissible as evidence; 6 C. P. 437. The principle of the exclusion of such admissions, whether verbal or documentary, therefore, seems to rest on the fact that there is some matter in controversy or some claim by one person against the other for the settlement or adjustment of which the communication is made, and that in furtherance of the maxim, *"Interest respublicæ ut sit finis litium,"* it is for the public good that communications having that end in view should not be allowed to prejudice either party in the event of their proving abortive. It is not necessary that such communications should be expressly guarded if they manifestly appear to have been made by way of compromise; 2 C. & K. 24; such admissions or negotiations are inadmissible whether made "without prejudice" or not; Reynolds v. Manning, 15 Md. 510; Frick & Co. v. Wilson, 36 S. C. 65, 15 S. E. 331; Emery v. Real Estate Exch., 88 Ga. 321, 14 S. E. 556; Smith v. Satterlee, 130 N. Y. 677, 29 N. E. 225; 2 Whart. Ev § 1090; but see Chaffe v. Mackenzie, 43 La Ann. 1062, 10 South. 369; Hood v. Tyner, 3 Ind. App. 51, 28 N. E 1033; Thom v. Hess, 51 Ill. App. 274. Where a letter opening negotiations for a compromise, but not stated to be without prejudice, was followed a day or two afterwards by another guarding against prejudice, it was held that the whole correspondence was thereby protected; 26 W R 109, and Gurney, B., refused to receive in evidence a letter written "without prejudice," even in favor of the party who had written it, saying, "If you write without prejudice so as not to bind yourself, you cannot use the letter against the other party;" 8 C. & P. 388.

And evidence of plaintiff that offers of compromise were made by him is inadmissible; York v. Conde, 66 Hun 316, 20 N. Y. Supp. 961. And negotiations between parties for the purpose of clearing title to land and compromising differences will not prejudice the rights of either party; Hand v. Swann, 1 Tex. Civ. App. 241, 21 S. W. 282.

Correspondence of this kind is not only inadmissible as evidence at the trial of the action, but it has also been held to be privileged from production for the purpose of discovery; 11 Beav. 111; 15 *id.* 321, 388.

Romilly, M. R., in the last of these cases, stated the rule very much in the same way as did Tindal, C. J., *supra;* he said: "Such communications made with a view of an amicable arrangement ought to be held very sacred, for if parties were to be afterwards prejudiced by their efforts to compromise, it would be impossible to attempt an amicable arrangement of differences."

When a correspondence for a settlement had commenced "without prejudice" but those words were afterwards dropped, it was immaterial; 6 Ont. 719.

The same principle is applied where the cause of action is other than a debt, as in a bastardy proceeding, where offers of compromise were held not admissible against the defendant as admissions of his guilt; Olson v. Peterson, 33 Neb. 358, 50 N. W. 155; East Tennessee, V. & G. Ry. Co. v. Davis, 91 Ala. 615, 8 South. 349; Carey v. Carey, 108 N. C. 267, 12 S. E. 1038; nor does the payment of a certain sum on a claim for a much larger sum constitute a recognition of a legal liability to make further payments on such claim; Camp v. U. S., 113 U. S. 648, 5 Sup. Ct. 687, 28 L. Ed. 1081; but where offers of compromise are made to a third person, who has no authority to settle the claim, and there is no intimation that they were made "without prejudice" or in confidence, they are admissible in evidence; Moore v. Mfg. Co., 113 Mo. 98, 20 S. W. 975; a statement made by one of several defendants to his co-defendants, advocating the settlement of plaintiff's claims is not within the rule excluding offers made for the purpose of compromise, but is competent as an admission of liability; Smith v. Whittier, 95 Cal. 279, 30 Pac. 529; and evidence of the admission of an independent fact, although made during a negotiation tending towards a compromise, is admissible; Hess v. Van Auken, 11 Misc. 422, 32 N. Y. Supp. 126; Durgin v. Somers, 117 Mass. 55.

In a prosecution for rape, evidence that defendant had offered money to the foster father of prosecutrix to stop criminal proceedings was incompetent, Sanders v. State, 148 Ala. 603, 41 South. 466.

The extent of the protection which may be invoked by the use of the word "without prejudice" is limited to the purposes contemplated by the rule as stated and will not be extended to exclude evidence of communications, which from their character may prejudice the person to whom it is addressed if he should reject the offer, 62 L. J. Rep. Q B. 511; nor a letter which is intended to be used by the party writing it; the words protect both parties from its use, but if the writer declare that he will use it, from that moment it loses its privileged character; 29 U. C. Q B. 136. Such communications, when the negotiation is successful and a compromise is agreed to, are admissible both for the purpose of showing the terms of the compromise and enforcing it; 6 Ont. 719; and also in order to account for lapse of time; 15 Beav. 388, L. R. 23 Q. B. Div. 38. But whether verbal or written, such communications cannot be regarded for the purpose of determining the question of costs; 58 L. J. Rep. Q B. 501. In this well considered case, the English court of appeal established the rule contrary to what had been in some previous cases thought proper. See 2 Dr. & Sm. 29; 1 Jur. N. S. 899.

As to a compromise on a mistaken interpretation of a will, see [1905] 1 Ch. 704.

See ACCORD AND SATISFACTION.

In Civil Law. An agreement between two or more persons, who, wishing to settle their disputes, refer the matter in controversy to arbitrators, who are so called because those who choose them give them full powers to arbitrate and decide what shall appear just and reasonable, to put an end to the differences of which they are made the judges. 1 Domat, *Lois, Civ.* liv. 1, t. 14.

COMPTE ARRÊTÉ (Fr.). An account stated in writing and acknowledged to be correct on its face by the party against whom it

is stated. Chevalier v. Hyams, 9 La. Ann. 485.

COMPTROLLER. An officer of a state, or of the United States, who has certain duties to perform in the regulation and management of the fiscal matters of the government under which he holds office.

In the treasury department of the United States there is an officer known as the comptroller of the treasury. R. S. § 268 *et seq.* He is charged with the duty of revising accounts, upon appeal from the settlements made by the auditors. Upon the request of a disbursing officer, or the head of a department, he is required to give his decision upon the validity of a payment to be made; to approve, disapprove, or modify all decisions made by the auditors making an original construction, or modifying an existing construction of statutes, and to certify his action to the auditor. The forms of keeping and rendering all public accounts (except those relating to the postal service), the recovery of debts certified by the auditors to be due to the United States, and the preservation, with their vouchers and certificates, of accounts finally adjusted, are under his direction

COMPTROLLER OF THE CURRENCY. An officer of the United States Treasury Department. R. S. § 324 *et seq.* He has supervision over the creation of national banks and their operations, with a visitatorial power; he may appoint receivers for them if he deems them insolvent.

COMPULSION. Forcible inducement to the commission of an act.

Acts done under compulsion are not, in general, binding upon a party; but when a man is compelled by lawful authority to do that which he ought to do, that compulsion does not affect the validity of the act; as, for example, when a court of competent jurisdiction compels a party to execute a deed, under the pain of attachment for contempt, the grantor cannot object to it on the ground of compulsion. But if the court compelled a party to do an act forbidden by law, or had not jurisdiction over the parties or the subject-matter, the act done by such compulsion would be void. See COERCION; DURESS.

COMPULSORY NON-SUIT. See NON-SUIT.

COMPULSORY PILOTAGE. See PILOT.

COMPULSORY SCHOOL ATTENDANCE ACTS. Such acts are not unconstitutional as an invasion of the natural right of the parents to control their children; State v. Bailey, 157 Ind. 324, 61 N. E. 730, 59 L. R. A. 435; State v. Jackson, 71 N. H. 552, 53 Atl. 1021, 60 L. R. A. 739. They do not include occasions of temporary absence; State v. Jackson, 71 N. H. 552, 53 Atl. 1021, 60 L. R. A. 739.

In Washington the act provides that any parent may be summoned before a superior judge to show cause why his child should not be kept in school, and for want of cause may be found guilty of a misdemeanor and fined. See State v. Macdonald, 25 Wash. 122, 64 Pac. 912.

COMPURGATOR. One of several neighbors of a person accused of a crime or charged as a defendant in a civil action, who appeared and swore that they believed him on his oath. 3 Bla. Com. 341.

Formerly, when a person was accused of a crime, or sued in some kinds of civil actions, he might purge himself upon oath of the accusation made against him, whenever the proof was not the most clear and positive; and if upon his oath he declared himself innocent, he was absolved.

This usage, so eminently calculated to encourage perjury by impunity, was soon found to be dangerous to the public safety. To remove this evil, the laws were changed, by requiring that the oath should be administered with the greatest solemnity; but the form was soon disregarded, for the mind became easily familiarized to those ceremonies which at first imposed on the imagination, and those who cared not to violate the truth did not hesitate to treat the form with contempt. In order to give a greater weight to the oath of the accused, the law was again altered so as to require that the accused should appear before the judge with a certain number of his neighbors, who were freeholders of the hundred, who should swear that they believed the accused had sworn truly. This new species of witnesses were called compurgators. If it was not his first offence or if his compurgators did not agree to make the oath, he was put to the ordeal *(q. v.)*. The origin of the system lies back in the history of the Teuton race. It is said still to survive in the practice of the criminal courts by which an accused person is allowed to call witnesses as to his character, as a defence, while the prosecution is not allowed to traverse their testimony. Inderwick, The King's Peace See WAGER OF LAW

The number of compurgators varied according to the nature of the charge and and other circumstances, and the rank of the party—formerly, from two to five, later the practice was twelve. See 2 Holdsw. Hist E L. See Du Cange, *Juramentum*, Spelman, Gloss *Assarth; Termes de la Ley;* 3 Bla Com. 341-348. The last reported case is 2 B. & C. 538; see 2 Poll. & Maitl. 600.

COMPUTUS (Lat. *computare*, to account). A writ to compel a guardian, bailiff, receiver, or accountant, to yield up his accounts. It is founded on the stat. Westm. 2, cap. 12; Reg. Orig. 135.

CONCEAL. To withhold or keep secret mental facts from another's knowledge, as well as to hide or secrete physical objects from sight or observation. Gerry v. Dunham, 57 Me. 339

CONCEALED WEAPONS. See DANGEROUS WEAPONS.

CONCEALERS. Such as find out concealed lands: that is, lands privily kept from the king by common persons having nothing to show for them. They are called "*a troublesome, disturbant sort of men; turbulent persons.*" Cowell.

CONCEALMENT. The improper suppression of any fact or circumstance by one of the parties to a contract from the other, which in justice ought to be known.

The omission by an applicant for insurance preliminarily to state facts known to him, or which he is bound to know, material to the risk proposed to be insured against, or omission to state truly the facts expressly inquired about by the underwriters to whom

application for insurance is made, whether the same are or are not material to the risk.

Concealment, when fraudulent, avoids a contract, or renders the party using it liable for the damage arising in consequence thereof; Kidney v. Stoddard, 7 Metc. (Mass.) 252; Prentiss v. Russ, 16 Me. 30; Jackson v. Wilcox, 1 Scam. (Ill.) 344; 3 B. & C. 605; Daniels v. Ins. Co., 12 Cush. (Mass.) 416, 59 Am. Dec. 192. But it must have been of such facts as the party is bound to communicate; Webb, Poll. Torts 368; 3 E. L. & Eq. 17; Otis v. Raymond, 3 Conn. 413; Van Arsdale & Co. v. Howard, 5 Ala. 596; Kintzing v. McElrath, 5 Pa. 467; Stevens v. Fuller, 8 N. H. 463; Hamrick v. Hogg, 12 N. C. 351; Fleming v. Slocum, 18 Johns. (N. Y.) 403, 9 Am. Dec. 224; George v. Johnson, 6 Humphr. (Tenn.) 36, 44 Am. Dec. 288. A concealment of extrinsic facts is not, in general, fraudulent, although peculiarly within the knowledge of the party possessing them; Laidlaw v. Organ, 2 Wheat. (U. S.) 195, 4 L. Ed. 214; Blydenburgh v. Welsh, Baldw. 331, Fed. Cas. No. 1,583; Bench v. Sheldon, 14 Barb. (N. Y.) 72; Burnett v. Stanton, 2 Ala. 181. But see Frazer v. Gervais, Walk. (Miss.) 72; Baker v. Seahorn, 1 Swan (Tenn.) 54, 55 Am. Dec. 724; Hough v. Evans, 4 McCord (S. C.) 169. And the rule against the concealment of latent defects is stricter in the case of personal than of real property; Mason v. Crosby, 1 Woodb. & M. 342, Fed. Cas. No. 9,234; 3 Campb. 508; 3 Term 759.

A failure to state facts known to an insurer or his agent, or which he ought to know, or which lessen the risk, for that only is material which tends to increase the risk, in the absence of express stipulation, and where no inquiry is made, is no concealment; May, Ins. § 207; Lexington Fire, Life & Marine Ins. Co. v. Paver, 16 Ohio 334.

Where there is confidence reposed, concealment becomes more fraudulent; 9 B. & C. 577.

See, generally, 2 Kent 482; DECEIT; MISREPRESENTATION; REPRESENTATION.

CONCERT OF EUROPE. The union between the chief powers of Europe for purposes of concerted action in matters affecting their mutual interests. It is sometimes called the *Primacy of the Great Powers*. It has existed under various forms from the time of the Congress of Vienna, in 1815. The most important action of the *Concert of Europe* within recent years was that taken at Berlin in 1878, when the status of the European provinces of Turkey was determined, and again in 1885, when the general act of the Congo Conference laid down rules determining the status of the newly acquired colonies in Africa.

CONCESSI (Lat. I have granted). A term formerly used in deeds.

It is a word of general extent, and is said to amount to a grant, feoffment, lease, release, and the like; 2 Saund. 96; Co. Litt. 301; Dane, Abr. Index; Hemphill v. Eckfeldt, 5 Whart. (Pa.) 278.

It has been held in a feoffment or fine to imply no warranty; Co. Litt. 384; 4 Co. 80; Vaughan's Argument in Vaughan 126; Butler's note, Co. Litt. 384. But see 1 Freem. 339, 414.

CONCESSIMUS (Lat. we have granted). A term used in conveyances. It created a joint covenant on the part of the grantors. 5 Co. 16; Bacon, Abr. *Covenant*.

CONCESSION. A grant. The word is frequently used in this sense when applied to grants made by the French and Spanish governments in Louisiana.

CONCESSOR. A grantor.

CONCILIUM. A council.

In Roman Law. A meeting of a section of the people to consider and decide matters especially affecting itself. Launspach, State and Family in Early Rome 70.

CONCILIUM REGIS. See CURIA REGIS; PRIVY COUNCIL; COMMUNE CONCILIUM.

CONCLUSION. The close; the end.

In Pleading. IN DECLARATIONS. That part which follows the statement of the cause of action. In personal or mixed actions, where the object is to recover damages, the conclusion is, properly, *to the damage* of the plaintiff, etc. Com. Dig. *Pleader*, c. 84; 10 Co. 116b. And see 1 M. & S. 236; DAMAGES.

The form was anciently, in the King's Bench, "To the damage of the said A B, and thereupon he brings suit;" in the Exchequer, "To the damage," etc., "whereby he is the less able to satisfy our said lord the king the debts which he owes his said majesty at his exchequer, and therefore he brings his suit;" 1 Chit. Pl. 356. It is said to be mere matter of form, and not demurrable; Pierson v. Wallace, 7 Ark. 282.

IN PLEAS. The conclusion is either *to the country*—which must be the case when an issue is tendered, that is, whenever the plaintiff's material statements are contradicted—or by verification, which must be the case when new matter is introduced. See VERIFICATION. Every plea in bar, it is said, must have its proper conclusion. All the formal parts of pleadings have been much modified by statute in the various states and in England.

In Practice. Making the last argument or address to the court or jury. The party on whom the burden of proof rests, in general, has the conclusion. See OPENING AND CLOSING.

In Remedies. An estoppel; a bar; the act of a man by which he has confessed a matter or thing which he can no longer deny.

For example, the sheriff is concluded by his return to a writ; and, therefore, if upon a capias he return *cepi corpus*, he cannot afterwards show that he did not arrest the defendant, but is con-

cluded by his return. See Plowd. 276 *b*; 3 Thomas, Co. Litt. 600.

CONCLUSION TO THE COUNTRY. In Pleading. The tender of an issue for trial by a jury.

When an issue is tendered by the defendant, it is as follows: "And of this the said C D puts himself upon the country." When tendered by the plaintiff, the formula is, "And this the said A B prays may be inquired of by the country." It is held, however, that there is no material difference between these two modes of expression, and that if the one be substituted for the other the mistake is unimportant, 10 Mod. 166.

When there is an affirmative on one side and a negative on the other, or *vice versa*, the conclusion should be to the country; 2 Saund. 180; Gazley v. Price, 16 Johns. (N. Y.) 267. So it is though the affirmative and negative be not in express words, but only tantamount thereto; Co. Litt. 126 *a*; 1 Saund. 103; 1 Chit. Pl. 592; Com. Dig. *Pleader*, E, 32.

CONCLUSIVE EVIDENCE. That which cannot be controlled or contradicted by any other evidence.

Evidence which of itself, whether contradicted or uncontradicted, explained or unexplained, is sufficient to determine the matter at issue. 6 Lond. L. Mag. 373.

Evidence upon the production of which the judgment is bound by law to regard some fact as proved, and to exclude evidence to exclude it. Steph. Dig. Ev.

CONCLUSIVE PRESUMPTION. A rule of law determining the quantity of evidence requisite for the support of a particular averment which is not permitted to be overcome by any proof that the fact is otherwise. 1 Greenl. Ev. § 15. Thus, for example, the possession of land under claim of title for a certain period of time raises a conclusive presumption of a grant. See PRESUMPTION.

In the civil law, such presumptions are said to be *juris et de jure*.

CONCORD. An agreement or supposed agreement between the parties in levying a fine of lands in which the deforciant (or he who keeps the other out of possession) acknowledges that the lands in question are the right of complainant; and from the admission of right thus made, the party who levies the fine is called the cognizor, and the person to whom it is levied, the cognizee. 2 Bla. Com. 350; Cruise, Dig. tit. 35, c. 2, § 33; Com. Dig. *Fine* (E, 9).

CONCORDAT. A convention; a pact; an agreement. The term is generally confined to the agreements made between independent governments, and most usually applied to those between the pope and some prince.

In French Law. A composition. The French Concordat was repealed in 1906.

CONCUBEANT. Lying together. Wharton.

CONCUBINAGE. A species of marriage which took place among the ancients.

The act or practice of cohabiting, in sexual commerce, without the authority of law or a legal marriage. See 1 Brown, Civ. Law 80; Merlin, *Rép.*; Dig. 32. 49. 4; 7. 1. 1; Code, 5. 27. 12.

"Concubinage is the act upon the part of the woman of cohabiting with a man without ceremonial marriage, or consent and intent good at common law." U. S. v. Bitty, 155 Fed. 938. See a definition in State v. Baldwin, 214 Mo. 290, 113 S. W. 1123.

Living together and having sexual relations as husband and wife; State v. Tucker, 72 Kan. 481, 84 Pac. 126. The words *concubinage* and *prostitution* have no common law meaning, but in their popular sense cover all cases of lewd intercourse; People v. Cummons, 56 Mich. 544, 23 N. W. 215. See ABDUCTION; PROSTITUTION; PROCURATION.

CONCUBINATUS. A sort of unequal marriage which existed under Roman law between a man of superior rank and a woman of inferior rank. It did not raise the wife to the husband's level; the children were not legitimate, but they could require their father to support them, and, in Justinian's time, had a qualified right of intestate succession to him. They followed their mother's condition and could inherit from her. A man could not have more than one concubine at a time. It was abolished by the Emperor Leo the Philosopher in A. D. 887. Bryce, Studies in Hist., etc. See MARRIAGE.

CONCUBINE. A woman who cohabits with a man as his wife, without being married.

CONCUR. In Louisiana. To claim a part of the estate of an insolvent along with other claimants. Thompson v. Chauveau, 6 Mart. N. S. (La.) 460; as, "the wife concurs with her husband's creditors, and claims a privilege over them."

CONCURRENCE. In French Law. The equality of rights or privileges which several persons have over the same thing; as, for example, the right which two judgment-creditors, whose judgments were rendered at the same time, have to be paid out of the proceeds of real estate bound by them. *Dict. de Jur.*

CONCURRENT. Running together; having the same authority; thus, we say, a concurrent consideration occurs in the case of mutual promises; such and such courts have concurrent jurisdiction,—that is, each has the same jurisdiction.

Concurrent writs. Duplicate originals, or several writs running at the same time for the same purpose, for service on or arrest of a person, when it is not known where he is to be found; or for service on several persons, as when there are several defendants to an action. Mozley & W. Dict.

CONCURSUS. A proceeding in Louisiana similar to interpleader. See Louisiana Molasses Co. v. Le Sassier, 52 La. Ann. 2070, 28 South. 217.

CONCUSSION. **In Civil Law.** The unlawful forcing of another by threats of violence to give something of value. It differs from robbery in this, that in robbery the thing is taken by force, while in concussion it is obtained by threatened violence. Heineccius, Lec. El. § 1071.

CONDEMN. To sentence; to adjudge. 3 Bla. Com. 291.

To declare a vessel a prize. To declare a vessel unfit for service. 1 Kent 102; 5 Esp. 65.

CONDEMNATION. The sentence of a competent tribunal which declares a ship unfit for service. This sentence may be re-examined and litigated by the parties interested in disputing it; 5 Esp. 65; Abb. Sh. 15; 30 L. J. Ad. 145.

The judgment, sentence, or decree by which property seized and subject to forfeiture for an infraction of revenue, navigation, or other laws is condemned or forfeited to the government. See CAPTOR.

In International Law. The sentence or judgment of a court of competent jurisdiction that a ship or vessel taken as a prize on the high seas was liable to capture, and was properly and legally captured and held as prize.

Some of the grounds of capture and condemnation are: *violation of neutrality* in time of war; The Commercen, 2 Gall. 261, Fed. Cas. No. 3,055; *carrying contraband goods;* The Springbok, 5 Wall. (U. S.) 1, 18 L. Ed. 480; The Peterhoff, 5 Wall. (U. S.) 28, 18 L. Ed. 564; The Bermuda, 3 Wall. (U. S.) 514, 18 L. Ed. 200; *breach of blockade;* The Plymouth, 3 Wall. (U. S.) 28, 18 L. Ed. 125; The Louisiana, 3 Wall. (U. S.) 170, 18 L. Ed. 85; The Admiral, 3 Wall. (U. S.) 603, 18 L. Ed. 58.

By the general practice of the law of nations, a sentence of condemnation is at present generally deemed necessary in order to divest the title of a vessel taken as a prize. Until this has been done, the original owner may regain his property, although the ship may have been in possession of the enemy twenty-four hours, or carried *infra præsidia;* Hall, Int. L.; The Estrella, 4 Wheat. (U. S.) 298, 4 L. Ed. 574. A sentence of condemnation is generally binding everywhere; Gelston v. Hoyt, 3 Wheat. (U. S.) 246, 4 L. Ed. 381; Croudson v. Leonard, 4 Cra. (U. S.) 434, 2 L. Ed. 670. Title vests completely in the captors, and relates back to the time of capture; 2 Russ. & M. 35; 15 Ves. 139.

Confiscation (*q. v.*), in technical if not in general usage, is the act of the sovereign against a rebellious subject; condemnation as prize is the act of a belligerent against another belligerent. The former may be effected by such means as the sovereign through legal channels may please to adopt; the latter can be made only in accordance with principles recognized in the common jurisprudence of the world. Both are *in rem;* but confiscation recognizes the title of the original owner, while in prize the tenure of the property is qualified, provisional and destitute of absolute ownership; Winchester v. U. S., 14 Ct. Cls. 14.

The condemnation of prize property while lying in a neutral port or the port of an ally is valid; Jecker v. Montgomery, 13 How. (U. S.) 498, 14 L. Ed. 240; 4 C. Rob. 43.

By Art. 3 of the Convention Relative to the Establishment of an International Prize Court (*q. v.*) the judgments of national prize courts condemning neutral ships or cargoes, or enemy cargoes on board neutral ships, may be reviewed by the International Prize Court.

The word is in general use in connection with the taking of land under the right of eminent domain, *q. v.* The condemnation of lands is but a purchase of them *in invitum*, and the title acquired is but a quit claim; Lake Merced Water Co. v. Cowles, 31 Cal. 215.

In Civil Law. A sentence or judgment which condemns some one to do, to give, or to pay something, or which declares that his claim or pretensions are unfounded.

The word is used in this sense by common-law lawyers also; though it is more usual to say conviction, both in civil and criminal cases. 3 Bla. Com. 291. It is a maxim that no man ought to be condemned unheard and without the opportunity of being heard.

CONDICTIO (Lat. from *condicere*).

In Civil Law. A summons.

A personal action. An action arising from an obligation to do or give some certain, precise, and defined thing. Inst. 3. 15. pr.

Condictio is a general name given to personal actions, or actions arising from obligations, and is distinguished from *vindicatio* (real action), an action to regain possession of a thing belonging to the *actor*, and from *actiones mixtæ* (mixed actions). *Condictio* is also distinguished from an action *ex stipulatu*, which is a personal action which lies where the thing to be done or given is uncertain in amount or identity. See Calvinus, Lex.; Halifax, Anal. 117.

CONDICTIO EX LEGE. An action arising where the law gave a remedy but provided no appropriate form of action. Calvinus, Lex.

CONDICTIO INDEBITATI. An action which lies to recover that which the plaintiff has paid to the defendant, by mistake, and which he was not bound to pay, either in fact or in law.

This action does not lie if the money was due *ex æquitate*, or by a natural obligation, or if he who made the payment knew that nothing was due; for *qui consulto dat quod non debetat præsumitur donare;* Bell, Dict.; Calvinus, Lex.; 1 Kames, Eq 301.

CONDICTIO REI FURTIVÆ. An action against the thief or his heir to recover the thing stolen.

CONDICTIO SINE CAUSA. An action by which anything which has been parted with without consideration may be recovered. It also lay in case of failure of consideration, under certain circumstances. Calvinus, Lex.

CONDIDIT, COMMON. The name of a plea entered by a party to a libel in the Ecclesiastical Court. The administrators "formally propounded the will, in a plea known as *common condidit* from its merely pleading the deceased to have *made* the will, being of sound mind, etc., in set form—in common use . . . in this description of cases"; 3 Addams Eccl. 79 (2 Engl. Eccl. Repts., Phila. Reprint 438); also used in 1 Curteis Eccl. 707 (6 Engl. Eccl. Rep. 431).

CONDITION. In Civil Law. The situation of every person in some one of the different orders of persons which compose the general order of society and allot to each person therein a distinct, separate rank. Domat, tom. ii. l. 1, tit. 9, sec. i. art. viii.

A paction or agreement which regulates that which the contractors have a mind should be done if a case which they foresee should come to pass. Domat, tom. i. l. 1, tit. 1, sec. 4.

Casual conditions are such as depend upon accident, and are in no wise in the power of the person in whose favor the obligation is entered into.

Mixed conditions are such as depend upon the joint wills of the person in whose favor the obligation is contracted and of a third person: as "If you marry my cousin, I will give," etc. Pothier.

Potestative conditions are those which are in the power of the person in whose favor the obligation was contracted: as, if I contract to give my neighbor a sum of money in case he cuts down a tree.

Resolutory conditions are those which are added not to suspend the obligation till their accomplishment, but to make it cease when they are accomplished.

Suspensive obligations are those which suspend the obligation until the performance of the condition. They are casual, mixed, or potestative.

Domat says conditions are of three sorts. The *first* tend to accomplish the covenants to which they are annexed. The *second* dissolve covenants. The *third* neither accomplish nor avoid, but create some change. When a condition of the first sort comes to pass, the covenant is thereby made effectual. In case of conditions of the second sort, all things remain in the condition they were in by the covenant, and the effect of the *condition* is in suspense until the condition comes to pass and the covenant is void. Domat, lib. 1. tit. 1, § 4, art. 6. See Pothier, Obl. pt. 1. c. 2, art. 1, § 1; pt. ii. c. 3, art. 2.

In Common Law. The status or relative situation of a person in the state arising from the regulations of society. Thus, a person under twenty-one is an infant, with certain privileges and disabilities. Every person is bound to know the condition of the person with whom he deals.

A qualification, restriction, or limitation modifying or destroying the original act with which it is connected.

A clause in a contract or agreement which has for its object to suspend, rescind, or modify the principal obligation, or, in a case of a will, to suspend, revoke, or modify the devise or bequest.

A modus or quality annexed by him that hath an estate, or interest or right to the same, whereby an estate, etc., may either be defeated, enlarged, or created upon an uncertain event. Co. Litt. 201 *a*.

A qualification or restriction annexed to a conveyance of lands, whereby it is provided that in case a particular event does or does not happen, or in case the grantor or grantee does or omits to do a particular act, an estate shall commence, be enlarged, or be defeated. Greenl. Cruise, Dig. tit. xiii. c. i. § 1.

A future uncertain event on the happening or the non-happening of which the accomplishment, modification, or rescission of a testamentary disposition is made to depend.

A condition annexed to a bond is usually termed a defeasance, which see. A condition defeating a conveyance of land in a certain event is generally a mortgage. See MORTGAGE Conditions annexed to the realty are to be distinguished from *limitations;* a stranger may take advantage of a *limitation,* but only the grantor or his heirs of a condition, Den v. R. Co., 26 N. J. L. 1; Vermont v. Society, 2 Paine 545, Fed. Cas. No. 16,920; a limitation always determines an estate without entry or claim, and so doth not a condition, Sheppard, Touchst. 121; 2 Bla. Com. 155; 4 Kent 122, 127; Proprietors of the Church in Brattle Square v. Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725, Van Rensselaer v. Ball, 19 N. Y. 100; from *conditional limitations;* in case of a condition, the entire interest in the estate does not pass from the grantor, but a possibility of reverter remains to him and to his heirs and devisees, in case of a conditional limitation, the possibility of reverter is given over to a third person; Chal. R. P. 233, Proprietors of the Church in Brattle Square v. Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725; from *remainders;* a conditon operates to defeat an estate before its natural termination, a remainder takes effect on the completion of a preceding estate, Co. Litt. Butler's note 94; from *covenants;* a covenant may be said to be a contract, a condition, something affixed *nomine pœnæ* for the non-fulfilment of a contract, the question often depends upon the apparent intention of the parties, rather than upon fixed rules of construction; if the clause in question goes to the whole of the consideration, it is rather to be held a condition; 2 Parsons Contr. 31; Platt, Cov. 71; 10 East 295; see Woodruff v. Power Co., 10 N. J. Eq. 489; McCullough v. Cox, 6 Barb. (N. Y.) 386; Houston v. Spruance, 4 Harr. (Del.) 117; a covenant may be made by a grantee, a condition by the grantor only; 2 Co. 70; from *charges;* if a testator create a charge upon the devisee personally in respect of the estate devised, the devisee takes the estate on condition, but where a devise is made of an estate and also a bequest of so much to another person, payable "thereout"

or "therefrom" or "from the estate," it is rather to be held a charge; 4 Kent 604; Potter v. Gardner, 12 Wheat. (U. S.) 498, 6 L. Ed. 706; Taft v. Morse, 4 Metc. (Mass.) 523; Harvey v. Olmsted, 1 N. Y. 483; 14 M. & W. 698. Where a forfeiture is not distinctly expressed or implied, it is held a charge; Luckett v. White, 10 Gill & J. (Md.) 480; Pownal v. Taylor, 10 Leigh (Va.) 172, 34 Am. Dec. 725. See, also, Wilson v. Wilson, 38 Me. 1, 61 Am. Dec. 227; 1 Pow. Dev. 664; CHARGE; LEGACY.

Affirmative conditions are positive conditions.

Affirmative conditions implying a negative are spoken of by the older writers: but no such class is now recognized. Shep. Touchst. 117.

Collateral conditions are those which require the doing of a collateral act. Shep. Touchst. 117.

Compulsory conditions are such as expressly require a thing to be done.

Consistent conditions are those which agree with the other parts of the transaction.

Copulative conditions are those which are composed of distinct parts or separate conditions, all of which must be performed. They are generally conditions precedent, but may be subsequent. Pow. Dev. c. 15.

Covert conditions are implied conditions.

Conditions in deed are express conditions.

Disjunctive conditions are those which require the doing of one of several things. If a condition become impossible in the copulative, it may be taken in the disjunctive. Viner, Abr. *Condition* (S b) (Y b 2).

Express conditions are those which are created by express words. Co. Litt. 328.

Implied conditions are those which the law supposes the parties to have had in mind at the time the transaction was entered into, though no condition was expressed. Shep. Touchst. 117.

Impossible conditions are those which cannot be performed in the course of nature.

Inherent conditions are such as are annexed to the rent reserved out of the land whereof the estate is made. Shep. Touchst. 118.

Insensible conditions are repugnant conditions.

Conditions in law are implied conditions. The term is also used by the old writers without careful discrimination to denote limitations, and is little used by modern writers. Littleton § 380; 2 Bla. Com. 155.

Lawful conditions are those which the law allows to be made.

Positive conditions are those which require that the event contemplated should happen.

Possible conditions are those which may be performed.

Precedent conditions are those which are to be performed before the estate or the obligation commences, or the bequest takes effect. Powell, Dev. c. 15. A bond to convey land on the payment of the purchase-money furnishes a common example of a condition precedent. Stone v. Ellis, 9 Cush. (Mass.) 95. They are distinguished from conditions subsequent.

Repugnant conditions are those which are inconsistent with, and contrary to, the original act.

Restrictive conditions are such as contain a restraint: as, that a lessee shall not alien. Shep. Touchst. 118.

Single conditions are those which require the doing of a single thing only.

Subsequent conditions are those whose effect is not produced until after the vesting of the estate or bequest or the commencement of the obligation.

A mortgage with a condition defeating the conveyance in a certain event is a common example of a condition subsequent. All conditions must be either precedent or subsequent. The character of a condition in this respect does not depend upon the precise form of words used. Creswell's Lessee v. Lawson, 7 Gill & J. (Md.) 227, 240; Vanhorne's Lessee v. Dorrance, 2 Dall. (Pa.) 317, Fed. Cas No 16,857, 1 L. Ed 391; In re New York Cent. R. Co., 20 Barb. (N. Y.) 425; Brockenbrough v. Ward's Adm'r, 4 Rand. (Va.) 352, Sprigg's Heirs v. Albin's Heirs, 6 J. J. Marsh. (Ky.) 161; Barry v. Alsbury, Litt. Sel. Cas. (Ky.) 151; Shinn v. Roberts, 20 N. J. L. 435, 43 Am Dec 636, Yeatman v. Broadwell, 1 La Ann. 424; Rogan v. Walker, 1 Wis. 527; nor upon the position of the words in the instrument; 1 Term 645, Cas. *temp* Talb. 166; the question is whether the conditional event is to happen before or after the principal. Brockenbrough v. Ward's Adm'r, 4 Rand (Va.) 352. The word "if" implies a condition precedent, however, unless controlled by other words; Crabb, R. P. § 2152.

Unlawful conditions are those which are forbidden by law.

They are those which *first*, require the performance of some act which is forbidden by law, or which is *malum in se*; or, *second*, require the omission of some act commanded by law; or, *third*, those which encourage such acts or omissions. 1 P Wms 189.

Void conditions are those which are of no validity or effect.

Creation of. Conditions must be made at the same time as the original conveyance or contract, but may be by a separate instrument, which is then considered as constituting one transaction with the original; Hamilton v. Elliott, 5 S. & R. (Pa.) 375; Cooper v. Whitney, 3 Hill (N. Y.) 95; Brown v. Dean, 3 Wend. (N. Y.) 208; Perkins' Lessee v. Dibble, 10 Ohio 433, 36 Am. Dec. 97; Bassett v. Bassett, 10 N. H. 64; Blaney v. Bearce, 2 Greenl. (Me.) 132; Watkins v. Gregory, 6 Blackf. (Ind.) 113. Conditions are sometimes annexed to and depending upon estates, and sometimes annexed to and depending upon recognizances, statutes, obligations, and other things, and are also sometimes contained in acts of parliament and records; Shep. Touchst. 117.

Unlawful conditions are void. Conditions in restraint of marriage *generally* are held void; Poll. Contr. 334; Williams v. Cowden, 13 Mo. 211, 53 Am. Dec. 143; see Com. v. Stauffer, 10 Pa. 350, 51 Am. Dec. 489; Denfield, Petitioner, 156 Mass. 265, 30 N. E. 1018; Knight v. Mahoney, 152 Mass. 523, 25 N. E. 971, 9 L. R. A. 573; Mann v. Jackson,

84 Me. 400, 24 Atl. 886, 16 L. R. A. 707, 30 Am. St. Rep. 358; otherwise of conditions restraining from marriage to a particular person, or restraining a widow from a second marriage; 10 E. L. & Eq. 139; 2 Sim. 255; Fahs v. Fahs, 6 Watts (Pa.) 213. A condition in general restraint of alienation is void; Schermerhorn v. Negus, 1 Den. (N. Y.) 449; 6 East 173; Potter v. Couch, 141 U. S. 296, 11 Sup. Ct. 1005, 35 L. Ed. 721; and see Blackstone Bank v. Davis, 21 Pick. (Mass.) 42, 32 Am. Dec. 241; but a condition restraining alienation for a limited time may be good; Co. Litt. 223. An unreasonable condition is also void; In re Vandevort, 62 Hun 612, 17 N. Y. Supp. 316; as is a condition repugnant to the grant; Hardy v. Galloway, 111 N. C. 519, 15 S. E. 890, 32 Am. St. Rep. 828.

Where land is devised, there need be no limitation over to make the condition good; 1 Mod. 300; 1 Atk. 361. See Tilley v. King, 109 N. C. 461, 13 S. E. 936; but where the subject of the gift is personalty without a limitation over, the condition, if subsequent, is held to be *in terrorem* merely, and void; 1 Jarm. Wills 887; McIlvaine v. Gethen, 3 Whart. (Pa.) 575. See In re Vandevort, 62 Hun 612, 17 N. Y. Supp. 316. But if there be a limitation over, a non-compliance with the condition divests the bequest; 1 Eq. Cas. Abr. 112. A limitation over must be to persons who could not take advantage of a breach; Jackson v. Topping, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515; Wheeler v. Walker, 2 Conn. 196, 7 Am. Dec. 264. A gift of personalty may not be on condition subsequent at common law, except as here stated; 1 Rolle, Abr. 412. See Halbert v. Halbert, 21 Mo. 277.

Any words suitable to indicate the intention of the parties may be used in the creation of a condition; "On condition" is a common form of commencement.

Formerly, much importance was attached to the use of particular and formal words in the creation of a condition. Three phrases are given by the old writers by the use of which a condition was created without words giving a right of re-entry. These were *Sub conditione* (On condition), *Provisa ita quod* (Provided always), *Ita quod* (So that). Littleton 331; Shep. Touchst 125.

Amongst the words used to create a condition where a clause of re-entry was added were, *Quod si contingat* (If it shall happen), *Pro* (For), *Si* (If), *Causa* (On account of); sometimes, and in case of the king's grants, but not of any other person, *ad faciendum* or *faciendo, ea intentione, ad effectum* or *ad propositum*. For avoiding a lease for years, such precise words of condition are not required; Co. Litt. 204 *b*. In a gift, it is said, may be present a modus, a condition and a consideration: the words of creation are *ut* for the modus, *si* for the condition, and *quid* for the consideration.

Technical words in a will will not create a condition where it is unreasonable to suppose that the testator intended to create a technical condition; Emery v. Judge of Probate, 7 N. H. 142. The words of condition need be in no particular place in the instrument; 1 Term 645; 6 *id.* 668.

Construction of. Conditions which go to defeat an estate or destroy an act are strictly construed; while those which go to vest an estate are liberally construed; Crabb, R. P. § 2130; Mayor etc., of New York v. Stuyvesant, 17 N. Y. 34; Inhabitants of Hadley v. Mfg. Co., 4 Gray (Mass.) 140; Chapin v. School District, 35 N. H. 445; Wilson v. Galt, 18 Ill. 431; Perkins v. Fourniquet, 15 How. (U. S.) 323, 14 L. Ed. 435. The condition of an obligation is said to be the language of the obligee, and for that reason to be construed liberally in favor of the obligor; Co. Litt. 42 *a*, 183 *a*; Shep. Touchst. 375; Dy. 14 *b*, 17 *a*; Jackson v. Brownell, 1 Johns. (N. Y.) 267, 3 Am. Dec. 326. But wherever an obligation is imposed by a condition, the construction is to be favorable to the obligee; Catlin v. Fire Ins. Co., 1 Sumn. 440, Fed. Cas. No. 2,522. Conditions subsequent are not favored in law but are always strictly construed because they tend to destroy estates; Peden v. R. Co., 73 Ia. 328, 35 N. W. 424, 5 Am. St. Rep. 680; and where it is doubtful whether a clause in a deed be a covenant or a condition, the courts will incline against the latter construction; Woodruff v. Woodruff, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380.

Performance should be complete and effectual; 1 Rolle, Abr. 425. An inconsiderable casual failure to perform is not nonperformance; Mayor, etc., of New York v. Stuyvesant's Heirs, 17 N. Y. 34. Any one who has an interest in the estate may perform the condition; but a stranger gets no benefit from performing it; Frederick v. Gray, 10 S. & R. (Pa.) 186. Conditions precedent, if annexed to land, are to be strictly performed, even when affecting marriage. Conditions precedent can generally be exactly performed; and, at any rate, equity will not generally interfere to avoid the consequences of non-performance; 3 Ves. Ch. 89; 2 Brown, Ch. 431. But in cases of conditions subsequent, equity will interfere where there was even a partial performance, or where there is only a delay of performance; Crabb, R. P. § 2160; Leach v. Leach, 4 Ind. 628, 58 Am. Dec. 642; Luques v. Thompson, 26 Me. 525. This is the ground of equitable jurisdiction over mortgages.

Generally, where there is a gift over in case of non-performance, the parties will be held more strictly to a performance than where the estate or gift is to revert to the grantor or his heirs.

Where conditions are liberally construed, a strict performance is also required; and it may be said, in the same way, that a non-exact performance is allowed where there is a strict construction of the condition.

Generally, where no time of performance is limited, he who has the benefit of the contract may perform the condition when he pleases, at any time during his life;

Plowd. 16; Co. Litt. 208 *b;* and need not do it when requested; Co. Litt. 209 *a*. A condition precedent must be performed within a reasonable time, when no time is fixed for the performance thereof; Soderberg v. Crockett, 17 Nev. 409, 30 Pac. 826. But if a prompt performance be necessary to carry out the will of a testator, the beneficiary shall not have a lifetime in which to perform the condition; Hamilton v. Elliott, 5 S. & R. (Pa.) 284. In this case, no previous demand is necessary; Hamilton v. Elliott, 5 S. & R. (Pa.) 385; nor is it when the continuance of an estate depends upon an act to be done at a fixed time; Royal v. Aultman & Taylor Co., 116 Ind. 424, 19 N. E. 202, 2 L. R. A. 526. But even then a reasonable time is allowed; 1 Rolle, Abr. 449.

If the place be agreed upon, neither party alone can change it, but either may with consent of the other; 1 Rolle 444; Peck's Adm'r v. Hubbard, 11 Vt. 612; 3 Leon. 260. See CONTRACT; PERFORMANCE.

Non-performance of a condition which was possible at the time of its making, but which has since become impossible, is excused if the impossibility is caused by act of God; Poll. Contr. 387; Merrill v. Emery, 10 Pick. (Mass.) 507; or by act of law, if it was lawful at its creation; Taylor v. Taintor, 16 Wall. (U. S.) 366, 21 L. Ed. 287; Kelly v. Henderson, 1 Pa. 495; or by the act of the party; as, when the one imposing the obligation accepts another thing in satisfaction or renders the performance impossible by his own default; Bradstreet v. Clark, 21 Pick. (Mass.) 389; Vermont v. Society, 1 Paine 652, Fed. Cas. No. 16,919; U. S. v. De la Maza Arredondo, 6 Pet. 691, 8 L. Ed. 547; Frets v. Frets, 1 Cow. (N. Y.) 339. If performance of one part becomes impossible by act of God, the whole will, in general, be excused; 1 B. & P. 242; Cro. Eliz. 280; 5 Co. 21; 1 Ld. Raym. 279.

The effect of conditions may be to *suspend* the obligation; as, if I bind myself to convey an estate to you on condition that you first pay one thousand dollars, in which case no obligation exists until the condition is performed; or may be to *rescind* the obligation; as, if you agree to buy my house on condition that it is standing unimpaired on the tenth of May, or I convey to you my farm on condition that the conveyance shall be void if I pay you one thousand dollars, in such cases the obligation is rescinded by the non-performance of the condition: or it may *modify* the previous obligation; as if I bind myself to convey my farm to you on the payment of four thousand dollars if you pay in bank stock, or of five thousand if you pay in money: or, in case of gift or bequest, may qualify the gift or bequest as to amount or persons.

The effect of a condition precedent is, when performed, to vest an estate, give rise to an obligation, or enlarge an estate already vested; Ludlow v. R. Co., 12 Barb. (N. Y.) 440. Unless a condition precedent be performed, no estate will vest; and this even where the performance is prevented by the act of God or of the law; Co. Litt. 42; 2 Bla. Com. 157; 4 Kent 125; Mizell v. Burnett, 49 N. C. 249, 69 Am. Dec. 744; Tilley v. King, 109 N. C. 461, 13 S. E. 936. Not so if prevented by the party imposing it; Jones v. Walker, 13 B. Monr. (Ky.) 163, 56 Am. Dec. 557.

If a condition subsequent was void at its creation, or becomes impossible, unlawful, or in any way void, the estate or obligation remains intact and absolute; 2 Bla. Com. 157; Taylor v. Sutton, 15 Ga. 103, 60 Am. Dec. 682. Where the condition upon which an estate is to be divested and go to a third party is founded on a contingency that can never happen, the grantee will take a fee simple; Munroe v. Hall, 97 N. C. 206, 1 S. E. 651.

In case of a condition broken, if the grantor is in possession, the estate revests at once; Lincoln & Kennebeck Bank v. Drummond, 5 Mass. 321; Hamilton v. Elliott, 5 S. & R. (Pa.) 375; Andrews v. Senter, 32 Me. 394; Thrall v. Spear, 63 Vt. 266, 22 Atl. 414; Higbee v. Rodeman, 129 Ind. 244, 28 N. E. 442; Alford v. Alford, 1 Tex. Civ. App. 245, 21 S. W. 283. But see Willard v. Henry, 2 N. H. 120. But if the grantor is out of possession, he must enter; Cross v. Carson, 8 Blackf. (Ind.) 138, 44 Am. Dec. 742; Phelps v. Chesson, 34 N. C. 194; Bowen v. Bowen, 18 Conn. 535; Sperry v. Sperry, 8 N. H. 477; Inhabitants of Bangor v. Warren, 34 Me. 324, 56 Am. Dec. 657; 8 Exch. 67; and is then in, as of his previous estate; Co. Litt. Butler's note, 94. Only the grantor, his heirs or devisees, can take advantage of the failure to perform a condition subsequent, contained in a deed; Boone v. Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; Skipwith v. Martin, 50 Ark. 141, 6 S. W. 514.

It is usually said in the older books that a condition is not assignable, and that no one but the grantor and his heirs can take advantage of a breach; Gilbert, Ten. 26. Statutory have equal rights in this respect with common-law heirs; Bowen v. Bowen, 18 Conn. 535; Marwick v. Andrews, 25 Me. 525; and in some of the states the common-law rule has been broken in upon, and the devisee may enter; McKissick v. Pickle, 16 Pa. 150; Hayden v. Stoughton, 5 Pick. (Mass.) 528; *contra*, Underhill v. Ry. Co., 20 Barb. (N. Y.) 455; while in others even an assignment of the grantor's interest is held valid, if made before breach; McKissick v. Pickle, 16 Pa. 140; and of a particular estate; Van Rensselaer v. Ball, 19 N. Y. 100. In *equity*, a condition with a limitation over to a third person will be regarded as a trust, and, though the legal rights of the grantor and his heirs may not be destroyed, equity will follow him and compel a performance of the trust; Co. Litt. 236 *a*;

Downer v. Downer, 9 Watts (Pa.) 60; Wheeler v. Walker, 2 Conn. 201, 7 Am. Dec. 264.

Consult Blackstone; Kent, Commentaries; Crabb; Washburn, Real Prop.; Leake, Pollock, Contracts. As to effect of conditions in deeds, see Conger v. Low, 124 Ind. 368, 24 N. E. 889, 9 L. R. A. 165.

CONDITIONAL FEE. A fee which, at the common law, was restrained to some particular heirs, exclusive of others.

It was called a conditional fee by reason of the condition, expressed or implied in the donation of it, that if the donee died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatsoever, that, on failure of the heirs specified in the grant, the grant should be at an end and the land return to its ancient proprietor

Such a gift, then, was held to be a gift upon condition that it should revert to the donor if the donee had no heirs of his body, but, if he had, it should then remain to the donee. It was, therefore, called a fee simple, on condition that the donee had issue. As soon as the donee had issue born, his estate was supposed to become absolute, by the performance of the condition,—at least so far absolute as to enable him to charge or to alienate the land, or to forfeit it for treason. But on the passing of the statute of Westminster II., commonly called the statute *De Donis Conditionalibus*, the judges determined that the donee had no longer a conditional fee simple which became absolute and at his own disposal as soon as any issue was born, but they divided the estate into two parts, leaving the donee a new kind of particular estate, which they denominated a *fee tail;* and vesting in the donor the ultimate fee simple of the land, expectant on the failure of issue, which expectant estate was called a reversion And hence it is said that tenant in fee tail is by virtue of the statute *De Donis* 2 Bla Com. 112.

A conditional fee may be granted by will as well as by deed; Corey v. Springer, 138 Ind. 506, 37 N. E. 322.

CONDITIONAL LIMITATION. A condition followed by a limitation over to a third person in case the condition be not fulfilled or there be a breach of it.

A condition determines an estate after breach upon entry or claim by the proper person: a limitation marks the period which determines an estate without any act on the part of him who has the next expectant interest A conditional limitation is, therefore, of a mixed nature, partaking of that of a condition and a limitation Proprietors of Church in Brattle Square v. Grant, 3 Gray (Mass.) 143, 63 Am. Dec. 725. The limitation over need not be to a stranger; 2 Bla Com. 155, Fifty Associates v. Howland, 11 Metc. (Mass.) 102, Watk. Conv. 204

See CONDITION; LIMITATION; 1 Washburn, Real Prop. 459; 4 Kent 122, 127; 1 Preston, Est. §§ 40, 41, 93.

CONDITIONAL SALE. See SALE; ROLLING STOCK.

CONDITIONAL STIPULATION. **In Civil Law.** A stipulation on condition. Inst. 3, 16, 4.

CONDITIONS OF SALE. The terms upon which the vendor of property by auction proposes to sell it.

The instrument containing these terms, when reduced to writing or printing.

It is always prudent and advisable that the conditions of sale should be printed and exposed in the auction-room: when so done, they are binding on both parties, and nothing that is *said* at the time of sale, to add to or vary such printed conditions, will be of any avail; 12 East 6; 6 Ves. Ch. 330; 15 *id.* 521; 1 Des. Ch. 573; Judson v. Wass, 11 Johns. (N. Y.) 525, 6 Am. Dec. 392. See forms of conditions of sale in Babington Auct. 233-243; Sugden, Vend. App. no. 4.

CONDONACION. **In Spanish Law.** The remission of a debt, either expressly or tacitly.

CONDONATION. The conditional forgiveness or remission, by a husband or wife, of a matrimonial offence which the other has committed.

"A blotting out of an imputed offence against the marital relation so as to restore the offending party to the same position he or she occupied before the offence was committed." 1 Sw. & Tr. 334. See, as to this definition, 2 Bish. Mar. & Div. § 35; Odom v. Odom, 36 Ga. 286; [1893] P. D. 313.

While the condition remains unbroken, condonation, on whatever motive it proceeded, is an absolute bar to the remedy for the particular injury condoned; Bish. Mar. & Div. § 354.

The doctrine of condonation is chiefly, though not exclusively, applicable to the offence of adultery. It may be either express, *i. e.* signified by words or writing, or implied from the conduct of the parties. The latter, however, is much the more common; and it is in regard to that that the chief legal difficulty has arisen. The only general rule is, that any cohabitation with the guilty party, after the commission of the offence, and with the knowledge or belief on the part of the injured party of its commission, will amount to conclusive evidence of condonation: but this presumption may be rebutted by evidence; 60 L. J. Prob. 73. The construction, however, is more strict when the wife than when the husband is the delinquent party; Bish Mar. & Div. § 355; Miles v. Miles, 101 Ill. App. 406. A mere promise to condone is not in itself a condonation; 1 Sw. & Tr. 183; Quarles v. Quarles, 19 Ala. 363; but see, *contra*, Christianberry v. Christianberry, 3 Blackf. (Ind.) 202, 25 Am. Dec. 96, where there was only an unaccepted inducement held out to the wife to return. Knowledge of the offence is essential; Burns v. Burns, 60 Ind. 259; Turnbull v. Turnbull, 23 Ark. 615; Connelly v. Connelly, 98 Mo. App. 95, 71 S. W. 1111. A divorce will not be granted for adultery where the parties continue to live together after it was known; Land v. Martin, 46 La. Ann. 1246, 15 South. 657; Day v. Day, 71 Kan. 385, 80 Pac. 974, 6 Ann. Cas. 169; or there is sexual intercourse after knowledge of the adultery; Rogers v. Rogers, 67 N. J. Eq. 534, 58 Atl. 822; or sleeping together for a single night; Toulson v. Toulson, 93 Md. 754, 50 Atl. 401;

Todd v. Todd (N. J.) 37 Atl. 766 (the wife alleging that he had intercourse with her); *contra*, where for three or four nights they occupied the same bed, but there was no reconciliation and no sexual intercourse; Hann v. Hann, 58 N. J. Eq. 211, 42 Atl. 564; or where they continued to cohabit but a disease was communicated to the wife; Muir v. Muir, 92 S. W. 314, 28 Ky. L. Rep. 1355, 4 L. R. A. (N. S.) 909; or where the husband had a venereal disease which he told the wife was the result of an injury; Wilkins v. Wilkins (N. J.) 58 Atl. 821; or where the wife denied actual guilt, and the husband, after belief in her innocence was no longer possible, left her; Gosser v. Gosser, 183 Pa. 499, 38 Atl. 1014; or where the husband lied to the wife as to his offence, and she left him after she learned the truth; Merrill v. Merrill, 41 App. Div. 347, 58 N. Y. Supp. 503.

Every implied condonation is upon the implied condition that the party forgiven will abstain from the commission of the like offence thereafter; and also treat the forgiving party, in all respects, with conjugal kindness. Such, at least, is the better opinion; though the latter branch of the proposition has given rise to much discussion. It is not necessary, therefore, that the subsequent injury be of the same kind, or proved with the same clearness, or sufficient of itself, when proved, to warrant a divorce or separation. Accordingly, it seems that a course of unkind and cruel treatment will revive condoned adultery, though the latter be a ground of divorce *a vinculo matrimonii*, while the former will, at most, only authorize a separation from bed and board; Johnson v. Johnson, 14 Wend. (N. Y.) 637; Warner v. Warner, 31 N. J. Eq. 225; Wagner v. Wagner, 6 Mo. App. 573; Atteberry v. Atteberry, 8 Or. 224. Acts of cruelty against a wife revive acts of cruelty which have been condoned; Straus v. Straus, 67 Hun 491, 22 N. Y. Supp. 567; Denison v. Denison, 4 Wash. 705, 30 Pac. 1100.

Condonation is not so strict a bar against the wife as the husband; Armstrong v. Armstrong, 32 Miss. 279; Phillips v. Phillips, 1 Ill. App. 245; 1 Hag. Ec. 773.

The presumption of condonation from cohabitation in cases of cruelty is not so strong as in cases of adultery; 2 Bish. Mar. & Div. § 50 *et seq.* A divorce on the ground of cruelty will not be granted where the parties lived together a long time after the alleged cruelty and before the action was brought, as the offence will be presumed to have been condoned; O'Connor v. O'Connor, 109 N. C. 130, 13 S. E. 887; Hitchins v. Hitchins, 140 Ill. 326, 29 N. E. 888; Nullmeyer v. Nullmeyer, 49 Ill. App. 573. But not in cases where it is overlooked for a time, but its continuance makes it intolerable; Owens v. Owens, 96 Va. 191, 31 S. E. 72; Gauntt v. Gauntt, 34 Pa. C. C. R. 100; Breedlove v. Breedlove, 27 Ind. App. 560, 61 N. E. 797.

Enduring cruelty for several years in the hope of better treatment will not prevent a reliance upon the original cruelty; Creyts v. Creyts, 133 Mich. 4, 94 N. W. 383; Cochran v. Cochran, 93 Minn. 284, 101 N. W. 179; Twyman v. Twyman, 27 Mo. 383.

Where a husband's infidelity was condoned, a remedy because of such infidelity was revived by his subsequent cruelty to her; Moorhouse v. Moorhouse, 90 Ill. App. 401; Fisher v. Fisher, 93 Md. 298, 48 Atl. 833; or by subsequent adultery; 19 L. Q. R. 365; or by subsequent desertion; 29 *id.* 108.

Condonation of husband's cruelty is upon the explicit condition that he will thereafter treat her kindly. A breach of this condition revives the right of suit for the original misconduct; Smith v. Smith, 167 Mass. 87, 45 N. E. 52; and it is not necessary that the subsequent misconduct shall be sufficient to warrant divorce without regard to previous cruelty if there is such frequent unkindness as to warrant the belief that it will break out into acts of gross cruelty; Jefferson v. Jefferson, 168 Mass. 456, 47 N. E. 123.

If condonation was based upon conditions which the husband failed to perform, it was ineffective; Ferguson v. Ferguson, 145 Mich. 290, 108 N. W. 682. It is always based upon the condition of proper conduct afterwards; a breach of a condition revives the original offence; Owens v. Owens, 96 Va. 191, 31 S. E. 72; Mosher v. Mosher, 16 N. D. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820, 125 Am. St. Rep. 654; [1905] P. 94.

There is no condonation in case of a continuing venereal disease; Hooe v. Hooe, 122 Ky. 590, 92 S. W. 317, 5 L. R. A. (N. S.) 729, 13 Ann. Cas. 214.

CONDUCT MONEY. Money paid to a witness for his travelling expenses. Wharton.

CONDUCTIO (Lat.). A hiring; a bailment for hire.

It is the correlative of *locatio*, a letting for hire *Conducti actio*, in the civil law, is an action which the hirer of a thing or his heir had against the latter or his heir to be allowed to use the thing hired. *Conducere*, to hire a thing. *Conductor*, a hirer, a carrier; one who undertakes to perform labor on another's property for a specified sum. *Conductus*, the thing hired. Calvinus, Lex.; Du Cange; 2 Kent 586. See BAILMENT.

CONE AND KEY. A woman at fourteen or fifteen years of age may take charge of her house and receive *cone* and *key* (that is, keep the accounts and keys). Cowell. Said by Lord Coke to be *cover* and *keye*, meaning that at that age a woman knew what in her house should be kept under lock and key. Co. 2d Inst. 203.

CONFECTIO (Lat. from *conficere*). The making and completion of a written instrument. 5 Co. 1.

CONFEDERACY. In Criminal Law. An agreement between two or more persons to do an unlawful act or an act which though not unlawful in itself, becomes so by the confederacy. The technical term usually employed to signify this offence is *conspiracy*. See State v. Crowley, 41 Wis. 284, 22 Am. Rep. 719; Watson v. Navigation Co., 52 How. Pr. (N. Y.) 353.

In Equity Pleading. An improper combination alleged to have been entered into between the defendants to a bill in equity.

A general charge of confederacy is made a part of a bill in chancery, and is the fourth part, in order, of the bill; but it has become merely formal, except in cases where the complainant intends to show that such a combination actually exists or existed, in which case a special charge of such confederacy must be made. Story, Eq. Pl. § 29; Mitf. Eq. Pl. 41.

In International Law. An agreement between two or more states or nations, by which they unite for their mutual protection and good. This term is applied to such an agreement made between two independent nations; but it is also used to signify the union of different states of the same nation: as, the confederacy of the states.

The original thirteen states, in 1781, adopted for their federal government the "Articles of confederation and perpetual union between the states." These were completed on the 15th of November, 1777, and, with the exception of Maryland, which afterwards also agreed to them, were adopted by the several states, which were thereby formed into a federal government, going into effect on the first day of March, 1781, 1 Story, Const. § 225, and so remained until the adoption of the present constitution, which acquired the force of the supreme law of the land on the first Wednesday of March, 1789. Owings v. Speed, 5 Wheat (U. S.) 420, 5 L. Ed. 121. See ARTICLES OF CONFEDERATION.

CONFEDERATE BONDS. As the bonds of the Confederate States have been declared illegal by the Fourteenth Amendment, a contract entered into since the war for the sale and delivery of such bonds is void, and no action will lie for a breach of the contract; Branch v. Haas, 16 Fed. 53.

CONFEDERATE MONEY. Contracts made during the rebellion in Confederate money may be enforced in the United States courts, and parties compelled to pay in lawful money of the United States the actual value of the notes at the time and place of contract; Effinger v. Kenney, 115 U. S. 566, 6 Sup. Ct. 179, 29 L. Ed. 495; and when payment was accepted and receipted for by the creditor, it was held to be a valid payment; Glasgow v. Lipse, 117 U. S. 327, 6 Sup. Ct. 757, 29 L. Ed. 901. These notes were currency imposed upon the community by irresistible force, and it must be considered in the courts of law the same as if it had been issued by a foreign government temporarily occupying a part of the territory of the United States; Thorington v. Smith, 8 Wall. (U. S.) 1, 19 L. Ed. 361; and a contract payable in such notes was not invalid; Hanauer v. Woodruff, 15 Wall. (U. S.) 448, 21 L. Ed. 224; Confederate Note Case, 19 Wall. (U. S.) 556, 22 L. Ed. 196; Stevens v. Griffith, 111 U. S. 50, 4 Sup. Ct. 283, 28 L. Ed. 348; Cook v. Lillo, 103 U. S. 792, 26 L. Ed. 460; Stewart v. Salamon, 94 U. S. 434, 24 L. Ed. 275; Rives v. Duke, 105 U. S. 132, 26 L. Ed. 1031; but where a contract was entered into before the war, and the deferred payments came due and were discharged with depreciated currency, it was held, as against the non-ratification of the payment, to be void; Opie v. Castleman, 32 Fed. 511.

After one has accepted payment in Confederate money and acquiesces in the transaction for fifteen years, he is concluded by laches from disputing its validity; Washington v. Opie, 145 U. S. 214, 12 Sup. Ct. 822, 36 L. Ed. 680. Where payment was made in 1864 in such money, it was sufficient consideration though it afterwards became worthless; Dohoney v. Womack, 1 Tex. Civ. App. 354, 19 S. W. 883, 20 S. W. 950. The act of a fiduciary in accepting Confederate money in payment of debts due the estate and investing the proceeds in bonds of the Confederate States issued for the avowed purpose of waging war against the United States is wholly illegal; Opie v. Castleman, 32 Fed. 511.

CONFEDERATE STATES OF AMERICA. The Confederate States were a *de facto* government in the sense that its citizens were bound to render the government obedience in civil matters, and did not become responsible, as wrong-doers, for such acts of obedience; Thorington v. Smith, 8 Wall. (U. S.) 9, 19 L. Ed. 361; but it was not strictly a *de facto* government; *ibid.*; see Williams v. Bruffy, 96 U. S. 176, 24 L. Ed. 716. During the war the inhabitants of the Confederate States were treated as belligerents; Thorington v. Smith, 8 Wall. (U. S.) 10, 19 L. Ed. 361; U. S. v. Alexander, 2 Wall. (U. S.) 404, 17 L. Ed. 915. Land sold to the Confederate government, and captured by the Federal government, became the property of the United States; U. S. v. Huckabee, 16 Wall. (U. S.) 414, 21 L. Ed. 457.

The Confederate States was an illegal organization, within the provision of the constitution of the United States prohibiting any treaty, alliance, or confederation of one state with another; whatever efficacy, therefore, its enactments possessed in any state entering into that organization, must be attributed to the sanction given to them by that state; Williams v. Bruffy, 96 U. S. 176, 24 L. Ed. 716. The laws of the *several states* were valid except so far as they tended to impair the national authority or the rights of citizens under the constitution; *ibid.*

Unless suspended or superseded by the commanders of the United States forces

which occupied the insurrectionary states, the laws of those states, so far as they affected the inhabitants, remained in force during the war, and over them their tribunals continued to exercise their ordinary jurisdiction; Coleman v. Tennessee, 97 U. S. 509, 24 L. Ed. 1118.

"Beyond all doubt, the late rebellion against the government of the United States was a sectional civil war; and all persons interested in or affected by its operations are entitled to have their rights determined by the laws applicable to such a condition of affairs." Waite, C. J., in Young v. U. S., 97 U. S. 39, 24 L. Ed. 992.

Transactions between persons actually dwelling within the territory dominated by the government of the Confederate States were not invalid for the reason only that they occurred under the sanction of the laws of that government or of any local government recognizing its authority; that within such territory, the preservation of order, the maintenance of police regulations, the prosecution of crimes, the protection of property, the enforcement of contracts, the celebration of marriages, the settlement of estates, etc., were, during the war, under the control of the local governments constituting the so-called Confederate States. What was done in respect of such matters under the authority of the laws of these local *de facto* governments should not be disregarded or held invalid *merely* because those governments were organized in hostility to the Union. Judicial and legislative acts in the respective states should be respected by the courts if they were not hostile in their purpose or mode of enforcement to the authority of the national government, and did not impair the rights of citizens under the federal constitution. Harlan, J., in Baldy v. Hunter, 171 U. S. 388, 18 Sup. Ct. 890, 43 L. Ed. 208.

"The government of the Confederate States, although in no sense a government *de jure*, and never recognized by the United States as in all respects a government *de facto*, yet was an organized and actual government, maintained by military power, throughout the limits of the states that adhered to it, except in those portions of them protected from its control by the presence of the armed forces of the United States; and the United States had conceded to that government some of the rights and obligations of a belligerent." Oakes v. U. S., 174 U. S. 794, 19 Sup. Ct. 864, 43 L. Ed. 1169.

See 2 So. L. Rev. 313; 3 *id.* 47; SECESSION.

CONFEDERATION. The name given to the form of government which the American colonies during the revolution devised for their mutual safety and government.

CONFEDERATION CLAUSE. See CONFEDERACY.

CONFÉRENCE. In French Law. A similarity between two laws or two systems of laws.

In International Law. Verbal explanations between the representatives of at least two nations, for the purpose of accelerating matters by avoiding the delays and difficulties of written communications.

A meeting of plenipotentiaries of different nations to adjust differences or formulate a plan of joint action; as, the conference at Berlin of representatives of the United States, Great Britain, and Germany respecting the affairs of Samoa, in 1889, the monetary conference at Brussels of representatives of the United States and several European powers in 1894, and the Hague Conferences of 1899 and 1907. See CONGRESS.

In Legislation. Mutual consultations by two committees appointed, one by each house of a legislature, in cases where the houses cannot agree in their action.

CONFESSION. In Criminal Law. The voluntary admission or declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation which he had in the same. People v. Parton, 49 Cal. 632; State v. Novak, 109 Ia. 717, 79 N. W. 465.

Judicial confessions are those made before a magistrate or in court in the due course of legal proceedings.

Extra-judicial confessions are those made by the party elsewhere than before a magistrate or in open court.

Voluntary confessions are admissible in evidence; Rafe v. State, 20 Ga. 60; Hamilton v. State, 3 Ind. 552; Dick v. State, 30 Miss. 593; Craig v. State, 30 Tex. App. 619, 18 S. W. 297; McQueen v. State, 94 Ala 50, 10 South. 433; State v. Coella, 3 Wash. 99, 28 Pac. 28; Wigginton v. Com., 92 Ky. 282, 17 S. W. 634; People v. Taylor, 93 Mich. 638, 53 N. W. 777; People v. Goldenson, 76 Cal. 328, 19 Pac. 161; Anderson v. State, 25 Neb. 555, 41 N. W. 357; State v Demareste, 41 La. Ann. 617, 6 South. 136; Com. v. Culver, 126 Mass. 464; but a confession is not admissible in evidence where it is obtained by temporal inducement, by threats, promise or hope of favor held out to the party in respect of his escape from the charge against him, by a person in authority; 4 C. & P. 570; State v. York, 37 N. H. 175; Simon v. State, 5 Fla. 285; Smith v. State, 10 Ind. 106; Smith v. Com., 10 Gratt. (Va.) 734; Flagg v. People, 40 Mich. 706; Joe v. State, 38 Ala. 422; Earp v. State, 55 Ga. 136; Garrard v. State, 50 Miss. 147; Territory v. McClin, 1 Mont. 394; Beery v. U. S., 2 Col. 186; State v. Carr, 37 Vt. 191; Laros v. Com., 84 Pa. 200; see People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484; Com. v. Cuffee, 108 Mass. 285; State v. Day, 55 Vt. 510; State v. De Graff, 113 N. C. 688, 18 S. E. 507; or where there is reason to presume that such person appeared to the party to sanction such threat or in-

ducement; 5 C. & P. 539; 2 Crawf. & D. 347; State v. Roberts, 12 N. C. 259.

To make an admission or a declaration a confession, it must, in some way, have been an acknowledgment of guilt, and have been so intended, for it must have been voluntary; State v. Novak, 109 Ia. 717, 79 N. W. 465; People v. Parton, 49 Cal. 632. Voluntary does not in such cases mean spontaneous; Levison v. State, 54 Ala. 520; Roesel v. State, 62 N. J. L. 216, 41 Atl. 408. There are three kinds: (1) A confession in open court of the prisoner's guilt, which is conclusive and renders any proof unnecessary. (2) The next highest kind of confession is that made before a magistrate. (3) The lowest is that which is made to any other person, and requires to be sustained by proof of corroborating circumstances; Garrard v. State, 50 Miss. 147.

The distinction between a confession and a statement or declaration is recognized both by courts and text-writers. A confession in a legal sense is restricted to an acknowledgment of guilt made by a person after an offense has been committed and does not apply to a mere statement or declaration of an independent fact from which such guilt may be inferred; State v. Campbell, 73 Kan. 688, 85 Pac. 784, 9 L. R. A. (N. S.) 533, 9 Ann. Cas. 1203; State v. Reinhart, 26 Or. 466, 38 Pac. 822; People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193.

Where a defendant attended an inquest in obedience to a subpoena and testified under a threat of punishment for contempt if he refused, his testimony was held admissible, though he was not advised of his rights when it was given; it being shown that he was not under arrest or formally accused of crime; People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193. To the same effect, Taylor v. State, 37 Neb. 788, 56 N. W. 623; People v. Mondon, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709; People v. Chapleau, 121 N. Y. 266, 24 N. E. 469; Wilson v. State, 110 Ala. 1, 20 South. 415, 55 Am. St. Rep. 17; State v. Coffee, 56 Conn. 399, 16 Atl. 151; People v. Hickman, 113 Cal. 80, 45 Pac. 175; People v. Parton, 49 Cal. 632. The inducement must be held out by a person in authority; Com. v. Tuckerman, 10 Gray (Mass.) 173; but see 4 C. & P. 570; otherwise the confession is admissible; 1 C. & P. 97, 129; State v. Gossett, 9 Rich. (S. C.) 428; Shifflet v. Com., 14 Gratt. (Va.) 652; Com. v. Sego, 125 Mass. 210; Cady v. State, 44 Miss. 332; Ulrich v. People, 39 Mich. 245; but see Spears v. State, 2 Ohio St. 583; or if the inducement be spiritual merely; 1 Mood. 197; Jebb, Ir. 15; Com. v. Drake, 15 Mass. 161; Fouts v. State, 8 Ohio St. 98; or an appeal to the party to speak the truth; L. R. 1 C. C. 362; Cady v. State, 44 Miss. 333; Huffman v. State, 130 Ala. 89, 30 South. 394; State v. General Armstrong, 167 Mo. 267, 66 S. W. 961; Com. v. Sego, 125 Mass. 210; even if the appeal comes from an officer of the law; 15 Ir. L. R. N. S. 60; Harding v. State, 54 Ind. 359; State v. McLaughlin, 44 Ia. 82; Davis v. State, 2 Tex. App. 588; Hornsby v. State, 94 Ala. 55, 10 South. 522; Com. v. Myers, 160 Mass. 530, 36 N. E. 481; but see 2 Crawf. & D. 152. Mere advice to confess and tell the truth does not exclude; State v. Hagan, 54 Mo. 192; Stafford v. State, 55 Ga. 592; but see State v. Carson, 36 S. C. 524, 15 S. E. 588; and the temporal inducement must have been held out by the person to whom the confession was made; 4 C. & P. 223; unless collusion be suspected; 4 C. & P. 550. The fact that defendant was intoxicated when he made his confession, though tending to affect its weight, is not ground for its exclusion; White v. State, 32 Tex. Cr. R. 625, 25 S. W. 784; State v. Hogan, 117 La. 863, 42 South. 352; Lester v. State, 32 Ark. 727; Eskridge v. State, 25 Ala. 30.

Confessions made by an accused in her sleep were held admissible; State v. Morgan, 35 W. Va. 266, 13 S. E. 385; *contra*, People v. Robinson, 19 Cal. 41.

Nervousness on the part of the accused will not render his statements inadmissible; State v. Jones, 47 La. Ann. 1524, 18 South. 515; or that he was greatly excited; People v. Cokahnour, 120 Cal. 253, 52 Pac. 505; Young v. State, 90 Md. 579, 45 Atl. 531; or that he had but recently recovered from delirium tremens; Com. v. Chance, 174 Mass. 245, 54 N. E. 551, 75 Am. St. Rep. 306.

A confession is admissible though elicited by questions put to a prisoner by a constable, magistrate, or other person; 5 C. & P. 312; Austin v. State, 14 Ark. 556; Com. v. Smith, 119 Mass. 305; Murphy v. People, 63 N. Y. 590; State v. Carlisle, 57 Mo. 102; State v. Ingram, 16 Kan. 14; McQueen v. State, 94 Ala. 50, 10 South. 433; Bell v. State, 31 Tex. Cr. R. 276, 20 S. W. 549; State v. McLaughlin, 44 Ia. 82; even though the question assumes the prisoner's guilt or the confession is obtained by trick or artifice; 1 Mood. 28; Sam v. State, 33 Miss. 347; State v. Fredericks, 85 Mo. 145; State v. Staley, 14 Minn. 105 (Gil. 75); Balbo v. People, 80 N. Y. 484; King v. State, 40 Ala. 314; and although it appears that the prisoner was not warned that what he said would be used against him; 8 Mod. 89; 9 C. & P. 124. Statements made to a trial judge freely and voluntarily are admissible in evidence; State v. Chambers, 45 La. Ann. 36, 11 South. 944.

Confession under oath is admissible when freely made; Com. v. Wesley, 166 Mass. 248, 44 N. E. 228; Shoeffler v. State, 3 Wis. 823; Com. v. Clark, 130 Pa. 641, 18 Atl. 988; State v. Legg, 59 W. Va. 315, 53 S. E. 545, 3 L. R. A. (N. S.) 1152; U. S. v. Brown, 40 Fed. 457; People v. McGloin, 91 N. Y. 241. That it was made under oath does not change it from a confession into a deposition; People v.

Owen, 154 Mich. 571, 118 N. W. 590, 21 L. R. A. (N. S.) 520.

The question of the admissibility of confessions at examinations under oath is almost wholly controlled by statute, the prisoner being permitted to become a witness for himself, and being entitled to be cautioned that his statements may be used against him. It is then simply a question whether the statutory requirements have been fulfilled. Where a statute contained no provision authorizing or permitting an oath in the preliminary examination, a confession under oath was held inadmissible; People v. Gibbons, 43 Cal. 557.

The spirit of the law is that one accused of crime shall not be required to be put under oath, and thus placed in the dilemma of either being required to testify against himself or being subject to the penalties of false swearing; Adams v. State, 129 Ga. 248, 58 S. E. 822, 17 L. R. A. (N. S.) 468, 12 Ann. Cas. 158, where the accused were summoned before a coroner's jury, and without being informed of their right not to testify, were sworn.

A statement, not compulsory, made by a party not at the time a prisoner under a criminal charge, is admissible in evidence against him, although it is made upon oath; 5 C. & P. 530; State v. Broughton, 29 N. C. 96, 45 Am. Dec. 507; State v. Vaigneur, 5 Rich. (S. C.) 391; Com. v. Reynolds, 122 Mass. 454; Alston v. State, 41 Tex. 39; Snyder v. State, 59 Ind. 105; *contra*, Josephine v. State, 39 Miss. 615; see 8 C. & P. 250; otherwise, if the answers are compulsory; 1 Den. Cr. Cas. 236; People v. McMahon, 15 N. Y. 384; Shoeffler v. State, 3 Wis. 823; People v. McMahon, 2 Park. Cr. Cas. (N. Y.) 663; U. S. v. Prescott, 2 Dill. 405, Fed. Cas. No. 16,085; People v. Soto, 49 Cal. 69.

A confession may be inferred from the conduct and demeanor of a prisoner when a statement is made in his presence affecting himself; 5 C. & P. 332; State v. Crowson, 98 N. C. 595, 4 S. E. 143; Slattery v. People, 76 Ill. 217; Murphy v. State, 36 Ohio St. 628; Broyles v. State, 47 Ind. 251; unless such statement is made in the deposition of a witness or examination of another prisoner before a magistrate; 1 Mood. 347; 6 C. & P. 164.

Where a confession has been obtained, or an inducement held out, under circumstances which would render a confession inadmissible, a confession subsequently made is not admissible, unless from the length of time intervening, from proper warning of the consequences, or from other circumstances, there is reason to presume that the hope or fear which influenced the first confession is dispelled; 1 Greenl. Ev. 221; 4 C. & P. 225; State v. Guild, 10 N. J. L. 163, 18 Am. Dec. 404; State v. Patrick, 48 N. C. 443; State v. Vaigneur, 5 Rich. (S. C.) 391; Van Buren v. State, 24 Miss. 512; Bubster v. State, 33 Neb. 663, 50 N. W. 953; State v. Drake, 113 N. C. 624, 18 S. E. 166; State v. Carr, 37 Vt. 191; Com. v. Sheets, 197 Pa. 69, 46 Atl. 753; People v. Castro, 125 Cal. 521, 58 Pac. 133; Smith v. State, 74 Ark. 397, 85 S. W. 1123; State v. Wood, 122 La. 1014, 48 South. 438, 20 L. R. A. (N. S.) 392; U. S. v. Charles, 2 Cra. C. C. 76, Fed. Cas. No. 14,786; and the motives proved to have been offered will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence, and the confession will be rejected; State v. Roberts, 12 N. C. 259; Peter v. State, 12 Smedes & M. (Miss.) 31; Com. v. Taylor, 5 Cush. (Mass.) 605; State v. Potter, 18 Conn. 166; Moore v. Com., 2 Leigh (Va.) 701; Bob v. State, 32 Ala. 560; Deathridge v. State, 1 Sneed (Tenn.) 75.

Under such circumstances, contemporaneous declarations of the party are receivable in evidence, or not, according to the attending circumstances; but any act of the party, though done in consequence of such confession, is admissible if it appears from a fact thereby discovered that so much of the confession as immediately relates to it is true; 1 Leach 263, 386; Russ & R. 151; Com. v. Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; Jordan v. State, 32 Miss. 382; State v. Motley, 7 Rich. (S. C.) 327.

A confession made before a magistrate is admissible; State v. Patterson, 68 N. C. 292; State v. Hand, 71 N. J. L. 137, 58 Atl. 641; though made before the evidence of the witnesses against the party was concluded; 4 C. & P. 567.

Parol evidence, precise and distinct, of a statement made by a prisoner before a magistrate during his examination, is admissible though such statement neither appears in the written examination nor is vouched for by the magistrate; State v. Bowe, 61 Me. 171; 7 C. & P. 188; but not if it is of a character which it was the duty of the magistrate to have noted; 1 Greenl. Ev. § 227, n. Parol evidence of a confession before a magistrate may be given where the written examination is inadmissible through informality; 4 C. & P. 550, n.; State v. Parish, 44 N. C. 239.

Accusatory statements made to a prisoner and not replied to by him are admissible; Simmons v. State (Ala.) 61 South. 466.

The whole of what the prisoner said must be taken together; 1 Greenl. Ev. 218; 2 C. & K. 221; Brown v. Com., 9 Leigh (Va.) 633, 33 Am. Dec. 263; Republica v. McCarty, 2 Dall. (Pa.) 86, 1 L. Ed. 300. Where a prisoner signs the confession which is written by another for him, he waives any objection to it as evidence; Com. v. Coy, 157 Mass. 200, 32 N. E. 4.

The prevailing rule is that confessions are *prima facie* voluntary; Egner v. State, 25

Ohio St. 464; Com. v. Culver, 126 Mass. 464; State v. Sanders, 84 N. C. 728; State v. Meyers, 99 Mo. 107, 12 S. W. 516; State v. Hottman, 196 Mo. 110, 94 S. W. 237; State v. Grover, 96 Me. 363, 52 Atl. 757; Thurman v. State, 169 Ind. 240, 82 N. E. 64; but it is sometimes held that confessions are *prima facie* involuntary and therefore inadmissible, and they can be rendered admissible only by showing that they are voluntary and not constrained; Amos v. State, 83 Ala. 1, 3 South. 749, 3 Am. St. Rep. 682; Jackson v. State, 83 Ala. 76, 3 South. 847; Corley v. State, 50 Ark. 305, 7 S. W. 255; but a confession is not rendered inadmissible by the fact that the party is in custody, provided it is not extorted by inducements or threats; Pierce v. U. S., 160 U. S. 355, 16 Sup. Ct. 321, 40 L. Ed. 454; Nicholson v. State, 38 Md. 140; State v. Johnson, 30 La. Ann. 881; State v. Hernia, 68 N. J. L. 299, 53 Atl. 85; State v. Conly, 130 N. C. 683, 41 S. E. 534; Hintz v. State, 125 Wis. 405, 104 N. W. 110; Calloway v. State, 103 Ala. 27, 15 South. 821; State v. Armstrong, 203 Mo. 554, 102 S. W. 503.

The practice of eliciting confessions by a magistrate during the preliminary examination has been strongly condemned. Such a power, once admitted, is liable to unlimited abuse. It is a power not judicial, but essentially inquisitorial, and, on the whole, prejudicial to the administration of justice; Kelly v. State, 72 Ala. 244; Brown v. Walker, 161 U. S. 596, 16 Sup. Ct. 644, 40 L. Ed. 819.

In Bram v. U. S., 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, it was said: To communicate to a person suspected of the commission of crime the fact that his co-suspect has stated that he had seen him commit the offense; to make this statement to him under circumstances which call imperatively for an admission or a denial; and to accompany the communication with conduct which necessarily perturbs the mind and engenders confusion of thought; and then to use the denial made by the person so situated as a confession because of the form in which the denial is made, is not only to compel the reply, but to produce the confusion of words supposed to be found in it, and then use statements thus brought into being for the conviction of the accused. A plainer violation as well of the letter as of the spirit and purpose of the constitutional immunity could scarcely be conceived of.

A confession by a prisoner who had been confined for several days in a sweat box is not admissible against him, though no threats nor coercion were used, nor any inducements held out to him; Ammons v. State, 80 Miss. 592, 32 South. 9, 18 L. R. A. (N. S.) 768, 92 Am. St. Rep. 607. Such sweat box procedure is unlawful; Flagg v. People, 40 Mich. 706.

Where the accused was taken to the office of the chief of police, and in the presence of several deputies, detectives and newspaper men, for an hour to an hour and a half, was closely questioned by those present until he was very much broken down, being very weak but "not quite collapsed," and in this condition he confessed, such confession was held involuntary and inadmissible; Gallaher v. State, 40 Tex. Cr. R. 296, 50 S. W. 388.

In 31 Ont. Rep. 14, it is said that as to statements made by persons accused, while in custody, in response to questions put by an officer in charge, the judges have regarded the matter from three points of view. First, there are those who consider the practice so reprehensible that any statement so obtained should not be given in evidence. Others, that while the practice of interrogation is undesirable and not to be encouraged, yet the answer so obtained could not be rejected as evidence. The third class held that such an investigation might be so conducted as to be useful and even desirable in the furtherance of justice.

That the confession was drawn out by the questions of a police officer will not render it inadmissible; Bram v. U. S., 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568; Com. v. Storti, 177 Mass. 339, 58 N. E. 1021; Com. v. Williams, 171 Mass. 461, 50 N. E. 1035; State v. Phelps, 74 Mo. 128. In State v. Brinte, 4 Pennewill (Del.) 551, 58 Atl. 258, an objection was made that such a confession was involuntary under the 5th Amendment to the U. S. Constitution, but it was held that this applies to judicial examinations, not to extra-judicial confessions; so in (1893) 2 Q. B. 12.

The prisoner's confession, when the *corpus delicti* is not otherwise proved, is insufficient to warrant his conviction; State v. Guild, 10 N. J. L. 163, 185, 18 Am. Dec. 404; Keithler v. State, 10 Smedes & M. (Miss.) 229; Flower v. U. S., 116 Fed. 241, 53 L. Ed. 271; Bergen v. People, 17 Ill. 426, 65 Am. Dec. 672. See, *contra*, Russ. & R. 481, 509; 1 Leach 311; People v. Rulloff, 3 Park. Cr. Cas. (N. Y.) 401; Stephen v. State, 11 Ga. 225.

Whether a confession is voluntary is held to be primarily for the court to determine; State v. Hernia, 68 N. J. L. 299, 53 Atl. 85; State v. Burgwyn, 87 N. C. 572; Hunter v. State, 74 Miss. 515, 21 South. 305; Smith v. Com., 10 Gratt. (Va.) 734; Brown v. State, 124 Ala. 76, 27 South. 250; Murray v. State, 25 Fla. 528, 6 South. 498; State v. Gorham, 67 Vt. 365, 31 Atl. 845; State v. Sherman, 35 Mont. 512, 90 Pac. 981, 119 Am. St. Rep. 869; Com. v. Howe, 132 Mass. 250; State v. Stebbins, 188 Mo. 387, 87 S. W. 460; People v. White, 176 N. Y. 331, 68 N. E. 630; Com. v. Johnson, 217 Pa. 77, 66 Atl. 233; Hintz v. State, 125 Wis. 405, 104 N. W. 110; other cases hold that, on conflicting evidence, it is for the jury; Burdge v. State, 53 Ohio

St. 512, 42 N. E. 594; People v. Cassidy, 133 N. Y. 612, 30 N. E. 1003; Com. v. Sheu, 190 Pa. 23, 42 Atl. 377; Com. v. Burrough, 162 Mass. 513, 39 N. E. 184; People v. Robinson, 86 Mich. 415, 49 N. W. 260; State v. Stebbins, 188 Mo. 387, 87 S. W. 460; State v. Moore, 160 Mo. 443, 61 S. W. 199; Com. v. Epps, 193 Pa. 512, 44 Atl. 570; People v. Oliveria, 127 Cal. 377, 59 Pac. 772.

When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury, with the direction that they shall reject the confession if, upon the whole evidence, they are satisfied it was not the voluntary act of the defendant; Wilson v. U. S., 162 U. S. 613, 16 Sup. Ct. 895, 40 L. Ed. 1090, followed in Roesel v. State, 62 N. J. L. 216, 41 Atl. 408; Burdge v. State, 53 Ohio St. 512, 42 N. E. 594; Hardy v. U. S., 3 App. D. C. 35; Com. v. Preece, 140 Mass. 276, 5 N. E. 494.

Consult Greenleaf; Wigmore; Phillipps, Evidence; Wharton, Criminal Evidence; Roscoe, Crim. Ev.; Joy, Confessions; 1 Bennett & H. Lead. Cr. Cas. 112. See ADMISSIONS.

CONFESSION AND AVOIDANCE. The admission in a pleading of the truth of the facts as stated in the pleading to which it is an answer, and the allegation of new and related matter of fact which destroys the legal effect of the facts so admitted. The plea and any of the subsequent pleadings may be by way of confession and avoidance, or, which is the same thing, *in* confession and avoidance. Pleadings in confession and avoidance must give color. See COLOR; 1 East 212. They must admit the material facts of the opponent's pleading, either expressly in terms; Dy. 171 *b*; or in effect. They must conclude with a verification; 1 Saund. 103, n. For the form of statement, see Steph. Pl. 72, 79.

Pleas in confession and avoidance are either in justification and excuse, which go to show that the plaintiff never had any right of action, as, for example, son assault demesne, or in discharge, which go to show that his right has been released by some matter subsequent.

CONFESSOR. A priest of some Christian church who hears confessions of their sins by members of his church and undertakes to give them absolution of their sins. The common law does not recognize any such relation, at least so as to exempt or prevent the confessor from disclosing such communications as are made to him in this capacity, when he is called upon as a witness. See CONFIDENTIAL COMMUNICATIONS.

CONFIDENCE. This word is considered peculiarly appropriate to create a trust. It is, when applied to the subject of a trust, as nearly a synonym as the English language is capable of. Trust is a confidence which one man reposes in another, and confidence is a trust. Coates' Appeal, 2 Pa. 133.

CONFIDENTIAL COMMUNICATIONS. Those statements with regard to any transaction made by one person to another during the continuance of some relation between them which calls for or warrants such communications.

At law, certain classes of such communications are held not to be proper subjects of inquiry in courts of justice, and the persons receiving them are excluded from disclosing them when called upon as witnesses, upon grounds of public policy.

Secrets of state and communications between the government and its officers are usually privileged; Gray v. Pentland, 2 S. & R. (Pa.) 23; Thompson v. R. Co., 22 N. J. Eq. 111; 5 H. & N. 538; Totten v. U. S., 92 U. S. 107, 23 L. Ed. 605. So also the consultations of the judges, the testimony of arbitrators in certain cases, and the sources of information in criminal prosecutions; 1 Wharton, Ev. sec. 600; Welcome v. Batchelder, 23 Me. 85; 4 C. & P. 327; Woodbury v. Northy, 3 Greenl. (Me.) 85, 14 Am. Dec. 214; Worthington v. Scribner, 109 Mass. 487, 12 Am. Rep. 736; Stephen's Dig. Ev. art. 113.

Of this character are all communications made between husband and wife in all cases in which the interests of the other party are involved; Stein v. Bowman, 13 Pet. (U. S.) 223, 10 L. Ed. 129; Drew v. Tarbell, 117 Mass. 90; Castello v. Castello, 41 Ga. 613; Corse v. Patterson, 6 Har. & J. (Md.) 153; Warner v. Pub. Co., 132 N. Y. 181, 30 N. E. 393; French v. Wade, 35 Kan. 391, 11 Pac. 138; Higham v. Vanosdol, 101 Ind. 160. Nor does it make any difference which party is called upon as a witness; Ry. & M. 352; or when the relation commenced; 3 C. & P. 558; or whether it has terminated; Stein v. Bowman, 13 Pet. (U. S.) 209, 10 L. Ed. 129; Barnes v. Camack, 1 Barb. (N. Y.) 392; 1 C. & P. 364; Robb's Appeal, 98 Pa. 501; Stanley v. Montgomery, 102 Ind. 102, 26 N. E. 213; Crose v. Rutledge, 81 Ill. 266; Lingo v. State, 29 Ga. 470. A third party who overheard such a conversation may testify as to it; Com. v. Griffin, 110 Mass. 181; Gannon v. People, 127 Ill. 518, 21 N. E. 525, 11 Am. St. Rep. 147. The wife may be examined as to a conversation with her husband in the presence of a third party; State v. Center, 35 Vt. 379; Lyon v. Prouty, 154 Mass. 488, 28 N. E. 908; Fay v. Guynon, 131 Mass. 31; Floyd v. Miller, 61 Ind. 224; Westerman v. Westerman, 25 Ohio St. 500; but not if the third person failed to hear or paid no attention to the conversation; Jacobs v. Hesler, 113 Mass. 160.

The confidential counsellor, solicitor, or attorney of any party cannot be compelled to disclose papers delivered or communications made to him, or letters written or entries

made by him, in that capacity; 4 B. & Ad. 876; Britton v. Lorenz, 45 N. Y. 57; Orton v. McCord, 33 Wis. 205; Johnson v. Sullivan, 23 Mo. 474; Chirac v. Reinicker, 11 Wheat. (U. S.) 295, 6 L. Ed. 474; Sweet v. Owens, 109 Mo. 1, 18 S. W. 928; Swaim v. Humphreys, 42 Ill. App. 370; Andrews v. Simms, 33 Ark. 771; Hollenback v. Todd, 119 Ill. 543, 8 N. E. 829; Higbee v. Dresser, 103 Mass. 523; Vogel v. Gruaz, 110 U. S. 311, 4 Sup. Ct. 12, 28 L. Ed. 158; Snow v. Gould, 74 Me. 540, 43 Am. Rep. 604; 9 Exch. 298; nor will he be permitted to make such communications against the will of his client; 4 Term 756, 759; 12 J. B. Moo. 520; Bank of Utica v. Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; Anon., 8 Mass. 370; nor even if the communication is made in the presence of a third person; Blount v. Kimpton, 155 Mass. 378, 29 N. E. 590, 31 Am. St. Rep. 554; nor will the client be compelled to disclose such communications; Bigler v. Reyher, 43 Ind. 112; Duttenhofer v. State, 34 Ohio St. 91, 32 Am. Rep. 362; Hemenway v. Smith, 28 Vt. 701; not even when the client takes the witness stand on his own behalf; Bigler v. Reyher, 43 Ind. 112; Barker v. Kuhn, 38 Ia. 395; Duttenhofer v. State, 34 Ohio St. 91, 32 Am. Rep. 362; *contra*, Inhabitants of Woburn v. Henshaw, 101 Mass. 193, 3 Am. Rep. 333.

The privilege extends to all matters made the subject of professional intercourse, without regard to the pendency of legal proceedings; 5 C. & P. 592; Miller v. Weeks, 22 Pa. 89; Foster v. Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; Sargent v. Inhabitants of Hampden, 38 Me. 581; Wetherbee v. Ezekiel, 25 Vt. 47; Bacon v. Frisbie, 80 N. Y. 394, 36 Am. Rep. 627; Jones v. State, 65 Miss. 179, 3 South. 379; Young v. State, 65 Ga. 525; but see Hemenway v. Smith, 28 Vt. 701; Thompson v. Kilborne, 28 Vt. 750, 67 Am. Dec. 742; and to matters discovered by the counsellor, etc., in consequence of this relation; 5 Esp. 52.

Conversations between solicitor or counsel and a party, relating to the subject matter of a suit, are privileged: Montgomery v. Perkins, 94 Fed. 23; but evidence of a contract between an attorney and client for compensation, or the assignment of an interest in the judgment, is not privileged; Strickland v. Mills, 74 S. C. 16, 54 S. E. 220, 7 L. R. A. (N. S.) 426; and the attorney is released from his obligation of secrecy so far as is necessary to protect his interests; Keck v. Bode, 23 Oh. C. C 413; Mitchell v. Bromberger, 2 Nev. 345, 90 Am. Dec. 550; Minard v. Stillman, 31 Or. 164, 49 Pac. 976, 65 Am. St. Rep. 815; Nave v. Baird, 12 Ind. 318; L. R. 35 Ch. Div. 722. An attorney will be compelled to disclose the name and residence of a person who retains him as counsel for an accused person, but he need not disclose, the interest of such person in the matter; U. S. v. Lee, 107 Fed. 702. A communication to a counselor in the course of his employment by persons other than his client is not privileged; General Electric Co. v. Jonathon Clark & Sons Co., 108 Fed. 170; likewise a letter written by an attorney to his client advising him of the terms of an injunction granted against him; Aaron v. U. S., 155 Fed. 833, 84 C. C. A. 67.

The doctrine of privileged communications does not apply to a solicitor of patents when he is not an attorney-at-law; Brungger v. Smith, 49 Fed. 124.

Communications between a party or his legal adviser and witnesses are privileged; L. R. 8 Eq. 522; 16 *id.* 112; but see In re Mellen, 18 N. Y. Supp. 515; so are communications between parties to a cause touching the preparation of evidence; Hare, Discov. 152; 43 L. J. C. P. 206; but see 6 B. & S. 888; 3 H. & N. 871. Communications between an attorney and client are not privileged where the latter disclaims the existence of such relations.

Interpreters; 4 Term 756; Jackson v. French, 3 Wend. (N. Y.) 337, 20 Am. Dec. 699; In re Mellen, 18 N. Y. Supp. 515; Parker v. Carter, 4 Munf. (Va.) 273, 6 Am. Dec. 513; Maas v. Bloch, 7 Ind. 202; Andrews v. Solomon, 1 Pet. C. C. 356, Fed. Cas. No. 378; and agents to collect evidence; 2 Beav. 173; 1 Phill. Ch 471, 687; are considered as standing in the same relation as the attorney; so, also, is a barrister's clerk; 2 C. & P. 195; 5 *id.* 177; 5 M. & G. 271; Foster v. Hall, 12 Pick. (Mass.) 93, 22 Am. Dec. 400; Jackson v. French, 3 Wend. (N. Y.) 337, 20 Am. Dec. 699; Sibley v. Waffle, 16 N. Y. 180; Landsberger v. Gorham, 5 Cal. 450; but not a student at law in an attorney's office; Barnes v. Harris, 7 Cush. (Mass.) 576, 54 Am. Dec. 734. *Contra*, Pritchard v. Henderson, 3 Pennewill (Del.) 128, 50 Atl. 217.

The cases in which communications to counsel have been held not to be privileged may be classed under the following heads: When the communication was made before the attorney was employed as such; 1 Ventr. 197; see Sargent v. Hampden, 38 Me. 581; Sharon v. Sharon, 79 Cal. 636, 22 Pac. 26, 131; Althouse v. Wells, 40 Hun (N. Y.) 336; Wilson v. Godlove, 34 Mo. 337; after the attorney's employment has ceased; 4 Term 431; Williams v. Benton, 12 La Ann. 91; when the attorney was consulted because he was an attorney, yet was not acting as such; 4 Term 753; Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321; Goltra v. Wolcott, 14 Ill. 89; Branden & Nethers v. Gowing, 7 Rich. (S. C.) 459; where his relation of attorney was the cause of his being present at the taking place of a fact, but there was nothing in the circumstances to make it amount to a communication; 2 Ves. Ch. 189; 2 Curt. Eccl. 866; Patten v. Moor, 29 N. H. 163; when the matter communicated was not in its nature private, and could in no sense be termed the subject of a confidential com-

munication; 7 East 357; Riggs v. Denniston, 3 Johns. Cas. (N. Y.) 198, 2 Am. Dec. 145; Lloyd v. Davis, 2 Ind. App. 170, 28 N. E. 232; when it was intended that the communications should be imparted by him to others; Ferguson v. McBean, 91 Cal. 63, 27 Pac. 518, 14 L. R. A. 65; when the things disclosed had no reference to professional employment, though disclosed while the relation of attorney and client subsisted; Peake 77; when the attorney made himself a subscribing witness; 2 Curt. Eccl. 866; 3 Burr. 1687; when he is a party to the transaction; Dudley v. Beck, 3 Wis. 274; Story, Eq. Pl. § 601; when he was directed to plead the facts to which he is called to testify; Cormier v. Richard, 7 Mart. La. (N. S.) 179; where an attorney is employed only to draw up a deed and bill of sale to be executed by another to such person, he may testify as to what passed between them and himself; O'Neill v. Murry, 6 Dak. 107, 50 N. W. 619.

The attorney may be called upon to prove his client's handwriting; Brown v. Jewett, 120 Mass. 215; L. R. 8 Eq. 575; L. R. 5 Ch. Ap. 703; Glenn v. Liggett, 47 Fed. 472; to identify his client; 2 D. & R. 347; though not to disclose his client's address; L. R. 15 Eq. 257; unless the client be a ward of court; L. R. 8 Eq. 575; or a bankrupt; L. R. 5 Ch. 703. He may be required to testify as to whether he was retained by his client, and in what capacity; Whart. Ev. 589; Heaton v. Findlay, 12 Pa. 304; but see Chirac v. Reinicker, 11 Wheat. (U. S.) 280, 6 L. Ed. 474.

After testator's death on the question whether an instrument present for probate was his will, the attorney may testify as to directions given him in its preparation by testator; Doherty v. O'Callaghan, 157 Mass. 90, 31 N. E. 726, 17 L. R. A. 188, 34 Am. St. Rep. 258. He may testify as to what was said in their presence by a third person brought by his client; Tyler v. Hall, 106 Mo. 313, 17 S. W. 319, 27 Am. St. Rep. 337.

The rule of privilege does not extend to confessions made to *clergymen;* 1 Greenl. Ev. 247; 4 Term 753; 2 Skimm. 404; Com. v. Drake, 15 Mass. 161; 1 McNally 253; State v. Bostick, 4 Harr. (Del.) 563; 22 L. R. Ir. 158; see 33 Am. L. Rev. 544; though judges have been unwilling to enforce a disclosure; 3 C. & P. 519; 6 Cox, C. C. 219; and see Totten v. U. S., 92 U. S. 105, 23 L. Ed. 605; Sutton v. Johnson, 62 Ill. 209; Com. v. Call, 21 Pick. (Mass.) 515, 32 Am. Dec. 284; and the rule is otherwise by statute in some states; nor to *physicians;* 11 Hargr. St. Tr. 243; 20 How. St. Tr. 643; 1 C. & P. 97; L. R. 6 C. P. 252; Campau v. North, 39 Mich. 606, 33 Am. Rep. 433; L. R. 9 Ex. 398; but in some states this has been changed by statute; Whart. Ev. § 606; Masonic Mut. Ben. Ass'n v. Beck, 77 Ind. 203, 40 Am. Rep. 295; Connecticut Mut. Life Ins. Co. v. Trust Co., 112 U. S. 250, 5 Sup. Ct. 119, 28 L. Ed. 708; Corbett v. R. Co., 26 Mo. App. 621; Kansas City, Ft. S. & M. R. Co. v. Murray, 55 Kan. 336, 40 Pac. 646; In re Flint, 100 Cal. 391, 34 Pac. 863; Johnson v. Johnson, 14 Wend. (N. Y.) 637; and information acquired by the physicians of a railroad company in treating an injured person against her protest is privileged; Union Pac. R. Co. v. Thomas, 152 Fed. 365, 81 C. C. A. 491; but he may testify from knowledge and information acquired while not treating a patient professionally; Fisher v. Fisher, 129 N. Y. 654, 29 N. E. 951.

Privilege does not extend to *confidential friends;* 4 Term 758; Hoffman v. Smith, 1 Cal. (N. Y.) 157; Brayton v. Chase, 3 Wis. 456; Goltra v. Wolcott, 14 Ill. 89; L. R. 18 Eq. 649; *clerks;* 3 Campb. 337; 1 C. & P. 337; *bankers;* 2 C. & P. 325; a banker is not privileged to withhold the identity of a person depositing securities in his bank; Interstate Commerce Commission v. Harriman, 157 Fed. 432; *stewards;* 2 Atk. 524; 11 Price 455; nor *servants;* Isham v. State, 6 How. (Miss.) 35.

Where, at the trial, the privilege of a physician is waived, such waiver extends to subsequent trials; Elliott v. Kansas City, 198 Mo. 593, 96 S. W. 1023, 6 L. R. A. (N. S.) 1082, 8 Ann. Cas. 653; McKinney v. R. Co., 104 N. Y. 352, 10 N. E. 544; Green v. Crapo, 181 Mass. 55, 62 N. E. 956; *contra,* Burgess v. Drug Co., 114 Ia. 275, 86 N. W. 307, 54 L. R. A. 364, 89 Am. St. Rep. 359; Briesenmeister v. Supreme Lodge, 81 Mich. 525, 45 N. W. 977; Grattan v. Ins. Co., 92 N. Y. 274, 44 Am. Rep. 372 (referred to in brief of counsel, but not cited in the opinion of the court, in McKinney v. R. Co., 104 N. Y. 352, 10 N. E. 544); but a waiver by the plaintiff as to the testimony of his own physicians does not operate as a waiver of the testimony of a physician called by the defendant who had attended the plaintiff for the same injuries but at a different time; Metropolitan St. Ry. Co. v. Jacobi, 112 Fed. 924, 50 C. C. A. 619.

A trial judge may properly refuse to charge the jury that they might draw inferences from a party's refusal to waive the privilege with respect to his physician's testimony; Pennsylvania R. Co. v. Durkee, 147 Fed. 99, 78 C. C. A. 107, 8 Ann. Cas. 790; Brackney v. Fogle, 156 Ind. 535, 60 N. E. 303; Wigm. Ev. § 2386; *contra,* Deutschmann v. R. Co., 87 App. Div. 503, 84 N. Y. Supp. 887.

See COMMERCIAL AGENCY; PRIVILEGED COMMUNICATIONS; LIBEL.

CONFIRMATIO (Lat. *confirmare*). The conveyance of an estate, or the communication of a right that one hath in or unto lands or tenements, to another that hath the possession thereof, or some other estate therein, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased or enlarged. Shep. Touchst. 311; 2 Bla. Com. 325.

Confirmatio crescens tends and serves to increase or enlarge a rightful estate, and so to pass an interest.

Confirmatio diminuens tends or serves to diminish and abridge the services whereby the tenant holds.

Confirmatio perficiens tends and serves to confirm and make good a wrongful and defeasible estate, by adding the right to the possession or defeasible seisin, or to make a conditional estate absolute, by discharging the condition.

CONFIRMATIO CHARTARUM (Lat. confirmation of the charters). A statute passed in the 25 Edw. I., whereby the Great Charter is declared to be allowed as the common law; all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral-churches and read twice a year to the people; and sentence of excommunication is directed to be as constantly denounced against all those that, by word or deed or counsel, act contrary thereto or in any degree infringe it. 1 Bla. Com. 128.

CONFIRMATIO PERFICIENS. A confirmation which makes valid a wrongful and defeasible title, or makes a conditional estate, absolute. Shep, Touchst. 311; Black.

CONFIRMATION. A contract by which that which was voidable is made firm and unavoidable.

A species of conveyance.

Where a party, acting for himself or by a previously authorized agent, has attempted to enter into a contract, but has done so in an informal or invalid manner, he confirms the act and thus renders it valid, in which case it will take effect as between the parties from the original making. See 2 Bouvier, Inst. nn. 2067-2069.

To make a valid confirmation, the party must be apprized of his rights; and where there has been a fraud in the transaction he must be aware of it and intend to confirm his contract. See 1 Ball & B. 353; 2 Sch. & L. 486; 12 Ves. Ch. 373; 1 *id.* 215; 1 Atk. 301.

A confirmation does not strengthen a void estate. For confirmation may make a voidable or defeasible estate good, but cannot operate on an estate void in law; Co. Litt. 295. The canon law agrees with this rule; and hence the maxim, *qui confirmat nihil dat.* Toullier, Dr. Civ. Fr. l. 3, t. 3, c. 6, n. 476. See Viner, Abr.; Comyns, Dig.; Ayliffe, Pand. *386; 1 Chit. Pr. 315; Blessing v. House's Lessee, 3 Gill & J. (Md.) 290; Love's Lessee v. Shields, 3 Yerg. (Tenn.) 405; 9 Co. 142 *a;* RATIFICATION.

CONFIRMEE. He to whom a confirmation is made.

CONFIRMOR. He who makes a confirmation to another.

CONFISCARE. To confiscate.

CONFISCATE. To appropriate to the use of the state.

Especially used of the goods and property of alien enemies found in a state in time of war. 1 Kent 52 *et seq.* *Bona confiscata* and *forisfacta* are said to be the same (1 Bla. Com. 299), and the result to the individual is the same whether the property be forfeited or confiscated; but, as distinguished, an individual forfeits, a state confiscates, goods or other property. Used also as an adjective—forfeited. 1 Bla. Com. 299.

In International Law. It is a general rule that the property of the subjects of an enemy found in the country may be appropriated by the government without notice, unless there be a treaty to the contrary; Hall, Int. L. 397; The Emulous, 1 Gall. 563, Fed. Cas. No. 4,479; Ware v. Hylton, 3 Dall. (U. S.) 199, 1 L. Ed. 568. It has been frequently provided by treaty that foreign subjects should be permitted to remain and continue their business, notwithstanding a rupture between the governments, so long as they conducted themselves innocently; and when there was no such treaty, such a liberal permission has been announced in the very declaration of war. Vattel, l. 3, c. 4, § 63. Sir Michael Foster (Discourses on High Treason, pp. 185-6) mentions several instances of such declarations by the king of Great Britain; and he says that alien enemies were thereby enabled to acquire personal chattels and to maintain actions for the recovery of their personal rights in as full a manner as alien friends; 1 Kent 57.

In the United States, the broad principle has been laid down "that war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found. The mitigations of this rigid rule which the policy of modern times has introduced into practice will more or less affect the exercise of this right, but cannot impair the right itself;" Brown v. U. S., 8 Cra. (U. S.) 122, 3 L. Ed. 504. Commercial nations have always considerable property in the possession of their neighbors; and when war breaks out, the question what shall be done with enemies' property found in the country is one rather of policy than of law, and is properly addressed to the consideration of the legislature, and not to courts of law. The strict right of confiscation exists in congress; and without a legislative act authorizing the confiscation of enemies' property, it cannot be condemned; 8 Cra. (U. S.) 128, 3 L. Ed. 504.

Notwithstanding this positive statement of the law, private property of enemy subjects was not confiscated during the wars of the 19th century, and it may safely be said that an international custom prohibiting such confiscation has grown up having nearly the force of law. An exception is to be found in the right of a belligerent to seize and make use of such private property of enemy subjects as may be of use in the conduct of the war, upon payment of proper indemnity. On

the other hand, public property, such as provisions, ammunition, rolling stock of state railroads, realizable securities, funds, etc., of one belligerent in the territory of the other, is subject to seizure. See IV H. C. Art. 53.

The claim of a right to confiscate debts contracted by individuals in time of peace, and which remain due to subjects of the enemy in time of war, rests upon much the same principle as that concerning the enemy's tangible property found in the country at the commencement of the war. But it is the universal practice to forbear to seize and confiscate debts and credits. 1 Kent 64.

The right of confiscation exists as fully in case of a civil war as it does when the war is foreign, and rebels in arms against the lawful government, or persons inhabiting the territory exclusively within the control of the rebel belligerents, may be treated as public enemies. So may adherents, or aiders and abettors of such a belligerent, though not resident in such enemy's territory; Miller v. U. S., 11 Wall. (U. S.) 269, 20 L. Ed. 135. Proceedings under the Confiscation Act of July 17, 1862, were justified as an exercise of belligerent rights against a public enemy, but were not, in their nature, a punishment for treason. Therefore, confiscation being a proceeding distinct from, and independent of, the treasonable guilt of the owner of the property confiscated, pardon for treason will not restore rights to property previously condemned and sold in the exercise of belligerent rights as against a purchaser in good faith and for value; Semmes v. U. S., 91 U. S. 21, 23 L. Ed. 193.

A suit in confiscation is an action of entirely different nature from a proceeding in prize. Confiscation is the act of the sovereign against a rebellious subject. Condemnation as prize is the act of a belligerent against another belligerent or against an offending neutral. Confiscation may be effected by such means, either summary or arbitrary, as the sovereign expressing his will through lawful channels, may please to adopt. Condemnation as prize can only be made in accordance with principles of law recognized in the common jurisprudence of the world. Both are proceedings *in rem*, but confiscation recognizes the title of the original owner to the property which is to be forfeited, while in prize the tenure of the property seized is qualified, provisional and destitute of absolute ownership; The Peterhoff, Blatchf. Pr. Cas. 620, Fed. Cas. No. 11,025. To confiscate property seized upon land, resort must be had to the common-law side of the court; The Confiscation Cases, 20 Wall. (U. S.) 110, 22 L. Ed. 320; prize proceedings are always in admiralty; Winchester v. U. S., 14 Ct. Cls. 48.

See, generally, Chitty, Law of Nations, c. 3; Marten, Law of Nat. lib. 8, c. 3, s. 9; Burlamaqui, Pol. Law, part 4, c. 7; Vattel, liv. 3, c. 4, § 63; Twiss, Law of Nations; Wheaton; Hall, International Law.

CONFITENS REUS. An accused person who admits his guilt. Wharton.

CONFLICT OF LAWS. A contrariety or opposition in the laws of states or countries in cases where the rights of the parties, from their relations to each other or to the subject-matter in dispute, are liable to be affected by the laws of both jurisdictions.

As a term of art, it also includes the deciding which law is in such cases to have superiority. It also includes many cases where there is no opposition between two systems of law, but where the question is how much force may be allowed to a foreign law with reference to which an act has been done, either directly or by legal implication, in the absence of any domestic law exclusively applicable to the case.

As to the most suitable term to apply to this branch of the law, see PRIVATE INTERNATIONAL LAW.

Among the leading canons on the subject are these: the laws of every state affect and bind directly all property, real or personal, situated within its territory, all contracts made and acts done and all persons resident within its jurisdiction, and are supreme within its own limits by virtue of its sovereignty; Milne v. Moreton, 6 Binn. (Pa.) 361, 6 Am. Dec. 466; Green v. Van Buskirk, 7 Wall. (U. S.) 151, 19 L. Ed. 109; Minor v. Cardwell, 37 Mo. 354, 90 Am. Dec. 390; Cowp. 208; 4 T. R. 192. Ambassadors and other public ministers while in the state to which they are sent, and members of an army marching through or stationed in a friendly state, are not subject to this rule; Crawford v. Wilson, 4 Barb. (N. Y.) 522; U. S. v. Lafontaine, 4 Cra. C. C. 173, Fed. Cas. No. 15,550.

Possessing exclusive authority, with the above qualification, a state may regulate the manner and circumstances under which property, whether real or personal, in possession or in action, within it, shall be held, transmitted, or transferred, by sale, barter, or bequest, or recovered or enforced; the condition, capacity, and state of all persons within it; the validity of contracts and other acts done there; the resulting rights and duties growing out of these contracts and acts; and the remedies and modes of administering justice in all cases; Story, Confl. Laws § 18; Vattel, b. 2, c. 7, §§ 84, 85.

Whatever force and obligation the laws of one country have in another depends upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent; Huberus, lib. 1, t. 3, § 2.

The power of determining whether, or how far, or with what modification, or upon what conditions, the laws of one state or any rights dependent upon them shall be recognized in another, is a legislative one. The comity involved is a comity of the states, and

not of the courts, and the judiciary must be guided in deciding the question by the principle and policy adopted by the legislature; Thompson v. Waters, 25 Mich. 214, 12 Am. Rep. 243; Stack v. Cedar Co., 151 Mich. 21, 114 N. W. 876, 16 L. R. A. (N. S.) 616, 14 Ann. Cas. 112. The contract in the latter case was made in Michigan, in which state an Illinois corporation had been admitted to do business. An Illinois statute provided that no corporation should interpose the defense of usury in any action. It was contended that this disability imposed in the state creating the corporation followed it and attached to its charter in Michigan. But the court held that the restriction in Illinois would not follow it into Michigan so as to prevent it from taking advantage of the local statute against usury.

When a statute or the unwritten or common law of the country forbids the recognition of the foreign law, the latter is of no force whatever. When both are silent, then the question arises, which of the conflicting laws is to have effect. Each sovereignty must determine for itself whether it will enforce a foreign law; Finney v. Guy, 106 Wis. 256, 82 N. W. 595, 49 L. R. A. 486; Hunt v. Whewell, 122 Wis. 33, 99 N. W. 599; Fox v. Telegraph-Cable Co., 138 Wis. 648, 120 N. W. 399, 28 L. R. A. (N. S.) 490. It is a principle universally recognized that the revenue laws of one country have no force in another. The exemption laws and laws relating to married women, as well as the local statute of frauds, and statutes authorizing distress and sale for non-payment of rent, are not recognized in another jurisdiction under the principles of comity. Morgan v. Neville, 74 Pa. 52; Waldron v. Ritchings, 3 Daly (N. Y.) 288; Siegel v. Robinson, 56 Pa. 19, 93 Am. Dec. 775; Ross v. Wigg, 34 Hun (N. Y.) 192; Ludlow v. Van Rensselaer, 1 Johns. (N. Y.) 95.

The statutes of one state giving a right of action to enforce a penalty have no force in another; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; Russell v. R. Co., 113 Cal. 258, 45 Pac. 323, 34 L. R. A. 747; Ferguson v. Sherman, 116 Cal. 169, 47 Pac. 1023, 37 L. R. A. 622; Commercial Nat. Bank v. Kirk, 222 Pa. 567, 71 Atl. 1085, 128 Am. St. Rep. 823.

So rights of action arising under foreign bankrupt, insolvent, or assignment laws are not recognized by a state when prejudicial to the interests of its own citizens; Warner v. Jaffray, 96 N. Y. 248, 48 Am. Rep. 616; In re Waite, 99 N. Y. 443, 2 N. E. 440; Barth v. Backus, 140 N. Y. 230, 35 N. E. 425, 23 L. R. A. 47, 37 Am. St. Rep. 545; Gilman v. Lockwood, 4 Wall. (U. S.) 409, 18 L. Ed. 432.

A remedy special to a particular foreign state is not, by any principle of comity enforceable elsewhere and must be applied within the jurisdiction of the domicile of the corporation; Fowler v. Lamson, 146 Ill. 472, 34 N. E. 932, 37 Am. St. Rep. 163; Young v. Farwell, 139 Ill. 326, 28 N. E. 845; Tuttle v. Bank, 161 Ill. 497, 44 N. E. 984, 34 L. R. A. 750; National Bank of Auburn v. Dillingham, 147 N. Y. 603, 42 N. E. 338, 49 Am. St. Rep. 692; Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654.

Generally, force and effect will be given by any state to foreign laws in cases where from the transactions of the parties they are applicable, unless they affect injuriously her own citizens, violate her express enactments, or are *contra bonos mores*.

The broad rule as to contracts is thus stated by Wharton (Confl. Laws § 401): "Obligations, in respect to the mode of their solemnization, are subject to the rule *locus regit actum;* in respect to their interpretation, to the *lex loci contractus;* in respect to the mode of their performance, to the law of the place of their performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and in all cases not specified above, supplies the applicatory law." This rule is quoted by Hunt, J., in Scudder v. Bank, 91 U. S. 411, 23 L. Ed. 245. In a later part of his opinion, in the same case, he says: "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where the suit is brought. A careful consideration of the decisions of this country and of England will sustain these positions," cited in Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241, which is in turn cited in Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104, where, in a suit on a bond executed in New York to indemnify the plaintiff's intestate as surety in an appeal bond in a suit in Louisiana, the court defined the "*seat of the obligation*" and held the law applicable to be the *lex loci solutionis* which was the law of Louisiana; the *lex loci contractus* was said to be a confusing phrase, because it is in reality the law not of the place of execution but of the seat of the obligation, and that might be either the place of execution or the place of performance.

Mr. Wharton expressed the rule in the following terms, in the second edition (1881) of his Confl. Laws § 401: "A contract, so far as concerns its formal making, is to be determined by the place where it is solemnized, unless the *lex situs* of property disposed of otherwise requires; so far as concerns its interpretation, by the law of the place where its terms are settled, unless the parties had the usages of another place in view; so far as concerns the remedy, by the law of the

place of suit; and so far as concerns its performance, by the law of the place of performance."

The criterion by which to ascertain whether a particular inquiry relates to the substance of the contract or the remedy merely is said to be: *Suppose* the legislature of the *locus contractus* to enact the law of the forum, making it applicable to the existing contract. If the result is that the obligation of the contract is either increased or impaired thereby, then the point to which the law of the forum relates is part of the obligation or substance of the contract and is not merely a matter of remedy, and the *lex loci*, not the *lex fori*, should control. If, on the other hand, the result is that the obligation of the contract is not at all affected, being neither increased nor diminished, then the inquiry relates to a matter of remedy only, and the *lex fori* should govern. 16 Harv. L. Rev. 262.

A contract (to pay money) was made in Dakota by a married woman and was payable there. The Dakota law permitted her to contract and to sue, and be sued as though she were unmarried. She owned land in Missouri which the Dakota creditor sought to attach. By the law of Missouri (*lexi fori*) a married woman (for purposes of this case) was competent to be sued personally, but her property could not be attached. The question was whether the particular remedy of attachment related to the obligation of the contract (to be governed by Dakota law) or to the remedy merely, in which case the law of Missouri should control. By a divided court it was held that the Missouri law should control; Ruhe v. Buck, 124 Mo. 178, 27 S. W. 412, 25 L. R. A. 178, 46 Am. St. Rep. 439.

Where an action was brought in Massachusetts upon a contract made in New York to convey land situated in Massachusetts, it was held that the measure of damages for the breach of contract was part of the obligation of the contract to be determined by New York law, not a mere matter of remedy to be controlled by the *lex fori;* Atwood v. Walker, 179 Mass. 514, 61 N. E. 58.

Prof. Beale (23 Harv. L. Rev.) considers very fully the laws governing the validity of contracts and reaches substantially the following results (here summarized by permission):

Story states as a general principle that the law of the place of making governs, but there is an exception where the contract is to be elsewhere performed, and hence the law of the place of performance governs. The rule that the intention of the parties shall govern may be directly traced to the *dictum* of Lord Mansfield in Robinson v. Bland, 2 Burr. 1077, and was derived by him from the doctrines of the Civil Law. The rule that the law of the place of performance governs may be traced to the statement of Judge Story in his Conflict of Laws § 280, often repeated verbatim in the cases; and it was on his part a restatement of his opinion in Van Reimsdyk v. Kane, 1 Gall. 371, 375, Fed. Cas. No. 16,871. The present tendency greatly stimulated by the late English and federal cases, is toward the adoption of the law intended by the parties. Though the greater number of states still profess adherence to Judge Story's rule, it is being superseded by the other rule. In enumerating the states which accept one or the other of the principal rules, it must be pointed out that in several the question appears not to have arisen; in others, the decisions or dicta are not sufficiently clear to justify including the state in either list.

Cases adopting the law of the place of making: Wolf v. Burke, 18 Colo. 264, 32 Pac. 427, 19 L. R. A. 792; Garrigue v. Kellar, 164 Ind. 676, 74 N. E. 523, 69 L. R. A. 870, 108 Am. St. Rep. 324; New York Security & Trust Co. v. Davis, 96 Md. 81, 53 Atl. 669; Polson v. Stewart, 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771, 57 Am. St. Rep. 452; Gray v. Telegraph Co., 108 Tenn. 39, 64 S. W. 1063, 56 L. R. A. 301, 91 Am. St. Rep. 706; Galloway v. Ins. Co., 45 W. Va. 237, 31 S. E. 969.

Cases adopting the law of the place of performance: Southern Exp. Co. v. Gibbs, 155 Ala. 303, 46 South. 465, 18 L. R. A. (N. S.) 874, 130 Am. St. Rep. 24; Midland Valley R. Co. v. Mfg. Co., 80 Ark. 399, 97 S. W. 679, 10 Ann. Cas. 372; Progresso S. S. Co. v. Ins. Co., 146 Cal. 279, 79 Pac. 967; Odom v. Security Co., 91 Ga. 505, 18 S. E. 131; Spinney v. Chapman, 121 Ia. 38, 95 N. W. 230, 100 Am. St. Rep. 305; Alexander v. Barker, 64 Kan. 396, 67 Pac. 829; Western Union Tel. Co. v. Eubanks, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361; Lynch v. Postlethwaite, 7 Mart. (O. S.) 69, 12 Am. Dec. 495; Stanton v. Harvey, 44 La. Ann. 511, 10 South. 778; Emerson Co. v. Proctor, 97 Me. 360, 54 Atl. 849; Arbuckle v. Reaume, 96 Mich. 243, 55 N. W. 808; Limerick Nat. Bank v. Howard, 71 N. H. 13, 51 Atl. 641, 93 Am. St. Rep. 489; Brownell v. Freese, 35 N. J. L. 285, 10 Am. Rep. 239; Montana Coal & Coke Co. v. Coal & Coke Co., 69 Ohio St. 351, 69 N. E. 613; Bennett v. Loan Ass'n, 177 Pa. 233, 35 Atl. 684, 34 L. R. A. 595, 55 Am. St. Rep. 723; First Nat. Bank v. Doeden, 21 S. D. 400, 113 N. W. 81.

Cases adopting the law intended by the parties: Beggs v. Bartels, 73 Conn. 132, 46 Atl. 874, 84 Am. St. Rep. 152; Burson v. Vogel, 29 App. D. C. 396; Illinois Cent. R. Co. v. Beebe, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210, 66 Am. St. Rep. 253; Security Co. of Hartford, Connecticut v. Eyer, 36 Neb. 507, 54 N. W. 838, 38 Am. St. Rep. 735; Wilson v. Mill Co., 150 N. Y. 314, 44 N. E. 959, 55 Am. St. Rep. 680; Williams v. Mutual Reserve Fund Life Ass'n, 145 N. C. 128, 58 S. E. 802, 13 Ann. Cas. 51; U. S. Savings & Loan Co.

v. Shain, 8 N. D. 136, 77 N. W. 1006; Galletley v. Strickland, 74 S. C. 394, 54 S. E. 576; Metropolitan Life Ins. Co. v. Bradley, 98 Tex. 230, 82 S. W. 1031, 68 L. R. A. 509; Union Central Life Ins. Co. v. Pollard, 94 Va. 146, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715; Benjamin Bank v. Doherty, 42 Wash. 317, 84 Pac. 872, 4 L. R. A. (N. S.) 1191, 114 Am. St. Rep. 123; Brown v. Gates, 120 Wis. 349, 97 N. W. 221, 98 N. W. 205, 1 Ann. Cas. 85; and, in usury cases, also the federal courts and Alabama, Georgia, Kansas, Missouri, Mississippi, Ohio, and Tennessee.

THE FEDERAL CASES. *1.* Place of making governs; Fidelity Mut. Life Ass'n v. Jeffords, 107 Fed. 402, 46 C. C. A. 377, 53 L. R. A. 193; Robinson v. Brick Co., 127 Fed. 804, 62 C. C. A. 484; thus the place of making is adopted as opposed to the law of the domicil of the parties; Northwestern S. S. Co. v. Ins. Co., 161 Fed. 166; or to the place from which the offer is sent; Equitable Life Assur. Soc. of United States v. Trimble, 83 Fed. 85, 27 C. C. A. 404; or to the place where a document is signed, prior to its taking effect elsewhere as an obligation; Phipps v. Harding, 70 Fed. 468, 17 C. C. A. 203, 30 L. R. A. 513.

2. In a small number of cases, it has been held that the law of the place of performance governs the validity of the contract; Smith v. Ins. Co., 5 Fed. 582; Pacific States Savings, Loan & Bldg. Co. v. Green, 123 Fed. 43, 59 C. C. A. 167; Berry v. Chase, 146 Fed. 625, 77 C. C. A. 161; but where there is more than one place of performance, it has been held that the parties *ex necessitate* must be referred to the law of the place of making; Morgan v. R. Co., 2 Woods 244, Fed. Cas. No. 9,804.

3. The place by the law of which the contract is valid: In usury cases it has often been held that, if the place of performance would hold an agreement void for usury, the law of the place of making may be resorted to for making the contract valid; Sturdivant v. Bank, 60 Fed. 730, 9 C. C. A. 256; Andruss v. Saving Ass'n, 94 Fed. 575, 36 C. C. A. 336; Dygert v. Trust Co., 94 Fed. 913, 37 C. C. A. 389.

4. Place intended by the parties: In some cases the court seeks to find the intention of the parties, and governs the contract by that; Wayman v. Southard, 10 Wheat. (U. S.) 1, 6 L. Ed. 253; Gibson v. Ins. Co., 77 Fed. 561. This is the rule most commonly laid down in the usury cases, where the parties are presumed to intend the law of the place of making or of the place of performance, according to which would make the contract valid; Cromwell v. Sac County, 96 U. S. 51, 24 L. Ed. 681; Matthews v. Murchison, 17 Fed. 760; so in other than usury cases; Hubbard v. Bank, 72 Fed. 234, 18 C. C. A. 525; but where both laws would make the agreement usurious, the intention of the parties is allowed no weight, and the law of the place of making governs; Andrews v. Pond, 13 Pet. (U. S.) 65, 10 L. Ed. 61; Heath v. Griswold, 5 Fed. 573, 18 Blatch. 555. The law of the place of making is presumed, in some cases, to be that intended by the parties; Liverpool & G. W. S. Co. v. Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; Mutual Life Ins. Co. v. Cohen, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181; The Majestic, 60 Fed. 624, 9 C. C. A. 161, 23 L. R. A. 746; in a few other cases, the law of the place of performance is presumed to be that intended by the parties; Hall v. Cordell, 142 U. S. 116, 12 Sup. Ct. 154, 35 L. Ed. 956; Johnson v. Norton Co., 159 Fed. 361, 86 C. C. A. 361. When the parties expressly agree that the contract shall be subject to a certain law, it has been intimated, though never expressly decided by the Supreme Court, that the court will give effect to this intention; Mutual Life Ins. Co. v. Hill, 193 U. S. 551, 24 Sup. Ct. 538, 48 L. Ed. 788; but no such stipulation will be given effect where it is regarded as against public policy; Lewisohn v. Steamship Co., 56 Fed. 602; Botany Worsted Mills v. Knott, 76 Fed. 582; or where the parties would thereby avoid the provisions of a statute of the place of making; Fowler v. Trust Co., 141 U. S. 384, 12 Sup. Ct. 1, 35 L. Ed. 786; Mutual Life Ins. Co. v. Hathaway, 106 Fed. 815, 45 C. C. A. 655; Albro v. Ins. Co., 119 Fed. 629; but a legislative enactment which declares a public policy and prohibits its violation has, to some extent, an extra-territorial effect; thus, a prohibition in a decree of divorce against the re-marriage of the guilty party during the lifetime of the other has, in general, no extra-territorial effect; Dimpfel v. Wilson, 107 Md. 329, 68 Atl. 561, 13 L. R. A. (N. S.) 1180, 15 Ann. Cas. 753; Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505; Thorp v. Thorp, 90 N. Y. 602, 43 Am. Rep. 189; Moore v. Hegeman, 92 N. Y. 521, 44 Am. Rep. 408; yet where a statute forbids such remarriage within a specified time, and the persons go to another state for the express purpose of evading the law of their domicil, contract a marriage in such state, valid under its laws, and return to the state of their domicil, such marriage will there be held invalid as against public policy and good morals; Lanham v. Lanham, 136 Wis. 360, 117 N. W. 787, 17 L. R. A. (N. S.) 804, 128 Am. St. Rep. 1085; and where the state statutes prohibit the guilty party in a divorce granted for adultery from marrying the co-respondent, during the lifetime of the innocent spouse, a marriage in another state, valid according to its laws, will not be recognized in the state declaring such a marriage to be against its public policy and good morals; Pennegar v. State, 87 Tenn. 244, 10 S. W. 305, 2 L. R. A. 703, 10 Am. St. Rep. 648; Stull's Estate, 183 Pa. 625, 39 Atl. 16, 39 L. R. A. 539, 63 Am. St. Rep. 776; so where a statute prohibited the marriage of negroes and white persons, such a marriage,

when made outside of the state and valid where performed, was held void in the state enacting it; Dupre v. Boulard's Ex'r, 10 La. Ann. 411; Kinney v. Com., 30 Gratt. (Va.) 858, 32 Am. Rep. 690; so where an English statute provided that a marriage with a deceased wife's sister should be invalid, a marriage made outside of England, and lawful where it was celebrated, was held void in England; 9 H. L. Cas. 193; so where there was statutory prohibition of the marriage of first cousins, such a marriage was held void where the parties contracted a valid marriage elsewhere and returned to the state prohibiting it; Johnson v. Johnson, 57 Wash. 89, 106 Pac. 500, 26 L. R. A. (N. S.) 179.

A like provision in the Civil Code of South Dakota was held not to warrant the annulment of a marriage contracted in California between first cousins who at the time of the marriage were citizens of California; Garcia v. Garcia, 25 S. D. 645, 127 N. W. 586, Ann. Cas. 1912C, 621.

A statute declared that re-marriage by one of the parties to a divorce within a given time, either within or without the state, should be void; after a divorce within the state, one of the parties within the prohibited time went to a foreign country and there acquired a domicil and contracted a marriage valid by its laws; six years after she returned to the state, where she was divorced and married again. On a prosecution for bigamy, her foreign marriage was held valid; State v. Fenn, 47 Wash. 561, 92 Pac. 417, 17 L. R. A. (N. S.) 800, on the ground that her domicil was at the time in such foreign country.

REAL ESTATE. In general, the mode of conveying, incumbering, transmitting, devising, and controlling real estate is governed by the law of the place of situation of the property; Bronson v. Lumber Co., 44 Minn. 348, 46 N. W. 570; Cochran v. Benton, 126 Ind. 58, 25 N. E. 870; U. S. v. Crosby, 7 Cr. (U. S.) 115, 3 L. Ed. 287; Oakey v. Bennett, 11 How. (U. S.) 33, 13 L. Ed. 593; Augusta Ins. & Banking Co. v. Morton, 3 La. Ann. 418; 14 Ves. 541; 4 T. R. 182; Fall v. Eastin, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N. S.) 924, 17 Ann. Cas. 853; Brine v. Ins. Co., 96 U. S. 627, 24 L. Ed. 858. See LEX REI SITÆ.

Perhaps an exception may exist in the case of mortgages; Bank of England v. Tarleton, 23 Miss. 175; Dundas v. Bowler, 3 McLean 397, Fed. Cas. No. 4,141. But the point cannot be considered as settled; 1 Washb. R. P. 524; Story, Confl. Laws § 363; Westl. Priv. Int. Law 75. It is said by Wharton (Confl. Laws § 368) that the law governing the mortgage, as such, is the law of *situs* of the land which the mortgage covers; but the *debt* is governed by the law of the domicil of the party to whom it is due, no matter where the property be situated; see Townsend v. Riley, 46 N. H. 300; Oregon & W. Trust Inv. Co. v. Rathburn, 5 Sawy. 32, Fed. Cas. No. 10,555; Cope v. Wheeler, 41 N. Y. 313; Post v. Bank, 138 Ill. 559, 28 N. E. 978; Penfield v. Tower, 1 N. D. 216, 46 N. W. 413; and that when the money is invested on the land for which the mortgage is given, the *lex sitæ* prevails. For the purposes of taxation a *debt* has its *situs* at the domicil of the creditor; Hauenstein v. Lynham, 100 U. S. 490, 25 L. Ed. 628.

PERSONAL PROPERTY. For the general rules as to the disposition of personal property, see DOMICIL. *Bills of exchange and promissory notes* are to be governed, as to validity and interpretation, by the law of the place of making, as are other contracts. The residence of the drawee of a bill of exchange, and the place of making a promissory note where no other place of payment is specified, is the *locus contractus;* 10 B. & C. 21; 4 C. & P. 35; Bissell v. Lewis, 4 Mich. 450; Davis v. Clemson, 6 McLean, 622, Fed. Cas. No. 3,630; Barney v. Newcomb, 9 Cush. (Mass.) 46; Peck v. Hibbard, 26 Vt. 698, 62 Am. Dec. 605; Wilson v. Lazier, 11 Gratt. (Va.) 477; Lizardi v. Cohen, 3 Gill (Md.) 430; Fessenden v. Taft, 65 N. H. 39, 17 Atl. 713; Stevens v. Gregg, 89 Ky. 461, 12 S. W. 775; see Raymond v. Holmes, 11 Tex. 54; Frazier v. Warfield, 9 Smedes & M. (Miss.) 220, where the place of address is said to be the place of making. As between the drawee and drawer and other parties (but not as between an indorser and indorsee, Everett v. Vendyres, 19 N. Y. 436; but see Peck v. Mayo, 14 Vt. 33, 39 Am. Dec. 205); each indorsement is considered a new contract; Young v. Harris, 14 B. Monr. (Ky.) 556, 61 Am. Dec. 170; Cook v. Litchfield, 5 Sandf. (N. Y.) 330; Cox v. Adams, 2 Ga. 158; Dundas v. Bowler, 3 McLean 397, Fed. Cas. No. 4,141. On a bill of exchange drawn in one state and payable in another, the time within which notice of protest must be mailed is determined by the law of the latter state; Brown v. Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227. In case of commercial paper the notice required to bind drawer and indorser is determined by law of place of drawing and indorsing. See LEX LOCI. A statute of limitations of a foreign state providing that an action on a note shall be brought within a certain time after the cause of action accrues bars the debt itself if not brought within the time limited, and may be pleaded in bar of an action brought on the note in another state; Rathbone v. Coe, 6 Dak. 91, 50 N. W. 620. See MacNichol v. Spence, 83 Me. 87, 21 Atl. 748. Place of payment governs as to all matters connected with payment; Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104; Tarbox v. Childs, 165 Mass. 408, 43 N. E. 124.

The better rule as to the rate of interest to be allowed on bills of exchange and promissory notes, where no place of payment is specified and no rate of interest mentioned,

seems to be the rate of the *lex loci;* 5 C. & F. 1, 12; Slacum v. Pomery, 6 Cra. (U. S.) 221, 3 L. Ed. 205; The Star, 3 Wheat. (U. S.) 101, 4 L. Ed. 338; James v. Allen, 1 Dall. (Pa.) 191, 1 L. Ed. 93; Hawley v. Sloo, 12 La. Ann. 815. And see Friend v. Wilkinson, 9 Gratt. (Va.) 31; Buck v. Little, 24 Miss. 463; Price v. Page & Bacon, 24 Mo. 65; 1 Pars. Contr. 238; Cope v. Alden, 53 Barb. (N. Y.) 350; Campbell v. Nichols, 33 N. J. L. 81; The Star, 3 Wheat. (U. S.) 101, 4 L. Ed. 338. The damages recoverable on a bill of exchange not paid are those of the place where the plaintiff is entitled to reimbursement. In the United States, these are generally fixed by statute; Hendricks v. Franklin, 4 Johns. (N. Y.) 119; Grimshaw v. Bender, 6 Mass. 157; Smith v. Shaw, 2 Wash. C. C. 167, Fed. Cas. No. 13,107; Grant v. Healey, 3 Sumn. 523, Fed. Cas. No. 5,696.

Where a place of payment is specified, the interest of that place must be allowed; French v. French, 126 Mass. 360; Peck v. Mayo, 14 Vt. 33, 39 Am. Dec. 205; Pomeroy v. Ainsworth, 22 Barb. (N. Y.) 118; Dickinson v. Edwards, 77 N. Y. 573, 33 Am. Rep. 671. See Fanning v. Consequa, 17 Johns. (N. Y.) 511, 8 Am. Dec. 442; except that when a contract is made in one state, to be performed in another, parties may contract for the legal rate of interest allowable in either state, provided such contract is entered into in good faith, and not merely to avoid the usury laws; Depau v. Humphreys, 8 Mart. N. S. (La.) 1; Townsend v. Riley, 46 N. H. 300; Miller v. Tiffany, 1 Wall. (U. S.) 310, 17 L. Ed. 540; Berrien v. Wright, 26 Barb. (N. Y.) 213; Kilgore v. Dempsey, 25 Ohio St. 413, 18 Am. Rep. 306; Arnold v. Potter, 22 Ia. 194; Brownell v. Freese, 35 N. J. L. 285, 10 Am. Rep. 239. See Odom v. Security Co., 91 Ga. 505, 18 S. E. 131; *contra*, Story, Confl. Laws § 298. A note made in one state and payable in another, is not subject to the usury laws of the latter state, if it is valid in that respect in the state where it was made; Matthews v. Paine, 47 Ark. 54, 14 S. W. 463; Brewster v. Lyndes, 2 Miles (Pa.) 185.

Chattel mortgages valid and duly registered under the laws of the state in which the property is situated at the time of the mortgage, will be held valid in another state to which the property is removed, although the regulations there are different; Bank of United States v. Lee, 13 Pet. (U. S.) 107, 10 L. Ed. 81; Feurt v. Rowell, 62 Mo. 524; Barker v. Stacy, 25 Miss. 471; Kanaga v. Taylor, 7 Ohio St. 134, 70 Am. Dec. 62; Martin v. Hill, 12 Barb. (N. Y.) 631; but see Handley v. Harris, 48 Kan. 606, 29 Pac. 1145, 17 L. R. A. 703, 30 Am. St. Rep. 322; Clough v. Kyne, 40 Ill. App. 234; Green v. Van Buskirk, 7 Wall. (U. S.) 140, 19 L. Ed. 109; and it will be enforced in the state to which the property has been removed, although it would have been invalid if made in that state; Smith v. Hutchings, 30 Mo. 383; but it is said by Wharton (Confl. Laws § 317), that the law in regard to chattel mortgages is governed by the *lex rei sitæ;* that a lien is extinguished when goods are taken from the place where the lien was created to a place where such a lien is not recognized; Whart. Confl. Laws § 318; McCabe v. Blymyre, 9 Phila. (Pa.) 615 (where a chattel mortgage made in Maryland was held invalid in Pennsylvania as against a *bona fide* purchaser without notice); and a Louisiana court refused to enforce a chattel mortgage made in another state, such mortgages being unknown in Louisiana; Delop v. Windsor & Randolph, 26 La. Ann. 185.

The law of the *situs* governs a mortgage of chattels in one state, executed in another; Rorer, Int. St. L. 96; Jones, Chat. Mortg. § 305; Clark v. Tarbell, 58 N. H. 88; Green v. Van Buskirk, 7 Wall. (U. S.) 139, 19 L. Ed. 109; Denny v. Faulkner, 22 Kan. 89. See Ames Iron Works v. Warren, 76 Ind. 512, 40 Am. Rep. 258; Tyler v. Strang, 21 Barb. (N. Y.) 198; *contra*, Runyon v. Groshon, 12 N. J. Eq. 86; Blystone v. Burgett, 10 Ind. 28, 68 Am. Dec. 658. The same is true in the case of conditional sales; Langworthy v. Little, 12 Cush. (Mass.) 109; Hervey v. Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003; Cleveland Machine Works v. Lang, 67 N. H. 348.

The *lex fori* determines the remedies on the mortgage; Ferguson v. Clifford, 37 N. H. 86; *contra*, Story, Confl. Laws § 402; Mumford v. Canty, 50 Ill. 370, 99 Am. Dec. 525 (where there appears to have been notice). See Wattson v. Campbell, 38 N. Y. 153, where a mortgage on a ship, made and shown to be invalid in Pennsylvania, was held invalid in New York; Beaumont v. Yeatman, 8 Humphr. (Tenn.) 542.

The registration of chattel mortgages and transfer of government and local stocks are frequently made subjects of positive law, which then suspends the law of the domicil.

Where the mortgagor of chattels removes with them to another state, the mortgagee, to preserve his rights, need not again record the mortgage in such other state; Keenan v. Stimson, 32 Minn. 377, 20 N. W. 364; Ferguson v. Clifford, 37 N. H. 87; Feurt v. Rowell, 62 Mo. 524; Parr v. Brady, 37 N. J. L. 201. But in Alabama it must be recorded to preserve its validity; Johnson v. Hughes, 89 Ala. 588, 8 South. 147.

As to whether such mortgages will be respected in preference to claims of citizens of the state into which the property is removed, it is held that they will; Jones v. Taylor, 30 Vt. 42, overruling Skiff v. Solace, 23 Vt. 279; Kanaga v. Taylor, 7 Ohio St. 134, 70 Am. Dec. 62; Martin v. Hill, 12 Barb. (N. Y.) 631; Beaumont v. Yeatman, 8 Humphr. (Tenn.) 542. A chattel mortgage

valid in the state where executed without change of possession protects the property mortgaged against an attachment in Vermont, though in the possession of the mortgagor; Taylor v. Boardman, 25 Vt. 581; Norris v. Sowles, 57 Vt. 360.

Questions of priority of liens and other claims are, in general, to be determined by the *lex rei sitæ* even in regard to personal property; Harrison v. Sterry, 5 Cra. (U. S.) 289, 3 L. Ed. 104; Olivier v. Townes, 2 Mart. N. S. (La.) 93; In re Miller's Estate, 3 Rawle (Pa.) 312, 24 Am. Dec. 345; Hammond v. Stovall, 17 Ga. 491; Walker v. Roberts, 4 Rich. (S. C.) 561; Trapnall v. Richardson, 13 Ark. 543, 58 Am. Dec. 338. A chattel mortgage made in Canada, with possession delivered to the mortgagee, was held entitled to priority in Michigan, whither the property was taken without consent of the mortgagee, over a prior chattel mortgage in Michigan executed before the property was taken to Canada and recorded after its return; Vining v. Millar, 109 Mich. 205, 67 N. W. 126, 32 L. R. A. 442.

The existence of the lien will generally depend on the *lex loci;* Story, Confl. Laws §§ 322 *b*, 402; Harrison v. Sterry, 5 Cra. (U. S.) 289, 3 L. Ed. 104. See note on extra-territoriality of chattel mortgages, 17 L. R. A. 127.

Marriage comes under the general rule in regard to contracts, with some exceptions. See LEX LOCI; 25 Amer. Law Rev. 82.

The scope of a marriage settlement made abroad is to be determined by the *lex loci contractus;* 1 Bro. P. C. 129; 2 M. & K. 513; where not repugnant to the *lex rei sitæ;* 31 E. L. & Eq. 443; De Pierres v. Thorn, 4 Bosw. (N. Y.) 266.

When the contract for marriage is to be executed elsewhere, the place of execution becomes the *locus contractus;* 23 E. L. & Eq. 288. On the continent of Europe, capacity is usually governed by nationality, though in administering the rule the courts favor their own citizens; in England it was governed by domicil, but now the courts have gone back to the decision in 3 P. D. 1, holding capacity is governed by law of place of ceremony; and in America by the *lex loci;* Com. v. Lane, 113 Mass. 458, 18 Am. Rep. 509. Hence it is quite unsafe for an American to marry a foreigner without a complete investigation of his capacity to marry according to his personal law. See an article by J. H. Beale, Jr., in 15 H. L. R. 382; MARRIAGE.

Torts. In an action brought in one state for injuries done in another, the statutes and decisions of the courts of the latter state must fix the liability; Njus v. Ry. Co., 47 Minn. 92, 49 N. W. 527; Erickson v. S. S. Co., 96 Fed. 80; Burnett v. R. Co., 176 Pa. 45, 34 Atl. 972 (where a ticket was purchased at a point in New Jersey to a place in New York; the person was injured in Pennsylvania; the law of Pennsylvania was held to apply); Alexander v. Pennsylvania Co., 48 Ohio St. 623, 30 N. E. 69; Railway Co. v. Lewis, 89 Tenn. 235, 14 S. W. 603. See Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 193, 12 Sup. Ct. 806, 36 L. Ed. 672.

In a proceeding to limit liability for claims against a French vessel found to be in fault for a collision in a fog on the high seas, the law of France, which authorizes a recovery for loss of life against the vessel in fault, will be enforced by the courts of the United States, although the French courts, in applying the facts, found the international rule as to the speed of vessels in a fog might not have held such vessel to be at fault; La Bourgogne, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973.

Movables in general. An assignment of a movable which gives a good title according to the law of the country where it is situated is recognized as valid in England, whatever the domicil of the parties may be; [1892] 1 Ch. 238; so it lies with the law of the place where a written instrument is situated to determine whether it is negotiable or not; [1905] 1 K. B. 677. Where, by the law of the place where goods are shipped and where the ship is, a shipper is entitled to exercise a right of stoppage in transitu, and has exercised that right in a manner recognized as valid by such law, his title to the goods will be recognized; 1 East 515. The rights of the assignor and the assignee on an assignment, in one country, of a document of title to a debt or to an interest in personal property, are in general governed by the law of the country where the assignment takes place, although the debt may be due from persons living in, or the personal property may be situated in, a foreign country; [1898] A. C. 616. The validity of an assignment of documents, such as policies of insurance; 17 Q. B. D. 309; or negotiable instruments; [1904] 2 K. B. 870; is determined by the law of the place where the assignment is made; 15 App. Cas. 267.

SPECIAL PERSONAL RELATIONS. *Executors and administrators,* in the absence of a specific statute authorizing it, have no power to sue or be sued by virtue of a foreign appointment as such; Westl. Priv. Int. Law 279; Brookshire v. Dubose, 55 N. C. 276; Kirkpatrick v. Taylor, 10 Rich. (S. C.) 393; L. R. 5 Ch. App. 315; Swatzel v. Arnold, 1 Woolw. 383, Fed. Cas. No. 13,682; Clark v. Blackington, 110 Mass. 369; Parker's Appeal, 61 Pa. 478; Watson's Adm'r v. Pack's Adm'r, 3 W. Va. 154; Turner v. Linam, 55 Ga. 253; Morton v. Hatch, 54 Mo. 408; Bell's Adm'r v. Nichols, 38 Ala. 678; Gilman v. Gilman, 54 Me. 453; Armstrong v. Lear, 12 Wheat. (U. S.) 169, 6 L. Ed. 589; 3 Q. B. 498; 2 Ves. 35. Where a foreign executor has brought assets into a state, then as the title is in him he can sue as an individual, but not as executor; Talmage v. Chapel, 16 Mass. 71.

In the United States, however, payment to

such executor will be an equitable discharge, if the money has been distributed to those entitled; Doolittle v. Lewis, 7 Johns. Ch. (N. Y.) 49, 11 Am. Dec. 389.

Ships and cargoes and the proceeds thereof, on the death of the owner, complete their voyages and return to the home port to be administered; Story, Confl. Laws § 520; Wells v. Miller, 45 Ill. 382; Orcutt v. Orms, 3 Paige Ch. (N. Y.) 459.

See EXECUTORS AND ADMINISTRATORS.

Guardians have no power over the property, whether real or personal, of their wards, by virtue of a foreign appointment; Morrell v. Dickey, 1 Johns. Ch. (N. Y.) 153; Kraft v. Wickey, 4 Gill & J. (Md.) 332, 23 Am. Dec. 569; 4 T. R. 185; they must have the sanction of the appropriate local tribunal; Curtis v. Smith, 6 Blatch. 537, Fed. Cas. No. 3,505; Noonan v. Bradley, 9 Wall. (U. S.) 394, 19 L. Ed. 757; Woodworth v. Spring, 4 Allen (Mass.) 321; Whart. Confl. Laws § 260; L. R. 2 Eq. 74.

As to the power of a guardian over the domicil of his ward, see DOMICIL.

As to their extra-territorial powers, see RECEIVERS.

Sureties come under the general rules, and their contracts are governed by the *lex loci;* but in the case of a bond with sureties, given to the government by a navy agent for the faithful performance of his duties, the liability of the sureties is governed by the common law, as the accountability of the principal was at Washington, the seat of government; Cox v. U. S., 6 Pet. (U. S.) 172, 8 L. Ed. 359 (the case coming up from Louisiana). See Duncan v. U. S., 7 Pet. (U. S.) 435, 8 L. Ed. 739. See SURETYSHIP.

JUDGMENTS AND DECREES OF FOREIGN COURTS relating to immovable property within their jurisdiction are held binding everywhere. And the rule is the same with regard to movables actually within their jurisdiction; Noble v. Oil Co., 79 Pa. 354, 21 Am. Rep. 66, The Rio Grande, 23 Wall. (U. S.) 458, 23 L. Ed. 158; 2 C. & P. 155. See Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; L. R. 4 H. L. 414; Barrow v. West, 23 Pick. (Mass.) 270; Croudson v. Leonard, 4 Cra. (U. S.) 434, 2 L. Ed. 670. Thus *admiralty* proceedings *in rem* are held conclusive everywhere if the court had a rightful jurisdiction founded on actual possession of the subject-matter; Rose v. Himely, 4 Cra. (U. S.) 241, 2 L. Ed. 608; Hudson v. Guestier, 4 Cra. (U. S.) 293, 2 L. Ed. 625; Croudson v. Leonard, 4 Cra. (U. S.) 434, 2 L. Ed. 670; The Mary, 9 Cra. (U. S.) 126, 3 L. Ed. 678; Grant v. M'Lachlin, 4 Johns. (N. Y.) 34; Bradstreet v. Ins. Co., 3 Sumn. 600, Fed. Cas. No. 1,793; Magoun v. Ins. Co., 1 Sto. 157, Fed. Cas. No. 8,961; Gray v. Swan, 1 H. & J. (Md.) 142; Calhoun v. Ins. Co., 1 Binn. (Pa.) 290; Baxter v. Ins. Co., 6 Mass. 277, 4 Am. Dec. 125; L. R. 5 Q. B. 599; Dunham v. Ins. Co., 1 Low. 253, Fed. Cas. No. 4,152; State v. R. Co., 10 Nev. 47.

But such decree may be avoided for matter apparently erroneous on the face of the record; 7 Term 523; or if there be an ambiguity as to grounds of condemnation; 7 Bingh. 495; 1 Greenl. Ev. § 541, n.; Andrews v. Herriot, 4 Cow. (N. Y.) 520, n. 3; 2 Kent 120.

Jurisdiction to garnish a debt not payable at a particular place cannot, according to some cases, be had without personal service on the creditor; see cases collected in Minor, Confl. of Laws § 125. These cases are overruled in Chicago, R. I. & P. Ry. Co. v. Sturm, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144, which holds that service on the garnishee alone, obtained in the state of his domicil, gives jurisdiction. This decision was based on reasoning and dicta which would allow jurisdiction irrespective of domicil wherever such service is obtained, and this view had been previously adopted by a few cases cited in Chicago, R. I. & P. Ry. Co. v. Sturm, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144. See, *contra*, Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178.

Proceedings under the garnishee process are held proceedings *in rem;* and a decree may be pleaded in bar of an action against the trustee or garnishee; 1 Greenl. Ev. § 542; 4 Cow. (N. Y.) 520, n. But the court must have rightful jurisdiction over the *res* to make the judgment binding; and then it will be effectual only as to the *res*, unless the court had actual jurisdiction over the person also; McVicker v. Beedy, 31 Me. 314, 50 Am. Dec. 666; Mattingly's Heirs v. Corbit, 7 B. Monr. (Ky.) 376; State v. R. Co., 10 Nev. 47; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

ASSIGNMENTS AND TRANSFERS. Voluntary assignments of personal property, valid where made, will transfer property everywhere; Speed v. May, 17 Pa. 91, 55 Am. Dec. 540; Schroder v. Tompkins, 58 Fed. 672; Van Wyck v. Read, 43 Fed. 716; Richardson v. Leavitt, 1 La. Ann. 430, 45 Am. Dec. 90; Greene v. Mfg. Co., 52 Conn. 330; Train v. Kendall, 137 Mass. 366; not as against citizens of the state of the *situs* attaching prior to the assignees' obtaining possession; Ingraham v. Geyer, 13 Mass. 146, 7 Am. Dec. 132; King v. Johnson, 5 Har. (Del.) 31. Otherwise Wilson v. Carson, 12 Md. 54.

An involuntary assignment by operation of law as under bankrupt or insolvent laws will not avail as against attaching creditors in the place of situation of the property; Hoyt v. Thompson, 5 N. Y. 320; Frazier v. Fredericks, 24 N. J. L. 162; Blake v. Williams, 6 Pick. (Mass.) 286, 302, 17 Am. Dec. 372; McNeil v. Colquhoon, 3 N. C. 24; Robinson v. Crowder, 4 McCord (S. C.) 519, 17

Am. Dec. 762; Saunders v. Williams, 5 N. H. 213; Olivier v. Townes, 2 Mart. N. S. (La.) 93; Milne v. Moreton, 6 Binn. (Pa.) 353, 6 Am. Dec. 466; Harrison v. Sterry, 5 Cra. (U. S.) 289, 3 L. Ed. 104; Very v. McHenry, 29 Me. 208; Burk v. McClain, 1 Harr. & McH. (Md.) 236; Beer v. Hooper, 32 Miss. 246; Upton v. Hubbard, 28 Conn. 274, 73 Am. Dec. 670; Woodward v. Roane, 23 Ark. 526; Osborn v. Adams, 18 Pick. (Mass.) 247; Lichtenstein v. Gillett, 37 La. Ann. 522.

It may be a question whether the same rule would hold if the assignees had obtained possession; Cook v. Van Horn, 81 Wis. 291, 50 N. W. 893. An assignment by operation of law is good so as to vest property in the assignees by comity; 6 M. & S. 126; Holmes v. Remsen, 20 Johns. (N. Y.) 262, 11 Am. Dec. 269; Milne v. Moreton, 6 Binn. (Pa.) 363, 6 Am. Dec. 466; Goodwin v. Jones, 3 Mass. 517, 3 Am. Dec. 173.

In England it is settled that an assignment under the bankrupt law of a foreign country passes all the personal property of the bankrupt locally situate, and debts owing in England, and that an attachment of such property by an English creditor, after such bankruptcy, with or without notice to him, is invalid to overreach the assignment. See 25 Q. B. Div. 399.

Discharges by the *lex loci contractus* are valid everywhere; May v. Breed, 7 Cush. (Mass.) 15, 54 Am. Dec. 700; Long v. Hammond, 40 Me. 204; Peck v. Hibbard, 26 Vt. 703, 62 Am. Dec. 605; Blanchard v. Russell, 13 Mass. 1, 7 Am. Dec. 106; Mason v. Haile, 12 Wheat. (U. S.) 370, 6 L. Ed. 660; 5 East 124. This rule is restricted in the United States by the clause in the constitution forbidding the passage of any law impairing the obligation of contracts. Under this provision, it is held that a state insolvent or bankrupt law may not have any extra-territorial effect to discharge the debtor; Cook v. Moffat, 5 How. (U. S.) 307, 12 L. Ed. 159; Donnelly v. Corbett, 7 N. Y. 500; Story, Const. § 1115. See LEX FORI. It may, however, take away the remedy for non-performance of the contract in the *locus contractus*, on contracts made subsequently.

As to FOREIGN JUDGMENTS and FOREIGN LAWS, see those titles.

The important question of federal courts following state decisions, or not, is properly treated here. There is no common law of the United States in the sense of a national customary law distinct from the common law of England as adopted by the several states, each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes; Wheaton v. Peters, 8 Pet. (U. S.) 591, 8 L. Ed. 1055; Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508. A determination in a given case, of what that law is, may be different in a federal court from one prevailing in a state court. This arises from the circumstance that the federal courts, where they are called upon to administer the law of the state in which they sit, or by which the transaction is governed, exercise an independent, though concurrent, jurisdiction, and are required to ascertain and declare the law according to their own judgment; Western Union Telegraph Co. v. Pub. Co., 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765. The conclusion of a state court, as to the time when a cause of action accrues in case of fraud or concealment, based, not on a construction of a state statute, but on the view taken of the rule of the common law, is not binding on a federal court, when called on to construe the common law and to apply its principles to cases arising between citizens of different states; Murray v. R. Co., 62 Fed. 24.

U. S. R. S. § 721, provides that the laws of the several states shall be regarded as rules of decision in trials at common law in courts of the United States in cases where they apply. Judge Story in Swift v. Tyson, 16 Pet. (U. S.) 1, 10 L. Ed. 865, says: "It will hardly be contended that decisions of courts constitute laws. They are at most only evidence of what the laws are, and are not themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, ill-founded or otherwise incorrect." All the decisions of the state courts are "highly persuasive" upon the United States courts, even on propositions of general law; this is because of the desire for harmony between the jurisdictions; Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359. Some of the questions on which the federal courts have refused to follow the state courts are as follows: A case concerning building and loan associations; Alexander v. Loan Ass'n, 110 Fed. 267; as to taking possession of chattels under a chattel mortgage; Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; as to the liability of common carriers, in the absence of a statute; Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed 97; the law of fellow servant; Baltimore & O. R. Co. v. Baugh, 149 U. S. 372, 13 Sup. Ct. 914, 37 L. Ed. 772; the law as to the duties of the master to furnish safe appliances to the servant; Texas & P. R. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; the law as to injuries at railroad crossings; Schofield v. Ry. Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; and as to the validity of contracts exempting telegraph companies from liability for mistakes, etc., in the transmission of messages; Western Union Telegraph Co. v. Cook, 61 Fed. 624, 9 C. C. A. 680.

As to all matters governed by the law merchant, the federal courts are not bound by state decisions; Burgess v. Seligman,

107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359. It is said that the same is true in the law of insurance; see Foster Fed. Pr. 557, 575, where the cases are collected.

Federal courts follow decisions of state courts: 1. Upon the construction of state constitutions and statutes; Walker v. State Harbor Com'rs, 17 Wall. 648, 21 L. Ed. 744; Gage v. Pumpelly, 115 U. S. 454, 6 Sup. Ct. 136, 29 L. Ed. 449; its interpretation is accepted as the true interpretation, whatever may be the federal court's opinion of its soundness; Oates v. Bank, 100 U. S. 245, 25 L. Ed. 580. 2. Upon questions involving the title to land; Myrick v. Heard, 31 Fed. 241; Deguire v. Lead Co., 37 Fed. 663; Shields v. McAuley, 37 Fed. 302; Arrowsmith v. Gleason, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. Ed. 630. 3. Upon the question whether a third person may sue on a contract made for his benefit; Bethlehem Iron Co. v. Hoadley, 152 Fed. 735; as to the effect upon contracts of a statute prohibiting labor on Sunday; Hill v. Hite, 79 Fed. 826; as to what constitutes a breach of a contract for service; Ely v. Revolving Door Co., 184 Fed. 459; as to the right of the lowest bidder to the award of a contract for a public improvement; U. S. Wood Preserving Co. v. Sundmaker, 186 Fed. 678, 110 C. C. A. 224; as to the payment of wages of employees; Crowther v. Ins. Trust & C. Co., 85 Fed. 41, 29 C. C. A. 1. 4. Upon the construction and effect of statutes in relation to marriage; Meister v. Moore, 96 U. S. 76, 24 L. Ed. 826; and generally as to the capacity of married women to contract and their liability on their contracts; Cross v. Allen, 141 U. S. 528, 12 Sup. Ct. 67, 35 L. Ed. 843; and specifically her right, under married women's acts, to mortgage her separate property to secure her husband's debts; Mitchell v. Lippincott, 2 Woods 467, Fed. Cas. No. 9,665; the requisites of conveyances; Gillespie v. Coal, etc., Co., 163 Fed. 992, 91 C. C. A. 494; and acknowledgment; Berry v. Bank, 93 Fed. 44, 35 C. C. A. 185, by a married woman; the effect of conveyances to husband and wife; Meyers v. Reed, 17 Fed. 401; a wife's right to sue in her own name; and as to the running of the statute of limitations against her; Kibbe v. Ditto, 93 U. S. 674, 23 L. Ed. 1005; the common-law right of husband and wife respectively to the custody of a child; In re Barry, 42 Fed. 113, 136 U. S. 597, 34 L. Ed. 503, note. 5. Upon questions distinctive of a statute giving a right of action for a negligent homicide; Matz v. C. & A. R. R. Co., 85 Fed. 180; Spinello v. R. Co., 183 Fed. 762, 106 C. C. A. 189. 6. Upon the validity of a license ordinance adopted by a board of county supervisors; Flanigan v. Sierra County, 196 U. S. 553, 25 Sup. Ct. 314, 49 L. Ed. 597; or ordinances respecting the traffic in intoxicating liquors; Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620. 7. Upon general questions of local law in regard to the character and extent of the powers and liabilities of the political bodies or municipal corporations of a state; Johnson v. St. Louis, 172 Fed. 31, 96 C. C. A. 617, 18 Ann. Cas. 949. 8. Upon questions in relation to the state courts; Mohr v. Manierre, 101 U. S. 417, 25 L. Ed. 1052.

See 40 L. R. A. (N. S.) 380, with an exhaustive note.

The rules of evidence of the state are generally applied in the federal courts; Bucher v. R. Co., 125 U. S. 555, 583, 8 Sup. Ct. 974, 31 L. Ed. 795.

As to the situs of movable property for taxation, see TAXATION.

See UNITED STATES COURTS; HUSBAND AND WIFE; LEGITIMACY; DIVORCE; CONTRACTS; GUARDIAN AND WARD; ADOPTION; POWERS; USURY; TRUSTS; CORPORATIONS; CONSTITUTION OF UNITED STATES.

CONFORMITY STATUTE. A term used to designate section 721 of Revised Statutes of the U. S. which provides as to federal courts conforming to state practice.

CONFRONTATION. The act by which a witness is brought into the presence of the accused, so that the latter may object to him, if he can, and the former may know and identify the accused and maintain the truth in his presence. In criminal cases no man can be a witness unless confronted with the accused, except by consent.

CONFUSIO (Lat. *confundere*). **In Civil Law.** A pouring together of liquids; a melting of metals; a blending together of an inseparable compound.

It is distinguished from *commixtion* by the fact that in the latter case a separation may be made, while in a case of *confusio* there cannot be. 2 Bla. Com. 405

CONFUSION OF DEBTS. The concurrence of two adverse rights to the same thing in one and the same person. Woods v. Ridley, 11 Humph. (Tenn.) 198.

CONFUSION OF GOODS. Such a mixture of the goods of two or more persons that they cannot be distinguished.

When this takes place by the mutual consent of the owners, they have an interest in the mixture in proportion to their respective shares; Silsbury v. McCoon, 6 Hill (N. Y.) 425, 41 Am. Dec. 753; but see Wells v. Batts, 112 N. C. 283, 17 S. E. 417, 34 Am. St. Rep. 506. Where it is caused by the wilful act of one party without the other's consent, the one causing the mixture must separate them at his own peril; Bisp. Eq. § 86; Hesseltine v. Stockwell, 30 Me. 237, 50 Am. Dec. 627; Bryant v. Ware, 30 Me. 295; Dunning v. Stearns, 9 Barb. (N. Y.) 630; 2 Kent 365; and must bear the whole loss; Brackenridge v. Holland, 2 Blackf. (Ind.) 377, 20 Am. Dec. 123; Huff v. Earl, 3 Ind. 306; Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 62; Willard v. Rice, 11 Metc. (Mass.)

493, 45 Am. Dec. 226: Hesseltine v. Stockwell, 30 Me. 237; unless he can identify his goods; Ayre v. Hixson, 53 Or. 19, 98 Pac. 518, 133 Am. St. Rep. 819; Levyeau v. Clements, 175 Mass. 376, 56 N. E. 735, 50 L. R. A. 397; otherwise, it is said, if the confusion is the result of negligence merely, or accident; Pratt v. Bryant, 20 Vt. 333; or of the wrongful act of a stranger; Bryant v. Ware, 30 Me. 295; if commingled by mistake or accident, or by consent of the parties, the owners will be treated as tenants in common; Ayre v. Hixson, 53 Or. 19, 98 Pac. 518, 133 Am. St. Rep. 819. The rule extends no further than necessity requires; 2 Campb. 575; Holbrook v. Hyde, 1 Vt. 286; Wood v. Fales, 24 Pa. 246, 64 Am. Dec. 655; Queen v. Wernwag, 97 N. C. 383, 2 S. E. 657; for if the goods can be distinguished, it will not justify one in taking another's goods upon the ground that they have been intermingled; Claflin v. Beaver, 55 Fed. 576.

Lord Eldon was of opinion that the wrongdoer should not lose his whole property in the mass; 15 Ves. 442; and with this view agrees a learned article in 6 Am. L. Rev. 455, understood (Williston, Sales, 179) to have been written by Mr. Justice O. W. Holmes, and containing a full discussion of the principles relating to grain in elevators.

Where a vessel was wrecked and the bales of cotton that were saved were indistinguishable as to ownership, it was held that the several owners of the cotton that was shipped had a proportional interest in what was saved, as by a kind of tenancy in common; L. R. 3 C. P. 427.

The fact that defendants in replevin to recover ore had wrongfully mixed plaintiff's ore with their ore of a lower grade did not preclude recovery of their ore, though some of the defendants' might have been taken with it; Blurton v. Hansen, 135 Mo. App. 548, 116 S. W. 474. Where a bank commingles its own collateral to secure its own debts with collaterals which it held to secure a note payable through the bank, owed to a depositor, in such a way that it was impossible to distinguish one set from the other, all the collaterals became the property of the depositor to secure the note; First Nat. Bank of Decatur v. Henry, 159 Ala. 367, 49 South. 97.

A writer in 14 Harv. L. Rev. 157, is of opinion that the better view is that where there has been no change of value and the mass is homogeneous each party is entitled to his proportionate share irrespective of brand; citing Hesseltine v. Stockwell, 30 Me. 237, 50 Am. Dec. 627; Claflin v. Jersey Works, 85 Ga. 27, 46, 11 S. E. 721.

As to grain in an elevator, the cases give effect to the intention of the parties (which undoubtedly exists) that the depositor shall retain title; Williston, Sales, § 154, citing Woodward v. Semans, 125 Ind. 330, 25 N. E. 444, 21 Am. St. Rep. 225; Moses v. Teetors, 64 Kan. 149, 67 Pac. 526, 57 L. R. A. 267; Ledyard v. Hibbard, 48 Mich. 421, 12 N. W. 637, 42 Am. Rep. 474; Millhiser Mfg. Co. v. Mills Co., 101 Va. 579, 44 S. E. 760; Rahilly v. Wilson, 3 Dill. 420, Fed. Cas. No. 11,532. The same writer says (section 154): "The warehouseman is thus a bailee to keep the grain, with power to change the bailor's ownership in severalty into a tenancy in common of a larger mass and back again, and with a continuous power of sale, substitution and resale. At any given moment, however, all the holders of receipts for the grain are tenants in common of the amount in store, the share of each being proportionate to the amount of his receipts as compared with the total number of receipts outstanding." It is the duty of the bailee to keep sufficient grain to meet all his outstanding receipts; Young v. Miles, 23 Wis. 643.

Where gas from plaintiff's well was wrongfully mixed with gas from defendant's 59 wells, plaintiff could recover $1/60$ of the proceeds from the sale of the product of all of the 60 wells; Great Southern Gas & Oil Co. v. Fuel Co., 155 Fed. 114, 83 C. C. A. 574.

The doctrine does not apply to cattle and horses or other like property that can be readily identified; McKnight v. U. S., 130 Fed. 659, 65 C. C. A. 37.

CONFUSION OF RIGHTS. A union of the qualities of debtor and creditor in the same person. The effect of such a union is, generally, to extinguish the debt; 1 Salk. 306; Cro. Car. 551; 1 Ld. Raym. 515. See 5 Term 381; Comyns, Dig. *Baron et Feme* (D).

CONGÉ. **In French Law.** A clearance. A species of passport or permission to navigate.

CONGÉ D'ACCORDER (Fr. leave to accord). A phrase used in the process of levying a fine. Upon the delivery of the original writ, one of the parties immediately asked for a *congé d'accorder*, or leave to agree with the plaintiff. *Termes de la Ley*; Cowell. See LICENTIA CONCORDANDI; 2 Bla. Com. 350.

CONGÉ D'ÉLIRE (Fr. leave to elect). The king's permission royal to a dean and chapter in time of vacation to choose a bishop, or to an abbey or priory of his own foundation to choose the abbot or prior.

Originally, the king had free appointment of all ecclesiastical dignities whensoever they chanced to be void. Afterwards he made the election over to others, under certain forms and conditions: as, that at every vacation they should ask of the king *congé délire;* Cowell; *Termes de la Ley;* 1 Bla. Com. 379, 382. The permission to elect is a mere form; the choice is practically made by the crown. A letter missive accompanies the authority to elect, designating the person to be chosen and if there is no election within twenty days there is a liability to a penalty.

CONGÉ D'EMPARLER (Fr. leave to imparl). The privilege of an imparlance (*licentia loquendi*). 3 Bla. Com. 299.

CONGEABLE (Fr. *congé*, permission, leave). Lawful, or lawfully done, or done with permission; as, entry congeable and the like. Littleton, § 279.

CONGREGATION. A society of a number of persons who compose an ecclesiastical body.

Certain bureaus at Rome, where ecclesiastical matters are attended to.

In the United States, the members of a particular church who meet in one place to worship. See Robertson v. Bullions, 9 Barb. (N. Y.) 64.

CONGRESS. An assembly of deputies convened from different governments to treat of peace or of other international affairs; as the Congress of Berlin to settle the terms of peace between Russia and Turkey in 1878, composed of representations of the great Powers of Europe.

In theory a congress may conclude a treaty, while a conference is for consultation, and its result, ordinarily a protocol, prepares the way for a treaty. See Cent. Dict.; Encyc. Dict. But this is not always true, as the Berlin conference of 1889 was composed of plenipotentiaries and its deliberations resulted in a treaty.

The legislative body of the United States, composed of the senate and house of representatives (*q. v.*). U. S. Const. art. 1, § 1.

Each house is the judge of the election and qualifications of its members. A majority of each house is a quorum; but a smaller number may adjourn from day to day, and compel the attendance of absent members. Each house may make rules, punish its members, and by a two-thirds vote expel a member. Each house must keep a journal and publish the same, excepting such parts as may, in their judgment, require secrecy, and record the yeas and nays at the desire of one-fifth of the members present. Art. 1, s. 5. A court is bound to assume that the journal speaks the truth and cannot receive oral testimony to impeach its correctness; U. S. v. Ballin, 144 U. S. 1, 12 Sup. Ct. 507, 36 L. Ed 321.

The members of both houses are in all cases, except treason, felony, and breach of the peace, privileged from arrest while attending to and returning from the session of their respective houses; and no member can be questioned in any other place for any speech or debate in either house. U. S. Const. art. 1, s. 6.

Whether a senator of the United States has waived his privilege from arrest and whether such privilege is personal or given for the purpose of always securing the representation of his state in the senate are questions which can be raised by writ of error directly to the district court; Burton v. U. S., 196 U. S. 283, 25 Sup. Ct. 243, 49 L. Ed. 482.

Each house of congress has claimed and exercised the power to punish contempts and breaches of its privileges, on the ground that all public functionaries are essentially invested with the powers of self-preservation, and that whenever authorities are given, the means of carrying them into execution are given by necessary implication. Jefferson, Manual, § 3, art. *Privilege;* Duane's Case, Senate Proceedings, Gales and Seaton's Annals of Cong., 6th Congress, pp. 122, 184; Wolcott's Case, Journal Hou. Reps. 1st Sess. 35th Congress, pp. 371, 386, 535. Irwin's Case, 2d Sess. 43d Congress, Index. In Kilbourn's Case, 103 U. S. 168, 26 L. Ed. 377, it was held that although the house can punish its own members for disorderly conduct or for failure to attend its sessions, and can decide cases of contested elections and determine the qualifications of its members, and exercise the sole power of impeachment of officers of the government, and may, when the examination of witnesses is necessary to the performance of these duties, fine or imprison a contumacious witness,—there is not found in the constitution any general power vested in either house to punish for contempt. The order of the house ordering the imprisonment of a witness for refusing to answer certain questions put to him by the house, concerning the business of a real estate partnership of which he was a member, and to produce certain books in relation thereto, was held void and no defence on the part of the sergeant-at-arms in an action by the witness for false imprisonment. The members of the committee, who took no actual part in the imprisonment, were held not liable to such action. The cases in which the power had been exercised are numerous. This power, however, extends no further than imprisonment; and that will continue no further than the duration of the power that imprisons. The imprisonment will therefore terminate with the adjournment or dissolution of congress.

The rules of proceeding in each house are substantially the same: the house of representatives choose their own speaker; the vice-president of the United States is, *ex officio*, president of the senate For rules of proceeding, see Hind's Precedents of the H. of R.

When a bill is engrossed, and has received the sanction of both houses, it is sent to the president for his approbation If he approves of the bill, he signs it. If he does not, it is returned, with his objections, to the house in which it originated, and that house enters the objections at large on its journal and proceeds to reconsider it. If, after such reconsideration, two-thirds of the house agree to pass the bill, it is sent, together with the objections, to the other house, by which it is likewise reconsidered, and, if approved by two-thirds of that house, it becomes a law. But in all such cases the votes of both houses are determined by yeas and nays, and the names of the persons voting for and against the bill are to be entered on the journal of each house respectively.

If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return; in which case it shall not be a law. See Kent, Lect. XI.

The right of the president to sign a bill after an adjournment of congress although within ten days of its passage, has been inferentially approved by the supreme court on four different occasions, in connection with the captured and abandoned property act, which was signed by the president on March 12, 1863, and after the adjournment of congress, Tobey v. Leonard, 2 Wall (U. S.) 423, 17 L. Ed. 842; U. S. v. Anderson, 9 Wall (U. S.) 56, 19 L. Ed. 615; U. S. v. Klein, 13 Wall. (U. S.) 128, 20 L. Ed. 519 Upon this point the court of claims held that a bill signed by the president after the usual adjournment of congress for the winter holidays, but within ten days from the time when it was presented to him, was duly approved within the intent and meaning of the constitution; U. S. v. Alice Weil, 29 Ct. Cl. 523.

The house of representatives has the exclusive right of originating bills for raising revenue; and this is the only privilege that house enjoys in its legislative character which is not shared equally with the other; and even those bills are amendable by the senate in its discretion; Art. 1, s. 7.

One of the houses cannot adjourn, during the session of congress, for more than three days without the consent of the other; nor to any other place than that in which the two houses shall be sitting; Art. 1, s. 5.

All the legislative powers granted by the constitution of the United States or necessarily implied from those granted, are vested in the congress.

CONJECTIO CAUSÆ. In Civil Law. A statement of the case. A brief synopsis of the case given by the advocate to the judge in opening the trial. Calvinus, Lex.

CONJECTURE. A slight degree of credence, arising from evidence too weak or too remote to cause belief. 1 Mascardus, *De Prob.* quæst. 14, n. 14.

An idea or notion founded on a probability without any demonstration of its truth.

CONJOINTS. Persons married to each other. Story, Confl. Laws, § 71; Wolffius, *Droit de la Nat.* § 858.

CONJUGAL RIGHTS. See RESTITUTION OF CONJUGAL RIGHTS.

CONJUNCTIVE. Connecting in a manner denoting union.

There are many cases in law where the conjunctive *and* is used for the disjunctive *or*, and *vice versa*.

CONJUNCTIVE OBLIGATION. One in which the several objects in it are connected by a copulative, or in any other manner which shows that all of them are severally comprised in the contract. This contract creates as many different obligations as there are different objects; and the debtor, when he wishes to discharge himself, may force the creditor to receive them separately. Civil Code, La. § 2063.

CONJURATION (Lat. a swearing together). A plot, bargain, or compact, made by a number of persons under oath, to do some public harm.

Personal conference with the devil or some evil spirit, to know any secret or effect any purpose. The laws against conjuration and witchcraft were repealed in 1736. Mozley & W. Law Dict.

CONNECTICUT. The name of one of the original states of the United States of America.

It was not until the year 1665 that the whole territory now known as the state of Connecticut was under one colonial government. The charter was granted by Charles II in April, 1662. Previous to that time there had been two colonies, with separate governments.

As this charter to the colony of Connecticut embraced the colony of New Haven, the latter resisted it until about January, 1665, when the two colonies, by mutual agreement, became indissolubly united In 1687, Sir Edmund Andros attempted to seize and take away the charter; but it was secreted and preserved in the famous Charter Oak at Hartford, and is now kept in the office of the secretary of state. 1 Hollister, Hist. Conn. 315. It remained in force, with a temporary suspension, as a fundamental law of the state, until the present constitution was adopted. Story, Const. 386; Comp. Stat. Conn. Rev. of 1875, lii. xlv.

The present constitution was adopted on the 15th of September, 1818. Seventeen amendments have been adopted, 1823-1875; also in 1901 and 1905.

CONNECTING LINES. See COMMON CARRIERS.

CONNIVANCE. An agreement or consent, indirectly given, that something unlawful shall be done by another.

Connivance differs from condonation, though the same legal consequences may attend it. Connivance necessarily involves criminality on the part of the individual who connives; condonation may take place without imputing the slightest blame to the party who forgives the injury. Connivance must be the act of the mind before the offence has been committed; condonation is the result of a determination to forgive an injury which was not known until after it was inflicted 3 Hagg. Eccl. 350.

Connivance differs, also, from collusion: the former is generally collusion for a particular purpose, while the latter may exist without connivance 3 Hagg. Eccl. 130.

The connivance of the husband to his wife's prostitution deprives him of the right of obtaining a divorce, or of recovering damages from the seducer; Geary, Mar. & Fam. R. 268; 4 Term 657. The husband may actively connive at the adultery; Myers v. Myers, 41 Barb. (N. Y.) 114; Hedden v. Hedden, 21 N. J. Eq. 61; or he may passively; 5 Eng. Ecc. 27; 3 Hagg. Eccl. 87. It may be satisfactorily proved by implication. See Shelf. Mar. & Div. 449; 2 Bish. Mar. & Div. § 6; 2 Hagg. Eccl. 278, 376; 3 *id.* 58, 82, 107, 119, 312; Pierce v. Pierce, 3 Pick. (Mass.) 299, 15 Am. Dec. 210; Seagar v. Sligerland, 2 Caines (N. Y.) 219; Masten v. Masten, 15 N. H. 161; Herrick v. Herrick, 31 Mich. 300; In re Childs, 109 Mass. 407; Cochran v. Cochran, 35 Ia. 477.

A husband who connives at or consents to adultery by his wife is deemed as consenting to it with others and cannot have a divorce for a subsequent act with a different person, though the act connived at was not committed; Hedden v. Hedden, 21 N. J. Eq. 61; nor can he where the wife was led into it by connivance of a detective employed by the husband, not for such purpose but to obtain evidence; Rademacher v. Rademacher, 74 N. J. Eq. 570, 70 Atl. 687; L. R. 2 P. & D. 428. So also abandonment by the wife, knowing (as she said she did) that the husband would naturally seek other women, was held to be connivance; Richardson v. Richardson, 114 N. Y. Supp. 912. Where a husband wilfully abstains from any attempt to prevent misconduct which he must know is likely to occur, he is held to have connived at such misconduct; 33 L. J. Mat. Cas. 161.

CONNOISSEMENT. In French Law. An instrument, signed by the master of a ship or his agent, containing a description of the goods loaded on a ship, the persons who have sent them, the persons to whom they were sent, and the undertaking to transport them. A bill of lading. Guyot, *Répert. Univ.; Ord. de la Marine*, l. 3, t. 3, art. 1.

CONNUBIUM (Lat.). A lawful marriage. See MARRIAGE; CONCUBINATUS.

CONOCIMIENTO. In Spanish Law. A bill of lading. In the Mediterranean ports it is called *poliza de cargamiento*.

CONQUEST (Lat. *conquiro*, to seek for). **In Feudal Law.** Purchase; any means of obtaining an estate out of the usual course of inheritance.

The estate itself so acquired.

According to Blackstone and Sir Henry Spelman, the word in its original meaning was entirely dissociated from any connection with the modern idea of military subjugation, but was used solely in the sense of purchase. It is difficult and quite profitless to attempt a decision of the question which has arisen, whether it was applied to William's acquisition of England in its original or its popular meaning. It must be allowed to offer a very reasonable explanation of the derivation of the modern signification of the word, that it was still used at that time to denote a technical *purchase*—the prevalent method of *purchase* then, and for quite a long period subsequently, being by driving off the occupant by superior strength. The operation of making a *conquest*, as illustrated by William the Conqueror, was no doubt often afterwards repeated by his followers on a smaller scale; and thus the modern signification became established. On the other hand, it would be much more difficult to derive a general signification of *purchase* from the limited modern one of military subjugation. But the whole matter must remain mainly conjectural; and it is undoubtedly going too far to say, with Burrill, that the meaning assigned by Blackstone is "demonstrated," or, with Wharton, that the same meaning is a "mere idle ingenuity." Fortunately, the question is not of the slightest importance in any respect.

See 17 L. Q. R. 392.

In International Law. The acquisition of the sovereignty of a country by force of arms, exercised by an independent power which reduces the vanquished to submission to its empire.

The intention of the conqueror to retain the conquered territory is generally manifested by formal proclamation of annexation, and when this is combined with a recognized ability to retain the conquered territory, the transfer of sovereignty is complete. A treaty of peace based upon the principle of *uti possidetis* (*q. v.*) is formal recognition of conquest.

The effects of conquest are to confer upon the conquering state the public property of the conquered state, and to invest the former with the rights and obligations of the latter; treaties entered into by the conquered state with other states remain binding upon the annexing state, and the debts of the extinct state must be taken over by it. Conquest likewise invests the conquering state with sovereignty over the subjects of the conquered state. Among subjects of the conquered state are to be included persons domiciled in the conquered territory who remain there after the annexation. The people of the conquered state change their allegiance but not their relations to one another. Leitensdorfer v. Webb, 20 How. (U. S.) 176, 15 L. Ed. 891.

After the transfer of political jurisdiction to the conqueror the municipal laws of the territory continue in force until abrogated by the new sovereign. American Ins. Co. v. Canter, 1 Pet. (U. S.) 511, 7 L. Ed. 242.

CONQUÊTS. In French Law. The name given to every acquisition which the husband and wife, jointly or severally, make during the conjugal community. Thus, whatever is acquired by the husband and wife, either by his or her industry or good fortune, enures to the extent of one half for the benefit of the other. Merlin, *Rép. Conquêt;* Merlin, *Quest., Conquêt.* In Louisiana, these gains are called *acquêts.* La. Civ. Code, art. 2369. The *conquêts* by a former marriage may not be settled on a second wife to prejudice the heirs; 2 Low. C. 175.

CONSANGUINEOUS FRATER. A brother who has the same father. 2 Bla. Com. 231.

CONSANGUINITY (Lat. *consanguis*, blood together).

The relation subsisting among all the different persons descending from the same stock or common ancestor. See Sweezey v. Willis, 1 Brad. Surr. R. (N. Y.) 495.

Having the blood of some common ancestor. Blodget v. Brinsmaid, 9 Vt. 30.

Collateral consanguinity is the relation subsisting among persons who descend from the same common ancestor, but not from each other. It is essential, to constitute this relation, that they spring from the same common root or stock, but in different branches.

Lineal consanguinity is that relation which exists among persons where one is descended from the other, as between the son and the father, or the grandfather, and so upward in a direct ascending line; and between the father and the son, or the grandson, and so downwards in a direct descending line.

In computing the degree of lineal consanguinity existing between two persons, every generation in the direct course of relationship between the two parties makes a degree; and the rule is the same by the canon, civil, and common law.

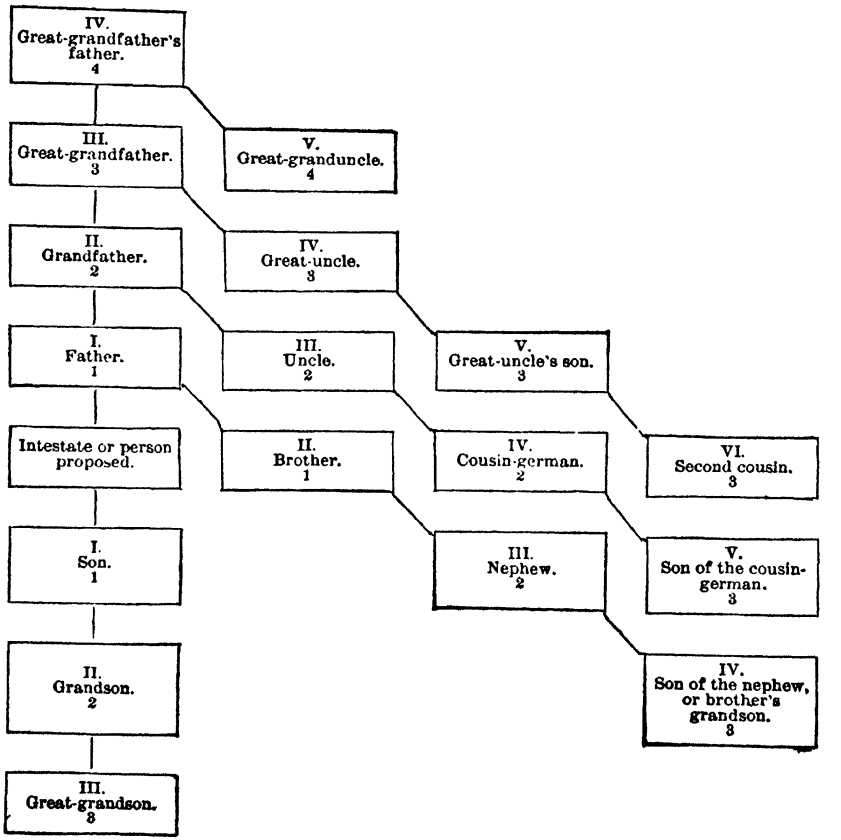
The mode of computing degrees of collateral consanguinity at the common and by the canon law is to discover the common ancestor, to begin with him to reckon downwards, and the degree the two persons, or the more remote of them, is distant from the ancestor, is the degree of kindred subsisting between them. For instance, two brothers are related to each other in the first degree, because from the father to each of them is one degree. An uncle and a nephew are related to each other in the second degree, because the nephew is two degrees distant from the common ancestor; and the rule of computation is extended to the remotest degrees of collateral relationship.

The method of computing by the civil law is to begin at either of the persons in question, and count up to the common ancestor, and then downwards to the other person, calling it a degree for each person, both as-

cending and descending, and the degrees they stand from each other is the degree in which they stand related. Thus, from a nephew to his father is one degree; to the grandfather, two degrees; and then to the uncle three; which points out the relationship.

The following table, in which the Roman numeral letters express the degrees by the civil law, and those in Arabic figures those by the common law, will fully illustrate the subject.

The mode of the civil law is preferable, for it points out the actual degree of kindred in all cases; by the mode adopted by the common law, different relations may stand in the same degree. The uncle and nephew stand related in the second degree by the common law, and so are two first cousins, or two sons of two brothers; but by the civil law the uncle and nephew are in the third degree, and the cousins are in the fourth. The mode of computation, however, is immaterial; for both will establish the same person to be the heir; 2 Bla. Com. 202.



CONSCRIPTION. A compulsory enrolment of men for military service; draft. The body of conscripts. Stand. Dict.

A military force was raised by conscription under the acts of July 17, 1862, March 3, 1863, and February 10, 1864. They provided for a national enrolment under the authority of the United States, for an apportionment of quotas among the states, and authorized the quotas to be obtained in the several districts into which the states were divided. Certain classes of persons were exempt, and drafted men were released upon furnishing acceptable substitutes or by the payment of a statutory sum of money. Davis, Mil. Law. 51.

CONSEIL D'ÉTAT. This is one of the oldest of French institutions, its origin dating back to 1302. Under a law of 1879 it was reorganized as follows: President, the keeper of the seals, who at the same time is invariably the Minister of Justice. There are thirty-two councillors (ordinary) and eighteen councillors (extraordinary) and

thirty assistant councillors. It decides upon state questions and measures proposed for legislation, submitted to it by the President of the Republic and by the members of the Cabinet. It advises in connection with bills submitted by Parliament for its consideration and bills prepared by the government, and proposed decrees. Matters relating to public administration come within the scope of its duties. Coxe, Manual of French Law.

CONSEILLE DE FAMILLE (Fr.). A family council, which see.

CONSENSUAL CONTRACT. In Civil Law. A contract completed by the consent of the parties merely, without any further act.

The contract of sale, among the civilians, is an example of a consensual contract, because the moment there is an agreement between the seller and the buyer as to the thing and the price, the vendor and the purchaser have reciprocal actions. On the contrary, on a loan, there is no action by the lender or borrower, although there may have been consent, until the thing is delivered or the money counted: Pothier, Obl. pt. 1, c. 1, s. 1, art 2;. 1 Bell, Comm. 435.

CONSENSUS AD IDEM. An agreement of parties to the same thing; a meeting of minds. See AGREEMENT.

CONSENT (Lat. *con*, with, together, *sentire*, to feel). A concurrence of wills.

Express consent is that directly given, either *viva voce* or in writing.

Implied consent is that manifested by signs, actions, or facts, or by inaction or silence, from which arises an inference that the consent has been given.

Consent supposes a physical power to act, a moral power of acting, and a serious, determined, and free use of these powers. Fonblanque, Eq. b. 1, c. 2, s. 1. Consent is implied in every agreement. See AGREEMENT; CONTRACT.

Where a power of sale requires that the sale should be with the consent of certain specified individuals, the fact of such consent having been given ought to be evinced in the manner pointed out by the creator of the power, or such power will not be considered as properly executed; 10 Ves. Ch. 308, 378. See as to consent in vesting or divesting legacies; 2 V. & B. 234; 3 Ves. Ch. 239; 12 *id.* 19; 3 Bro. C. C. 145; 1 Sim. & S. 172. As to implied consent arising from acts, see ESTOPPEL IN PAIS.

See Hakm Chand, Law of Consent.

In Criminal Law. No act shall be deemed a crime if done with the consent of the party injured, unless it be committed in public, and is likely to provoke a breach of the peace, or tends to the injury of a third party; provided no consent can be given which will deprive the consenter of any inalienable right; A. & E. Encyc; Desty, Cr. L. § 33. The one who gives consent must be capable of doing so; 1 Whar. Cr. L. § 146; Hadden v. People, 25 N. Y. 373. But by statutes in various states a female child under a certain specified age cannot consent to sexual intercourse. See RAPE.

CONSENT JUDGMENT. One entered by agreement of the parties.

Proceedings at the instance of one party to a cause are not taken by consent simply because the other party had notice and did not object; Jennings v. R. Co., 218 U. S. 255, 31 Sup. Ct. 1, 54 L. Ed. 1031.

CONSENT RULE. An entry of record by the defendant, confessing the lease, entry, and ouster by the plaintiff, in an action of ejectment. This was, until recently, used in England, and still is in those states in which ejectment is still retained as a means of acquiring possession of land.

The consent rule contains the following particulars, viz.: *first*, the person appearing consents to be made defendant instead of the casual ejector; *second*, he agrees to appear at the suit of the plaintiff, and, if the proceedings are by bill, to file common bail; *third*, to receive a declaration in ejectment, and to plead not guilty; *fourth*, at the trial of the case, to confess lease, entry, and ouster, and to insist upon his title only; *fifth*, that if, at the trial, the party appearing shall not confess lease, entry, and ouster, whereby the plaintiff shall not be able to prosecute his suit, such party shall pay to the plaintiff the cost of the *non pros.*, and suffer judgment to be entered against the casual ejector; *sixth*, that if a verdict shall be given for the defendant, or the plaintiff shall not prosecute his suit for any other cause than the non-confession of lease, entry, and ouster, the lessor of the plaintiff shall pay costs to the defendant; *seventh*, that, when the landlord appears alone, the plaintiff shall be at liberty to sign judgment immediately against the casual ejector, but that execution shall be stayed until the court shall further order; Ad. Eject. 233. See, also, Jackson v. Stiles, 2 Cow. (N. Y.) 442; Jackson v. Denniston, 4 Johns. (N. Y.) 311.

CONSENTIBLE LINES. See LINE.

CONSEQUENTIAL DAMAGES. Those damages which arise not from the immediate act of the party, but as an incidental consequence of such act. See DAMAGES.

CONSERVATOR (Lat. *conservare*, to preserve). A preserver; one whose business it is to attend to the enforcement of certain statutes.

A delegated umpire or standing arbitrator, chosen to compose and adjust difficulties arising between two parties. Cowell.

A guardian. So used in Connecticut. Woodford v. Webster, 3 Day (Conn.) 472; Treat v. Peck, 5 Conn. 280; Hutchins v. Johnson, 12 Conn. 376, 30 Am. Dec. 622.

See CONSERVATOR TRUCIS.

CONSERVATOR OF THE PEACE. He who hath an especial charge, by virtue of his office, to see that the king's peace be kept.

Before the reign of Edward III., who created justices of the peace, there were sundry persons interested to keep the peace, of whom there were two classes: one of which had the power annexed to the office which they hold; the other had it merely by itself, and were hence called wardens or conservators of the peace. Lambard, *Eirenarchia*, l. 1, c. 3. This latter sort are superseded by the modern justices of the peace; 1 Bla. Com. 349.

The king was the principal conservator of the peace within all his dominions. The lord chancellor or keeper, the lord treasurer, the lord high steward, the lord marshal and lord high constable, all the justices of the court of king's bench (by virtue of their offices), and the master of the rolls (by prescription) were general conservators of the peace throughout the whole kingdom, and might commit all breakers of it, or bind them in recognizances to keep it: the other judges were only so in their own courts. The coroner was also a conservator of the peace within his own county, as also the sheriff, and both of them might take recognizances or security for the peace. Constables, tythingmen, and justices of the peace were also conservators of the peace within their own jurisdiction; and might apprehend all breakers of the peace, and commit them until they found sureties for their keeping it. See Stephen, Hist. Cr. L. 110; Burns Justice; 19 State Tr. (Judgment of Lord Camden).

The judges and other similar officers of the various states, and also of the United States, are conservators of the public peace, being entitled "to hold to the security of the peace and during good behavior."

The Constitution of Delaware (1831) provides that: "The members of the senate and house of representatives, the chancellor, the judges, and the attorney-general shall, by virtue of their offices, be conservators of the peace throughout the state; and the treasurer, secretary, and prothonotaries, registers, recorders, sheriffs, and coroners, shall, by virtue of their offices, be conservators thereof within the counties respectively in which they reside."

CONSERVATOR TRUCIS (Lat.). An official appointed under an English act of 1414 passed to prevent breaches of truces made, or of safe conducts granted, by the king. 2 Holdsw. Hist. E. L. 392.

Such offences are declared to be treason, and such officers are appointed in every port, to hear and determine such cases, "according to the ancient maritime law then practised in the admiral's court as may arise upon the high seas, and with two associates to determine those arising upon land." 4 Bla. Com. 69.

CONSIDER, CONSIDERED. See CONSIDERATUM EST PER CURIAM.

CONSIDERATION. An act or forbearance, or the promise thereof, which is offered by one party to an agreement, and accepted by the other as an inducement to that other's act or promise. Poll. Contr. 91.

Blackstone defines it to be the reason which moves a contracting party to enter into a contract (2 Com. 443); Burgher v. R. Co., 139 Mo. App. 62, 120 S. W. 673; but this definition is manifestly defective because it is within the distinction taken by Patteson, J., who says: "It is not to be confounded with motive, which is not the same thing as consideration. The latter means something which is of value in the eye of the law, moving from the plaintiff, either of benefit to the plaintiff or of detriment to the defendant;" Langd. Sel. Cas. Contr. 168; s. c. 2 Q. B. 851. In distinguishing between consideration and motive a helpful criterion is to be found in the expression "nothing is consideration that is not regarded as such by both parties;" Philpot v. Gruninger, 14 Wall. (U. S.) 570, 577, 20 L. Ed. 743; Ellis v. Clark, 110 Mass. 389, 14 Am. Rep. 609; Sterne v. Bank, 79 Ind. 549, 551.

The price, motive, or matter of inducement to a contract,—whether it be the compensation which is paid, or the inconvenience which is suffered by the party from whom it proceeds. A compensation or equivalent. A cause or occasion meritorious, requiring mutual recompense in deed or in law. Viner, Abr. *Consideration* (A).

Consideration, in a contract, is the *quid pro quo* that the party to whom the promise is made does or agrees to do in exchange for the contract. Phœnix Mut. Life Ins. Co. v. Raddin, 120 U. S. 197, 7 Sup. Ct. 500, 30 L. Ed. 644. See also Pollock, Contracts (1902 Ed.).

It is also defined as "any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labor, detriment, or inconvenience sustained by the plaintiff, however small, if such act is performed or inconvenience suffered by the plaintiff by the consent, express or implied, of the defendant." Tindal, C. J., in 3 Scott 250. According to Kent it must be given in *exchange*, *mutual*, an *inducement* to the contract, *lawful*, and of sufficient *value*, with respect to the assumption. 2 Com. 464.

"The name *consideration* appeared only about the 16th century, and we do not know by what steps it became a settled term of art." Pollock Contr. 170. That it was not borrowed from equity as a modification of the Roman Law *causa*, see CAUSA.

Concurrent considerations are those which arise at the same time or where the promises are simultaneous and reciprocal.

Continuing considerations are those which consist of acts which must necessarily continue over a considerable period of time.

Executed considerations are acts done or values given at the time of making the contract. Leake, Contr. 18, 612.

Executory considerations are promises to do or give something at a future day. *Ibid.*

Good considerations are those of blood, natural love or affection, and the like.

Motives of natural duty, generosity, and prudence come under this class; 2 Bla. Com. 297; Batty v. Carswell, 2 Johns. (N. Y.) 52; Ewing v. Ewing, 2 Leigh (Va.) 337; Carpenter v. Dodge, 20 Vt. 595; 1 C. & P. 401; Doran v. McConlogue, 150 Pa. 98, 24 Atl. 357; Mascolo v. Montesanto, 61 Conn. 50, 23 Atl. 714, 29 Am. St. Rep. 170. The only purpose for which a *good* consideration may be effectual is to support a covenant to stand seized to uses, in favor of wife, child or blood relation. It is good

against a grantor when it has been executed; Chitty, Contr. 28; so of a gift; Candee v. Savings Bank, 81 Conn. 372, 71 Atl. 551, 22 L. R. A. (N. S.) 568; but may be void against creditors and subsequent bona fide purchasers for value; Stat. 27 Eliz. c. 4; 10 B. & C. 606; Patterson v. Mills, 69 Ia. 755, 28 N. W. 53; Shep. Touchst. 512; Leake Contr. 442.

The term is sometimes used in the sense of a consideration valid in point of law; and it then includes a valuable as well as a meritorious consideration; Hodgson v. Butts, 3 Cra. (U. S.) 140, 2 L. Ed. 391; Lang v. Johnson, 24 N. H. 302; 2 Madd. 430; 3 Co. 81; Ambl. 598. Generally, however, *good* is used in antithesis to *valuable*.

Illegal considerations are acts, which if done or promises which if enforced, would be prejudicial to the public interest. Harriman, Cont. 101.

Impossible considerations are those which cannot be performed.

Moral considerations are such as are based upon a moral duty.

Past consideration is an act done before the contract is made, and is ordinarily by itself no consideration for a promise; Anson, Contr. 82. Pollock considers that whether a past benefit is, in any case, a good consideration is a question not free from uncertainty. On principle it should not be. Possible exceptions might be services rendered on request, without definite promise of reward (see Hob. 105) and voluntarily doing something which one was legally bound to do. Also a promise to pay a debt barred by the statute of limitations; but he considers that none of these exceptions are logical. See Poll. Contr. 170.

Valuable considerations are either some benefit conferred upon the party by whom the promise is made, or upon a third party at his instance or request; or some detriment sustained, at the instance of the party promising, by the party in whose favor the promise is made. Doct. & Stud. 179; Townsley v. Sumrall, 2 Pet. (U. S.) 182, 7 L. Ed. 386; Violett v. Patton, 5 Cra. (U. S.) 142, 3 L. Ed. 61; Wright v. Wright, 1 Litt. (Ky.) 183; Powell v. Brown, 3 Johns. (N. Y.) 100; Brewster v. Silence, 8 N. Y. 207; Forster v. Fuller, 6 Mass. 58, 4 Am. Dec. 87; Lemaster v. Burckhart, 2 Bibb (Ky.) 30; Wooldridge v. Cates, 2 J. J. Marsh. (Ky.) 222; Farmer v. Stewart, 2 N. H. 97; Shenk v. Mingle, 13 S. & R. (Pa.) 29; Tompkins v. Philips, 12 Ga. 52; Odincal v. Barry, 24 Miss. 9; Dunbar v. Bonesteel, 3 Scam. (Ill.) 33; Taylor v. Meek, 4 Blackf. (Ind.) 388; 3 C. B. 321; Hodge v. Powell, 96 N. C. 67, 2 S. E. 182, 60 Am. Rep. 401. The detriment to the promisee must be a detriment on entering into the contract and not from the breach of it; Ridgway v. Grace, 2 Misc. 293, 21 N. Y. Supp. 934.

"A valuable consideration may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." L. R. 10 Ex. 162. See Train v. Gold, 5 Pick. (Mass.) 380.

A valuable consideration is usually in some way pecuniary, or convertible into money; and a very slight consideration, provided it be valuable and free from fraud, will support a contract; Lawrence v. McCalmont, 2 How. (U. S.) 426, 11 L. Ed. 326; Phelps v. Stewart, 12 Vt. 259; Upson v. Raiford, 29 Ala. 188; Harlan v. Harlan, 20 Pa. 303; Sanborn v. French, 22 N. H. 246; 11 Ad. & E. 983; Mathews v. Meek, 23 Ohio St. 292. Valuable considerations are divided by the civilians into four classes, which are given, with literal translations: *Do ut des* (I give that you may give), *Facio ut facias* (I do that you may do), *Facio ut des* (I do that you may give), *Do ut facias* (I give that you may do).

Consideration has been treated as the very life and essence of a contract; and a parol contract or promise for which there was no consideration could not be enforced at law; Reading R. R. Co. v. Johnson, 7 W. & S. (Pa.) 317; Plowd. 308; Cumber v. Wane, 1 Smith, Lead. Cas. 606; Mosby v. Leeds, 3 Call (Va.) 439; Cook v. Bradley, 7 Conn. 57, 18 Am. Dec. 79; Brown v. Adams, 1 Stew. (Ala.) 51, 18 Am. Dec. 36; Thacher v. Dinsmore, 5 Mass. 301, 4 Am. Dec. 61; Burnet v. Bisco, 4 Johns. (N. Y.) 235; Perrine v. Cheeseman, 11 N. J. L. 174, 19 Am. Dec. 388; Beverleys v. Holmes, 4 Munf. (Va.) 95; Westmoreland v. Walker, 25 Miss. 76; Chase v. Vaughan, 30 Me. 412; Goldsborough v. Gable, 140 Ill. 269, 29 N. E. 722, 15 L. R. A. 294; McNutt v. Loney, 153 Pa. 281, 25 Atl. 1088; Bush v. Rawlins, 89 Ga. 117, 14 S. E. 886; North Atchison Bank v. Gay, 114 Mo. 203, 21 S. W. 479; Brooke, Abr. *Action sur le Case*, 40; such a promise was often termed a *nudum pactum* (*ex nudo pacto non oritur actio*), or *nude pact*. This phrase was undoubtedly borrowed from the Roman law, but its use in English law had no relation whatever to its meaning in the Roman; nor is the word *pact* of the latter in any sense related to the common-law *contract*. The *nudum pactum*, as appears by the note cited *infra* from Pollock, had not anciently in England its modern signification of an agreement without consideration in the sense of the maxim quoted. In an elaborate note to Pollock, Contracts 673, the learned author calls attention to a difference between consideration in the English law and its nearest continental analogies, which difference, he says, has not always been realized. The actual history of the English doctrine is obscure. The most we can affirm is that the general idea was formed somewhere in the latter part of the fifteenth century. At the same time or a little later, *nudum pactum* lost its ancient meaning (viz.: an agreement not made by specialty so as to support an action of covenant or falling within one of certain classes so as to support an action of debt), and came to mean what it does now. The word consideration in the sense now before us came into use, at least as a settled term of art, still later. In the early writers, *consideration* always means the judgment of a court.

The early cases of actions of assumpsit show by negative evidence which is almost conclusive that in the first half of the 15th century, the doctrine of consideration was quite unformed, though the phrase *quid pro quo* is earlier. But in 1459 there was a case which showed that an action of debt would then lie on any consideration executed. In the Doctor and Student (A. D. 1530) we find substantially the modern doctrine. So far as the writer of that work knows, he finds the first full discussion of consideration by that name in Plowden's report of Sharington *v.* Strotton, Plowd. 298.

The question of consideration was of importance in the learning of Uses before the statute, and the reflection is obvious that both the general conception and the name of Consideration have had their origin in the court of chancery in the law of uses and have been thence imported into the law of contracts rather than developed by the common-law courts. On this hypothesis, a connection with the Roman *causa* may be suggested with some plausibility. But see CAUSA.

The same writer proceeds to say that in the process thus sketched out some steps are conjectural, and considers that the materials are not ripe for a positive conclusion and will not be until the unpublished records of mediæval English law shall be competently edited. See Holmes, Common Law 253, where a different theory of the origin of consideration is given as being a generalization from the technical requirements of the action of debt in its earlier form.

The theory on which the phrase *nudum pactum* was wrongly applied was that the maxim signified that a *gratuitous promise* to do or pay anything on the one side, without any compensation on the other, could only be enforced, in the Roman law, when made (or clothed) with proper words or formalities—*pactum verbis prescriptis vestitum;* Vinnius, *Com. de Inst.* lib. 3, *de verborum obligationibus*, tit. 16, p. 677; Cod. lib. 7, tit. 52. This solemnity it was argued had much the force of our seal, which imported consideration, as it was said, meaning that the formality implied *consideration* in its ordinary sense *i. e.*, deliberation, caution, and fulness of assent; Hare, Contr. 146; 3 Bingh. 111; 3 Burr. 1639; Wing v. Chase, 35 Me. 260; Augusta Bank v. Hamblet, 35 Me. 491; Erickson v. Brandt, 53 Minn. 10, 55 N. W. 62; but see Winter v. Goebner, 2 Colo. App. 259, 30 Pac. 51. There was, however, the distinction often lost sight of but which ought to be made that even on the theory that the vitality of a seal was solely as a token of the existence of a consideration, under the common law it was not the fact that the instrument was under seal which gave it vitality, but the consideration whose existence is implied therefrom, while, under the civil law, the subject of consideration bore no such relation to the contract as it does under the English law even accepting the theory of Stephen and other writers stated under title CONTRACT, *q. v.*, that the consideration is not an essential element of a contract,—necessary to its existence. Under the civil law it was of the essence of certain contracts that they should be gratuitous, and those based upon a consideration constituted only a single division called commutative contracts, which again was subdivided into the four classes represented by the formula quoted, *supra, do et des*, etc.

While, therefore, the Roman law doubtless exercised a large influence upon the English law of contracts, the subject of consideration particularly has been overlaid with erroneous theories, and the ascertainment of its true bearing long postponed, by the pursuit of false analogies, due probably to the early adoption of such phrases as the above and their incorporation into the common law, to express superficial impressions created by them rather than the meaning attributed to them by the Roman jurists.

These analogies have, however, been in recent years the subject of more careful investigation, and the study of the early English authorities and a greatly increased interest in, and knowledge of, the Roman law, have resulted in disturbing many of the theories of consideration in its true relation to the contract and the true meaning of the seal as making a contract actionable which would not be so if by parol.

The consideration is generally conclusively presumed from the nature of the contract, when sealed; Grubb v. Willis, 11 S. & R. (Pa.) 107; but in some of the states the want or failure of a consideration may be a good defence against an action on a sealed instrument or contract; Solomon v. Kimmel, 5 Binn. (Pa.) 232; Case v. Boughton, 11 Wend. (N. Y.) 106; Leonard v. Bates, 1 Blackf. (Ind.) 173; Coyle's Ex'x v. Fowler, 3 J. J. Marsh. (Ky.) 473; Peebles v. Stephens, 1 Bibb (Ky.) 500; Matlock v. Gibson, 8 Rich. (S. C.) 437.

While one cannot deny the existence of some consideration, so as to defeat a deed; McGee v. Allison, 94 Ia. 527, 63 N. W. 322; Weissenfels v. Cable, 208 Mo. 515, 106 S. W. 1028; it may be proved to have been greater or less or different in character, as property or services, instead of money, and the like; Jost v. Wolf, 130 Wis. 37, 110 N. W. 232; to the same effect; Jackson v. R. Co., 54 Mo. App. 636; Cheesman v. Nicholl, 18 Colo. App. 174, 70 Pac. 797; Martin v. White, 115 Ga. 866, 42 S. E. 279. The receipt for the consideration money is only *prima facie* evidence of its payment, which may be rebutted by parol testimony; Smith v. Arthur, 110 N. C. 400, 15 S. E. 197; R.

A. Sherman's Sons Co. v. Mfg. Co., 82 Conn. 479, 74 Atl. 773. Parol evidence is admissible to prove a promise to pay a consideration in addition to that expressed in the deed; Allen v. Rees, 136 Ia. 423, 110 N. W. 583; 8 L. R. A. (N. S.) 1137; Henry v. Zurflieh, 203 Pa. 440, 53 Atl. 243; but if the consideration is contractual, such evidence is not admissible; Baum v. Lynn, 72 Miss. 932, 18 South. 428, 30 L. R. A. 441.

See note in 25 L. R. A. (N. S.) 1194.

"The truth is that neither consideration or anything of the kind ever was necessary in the case of a deed and . . . a mere acknowledgment of consideration received, forming no part of a contract, is only evidence, and hence may be qualified or disputed altogether." Bigelow, Estoppel, 478.

Where a deed states a consideration grossly misrepresenting the value of the property for the purpose of cheating and defrauding another who relies on such representations, such statement of value may be made the basis of an action for fraud; Leonard v. Springer, 197 Ill. 532, 64 N. E. 299.

Negotiable instruments also, as bills of exchange and promissory notes, by statute 3 & 4 Anne (adopted as common law or by re-enactment in the United States), carry with them *prima facie* evidence of consideration; 4 Bla. Com. 445. See BILLS OF EXCHANGE; NEGOTIABLE INSTRUMENTS.

The consideration, if not expressed (when it is *prima facie* evidence of consideration), in all parol contracts (oral or written), must be proved; this may be done by evidence *aliunde;* Thompson v. Blanchard, 3 N. Y. 335; Tingley v. Cutler, 7 Conn. 291; Whitney v. Stearns, 16 Me. 394; Bean v. Burbank, 16 Me. 458, 33 Am. Dec. 681; Arms v. Ashley, 4 Pick. (Mass.) 71; Cummings v. Dennett, 26 Me. 397; Patchin v. Swift, 21 Vt. 292; Sloan v. Gibson, 4 Mo. 33.

Moral or equitable considerations are not sufficient to support an express or implied promise. They are only sufficient as between the parties in conveyances by deed, and in transfers, not by deed, accompanied by possession; Scott v. Carruth, 9 Yerg. (Tenn.) 418; 3 B. & P. 249. See 11 A. & E. 438; Mills v. Wyman, 3 Pick. (Mass.) 207. These purely moral obligations are left by the law to the conscience and good faith of the individual. Baron Parke says, "A mere moral consideration is *nothing;*" 9 M. & W. 501; Kennerly v. Martin, 8 Mo. 698. See In re James, 78 Hun 121, 28 N. Y. Supp. 992. It was at one time held in England that an express promise made in consequence of a previously existing moral obligation created a valid contract; per Mansfield, C. J., Cowp. 290; 5 Taunt. 36. This doctrine was at one time received in the United States, but appears now to be repudiated there; Poll. Contr. 168; except in Pennsylvania; Cornell v. Vanartsdalen, 4 Pa. 364; Hemphill v. McClimans, 24 Pa. 370. Where one is induced to become a surety for another's husband and the promise by the other party is void on account of coverture, a subsequent promise made after the disability was removed is void for lack of consideration; Hollaway's Assignee v. Rudy, 60 S. W. 650, 22 Ky. L. Rep. 1406, 53 L. R. A. 353.

It is often said that a moral obligation is sufficient consideration; but it is a rule, that such moral obligation must be one which has once been valuable and enforceable at law, but has ceased to be so by the operation of the statute of limitations, or by the intervention of bankruptcy for instance. The obligation, in such case, remains equally strong on the conscience of the debtor. The rule amounts only to a permission to waive certain positive rules of law as to *remedy;* Poll. Contr. 623; 2 Bla. Com. 445; Cowp. 290; 3 B. & P. 249, n.; 2 East 506; 2 Ex. 90; 8 Q. B. 487; Way v. Sperry, 6 Cush. (Mass.) 238, 52 Am. Dec. 779; Turner v. Chrisman, 20 Ohio 332; Eble v. Judson, 24 Wend. (N. Y.) 97; Warren v. Whitney, 24 Me. 561, 41 Am. Dec. 406; Paul v. Stackhouse, 38 Pa. 306; Smith v. Ware, 13 Johns. (N. Y.) 259; Cook v. Bradley, 7 Conn. 57, 18 Am. Dec. 79; Hawley v. Farrar, 1 Vt. 420; Biddle v. Moore, 3 Pa. 172; Willing v. Peters, 12 S. & R. (Pa.) 177; Levy v. Cadet, 17 S. & R. (Pa.) 126, 17 Am. Dec. 650; Viser v. Bertrand, 14 Ark. 267; Pritchard v. Howell, 1 Wis. 131, 60 Am. Dec. 363; Trumball v. Tilton, 21 N. H. 129; Ellicott v. Turner, 4 Md. 476. See Easley v. Gordon, 51 Mo. App. 637; In re James, 78 Hun 121, 28 N. Y. Supp. 992; Brooks v. Bank, 125 Pa. 394, 17 Atl. 418. But now, by statute, in England a promise to pay a debt barred by bankruptcy or one contracted during infancy is void; Leake, Contr. 318. If the *moral duty* were once a *legal* one which could have been made available in defence, it is equally within the rule; Nash v. Russell, 5 Barb. (N. Y.) 556; Watkins v. Halstead, 2 Sandf. (N. Y.) 311; Phelan v. Kelley, 25 Wend. (N. Y.) 389; Mardis v. Tyler, 10 B. Monr. (Ky.) 382; Womack v. Womack, 8 Tex. 397, 58 Am. Dec. 119. See as to moral obligation as a consideration, 32 Cent. L. J. 53.

An express promise to perform a previous legal obligation, without any new consideration, does not create a new obligation; 7 Dowl. 781; Reynolds v. Nugent, 25 Ind. 328; 15 C. B. 295; 16 Q. B. 689; Vanderbilt v. Schreyer, 91 N. Y. 401; Withers v. Ewing, 40 Ohio St. 400; Conover v. Stillwell, 34 N. J. L. 54; Cobb v. Cowdery, 40 Vt. 28, 94 Am. Dec. 370; Runnamaker v. Cordray, 54 Ill. 303; Warren v. Hodge, 121 Mass. 106. The promise of one party under an existing contract to perform his obligation is not a valid consideration for a new promise by the other party; Wescott v. Mitchell, 95 Me. 377, 50 Atl. 21; so where one party promises to do less than

he has already agreed to do and the other party promises to do more than he is obliged to do; Weed v. Spears, 193 N. Y. 289, 86 N. E. 10; and where the consideration of the new contract is services which one is legally bound to perform under a pre-existing contract; Alaska Packers' Ass'n v. Domenico, 117 Fed. 99, 54 C. C. A. 485; *contra*, where additional compensation is promised to induce another to complete his contract after abandonment on account of unforeseen and unanticipated difficulties; Linz v. Schuck, 106 Md. 220, 67 Atl. 286, 11 L. R. A. (N. S.) 789, 124 Am. St. Rep. 481, 14 Ann. Cas. 495. Whether (a) the performance of an existing contractual obligation or (b) a new promise of such performance made to a new promisee is a good consideration for a new contract has been much discussed by legal writers. That neither is good is maintained by Anson and Williston; that both are good is the view of Ames (who even holds that a new promise of the same thing to the same promisee may be good) and Harriman; that (a) is not good, but (b) is, is the opinion of Langdell, Leake and Pollock and (for not quite the same reason) Beale. See 20 L. Q. R. 9. See Articles on consideration in 9 Harv. L. R. 233; 12 *id.* 517; 17 *id.* 71; 17 Yale L. Journal, 338; 17 L. Q. R. 415.

A valuable consideration alone is good as against subsequent purchasers and attaching creditors; and one which is rendered at the request, express or implied, of the promisor; Dy. 172, n.; 1 Rolle, Abr. 11, pl. 2, 3; 1 Ld. Raym. 312; 1 Wms. Saund. 264, n. (1); 6 Ad. & E. 718; 3 C. & P. 36; 6 Am. & W. 485; 3 Q. B. 234; Cro. Eliz. 442; Hort v. Norton, 1 McCord (S. C.) 22.

Among valuable considerations may be mentioned these:

In general, the waiver of any legal or equitable right at the request of another is sufficient consideration for a promise; Knapp v. Lee, 3 Pick. (Mass.) 452; Farmer v. Stewart, 2 N. H. 97; Nicholson v. May, 1 Wright (Ohio) 660; Smith v. Weed, 20 Wend. (N. Y.) 184, 32 Am. Dec. 525; Williams v. Alexander, 39 N. C. 207; 4 B. & C. 8; Union Bank v. Geary, 5 Pet. (U. S.) 114, 8 L. Ed. 60; 4 Ad. & E. 108; Heitsch v. Cole, 47 Minn. 320, 50 N. W. 235; Fraser v. Backus, 62 Mich. 540, 29 N. W. 92; Vogel v. Meyer, 23 Mo. App. 427.

Forbearance for a certain or reasonable time to institute a suit upon a valid or doubtful claim, but not upon one utterly unfounded. This is a benefit to one party, the promisor, and an injury to the other, the promisee; 1 Rolle, Abr. 24, pl. 33; Com. Dig. *Action on the Case upon Assumpsit* (B, 1); L. R. 7 Ex. 235; L. R. 10 Q. B. 92; L. R. 2 C. P. 196; Busby v. Conoway, 8 Md. 55, 63 Am. Dec. 688; King v. Upton, 4 Greenl. (Me.) 387, 16 Am. Dec. 266; Elting v. Vanderlyn, 4 Johns. (N. Y.) 237; Jennison v. Stafford, 1 Cush. (Mass.) 168, 48 Am. Dec. 594; Giles v. Ackles, 9 Pa. 147, 49 Am. Dec. 551; McKinley v. Watkins, 13 Ill. 140; Gilman v. Kibler, 5 Humphr. (Tenn.) 19; Colgin v. Henley, 6 Leigh. (Va.) 85; 21 E. L. & Eq. 199; Mills' Heirs v. Lee, 6 T. B. Monr. (Ky.) 91, 17 Am. Dec. 118; Hargroves v. Cooke, 15 Ga. 321; Boyd v. Freize, 5 Gray (Mass.) 553; Tappan v. Campbell, 9 Yerg. (Tenn.) 436; Sage v. Wilcox, 6 Conn. 81; 1 Bulstr. 41; Lonsdale v. Brown, 4 Wash. C. C. 148, Fed. Cas. No. 8494; Downing v. Funk, 5 Rawle (Pa.) 69; Hakes v. Hotchkiss, 23 Vt. 235; Morgan v. Bank, 44 Ill. App. 582; 18 C. B. 273; Calkins v. Chandler, 36 Mich. 320, 24 Am. Rep. 593; Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279; Edgerton v. Weaver, 105 Ill. 43; Johnston Harvester Co. v. McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39. "If an intending litigant *bona fide* forbears the right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value." Lord Bowen in 32 Ch. Div. 266, 291. An agreement to forbear suit, though for an indefinite period, is sufficient consideration; Traders' Nat. Bank of San Antonio v. Parker, 130 N. Y. 415, 29 N. E. 1094; Mathews v. Seaver, 34 Neb. 592, 52 N. W. 283; Lancaster v. Elliot, 42 Mo. App. 503.

An invalid or not enforceable agreement to forbear is not a good consideration; suit may be brought immediately after the promise is made. The forbearance must be an enforceable agreement for a reasonable time; Hardr. 5; 4 M. & W. 795; King v. Upton, 4 Greenl. (Me.) 387, 16 Am. Dec. 266; Rix v. Adams, 9 Vt. 233, 31 Am. Dec. 619; L. R. 8 Eq. 36; Tucker v. Ronk, 43 Ia. 80; Prater v. Miller, 25 Ala. 320, 60 Am. Dec. 521; Kidder v. Blake, 45 N. H. 530; Mulholland v. Bartlett, 74 Ill. 58; Cline v. Templeton, 78 Ky. 550. But if a meritorious claim is made in good faith, a forbearance to prosecute it may be a good consideration for a promise, although on the facts or on the law the suit would have failed of success; L. R. 5 Q. B. 449; Rue v. Meirs, 43 N. J. Eq. 377, 12 Atl. 369; 25 L. T. R. 504; 32 Ch. Div. 269; Hewett v. Currier, 63 Wis. 387, 23 N. W. 884; Fish v. Thomas, 5 Gray (Mass.) 45, 66 Am. Dec. 348; 10 Harv. L. Rev. 113.

Forbearance to prosecute a claim honestly made but not legally valid is no consideration for a promise; Price v. Bank, 62 Kans. 743, 64 Pac. 639.

The prevention of litigation is a valid and sufficient consideration; for the law favors the settlement of disputes. Thus, a compromise or mutual submission of demands to arbitration is a highly favored consideration at law; Van Dyke v. Davis, 2 Mich. 145; Zane's Devisees v. Zane, 6 Munf. (Va.) 406; Taylor v. Patrick, 1 Bibb (Ky.) 168; Truett v. Chaplin, 11 N. C. 178; Stoddard v. Mix, 14 Conn. 12; Barlow v. Ins. Co., 4

Metc. (Mass.) 270; Burnham v. Dunn, 35 N. H. 556; Blake v. Peck, 11 Vt. 483; Field v. Weir, 28 Miss. 56; Mayo v. Gardner, 49 N. C. 359; Pounds v. Richards, 21 Ala. 424; Stoddart v. Mix, 14 Conn. 12; Banks v. Searles, 2 McMull. (S. C.) 356; Coleman v. Frum, 3 Scam. (Ill.) 378; Clarke v. McFarland's Ex'rs, 5 Dana (Ky.) 45; 21 E. L. & Eq. 199; 5 B. & Ald. 117; Battle v. McArthur, 49 Fed. 715; Robson v. Logging Co., 43 Fed. 364; White v. Hoyt, 73 N. Y. 514; Barnes v. Ryan, 66 Hun 170, 21 N. Y. Supp. 127; Swem v. Green, 9 Colo. 358, 12 Pac. 202; Moon v. Martin, 122 Ind. 211, 23 N. E. 668; 32 Ch. D. 266.

The giving up a suit instituted to try a question respecting which the law is doubtful, or is supposed by the parties to be doubtful, is a good consideration for a promise; Poll. Contr. 180; Leake, Contr. 626; L. R. 5 Q. B. 241; Hunter v. Lanius, 82 Tex. 677, 18 S. W. 201; Hamaker v. Eberley, 2 Binn. (Pa.) 509, 4 Am. Dec. 477; 2 C. B. 548; 4 East 455; Feeter v. Weber, 78 N. Y. 334; Parker v. Enslow, 102 Ill. 272, 40 Am. Rep. 588; Livingston v. Smith, 5 Pet. (U. S.) 98, 8 L. Ed. 57; Easton v. Easton, 112 Mass. 438; Grandin v. Grandin, 49 N. J. Law, 508, 9 Atl. 756, 60 Am. Rep. 642; Feeter v. Weber, 78 N. Y. 334; Prout v. Fire Dist., 154 Mass. 453, 28 N. E. 679, and cases cited.

Incurring a legal liability to a third party is a valid consideration for a promise by the party at whose request the liability was incurred; L. R. 8 Eq. 134.

Refraining from the use of liquor and tobacco for a certain time at the request of another, is a sufficient consideration for a promise by the latter to pay a sum of money; Hamer v. Sidway, 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693.

The assignment of a debt or chose in action (unless void by reason of maintenance) with the consent of the debtor, is a good consideration for the debtor's promise to pay the assignee. It is merely a promise to pay a debt due, and the consideration is the discharge of the debtor's liability to the assignor; 4 B. & C. 525; 13 Q. B. 548; Whittle v. Skinner, 23 Vt. 532; Harrison v. Knight, 7 Tex. 47; Edson v. Fuller, 22 N. H. 185; 10 J. B. Moo. 34; 2 Bingh. 437; 1 Cr. M. & R. 430; Morse v. Bellows, 7 N. H. 549, 28 Am. Dec. 372. Work and service are perhaps the most common considerations.

In the case of deposit or mandate it was once held that there was no consideration; Yelv. 4, 128; Cro. Eliz. 883; the reverse is now usually maintained; 10 J. B. Moo. 192; 2 M. & W. 143; M'Cl. & Y. 205; Robinson v. Threadgill, 35 N. C. 39; Clark v. Gaylord, 24 Conn. 484; Coggs v. Bernard, 1 Sm. Lead. Cas. 354.

In these cases there does not appear to be any benefit arising from the bailment to the promisor. The definitions of mandate and deposit exclude this. Nor does any injury at the time accrue to the promisee; the bailment is for his benefit entirely.

Trust and confidence in another are said to be the considerations which support this contract. But we think parting with the possession of a thing may be considered an injury to the promisee, for which the prospect of return was the consideration held out by the promisor.

Mutual promises made at the same time are concurrent considerations, and will support each other if both be legal and binding; Cro. Eliz. 543; 6 B. & C. 255; 3 B. & Ad. 703; 3 E. L. & Eq. 420; Dorsey v. Packwood, 12 How. (U. S.) 126, 13 L. Ed. 921; Babcock v. Wilson, 17 Me. 372, 35 Am. Dec. 263; Forney v. Shipp, 49 N. C. 527; Nott v. Johnson, 7 Ohio St. 270; Cherry v. Smith, 3 Humphr. (Tenn.) 19, 39 Am. Dec. 150; Miller v. Drake, 1 Cai. (N. Y.) 45; Howe v. O'Mally, 5 N. C. 287, 3 Am. Dec. 693; McKinley v. Watkins, 13 Ill. 140; Byrd v. Fox, 8 Mo. 574; Flanders v. Wood, 83 Tex. 277, 18 S. W. 572; Earle v. Angell, 157 Mass. 294, 32 N. E. 164; Bracco v. Tighe, 75 Hun 140, 27 N. Y. Supp. 34. Yet the promise of an infant is a consideration for the promise of an adult. The infant may avoid his contract, but the adult cannot; Boyden v. Boyden, 9 Metc. (Mass.) 519; McGinn v. Shaeffer, 7 Watts (Pa.) 412; Hunt v. Peake, 5 Cow. (N. Y.) 475, 15 Am. Dec. 475; Pool v. Pratt, 1 D. Chipm. (Vt.) 252; Cannon v. Alsbury, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709; Eubanks v. Peak, 2 Bail. (S. C.) 497; 3 Maule & S. 205. While a contract is executory, an agreement by one party to modify it is a consideration for a like agreement by the other; Dickson v. Owens, 134 Ill. App. 561; and a contract of employment is not lacking in mutuality because the party employed does not bind himself to continue in the employment for a definite period; Newhall v. Printing Co., 105 Minn. 44, 117 N. W. 228, 20 L. R. A. (N. S.) 899.

Marriage is a *valuable* consideration; Whelan v. Whelan, 3 Cow. (N. Y.) 537; Huston's Adm'r v. Cantril, 11 Leigh (Va.) 136; Magniac v. Thompson, 7 Pet. (U. S.) 348, 8 L. Ed. 709; Donallen v. Lennox, 6 Dana (Ky.) 89; 2 D. F. & J. 566; Edwards v. Martin, 39 Ill. App. 145; Prignon v. Doussat, 4 Wash. 199, 29 Pac. 1046, 31 Am. St. Rep. 914; Whitehill's Lessee v. Lousey, 2 Yeates (Pa.) 109; Nally v. Nally, 74 Ga. 669, 58 Am. Rep. 458. A promise by one to support another in consideration of the other party's release of the first party from his promise to marry her, is valid and enforceable; Henderson v. Spratlen, 44 Colo. 278, 98 Pac. 14, 19 L. R. A. (N. S.) 655.

Subscriptions to shares in a chartered company are said to rest upon sufficient consideration; for the company is obliged to give the subscriber his shares, and he must

pay for them; Pars. Contr. 377; Chester Glass Co. v. Dewey, 16 Mass. 94, 8 Am. Dec. 128; New Bedford & B. Turnpike Corp. v. Adams, 8 Mass. 138, 5 Am. Dec. 81; Curry v. Rogers, 21 N. H. 247; Kennebec & P. R. Co. v. Jarvis, 34 Me. 360; Barnes v. Perine, 15 Barb. (N. Y.) 249; Selma & T. R. Co. v. Tipton, 5 Ala. 787, 39 Am. Dec. 344; State Treasurer v. Cross, 9 Vt. 289, 31 Am. Dec. 626.

On the subject of voluntary subscriptions for charitable purposes there is much confusion among the authorities; Ives v. Sterling, 6 Metc. (Mass.) 310. A promise of a subscription for the purchase of a church site, followed by the subsequent contract of the church for the land, is supported by a valid consideration; First Universalist Church v. Pungs, 126 Mich. 670, 86 N. W. 235. See SUBSCRIPTION.

Illegal considerations can be no foundation for a contract. Violations of morality, decency, and policy are in contravention of common law: as, contracts to commit, conceal, or compound a crime. So, a contract for *future* illicit intercourse, or in fraud of a third party, will not be enforced. *Ex turpi contractu non oritur actio.* But the act in question is not always a criterion; e. g. as to immoral considerations that which the law considers is whether the promise has a tendency to produce immoral results; hence while a promise of future illicit cohabitation is an illegal consideration; L. R. 16 Eq. 275; Boigneres v. Boulon, 54 Cal. 146; Baldy v. Stratton, 11 Pa. 316; Harriman, Cont. 114; but a promise founded upon past illicit cohabitation is not illegal; Bunn v. Winthrop, 1 Johns. Ch. (N. Y.) 329; but simply voluntary and governed by the same rules as other past executed considerations; Poll. Cont. 262. The illegality created by statute exists when the statute either expressly prohibits a particular thing, or affixes a penalty which implies prohibition, or implies such prohibition from its object and nature; 10 Ad. & E. 815; Donallen v. Lennox, 6 Dana (Ky.) 91; Brown's Adm'rs v. Langford's Adm'rs, 3 Bibb (Ky.) 500; Town of Hinesburgh v. Sumner, 9 Vt. 23, 31 Am. Dec. 599; Armstrong v. Toler, 11 Wheat. (U. S.) 258, 6 L. Ed. 468; Deering v. Chapman, 22 Me. 488, 39 Am. Dec. 592; Gamble v. Grimes, 2 Ind. 392; President, etc., of Springfield Bank v. Merrick, 14 Mass. 322; Sharp v. Teese, 9 N. J. L. 352, 17 Am. Dec. 479; Aspinwall v. Meyer, 2 Sandf. (N. Y.) 186; Hale v. Henderson, 4 Humphr. (Tenn.) 199; Lewis v. Welch, 14 N. H. 294; Caldwell v. Wentworth, *id.* 435; Cornwell v. Holly, 5 Rich. (S. C.) 47; Solomons v. Jones, 3 Brev. (S. C.) 54, 5 Am. Dec. 538; Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759. If any part of the consideration is void as against the law, it is void *in toto;* Woodruff v. Hinman, 11 Vt. 592, 34 Am. Dec. 712; Allen v. Pearce, 84 Ga. 606, 10 S. E. 1015; see Wilcox v. Daniels, 15 R. I. 261, 3 Atl. 204; Buck v. Abbee, 26 Vt. 184, 62 Am. Dec. 564; Widoe v. Webb, 20 Ohio St. 431, 5 Am. Rep. 664; Hazelton v. Sheckels, 202 U. S. 71, 26 Sup. Ct. 567, 50 L. Ed. 939, 6 Ann. Cas. 217; but *contra,* if the promise be divisible and apportionable to any part of the consideration, the promise so far as not attributable to the illegal consideration might be valid; Leake, Contr. 631; 2 M. & G. 167.

A contract founded upon an impossible consideration is void. *Lex neminem cogit ad vana aut impossibilia;* 5 Viner, Abr. 110, 111, *Condition* (C) *a,* (D) *a;* 1 Rolle, Abr. 419; Co. Litt. 206 *a;* 2 B. & C. 474; Leake, Contr. 719. But such impossibility must be a natural or physical impossibility; 7 Ad. & E. 798; Youqua v. Nixon, 1 Pet. C. C. 221, Fed. Cas. No. 18,189; 2 Moore & S. 89; 9 Bingh. 68; but it may be otherwise when the consideration is valid at the time the contract was formed, but afterwards became impossible; Leake, Contr. 719.

An executory consideration which has totally failed will not support a contract when the performance of the consideration forms a condition precedent to the performance of the promise; 2 C. B. 548; New York Life Ins. Co. v. Beebe, 7 N. Y. 369; Fowler v. Shearer, 7 Mass. 14; Woodward v. Cowing, 13 Mass. 216; Pettibone v. Roberts, 2 Root (Conn.) 258; Dean v. Mason, 4 Conn. 428, 10 Am. Dec. 162; Boyd v. Anderson, 1 Ov. (Tenn.) 438, 3 Am. Dec. 762; Treat v. Inhabitants of Orono, 26 Me. 217; Charlton v. Lay, 5 Humphr. (Tenn.) 496; Cabot v. Haskins, 3 Pick. (Mass.) 83; Jarvis v. Sutton, 3 Ind. 289. Sometimes when the consideration partially fails, the appropriate part of the agreement may be apportioned to what remains, if the contract is capable of being severed; 4 Ad. & E. 605; 8 M. & W. 870; Parish v. Stone, 14 Pick. (Mass.) 198, 25 Am. Dec. 378; Carleton v. Woods, 28 N. H. 290; Frazier v. Thompson, 2 W. & S. (Pa.) 235; L. R. 10 Q. B. 491; 1 Q. B. Div. 679; Wilson v. Hentges, 26 Minn. 288, 3 N. W. 338. See BREACH.

A past consideration will not generally be sufficient to support a contract. It is something done before the obligor makes his promise, and, therefore, cannot be a foundation for that promise, unless it has been executed at the request (express or implied) of the promisor. Such a request plainly implies a promise of fair and reasonable compensation; L. R. 8 Ch. 888; Carson v. Clark, 1 Scam. (Ill.) 113, 25 Am. Dec. 79; Doty v. Wilson, 14 Johns. (N. Y.) 378; Gleason v. Dyke, 22 Pick. (Mass.) 393; Hayden v. Inhabitants of Madison, 7 Greenl. (Me.) 76; Abbot v. Third School Dist., 7 Greenl. (Me.) 118; Comstock v. Smith, 7 Johns. (N. Y.) 87; Bulkley v. Landon, 2 Conn. 404; 1 Sm. Lead. Cas. 144, note to Lampleigh v. Brathwait. But a pre-existing obligation will support a promise to perform

that obligation which the law, in the case of a debt, will imply; Harriman, Contr. 83; 5 M. & W. 541; but a past consideration which did not raise an obligation at the time it was furnished, will support no promise whatever; 3 Q. B. 234; Harriman, Contr. 83; where there has been a request for services, a subsequent promise to pay a definite sum for them is evidence of the actual value of the services; *id.* Where a creditor gives an extension of time for payment of a pre-existing debt and takes a mortgage as security he is a purchaser for value; O'Brien v. Fleckenstein, 180 N. Y. 350, 73 N. E. 30, 105 Am. St. Rep. 768; the promise to pay for another's past services to and support of defendant's mother during an illness is valid; Montgomery v. Downey, 116 Ia. 632, 88 N. W. 810; but an agreement to take up a past due note without additional consideration or a request or promise of forbearance against the maker is without consideration; J. H. Queal & Co. v. Peterson, 138 Ia. 514, 116 N. W. 593, 19 L. R. A. (N. S.) 842.

As to time, considerations may be of the past, present, or future. Those which are present or future will support a contract not void for other reasons; Story, Contr. 71. When the consideration is to do a thing hereafter, and the promise has been accepted, and a promise in return founded upon it, the latter promise rests upon sufficient foundation, and is obligatory; Stewart v. Redditt, 3 Md. 67; Hilton v. Southwick, 17 Me. 303, 35 Am. Dec. 253; Andrews v. Pontue, 24 Wend. (N. Y.) 285; Gardner v. Webber, 17 Pick. (Mass.) 407.

The adequacy of the consideration is generally immaterial; L. R. 5 Q. B. 87; 8 A. & E. 745; L. R. 7 Ex. 235; 5 C. B. N. S. 265; 24 L. J. C. P. 271; 16 East 372; Hesser v. Steiner, 5 W. & S. (Pa.) 476; Downing v. Funk, 5 Rawle (Pa.) 69; excepting formerly in England before 31 & 32 Vict. c. 4, in the case of the sale of a reversionary interest or where the inadequacy of the consideration is so gross as of itself to prove fraud or imposition; Judy v. Louderman, 48 Ohio St. 562, 29 N. E. 181. There is no case where mere inadequacy of price, independent of other circumstances has been held sufficient to set aside a contract between parties standing on equal ground and dealing with each other without imposition or oppression; Hind v. Holdship, 2 Watts (Pa.) 104, 26 Am. Dec. 107; Williams v. Jensen, 75 Mo. 681; Smock v. Pierson, 68 Ind. 405, 34 Am. Rep. 269; Wolford v. Powers, 85 Ind. 294, 44 Am. Rep. 16; Wells v. Tucker, 57 Vt. 227; Worth v. Case, 42 N. Y. 369. The adequacy of the consideration does not affect the contract; Lawrence v. McCalmont, 2 How. (U. S.) 426, 11 L. Ed. 326; but the consideration must be real and not merely colorable; one cent has been held not to be a sufficient consideration for a promise to pay $700; Schnell v. Nell, 17 Ind. 29, 79 Am. Dec. 453; and $1 has been held insufficient to support a promise to pay $1000; Shepard v. Rhodes, 7 R. I. 470, 84 Am. Dec. 573; a dollar would be a sufficient consideration for any promise except one to pay a larger sum of money absolutely; Lawrence v. McCalmont, 2 How. (U. S.) 426, 11 L. Ed. 326. A fully executed contract will not be disturbed for want of consideration; Lamb's Estate v. Morrow, 140 Ia. 89, 117 N. W. 1118, 18 L. R. A. (N. S.) 226.

See note to Chesterfield v. Jannsen in 1 W. & T. Lead. Cas.; CONTRACT.

CONSIDERATUM EST PER CURIAM (Lat. it is considered by the court). A formula used in giving judgments.

A judgment is the decision or sentence of the law, given by a court of justice, as the result of proceedings instituted therein for the redress of an injury. The language of the judgment is not, therefore, that "it is decreed," or "resolved," by the court, but that "it is considered by the court," *consideratum est per curiam,* that the plaintiff recover his debt, etc.

In the early writers, *considerare, consideratio* always means the judgment of a court. This usage was preserved down to our time in the judgment of the common-law courts in the form "It is considered," which, as Sir Frederick Pollock says, was for no obvious reason altered to "It is adjudged," in the Judicature Acts. Poll. Contr. 177. "Adjudged" was current with text-writers from the 16th century onward.

CONSIGN. To send goods to a factor or agent. See Gillespie v. Winberg, 4 Daly (N. Y.) 320.

In Civil Law. To deposit in the custody of a third person a thing belonging to the debtor, for the benefit of the creditor, under the authority of a court of justice. Pothier, Obl. pt. 3, c. 1, art. 8.

The term to consign, or consignation, is derived from the Latin *consignare,* which signifies to seal; for it was formerly the practice to seal up the money thus received in a bag or box. Aso & M. Inst. b. 2, t. 11, c. 1, § 5.

Generally, the consignation is made with a public officer; it is very similar to our practice of paying money into court. See Burge, Surety.

CONSIGNATIO. See CONSIGN.

CONSIGNEE. One to whom a consignment is made.

It is usual in bills of lading to state that the goods are to be delivered to the consignee or his assigns, he or they paying freight: in such case the consignee or his assigns, by accepting the goods, by implication become bound to pay the freight; Du Peirat v. Wolfe, 29 N. Y. 436; Dart v. Ensign, 47 N. Y. 619; 3 Bingh. 383.

CONSIGNMENT. The goods or property sent by means of a common carrier by one or more persons, called the consignors, in one place, to one or more persons, called the consignees, who are in another. The goods sent by one person to another, to be sold or

disposed of by the latter for and on account of the former. The transmission of the goods.

CONSIGNOR. One who makes a consignment.

CONSILIARIUS (Lat. *consiliare*, to advise). **In Civil Law.** A counsellor, as distinguished from a pleader or advocate. An assistant judge. One who participates in the decisions. Du Cange.

CONSILIUM (called, also, *Dies Consilii*). A day appointed to hear the counsel of both parties. A case set down for argument.

It is commonly used for the day appointed for the argument of a demurrer, or errors assigned; 1 Tidd, Pr. 438; 2 *id.* 684, 1122; 1 Sell. Pr. 336; 1 Archb. Pr. 191, 246.

CONSIMILI CASU (Lat. in like case). A writ of entry, framed under the provisions of the statute Westminster 2d (13 Edw. I.), c. 24, which lay for the benefit of the reversioner, where a tenant by the curtesy aliened in fee or for life; 3 Bla. Com., 4th Dublin ed. 183 n.; Bac. Abr. Court of Chancery (A).

Many other new writs were framed under the provisions of this statute; but this particular writ was known emphatically by the title here defined. The writ is now practically obsolete. See 3 Bla. Com. 51; CASE; ASSUMPSIT.

CONSISTOR. A magistrate. Jacob L. D.

CONSISTORY. An assembly of cardinals convoked by the pope.

The consistory is either public or secret. It is *public* when the pope receives princes or gives audience to ambassadors; *secret* when he fills vacant sees, proceeds to the canonization of saints, or judges and settles certain contestations submitted to him.

A tribunal (*prætorium*).

CONSISTORY COURT. The courts of diocesan bishops held in their several cathedrals (before the bishop's chancellor, or commissary, who is the judge) for the trial of all ecclesiastical causes arising within their respective dioceses, and also for granting probates and administrations. Originally the "Chancellor" or "Official" of the bishop usually presided. In time he came to be a permanent judge, but the bishop could withdraw cases from his cognizance and hear them himself, or delegate jurisdiction over certain parts of the diocese to his "commissary"; 1 Holdsw. Hist. E. L. 369, citing L. R. 1902, 1 K. B. 816. A Consistory Court of London still exists. From the sentence of these courts an appeal lies to the Provincial Court of the archbishop of each province respectively. 2 Steph. Com. 230; 3 *id.* 430; 3 Bla. Com. 64; 1 Woodd. Lect. 145; Halifax, An. b. 3, c. 10, n. 12.

CONSOLATO DEL MARE. See CODE.

CONSOLIDATE. To unite into one distinct things or parts of a thing. In a general sense, to unite into one mass or body, as to consolidate the forces of an army or various funds. In parliamentary usage, to consolidate two bills is to unite them into one. In law, to consolidate benefices, actions, or corporations is to combine them into one. See Independent Dist. of Fairview v. Durland, 45 Ia. 56.

CONSOLIDATED FUND. In England. (Usually abbreviated to *Consols.*) A fund for the payment of the public debt.

Formerly, when a loan was made by government, a particular part of the revenue was appropriated for the payment of the interest and principal. This was called the fund; and every loan had its fund. In this manner the Aggregate fund originated in 1715; the South-Sea fund in 1717; the General fund in 1717; and the Sinking fund, into which the surplus of these flowed, which, although intended for the diminution of the debt, was applied to the necessities of the government. These four funds were consolidated into one in the year 1787; and this fund is the Consolidated fund.

It is wholly appropriated to the payment of certain specific charges and the interest on the sums originally lent the government by individuals, which yield an annual interest of three per cent. to the holders. The principal of the debt is to be returned only at the option of the government.

CONSOLIDATION. In Civil Law. The union of the usufruct with the estate out of which it issues, in the same person; which happens when the usufructuary acquires the estate, or *vice versa*. In either case the usufruct is extinct. Lec. Elm. Dr. Rom. 424.

CONSOLIDATION OF CORPORATIONS. See MERGER.

CONSOLIDATION RULE. An order of the court requiring the plaintiff to join in one suit several causes of action against the same defendant which may be so joined consistently with the rules of pleading, but upon which he has brought distinct suits. Brown v. Scott, 1 Dall. (Pa.) 147, 1 L. Ed. 74; Groff v. Musser, 3 S. & R. (Pa.) 264; 2 Archb. Pr. 180. The matter is regulated by statute in many of the states.

It may take place in two ways: first, by the usufructuary surrendering his right to the proprietor, which in the common law is called a surrender; secondly, by the release of the proprietor of his rights to the usufructuary, which in our law is called a release.

In Ecclesiastical Law. The union of two or more benefices in one. Cowell.

In Practice. The union of two or more actions in the same declaration.

An order of court, issued in some cases, restraining the plaintiff from proceeding to trial in more than one of several actions brought against different defendants but involving the same rights, and requiring the defendants also, in such actions, to abide the event of the suit which is tried. It is in reality in this latter case a mere stay of proceedings in all the cases but one.

It is often issued where separate suits are brought against several defendants founded upon a policy of insurance; 2 Marsh. Ins. 701; see Jackson v. Schauber, 4 Cow. (N. Y.) 78; Sherman v. McNitt, *id.* 85; or against several obligors in a bond; 3 Chit. Pr. 645;

8 C. & P. 58. See Scott v. Brown, 1 N. & McC. (S. C.) 417, note; Powell v. Gray, 1 Ala. 77; Dews v. Eastham, 5 Yerg. (Tenn.) 297; Sykes v. Ins. Co., 7 Mo. 477; Den v. Fen, 9 N. J. L. 335; Groff v. Musser, 3 S. & R. (Pa.) 262; Farmers' & Manufacturers' Bank v. Tracy, 19 Wend. (N. Y.) 23.

A court may consolidate actions for trial when they involve the same property and the same questions of law and fact and the parties are the same; Welch v. Lynch, 30 App. D. C. 122.

Where two actions arose upon the same transaction, one for trespass against defendant's property, another against his person, and might have been joined, the court ordered them tried at the same time; Holmes v. Sheridan, 1 Dill. 351, Fed. Cas. No. 6,644.

When two actions are consolidated, the original actions are discontinued and only the consolidated action remains; Hiscox v. New Yorker Staats Zeitung, 30 Abb. N. C. (N. Y.) 131; *id.*, 3 Misc. Rep. 110, 23 N. Y. Supp. 682.

The Federal courts are authorized to consolidate actions of a like nature, or relative to the same question, as they may deem reasonable; Rev. Stat. § 921.

CONSOLS. See CONSOLIDATED FUND.

CONSORTIUM (Lat. a union of lots or chances). A lawful marriage. Union of parties in an action.

The right of the husband and wife respectively to the conjugal fellowship, company, cooperation and aid of the other.

Company; companionship.

It occurs in this last sense in the phrase *per quod consortium amisit* (by which he has lost the companionship), used when the plaintiff declares for any bodily injury done to his wife by a third person, 3 Bla. Com. 140.

It is not property, but "a marital right growing out of the marriage relation"; Hodge v. Wetzler, 69 N. J. L. 490, 55 Atl. 49; but is treated as property in a broader sense in some cases; Jaynes v. Jaynes, 39 Hun (N. Y.) 40; Deitzman v. Mullin, 108 Ky. 610, 57 S. W. 247, 50 L. R. A. 808, 94 Am. St. Rep. 390; Warren v. Warren, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545. "It usually includes the person's affection, society and aid," and, as to it, the husband and wife are equal; Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553, where the term is discussed at length. See HUSBAND AND WIFE.

CONSPIRACY (Lat. *con*, together, *spiro*, to breathe). A combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. Pettibone v. U. S., 148 U. S. 203, 13 Sup. Ct. 542, 37 L. Ed. 419; Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346; People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; State v. Burnham, 15 N. H. 396; State v. Buchanan, 5 H. & J. (Md.) 317, 9 Am. Dec. 534; Collins v. Com., 3 S. & R. (Pa.) 220; Stale v. Rowley, 12 Conn. 101; 11 Cl. & F. 155; Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321; Breitenberger v. Schmidt, 38 Ill. App. 168.

Lord Denman defines conspiracy as a combination for accomplishing an unlawful end or a lawful end by unlawful means; 4 B. & Ad. 345.

Criminal Conspiracy. Conspiracies formed to commit crimes, or to do anything unlawful, were first treated as substantive offenses by the Star Chamber; 2 Steph. H. C. L. 227; before that, a conspiracy only extended to taking civil and criminal proceedings maliciously; 3 Holdsw. H. E. L. 313. In a prosecution for a conspiracy at common law it was neither necessary to aver nor to prove an overt act; Bannon v. U. S., 156 U. S. 468, 15 Sup. Ct. 467, 39 L. Ed. 494. So long as the design to do an unlawful act, or to do a lawful act by unlawful means, rests in intention only, it is not indictable; but when two or more agree to carry it into effect, the very plot is an act in itself and the act of each of the parties, promise against promise, act against act; L. R. 3 H. L. 317, approved in [1901] A. C. 529; [1905] 2 K. B. 746.

An indictment for a conspiracy to compass or promote a criminal or unlawful purpose must set forth that purpose, fully and clearly; and an indictment for a conspiracy to compass or promote a purpose not in itself criminal or unlawful, by the use of criminal or unlawful means, must set forth the means intended to be used; Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346.

The participation in a common plan by two or more persons is not in itself a criminal conspiracy; in order to make it such, the motives of those who enter into the combination must be corrupt; People v. Flack, 125 N. Y. 324, 26 N. E. 267, 11 L. R. A. 807; Wood v. State, 47 N. J. L. 461, 1 Atl. 509; but if one member of the combination has no corrupt motive when entering into it, but afterward becomes aware of its illegality and remains a member, he is criminally liable; U. S. v. Mitchell, 1 Hughes 439, Fed. Cas. No. 15,790. So persons who agree in good faith to do an act innocent in itself do not become guilty of conspiracy if it is afterwards ascertained that the act is forbidden by statute; People v. Powell, 63 N. Y. 88.

In the definitions the terms criminal or unlawful are used, because it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution, and yet there is no doubt that a combination by numbers to do them is an unlawful conspiracy and punishable by indictment; Stale v. Rowley, 12 Conn. 101; State v. Burnham, 15 N. H. 396; People v. Richards, 1 Mich. 216, 51 Am. Dec. 75; 11

Q. B. 245; Twitchell v. Com., 9 Pa. 211; State v. Shooter, 8 Rich. (S. C.) 72.

Of this character was a conspiracy to cheat by false pretences without false tokens, when a cheat by false pretences only by a single person was not a punishable offence; 11 Q. B. 245. So a combination to destroy the reputation of an individual by verbal calumny of itself is not indictable; per Shaw, C. J., Com. v. Hunt, 4 Metc. (Mass.) 123, 38 Am. Dec. 346. So a conspiracy to induce and persuade a young woman, by false representations, to leave the protection of her parent's house, with a view to facilitate her prostitution; Mifflin v. Com., 5 W. & S. (Pa.) 461, 40 Am. Dec. 527; 2 Den. C. Cas. 79; and to procure an unmarried girl of seventeen to become a prostitute; 4 F. & F. 160; to procure a woman to be married by a mock ceremony, whereby she was seduced; State v. Savoye, 48 Ia. 562. And see Anderson v. Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776; State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79. So a conspiracy, by false and fraudulent representations that a horse bought by one of the defendants from the prosecutor was unsound, to induce him to accept a less sum for the horse than the agreed price; 1 Dearsl. 337. A conspiracy by traders to dispose of their goods in contemplation of bankruptcy, with intent to defraud their creditors; 1 F. & F. 33.

The obtaining of goods on credit by an insolvent person without disclosing his insolvency, and without having any reasonable expectation of being able to pay for such goods in and by means of the fair and ordinary course of his business, is not of itself such an unlawful act as may be the subject of an action for conspiracy; though it would be otherwise, it seems, in the case of a purchase made without any expectation of payment. But the obtaining possession of goods under the pretence of paying cash for them on delivery, the buyer knowing that he has no funds to pay with, and appropriating the goods to his own use in fraud of the seller, is such a fraud or cheat as may be the subject of a charge of conspiracy; Com. v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596.

A combination to go to a theatre to hiss an actor; 2 Campb. 369; 6 Term 628; to indict for the purpose of extorting money; 4 B. & C. 329; to charge a person with being the father of a bastard child; 1 Salk. 174; to coerce journeymen to demand a higher rate of wages; 6 Term 619; People v. Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501; to charge a person with poisoning another; F. Moore 816; to affect the price of public stocks by false rumors; 3 M. & S. 67; to prevent competition at an auction; 6 C. & P. 239; to cheat by a fraudulent prospectus of a projected company and by false accounts; 11 Cox, Cr. Ca. 414; by false accounts between partners; L. R. 1 C. C. 274; by a mock auction; 11 Cox, Cr. Ca. 404; have each been held indictable for conspiracy; as was an association of retail coaldealers in a city to fix prices and prevent a person not a member from obtaining coal from wholesalers; People v. Sheldon, 66 Hun 590, 21 N. Y. Supp. 859; *id.*, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690. So it is a crime for two or more persons to conspire to cheat and defraud another out of his property, but in such case the indictment must set forth the means proposed to be used to accomplish the purpose; U. S. v. Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588.

In order to render the offence complete, it is not necessary that any act should be done in pursuance of the unlawful agreement entered into between the parties, or that any one should have been defrauded or injured by it. The conspiracy is the gist of the crime; 9 Co. 55; 28 L. T. N. S. 75; Com. v. Judd, 2 Mass. 337, 3 Am. Dec. 54; Com. v. Tibbetts, 2 Mass. 538; Collins v. Com., 3 S. & R. (Pa.) 220; People v. Mather, 4 Wend. (N. Y.) 259, 21 Am. Dec. 122; State v. Norton, 23 N. J. L. 33; Steele v. Kinkle, 3 Ala. 360; State v. Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534; State v. Brady, 107 N. C. 822, 12 S. E. 325; U. S. v. Lancaster, 44 Fed. 896, 10 L. R. A. 333. But see Torrey v. Field, 10 Vt. 353. Where persons enter on an unlawful purpose, with the intent to aid or encourage each other in carrying out their design, they are each criminally responsible for everything resulting from such purpose whether specifically contemplated or not; Turner v. State, 97 Ala. 57, 12 South. 54; Boyd v. U. S., 142 U. S. 450, 12 Sup. Ct. 292, 35 L. Ed. 1077.

It is a crime for several persons, out of malice, to agree to induce many others not to enter into contracts with a certain person; see [1901] A. C. 531; or for strangers to a contract, and without just excuse, to combine in inducing a breach of it; [1905] A. C. 239; otherwise, in most cases, if they act merely out of self-interest; see 23 Q. B. D. 618. That may be unlawful if done by several, which is not if done by one; [1892] A. C. 45, per Lord Bramwell. One may be indicted alone for a conspiracy "with other persons to the jury unknown"; 94 L. T. 887.

A criminal conspiracy as boycotting, may arise out of acts which in themselves might be done by one person without preconcert with others. The parties must be numerous; they must be actuated by ill-will, and their conduct must be calculated to do harm to the person intended; 14 Cox 505.

Conspiracy may be proved by showing the declarations, acts and conduct of the conspirators; State v. Ryan, 47 Or. 338, 82 Pac. 703, 1 L. R. A. (N. S.) 862.

Where it is necessary that two persons concur in the commission of an act to make it a crime, as in case of bigamy, adultery or the like, the agreement is said to form part of the crime and not a conspiracy; Shannon

v. Com., 14 Pa. 226; Miles v. State, 58 Ala. 390; the combination, which is the essential of conspiracy, is not an aggravation of, but necessary to constitute, the offense, and probably such an agreement not coupled with an overt act would be a mere attempt; 2 Bish. Crim. L. (8th ed.) § 184, n. 4, cited in 20 Harv. L. Rev. 63, where the matter is illustrated by U. S. v. Guilford, 146 Fed. 298, where the indictment was for conspiracy to violate the Elkins act in giving and taking rebates and the fact was proved, there being three takers and two givers besides two other persons who were go-betweens or agents. It was held not a conspiracy, upon the principle stated.

Where three defendants were jointly arraigned on a charge of conspiracy, and one of them pleaded guilty and the other two were acquitted on pleas of not guilty, it was held that the judgment against the one who pleaded guilty must be vacated; [1902] 2 K. B. 339; this rule it has been said was "tacitly assumed by the early English decisions, and has been expressly recognized by the later ones." 1 Stra. 193; 5 B. & C. 538; 12 Q. B. D. 241; 16 Q. B. 832. The same rule is adopted in some states in certain cases in which the offense was necessarily a joint one committed by two persons; Turpin v. State, 4 Blackf. (Ind.) 72; State v. Mainor, 28 N. C. 340; State v. Rinehart, 106 N. C. 787, 11 S. E. 512; and repudiated in others; Alonzo v. State, 15 Tex. App. 378, 49 Am. Rep. 207; State v. Caldwell, 8 Baxt. (Tenn.) 576. It is argued in a note on the subject that the last two cases are more in accord with reason; as one defendant might be a party to a joint act without criminal intent, and in the first English case cited the plea of guilty outweighs the verdict, which means nothing more than not proven; 16 Harv. L. Rev. 142.

Civil Liability. It is an early saying in the law that a conspiracy of itself gives no cause of action. There must be some overt act by one of the parties to the injury of another, Bowen v. Matheson, 14 Allen (Mass.) 499 (though there is a *dictum, contra,* in Patten v. Gurney, 17 Mass. 182, 9 Am. Dec. 141); Hutchins v. Hutchins, 7 Hill (N. Y.) 104; Bush v. Sprague, 51 Mich. 41, 16 N. W. 222; Hauser v. Tate, 85 N. C. 81, 39 Am. Rep. 689; 1 Ld. Raym. 374; and an act which is lawful when committed by one will not be rendered unlawful when two or more conspire to do it; Boston v. Simmons, 150 Mass. 461, 23 N. E. 210, 6 L. R. A. 629, 15 Am. St. Rep. 230; Martens v. Reilly, 109 Wis. 464, 84 N. W. 840; De Wulf v. Dix, 110 Ia. 553, 81 N. W. 779; Adler v. Fenton, 24 How. (U. S.) 407, 16 L. Ed. 696; [1898] 1 Q. B. 181; but it is held otherwise in Cote v. Murphy, 159 Pa. 420, 28 Atl. 190, 23 L. R. A. 135, 39 Am. St. Rep. 686; and this is supported by a *dictum* in State v. Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

Civil actions have been sustained for conspiracies to injure in person or reputation, as by maliciously prosecuting; Dreux v. Domec, 18 Cal. 83; or by making false charges; Irvine v. Elliott, 206 Pa. 152, 55 Atl. 859; or to injure one in property or business; Van Horn v. Van Horn, 52 N. J. L. 284, 20 Atl. 485, 10 L. R. A. 184; Garst v. Charles, 187 Mass. 144, 72 N. E. 839; Mapstrick v. Ramge, 9 Neb. 390, 2 N. W. 739, 31 Am. Rep. 415; Casey v. Typographical Union No. 3, 45 Fed. 135, 12 L. R. A. 193; [1893] 1 Q. B. 715; Martell v. White, 185 Mass. 255, 69 N. E. 1085, 64 L. R. A. 260, 102 Am. St. Rep. 341; as by fraudulent use of legal proceedings; Verplanck v. Van Buren, 76 N. Y. 247.

An association of ship owners to secure a profitable and exclusive carrying trade, having agreed to limit the number of ships to be sent by members, and to allow a rebate on freights to all shippers who dealt only with members, is not an actionable conspiracy, as it was done with the lawful object of protecting and increasing trade and profit and no unlawful means had been used; [1892] A. C. 25, where the House of Lords affirmed the judgment in 23 Q. B. D. 598, where the C. A. affirmed the judgment of Lord Coleridge in 21 Q. B. D. 544.

Corporations as Conspirators. The law of conspiracy is applicable to corporations, and a combination of corporations for an unlawful purpose, either as an end or means, is a conspiracy in any case where a combination of natural persons would be such, and the converse of the proposition is equally true; Noyes, Intercorp. Rel. § 326. "We entertain," said the New York Court of Appeals, "no doubt that an action against a corporation may be maintained to cover damages caused by a conspiracy," and "it is well settled . . . that the malice and wicked intent needful to sustain such action, may be imputed to such corporations"; Buffalo Lubricating Oil Co. v. Standard Oil Co., 106 N. Y. 670, 12 N. E. 826; Transportation Co. v. Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895. Both of these were civil actions against the Standard Oil Company, but apparently the same reason should apply in making a corporation liable for criminal conspiracy as well as civil, and such was the opinion of Judge Noyes as expressed in the section of his text book above cited. But this view was authoritatively declared when an indictment and conviction of the same company (its individual co-defendant being acquitted) were sustained on appeal. The court said: "Corporations can unquestionably commit and be guilty of a criminal conspiracy denounced by the statute, as it so expressly enacts, and they, therefore, must be counted," and further that "independent of statute, upon principle and in furtherance of sound public policy, both corporations and their officers and agents who engage in the conspiracy must be held to be

parties to it"; Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. (N. S.) 1015. Where it is provided, as in the laws of several states, that corporations as well as individuals shall be subject to the provisions of anti-trust laws the construction given to these laws has been that they "did not contemplate the commission of an offense by an impalpable abstraction, which could neither think nor act; but it was intended to bind this corporate entity by the imputed actions of its human agencies"; National Lead Co. v. Paint Store Co., 80 Mo. App. 247; State v. Ins. Co., 152 Mo. 37, 52 S. W. 595, 45 L. R. A. 363.

Conspiracy under Federal Laws. Conspiracies to prevent witnesses from testifying, to impede the course of justice, to hinder citizens from voting, to prevent persons from holding office, to defraud the United States by obtaining approval of false claims, to levy war against the United States, to impede the enforcement of the laws, etc., etc., are made punishable by acts of congress; U. S. R. S. Index, *Conspiracy.*

In the absence of damage, the simple act of conspiracy does not furnish ground for a civil action; Robertson v. Parks, 76 Md. 118, 24 Atl. 411.

After a conspiracy has come to an end, the admissions of one conspirator by way of narrative of past facts are not admissible in evidence against the others; Brown v. U. S., 150 U. S. 93, 14 Sup. Ct. 37, 37 L. Ed. 1010; Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429.

In a prosecution under U. S. R. S. § 5480, as amended, for a conspiracy to defraud by means of the postoffice, three matters of fact must be charged in the indictment and established by the evidence: 1. That the persons charged devised a scheme to defraud; 2. that they intended to effect this scheme by opening or intending to open correspondence with some other person through the postoffice establishment or by inciting such other person to open communication with them; 3. and that in carrying out such scheme such person must have either deposited a letter or packet in the postoffice, or taken or received one therefrom; Stokes v. U. S., 157 U. S. 187, 15 Sup. Ct. 617, 39 L. Ed. 667.

Where parties are on trial for conspiracy to stop the mails, contemporary telegrams from different parts of the country, announcing the stoppage of mail trains, are admissible in evidence against the defendants if brought home to them, and so, too, are acts and declarations of persons not parties to the record if it appears that they were made in carrying the conspiracy into effect; Clune v. U. S., 159 U. S. 590, 16 Sup. Ct. 125, 40 L. Ed. 269.

Under R. S. § 5440, the conspiracy to commit a crime against the United States is itself the offence, without reference to whether the crime is consummated, or agreed upon by the conspirators in all its details; an indictment charging the accused with a conspiracy to commit the crime of subornation of perjury was held in this case to be sufficient although the precise persons to be suborned, and the time and place of such suborning were not particularized; Williamson v. U. S., 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278. A conspiracy under that statute does not necessarily involve a direct pecuniary loss, but may exist to impair, obstruct or defeat the lawful function of any department of the government; Haas v. Henkel, 216 U. S. 462, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112. The words "unlawfully did conspire to defraud the United States," followed by a statement of the nature and purpose of the conspiracy and the acts done to effect its object, is sufficient; Wright v. U. S., 108 Fed. 805, 48 C. C. A. 37, where the subject is very fully discussed. It is a conspiracy under that act to do an act which Congress has made a crime, if two or more conspire to do it, and Congress may make the punishment for conspiring greater than for committing the crime itself; U. S. v. Stevenson, 215 U. S. 200, 30 Sup. Ct. 37, 54 L. Ed. 157.

The crime is complete when the conspiracy is shown; it is not necessary to aver that it succeeded; U. S. v. Greene, 115 Fed. 343.

Upon a charge of conspiracy to defraud, a somewhat wide latitude is always allowed in the introduction of circumstantial evidence to prove the intent; U. S. v. Greene, 108 Fed. 816.

The jurisdiction is in the district in which the conspiracy was entered into, although the overt act carrying it out is within another jurisdiction; Hyde v. Shine, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. Ed. 90.

Where a conspiracy had been formed more than the period of the statute of limitations before the indictment and an overt act is committed within the statutory period, if the existence of the conspiracy as well as the overt act are proved, the prosecution may be sustained; Ware v. U. S., 154 Fed. 577, 84 C. C. A. 503, 12 L. R. A. (N. S.) 1053, 12 Ann. Cas. 233, where the subject is thoroughly discussed and the cases collected by Sanborn, C. J., and in a note to the last citation.

A federal court has no jurisdiction, under the 13th Amendment, of a charge of conspiracy made and carried out in a state to prevent its citizens of African descent because of their color and race from making or carrying out contracts and agreements of labor; Hodges v. U. S., 203 U. S. 1, 27 Sup. Ct. 6, 51 L. Ed. 65.

On a bill alleging a malicious conspiracy to interfere with carrying the mails and with interstate commerce, an injunction may be granted to restrain the ordering or causing a strike of the carrier's employés; Wabash R. Co. v. Hannahan, 121 Fed. 563. No civil action lies for conspiracy, unless there be an

overt act that results in damage to the plaintiff; Nalle v. Oyster, 230 U. S. 165, 33 Sup. Ct. 1043, 57 L. Ed. —.

Some writers consider that there is in this country a tendency to extend the doctrine of criminal conspiracy and utilize it for the indictment of persons suspected of crime of which there is difficulty in obtaining sufficient proof. This tendency is the subject of extended discussion in an article on "The Judge-Made Law of Conspiracy," by F. P. Blair, in 37 Am. L. Rev. 33, in which the author contends that there has been a departure from the common law upon this subject. It contains a valuable enumeration and discussion of the early English cases on the subject of conspiracy.

As to conspiracies in connection with labor and labor unions, see BOYCOTT; LABOR UNION; STRIKE; COMBINATION; RESTRAINT OF TRADE.

CONSPIRATORS. Persons guilty of a conspiracy.

CONSTABLE. An officer whose duty it is to keep the peace in the district which is assigned to him. See SHERIFF.

The most satisfactory derivation of the term and history of the origin of this office is that which deduces it from the French *comestable* (Lat. *comes-stabuli*), who was an officer second only to the king. He might take charge of the army, wherever it was, if the king were not present, and had the general control of everything relating to military matters, as the marching troops, their encampment, provisioning, etc. Guyot, *Rép. Univ.*

The same extensive duties pertained to the constable of Scotland. Bell, Dict.

The duties of this officer in England seem to have been first fully defined by the stat. Westm. (13 Edw. I.); and question has been frequently made whether the office existed in England before that time. 1 Bla. Com. 356. It seems, however, to be pretty certain that the office in England is of Norman origin, being introduced by William, and that subsequently the duties of the Saxon tithing-men, borsholders, etc., were added to its other functions. See Cowell; Willc. Const.; 1 Bla. Com. 356; 1 Poll. & M. 542

High constables were first ordained, according to Blackstone, by the statute of Westminster, though they were known as efficient public officers long before that time. 1 Sharsw. Bla. Com. 356. They were appointed for each franchise or hundred by the leet, or, in default of such appointment, by the justices at quarter-sessions. Their first duty is that of keeping the king's peace. In addition, they are to serve warrants, return lists of jurors, and perform various other services enumerated in Coke, 4th Inst. 267; 3 Steph. Com. 47.

The parish constables, under various names, were probably the successors of the old reeves in the townships. In each hundred, and in many franchises, there were also high constables, or similar officers with other names, who corresponded with the parish constables in the townships. They continued to be appointed till of late years, but their duties became almost nominal, and were abolished practically in 1869. Parish constables continued to be appointed till 1872. Up to 1829 they were the only body of men, except the watchmen in cities and boroughs, charged with the duty of apprehending criminals and preventing crime. 1 Steph. Cr. L.

In some cities and towns in the United States there are officers called high constables, who are the principal police officers in their jurisdiction.

Petty constables are inferior officers in every town or parish, subordinate to the high constable. They perform the duties of headborough, tithing-man, or borsholder, and, in addition, their more modern duties appertaining to the keeping the peace within their town, village, or tithing.

In the United States, generally, petty constables only are retained, their duties being generally the same as those of constables in England prior to the 5 & 6 Vict. c. 109, including a limited judicial power as conservators of the peace, a ministerial power for the service of writs, etc., and some other duties not strictly referable to either of these heads. Their immunities and indemnities are proportioned to their powers, and are quite extensive. See 1 Sharsw. Bla. Com. 356, n.; ARREST.

CONSTABLE OF A CASTLE. The warden or keeper of a castle; the castellain. Stat. Westm. 1, c. 7 (3 Edw. I.); Spelman, Gloss.

The constable of Dover Castle was also warden of the Cinque Ports. There was besides a constable of the Tower, as well as other constables of castles of less note. Cowell; Lambard, Const.

CONSTABLE OF ENGLAND. His office consisted in the care of the common peace of the realm in deeds of arms and matters of war. Lambard, Const. 4.

He was to regulate all matters of chivalry, tournaments and feats of arms which were performed on horseback. 3 Steph. Com. 47. He held the court of chivalry, besides sitting in the *curia regis*. 4 Bla. Com. 92.

The office is disused in England, except on coronation-days and other such occasions of state, and was last held by the Duke of Buckingham, under Henry VIII. The title is Lord High Constable of England. 3 Steph. Com. 47; 1 Bla. Com. 355; 2 Grose, Mil. Antiq. 216.

See COURT OF CHIVALRY; COURT OF EARL MARSHAL.

CONSTABLE OF SCOTLAND. An officer who was formerly entitled to command all the king's armies in the absence of the king, and to take cognizance of all crimes committed within four miles of the king's person or of parliament, the privy council, or any general convention of the estates of the kingdom. The office was hereditary in the family of Errol, and was abolished by the 20 Geo. III. c. 43. Bell, Dict.; Erskine, Inst. 1. 3. 37.

CONSTABLE OF THE EXCHEQUER. An officer spoken of in the 51 Hen. III. stat. 5, cited by Cowell.

CONSTABLEWICK. The territorial jurisdiction of a constable. 5 Nev. & M. 261.

CONSTABULARIUS (Lat.). An officer of horse; an officer having charge of foot or horse; a naval commander; an officer having charge of military affairs generally. Spelman, Gloss.

The titles were very numerous, all derived, however, from *comes-stabuli*, and the duties were quite similar in all the countries where the civil law prevailed. His powers were second only to those of the king in all matters relating to the armies of the kingdom.

In England his power was early diminished and restricted to those duties which related to the preservation of the king's peace. The office is now abolished in England, except as a matter of ceremony, and in France. Guyot, *Rép. Univ.*; Cowell.

CONSTAT (Lat. it appears). A certificate by an officer that certain matters therein stated appear of record. See Wilcox v. Ray, 2 N. C. 410.

An exemplification under the great seal of the enrolment of letters patent. Co. Litt. 225.

A certificate which the clerk of the pipe and auditors of the exchequer make at the request of any person who intends to plead or move in the court for the discharge of anything; and the effect of it is, the certifying what *constat* (appears) upon record touching the matter in question.

CONSTAT D'HUISSIER. **In French Law.** An affidavit made by a *huissier* setting forth the appearance, form, quality, color, etc., of any article upon which a suit depends. Arg. Fr. Merc. L. 554; Black, L. Dict.

CONSTATING INSTRUMENTS. The term is used to signify the documents or collection of documents which fix the constitution or charter of a corporation. Brice, *Ultra Vires* 34; Ackerman v. Halsey, 37 N. J. Eq. 363.

CONSTITUENT. He who gives authority to another to act for him. The constituent is bound by the acts of his attorney, and the attorney is responsible to his constituent.

CONSTITUERE. **In Old English Law.** To establish; to appoint; to ordain.

Used in letters of attorney, and translated by constitute. Applied generally, also, to denote appointment. Reg. Orig. 172; Du Cange.

CONSTITUTED AUTHORITIES. The officers properly appointed under the constitution for the government of the people. Those powers which the constitution of each people has established to govern them, to cause their rights to be respected, and to maintain those of each of its members.

They are called *constituted*, to distinguish them from the *constituting* authority which has created or organized them, or has delegated to an authority, which it has itself created, the right of establishing or regulating their movements.

CONSTITUTIO. **In Civil Law.** An establishment or settlement. Used of controversies settled by the parties without a trial. Calvinus, Lex.

A sum paid according to agreement. Du Cange.

An ordinance or decree having its force from the will of the emperor. Dig. 1. 4. 1, Cooper's notes.

In Old English Law. An ordinance or statute. A provision of a statute.

CONSTITUTION. The fundamental law of a state, directing the principles upon which the government is founded, and regulating the exercise of the sovereign powers, directing to what bodies or persons those powers shall be confided and the manner of their exercise.

An established form of government; a system of laws and customs.

Constitution, in the former law of the European continent, signified as much as decree,—a decree of importance, especially ecclesiastical decrees. The decrees of the Roman emperors referring to the *jus circa sacra*, contained in the code of Justinian, have been repeatedly collected and called the Constitutions. The famous bull *Unigenitus* was usually called in France the Constitution. Comprehensive laws or decrees have been called constitutions, thus the *Constitutio Criminalis Carolina*, which is the penal code decreed by Charles V. for Germany, the Constitutions of Clarendon (*q. v.*). In political law the word constitution came to be used more and more for the fundamentals of a government,—the laws and usages which give it its characteristic feature. We find, thus, former English writers speak of the constitution of the Turkish empire. These fundamental laws and customs appeared to our race especially important where they limited the power and action of the different branches of government; and it came thus to pass that by constitution was meant especially the fundamental law of a state in which the citizen enjoys a high degree of civil liberty; and, as it is equally necessary to guard against the power of the executive in monarchies, a period arrived—namely, the first half of the present century—when in Europe, and especially on the continent, the term constitutional government came to be used in contradistinction to absolutism.

We now mean by the term constitution, in common parlance, the fundamental law of a free country, which characterizes the organism of the country and secures the rights of the citizen and determines his main duties as a freeman. Sometimes, indeed, the word constitution has been used in recent times for what otherwise is generally called an organic law. Napoleon I. styled himself Emperor of the French by the Grace of God and the Constitutions of the Empire.

Constitutions were generally divided into written and non-written constitutions, analogous to *leges scriptæ* and *non scriptæ*. These terms do not indicate the distinguishing principle; Lieber, therefore, divides political constitutions into accumulated or cumulative constitutions and enacted constitutions. The constitution of ancient Rome and that of England belong to the first class. The latter consists of the customs, statutes, common laws, and decisions of fundamental importance. The Reform act is considered by the English a portion of the constitution as much as the trial by jury or the representative system, which have never been enacted, but correspond to what Cicero calls *leges natæ*.

Constitutional law in England appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state; all rules which define the members of the sovereign power

and their relation to each other and the mode in which it, or the members thereof, exercise their authority, the order of succession to the throne, the prerogations of the chief magistrate and the form of the legislature and its mode of election, ministers with their responsibilities and sphere of action, the territory over which the sovereignty of the state extends, and who are to be deemed citizens and subjects. Dicey, Const. 22.

Our constitutions are enacted; that is to say, they were, on a certain day and by a certain authority, enacted as a fundamental law of the body politic. In many cases enacted constitutions cannot be dispensed with, and they have certain advantages which cumulative constitutions must forego; while the latter have some advantages which the former cannot obtain. It has been thought, in many periods, by modern nations, that enacted constitutions and statutory law alone are firm guarantees of rights and liberties. This error has been exposed in Lieber's Civil Liberty. Nor can enacted constitutions dispense with the "grown law" (*lex nata*). For the meaning of much that an enacted constitution establishes can only be found by the grown law on which it is founded, just as the British Bill of Rights (an enacted portion of the English constitution) rests on the common law.

Enacted constitutions may be either *octroyed*, that is, granted by the presumed full authority of the grantor, the monarch; or they may be enacted by a sovereign people prescribing high rules of action and fundamental laws for its political society, such as ours is; or they may rest on contracts between contracting parties,—for instance, between the people and a dynasty, or between several states. We cannot enter here into the interesting inquiry concerning the points on which all modern constitutions agree, and regarding which they differ,—one of the most instructive inquiries for the publicist and jurist. See Hallam's Constitutional History of England; Hare; Miller; Rawle; Story; Tucker; Watson; Willoughby; Stimson; Sutherland; Flanders; Guthrie; Foster, Boutwell; Tiedeman (the Unwritten Constitution); Taylor; Thayer, on the Constitution; Farrand, Records of the Federal Convention; Sheppard's Constitutional Text-Book; Elliot's Debates on the Constitution, etc.; Lieber's article (Constitution), in the Encyclopædia Americana; Cooley, Const. Lim.; Bryce, Am. Com.; Von Holst, Hist. U. S.

For the constitutions of the several states, including those in force and the previous ones, see Charters and Constitutions, published under authority of Congress in 1878.

Thorpe's American Charters, Constitutions, etc., gives the constitutions down to 1908 inclusive.

Constitution, Self-Executing Provisions. A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced, and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. Cooley, Const. Lim. 99 [84], 4th ed. 101.

"The question in every case is whether the language of a constitutional provision is addressed to the courts or the legislature. . . . If the nature and extent of the right conferred and of the liability imposed is fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the legislature for action, then the provision should be construed as self-executing, and its language as addressed to the courts." Willis v. Mabon, 48 Minn. 150, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 626.

"But it must remain entirely clear that where a state constitution declares in clear language that the members of corporations shall be individually liable for their debts to a defined extent, it cannot be held that supplementary legislation is required to execute this provision, and hence that the legislature may leave it forever dormant and inoperative merely because the framers of the constitution did not go on and prescribe the remedy which should be pursued for enforcing it." Thomp. Corp. § 3004.

See Morley v. Thayer, 3 Fed. 739; Barnes v. Wheaton, 80 Hun 14, 29 N. Y. Supp. 830; May v. Black, 77 Wis. 104, 45 N. W. 949; Groves v. Slaughter, 15 Pet. (U. S.) 449, 10 L. Ed. 800; Pierce v. Com., 104 Pa. 150; Fredericks v. Canal Co., 148 Pa. 317, 23 Atl. 1067.

But it has been held that a constitutional provision that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by such stockholder, and such other means as shall be provided by law," is not self-executing and is inoperative until supplemented by statute; Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654.

A provision of a state constitution imposing upon stockholders personal liability, to an additional amount equal to their stock, for "dues from corporations," is self-executing; Whitman v. Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587.

CONSTITUTION OF THE UNITED STATES OF AMERICA. The supreme law of the United States.

It was framed by a convention of delegates from all of the original thirteen states (except Rhode Island), which assembled at Philadelphia on the 14th of May, 1787. On September 17, 1787, by the unanimous consent of the states present, a form of constitution was agreed upon, and on September 28th was submitted to the congress of the confederation, with recommendations as to the method of its adoption by the states. In accordance with these recommendations, it was transmitted by the congress to the several state legislatures, in order to be submitted to conventions of delegates chosen in each state by the people thereof. The several states accordingly called conventions, which ratified the constitution upon the following dates: Delaware, December 7, 1787; Pennsylvania, December 12, 1787; New Jersey, December 18,

1787; Georgia, January 2, 1788; Connecticut, January 9, 1788; Massachusetts, February 6, 1788; Maryland, April 28, 1788; South Carolina, May 23, 1788; New Hampshire, June 21, 1788; Virginia, June 26, 1788; New York, July 26, 1788; North Carolina, November 21, 1789; Rhode Island, May 29, 1790.

It was said by Mr. Gladstone, who may be considered an impartial critic, that "as the British constitution is the most subtle organism which has proceeded from progressive history, so the American constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man." Fisher, Evolution of the Constitution, 11. In connection with this comment of the great English statesman, it is interesting to quote from an address before the American Bar Association in 1912 by George Sutherland, Senator from Utah (Rep. p. 371), which probably expresses the view of a majority of the thoughtful lawyers and statesmen of all parties. Alluding to "a growing sentiment that the constitution has become obsolete and that its provisions stand in the way of reforms which are demanded by the people," he continues: "Many of us do not believe that the constitution has been outworn, or that it has become a dead wall in the path of progress, to be assaulted and overthrown before we can move on. Its principles are living forces, as vital now as when they were adopted. It is not and never has been a wall, but a wide, free flowing stream within whose ample banks every needed and wholesome reform may be launched and carried." And the address concludes: "To the thoughtful student of law and government the great principles of the constitution, as old as the struggle for human liberty, are as nearly eternal as anything in this mutable world can be. We do not outgrow them any more than we outgrow the Ten Commandments or the enduring morality of the Sermon on the Mount. . . . The constitution did not create the Union, but, by making it 'more perfect,' preserved it from destruction. If the present day teachers of vague and visionary reform would know the fate which will overtake the republic if the constitution, through the shattered faith of the people, shall lose its binding force, they have but to read the history of our country under the Articles of Confederation. If by some unhappy turn of fortune the constitution should be wrecked, those conditions will be repeated, but intensified in the proportion that our population has increased, our territory extended, and our problems have become more numerous and intricate. The forty-eight states into which our imperial domain has finally been rounded, filled with patriotic, intelligent, justice-loving people, after all constitute but the body of the Union. Its soul is the constitution."

Under the terms of the constitution (art. vii.), its ratification by nine states was sufficient to establish it between the states so ratifying it. Accordingly, when, on July 2, 1788, the ratification by the ninth state was read to congress, a committee was appointed to prepare an act for putting the constitution into effect; and on September 13, 1788—in accordance with the recommendations made by the convention in reporting the constitution—congress appointed days for choosing electors, etc., and resolved that the first Wednesday in March then next (March 4, 1789) should be the time, and the then seat of congress (New York) the place, for commencing government under the new constitution. Proceedings were had in accordance with these directions, and on March 4, 1789, congress met, but, owing to the want of a quorum, the house did not organize until April 1st, nor the senate until April 6th. Washington took the oath of office on April 30th. The constitution became the law of the land on March 4, 1789. Owings v. Speed, 5 Wheat. (U. S.) 420, 5 L. Ed. 124.

Its adoption abrogated the ordinance of 1787, except as continued in force by congress; Pollard v. Hagan, 3 How. (U. S.) 212, 11 L. Ed. 565; Permoli v. Municipality No. 1 of New Orleans, 3 How. (U. S.) 589, 11 L. Ed. 739; Strader v. Graham, 10 How. (U. S.) 82, 13 L. Ed. 337; South Carolina v. Georgia, 93 U. S. 4, 23 L. Ed. 782; Wharton v. Wise, 153 U. S. 155, 14 Sup. Ct. 783, 38 L. Ed. 669. The constitution is to be construed with respect to the law existing at the time of its adoption and as securing to the individual citizen the rights inherited by him under English law, and not with reference to new guarantees; Mattox v. U. S., 156 U. S. 237, 15 Sup. Ct. 337, 39 L. Ed. 409; it is to be interpreted according to common law rules; Schick v. U. S., 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99; Kepner v. U. S., 195 U. S. 100, 24 Sup. Ct. 797, 49 L. Ed. 114; Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890; Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223; Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; In re Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. Ed. 627. Under it are derived all powers exercised by the various departments of the federal government; Dorr v. U. S., 195 U. S. 138, 24 Sup. Ct. 808, 49 L. Ed. 128, 1 Ann. Cas. 697; Downes v. Bidwell, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088; and the courts were thereafter bound to take notice of it; Marbury v. Madison, 1 Cra. (U. S.) 178, 2 L. Ed. 60; and in construing it, they gave special weight to the contemporaneous construction of it, acquiesced in; Stuart v. Laird, 1 Cra. (U. S.) 299, 2 L. Ed. 115. The "United States of America" was thereby constituted a government with full

powers necessary for accomplishing the objects of its creation; Respublica v. Sweers, 1 Dall. (U. S.) 44, 1 L. Ed. 29; U. S. v. Maurice, 2 Brock. 109, Fed. Cas. No. 15,747; U. S. v. Bradley, 10 Pet. (U. S.) 363, 9 L. Ed. 448; U. S. v. Linn, 15 Pet. (U. S.) 290, 10 L. Ed. 742; U. S. v. Tingey, 5 Pet. (U. S.) 115, 8 L. Ed. 66. The government created was one of delegated powers only; Martin v. Hunter, 1 Wheat. (U. S.) 304, 4 L. Ed. 97; McCulloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. Ed. 579; Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. Ed. 23; Briscoe v. Bank, 11 Pet. (U. S.) 257, 9 L. Ed. 709; Gilman v. Philadelphia, 3 Wall. (U. S.) 713, 18 L. Ed. 96; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; U. S. v. Harris, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290; and though a government of limited powers, it possesses, to every extent, the sovereignty required for the exercise of those powers which do not require to be put in practice by legislative action, but may be exercised at once by virtue of the constitution through the executive departments; In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092.

The constitution creates a government for the United States of America, and not for countries outside of their limits, and it can, therefore, have no operation in another country; In re Ross, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. Ed. 581.

The preamble of the constitution declares that the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity, do ordain and establish this constitution for the United States of America.

The "people of the United States" who are declared to have ordained and established the constitution "were the people of the several states that had before dissolved the political bands which connected them with Great Britain, and assumed a separate and equal station among the powers of the earth (Declaration of Independence) and had by Articles of Confederation and Perpetual Union, in which they took the name of 'The United States of America,' entered into a firm league of friendship with each other for their common defence, the security of their liberties and their mutual and general welfare, binding themselves to assist each other against all force offered to or attack made upon them, or any of them, on account of religion, sovereignty, trade or any pretense whatever" (Articles of Confederation, *q. v.*); Minor v. Happersett, 21 Wall. (U. S.) 162, 165, 22 L. Ed. 627.

The "perfect union" contemplated by the constitution was said by the Supreme Court to be "an indestructible union composed of indestructible states"; Texas v. White, 7 Wall. (U. S.) 700, 19 L. Ed. 227, where it was also said that the union is indissoluble by the act of any one or more of them; U. S. v. Cathcart, 1 Bond 556, Fed. Cas. No. 14,756. The ordinances of secession were declared to be absolute nullities; White v. Cannon, 6 Wall. (U. S.) 443, 18 L. Ed. 923; but the effort to separate from the Union will not destroy the identity of a state, or discharge it from its obligations under the constitution; Keith v. Clark, 97 U. S. 454, 24 L. Ed. 1071; nor does a condition of civil war take away from congress any of the powers necessary to the maintenance of the Union; Tyler v. Defrees, 11 Wall. (U. S.) 331, 20 L. Ed. 161. The federal and state governments are distinct and independent of each other, and while they exercise their powers within the same territorial limits, neither can intrude upon the sphere of the other, but in case of conflict between the authorities of the two governments, those of the federal government will control until the questions between them are determined by the federal tribunals; Ableman v. Booth, 21 How. (U. S.) 506, 16 L. Ed. 169; Tarble's Case, 13 Wall. (U. S.) 397, 20 L. Ed. 597.

In addition to the powers conferred upon the federal government, the power to provide for the common defence authorizes the condemnation by a state of land for the purpose of ceding it to the United States for forts and navy-yards; In re League Island, 1 Brewst. (Pa.) 524.

The first article is divided into ten sections. By the *first* the legislative power is vested in congress. The *second* regulates the formation of the house of representatives, and declares who shall be electors. The *third* provides for the organization of the senate, and bestows on it the power to try impeachments. The *fourth* directs the time of meeting of congress, and who may regulate the times, places, and manner of holding elections for senators and representatives. The *fifth* determines the power of the respective houses. The *sixth* provides for a compensation to members of congress, and for their safety from arrests, and disqualifies them from holding certain offices. The *seventh* directs the manner of passing bills. The *eighth* defines the powers vested in congress. The *ninth* contains the following provisions: 1st. That the migration or importation of certain classes of persons shall not be prohibited prior to the year 1808. 2d. That the writ of *habeas corpus* shall not be suspended, except in particular cases. 3d. That no bill of attainder or *ex post facto* law shall be passed. 4th. The manner of levying taxes. 5th. The manner of drawing money out of the treasury, 6th. That no title of nobility shall be granted. 7th. That no officer shall receive a present from a foreign government. The *tenth* forbids the respective states to exercise certain powers there enumerated.

Sec. 1. The power vested in congress under the constitution comprised all that por-

tion of governmental power and sovereignty which was, at the time of the adoption of the constitution, known and recognized as the "legislative power." As to what this includes and what it excludes, see LEGISLATIVE POWER.

Sec. 2. The right to vote for members of congress is derived from the constitution, and this is equally true even if the qualifications for electors of state officers have been adopted by the federal law as those to be required of electors for members of congress. Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. Ed. 84; and a denial to vote at an election of members of congress involves a federal question; Swafford v. Templeton, 185 U. S. 487, 22 Sup. Ct. 783, 46 L. Ed. 1005.

While congress has no power to establish qualifications for voters in state elections, it may impose a deprivation of citizenship as a penalty, and if the state constitution prescribes citizenship of the United States as one of the qualifications for voting, the voter, upon conviction, might thus be deprived of his right. Huber v. Reily, 53 Pa. 112.

The word "state," in this section, is used in the geographical or territorial sense. Texas v. White, 7 Wall. (U. S.) 700, 19 L. Ed. 227.

The qualifications of members of congress being fixed by par. 4, the state cannot enlarge or vary them; Barney v. McCreery, 1 Cont. Elect. Cas. 167.

As to what are direct taxes within the meaning of the constitution, see TAXATION.

The requirement that congress shall apportion direct taxes according to population does not apply to the District of Columbia or the territories, and a direct tax may be imposed in the direct district in proportion to the census; Loughborough v. Blake, 5 Wheat. (U. S.) 317, 5 L. Ed. 98.

Sec. 3. Under the 17th amendment, adopted in 1913, the method of choosing senators is changed from an election by the legislature to an election by the people of each state voting at large.

The senate is a permanent body. Cush. L. & Pr. of Legisl. Ass. 272. The seat of a senator is vacated by his addressing a resignation to the governor of the state without notice of its acceptance; 1 Cont. Elect. Cas. 869. A vacancy in the senate, which has occurred before a meeting of the legislature which adjourns without filling the vacancy, cannot be filled by the governor; 1 Cont. Elect. Cas. 874; nor is it competent for the governor to make a recess appointment to fill a vacancy which shall happen but has not happened; 1 Cont. Elect. Cas. 871.

Where a state constitution directed the governor to call a special session of the legislature upon the happening of a vacancy in the senate, and he was required by the federal constitution to make a temporary appointment, he considered that the two were in conflict and he exercised his discretion to disregard the positive mandate of the state constitution and appoint a senator to fill the vacancy. Knox's Case, 29 Pa. Co. Ct. 471 (opinion of Governor (formerly Judge) Pennypacker).

In the trials of impeachment in which the Chief Justice presides, he is a member of the court with a right to vote. 1 Trial of Pres. Johnson 185; Utica Bank v. Wagar, 8 Cow. (N. Y.) 398; Rights of Lieutenant-Governor, 2 Wend. (N. Y.) 213.

Sec. 4. When the legislature has failed to "prescribe the times, places and manner" of holding an election under this section, the governor may issue a writ of election, allowing a reasonable time for notice. 1 Cont. Elect. Cas. 135. Congress may control the election of senators and representatives and change any existing state regulations; In re Siebold, 100 U. S. 371, 25 L. Ed. 717; In re Clarke, 100 U. S. 399, 25 L. Ed. 715; and it may pass such laws as are required to secure the free exercise of a right of suffrage and punish illegal interference with it; In re Coy, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274; it may also punish violation of duty by election officers; U. S. v. Gale, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. Ed. 857; it may authorize the appointment of supervisors and deputy marshals; In re Siebold, 100 U. S. 371, 399, 25 L. Ed. 717; and generally may regulate the return and counting of the vote; In re Coy, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274.

Sec. 5. The returns from the state authorities are only *prima facie* evidence of election and are not conclusive upon either house of congress; Spaulding v. Mead, 1 Cont. Elect. Cas. 157; Reed v. Cosden, 1 Cont. Elect. Cas. 353; and a failure of the state executive to grant a certificate of election does not affect the right of one who is elected a member of congress; *id.* 95.

A majority of the house is a quorum and a majority of the quorum is sufficient to pass a bill; U. S. v. Ballin, 144 U. S. 1, 12 Sup. Ct. 507, 36 L. Ed. 321; and the house may determine any means, not in violation of the constitutional restraints or fundamental rights, for ascertaining the presence of a quorum, as by rule authorizing the counting of members who do not vote sufficient to make a quorum; U. S. v. Ballin, 144 U. S. 1, 12 Sup. Ct. 507, 36 L. Ed. 321.

Each of the two houses possesses an inherent power to punish for contempt; Anderson v. Dunn, 6 Wheat. (U. S.) 204, 5 L. Ed. 242; the power cannot be delegated, though a law providing for the indictment of a contumacious witness is valid; In re Chapman, 166 U. S. 661, 17 Sup. Ct. 677, 41 L. Ed. 1154. The power to punish for contempt requires that the matter in question shall be strictly within the jurisdiction of the body; Kilbourne v. Thompson, 103 U. S. 168, 26 L. Ed. 377, which overrules Anderson v. Dunn, 6 Wheat. (U. S.) 204, 5 L. Ed. 242, on the point

that the warrant of the speaker for the commitment of the witness is not conclusive by way of justification to the serjeant-at-arms in an action for false imprisonment. The court relied upon some English cases as authorities; 4 Moore P. C. 63; 11 Moore P. C. 347; 4 Moore P. C. (N. S.) 203.

The power to expel a member has been held to cover an offence not punishable by statute but inconsistent with the duty of a member. Blount's Case, cited 1 Story, Const. § 838; Smith's Case, 1 Hall, L. J. 459.

The constitutional power granted to each house to keep a journal of its proceedings does not make it evidence that an enrolled bill has passed containing a section not appearing in the enrolled act filed in the state department; Marshall Field & Co. v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294.

Sec. 6. The privilege from arrest extends to all indictable offences; 1 Story, Const. § 865; but it has been held that the privilege from arrest of a member of the legislature applies only to civil process and not to cases of crime or misdemeanor. Com. v. Keeper of Jail, 4 W. N. C. (Pa.) 540. The privilege extends to the service of civil process while in attendance on their public duties; Geyer v. Irwin, 4 Dall. (U. S.) 107, 1 L. Ed. 762; Nones v. Edsall, 1 Wallace, Jr. 191, Fed. Cas. 10,290; Respublica v. Duane, 4 Yeates (Pa.) 347; and the privilege extends to the period of going or returning as well as the time of attendance; Lewis v. Elmendorf, 2 Johns. Cas. (N. Y.) 222; and it protects a member who loses his seat on a contest until his return home in the shortest reasonable time; Com. v. Crans, 2 Clark (Pa.) 450.

The acceptance of a federal office after election to congress operates as a forfeiture of the seat; 1 Cont. Elect. Cas. 122; and this includes a military commission in a volunteer regiment; 2 Cont. Elect. Cas. 92; Hammond v. Herrick, 1 Cont. Elect. Cas. 295; but one who continued to execute the duties of a federal office after election to congress but before taking his seat is not disqualified; Hammond v. Herrick, 1 Cont. Elect. Cas. 287, 314, 316.

Sec. 7. An act imposing taxes on the notes of a national bank is not a revenue bill within this section; Twin City Nat. Bank v. Nebeker, 167 U. S. 196, 17 Sup. Ct. 766, 42 L. Ed. 134.

A bill takes effect from the time of its approval, and the doctrine that there is no fraction of a day does not apply; In re Richardson, 2 Sto. 571, Fed. Cas. No. 11,777; People v. Clark, 1 Cal. 406; *contra*, In re Welman, 20 Vt. 653, Fed. Cas. No. 17,407. As to the presentation of bills and their approval, see EXECUTIVE POWER.

Under the last paragraph of this section the senate has decided, July 7, 1856, that two-thirds of a quorum were sufficient to pass a bill over a veto.

A proposed amendment to the constitution need not be presented to the president for approval; Hollingsworth v. Virginia, 3 Dall. (U. S.) 378, 1 L. Ed. 644; nor joint resolutions; 6 Opin. A. G. 680.

Sec. 8. This section enumerates the powers specifically granted to congress, and with respect to them it is held that where they are not exclusive, either expressly or by necessary imputation, the states may exercise them concurrently; Sturges v. Crowninshield, 4 Wheat. (U. S.) 193, 4 L. Ed. 529; Houston v. Moore, 5 Wheat. (U. S.) 49, 5 L. Ed. 19. The power of congress to lay taxes is limited, so that it may not reach the means and instrumentalities of the government of a state; Pollock v. Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759; or the salaries of state officers; Collector v. Day, 11 Wall. (U. S.) 113, 20 L. Ed. 122; nor the revenues, or interest on bonds, of municipal corporations of the states; U. S. v. R. Co., 17 Wall. (U. S.) 322, 21 L. Ed. 597; Pollock v. Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759; but it may lay a tax upon an inheritance or property by states or from municipalities; Snyder v. Bettman, 190 U. S. 249, 23 Sup. Ct. 803, 47 L. Ed. 1035.

The debts of the United States, of which congress is authorized to provide for the payment, include those of an equitable character which would not be recoverable in a court of law; as, for example, the payment of sugar bounties to producers who were prevented by the repeal of the act from obtaining them in due time; U. S. v. Realty Co., 163 U. S. 427, 16 Sup. Ct. 1120, 41 L. Ed. 215. The requirement that taxes shall be uniform throughout the United States is a geographical expression and means simply to operate generally throughout the country; Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969; High v. Coyne, 178 U. S. 111, 20 Sup. Ct. 747, 44 L. Ed. 997; but this does not include foreign territory acquired by conquest or treaty and not incorporated into the United States; Downes v. Bidwell, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088.

As to the scope of the taxing power of congress in this section, see TAXATION; IMPOST; EXCISE; as to the power to regulate commerce, see COMMERCE; RESTRAINT OF TRADE; INTERSTATE COMMERCE COMMISSION; as to naturalization and bankruptcy, see those titles; as to coining money, see COINAGE; as to counterfeiting, post-offices and post-roads, see FORGERY; POST-OFFICE; POSTAL SERVICE; as to the power to promote science and useful arts, see COPYRIGHT; PATENT; TRADE-MARK; as to the power to establish inferior courts, see UNITED STATES COURTS; as to the power to define and punish piracy and felonies on the high seas, see ADMIRALTY; PIRACY; HIGH SEAS; as to the power to declare war and support armies and a navy

and to provide for the government regulation of military forces, see WAR; LETTER OF MARQUE AND REPRISAL; MILITARY LAW; COURT-MARTIAL; MILITIA; as to the power of legislation for the seat of government, see DISTRICT OF COLUMBIA; as to the line of distinction between the authority of the states over their internal affairs and that of congress in regulation of commerce, see POLICE POWER; HEALTH; QUARANTINE; INSPECTION; see also NAVIGABLE WATERS; BRIDGE; PILOT; HARBORS; FERRIES.

Sec. 9. The first paragraph of this section is no longer in force, being superseded by the 13th and 14th Amendments. While in force it was held to apply to the African race and the word "migration" related to free persons and "importation" to slaves; New York v. Compagnie Générale Transatlantique, 107 U. S. 59, 2 Sup. Ct. 87, 27 L. Ed. 383.

As to the prohibition of the suspension of the writ of habeas corpus, see that title; as to the three following paragraphs, see BILL OF ATTAINDER; EX POST FACTO; TAXATION. Under the last paragraph of this section it was determined that a United States marshal could not hold the office of commercial agent of France; 6 Opin. A. G. 409.

Sec. 10. The prohibition of the first paragraph of this section operated to make the Confederate government an illegal organization; Williams v. Bruffy, 96 U. S. 176, 24 L. Ed. 716; and during the time of the existence of the so-called Confederacy, the states composing it could not pass any law impairing the obligation of a contract; U. S. v. Kimbal, 13 Wall. (U. S.) 636, 20 L. Ed. 503; Ford v. Surget, 97 U. S. 594, 24 L. Ed. 1018.

The prohibitions against the states are absolute. They cannot, directly or indirectly, coin money; Briscoe v. Bank, 11 Pet. (U. S.) 257, 9 L. Ed. 709; emit bills of credit; Craig v. Missouri, 4 Pet. (U. S.) 410, 7 L. Ed. 903; which implies a pledge of the public faith and the issue of paper intended to circulate as money; Briscoe v. Bank, 11 Pet. (U. S.) 257, 9 L. Ed 709; pass a bill of attainder, which includes bills of pains and penalties; Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. Ed. 356; Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. Ed. 366; Drehman v. Stifle, 8 Wall. (U. S.) 595, 19 L. Ed. 508. As to the other prohibitions, see EX POST FACTO; IMPAIRING THE OBLIGATION OF CONTRACTS; NOBILITY. The prohibition against the entry by a state into an agreement or compact with another state or foreign power implies the broadest use of words and forbids any negotiations or intercourse between a state and a foreign nation; Bank of Augusta v. Earle, 14 Pet. (U. S.) 540, 10 L. Ed. 274. The states may, with the consent of congress, enter into a compact fixing their boundaries; Poole v. Fleeger, 11 Pet. (U. S.) 185, 9 L. Ed. 680; Virginia v. West Virginia, 11 Wall. (U. S.) 39, 20 L. Ed. 67; and the consent of congress may be implied from its legislation and proceedings as well as by express action; Green v. Biddle, 8 Wheat. (U. S.) 1, 5 L. Ed. 547; Virginia v. West Virginia, 11 Wall. (U. S.) 39, 20 L. Ed. 67; Virginia v. Tennessee, 148 U. S. 503, 13 Sup. Ct. 728, 37 L. Ed. 537.

There is nothing in the constitution of the United States prohibiting a state from changing the common law by permitting the recovery of damages for injury sustained for which at common law there could be no recovery; Ivey v. Telegraph Co., 165 Fed. 371.

The second article is divided into four sections. The *first* vests the executive power in the president of the United States, and (as amended) provides for his election and that of the vice-president. The *second* section confers various powers on the president. The *third* defines his duties. The *fourth* provides for the impeachment of the president, vice-president, and all civil officers of the United States.

This article deals with the executive power vested in the president, which comprehends by that term all the powers belonging to the executive department, and of governments, where the three-fold division of governmental powers is recognized. As to what is comprehended in this term, see EXECUTIVE POWER.

Sec. 1. The section under consideration provides in the first place for the election of the president by electors appointed in such manner as the state legislature may direct, and for this purpose their power is exclusive, and a law providing for their election by districts is valid; McPherson v. Blacker, 146 U. S. 1, 13 Sup. Ct. 3, 36 L. Ed. 869, affirming McPherson v. Secretary of State, 92 Mich. 377, 52 N. W. 469, 16 L. R. A. 475, 31 Am. St. Rep. 587. The jurisdiction of an indictment for illegal voting for electors, even where the sentence included punishment for illegal voting for a member of congress, is in the state courts; In re Green, 134 U. S. 377, 10 Sup. Ct. 586, 33 L. Ed. 951.

The third clause of this section, providing for the manner of ascertaining the result of the voting by the electors, and of choosing a president and vice-president in case of failure to elect, is of no further force having been supplied by the 12th Amendment.

The time of choosing electors has been fixed by congress as the Tuesday next after the first Monday in November; 1 U. S. R. S. § 131; and the time for electors to meet and vote in their respective states is the second Monday in January; Act Feb. 3, 1887, 1 Comp. St. 67, which invalidates a state law making provision for the meeting of electors, so far as the date is concerned, but not otherwise. The same act provides (sections 4–7) the method of ascertaining the result of the election by congress.

As to who are natural-born citizens and citizens of the United States with respect to

the qualifications of the president, see CITIZEN. As to the succession to the presidency in case of a vacancy in the office of both president and vice-president, see CABINET.

Sec. 2. Under the power vested in the president as commander-in-chief of the army and navy, he has authority without legislation to put in force all legitimate acts of belligerency, among which are included the power to remove an officer of the army if the case is not provided for by law; Keyes v. U. S., 109 U. S. 336, 3 Sup. Ct. 202, 27 L. Ed. 954; and to institute a blockade; U. S. v. The Tropic Wind, Fed. Cas. No. 16,541a; U. S. v. The F. W. Johnson, Fed. Cas. No. 15,179; to convene a general court-martial; Swaim v. U. S., 165 U. S. 553, 17 Sup. Ct. 448, 41 L. Ed. 823; levy contributions on the enemy; Cross v. Harrison, 16 How. (U. S.) 164, 190, 14 L. Ed. 889; Fleming v. Page, 9 How. (U. S.) 603, 13 L. Ed. 276; authorize the military or naval commanders of conquered territory to provide for civil and military government, and to impose duties on imports and tonnage for its support; Dooley v. U. S., 182 U. S. 222, 21 Sup. Ct. 762, 45 L. Ed. 1074; Cross v. Harrison, 16 How. (U. S.) 164, 14 L. Ed. 889; or courts for the administration of civil and criminal law in such territory may be established by the president, or a commanding officer therein; Mechanics' & Traders' Bank v. Bank, 22 Wall. (U. S.) 277, 22 L. Ed. 871; The Grapeshot, 9 Wall. (U. S.) 129, 19 L. Ed. 651; Leitensdorfer v. Webb, 20 How. (U. S.) 176, 15 L. Ed. 891. The president becomes commander-in-chief of the militia only when it is called into the service of the United States; Johnson v. Sayre, 158 U. S. 109, 15 Sup. Ct. 773, 39 L. Ed. 914; but his authority as to when it is necessary so to call it is decisive; Martin v. Mott, 12 Wheat. (U. S.) 19, 6 L. Ed. 537; and it may be made a criminal offence by state statute for the militia to refuse to obey his call; Houston v. Moore, 5 Wheat. (U. S.) 1, 5 L. Ed. 19. The president may place the militia under command of officers of the United States army to whom he may delegate his powers; 2 Opin. A. G. 711; but he cannot delegate his judicial duty to review the findings of a court-martial; Runkle v. U. S., 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. Ed. 1167.

The pardoning power conferred upon the president does not destroy the power of congress to pass an act of general amnesty; Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819. Pardon includes amnesty, and there is no distinction between them under the constitution; Knote v. U. S., 95 U. S. 149, 24 L. Ed. 442; U. S. v. Klein, 13 Wall. (U. S.) 128, 20 L. Ed. 519. A pardon is a private official act, and must be conveyed to and accepted by the criminal, and must be brought judicially to the attention of the court to be noticed; U. S. v. Wilson, 7 Pet. (U. S.) 150, 8 L. Ed. 640; unless made by public proclamation, when it has the force of law; Jenkins v. Collard, 145 U. S. 546, 12 Sup. Ct. 868, 36 L. Ed. 812. A pardon may be granted before trial; 6 Opin. A. G. 20; or after the expiration of imprisonment when that is part of the sentence; Steller's Case, Fed. Cas. No. 13,380, 1 Phila. 302; 9 Opin. A. G. 478. He may remit penalties, forfeitures and fines; Osborn v. U. S., 91 U. S. 474, 23 L. Ed. 388; even after the death of the offender; Caldwell's Case, 11 Opin. A. G. 35; or fines imposed for contempt of court; In re Mullee, 7 Blatchf. 23, Fed. Cas. No. 9,911.

As to the force and effect of pardons generally, see PARDON; AMNESTY. As to the treaty power, see TREATY.

Nomination and appointment to office are voluntary acts distinct from the issuing of the commission; Marbury v. Madison, 1 Cra. (U. S.) 137, 155, 2 L. Ed. 60; and the president may, after confirmation, withhold a commission, and until it has been delivered the appointment is not consummated; Case of Lieutenant Cox, 4 Opin. A. G. 218; but it was held in Marbury v. Madison, 1 Cra. (U. S.) 137, 2 L. Ed. 60, that formal delivery of a commission was not necessary to complete the appointment, which was done by affixing the seal to the commission; this having been done, the death of the president before the delivery will not affect its validity; U. S. v. Le Baron, 19 How. 73, 15 L. Ed. 525. See OFFICER; EXECUTIVE POWER; which latter title see also as to the power of the president to make recess appointments.

Inferior officers, such as are mentioned in the second paragraph of the section, include clerks of courts; In re Hennen, 13 Pet. (U. S.) 230, 10 L. Ed. 138; U. S. v. Avery, 1 Deady, 204, Fed. Cas. No. 14,481; extradition commissioners; Rice v. Ames, 180 U. S. 371, 21 Sup. Ct. 406, 45 L. Ed. 577; vice-consuls; U. S. v. Eaton, 169 U. S. 331, 18 Sup. Ct. 374, 12 L. Ed. 767; inspectors of immigration; Nishimura Ekiu v. U. S., 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146.

Sec. 3. The authority given to the president to communicate his views and recommendations to congress, and his power to adjourn them in case of disagreement between the two houses, does not seem to have been the occasion of any judicial or official construction. It is interesting to note that President Wilson has revived the earlier custom of communicating his views to both houses in person. The power to convene the two houses in extraordinary sessions has been frequently exercised, and there is not in the federal constitution, as there is in those of many states, any power given to the president to limit the subjects of consideration to that for which he calls the extraordinary sessions. As to the power to receive ambassadors and other public ministers, and the inferences which have been drawn from it,

and also the direction to take care that the laws be faithfully executed, see EXECUTIVE POWER.

It was determined in Blount's Case, p. 22, 102, that a member of either house of congress is not a civil officer subject to impeachment, nor is a territorial judge, his office being created by legislation only; 3 Opin. A. G. 409. As to the method of proceeding and impeachment, generally, see that title. The constitutional power of impeachment does not interfere with the president's power of removal for cause which he deems adequate; Shurtleff v. U. S., 189 U. S. 311, 23 Sup. Ct. 535, 47 L. Ed. 828. See EXECUTIVE POWER.

The third article contains three sections. The *first* vests the judicial power in sundry courts, provides for the tenure of office by the judges, and for their compensation. The *second* provides for the extent of the judicial power, vests in the supreme court original jurisdiction in certain cases, and directs the manner of trying crimes. The *third* defines treason, and vests in congress the power to declare its punishment.

Sec. 1. This article deals with the *judicial power*, as to which, generally, see that title. As to the power of the courts to declare an act of congress or of a state legislature unconstitutional, see CONSTITUTIONAL. The authority of the federal courts over state legislation is confined to cases in which it is repugnant to the federal constitution, and they have no power to declare it void under the state constitution; Jackson v. Lamphire, 3 Pet. (U. S.) 280, 7 L. Ed. 679.

The federal courts are not to be treated by the state courts as belonging to another sovereign; Com. v. R. Co., 58 Pa. 43.

It was established by an early case that the power of congress to create inferior tribunals is unlimited except by the sense of that body as to what is necessary and proper; Stuart v. Laird, 1 Cra. (U. S.) 299, 2 L. Ed. 115; and in the same case it was answered to an objection that the judges of the supreme court had no right to sit as circuit judges, that the practice and acquiescence in the custom "affords an irresistible answer and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature . . . too strong and obstinate to be shaken or controlled; . . . the question is at rest and ought not now to be disturbed."

It has also been determined in many cases that the territorial courts are not courts of the United States; Good v. Martin, 95 U. S. 90, 24 L. Ed. 341; Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244. As to the territorial courts, generally, see McAllister v. U. S., 141 U. S. 174, 11 Sup. Ct. 949, 35 L. Ed. 693.

The courts which congress is authorized by this section to establish do not include a court-martial, or a court for the administration of civil and criminal jurisdiction in conquered territory, which may be created by the president; *supra*. See COURT-MARTIAL.

The authority of congress to create new courts carries with it *ex necessitate* the power to define their jurisdiction; Sheldon v. Sill, 8 How. (U. S.) 449, 12 L. Ed. 1147.

The provision that the compensation of a judge shall not be diminished prevents a tax upon his salary; Com. v. Mann, 5 W. & S. (Pa.) 415.

Sec. 2. The constitutional jurisdiction of the federal courts cannot be affected by state legislation; Watson v. Tarpley, 18 How. (U. S.) 517, 15 L. Ed. 509; Lincoln County v. Luning, 133 U. S. 529, 10 Sup. Ct. 363, 33 L. Ed. 766; as by attempting to regulate executions; Bank of U. S. v. Halstead, 10 Wheat. (U. S.) 51, 6 L. Ed. 264; or by the interference of state courts or officers with persons or property within the jurisdiction of the federal court; Beers v. Haughton, 9 Pet. (U. S.) 329, 9 L. Ed. 145; Ableman v. Booth, 21 How. (U. S.) 506, 16 L. Ed. 169; or by a limitation of remedies within the state; Suydam v. Broadnax, 14 Pet. (U. S.) 67, 10 L. Ed. 357; Lincoln County v. Luning, 133 U. S. 529, 10 Sup. Ct. 363, 33 L. Ed. 766; or by removing a case from one state court to another; Hyde v. Stone, 20 How. (U. S.) 170, 15 L. Ed. 874. As to the attempts to limit to state courts the litigation by or against foreign corporations, see FOREIGN CORPORATION. The grant of judicial power includes both criminal and civil cases; Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648; but there is no common law jurisdiction in the federal courts in criminal cases; United States v. Hudson, 7 Cra. (U. S.) 32, 3 L. Ed. 259; though their implied powers include all that is necessary to enforce their jurisdiction, United States v. Hudson, 7 Cra. (U. S.) 32, 3 L. Ed. 259.

Cases at law under this section include all those usually embraced under that term, including for example, proceedings for the condemnation of land under the power of eminent domain; Chappell v. U. S., 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510; Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449; and those in equity are those which are included within the English system of equity jurisprudence, and include all cases of which the English court of chancery would have jurisdiction; Boyle v. Zacharie, 6 Pet. (U. S.) 648, 8 L. Ed. 532; Mississippi Mills v. Cohn, 150 U. S. 202, 14 Sup. Ct. 75, 37 L. Ed. 1052; and the system of equity administered by the federal courts is determined by the practice in England, subject to changes by legislation or by rule of court; Boyle v. Zacharie, 6 Pet. (U. S.) 648, 8 L. Ed. 532; but it cannot be affected by state legislation; Dravo v. Fabel, 132 U. S. 487, 10 Sup. Ct. 170, 33 L. Ed. 421; Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113.

A case "arising" under the constitution, laws or treaties of the United States means

one which required for its decision a construction of either; Cohens v. Virginia, 6 Wheat. (U. S.) 264, 5 L. Ed. 257; Martin v. Hunter, 1 Wheat. (U. S.) 304, 4 L. Ed. 97; or which involves a right created or protected by them; Patton v. Brady, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713; New Orleans v. De Armas, 9 Pet. (U. S.) 224, 9 L. Ed. 109. See as to this point, JURISDICTION; FEDERAL QUESTION; UNITED STATES COURTS. See those titles, generally, as to the subjects of the judicial power of the United States as enumerated in this section.

The clause relating to jury trials remains unaffected by the 6th Amendment; Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223; see JURY. As to the admiralty jurisdiction conferred by this section, see ADMIRALTY; MARITIME LAW; and other cognate titles.

The power of congress to designate the place of trial for offences not committed within any state includes the power to designate a place of trial for an offence previously committed; Cook v. U. S., 138 U. S. 157, 11 Sup. Ct. 268, 34 L. Ed. 906.

Sec. 3. As to *treason*, see that title. The provision as to proof applies to the trial and not the preliminary hearing; Charge to Grand Jury, Treason, 2 Wall. Jr. 134, Fed. Cas. No. 18,276; 1 Burr's Trial 196.

The prohibition contained in the last paragraph of this section was set up to defeat a forfeiture of real property employed in violation of the revenue laws, as making the act under which the remedy was applied in practical effect a bill of attainder within this provision, and it was said by Hall, J., that the clauses in this section "have respect to high crimes, and punishing them, restraining rigor and guarding against arbitrarily enacting guilt. The case before the court is a civil suit *in rem*, against the thing, to ratify the seizure of it, and the provision of the act of congress under which it is alleged to be forfeited, and therefore was seized, is a regulation of civil policy, framed to secure to the United States fair payment of taxes imposed for the support of the government, a regulation of civil policy to accomplish a purpose vital to government; for without revenue the government cannot exist; and what measures may be requisite to enforce the collection of a tax, it is for congress in the exercise of its legislative power to determine." Accordingly, the objection was overruled, and the information sustained, and a decree of condemnation was made; U. S. v. Distillery, 2 Abb. U. S. 192, Fed. Cas. No. 14,965.

The fourth article is composed of four sections. The *first* provides that state records, etc., shall have full faith and credit in other states. The *second* secures to citizens of each state all privileges and immunities of citizens in the several states, and the delivery of fugitives from justice or from labor. The *third* provides for the admission of new states, and the government of the territories. The *fourth* guarantees to every state in the Union a republican form of government, and protection from invasion or domestic violence.

Sec. 1. As to the full faith and credit to be given in one state to the records and judicial proceedings of another under this section, see FOREIGN JUDGMENT.

Sec. 2. As to the privileges and immunities to which citizens of each state are entitled in other states, see PRIVILEGES AND IMMUNITIES. As to the delivery of fugitives from justice by one state to another, see FUGITIVE FROM JUSTICE, sub-tit. *Interstate Rendition*.

The third paragraph of this section relates mainly to slavery and is necessarily obsolete, but the expression "no person held to service or labor" includes apprentices; Boaler v. Cummines, 5 Clark (Pa.) 246; *id.*, Fed. Cas. No. 1,584.

Sec. 3. It was held in Luther v. Borden, 7 How. 1, 12 L. Ed 581, that the power of recognizing state governments is vested in congress. The territories cannot without the consent of congress take legislative action for the formation of constitutions and state governments, but the people of a territory may meet in primary assemblies or conventions for the purpose of making application to congress for admission into the Union as a state; 2 Opin. A. G. 726. The admission of a new state gives it the same status as the other states; Bolln v. Nebraska, 176 U. S. 83, 20 Sup. Ct. 287, 44 L. Ed. 382; Huse v. Glover, 119 U. S. 543, 7 Sup. Ct. 313, 30 L. Ed. 487; and its sovereignty and equality cannot be restrained by congressional action; Withers v. Buckley, 20 How. (U. S.) 84, 15 L. Ed. 816; and immediately upon its admission, the federal laws extend over and into it; Calkin v. Cocke, 14 How. (U. S.) 229, 14 L. Ed 398.

The consent of the legislature to the division of a state requires that it be one representing and governing the whole state and not merely a part of it; 10 Opin. A. G 426

The power of congress over public lands is unlimited: U. S. v. Gratiot, 14 Pet. 526, 10 L. Ed. 573; and that power is not affected by the admission of a territory as a state; Camfield v. U. S., 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260. See LANDS, PUBLIC.

Sec. 4. The guarantee of a republican form of government to every "state" means to its people and not to its government; Texas v. White, 7 Wall. (U. S.) 700, 19 L. Ed. 227. Where it was also held that this clause was sufficient authority for the reconstruction, after the Civil War, of the governments of the states included within the Confederacy.

No precise definition of what constitutes a republican government under this clause has been judicially declared; it does not involve the recognition of woman suffrage; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. Ed. 627; nor is it violated by a pro-

vision for minority representation in a constitutional convention; Woods' Appeal, 75 Pa. 59; nor by an act of a state legislature giving the courts control over municipal boundaries; Forsyth v. Hammond, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 1095. The decision as to what is a republican government must necessarily remain absolutely with congress; Luther v. Borden, 7 How. (U. S.) 42, 12 L. Ed. 581; and the execution of this constitutional power belongs to the political department of the government and not the judicial; Taylor v. Beckham, 178 U. S. 548, 20 Sup. Ct. 890, 1009, 44 L. Ed. 1187. See REPUBLICAN FORM OF GOVERNMENT.

The authority to grant federal aid in the suppression of domestic violence may be exercised upon the call of the executive whenever the legislature cannot be convened; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.

The *fifth article* merely provides for the method of amendment which is to be made on the proposal of two-thirds of both houses and becomes part of the constitution when ratified by the legislature of three-fourths of the states, or by conventions in three-fourths of the states, as may be provided by congress in the proposal. Congress may also by a vote of two-thirds of each house or on the application of the legislatures of two-thirds of the states call a convention for proposing amendments.

The limitations on the power of amendment were that, prior to 1808 the first and fourth clauses in the ninth section of the first article should not be affected. The clauses in question were those relating to the importation of slaves, and requiring capitation or other direct tax to be laid in proportion to the population.

It was also provided "that no state, without its consent, shall be deprived of its equal suffrage in the senate."

Proposed amendments to the constitution need not be approved by the president; Hollingsworth v. Virginia, 3 Dall. (U. S.) 378, 1 L. Ed. 644.

The *sixth article* declares that the debts due under the Confederation shall be valid against the United States; that the constitution and treaties made under its powers shall be the supreme law of the land; that public officers shall be required by oath or affirmation to support the constitution of the United States; and that no religious test shall be required as a qualification for office.

The first clause has reference to a then condition and not to general powers of government; Dred Scott v. Sandford, 19 How. 393, 15 L. Ed. 691. The second clause is a very vital one, which has been and still is in the course of constant application to test the validity of legislation by the states and by congress. In either case if repugnant to the federal constitution, laws or treaties, it is void and the courts will so declare it; Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. Ed. 648; Pollock v. Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759; and in many other cases, which have declared federal or state laws unconstitutional, the principle has been declared. The obligations imposed by the federal constitution cannot be released or impaired by a state constitution; Dodge v. Woolsey, 18 How. (U. S.) 331, 15 L. Ed. 401; or any constitution or law of a foreign state received into the Union; League v. De Young, 11 How. (U. S.) 185, 13 L. Ed. 657; Herman v. Phalen, 14 How. (U. S.) 79, 14 L. Ed. 334. As to the principles which will be applied in testing the constitutionality of statutes, see CONSTITUTIONAL. And as to the force of treaties after being duly executed and ratified, see TREATY. Under this provision of the constitution, the constitution, laws and treaties of the United States are made a part of the law of every state; Hauenstein v. Lynham, 100 U. S. 483, 25 L. Ed. 628.

The *seventh article* directs what shall be a sufficient ratification of this constitution by the states.

In pursuance of the fifth article of the constitution, articles in addition to, and amendments of, the constitution, were proposed by congress, and ratified by the legislatures of the several states. These additional articles are to the following import. The first ten were proposed at the first session of the first congress, in accordance with the recommendations of various states in ratifying the constitution, and were adopted in 1791. The dates of the adoption of the subsequent amendments are given below.

As to the combined effect of the first ten amendments, see *infra*.

First Amendment. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.

Since this applies entirely to the federal government, there is no provision protecting the religious liberties of citizens of the states, and the claim that an ordinance of a state municipal corporation impairs it, raises no federal question; Permoli v. Municipality No. 1 of New Orleans, 3 How. (U. S.) 589, 11 L. Ed. 739; the term "religion" in this amendment refers exclusively to a person's views of his relations to his Creator, though often confused with some particular form of worship, from which it must be distinguished; Davis v. Beason, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637. The religious freedom secured is not available as a protection against legislation for the punishment of criminals, and their offences are not mitigated by the sanction of a re-

ligious sect; Church of Jesus Christ of L. D. S. v. U. S., 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 478; (the Mormon Church case); Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244; or by territorial legislation; Davis v. Beason, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637. This provision securing religious freedom is not violated by an appropriation of money by congress to a hospital as compensation for the treatment of poor patients; Bradfield v. Roberts, 175 U. S. 291, 20 Sup. Ct. 121, 44 L. Ed. 168.

The provision securing freedom of speech is not violated by legislation excluding alien anarchists from the country; or their deportation after entry in violation of law; U. S. v. Williams, 194 U. S. 279, 24 Sup. Ct. 719, 48 L. Ed. 979.

The provision securing freedom of the press is not invaded by the exclusion of lottery, literature from the mails; Ex parte Rapier, 143 U. S. 110, 12 Sup. Ct. 374, 36 L. Ed. 93; Horner v. U. S., 143 U. S. 207, 12 Sup. Ct. 407, 36 L. Ed. 126; and its transportation otherwise may be prohibited; Lottery Case, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492, disregarding a suggestion in In re Jackson, 96 U. S. 727, 24 L. Ed. 877.

The right of peaceable assemblage and of petition was not created, but simply recognized by the constitution and protected against federal interference; for its continued protection, the reliance must be had upon the states, U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.

Second Amendment. A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

The right secured by this article is not created, but only secured against interference by congress; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; and it may be regulated by state statutes not conflicting with valid congressional action; Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. 580, 29 L. Ed. 615, Wright v. Com., 77 Pa. 470; Nunn v. State, 1 Ga. 243; Cockrum v. State, 24 Tex. 394; State v. Reid, 1 Ala. 612, 35 Am. Dec. 44; State v. Mitchell, 3 Blackf. (Ind.) 229; Bliss v. Com., 2 Litt. (Ky.) 90, 13 Am. Dec. 251.

Third Amendment. No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

No legal question seems to have arisen under this article.

Fourth Amendment. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The guaranty of this article applies to letters and sealed packages in the mails as fully as to property retained in a man's home; In re Jackson, 96 U. S. 727, 24 L. Ed 877. It is violated by an act requiring the defendant in revenue cases to produce his private books etc., in court, and providing that, on refusal, the case shall be taken as confessed against him; Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; but not by an inquiry of a broker as to purchases or sales on behalf of any senator of corporate stock liable to be affected by the action of the senate; In re Chapman, 166 U. S. 661, 17 Sup. Ct. 677, 41 L. Ed. 1154; nor by compulsory production of documentary evidence under a statute which gives immunity from prosecution or forfeiture because of the testimony given; Interstate Commerce Commission v. Baird, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860. Testimony procured in violation of this prohibition is not thereby rendered inadmissible; Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575.

The provision as to warrants does not apply to any issued under a state process; Smith v. Maryland, 18 How. (U. S.) 71, 15 L. Ed. 269; nor to an action by the federal government for a debt due to it without search warrant; Den v. Improv. Co., 18 How. (U. S.) 272, 15 L. Ed. 372.

Fifth Amendment. No persons shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This amendment operates solely on the federal government and not on the state; Barrington v. Missouri, 205 U. S. 483, 27 Sup. Ct. 582, 51 L. Ed. 890; Hunter v. Pittsburgh, 207 U. S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151. It is satisfied by one inquiry and adjudication, and an indictment found by the proper grand jury should be accepted anywhere within the United States as at least *prima facie* evidence of probable cause and sufficient basis for the removal of the person charged from the district where he is arrested; Beavers v. Henkel, 194 U. S. 73, 24 Sup. Ct. 605, 48 L. Ed. 882. The requirement in the amendment of presentment or indictment for the grand jury does not take upon itself the local law as to how the

grand jury shall be made up and raise the latter to a constitutional requirement; Talton v. Mayes, 163 U. S. 376, 16 Sup. Ct. 986, 41 L. Ed. 196.

Whether a person on trial is compelled to be witness against himself contrary to the 5th Amendment because compelled to stand up and walk before the jury, or because the jury were stationed during a recess so as to observe his size and walk, was not decided, but it was held that it did not affect the jurisdiction of the trial court and render the judgment void; In re Moran, 203 U. S. 96, 27 Sup. Ct. 25, 51 L. Ed. 105.

As to the several guarantees contained in this article, see the separate titles and particularly FOURTEENTH AMENDMENT; DUE PROCESS OF LAW; EQUAL PROTECTION OF THE LAWS.

Sixth Amendment In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The purpose of this amendment was to provide for trial by jury in criminal cases in all the federal courts; Ex parte Milligan, 4 Wall. (U. S.) 2, 18 L. Ed 281; it applies to the territories; Thompson v. Utah, 170 U. S 343, 18 Sup. Ct. 620, 42 L Ed. 1061, and after the admission of a state, it cannot provide for the trial of felonies committed before its admission otherwise than by a common law jury; Thompson v. Utah, 170 U. S 343, 18 Sup. Ct. 620, 42 L Ed 1061. The provision applies to all criminal cases, not felonies merely; Callan v. Wilson, 127 U. S 540, 8 Sup. Ct. 1301, 32 L. Ed. 223; but only such crimes as were previously tried by jury; U. S. v. Duane, Wall. Sr. 102, Fed. Cas No. 14,997. It does not include an action for goods claimed to have been forfeited by an importer; U. S. v. Zucker, 161 U. S. 475, 16 Sup. Ct. 641, 40 L. Ed. 777; or petty criminal offences; Schick v. U. S., 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99, 1 Ann. Cas. 585. The protection of this amendment extends to aliens within the country; Wong Wing v. U. S., 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140.

See JURY; VENUE; WITNESS.

Seventh Amendment. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

This article secures the right of trial by jury in civil cases. Suits at common law mean only those distinguished from admiralty and equity; Parsons v. Bedford, 3 Pet. (U. S.) 433, 7 L. Ed. 732; Shields v. Thomas, 18 How. (U. S.) 253, 15 L. Ed. 368; U. S. v. La Vengeance, 3 Dall. (U. S.) 297, 1 L. Ed. 610; but the right cannot be impaired by blending a claim at law with an equitable demand; Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358. The right to a jury trial is secured in bankruptcy cases; In re Wood, 210 U. S. 246, 258, 28 Sup. Ct. 621, 52 L. Ed. 1046; and in proceedings for the condemnation of property seized as a prize; Armstrong's Foundry, 6 Wall. (U. S.) 766, 18 L. Ed 882; The Sarah, 8 Wheat. (U. S.) 394, 5 L. Ed. 644; it does not apply to proceedings to disbar an attorney; In re Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552; nor to findings by the court of claims; McElrath v. U. S., 102 U. S. 426, 26 L. Ed. 189, or by a special tribunal for hearing claims against a municipality not strictly legal, but properly provided for by legislation; Guthrie Nat. Bank v. Guthrie, 173 U. S. 528, 19 Sup. Ct. 513, 43 L. Ed. 796, nor to condemnations under the right of eminent domain; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 17 Sup Ct. 718, 41 L Ed. 1165, Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270. The common law which in this article is made the criterion of suits in which the right of trial by jury is secured is the common law of England, U. S v. Wonson, 1 Gall 5, Fed Cas. No 16,750 See JURY.

Eighth Amendment. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

As to the prohibitions of this article, see BAIL; FINE; PUNISHMENT.

Ninth Amendment. The enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

A distinction is taken between a case of express prohibition of state actions and one in which the power of the states is taken away by implication. In the former case the power of the state ceased upon the adoption of the constitution, in the latter it continues until congress acts upon the subject matter; Moore v. Houston, 3 S. & R. (Pa.) 169, 179, to which a writ of error to the United States Supreme Court was dismissed. So a grant to congress of power over a certain subject matter does not invest any particular court with jurisdiction over it until congress has enacted a law upon the subject; U. S. v. New Bedford Bridge, 1 Woodb. & M. 401, Fed. Cas. No. 15,867.

Tenth Amendment. The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectfully, or to the people.

The federal government possesses only the delegated powers defined by the constitution and all others are reserved to the states; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; from this results a different rule of interpretation of the federal constitution from those of the states; the former is strict, the latter liberal; Com. v. Hartman, 17 Pa. 118; Weister v. Hade, 52 Pa. 474. See INTERPRETATION.

All powers not conferred upon the federal government by the constitution are reserved to the states, and among the powers not surrendered by them are the police power (subject to the limitations imposed by the constitution); New Orleans Gaslight Co. v. Light Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; Louisville Gas Co. v. Gas Co., 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510; Patterson v. Kentucky, 97 U. S. 501, 24 L. Ed. 1115; Prigg v. Com., 16 Pet. (U. S.) 539, 10 L. Ed 1060; the right to control tide waters within the limits of the states; Weber v. Harbor Com'rs, 18 Wall. (U. S.) 57, 21 L. Ed. 798; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018; Pollard v. Hagan, 3 How. (U. S.) 212, 11 L. Ed. 565; the regulation of real property with respect to its acquisition, tenure and disposition; U. S. v. Fox, 94 U. S. 315, 24 L. Ed. 192; and the imposition of succession duties; Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed 439; and generally the power of taxation of subject matter within their jurisdiction; Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. Ed. 558; Providence Bank v. Billings, 4 Pet. (U. S.) 563, 7 L. Ed. 939.

The United States has no inherent powers of sovereignty and only those enumerated in the constitution of the United States; the manifest purpose of the 10th Amendment was to put beyond dispute the proposition that all powers not so granted were reserved to the people, and any further powers can only be attained by a new grant; Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.

The first ten amendments do not apply to the states; Fox v. Ohio, 5 How. (U. S.) 410, 12 L. Ed. 213; Twitchell v. Pennsylvania, 7 Wall. (U. S.) 321, 19 L. Ed. 223; Spies v. Illinois, 123 U. S. 131, 8 Sup. Ct. 22, 31 L. Ed. 80; McElvaine v. Brush, 142 U. S. 155, 160, 12 Sup. Ct. 156, 35 L. Ed. 971; Jack v. Kansas, 199 U. S. 372, 26 Sup. Ct. 73, 50 L. Ed. 234, 4 Ann. Cas 689; the same was held as to the first eight amendments; Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97; and as to the 2d and 4th; Miller v. Texas, 153 U. S. 535, 14 Sup. Ct. 874, 38 L. Ed. 812; and as to the 5th; Kelly v. Pittsburgh, 104 U. S. 78, 26 L. Ed. 658; Davis v. Texas, 139 U. S. 651, 11 Sup. Ct. 675, 35 L. Ed. 300; Fallbrook Irrig. District v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; and as to the 5th and 6th; In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402; Davis v. Texas, 139 U. S. 651, 11 Sup. Ct. 675, 35 L. Ed. 300; and as to the 8th Amendment; O'Neil v. Vermont, 144 U. S. 323, 12 Sup. Ct. 693, 36 L. Ed. 450; Eilenbecker v. District Court, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801; Pervear v. Mass., 5 Wall. (U. S.) 475, 18 L. Ed. 608. The provision of the 14th Amendment forbidding a state to make or enforce any law abridging the privileges and immunities of citizens of the United States does not operate to extend to the states the limitations on the powers of the federal government contained in the 10th Amendment; In re Kemmler, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519; Maxwell v. Dow, 176 U. S. 581, 20 Sup. Ct. 448, 494. 44 L. Ed 597; or those contained in the first eight; Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97; but the 7th applies in an appellate federal court to a case which was tried in a state court; Justices of Supreme Court v. U. S., 9 Wall. (U. S) 274, 19 L. Ed. 658.

Eleventh Amendment. (1798). The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state.

This amendment was a result of the decision in Chisholm v. Georgia, 2 Dall. (U. S.) 419, 1 L. Ed. 440. It has been the subject of much judicial construction and the cases upon the point as to what is a suit against a state are very numerous, the question being usually raised as to whether a suit against a state officer respecting property or official action is in fact a suit against a state.

Many suits against state officers have been held to be in effect against the state, but it is established, as a settled principle, that an attempt of a state officer to enforce an unconstitutional statute is a proceeding without authority of, and does not affect, the state in its sovereign capacity and is an illegal act, and the officer is stripped of his official character and is subjected as an individual for the consequences of it. The state has no power to impart to its officer immunity from responsibility to the supreme authority of the U. S.; Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

As to what has been held to be a suit against a state within this amendment, see STATE; and also an interesting discussion of the history and scope of this amendment by W. L. Guthrie in 8 Colum. L. Rev. 183. In the South Carolina Distillery Cases, Murray v. Distilling Co., 213 U. S. 151, 29 Sup. Ct. 458, 53 L. Ed. 742, and Murray v. South Carolina, 213 U. S 174, 29 Sup. Ct. 465, 53 L. Ed. 752, the first being a *certiorari* to the circuit court of appeals, and the second being a writ of error to the supreme court of

the state, the former was reversed and the latter affirmed. It was held that a bill in equity to compel specific performance of a contract between an individual and the state cannot, against the objection of the state, be maintained in the federal courts; and that the consent of a state to be sued in its own courts by a creditor does not give that creditor a right to sue in a federal court. It was also held that although by engaging in business, a state may not avoid a pre-existing right of the federal government to tax that business, it does not thereby lose the exemption from suit under this amendment, which was also held to prevent a suit in the federal courts against state officers by vendors of supplies for business carried on by the courts

Twelfth Amendment (1804). The electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president, and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate; the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates and the votes shall then be counted; the person having the greatest number of votes for president, shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of death or other constitutional disability of the president.

The person having the greatest number of votes as vice-president shall be the vice-president, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice-president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole shall be necessary to a choice.

But no person constitutionally ineligible to the office of president shall be eligible to that of vice-president of the United States.

This is a substitute for the third paragraph of section 1 of Article II of the constitution and provides for the method of the election of president and vice-president by the electors, or in default of an election by them.

Thirteenth Amendment (1865). Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Congress shall have power to enforce this article by appropriate legislation.

This amendment has been recognized by the Supreme Court as having been passed with special reference to the completion of the enfranchisement of the African race; Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676; but the word "servitude" which is included in it is of larger meaning than slavery, and by the use of it the amendment operates to prohibit any kind of slavery, including peonage and coolie labor; Butchers' Benevolent Ass'n v. Slaughter House Co, 16 Wall. (U. S.) 36, 21 L. Ed. 394; and every species of involuntary servitude, U. S. v. Harris, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290; but imprisonment at hard labor, compulsory and unpaid, is in the strongest sense of the words within this exception; Ex parte Wilson, 114 U. S 417, 5 Sup. Ct. 935, 29 L. Ed. 89. In a much later case than those which first defined the scope of this amendment, it is said: "The words 'involuntary servitude' have a 'larger meaning than slavery.' . . . The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude." Bailey v. Alabama, 219 U. S. 241, 31 Sup. Ct. 145, 55 L. Ed 191.

Fourteenth Amendment (1868). All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of

persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to the male inhabitants of such state, being of twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

No person shall be a senator or representative in congress, or elector of president or vice-president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each house, remove such disability.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void

The congress shall have power to enforce, by appropriate legislation, the provisions of this article

This amendment has given rise to so much discussion by the courts that it requires fuller treatment than can be given here, and for this see the title, FOURTEENTH AMENDMENT, and the cross-references therein; POLICE POWER; EMINENT DOMAIN.

Fifteenth Amendment (1870). The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

The congress shall have power to enforce this article by appropriate legislation.

This amendment under the decisions is not to be extended beyond the precise meaning of the words employed. It does not operate to increase the right of suffrage in the states, except so far as that had been previously abridged by "race, color or previous condition of servitude," or had been confined to white persons; Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274. It does not confer the right of suffrage upon women; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. Ed. 627; nor upon Indians still under tribal relations and not naturalized; Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. Ed. 643. The amendment is not violated by the qualifications requiring a specific amount of literacy; Williams v. Mississippi, 170 U. S. 213, 18 Sup. Ct. 583, 42 L. Ed. 1012.

Sixteenth Amendment (1913). Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

Seventeenth Amendment (1913). The senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

When vacancies happen in the representation of any state in the senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

The reader is referred to the notes to the United States Constitution in Vol. I of Ardemas Stewart's Edition of Purdon's Dig. (Pa. Stats) which may be properly termed a treatise on the subject of great value.

CONSTITUTIONAL. That which is consonant and agrees with the constitution.

Laws made in violation of the constitution are null and void. It is well established that it is the function of the courts so to declare them in any case coming before the court, which involves the question of their constitutionality. See *infra*. "An unconstitutional law is not a law." Chicago, I. & L. Ry. Co. v. Hackett, 228 U. S. 559, 33 Sup. Ct. 581, 57 L. Ed. —. The presumption is always in favor of the constitutionality of a law, and the party alleging the opposite must clearly establish it; Fletcher v. Peck, 6 Cra. (U. S.) 87, 3 L. Ed. 162; Sweet v. Rechel, 159 U. S. 380, 16 Sup. Ct. 43, 40 L. Ed. 188; U. S. v. Ry. Co., 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576; Ex parte Davis, 21 Fed. 396; Ewing v. Hoblitzelle, 85 Mo. 64; Pleuler v. State, 11 Neb. 547, 10 N. W. 481; Com'rs of Leavenworth County v. Miller, 7 Kan. 479, 12 Am. Rep. 425; Sawyer v. Dooley, 21 Nev. 390, 32 Pac. 437. In re League Island, 1 Brewst. (Pa.) 524. People v. Reardon, 184 N. Y. 431, 77 N. E. 970, 8 L. R. A. (N. S.) 314, 112 Am. St. Rep 628, 6 Ann. Cas. 515; New York v. Reardon, 204 U. S. 152, 27 Sup. Ct. 188, 51 L. Ed.

415, 9 Ann. Cas. 736; where an act is capable of two interpretations, the court will adopt that which will sustain it rather than that which will render it void as unconstitutional; St. Louis Nat. Bank v. Papin, 4 Dill. 29, Fed. Cas. No. 12,239; the incompatibility of the statute with the constitution should be so clear as to leave little reason for doubt before it is pronounced to be invalid; Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. Ed. 366.

An act may be declared partly valid and partly void as unconstitutional; Com. v. Kimball, 24 Pick. (Mass.) 361, 35 Am. Dec. 326; Berry v. R. Co., 41 Md. 446, 20 Am. Rep. 69; McPherson v. Secretary of State, 92 Mich. 377, 52 N. W. 469, 16 L. R. A. 475, 31 Am. St. Rep. 587; In re Sternbach, 45 Fed. 175; Marshall Field & Co. v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; Unity v. Burrage, 103 U. S. 459, 26 L. Ed 405; Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. 580, 29 L. Ed. 615; Gamble v. McCrady, 75 N. C. 509.

A part of a law may be unconstitutional, while there is no such objection to the remaining parts, and in this case all of the law stands, except that part which is unconstitutional; People v. Van De Carr, 178 N. Y. 425, 70 N. E 965, 66 L. R. A. 189, 102 Am. St. Rep. 516; Cella Commission Co. v. Bohlinger, 147 Fed. 419, 78 C. C. A. 467, 8 L. R. A. (N. S.) 537; but the parts must be wholly independent of each other; Allen v Louisiana, 103 U. S 80, 26 L Ed. 318; and capable of separation; Bank of Hamilton v. Dudley, 2 Pet. (U. S.) 492, 526, 7 L. Ed. 496; Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. 580, 29 L. Ed. 615; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. Ed. 106. The parts must be separable so that each may be read by itself; Baldwin v. Franks, 120 U. S. 678, 7 Sup. Ct. 656, 763, 30 L. Ed. 766; U. S. v. Steffens, 100 U. S. 82, 25 L. Ed. 550; but if the two provisions are so united that a presumption arises that the legislature would not have adopted the one without the other both will fail; Ex parte Frazer, 54 Cal. 94; Western Union Tel. Co. v. State, 62 Tex. 630; Slauson v. City of Racine, 13 Wis. 398; Connolly v. Sewer Pipe Co, 184 U. S. 540, 565, 22 Sup. Ct. 431, 46 L Ed 679; and it is a question for the court to determine whether it was the intent of congress to have the part which is constitutional stand by itself; Butts v. Transp. Co., 230 U. S. 126, 33 Sup. Ct. 964, 57 L. Ed. —; or where the section which is unconstitutional is an inseparable part of several sections which form one system mutually dependent; Campau v. City of Detroit, 14 Mich. 276; or where all the provisions of the act are secondary to the unconstitutional provisions; Brooks v. Hydorn, 76 Mich. 273, 42 N. W. 1122; where a portion is unconstitutional, the statute must fall as a whole, unless the apparent legislative intent is that in such case the remaining portion shall stand alone; Grey v. City of Dover, 62 N. J. L. 40, 40 Atl. 640.

This power of the courts to declare a law unconstitutional can only exist where there is a written constitution. No such power is possessed by the English courts, and an act of parliament is absolutely conclusive and binds everybody when once its meaning is ascertained. But, where a written constitution exists, it is the expression of the will of the sovereign power, and no body which owes its existence to that constitution (as does the legislature) can violate this fundamental expression of the will of the people. It was originally doubted whether the courts possessed this power, even where a written constitution exists, but it is now established beyond doubt. The question may arise with regard to both state and United States laws considered with reference to the United States constitution, and with regard to state laws also as considered in reference to the state. No important question of law has ever been approached with more caution, examined and discussed with more deliberation and finally determined more conclusively, than that of the existence of this judicial power. It arose as early as 1792, on an act conferring powers upon the judges which were alleged to be not judicial, but a decision was avoided by repeal of the statute; see Hayburn's Case, 2 Dall. (U. S.) 409, 1 L. Ed. 436; but the question arising in another case, the act was declared unconstitutional; see U. S. v. Ferreira, 13 How. (U. S) 40, 52 note, 14 L. Ed 42; the question was again raised in 1798 and not decided; Calder v. Bull, 3 Dall. (U. S.) 386, 1 L Ed 648; and later it was stated from the bench as the general sentiment of the bench and bar that the power existed; Com v. Coxe, 4 Dall. (U. S) 194, 1 L. Ed. 786. But in 1803 the question was directly raised in a famous case recently much discussed in legal periodical literature, and the power and duty of the court to declare an act unconstitutional were declared in an opinion by Marshall, C. J., in what Kent terms "an argument approaching to the precision and certainty of a mathematical demonstration;" 1 Kent 453; in that case the actual decision was against the jurisdiction, and therefore no law was declared unconstitutional, but the reasoning of the opinion is the basis of the rule afterwards applied and firmly settled; the question was next seriously raised and finally settled by the reasoning of Marshall, C. J., in Cohen v. Virginia, 6 Wheat. (U. S.) 264, 5 L. Ed. 257; Marbury v. Madison, 1 Cra. (U. S.) 137, 2 L. Ed. 60; prior to this decision the question had been raised and decided in favor of the power of the courts in New Jersey; State v. Parkhurst, 9 N. J. L. 427, 440, 444; in Virginia, In re First Case of the Judges, 4 Call, 1, 135; Com. v. Cherry, 2 Va. Cas. 20;

Page v. Pendleton, Wythe, 211; in South Carolina, Bowman v. Middleton, 1 Bay 252; in North Carolina, Den v. Singleton, 1 N. C. 48; in Rhode Island, Pamph. J. B. Varnum, Providence, 1787; and it was raised in New York in a case argued by Hamilton; Hamilton's Works, vol. 5, 115; vol. 7, 197. See Dillon, Laws & Jur. of Eng. 203.

In Eakin v. Raub, 12 S. & R. (Pa.) 330, Gibson, C. J., in a dissenting opinion, was of opinion that the right of the judiciary to declare a legislative act unconstitutional does not exist, unless expressly stated; but that it is expressly given by the clause in the federal constitution which provides that the constitution shall be the supreme law of the land, etc. The same judge in Norris v. Clymer, 2 Pa. 281, said to counsel that he had changed his opinion for two reasons: —the late convention of Pennsylvania by their silence sanctioned the pretensions of the court to deal freely with the acts of the legislature; and he was satisfied from experience of the necessity of the case.

The power has been exercised by the supreme court of the United States in the following cases: Hayburn's Case, 2 Dall. (U. S.) 409, 1 L. Ed. 436; U. S. v. Ferreira, 13 How. (U. S.) 40, 52, 14 L. Ed. 42; Marbury v. Madison, 1 Cra. (U. S.) 137, 2 L. Ed. 60; Gordon v. U. S., 2 Wall. (U. S.) 561, 17 L. Ed. 921; In re Garland, 4 Wall. (U. S.) 333, 18 L. Ed. 366; Hepburn v. Griswold, 8 Wall. (U. S.) 603, 19 L. Ed. 513; U. S. v. Dewitt, 9 Wall. (U. S.) 41, 19 L. Ed. 593; Supreme Justices v. Murray, 9 Wall. (U. S.) 274, 19 L. Ed. 658; Collector v. Day, 11 Wall. (U. S.) 113, 20 L. Ed. 122; U. S. v. Klein, 13 Wall. (U. S.) 128, 20 L. Ed. 519; U. S. v. R. Co., 17 Wall. (U. S.) 322, 21 L. Ed. 597; U. S. v. Reese, 92 U. S. 214, 23 L. Ed. 563; U. S. v. Fox, 95 U. S. 670, 24 L. Ed 538; U. S. v. Steffens, 100 U. S. 82, 25 L. Ed 550; Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377; U. S. v. Harris, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290; U. S. v. Stanley, 109 U. S. 3, 3 Sup. Ct. 18, 27 L Ed. 835; Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; Pollock v. Trust Co., 158 U. S 601, 15 Sup. Ct. 912, 39 L. Ed. 1108; Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297; Adair v. U. S., 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764. And the power has been exercised by that court with respect to state or territorial statutes in cases running into the hundreds.

The discussion of the subject was recently revived by an article on the Income Tax Cases in 29 Am. L. Rev. 550, characterizing the exercise of the power in question as "without constitutional warrant" and "based only on the plausible sophistries of John Marshall, and another by the same writer on the case of Marbury v. Madison, characterizing the doctrine as an "unconstitutional usurpation of the lawmaking power by the federal courts;" 30 Am. L. Rev. 188. The first of these was followed by an article in the same periodical taking issue with it; *id.* 55; and one in 34 Am. L. Reg. & Rev. 796. In the last the subject is thoroughly reviewed from the earliest cases down to the Income Tax cases, and it contains much historical matter bearing upon the question not before collected. See also 7 Harv. L. Rev. 129; 19 Am. L. Rev. 177; Coxe on Judicial Power and Unconstitutional Legislation; an elaborate discussion of the subject by Jno. R. Wilson, Pres't, Rep. Ind. St. Bar Ass'n for 1899, p. 12.

In judging what a constitution means, it must be interpreted in the light and by the assistance of the common law; Durham v. State, 117 Ind. 477, 19 N. E. 327; Brewer, J., in South Carolina v. U. S., 199 U. S. 437, 449, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737; Matthews, J., in Smith v. Alabama, 124 U. S. 465, 478, 8 Sup. Ct. 564, 31 L. Ed. 508; Gray, J., in U. S. v. Wong Kim Ark, 169 U. S. 649, 654, 18 Sup. Ct. 456, 42 L. Ed. 890; Bradley, J., in Moore v. U. S., 91 U. S. 270, 274, 23 L. Ed. 346.

Certain fundamental principles govern the courts in passing upon the validity of legislative acts under the constitution; among them are the following:

It is not usual as a *matter of practice* for courts to pass upon constitutional questions excepting before a full bench; Briscoe v. Bank, 8 Pet. (U. S.) 118, 8 L. Ed. 887.

It has been said that inferior courts will not pass upon these questions; Ortman v. Greenman, 4 Mich. 291; but see, *contra*, Cooley, Const. Lim 198, n.; Mayberry v. Kelly, 1 Kan. 116. The contrary rule would seem now to be well settled.

Courts will not draw into consideration constitutional questions collaterally, or unless the consideration is necessary to the determination of the very point in controversy; Hoover v. Wood, 9 Ind. 287; Smith v. Speed, 50 Ala. 277; Clarke v. City of Rochester, 24 Barb. (N. Y.) 446; Parker v. State, 5 Tex. App. 579; State v. Rich, 20 Mo. 393; Ireland v. Turnpike Co., 19 Ohio St. 373. If a statute is valid on its face, the court will not look into evidence *aliunde* to determine whether it violates the constitution; Rankin v. Colgan, 92 Cal. 605, 28 Pac. 673; but where it is plainly invalid for other reasons, courts will not pass on its constitutionality; State v. Price, 8 Ohio Cir. Ct. R. 25, 4 O. C. D. 296; Smith v. Speed, 50 Ala. 276; Weimer v. Bunbury, 30 Mich. 201; White v. Scott, 4 Barb. (N. Y.) 56. The question whether a legislative act is constitutional never comes before a court for decision as an abstract question, but can only be considered when it arises in a suit *inter partes*. "The serious duty of condemning state legislation as constitutional and void cannot be thrown upon this court, except at the suit of parties directly and

certainly effected thereby"; Chadwick v. Kelly, 187 U. S. 540, 23 Sup. Ct. 175, 47 L. Ed. 293; Manley v. Park, 187 U. S. 547, 23 Sup. Ct. 208, 47 L. Ed. 296. As to the effect of a decision in such a case upon the act itself, see *infra*.

To justify a court in declaring an act unconstitutional, the case must be so clear that no reasonable doubt can be said to exist; Blair v. Ridgely, 41 Mo. 63, 97 Am. Dec. 248; Smithee v. Garth, 33 Ark. 17; Petition of Wellington, 16 Pick. (Mass.) 95, 26 Am. Dec. 631; New York & O. M. R. Co. v. Van Horn, 57 N. Y. 473; Kerrigan v. Force, 68 N. Y. 381; Gormley v. Taylor, 44 Ga. 76; State v. R. Co., 48 Mo. 468; see Lake County v. Rollins, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed 1060; Rich v. Flanders, 39 N. H. 304; Chicago, D. & V. R. R. Co. v. Smith, 62 Ill. 268, 14 Am. Rep. 99; and every intendment will be made in favor of the constitutionality of the law; People v. Rucker, 5 Colo. 455. "The principle is universal, that legislation, whether by congress or by a state, must be taken to be valid, unless the contrary is made clearly to appear;" Reid v. Colorado, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108; and in Minsinger v Rau, 236 Pa. 327, 84 Atl. 902, it was said that when an act has been the result of deliberate thought of a commission of prominent citizens, and has been passed upon by two legislatures before final approval by the governor, it will not be set aside as unconstitutional "unless the alleged breaches of the fundamental law are so glaring that there is no escape."

The courts cannot pronounce void an act within the general scope of legislative powers, merely because contrary to natural justice; Commissioners of Northumberland County v. Chapman, 2 Rawle (Pa.) 74; Weber v. Reinhard, 73 Pa. 370, 13 Am. Rep. 747; State v. Kruttschnitt, 4 Nev. 178; Hills v. Chicago, 60 Ill. 86; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Martin v. Dix, 52 Miss. 53, 24 Am. Rep. 661; Maxwell v. Board, 119 Ind. 20, 23, 19 N. E. 617, 21 N. E. 453; nor because it violates fundamental principles of republican government, unless these principles are protected by the constitution; License Tax Cases, 5 Wall. (U. S.) 469, 18 L. Ed. 497; Perry v. Keene, 56 N. H. 514; nor because it is supposed to conflict with the *spirit* of the constitution; People v. Fisher, 24 Wend. (N. Y.) 220; Walker v. City of Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24; Cooley, Const. Lim. (6th ed.) 204. Any legislative act which does not encroach upon the powers vested in the other departments of the government must be enforced by the courts; Chicago, D. & V. R. R. Co. v. Smith, 62 Ill. 268, 14 Am. Rep. 99; Fletcher v. Peck, 6 Cra. (U. S.) 128, 3 L. Ed. 162. The courts of one state should not declare unconstitutional and void a statute of another state, whose courts had held it constitutional; American Print Works v. Lawrence, 23 N. J. L. 596, 57 Am. Dec. 420.

In the discussion of this subject expressions have been used from time to time by courts and legal authors which tend to leave in the mind of the reader an impression that legislative acts have been set aside upon some other or higher ground than that of unconstitutionality. These expressions will be found on examination either to consist of *dicta* not only entirely *obiter*, but usually not justified even as *dicta* by the facts of the cases in which they occur, or to be qualified by a context usually omitted in citing them. A few of them will suffice as examples. Judge Cooley, in the preface to the second edition of his very learned work on Constitutional Limitations, says: "There are on all sides definite limitations which circumscribe the legislative authority, independent of the specific restraints which the people impose by their state constitutions." Again, in the work itself it is said that it is not necessary that the courts, before they can set aside a law as invalid must be able to find some *specific* inhibition which has been disregarded, or some *specific* command which has been disobeyed; Cooley, Const. Lim 206. This language has been quoted and interpreted to sustain the idea sometimes hinted at rather than seriously and argumentatively advanced, that there is some vague sense of justice and right—some higher law, it might be termed—which may justify a court in holding that a legislative act is invalid, in the absence of an express or implied constitutional objection. And it has been considered that the same view is maintained by Judge Redfield in an article in 10 Am. L. Reg. N. S. 161. So in an early case it has been said that statutes against plain and obvious principles of common right and common reason are void; Ham v. McClaws, 1 Bay (S. C.) 98. So also Judge Story made some forcible observations respecting "fundamental maxims of free government," to disregard which no power "lurked under any general grant of legislative authority," Wilkinson v. Leland, 2 Pet. (U. S.) 627, 7 L. Ed. 542, 657, which have been referred to as supporting the view under consideration. Of the like character were the assertions of Hosmer, C. J., that he could not agree "with those judges who assert the omnipotence of the legislature in all cases when the constitution has not interposed an explicit restraint;" Inhabitants of Goshen v. Inhabitants of Stonington, 4 Conn. 209, 225, 10 Am. Dec. 121; and the language of a New York court which declared that the vested *rights* of the inhabitants of the city of New York in certain public property rested "not merely upon the constitution, but upon the great principles of eternal justice which lie at the foundation of all free government;" Benson v. City of New York, 10 Barb. (N. Y.)

223, 244. Commenting on these and similar statements, Mr. C. A. Kent, in an article in 11 Am. L. Reg. N. S. 734, says on this subject: "The judiciary of a state cannot declare a legislative act unconstitutional, unless it conflict, expressly or by implication, with some provision of the state or of the federal constitution." See City of Evansville v. State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93, note. A careful examination of these and other authorities relied upon for the purpose stated will make it apparent that there is no substantial basis for a doctrine which will permit a court to apply to a legislative act any test of validity other than that of its constitutionality. When there is doubt as to the construction of a law, courts may give to it one consonant with rather than opposed to principles of right and justice, and this was precisely the scope of the South Carolina case. In the New York case the great fundamental principles need not have been referred to by the court, for the reason that they were all protected by the constitution, and in the Connecticut case not only was no law held invalid, but the sole question decided was that an act declaring valid all marriages previously celebrated by a clergyman of any religious denomination according to its forms was constitutional. The note by Judge Redfield, referred to, is directed only to show that there are limitations to the legislative power, and that it does not embrace "judicial decrees or despotic orders or assessments such as a military conqueror might make," under the guise of taxation. But it will be found that the cases put by him, as well as those used by Judge Cooley, to illustrate the expression quoted from his work, and indeed all of those which have given rise to the theory under consideration, are provided for in the American constitutions either by express prohibitions and declarations of rights, or by the distribution of the powers of government and the right of the judicial branch to determine finally whether a given act is an exercise of *legislative power*. The whole subject is thoroughly discussed by Judge Cooley in his Constitutional Limitations, 6th ed., and upon full consideration of the authorities he concludes that a court cannot "declare a statute unconstitutional and void, solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it be shown that such injustice is prohibited or such rights guaranteed or protected by the constitution (p. 197); . . . that except when the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case" (p. 201), nor because of "apparent injustice or impolicy," or because "they appear to the minds of the judges to violate fundamental principles of republican government, unless it shall be found that those principles are placed beyond legislative encroachment by the constitution" (p. 202). See also Potter, Dwar. Stats. 62.

"There is no room in our constitutional theory for any transcendent right or instinct of nature, except as guaranteed by the constitution"; Henry v. Cherry & Webb, 30 R. I. 13, 31, 73 Atl. 97, 24 L. R. A. (N. S.) 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006; State v. McCrillis, 28 R. I. 165, 66 Atl. 301, 9 L. R. A. (N. S.) 635, 13 Ann. Cas. 701; State v. Ins. Co., 73 Conn. 255, 47 Atl. 299, 57 L. R. A. 481, denying the existence of "the vague notion of a higher law." The courts are not guardians of the rights of the people except as those rights are secured by some constitutional provision; Cooley, Const. Lim. 201. And see a thorough discussion of the subject of "Implied Limitations upon the Exercise of the Legislative Power" by R. C. Dale, Am. Bar. Ass'n Rep. (1901) 294.

A court cannot interfere merely because it does not consider that the circumstances at the time justified the action of the legislature; there must be a clear unmistakable infringement of rights secured by the fundamental law; Otis v. Parker, 187 U. S. 606, 23 Sup. Ct. 168, 47 L. Ed. 323, where an act forbidding sales of stock on margins was held not unconstitutional. By way of illustration, Holmes, J., said that no court would declare usury laws or Sunday laws unconstitutional, though every member of it believed such law to be unwise or useless; while on the other hand wagers may be declared illegal without a statute, or lotteries under one, though formerly thought pardonable.

In the consideration of these questions, the distinction between the federal and state constitutions must be borne in mind: "Congress can pass no laws but such as the constitution authorizes expressly or by clear implication; while the state legislature has jurisdiction of all subjects on which its legislation is not prohibited." Cooley, Const. Lim. 210; see Weister v. Hade, 52 Pa. 477; Giozza v. Tiernan, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599. But it has been held that the decision of congress that certain claims upon the public treasury are founded upon moral and honorable obligations and upon principles of right and justice, and that public money be appropriated in payment of such claims is constitutional, and can rarely, if ever, be the subject of review by the judicial branch of the government; U. S. v. Realty Co., 163 U. S. 427, 16 Sup. Ct. 1120, 41 L. Ed. 215.

No one can attack as unconstitutional an independent provision of a law, who has no interest in and is not affected by such provision; State v. Becker, 3 S. D. 29, 51

N. W. 1018; Farneman v. Cemetery Ass'n, 135 Ind. 344, 35 N. E. 271; Burnside v. County Court, 86 Ky. 423, 6 S. W. 276; Jones v. Black, 48 Ala. 540; Moore v. City of New Orleans, 32 La. Ann. 726; People v. R. Co., 89 N. Y. 75.

The judiciary of the United States should not strike down a legislative enactment of a state, especially if it has direct connection with the social order, health and morals of its people, unless such legislation plainly and palpably violates some right granted or secured by the national constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of national concern; Plumley v. Massachusetts, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223.

An act adjudged to be unconstitutional is as if it had never been enacted. Sumner v. Beeler, 50 Ind. 341, 19 Am. Rep. 718; City of Detroit v. Martin, 34 Mich. 170, 22 Am. Rep. 512; Woolsey v. Dodge, 6 McLean, 142, Fed. Cas. No 18,032; Clark v. Miller, 54 N. Y. 528; Norton v. Shelby County, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178; Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185; though it was held in Com. v. McCombs, 56 Pa. 436, that an officer acting under an unconstitutional law was a *de facto* officer. An unconstitutional law must be deemed to have the force of law so far as to protect an officer acting under it, until it is declared void; Sessums v. Botts, 34 Tex. 335; but see Astrom v. Hammond, 3 McLean, 107, Fed. Cas. No. 596; Poindexter v. Greenhow, 114 U. S. 288, 5 Sup. Ct. 903, 962, 29 L. Ed. 185. If a decision adjudging a statute unconstitutional is afterwards overruled, the statute is considered to have been in force during the whole period since its enactment; Pierce v. Pierce, 46 Ind. 86; but see Menges v. Dentler, 33 Pa. 495, 75 Am. Dec. 616; Geddes v. Brown, 5 Phila. (Pa.) 180; Gelpcke v. Dubuque, 9 Am. L. Rev. 402. An unconstitutional act can under no circumstances be validated by the legislature; State v. Whitesides, 30 S. C. 579, 9 S. E. 661, 3 L. R. A. 777.

See 11 Am. L. Reg. N. S 730; 9 *id.* 585.

The power of the courts to declare legislative acts unconstitutional is the subject of an extended article by Wm. M. Meigs, in 40 Am. L. Rev. 641, which in a sense continues a previous article in 19 Am. L. Rev. 175. Mr. Meigs elaborates the argument on the subject, particularly with reference to the early decisions and the congressional debates on the repeal of the Judiciary Act, in 1802, of which he declares his ignorance at the time he wrote his first article. He cites five cases in which the right was exercised and two others in which it was approved prior to 1800, and gives an interesting history of the earlier development of the subject, which has been less discussed in connection with it.

In passing upon an act the court can only take the facts before it; in this way it may sometimes enforce laws which would be declared invalid if attacked in a different manner; Quong Wing v. Kirkendall, 223 U. S. 59, 32 Sup. Ct. 192, 56 L. Ed. 350.

As to the constitutionality of various classes of statutes, see the several titles of constitutional law, including: ARMS; BONDS; BRIDGES; CIVIL RIGHTS; COMMERCE; DUE PROCESS OF LAW; EMINENT DOMAIN; EX POST FACTO LAWS; EXECUTIVE POWER; EXTRADITION; FEDERAL QUESTION; FOREIGN JUDGMENTS; FULL FAITH AND CREDIT; HABEAS CORPUS; IMPAIRING OBLIGATION OF CONTRACTS; INTERSTATE COMMERCE, JUDICIAL POWER; JUDICIARY; LIQUOR LAWS; ORIGINAL PACKAGES; POLICE POWER; PRIVILEGES AND IMMUNITIES; RETROACTIVE LAWS; SPECIAL LEGISLATION; STATUTES; TAXATION; TITLE; UNITED STATES COURTS.

See Thorpe, Amer. Charters, Constitutions and Organic Laws, for the text of state constitutions.

CONSTITUTIONAL CONVENTION. A convention summoned by the legislature to draw up a new, or amend an old constitution. It is ancillary and subservient to the fundamental law, not hostile and paramount thereto. Jameson, Const. Conv. § 11. It is bound by the act creating it; Wood's Appeal, 75 Pa. 59. See Jameson, Const. Conv. §§ 376–418. The result of its labors, when adopted, must be submitted to a vote of the people, before it can become effective; Jameson, § 479 *et seq.* *Contra*, if the legislature does not so provide in the act calling the convention; State v. Neal, 42 Mo. 119; Sproule v. Fredericks, 69 Miss. 898, 11 South. 472; in such case it need not be submitted to vote; Sproule v. Fredericks, 69 Miss. 898, 11 South. 472.

For a complete list of Constitutional conventions held in the United States, to 1876, see Jameson, Const. Conv. Appendix B, and see the work generally for a full discussion of the interesting questions which have arisen respecting the powers and duties of such bodies. See STATE.

CONSTITUTIONS OF CLARENDON. See CLARENDON.

CONSTITUTIONS OF THE FOREST. See FOREST LAWS; CHARTA DE FORESTA.

CONSTITUTOR. **In Civil Law.** He who promised by a simple pact to pay the debt of another; and this is always a principal obligation. Inst. 4. 6. 9.

CONSTITUTUM (Lat.). An agreement to pay a subsisting debt which exists without any stipulation, whether of the promisor or another party. It differs from a stipulation in that it must be for an existing debt. Du Cange.

A day appointed for any purpose. A form of appeal. Calvinus, Lex.

CONSTRAINT. The word constraint is equivalent to the word restraint. Edmondson v. Harris, 2 Tenn. Ch. 433.

CONSTRUCTION (Lat. *construere*, to put together). **In Practice.** Determining the meaning and application as to the case in question of the provisions of a constitution, statute, will, or other instrument, or of an oral agreement.

Drawing conclusions respecting subjects that lie beyond the direct expression of the term. Lieber, Leg. & Pol. Herm. 20.

Construction and interpretation are generally used by writers on legal subjects, and by the courts, as synonymous, sometimes one term being employed and sometimes the other Lieber, in his Legal and Political Hermeneutics, distinguishes between the two, considering the province of interpretation as limited to the written text, while construction goes beyond, and includes cases where texts interpreted and to be construed are to be reconciled with rules of law or with compacts or constitutions of superior authority, or where we reason from the aim or object of an instrument or determine its application to cases unprovided for, C 1, § 8; c 3, § 2, c 4; c. 5. Dr Wharton (2 Contracts, c 19) adopts this view Leake (Digest of Contracts 217) and Prof. James B. Thayer (Evidence 411) consider them as synonymous. Black (Interpretation of Laws 1) makes some distinction between the terms.

Legal rules of construction so called, suggest natural methods of finding and weighing evidence and ascertaining the fact of intention, but do not determine the weight which the evidence has in mind, and do not establish a conclusion at variance with that reached by a due consideration of all the competent proof; Edes v. Boardman, 58 N. H. 580, 592.

A *strict* construction is one which limits the application of the provisions of the instrument or agreement to cases clearly described by the words used. It is called, also, literal.

A *liberal* construction is one by which the letter is enlarged or restrained so as more effectually to accomplish the end in view. It is called, also, equitable.

The terms *strict* and *liberal* are applied mainly in the construction of statutes, and the question of strictness or liberality is considered always with reference to the statute itself, according to whether its application is confined to those cases clearly within the legitimate import of the words used, or is extended beyond though not in violation of *(ultra sed non contra)* the strict letter In contracts, a strict construction as to one party would be liberal as to the other.

One leading principle of construction is to carry out the intention of the authors of or parties to the instrument or agreement, so far as it can be done without infringing upon any law of superior binding force.

The subject will be treated under INTERPRETATION.

CONSTRUCTIVE. That which amounts in the view of the law to an act, although the act itself is not necessarily really performed. For words under this head, such as constructive fraud, etc., see the various titles FRAUD; NOTICE; TRUST; etc.

CONSUETUDINARIUS (Lat.). **In Old English Law.** A ritual or book containing the rites and forms of divine offices or the customs of abbeys and monasteries.

A record of the *consuetudines* (customs). Blount; Whishaw.

CONSUETUDINARY LAW. Customary or traditional law.

CONSUETUDINES FEUDORUM (Lat. feudal customs). A compilation of the law of feuds or fiefs in Lombardy, made A. D. 1170.

It is called, also, the Book of Fiefs, and is of great and generally received authority The compilation is said to have been ordered by Frederic Barbarossa, Erskine, Inst. 2. 3. 5, and to have been made by two Milanese lawyers, Spelman, Gloss., but this is uncertain It is commonly annexed to the *Corpus Juris Civilis*, and is easily accessible. See 3 Kent, Comm., 10th ed. 665, n.; Spelman, Gloss.

CONSUETUDO (Lat.) A custom; an established usage or practice. Co. Litt. 58.

Tolls; duties; taxes. Co. Litt. 58 *b*.

This use of *consuetudo* is not correct: *custuma* is the proper word to denote duties, etc. 1 Shars. Bla. Com 313, n. An action formerly lay for the recovery of customs due, which was commenced by a writ *de consuetud.nibus et servitus* (of customs and services). This is said by Blount to be "a writ of right close which lies against the tenant that deforceth the lord of the rent and services due him" Blount; Old Nat Brev. 77, Fitzh. Nat. Brev. 151.

There were various customs as, *consuetudo Anglicana* (custom of England), *consuetudo curiæ* (practice of a court), *consuetudo mercatorum* (custom of merchants). See CUSTOM; LEX, LEX ET CONSUETUDO REGNI NOSTRI; LEGES ET CONSUETUDINES REGNI.

CONSUL. A commercial agent appointed by a government to reside in a seaport or other town of a foreign country, and commissioned to watch over the commercial rights and privileges of the nation deputing him. The term includes consuls-general and vice-consuls. Rev. Stat. § 4130.

A *vice-consul* is one acting in the place of a consul.

Among the Romans, consuls were chief magistrates who were annually elected by the people, and were invested with powers and functions similar to those of kings. During the middle ages the term consul was sometimes applied to ordinary judges; and, in the Levant, maritime judges are yet called *consuls* 1 Boulay Paty, Dr. Mar. tit *Prel* s 2, p. 57. Officers with powers and duties corresponding to those of modern consuls were employed by the ancient Athenians, who had them stationed in commercial ports with which they traded 3 St John, Mann and Cus. of Anc Greece 283. They were appointed about the middle of the twelfth century by the maritime states of the Mediterranean; and their numbers have increased greatly with the extension of modern commerce.

As a general rule, consuls represent the subjects or citizens of their own nation not otherwise represented; Bee 209; The London Packet, 1 Mas. 14, Fed. Cas. No. 8,474; The Anne, 3 Wheat. (U. S.) 435, 4 L. Ed. 428; The Antelope, 10 Wheat. (U. S.) 66, 6 L. Ed. 268. Their duties and privileges are now generally limited, defined, and se-

cured by commercial treaties, or by the laws of the countries they represent. They are not strictly judicial officers; 3 Taunt. 102; and have no judicial powers except those which may be conferred by treaty and statutes. See The William Harris, Ware 367, Fed. Cas. No. 17,695; Dainese v. Hale, 91 U. S. 13, 23 L. Ed. 190.

American consuls are nominated by the president and confirmed by the senate. U. S. Const. art. 2, § 2. Upon the exercise of this power of appointment by the president, congress can place no limitation; Foote v. U. S., 23 Ct. Cls. 443.

The consular system was reorganized by Act of April 5, 1906. Seven classes of consuls-general were created with salaries running from $12,000 to $3,000; nine classes of consuls, with salaries running from $8,000 to $2,000. The offices of vice-consul-general, deputy-consul-general, vice-consul and deputy-consul were continued, and also consular agents. The office of commercial agent was abolished. No consul-general, consul, or consular agent, receiving a salary of $1,000 or over shall transact business as a merchant, manufacturer, broker, or other trader, or as a clerk for such, within the limits of his jurisdiction, nor practice as a lawyer.

They are required to perform many duties in relation to the commerce of the United States and towards masters of ships, mariners, and other citizens of the United States. Among these are the authority to receive protests or declarations which captains, masters, crews, passengers, merchants, and others make relating to American commerce; they are required to administer on the estates of American citizens dying within their consular jurisdiction and leaving no legal representatives, when the laws of the country permit it; see 2 Curt. Eccl. 241; to take charge of and secure the effects of stranded American vessels in the absence of the master, owner, or consignee; to settle disputes between masters of vessels and the mariners; to provide for destitute seamen within their consulate, and send them to the United States at the public expense. See R. S. § 1674 *et seq.* Also to hear complaints of ill-treatment of seamen; The Welhaven, 55 Fed. 80. The consuls are also authorized to make certificates of certain facts in certain cases, which receive faith and credit in the courts of the United States; Potter v. Ins. Co., 3 Sumn. 27, Fed. Cas. No. 11,335. But these consular certificates are not to be received in evidence, unless they are given in the performance of a consular function; Church v. Hubbart, 2 Cra. (U. S.) 187, 2 L. Ed. 249; Catlett v. Ins. Co., 1 Paine 594, Fed. Cas. No. 2,517; U. S. v. Mitchell, 2 Wash. C. C. 478, Fed. Cas. No. 15,791; Foster v. Davis, 1 Litt. (Ky.) 71; nor are they evidence, between persons not parties or privies to the transaction, of any fact, unless, either expressly or impliedly, made so by statute; Levy v. Burley, 2 Sumn. 355, Fed. Cas. No. 8,300; Catlett v. Ins. Co., 1 Paine 594, Fed. Cas. No. 2,517; Brown v. The Independence, 2 Crabbe 54, Fed. Cas. No. 2,014.

Their rights are to be protected agreeably to the laws of nations, and of the treaties made between the United States and the nation to which they are sent.

A consul is liable for negligence or omission to perform seasonably the duties imposed upon him, or for any malversation or abuse of power, to any injured person, for all damages occasioned thereby; and for all malversation and corrupt conduct in office a consul is liable to indictment.

Of foreign consuls. Before a consul can perform any duties in the United States, he must be recognized by the president of the United States, and have received his *exequatur*.

A consul is clothed only with authority for commercial purposes; he has a right to interpose claims for the restitution of property belonging to the citizens of the country he represents; The Adolph, 1 Curt. 87, Fed. Cas. No. 86; The London Packet, 1 Mar. 14, Fed. Cas. No. 8,471; Gernon v. Cochran, Bee 209, Fed. Cas. No. 5,368; The Bello Corrunes, 6 Wheat. (U. S.) 152, 5 L. Ed. 229; but he is not to be considered as a minister or diplomatic agent, intrusted by virtue of his office to represent his country in negotiations with foreign states; The Anne, 3 Wheat. (U. S.) 435, 4 L. Ed. 428. They do not represent the country, but are subject to the laws of the country where they reside; U. S. v. Wong Kim Ark, 169 U. S. 678, 18 Sup. Ct. 456, 42 L. Ed. 890.

Consuls are generally invested with special privileges by local laws and usages, or by international compacts; but by the laws of nations they are not entitled to the peculiar immunities of ambassadors. In civil and criminal cases they are subject to the local laws, in the same manner with other foreign residents owing a temporary allegiance to the state; 1 Op. Atty. Gen. 45, 362; Com. v. Kosloff, 5 S. & R. (Pa.) 546; 3 M. & S. 281; U. S. v. Ravara, 2 Dall. (U. S.) 297, 1 L. Ed. 388; Hall, Int. L. 289; Wicquefort, *De l'Ambassadeur*, liv. 1, § 5; Bynkershoek, cap. 10; Marten, *Droit des Gens*, liv. 4, c. 3, § 148.

R. S. § 687, gives to the supreme court original but not exclusive jurisdiction of all suits in which a consul or vice-consul shall be a party. See Mannhardt v. Soderstrom, 1 Binn. (Pa.) 143; State v. De La Foret, 2 N. & M'C. (S. C.) 217; Hall v. Young, 3 Pick. (Mass.) 80, 15 Am. Dec. 180; Sartori v. Hamilton, 13 N. J. L. 107; Valarino v. Thompson, 7 N. Y. 576.

His functions may be suspended at any time by the government to which he is sent, and his *exequatur* revoked. In general, a consul is not liable personally on a contract

made in his official capacity on account of his government; Jones v. Le Tombe, 3 Dall. (U. S.) 384, 1 L. Ed. 647. A vice-consul of a foreign nation who possesses an unrevoked *exequatur* issued by the President of the United States, must still be recognized by the courts as the accredited representative of his country and entitled to all its privileges, although the government which sent him has been overthrown and a revolutionary government established in its place; U. S. v. Trumbull, 48 Fed. 94.

A consul-general is a *consul* within an act concerning acknowledgments of real estate instruments; Linton v. Ins. Co., 104 Fed. 584, 44 C. C. A. 54.

See CONSULAR COURTS.

CONSULAR COURTS. By Act of June 22, 1860, ministers and consuls are invested with judicial authority in China, Japan, Siam, Egypt and Madagascar, to try and to sentence "all citizens of the United States charged with offences against law committed in such countries" and to issue process in execution of the sentence, and with jurisdiction in civil cases "in matter of contract" embracing "all controversies between citizens of the United States, or others," as provided by treaties. This jurisdiction is exercised in conformity with the laws of the United States as to its citizens, and as to others to the extent that the treaties require If such laws are not adapted to the object or are deficient in suitable remedies, "common law and equity and admiralty rules" are to be applied. If none of the above provide sufficient remedies, then the ministers shall, by decrees and regulations having the force of law, supply the deficiencies.

A consul alone may decide all cases when the fine does not exceed $500, or the imprisonment 90 days; but if the former exceeds $100 or the latter 60 days, an appeal on the law and facts lies to the minister.

If there be no minister in any such country, his duties devolve upon the Secretary of State.

The act is extended to Persia as to disputes between United States citizens; and by amendment (June 14, 1878) to Tripoli, Tunis, Morocco, Muscat and the Samoan Islands and to countries with which an applicable treaty shall be negotiated.

In China and Japan (Act of July 1, 1870), an appeal on the law and fact lies when the matter in dispute exceeds $500 and does not exceed $2,500, exclusive of costs; on final judgment exceeding $2,500, an appeal lies to the district court for the district of California; there is a like appeal by a person charged with crime.

By treaty between the United States and Japan, Nov. 22, 1894, it was provided that on July 17, 1899, consular jurisdiction in Japan should "absolutely and without notice cease and determine." 2 Moore, Int. Dig. 659.

By Act of March 23, 1874, the president may suspend the Act of June 22, 1860, as to the territory of the Sublime Porte and Egypt, or either of them, upon the organization of judicial tribunals by the Ottoman Government and accept such tribunals. See MIXED TRIBUNALS.

In China (Act of June 30, 1906), consular courts have the above jurisdiction in civil cases where the sum or value of the property does not exceed $500, and in criminal cases where the punishment cannot exceed $100 fine or 60 days imprisonment; all other jurisdiction is given by that act to the "United States Court for China." See CHINA. The vice-consul at Shanghai (Act of March 2, 1909) exercises such judicial functions in the place of the consul-general.

The judicial system of the United States in China was held to be constitutional in Forbes v. Scannell, 13 Cal. 242.

By Act of June 22, 1860, insurrection against any of the countries named, and murder, are punishable with death. Such cases, and also felonies, are tried before the minister.

In criminal cases of legal difficulty, or when the consul deems that severer punishments than those specified will be required, he shall summon not exceeding four citizens of the United States, and in capital cases not less than four, to sit with him in the trial. The consul may alone decide civil cases when the damages demanded do not exceed $500, but if he is of opinion that any such cases involve legal perplexities, or such damages exceed $500, he shall call in two or three citizens of the United States to sit with him. If all agree, the judgment is final. If any associate differs from the consul, either party may appeal to the minister, but if there be no appeal, the decision of the consul is final.

The constitutional guaranty of trial by jury and indictment by grand jury does not apply to consular courts in trying offenses committed in a foreign country. In re Ross, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. Ed. 581. The jurisdiction of home courts over offenses on the high seas does not exclude the jurisdiction of a consular court if the offender is not taken to the United States; *id.*

CONSULAR OFFICER. See CONSUL.

CONSULTATION. The name of a writ whereby a cause, being formerly removed by prohibition out of an inferior court into some of the king's courts in Westminster, is returned thither again; for, if the judges of the superior court, comparing the proceedings with the suggestion of the party, find the suggestion false or not proved, and that, therefore, the cause was wrongfully called from the inferior court, then, upon consul-

tation and deliberation, they decree it to be returned, whereupon this writ issues. *Termes de la Ley;* 3 Bla. Com. 114.

In French Law. The opinion of counsel upon a point of law submitted to them.

CONSUMMATE. Complete; finished; entire.

A marriage is said to be consummate A right of dower is *inchoate* when coverture and seisin concur, *consummate* upon the husband's death. 1 Washb R. P. 250, 251. A tenancy by the curtesy is *initiate* upon the birth of issue, and consummate upon the death of the wife. 1 Washb. R. P. 140, Watson v. Watson, 13 Conn 83, Witham v. Perkins, 2 Greenl (Me.) 400; 2 Bla Com 128

A contract is said to be consummated when everything to be done in relation to making it has been accomplished. It is frequently of great importance to know when a contract has been consummated, in order to ascertain the rights of the parties, particularly in the contract of sale. See DELIVERY, where the subject is more fully examined. It is also sometimes of consequence to ascertain where the consummation of the contract took place, in order to decide by what law it is to be governed See CONFLICT OF LAWS; CONTRACT; LEX LOCI.

CONTAGIOUS DISEASES. Diseases which are capable of being transmitted by mediate or immediate contact.

Persons sick of such disorders may remain in their own houses; Boom v. City of Utica, 2 Barb. (N. Y.) 104; but are indictable for exposing themselves in a public place endangering the public. See 4 M. & S. 73, 272. Nuisances which produce such diseases may be abated; Meeker v. Van Rensselaer, 15 Wend. (N. Y.) 397. See People v. Townsend, 3 Hill (N. Y.) 479; Barclay v. Com., 25 Pa. 503, 64 Am. Dec. 715; Caldwell v. Bridal, 48 Ia. 15; and a right of action may also be had for injury done to health; Jarvis v. Ry. Co., 26 Mo. App. 253; Fow v. Roberts, 108 Pa. 489.

A landlord is liable in damages for renting a property knowing it to be contaminated with an infectious disease; Snyder v. Gorden, 12 N. Y. St. Rep. 556; under the police power, cities and towns may adopt ordinances for the preservation and promotion of the health of the inhabitants; Com. v. Cutter, 156 Mass. 52, 29 N. E. 1146; Com. v. Hubley, 172 Mass. 58, 51 N. E. 418, 42 L. R. A. 403, 70 Am. St. Rep. 242; Borden's Condensed Milk Co. v. Board of Health, 81 N. J. L. 218, 80 Atl. 30. It is not unconstitutional, as a deprivation of property without due process of law, to pass an ordinance directing a milk inspector to destroy all milk below a certain standard of purity without notice to the owner; Blazier v. Miller, 10 Hun (N. Y.) 435; nor is an act unconstitutional as denying equal protection of the laws which gives a state board of health authority to prevent the landing of passengers and goods from a ship to a locality infected by contagious disease; Compagnie Francaise de Navigation a Vapeur v. Board of Health, 186 U. S. 380, 22 Sup. Ct. 811, 46 L. Ed. 1209, affirming 51 La. Ann. 645, 25 South. 591, 56 L. R. A. 795, 72 Am. St. Rep. 458; vaccination laws making vaccination of children a condition of their attendance in public schools are not unconstitutional; Viemeister v. White, 88 App. Div. 44, 84 N. Y. Supp. 712, affirmed 179 N. Y. 235, 72 N. E. 97, 70 L. R. A. 796, 103 Am. St. Rep. 859, 1 Ann. Cas. 334.

A state law may also prohibit the transportation of cattle from another state, except under certain conditions requiring a certificate of health of such cattle, and it is not an interference with interstate commerce; Reid v. Colorado, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108; St. Louis S. Ry. Co. v. Smith, 20 Tex. Civ. App. 451, 49 S. W. 627, affirmed Smith v. Ry. Co., 181 U. S. 248, 21 Sup. Ct. 603, 45 L. Ed. 847; and so with regard to sheep; State v. Rasmussen, 7 Idaho 1, 59 Pac. 933, 52 L. R. A. 78, 97 Am. St. Rep 234, affirmed in Rasmussen v. Idaho, 181 U. S. 198, 21 Sup. Ct. 594, 45 L. Ed. 820. Sleeping car companies may exclude from their cars insane persons and persons afflicted with contagious or infectious diseases; Pullman Car Co. v. Krauss, 145 Ala. 395, 40 South. 398, 4 L. R. A. (N. S.) 103, 8 Ann. Cas. 218.

See HEALTH.

CONTANGO. A double bargain, consist of a sale for cash of stock previously bought which the broker does not wish to carry, and a repurchase for the re-settlement two weeks ahead of the same stock at the same price as at the sale plus interest accrued up to the date of that settlement. The rate of interest is called a "contango" and contango days are the two days during the settlement when these arrangements are in effect.

CONTEK (L. Fr.). A contest, dispute, disturbance, opposition. Britt. c. 42.

CONTEMPLATION OF BANKRUPTCY. An intention or expectation of breaking up business or applying to be decreed a bankrupt. Atkinson v Bank, Crabbe 529, Fed Cas. No. 609; 5 B. & Ad. 289; 4 Bing. 20. McLean v. Bank, 3 McLean 587, Fed. Cas. No. 8,888.

Contemplation of a *state* of bankruptcy or a known insolvency and inability to carry on business, and a stoppage of business. Story, J., Hutchins v. Taylor, 5 Law Rep. 295, 299, Fed. Cas. No. 6,953. See Everett v. Stone, 3 Sto. 446, Fed. Cas. No. 4,577.

Something more is meant by the phrase than the expectation of insolvency; it includes the making provision against the results of it; Buckingham v. McLean, 13 How. (U. S.) 151, 14 L. Ed. 91; Heroy v. Kerr, 8 Bosw. (N. Y.) 194. See Rison v. Knapp, 1 Dill. 186, Fed. Cas. No. 11,861; Martin v. Toof, 1 Dill. 203, Fed. Cas. No. 9,167.

A conveyance or sale of property made in contemplation of bankruptcy is fraudulent and void; 2 Bla. Com. 285.

CONTEMPLATION OF INSOLVENCY. This term means something more than ex-

pectation of its occurrence; it must include provision against its results so far as the transferee is concerned, and that can only be where he is already a creditor and the object is to take his debt out of the equal ratable distribution of the assets of the company when insolvent. Heroy v. Kerr, 21 How. Pr. Rep. (N. Y.) 409.

CONTEMPT. A wilful disregard or disobedience of a public authority.

By the constitution of the United States, each house of congress may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member. The same provision is substantially contained in the constitutions of the several states.

The power to make rules carries that of enforcing them, and to attach persons who violate them and punish them for contempts; 1 Kent 236; State v. Matthews, 37 N. H. 450; 14 East 1. But see 4 Moore, P. C. 63; 11 *id.* 347. This power of punishing for contempts is confined to punishment during the session of the legislature, and cannot extend beyond it; Anderson v. Dunn, 6 Wheat. (U. S.) 204, 230, 231, 5 L. Ed. 242; Rap. Contempt 2; and it seems this power cannot be exerted beyond imprisonment. It is often regulated by statute; U. S. R. S. §§ 101–103. The arrest of the offending party is made by the sergeant-at-arms, acting by virtue of the speaker's warrant, both in England and the United States; Anderson v. Dunn, 6 Wheat. (U. S.) 204, 5 L. Ed. 242; 10 Q. B. 359. The power of congress to punish for contempt must be found in some express grant in the constitution or be found necessary to carry into effect such powers as are there granted; Kilbourn v. Thompson, 103 U. S. 169, 26 L. Ed. 377; U. S. v. Lee, 106 U. S. 220, 1 Sup. Ct. 240, 27 L. Ed. 171. See CONGRESS.

Courts of justice have an inherent power to punish all persons for contempt of their rules and orders, for disobedience of their process, and for disturbing them in their proceedings; 8 Co. 38 *b*; State v. Matthews, 37 N. H. 450; State v. Morrill, 16 Ark. 384; Ex parte Walker, 25 Ala. 81; Ex parte Adams, 25 Miss. 883, 59 Am. Dec. 234; Clark v. People, Breese (Ill.) 340, 12 Am. Dec. 178; Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405; Bessette v. W. B. Conkey Co., 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997; Kregel v. Bartling, 23 Neb. 848, 37 N. W. 668; Matter of Moore, 63 N. C. 397; People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528; Ex parte Wright, 65 Ind. 508. See In re Savin, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150; Respublica v. Oswald, 1 Dall. (U. S.) 319, 1 L. Ed. 155; it is said that the legislature cannot restrict the power: Ex parte McCown, 139 N. C. 95, 51 S. E. 957, 2 L. R. A. (N. S.) 603. A court may commit for a period reaching beyond the term at which the contempt is committed; Ex parte Maulsby, 13 Md. 642. The punishment should not be by piecemeal, but must be entire and final; O'Rourke v. Cleveland, 49 N. J. Eq. 577, 25 Atl. 367, 31 Am. St. Rep. 719.

Contempts of court are of two kinds: such as are committed in the presence of the court, and which interrupt its proceedings, which may be summarily punished by order of the presiding judge; and constructive contempts, arising from a refusal to comply with an order of court; Androscoggin & K. R. Co. v. R. Co., 49 Me. 392. In the court of chancery the failure or refusal to perform an order or decree is a contempt, and the enforcement of such orders and decrees is by attachment. For an exhaustive discussion of the practice in such cases, see note to State v. Livingston, 4 Del. Ch. 265.

A prosecution for contempt of court in order to compel obedience to an order made in a chancery proceeding is a civil action; Leopold v. People, 140 Ill. 552, 30 N. E. 348.

The punishment is summary and generally immediate in contempts committed *in facie curiæ*, and no process or evidence is necessary; In re Noonan, 47 Kan. 771, 28 Pac. 1104; 2 L. R. H. L. 361; Middlebrook v. State, 43 Conn. 257, 21 Am. Rep. 650; and a party in contempt cannot be heard except to purge himself; Gross v. Clark, 87 N. Y. 272.

In some states, as in Pennsylvania, the power to punish for contempts is restricted to offences committed by the officers of the court, or in its presence, or in disobedience of its mandates, orders, or rules; but no one is guilty of a contempt for any publication made or act done out of court which is not in violation of such lawful rules or orders or in disobedience of its process. By Act of Congress, March 2, 1831, the power in the federal courts to punish for contempt has been limited. Whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the constitution, may perhaps be a matter of doubt. The power of the circuit and district courts can only be exercised to ensure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes; Atwell v. U. S., 162 Fed. 97, 89 C. C. A. 97, 17 L. R. A. (N. S.) 1049, 15 Ann. Cas. 253, where it was held a grand juror was not guilty of contempt for violating his oath to keep the counsel of the United States. See Oswald's Case, 4 Lloyd's Debates 141. If a newspaper article is *per se* libellous, making a direct charge against court or jury, or admitting of but one reasonable construction and requiring no innuendo to apply its meaning to the court, then the publisher cannot escape by denying under oath that he intended the plain meaning which the language used conveys; Allen

v. State, 131 Ind. 599, 30 N. E. 1093. The question of contempt depends upon the act and not the intention of the party; 22 W. R. 398; Wartman v. Wartman, Taney 362, Fed. Cas. No. 17,210; 3 Burr. 1329; 3 C. B. 745. A publication in a newspaper, read by the jurors and attendants of the court, which has a tendency to interfere with the unbiased administration of the laws in pending cases, may be a contempt; State v. Judge of Civil District Court, 45 La. Ann. 1250, 14 South. 310, 40 Am. St. Rep. 282.

The jurisdiction prescribed by congress for federal courts gives no power to punish a newspaper publisher for contempt for criticising the conduct and integrity of the court; Cuyler v. R. Co., 131 Fed. 95; ordinarily, however, newspapers can be so punished; where a statement of facts are published which tend to influence a jury in a pending trial and such facts could not have been shown in evidence, such publication is a contempt; Telegram Newspaper Co. v. Com., 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. Rep. 280; where a newspaper article tends to prejudice the fair trial of a person who has been accused but has not yet been committed, it is a contempt; 67 J. P. 421; even an unintentional mis-statement of the conclusion reached by the court is a contempt; In re Providence Journal Co., 28 R. I. 489, 68 Atl. 428, 17 L. R. A. (N. S.) 582, 125 Am. St. Rep. 755. Contempt is not the proper remedy against one who publishes a newspaper article reflecting on the conduct of a judge in the performance of his ministerial duties, the keeping of accounts, fees, etc.; Hamma v. People, 42 Colo. 401, 94 Pac. 326, 15 L. R. A. (N. S.) 621, 15 Ann. Cas. 655. It is a contempt to publish any account, however meagre, and whether accurate or inaccurate, of proceedings heard *in camera;* [1894] 3 Ch. 193.

Criticism of the manner in which trials are conducted cannot be punished unless it refers to some particular case pending before the court; Ex parte Green, 46 Tex. Cr. App. 576, 81 S. W. 723, 66 L. R. A. 727, 108 Am. St. Rep. 1035.

There may be contempt of court by scandalizing the court itself; by abusing parties concerned in causes; by prejudicing mankind against persons before the cause is heard; 2 Atk. 471; but fair criticism on the proceedings of a court when the case is over, can seldom be contempt of court; [1889] A. C. 549. There is no sedition in just criticism on the administration of the law, but it must be without malignity and not attribute corrupt and malicious motives; 11 Cox 49.

A statement in a petition for re-hearing that the court's ruling is all wrong and written for political reasons is a contempt; In re Chartz, 29 Nev. 110, 85 Pac. 352, 5 L. R. A. (N. S.) 916, 124 Am. St. Rep. 915; but not to file a motion suggesting the disqualification of the judge on the ground that he is related to parties having an interest in the suit; Johnson v. State, 87 Ark. 45, 112 S. W. 143, 18 L. R. A. (N. S.) 619, 15 Ann. Cas. 531. For a case holding in contempt a trial judge who had grossly attacked in print an appellate court who had twice reversed his judgment in a trial for rape, see In re Fite, 11 Ga. App. 665, 76 S. E. 397.

A federal court may punish for contempt one who interferes with a receiver in bankruptcy appointed by it; In re Wilk, 155 Fed. 913; and contempts committed before its referee; United States v. Tom Wah, 160 Fed. 207; one accused of contempt is not entitled to a jury trial; In re Fellerman, 149 Fed. 244; O'Flynn v. State, 89 Miss. 850, 43 South. 82, 9 L. R. A. (N. S.) 1119, 119 Am. St. Rep. 727, 11 Ann. Cas. 530; a denial on oath of having committed a contempt raises an issue of fact for trial; Emery v. State, 78 Neb. 547, 111 N. W. 374, 9 L. R. A. (N. S.) 1124; either a municipal or business corporation may be fined for contempt where its officers and servants have violated an injunction; Marson v. City of Rochester, 112 App. Div. 51, 97 N. Y. Supp. 881; Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176, 4 L. R. A. (N. S.) 1001, 110 Am. St. Rep. 248. A defendant in a divorce proceeding who refused to pay alimony may be punished by having his answer stricken from the record; Bennett v. Bennett, 15 Okl. 286, 81 Pac. 632, 70 L. R. A. 864.

One cannot be guilty of contempt in refusing to obey an order which the court has no power to make; McHenry v. State, 91 Miss. 562, 44 South. 831, 16 L. R. A. (N. S.) 1062; Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764. A decree for the payment of money may be enforced by contempt proceedings; it is not imprisonment for debt; Jastram v. McAuslan, 29 R. I. 390, 71 Atl. 454, 17 Ann. Cas. 320. A decree that a trustee pay over a specified sum in trust funds is enforceable by execution but not by contempt; Mast v. Washtenaw Circuit Judge, 154 Mich. 485, 117 N. W. 1052. An unsuccessful attempt to induce a third person to influence a jury does not constitute a contempt; U. S. v. Carroll, 147 Fed. 947; an assault committed on an attorney in a case by persons interested in the party opposed to him is a contempt, although committed outside the court room; U. S. v. Barrett, 187 Fed. 378; and so where proceedings in a criminal case are ordered to be stayed, and a mob, with knowledge of such order, takes the prisoner from jail and hangs him; U. S. v. Shipp, 203 U. S. 563, 27 Sup. Ct. 165, 51 L. Ed. 319, 8 Ann. Cas. 265; *id.*, 214 U. S. 387, 29 Sup. Ct. 637, 53 L. Ed. 1041; a court may punish an attorney for contempt for wilfully absenting himself in a criminal case; In re Clark, 126 Mo. App. 391, 103 S.

W. 1105; In re McHugh, 152 Mich. 505, 116 N. W. 450; In re Clark, 208 Mo. 121, 106 S. W. 990, 15 L. R. A. (N. S.) 389.

The power of inferior courts to punish for contempt is usually restricted to contempts committed in the presence of the court; 3 Steph. Com. 342, n. 9; L. R. 8 Q. B. 134. A justice of the peace cannot punish contempts, even committed before him, by summary proceedings; Albright v. Lapp, 26 Pa. 99, 67 Am. Dec. 402; nor a committing magistrate for refusal to obey a subpœna; Farnham v. Colman, 19 S. D. 342, 103 N. W. 161, 1 L. R. A. (N. S.) 1135, 117 Am. St. Rep. 944, 9 Ann. Cas. 314.

It is said that it belongs exclusively to the court offended to judge of contempts; State v. Matthews, 37 N. H. 450; State v. McKinnon, 8 Or. 487; In re Pryor, 18 Kan. 72, 26 Am. Rep. 752; In re Williamson, 26 Pa. 9, 67 Am. Dec. 374; State v. Anderson, 40 Ia. 207; and no other court or judge can or ought to undertake, in a collateral way, to question or review an adjudication of a contempt made by another competent jurisdiction; 14 East 1; Gist v. Bowman, 2 Bay (S. C.) 182; State v. Tipton, 1 Blackf. (Ind.) 166; State v. White, T. U. P. Charlt. (Ga.) 136; Cossart v. State, 14 Ark. 538; Bunch v. State, *id.* 544; Lockwood v. State, 1 Ind. 161; Yates v. People, 6 Johns. (N. Y.) 337; Anderson v. Dunn, 6 Wheat. (U. S.) 204, 5 L. Ed. 242; People v. Owens, 8 Utah 20, 28 Pac. 871; Seventy-Six Land & Water Co. v. Superior Court, 93 Cal. 139, 28 Pac. 813. But it has been repeatedly held that a court of superior jurisdiction may review the decision of one of inferior jurisdiction on a matter of contempt; Com. v. Newton, 1 Grant, Cas. (Pa.) 453; Ex parte Rowe, 7 Cal 181; Baltimore & O. R. Co. v. City of Wheeling, 13 Gratt. (Va.) 40; Patton v. Harris, 15 B. Mon. (Ky.) 607; though not on *habeas corpus;* Jordan v. State, 14 Tex. 436; see Ex parte Smith, 53 Cal. 204; Shattuck v. State, 51 Miss. 50, 24 Am. Rep. 624; see Tolman v. Jones, 114 Ill. 147, 28 N. E. 464 It should be by direct order of the court, Geisse v. Beall, 5 Wis. 227. A proceeding for contempt is regarded as a distinct and independent suit; 22 E. L. & Eq. 150; Ex parte Langdon, 25 Vt. 680; Lyon v. Lyon, 21 Conn. 185; and irregularities in the proceedings are immaterial where the result is a sufficient purging of the contempt and a consequent discharge of the rule; Martin v. Burgwyn, 88 Ga. 78, 13 S. E. 958.

Though the same act constitute both a contempt and a crime, the contempt may be tried and punished by the court; U. S. v. Debs, 64 Fed. 724; affirmed by the supreme court, which held that it was competent to invoke the jurisdiction of the courts to remove or restrain obstructions to interstate commerce or the mails, though the acts were criminal in themselves, an injunction having been served, the circuit court had authority to inquire whether its orders had been disobeyed, and finding that they had been, to enter the order of punishment, and its findings as to the act of disobedience are not open to review on *habeas corpus* in the supreme court or any other; In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092.

Proceedings for contempt are of two classes, criminal or punitive, and civil or remedial. The former vindicates the dignity of the courts, the latter protects, preserves, and enforces the rights of private parties and compels obedience to orders, judgments and decrees made to enforce such rights: Wasserman v. United States, 161 Fed. 722, 88 C. C. A. 582; Garrigan v. U. S., 163 Fed. 16, 89 C. C. A. 494, 23 L. R. A. (N. S.) 1295; when contempt proceedings are brought to enforce a civil right, the constitutional provision that no person shall be compelled to be a witness against himself does not apply, since it is not a criminal proceeding; Patterson v. District Council, 31 Pa Super. Ct. 112.

Every member of the public "is bound to observe the restrictions of an injunction, when known, to the extent that he must not aid and abet its violation by others," nor obstruct the administration of justice; the power of the court to proceed against one so offending is inherent and indisputable; Garrigan v. U. S., 163 Fed. 16, 89 C. C. A. 494, 23 L. R. A. (N. S.) 1295, citing [1897] L. R. 1 Ch. 545; In re Reese, 107 Fed. 942, 47 C. C. A. 87. There is an elementary distinction between disobedience of an injunction by parties and privies, and the conduct of others in contempt of the commands of the courts; Garrigan v. U. S., 163 Fed. 16, 89 C. C. A. 494, 23 L. R. A. (N. S.) 1295. Actual notice will render one not a party guilty of contempt in violating an injunction; it is not necessary that he should have been served with a copy of the injunction decree or the writ; In re Lennon, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; Aldinger v. Pugh, 132 N. Y. 403, 30 N. E. 745. But publication in newspapers and the posting upon wagons of a teaming company of an injunction order forbidding interference with its teams, are not enough to charge with knowledge thereof one not a party to the proceedings who assists in a riot in which the teams are interfered with, such person denying knowledge and having a presumption of innocence in his favor; Garrigan v. U. S., 163 Fed. 16, 89 C. C. A. 494, 23 L. R. A. (N. S.) 1295. But mere reading and giving to one not a party a copy of the decree constitutes sufficient notice as a basis for contempt proceedings; Fowler v. Beckman, 66 N. H. 424, 30 Atl. 1117.

Proceedings for contempt against one not a party to the cause, for disobedience of an injunction, are criminal in their nature, and the accused is entitled to the presumption of innocence; they are reviewable by writ of

error; Garrigan v. U. S., 163 Fed. 16, 89 C. C. A. 494, 23 L. R. A. (N. S.) 1295, citing Bessette v. W. B. Conkey Co., 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997; In re Christensen Engineering Co., 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072.

A proceeding instituted by an aggrieved party to punish the other party for contempt for affirmatively violating an injunction in the same action in which the injunction was issued, and praying for damages and costs, is a civil proceeding in contempt of which the only punishment is by fine, measured by the pecuniary injury sustained. If the main suit is discontinued, the contempt proceedings fall with it, but in such case the court may institute proceedings to vindicate its authority; Gompers v. Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874.

For a contempt out of the view and hearing of the court, the offending party will be allowed to answer and offer evidence in defence of the charge; Hohenadel v. Steele, 237 Ill. 229, 86 N. E. 717. At common law the sworn answer of one charged with contempt was conclusive and discharged the contempt; Coleman v. State, 121 Tenn. 1, 113 S. W. 1045; Baird v. People, 134 Ill. App. 433.

Where a defendant violates an injunction pending an appeal, the appellate court is the proper tribunal to punish the contempt; Menuez v. Candy Co., 77 Ohio 386, 83 N. E. 82, 11 Ann. Cas. 1037; an order punishing contempt, made in the progress of a case not criminal, is interlocutory and can only be reviewed on appeal from final decree; Doyle v. Guarantee & Acc. Co., 204 U. S. 599, 27 Sup. Ct. 313, 51 L. Ed. 641; In re Christensen Engineering Co., 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072.

See 20 Am. Law Reg. N. S. 81, where the subject is treated at length; Rapalje, Contempt; JUDGE.

As to proceedings to compel payment of alimony, see Staples v. Staples, 87 Wis. 592, 58 N. W. 1036, 24 L. R. A. 433.

CONTEMPTIBILITER (L. Lat. contemptuously). **In Old English Law.** Contempt, contempts. Fleta, lib. 2, c. 60, § 35.

CONTENEMENTUM. See WAINAGIUM; CONTENTMENT.

CONTENTIOUS JURISDICTION. In Ecclesiastical Law. That which exists in cases where there is an action or judicial process and matter in dispute is to be heard and determined between party and party. It is to be distinguished from *voluntary* jurisdiction, which exists in cases of taking probate of wills, granting letters of administration, and the like. 3 Bla. Com. 66.

CONTENTMENT (or, more properly, *contenement;* L. Lat. *contenementum*). A man's countenance or credit, which he has together with, and by reason of, his freehold; or that which is necessary for the support and maintenance of men, agreeably to their several qualities or states of life. Cowell; 4 Bla. Com. 379.

CONTENTS. The contents of a note are the sum it shows to be due; Sere v. Pitot, 6 Cra. (U. S.) 332, 3 L. Ed. 240; Corbin v. Black Hawk County, 105 U. S. 659, 26 L. Ed. 1136; of a chose in action are the rights created by it; *id.*

CONTENTS AND NOT-CONTENTS. The "contents" are those who, in the house of lords, express assent to a bill; the "not-" or "non-contents," dissent. May, P. L. c. 12, 357.

CONTENTS UNKNOWN. A phrase contained in a bill of lading, denoting that the goods are shipped in apparently good condition. Clark v. Barnwell, 12 How. (U. S.) 273, 13 L. Ed. 985.

CONTESTATIO LITIS. In Civil Law. The statement and answer of the plaintiff and defendant, thus bringing the case before the judge, conducted usually in the presence of witnesses. Calvinus, Lex.

This sense is retained in the canon law. 1 Kaufm Mackeldey, C. L. 265. A cause is said to be *contestata* when the judge begins to hear the cause after an account of the claims, given not through pleadings, but by statement of the plaintiff and answer of the defendant. Calvinus, Lex.

In Old English Law. Coming to an issue; the issue so produced. Steph. Pl. App. n. 39; Crabb, Hist. 216.

CONTESTED ELECTION. This phrase has no technical or legally defined meaning. An election may be said to be contested whenever an objection is formally urged against it, which, if found to be true in fact, would invalidate it. This must be true both as to objection founded upon some constitutional provision, as well as upon any mere statutory enactment; Robertson v. State, 109 Ind. 116, 10 N. E. 582, 643.

CONTEXT. Those parts of a writing which precede and follow a phrase or passage in question; the connection.

It is a general principle of legal interpretation that a passage or phrase is not to be understood absolutely as if it stood by itself, but is to be read in the light of the context, *i. e.* in its connection with the general composition of the instrument. The rule is frequently stated to be that where there is any *obscurity* in a passage the context is to be considered; but the true rule is much broader. It is always proper to look at the context in the application of the most ambiguous expression. Thus, if on a sale of goods the vendor should give a written receipt acknowledging payment of the price, and containing, also, a promise *not* to deliver the goods, the word "not" would be rejected by the court, because it is repugnant to the context. It not unfrequently happens that two provisions of an instrument are conflicting, each is then the context of the other, and they are to be taken together and so understood as to harmonize with each other so far as may be, and to carry out the general intent of the instrument. In the context of a will, that which follows controls that which precedes; and the same rule has been asserted with reference to statutes. See CONSTRUCTION; INTERPRETATION; STATUTES.

CONTIGUOUS. In close proximity, in actual close contact. Arkell v. Ins. Co., 69 N. Y. 191, 25 Am. Rep. 168; as, contiguous proprietors are those whose lands actually touch. Vicinal are not necessarily contiguous proprietors; Raxedale v. Seip, 32 La. Ann. 435.

In an ordinance relating to excavations and the preservation of *contiguous* structures, it contemplates nearness of a structure, but with intervening space; Baxter v. Realty Co., 128 App. Div. 79, 112 N. Y. Supp. 455.

CONTINGENCY. The quality of being contingent or casual; the possibility of coming to pass; an event which may occur. Webster.

It is a fortuitous event which comes without design, foresight, or expectation. People v. Village of Yonkers, 39 Barb. (N. Y.) 272.

CONTINGENCY WITH DOUBLE ASPECT. If there are remainders so limited that the second is a substitute for the first in case it should fail, and not in derogation of it, the remainder is said to be in a contingency with double aspect. Fearne, Rem. 373; 1 Steph. Com. 328.

CONTINGENT. When applied to a use, remainder, devise, bequest, or other legal right or interest, it means that no present interest exists, and that whether such interest or right ever will exist, depends upon a future uncertain event. The legal definition of the word concurs with its ordinary acceptation in showing that the term contingent implies a possibility; Jemison v. Blowers, 5 Barb. (N. Y.) 692.

CONTINGENT DAMAGES. Those given where the issues upon counts to which no demurrer has been filed are tried, before demurrer to one or more counts in the same declaration has been decided. 1 Stra. 431.

Inaccurately used to describe consequential damages, *q. v.*

CONTINGENT ESTATE. A contingent estate depends for its effect upon an event which may or may not happen: as, an estate limited to a person not *in esse*, or not yet born. Crabb, R. P. § 946.

CONTINGENT FEES. See CHAMPERTY.

CONTINGENT INTEREST IN PERSONAL PROPERTY. It may be defined as a future interest not transmissible to the representatives of the party entitled thereto, in case he dies before it vests in possession. Thus, if a testator leaves the income of a fund to his wife for life, and the capital of the fund to be distributed among such of his children as shall be living at her death, the interest of each child during the widow's lifetime is *contingent*, and in case of his death is not transmissible to his representatives. Moz. & W. Law Dict.

CONTINGENT LEGACY. A legacy made dependent upon some uncertain event. 1 Rop. Leg. 506. Beach, Wills 406.

A legacy which has not vested. Wms. Ex. 1229.

CONTINGENT REMAINDER. An estate in remainder which is limited to take effect either to a dubious and uncertain person, or upon a dubious and uncertain event, by which no present or particular interest passes to the remainderman, so that the particular estate may chance to be determined and the remainder never take effect. 2 Bla. Com. 169.

A remainder limited so as to depend upon an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate. Fearne, Cont. Rem. 3; 2 Washb. R. P. 224. See L'Etourneau v. Henquenet, 89 Mich. 428, 50 N. W. 1077, 28 Am. St. Rep. 310; Maguire v. Moore, 108 Mo. 267, 18 S. W. 897; Peirce v. Hubbard, 152 Pa. 18, 25 Atl. 231; [1892] 1 Q. B. 184; REMAINDER; 30 Harv. L. Rev. 192; Dawson v. Lancaster, 28 Pa. Co. Ct. R. 657; Fisher v. Wagner, 109 Md. 243, 71 Atl. 999, 21 L. R. A. (N. S.) 121.

CONTINGENT USE. A use limited in a deed or conveyance of land which may or may not happen to vest, according to the contingency expressed in the limitation of such use.

Such a use as by possibility may happen in possession, reversion, or remainder. 1 Co. 121; Com. Dig. *Uses* (K, 6). A use limited to take effect upon the happening of some future contingent event; as, where lands are conveyed to the use of A and B after a marriage had between them. 2 Bla. Com. 334.

A contingent remainder limited by way of uses. Sugd. Uses 175. See 4 Kent 237.

CONTINUAL CLAIM. A formal claim made once a year to lands or tenements of which we cannot, without danger, attempt to take possession. It had the same effect as a legal entry, and thus saved the right of entry to the heir. Cowell; 2 Bla. Com. 316, 3 *id.* 175. This effect of a continual claim is abolished by stat. 3 & 4 Will. IV. c. 27, § 11. 1 Steph. Com. 509.

CONTINUANCE. The adjournment of a cause from one day to another of the same or a subsequent term.

The postponement of the trial of a cause.

In the ancient practice, continuances were entered upon the record, and a variety of forms adapted to the different stages of the suit were in use. See 1 Chit. Pl. 455; 3 Bla. Com. 316 The object of the continuance was to secure the further attendance of the defendant, who having once attended could not be required to attend again, unless a day was fixed. The entry of continuance became at the time mere matter of form, and is now discontinued in England and most of the states of the United States.

Before the declaration, continuance is by *dies datus prece partium;* after the declaration, and before issue joined, by *imparlance;* after issue joined, and before verdict, by *vice-comes non misit breve;* and after verdict or demurrer, by *curia advisare*

vult. 1 Chit. Pl. 455, 749; Bac. Abr. *Pleas* (P), *Trial* (H); Com. Dig. *Pleader* (V); Steph. Pl. 64. In its modern use the word has the second of the two meanings given above.

Among the causes for granting a continuance are *absence of a material witness;* Steinmetz v. Currie, 1 Dall. (U. S.) 270, 1 L. Ed. 132; Higginbotham v. Chamberlayne, 4 Munf. (Va.) 547; Eads v. State, 26 Tex. App. 69, 9 S. W. 68; Carter v. Wharton, 82 Va. 264; but he must have been subpœnaed; Bone v. Hillen, 1 Mill, Const. (S. C.) 198; Parker v. Leman, 10 Tex. 116; Wright v. State, 18 Ga. 383; in many states the opposite party may prevent it by admitting that certain facts would be proved by such witness; Smith v. Creason's Ex'rs, 5 Dana (Ky.) 298, 30 Am. Dec. 688; Willis v. People, 1 Scam. (Ill.) 399; Dominges v. State, 7 Smedes & M. (Miss.) 475, 45 Am. Dec. 315; Nave v. Horton, 9 Ind. 563; Keith v. Knoche, 43 Ill. App. 161; State v. Hatfield, 72 Mo. 518; and the party asking delay is usually required to make affidavit as to the facts on which he grounds his request; Rhea v. State, 10 Yerg. (Tenn.) 258; Vickers v. Hill, 1 Scam. (Ill.) 307; Phillips v. Reardon, 7 Ark. 256; People v. Baker, 1 Cal. 403; Smith v. Barker, 3 Day (Conn.) 280, Fed. Cas. No. 13,012; Ralston v. Lothain, 18 Ind. 303; and, in some states, as to what he expects to prove by the witness; Nash v. Upper Appomattox Co., 5 Gratt. (Va.) 332; Bailey v. Hardy, 12 Ill. 459; Sledman v. Hamilton, 4 McLean 538, Fed. Cas. No. 13,313; Merchant v. Bowyer, 3 Tex. Civ. App. 367, 22 S. W. 763; if the opposing counsel stipulates that the witness, if called, would so testify, a continuance is refused. In other states, an examination is made by the court; Harris v. Harris, 2 Leigh (Va.) 584; Irroy v. Nathan, 4 E. D. Sm. (N. Y.) 68; as to what diligence was used to procure his presence; St. Louis & K. C. R. Co. v. Olive, 40 Ill. App. 82; Weeks v. State, 31 Miss. 490; Flott v. Com., 12 Gratt. (Va.) 564; and it is error to grant a continuance on oral statement of counsel; Whaley v. King, 92 Cal. 431, 28 Pac. 579; the court is not bound to grant it where it is altogether conjectural whether the witnesses are alive, and if so where they reside or if their evidence can be procured; Lowenstein v. Greve, 50 Minn. 383, 52 N. W. 964; or to examine a witness not summoned; Soper v. Manning, 158 Mass. 381, 33 N. E. 516; *inability to obtain the evidence* of a witness out of the state in season for trial, in some cases; U. S. v. Duane, 1 Wall. Sr. 5, Fed. Cas. No. 14,996; Marsh v. Hulbert, 4 McLean 364, Fed. Cas. No. 9,116; *filing amendments* to the pleadings which introduce new matter of substance; Tourtelot v. Tourtelot, 4 Mass. 506; Jones v. Talbot, 4 Mo. 279; Taylor v. Heffner, 4 Blackf. (Ind.) 387; *filing a bill of discovery* in chancery in some cases; Ridgely v. Campbell, 1 Har. & J. (Md.) 452; Hurst v. Hurst, 3 Dall. (Pa.) 512, Fed. Cas. No. 6,929, 1 L. Ed. 700; *detention of a party* in the public service; Republica v. Matlack, 2 Dall. (Pa.) 108, 1 L. Ed. 310; see Nones v. Edsall, 1 Wall. Jr. 189, Fed. Cas. No. 10,290; *illness of counsel*, sometimes; Shultz v. Moore, 1 McLean 334, Fed. Cas. No. 12,825; Rhode Island v. Massachusetts, 11 Pet. (U. S.) 226, 9 L. Ed. 697; State v. Adams, 5 Harring. (Del.) 107; Thompson v. Thornton, 41 Cal. 626; Brady v. Malone, 4 Ia. 146; Printup v. Mitchell, 19 Ga. 586; *or surprise* from unexpected testimony; Branch v. Du Bose, 55 Ga. 21; Childs v. State, 10 Tex. App. 183. But it is not sufficient where it is not shown that the client's case is prejudiced thereby; Board of Com'rs of Tipton County v. Brown, 4 Ind. App. 288, 30 N. E. 925.

The request must be made in due season; Woods v. Young, 4 Cra. (U. S.) 237, 2 L. Ed. 607; McCourry v. Doremus, 10 N. J. L. 245; Clinton v. Hopkins, 2 Root (Conn.) 25; Smith v. Holebrook, *id.* 45; Hanna v. McKenzie, 5 B. Monr. (Ky.) 314, 43 Am. Dec. 122. It is addressed to the discretion of the court; Flott v. Com., 12 Gratt. (Va.) 564; Scogin v. Hudspeth, 3 Mo. 123; Farrand v. Bouchell, Harp. (S. C.) 85; Justrobe v. Price, Harp. (S. C.) 112; Sheppard v. Lark, 2 Bailey (S. C.) 576; Cornelius v. Boucher, Breese (Ill.) 32; Cox v. Hart, 145 U. S. 376, 12 Sup. Ct. 962, 36 L. Ed. 741; Smith v. Collins, 94 Ala. 394, 10 South. 334; Baumberger v. Arff, 96 Cal. 261, 31 Pac. 53; Wilkowski v. Halle, 37 Ga. 678, 95 Am. Dec. 374; Armour & Co. v. Kollmeyer, 161 Fed. 78, 88 C. C. A. 242; 16 L. R. A. (N. S.) 1110; without appeal; Hill v. Bishop, 2 Ala. 320; Babcock v. Scott, 1 How. (Miss.) 100; State v. Duncan, 28 N. C. 98; Magruder v. Snapp, 9 Ark. 108; Porter v. Lee, 16 Pa. 412; Simms v. Hundley, 6 How. (U. S.) 1, 12 L. Ed. 319; and is not reviewable on error; Cox v. Hart, 145 U. S. 376, 12 Sup. Ct. 962, 36 L. Ed. 741; Woods v. Young, 4 Cra. (U. S.) 237, 2 L. Ed. 607; Vanguilder v. Stull, 10 N. J. L. 235; but an improper and unjust abuse of such discretion may be remedied by superior courts, in various ways. See Vanblaricum v. Ward, 1 Blackf. (Ind.) 50; Fuller v. State, 1 Blackf. (Ind.) 64; Fox v. Govan, 4 Hen. & M. (Va.) 157; Reynard v. Brecknell, 4 Pick. (Mass.) 302; Sealy v. State, 1 Ga. 213, 44 Am. Dec. 641; McDaniel v. State, 8 Smedes & M. (Miss.) 401, 47 Am. Dec. 93; Darne v. Broadwater, 9 Mo. 19; Hipp v. Bissell, 3 Tex. 18; Cole v. Choteau, 18 Ill. 439; People v. Vermilyea, 7 Cow. (N. Y.) 369; Davis & Rankin Bldg. & Mfg. Co. v. Butter & Cheese Co., 84 Wis. 262, 54 N. W. 506; Isaacs v. U. S., 159 U. S. 487, 16 Sup. Ct. 51, 40 L. Ed. 229; Valdes v. Central Altagracia, 225 U. S. 58, 32 Sup. Ct. 664, 56 L. Ed. 980.

CONTINUANDO (Lat. *continuare*, to continue). An averment that a trespass has been continued during a number of days. 3

Bla. Com. 212. It was allowed, to prevent a multiplicity of actions; 2 Rolle, Abr. 545; only where the injury was such as could, from its nature, be continued; 1 Wms. Saund. 24, n. 1.

The form is now disused, and the same end secured by alleging divers trespasses to have been committed between certain days. 1 Saund. 24, n. 1. See Gould, Pl. c. 3, § 86; Hamm. N. P. 90, 91; Bac. Abr. *Trespass*, I, 2, n. 2.

CONTINUING CONSIDERATION. See CONSIDERATION.

CONTINUING DAMAGES. See MEASURE OF DAMAGES.

CONTINUING OFFENCE. When an offence consumes a great length of time in its perpetration, the question often arises whether it is but a single offence or whether it can be split into a number of indictments. The test is that, if the transaction is set in motion by a single impulse and operated upon by a single unintermittent force, it forms a continuous act, and hence must be treated as one; Whart. Cr. Law (10th ed.) §§ 27, 931. Thus gas fraudulently drawn from a main pipe for a great space of time constitutes but one offence; L. R. 1 C. C. 172; articles removed at intervals a few minutes apart but by one impulse; 4 C. & P. 217, 386; or when a shaft of coal is opened and quarried, if there be but one tapping of the vein, though it continue several years; 2 C. & P. 765. Nuisances, though usually continuous offences, may be the object of successive prosecutions, if distinct impulses are given at intermittent times. The test is whether the individual acts are prohibited or the course of action which they constitute; Whart. Cr. Law § 27. Cohabitation with more than one woman for a period of time constitutes but one offence under the act of congress of March 22, 1882; In re Snow, 120 U. S. 274, 7 Sup. Ct. 556, 30 L. Ed. 658.

The offence of receiving a rebate under the Elkins act is the transaction that the given rebate consummates, and not the units of measurement of the physical thing transported; Standard Oil Co. of Indiana v. U. S., 164 Fed. 376, 90 C. C. A. 364; as to interstate merchandise, it is a single continuing offence, continuously committed in each district through which it is conducted; Armour Packing Co. v. U. S., 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681.

CONTINUOUS EASEMENTS. Easements of which the enjoyment is or may be continual, without the necessity of any actual interference by man, as a waterspout or a right of light or air. Washb. Easem. 21. See EASEMENTS.

CONTIONES. General meetings of the Roman people. Launspach, State and Family in Early Rome 69.

CONTRA (Lat.). Over; against; opposite. Against; otherwise decided. After stating a rule of law, if it be followed by *contra*, and the citation of other cases, it signifies that the latter hold a contrary view. It is equivalent to *aliter*. *Per contra*. In opposition.

CONTRA BONOS MORES. Against sound morals.

Contracts which are incentive to crime, or of which the consideration is an obligation or engagement improperly prejudicial to the feelings of a third party, offensive to decency or morality, or which has a tendency to mischievous or pernicious consequences, are void, as being *contra bonos mores;* 2 Wils. 447; Cowp. 729; 4 Campb. 152; 1 B. & Ald. 683; 16 East 150.

CONTRA FORMAM STATUTI (Lat. against the form of the statute). The formal manner of alleging that the offence described in an indictment is one forbidden by statute.

When one statute prohibits a thing and another gives the penalty, in an action for the penalty the declaration should conclude *contra formam statutorum;* Plowd. 206; 2 East 333. The same rule applies to informations and indictments; 2 Hale, Pl. Cr. 172. But where a statute refers to a former one, and adopts and continues the provisions of it, the declaration or indictment should conclude *contra formam statuti;* Hale, Pl. Cr. 172. Where a thing is prohibited by several statutes, if one only gives the action and the others are explanatory and restrictive, the conclusion should be *contra formam statuti;* 2 Saund. 377.

When the act prohibited was not an offence or ground of action at common law, it is necessary both in criminal and civil cases to conclude against the form of the statute or statutes; 1 Saund. 135 *c;* 1 Chit. Pl. 556; Com. v. Inhabitants of Stockbridge, 11 Mass. 280; Cross v. U. S., 1 Gall. 30, Fed. Cas. No. 3,434.

But if the act prohibited by the statute is an offence or ground of action at common law, the indictment or action may be in the common-law form, and the statute need not be noticed even though it prescribe a form of prosecution or of action,—the statute remedy being merely cumulative; Co. 2d Inst. 200; 2 Burr. 803; 3 *id.* 1418; 4 *id.* 2351; 2 Wils. 146; Com. v. Hoxey, 16 Mass. 385.

When a statute only inflicts a punishment on that which was an offence at common law, the punishment prescribed may be inflicted though the statute is not noticed in the indictment; Com. v. Searle, 2 Binn. (Pa.) 332, 4 Am. Dec. 446.

If an indictment for an offence at common law only conclude "against the form of the statute in such case made and provided;" or "the form of the statute" generally, the conclusion will be rejected as surplusage, and the indictment maintained as at

common law; 1 Saund. 135 n. 3; Com. v. Hoxey, 16 Mass. 385; Com. v. Shattuck, 4 Cush. (Mass.) 143. But it will be otherwise if it conclude against the form of "the statute aforesaid," when a statute has been previously recited; 1 Chit. Cr. L. 289. See, further, Com. Dig. *Pleader* (C,) 76; 5 Viner, Abr. 552, 556; Cross v. U. S., 1 Gall. 26, Fed. Cas. No. 3,434; Sears v. U. S., 1 Gall. 257, Fed. Cas. No. 12,592; Scroter v. Harrington, 8 N. C. 192; Town of Barkhamsted v. Parsons, 3 Conn. 1; Com. v. Inhabitants of Stockbridge, 11 Mass. 280; Barter v. Martin, 5 Greenl. (Me.) 79.

CONTRA PACEM (Lat. against the peace). **In Pleading.** An allegation in an action of trespass or ejectment that the actions therein complained of were against the peace of the king. Such an allegation was formerly necessary, but has become a mere matter of form and not traversable. See 4 Term 503; 1 Chit. Pl. 163, 402; Arch. Civ. Pl. 155; TRESPASS.

CONTRABAND OF WAR. In International Law. Goods which neutrals may not carry in time of war to either of the belligerent nations without subjecting themselves to the loss of the goods, and formerly the owners, also, to the loss of the ship and other cargo, if intercepted. 1 Kent 138, 143. See Elrod v. Alexander, 4 Heisk. (Tenn.) 345. Food (8 Am. Lawy. 108).

Provisions may be contraband of war, and generally all articles calculated to be of direct use in aiding the belligerent powers to carry on the war; and if the use is doubtful, the mere fact of a hostile destination renders the goods contraband; 1 Kent 140; Hall, Int. L. 618.

The classification of goods made by English and American courts divides all merchandise into three classes: (1) Articles manufactured and primarily or ordinarily used for military purposes in time of war; (2) articles which may be and are used for war or peace according to circumstances; (3) articles exclusively used for peaceful purposes. Articles of the first class destined to a belligerent country are always contraband; articles of the second class are so only when actually destined to the military or naval use of the belligerent; articles of the third class are not contraband, though liable to seizure for violation of blockade or siege.

The Declaration of London (*q. v.*) introduces a new division of contraband. Certain specified articles, such as arms, ammunition, and other articles of direct use in military and naval operations, are arranged under the head of "Absolute Contraband" and are liable to capture if destined to territory belonging to, or occupied by, the enemy, or to the armed forces of the enemy. Other specified articles, such as foodstuffs, clothing, bullion, railroad material, fuel, etc., are classified under the name of "Conditional Contraband," and are liable to capture if destined for the use of the armed forces or of a government department of the enemy state. Certain other articles, such as cotton, wool, rubber, metallic ores, and industrial machinery, are expressly declared not to be contraband of war.

In the case of absolute contraband it is immaterial, according to the Declaration of London, whether the carriage of the goods is direct, or entails trans-shipment or a subsequent transport by land. This is but a restatement of the existing English and American rule. On the other hand, conditional contraband is not liable to capture under the above circumstances, so that the doctrine of "Continuous Voyage" does not apply in this case. By analogy with the right exercised by a belligerent of preventing contraband trade, a belligerent is allowed to prevent neutral ships from carrying dispatches or officers for the other belligerent. The Declaration of London lays down definite rules upon this subject under the title of "Unneutral service" (*q. v.*).

A belligerent may, by force, prevent a neutral ship from carrying dispatches or officers for the other belligerent, by analogy to the law of contraband. Probably a mere common carrier receiving persons in the service of a belligerent would not be subject to any penalty, therefore, if they took passage in the ordinary course of business; Hall Int. Law 673, approved in L. R. 1 K. B. (1908).

CONTRACAUSATOR. A criminal; one prosecuted for a crime. Wharton.

CONTRACT (Lat. *contractus*, from *con*, with, and *traho*, to draw. *Contractus ultro utroque obligatio est quam Graeci συναλλαγμα vocant.* Fr. *contrat*).

An agreement between two or more parties to do or not to do a particular thing. Taney, C. J., Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 572, 9 L. Ed. 773. An agreement in which a party undertakes to do or not to do a particular thing. Marshall, C. J., Sturges v. Crowninshield, 4 Wheat. (U. S.) 197, 4 L. Ed. 529. An agreement between two or more parties for the doing or not doing of some specified thing. 1 Pars. Com. 5.

It has been also defined as follows: A compact between two or more parties. Fletcher v. Peck, 6 Cra (U. S.) 87, 136, 3 L. Ed. 162. An agreement or covenant between two or more persons, in which each party binds himself to do or forbear some act, and each acquires a right to what the other promises. Encyc Amer.; Webster. A contract or agreement is where a promise is made on one side and assented to on the other; or where two or more persons enter into an engagement with each other by a promise on either side. 2 Steph Com 108, 109.

An agreement upon sufficient consideration to do or not to do a particular thing. 2 Bla. Com. 446; 2 Kent 449.

A covenant or agreement between two parties with a lawful consideration or cause. West, Symbol. lib. 1, § 10; Cowell; Blount.

A deliberate engagement between competent par-

ties upon a legal consideration to do or to abstain from doing some act. Story, Contr. § 1.

An agreement by which two parties reciprocally promise and engage, or one of them singly promises and engages to the other, to give some particular thing or to do or abstain from doing some particular act. Pothier, Conts. Pt. I, c. 1, § 1; 36 Ch. D. 695.

A mutual promise upon lawful consideration or cause which binds the parties to a performance. The writing which contains the agreement of parties with the terms and conditions, and which serves as a proof of the obligation. The last is a distinct signification. Pierson v. Townsend, 2 Hill (N. Y.) 551.

A voluntary and lawful agreement by competent parties, for a good consideration, to do or not to do a specified thing. Robinson v. Magee, 9 Cal. 83, 70 Am. Dec. 638.

An agreement enforceable at law, made between two or more persons, by which rights are acquired by one or both to acts or forbearances on the part of the other. Anson, Contr. 9.

A learned writer has said, in discussing the proper definition of contract, that "if we seek to build up a definition of the term 'contract' which shall include all things that have been called contracts and shall exclude all things that have been held not to be contracts, the task is evidently impossible. . . . Any definition of contract therefore must be either arbitrary or inexact." Harriman, Contr. 4.

The consideration is not properly included in the definition of contract, because it does not seem to be essential to a contract, although it may be necessary to its enforcement. See CONSIDERATION; 1 Pars. Contr. 7.

Mr. Stephen, whose definition of contract is given above, thus criticizes the definition of Blackstone, which has been adopted by Chancellor Kent and other high authorities. *First* that the word *agreement* itself requires definition as much as contract. *Second*, that the existence of a consideration, though essential to the validity of a parol contract, forms properly no part of the idea. *Third*, that the definition takes no sufficient notice of the mutuality which properly distinguishes a contract from a promise 2 Steph. Com 109.

The use of the word *agreement (aggregatio mentium)* seems to have the authority of the best writers in ancient and modern times (see above) as a part of the definition of contract It is probably a translation of the civil-law *conventio (con* and *venio)*, a coming together, to which (being derived from *ad* and *grex*) it seems nearly equivalent. We do not think the objection that it is a synonym (or nearly so) a valid one. Some word of the kind is necessary as a basis of the definition. No two synonyms convey precisely the same idea. "Most of them have minute distinctions," says Reid. If two are entirely equivalent, it will soon be determined by accident which shall remain in use and which become obsolete. To one who has no knowledge of a language, it is impossible to define any abstract idea But to one who understands a language, an abstraction is defined by a synonym properly qualified. By pointing out distinctions and the mutual relations between synonyms, the object of definition is answered Hence we do not think Blackstone's definition open to the first objection

As to the idea of consideration, Mr. Stephen seems correct and to have the authority of some of the first legal minds of modern times Consideration, however, may be necessary to enforce a contract, though not essential to the idea. Even in that class of contracts (by specialty) in which no consideration is in fact required, one is said to be always presumed in law,—the form of the instrument being held to import a consideration. 2 Kent 450, n. But see CONSIDERATION, where the subject is more fully treated.

The third objection of Mr. Stephen to the definition of Blackstone does not seem one to which it is fairly open. There is an idea of mutuality in *con* and *traho*, to draw together, and it would seem that mutuality is implied in agreement as well An *aggregatio mentium* seems impossible without mutuality. Blackstone in his analysis appears to have regarded agreement as implying mutuality; for he defines it (2 Bla. Com 442) "a mutual bargain or convention." In the above definition, however, all ambiguity is avoided by the use of the words "between two or more parties" following agreement.

In its widest sense, "contract" includes records and specialties (but see *infra*), but this use as a general term for all sorts of obligations, though of too great authority to be now doubted, seems to be an undue extension of the proper meaning of the term, which is much more nearly equivalent to "agreement" which is never applied to specialties. Mutuality is of the very essence of both,—not only mutuality of assent, but of act. As expressed by Lord Coke, *Actus contra actum;* 2 Co. 15; 7 M. & G. 998, argument and note.

This is illustrated in contracts of sale, bailment, hire, as well as partnership and marriage, and no other engagements but those with this kind of mutuality would seem properly to come under the head of contracts. In a bond there is none of this mutuality,—no act to be done by the obligee to make the instrument binding. In a judgment there is no mutuality either of act or of assent It is *judicium redditum in invitum* It may properly be denied to be a contract, though Blackstone insists that one is implied. Per Mansfield, 3 Burr. 1545; Wyman v. Mitchell, 1 Cow. (N. Y.) 316; per Story, J., Bullard v. Bell, 1 Mas. 288, Fed. Cas. No. 2,141. Chitty uses "obligation" as an alternative word of description when speaking of bonds and judgments. Chit. Con. 2, 4. An act of legislature may be a contract; so may a legislative grant with exemption from taxes; Matheny v. Golden, 5 Ohio St 361. So a charter is a contract between a state and a corporation within the meaning of the constitution of the United States, art 1, § 10, clause 1; Dartmouth College v. Woodward, 4 Wheat (U. S.) 518, 4 L Ed. 629. Contract is used in the United States constitution in its ordinary sense as signifying the agreement of two or more minds, from considerations proceeding from one to the other, to do, or not to do, certain acts. Mutual assent to its terms is of its very essence, it does not extend to a judgment against a city for damages suffered from a mob (given by statute); Louisiana v New Orleans, 109 U. S. 288, 3 Sup. Ct 211, 27 L. Ed. 936

At common law, contracts have been divided ordinarily into contracts of record, contracts by specialty, and simple or parol contracts. The latter may be either written (not sealed) or verbal; and they may also be express or implied. Implied contracts may be either implied in law or implied in fact. "The only difference between an express contract and one implied in fact is in the mode of substantiating it. An express agreement is proved by express words, written or spoken . . . ; an implied agreement is proved by circumstantial evidence showing that the parties intended to contract;" Leake, Contr. 11; 1 B. & Ad. 415; 1 Aust. Jur. 356, 377.

Accessory contracts are those made for assuring the performance of a prior contract, either by the same parties or by others, such as suretyship, mortgage, and pledges. Louisiana Code, art. 1764; Poth. Obl. pt. 1, c. 1, s. 1, art. 2, n. 14.

Bilateral contracts are those in which a promise is given in consideration of a promise. Parsons, Contr. 464.

Contracts of beneficence are those by which only one of the contracting parties is benefited: as, loans, deposit, and mandate. Louisiana Code, art. 1767.

Certain contracts are those in which the thing to be done is supposed to depend on the will of the party, or when, in the usual course of events, it must happen in the manner stipulated.

Commutative contracts are those in which what is done, given, or promised by one party is considered as an equivalent to or in consideration of what is done, given, or promised by the other. Louisiana Code, art. 1761.

Consensual contracts were contracts of agency, partnership, sale, and hiring in the Roman law, in which a contract arose from the mere consensus of the parties without other formalities. Maine, Anc. Law 243.

Entire contracts are those the consideration of which is entire on both sides.

Executed contracts are those in which nothing remains to be done by either party, and where the transaction has been completed, or was completed at the time the contract or agreement was made: as, where an article is sold and delivered and payment therefor is made on the spot.

Executory contracts are those in which some act remains to be done: as, when an agreement is made to build a house in six months; to do an act before some future day; to lend money upon a certain interest payable at a future time. Fletcher v. Peck, 6 Cra. (U. S.) 87, 136, 3 L. Ed. 162.

A contract *executed* (which differs in nothing from a grant) transfers a chose in possession; a contract *executory* transfers a chose in action. 2 Bla. Com. 443 As to the importance of grants considered as contracts, see IMPAIRING THE OBLIGATION OF CONTRACTS.

Express contracts are those in which the terms of the contract or agreement are openly and fully uttered and avowed at the time of making: as, to pay a stated price for certain specified goods; to deliver an ox, etc. 2 Bla. Com. 443.

Gratuitous contracts are those of which the object is the benefit of the person with whom it is made, without any profit or advantage received or promised as a consideration for it. It is not, however, the less gratuitous if it proceed either from gratitude for a benefit before received or from the hope of receiving one hereafter, although such benefit be of a pecuniary nature. Louisiana Code, art. 1766. Gratuitous promises are not binding at common law unless executed with certain formalities, viz., by execution under seal.

Illegal contracts are agreements to do acts prohibited by law, as to commit a crime; to injure another, as to publish a libel. H. & N. 73.

Hazardous contracts are those in which the performance of that which is one of its objects depends on an uncertain event. Louisiana Code, art. 1769.

Implied contracts may be either implied *in law* or *in fact*. A contract implied *in law* arises where some pecuniary inequality exists in one party relatively to the other which justice requires should be compensated, and upon which the law operates by creating a debt to the amount of the required compensation; Leake, Contr. 38. See 2 Burr. 1005; 11 L. J. C. P. 99; 8 C. B. 541. The case of the defendant obtaining the plaintiff's money or goods by fraud, or duress, shows an implied contract to pay the money or the value of the goods.

A contract implied in fact arises where there was not an express contract, but there is circumstantial evidence showing that the parties did intend to make a contract; for instance, if one orders goods of a tradesman or employs a man to work for him, without stipulating the price or wages, the law raises an implied contract (*in fact*) to pay the value of the goods or services. In the former class, the implied contract is a pure fiction, having no real existence; in the latter, it is inferred as an actual fact. See Leake, Contr. 12.

Independent contracts are those in which the mutual acts or promises have no relation to each other either as equivalents or as considerations. Louisiana Code, art. 1762.

Mixed contracts are those by which one of the parties confers a benefit on the other, receiving something of inferior value in return, such as a donation subject to a charge.

Contracts of mutual interest are such as are entered into for the reciprocal interest and utility of each of the parties: as sales, exchange, partnership, and the like.

Onerous contracts are those in which something is given or promised as a consideration for the engagement or gift, or some service, interest, or condition is imposed on what is given or promised, although unequal to it in value.

Oral contracts are simple contracts.

Principal contracts are those entered into by both parties on their own accounts, or in the several qualities or characters they assume.

Real contracts are those in which it is necessary that there should be something more than mere consent, such as a loan of money, deposit, or pledge, which, from their nature, require a delivery of the thing (*res*).

Reciprocal contracts are those by which the parties expressly enter into mutual engagements, such as sale, hire, and the like.

Contracts of record are those which are evidenced by matter of record, such as judgments, recognizances, and statutes staple.

These have been said to be the highest class of contracts. Statutes, merchant and staple, and other securities of the like nature, are confined to England. They are contracts entered into by the intervention of some public authority, and are witnessed by the highest kind of evidence, viz., matter of record; Poll. Contr. 141; 4 Bla. Com. 465.

Severable (or *separable*) *contracts* are those the considerations of which are by

their terms susceptible of apportionment or division on either side, so as to correspond to the several parts or portions of the consideration on the other side.

A contract to pay a person the worth of his services as long as he will do certain work, or so much per week as long as he shall work, or to give a certain price per bushel for every bushel of so much corn as corresponds to a sample, would be a severable contract If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. So when the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire. But the mere fact of sale by weight or measure—*i. e* so much per pound or bushel—does not make a contract severable.

Simple contracts are those not of specialty or record.

They are the lowest class of express contracts, and answer most nearly to our general definition of contract

To constitute a sufficient parol agreement to be binding in law, there must be that reciprocal and mutual assent which is necessary to all contracts They are by parol (which includes both oral and written). The only distinction between oral and written contracts is in their mode of proof. And it is inaccurate to distinguish *verbal from written;* for contracts are equally *verbal* whether the words are *written* or spoken,—the meaning of verbal being *—expressed in words* See 3 Burr. 1670, 7 Term 350, note, Stackpole v. Arnold, 11 Mass 27, 6 Am Dec 150, Cook v Bradley, 7 Conn 57, 18 Am. Dec 79, Union Turnpike Co. v Jenkins, 1 Caines (N. Y.) 385

Specialties are those which are under seal; as, deeds and bonds.

Specialties are sometimes said to include also contracts of record; 1 Pars Contr. 7, in which case there would be but two classes at common law, viz., specialties and simple contracts. The term specialty is always used substantively

They are the second kind of express contracts under the ordinary common-law division. They are not merely written, but *signed, sealed,* and *delivered* by the party bound. The solemnities connected with these acts, and the formalities of witnessing, gave in early times an importance and character to this class of contracts which implied so much caution and deliberation (consideration) that it was unnecessary to prove the consideration even in a court of equity, Plowd 305, 7 Term 477; 4 B. & Ad. 652, 3 Bingh 111; 1 Fonb. Eq. 342, note. Though little of the real solemnity now remains, and a scroll is substituted in most of the states for the seal, the distinction with regard to specialties has still been preserved intact except when abolished by statute In Ortman v. Dixon, 13 Cal 33, it is said that the distinction is now unmeaning and not sustained by reason. See CONSIDERATION, SEAL

When a contract by specialty is changed by a parol agreement, the whole contract becomes parol, Vicary v. Moore, 2 Watts (Pa) 451, 27 Am Dec 323, Munroe v Perkins, 9 Pick. (Mass) 298, 20 Am. Dec 475; Delacroix v. Bulkley, 13 Wend. (N. Y.) 71.

Unilateral contracts are those in which the party to whom the engagement is made makes no express agreement on his part.

They are so called even in cases where the law attaches certain obligations to his acceptance. Louisiana Code, art. 1758 A loan for use and a loan of money are of this kind. Poth. Obl. pt. 1, c. 1, s. 1, art. 2.

Verbal contracts are simple contracts.

Written contracts are those evidenced by writing.

Pothier's treatise on Obligations, taken in connection with the Civil Code of Louisiana, gives an idea of the divisions of the civil law. Poth. Obl. pt. 1, c. 1, s. 1, art. 2, makes the five following classes: *reciprocal* and *unilateral, consensual* and *real; those of mutual interest, of beneficence* and *mixed; principal* and *accessory, those which* are subjected by the civil law to certain rules and forms, and *those which* are regulated by mere natural justice.

It is true that almost all the rights of personal property do in great measure depend upon contracts of one kind or other, or at least might be reduced under some of them, which is the method taken by the civil law, it has referred the greatest part of the duties and rights of which it treats to the head of obligations *ex contractu* or *quasi ex contractu.* Inst. 3. 14. 2; 2 Bla. Com. 443.

Quasi-contracts. The usual classification of contracts is objected to by Prof. Keener in his law of Quasi-Contracts. A true contract exists, he says, because the contracting party has *willed,* in circumstances to which the law attaches the sanction of an obligation, that he shall be bound. His contract may be implied in fact, or express. Which of the two it is, is purely a question of the kind of evidence used to establish the contract. In either case the source of the obligation is the intention of the party. "Contract implied in law" is, however, a term used to cover a class of obligations, where the law, though the defendant did not intend to assume an obligation, imposes an obligation upon him, notwithstanding the absence of intention on his part, and, in many cases, in spite of his actual dissent. Such contracts, according to the work cited, may be termed quasi-contracts, and are not true contracts. They are founded generally:—

1. Upon a record.

2. Upon statutory, official, or customary duties.

3 Upon the doctrine that no one shall be allowed to enrich himself unjustly at the expense of another. The latter is the most important and most numerous class. See also Ans. Contr. 6th ed. 7; 2 Harv. L. Rev 64; Louisiana v. New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936.

A claim for half-pilotage fees under a statute allowing such fees, where a pilot's services are offered and declined, is an instance of a quasi-contract of the second class; Pacific Mail S. S. Co. v. Joliffe, 2 Wall. (U. S.) 450, 17 L. Ed. 805. See also Milford v. Com., 144 Mass. 64, 10 N. E. 516. Prof. Keener, in his work above cited, considers the duty of a carrier to receive and carry safely as being of a quasi-contractual nature Among the third class are also cases of the liability of a husband to pay for necessaries furnished to his wife; of a father for those furnished to his child. Also cases of actions to recover money paid under a mistake; actions in assumpsit against a tort-feasor, where the tort is waived; actions to recover compensation for benefits received under a contract which the plaintiff cannot enforce because he has

failed to comply with the conditions thereof; actions for benefits conferred by the plaintiff under a contract which the defendant, by reason of the statute of frauds, illegality, impossibility, etc., is not bound to perform; actions for benefits conferred on the defendant at his request, but in the absence of a contract; actions for benefits intentionally conferred, but without the defendant's request; actions for money paid to the use of the defendant; and actions for money paid under compulsion of law and money paid to the defendant under duress, legal or equitable. These are the general classes given in Keener, Quasi-Contracts, to which reference is made, *passim*. The question to be determined is not the defendant's intention, but what in equity and good conscience the defendant ought to do. The action of *indebitatus assumpsit* was extended to most cases of quasi-contracts; Harriman, Contr. 24; 2 Harv. L. Rev. 63. The settled tendency of English and American law is toward a new classification of contracts and the treatment of implied contracts upon the lines here indicated. They are lines clearly defined in the Roman law as shown by Maine (Anc. Law, 3d. Am. ed. 332), who is extensively quoted by Keener. See CONTRACTUAL OBLIGATION; Woodward, Quasi-Contracts.

Negotiations preceding a contract. Where there is an agreement between parties to enter into a contract in the future, and any essential part of the contract is left open, the agreement does not constitute a contract in itself; Sibley v. Felton, 156 Mass. 273, 31 N. E. 10. Such is the case also if the agreement itself shows that it was not intended to bind the parties, but that a formal contract was to be executed; Eads v. City of Carondelet, 42 Mo. 113; 70 L. T. 781. But a mere reference to a contract to be drawn up in the future is not conclusive that the parties are not bound by their original agreement, though it tends to show that such is the case; Allen v. Chouteau, 102 Mo. 309, 14 S. W. 869; L. R 18 Eq. 180. The question is one of intention to be gathered from the original agreement, in view of all the circumstances; Sanders v. Fruit Co., 144 N. Y. 209, 39 N. E. 75, 29 L. R A. 431, 43 Am. St. Rep. 757; Harriman, Contr. 52.

Where negotiations are made "subject to the preparation and approval" or "completion of a formal contract," they do not constitute a binding contract, whether the condition is expressed in the offer; [1895] 2 Ch. 1844; or in the acceptance; 7 Ch. D. 29; but "the mere reference to a future contract is not enough to negative the existence of a present one;" 8 Ch. D. 70. Where a baker sold, and a company bought a shop, and the contract seemed complete in two letters, but afterward the company wrote a third letter introducing a new and vital term, viz., a restriction upon the baker's trading in the district, it was held that the three letters read together negatived the idea that the two letters constituted the contract; 42 Ch. D. 616. Where the acceptance was "subject to the title being approved by our solicitor" it was held, that this meant no more than the liberty which every purchaser impliedly reserves to himself of breaking off the contract if the vendor breaks it, by not making a good title. The Court of Appeals construed these words as a condition, but Lord Cairns, L. C., pointed out that they would, if so construed, imply that the vendor was free, but the purchaser bound; 4 App. Cas. 311. In 3 App. Cases 1124, in the House of Lords, it was said, in holding that a correspondence between parties constituted a complete contract, "If you can find the true and important ingredients of an agreement in that which has taken place between two parties in the course of a correspondence, then, although the correspondence may not set forth, in a form which a solicitor would adopt if he were instructed to draw an agreement in writing, that which is the agreement between the parties, yet, if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters, be clearly and distinctly stated, although only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because that letter may say, 'We will have this agreement put in due form by a solicitor.'" In the same case Lord Blackburn said that there must be a complete agreement, "if not there is no contract so long as the parties are only in negotiation. But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared embodying the terms which shall be signed by the parties, does not by itself show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not."

The tendency in recent authorities is said in Pollock, Contr. 47, to discourage all attempts to lay down any fixed rule as governing these cases. The question may be made clear by putting it this way, whether there is in the particular case a final consent of the parties such that no new term or variation can be introduced in the formal document to be proposed. "It is a settled law that a contract may be made by letter and that the mere reference in them to a future formal contract will not prevent their constituting a binding contract;" 8 Ch. D. 70. It is not binding if the terms are uncertain, *e. g.*, an agreement to sell an estate reserving "the necessary land for making a railroad"; [1875] 20 Eq. 492; to make such a contract in the future "as the parties may agree upon"; Shepard v. Carpenter, 54 Minn. 153, 55 N. W. 906; to give a lease in the

form usual in the city where the property is situate; Scholtz v. Ins. Co., 100 Fed. 573, 40 C. C. A. 556; otherwise of an agreement to execute a deed of separation containing the "usual covenants"; [1881] 18 Ch. Div. 670.

Where all the terms of a contract were agreed upon and it was dictated to a stenographer to be written out and signed by the parties, the contract was held to be complete, though it was not reduced to writing before breach; Hollerbach & May Contract Co. v. Wilkins, 130 Ky. 51, 112 S. W. 1126. Though the parties to a contract agreed to reduce it to writing, failure to do so does not invalidate it, but merely affects the mode of proof; Jenkins & Reynolds Co. v. Alpena Portland Cement Co., 147 Fed. 641, 77 C. C. A. 625.

Where a contract was reduced to writing and assented to by the parties, but not yet signed, it was held not binding; Fourchy v. Ellis, 140 Fed. 149.

Since the judicature acts in England, a tenant holding under an agreement for a lease of which specific performance would be decreed, stands in precisely the same position as if the lease had been executed; 21 Ch. D. 9.

Qualities of contracts. Every agreement should be so complete as to give either party his action upon it; both parties must assent to all its terms; 3 Term 653; 1 B. & Ald. 681; McCulloch v. Ins. Co., 1 Pick. (Mass.) 278. To the rule that the contract must be obligatory on both parties, there are some exceptions: as the case of an infant, who may sue, though he cannot be sued, on his contract; Add. Contr. 380; Stra. 937. See other instances, 6 East 307; 3 Taunt. 169; 5 *id.* 788; 3 B. & C. 232. There must be a good and valid consideration (*q. v.*), which must be proved though the contract be in writing; 7 Term 350, note (*a*); 2 Bla. Com. 444; Fonb. Eq. 335, n. (*a*). There is an exception to this rule in the case of bills and notes, which are of themselves *prima facie* evidence of consideration. And in other contracts (written), when consideration is acknowledged, it is *prima facie* evidence thereof, but open to contradiction by parol testimony. There must be a thing to be done which is not forbidden by law, or one to be admitted which is not enjoined by law. Fraudulent, immoral, or forbidden contracts are void. A contract is also void if against public policy or the statutes, even though the statute be not prohibitory but merely affixes a penalty; Poll. Contr. 259 *et seq.*; Mitchell v. Smith, 4 Dall. (U. S.) 269, 1 L. Ed. 828; Mabin v. Coulon, 4 Dall. (U. S.) 298, 1 L. Ed. 841; Stanley v. Nelson, 28 Ala. 514; Siter v. Sheets, 7 Ind. 132; Solomon v. Dreschler, 4 Minn. 278 (Gil. 197); Coburn v. Odell, 30 N. H. 540; Bell v. Quin, 2 Sandf. (N. Y.) 146. But see Branch Bank at Montgomery v. Crocheron, 5 Ala. 250. As to contracts which cannot be enforced from non-compliance with the statute of frauds, see FRAUDS, STATUTE OF.

Suits by third parties. It was for a long time not fully settled whether a contract between A and B that one of them should do something for the benefit of C did or did not give C a right of action on the contract. See 1 B. & P. 98; 3 *id.* 149; but it is now distinctly established in England that C cannot sue; 1 B. & S. 393; Poll. Contr. 200; in America the authorities are conflicting.

On specialties most courts do not permit a suit in a third person's name, yet some do; Poll. Contr. 204, citing Millard v. Baldwin, 3 Gray (Mass.) 484. Professor Harriman (Contracts, ch. VII), after citing the authorities for the common-law rule that the one not a party to it can enforce a contract, enumerates and discusses the exceptions. The only exception recognized in Massachusetts (the right to recover money in the hands of the defendant which is of right the property of the plaintiff), is considered no real exception, as the liability is not contractual; the right of a son to sue on a promise made to a father is not now recognized in England or in Massachusetts as it formerly was, and it has no foundation in principle. The broad exception existing in most of the states permitting a person for whose benefit a promise is made to sue upon it, he considers not founded on any principle, but a clear case of judicial legislation which, like most arbitrary rules, has led to confusion. He reaches the conclusion that the right of a stranger to sue in certain cases is recognized in New York, Missouri, Indiana, Illinois, Nebraska, New Hampshire, Maine, and Rhode Island, and that in Massachusetts and Michigan, as in England, the common law prevails. In the federal courts he considers the rule not clearly settled, but that the general rules laid down by the supreme court coincide with the common-law rule.

In Hendrick v. Lindsay, 93 U. S. 143, 23 L. Ed. 855, the court (Davis, J.) said that "the right of a party to maintain assumpsit on a promise not under seal made to another for his benefit, although much controverted, is now the prevailing rule in this country." In Second Nat. Bank v. Grand Lodge, 98 U. S. 123, 25 L. Ed. 75, it was held that while the common-law rule is that a stranger cannot sue upon it, "there are confessedly many exceptions to it." In Pennsylvania the general rule is recognized; but it is held that where money or property is placed by one in the possession of another, to be paid or delivered to a third person, the latter has a right of action, being regarded as a party to the consideration on which the undertaking rests; Adams v. Kuehn, 119 Pa. 76, 13 Atl. 184; so, also, Blymire v. Boistle, 6 Watts (Pa.) 182, 31 Am. Dec. 458. And a promise to one to pay a debt due by him to another is valid; Hind v. Holdship, 2 Watts (Pa.) 104, 26 Am. Dec. 107. In some jurisdictions, even includ-

ing courts adhering to the general common-law rule, a third person has a right to enforce a trust created for his benefit by another person; Union P. R. Co. v. Durant, 95 U. S. 576, 24 L. Ed. 391; Street v. McConnell, 16 Ill. 125; Bay v. Williams, 112 Ill. 91, 1 N. E. 340, 54 Am. Rep. 209; Chace v. Chapin, 130 Mass 128; Pruitt v. Pruitt, 91 Ind. 595. But see Crandall v. Payne, 154 Ill. 627, 39 N. E. 601, where it was held that when a contract of sale of land from A to B recited that part of the purchase money was "going to C," the latter could not sue B.

See for a general discussion of the subject, Southern Express Co. v. R. Co., 29 Am. L. Reg. O. S. 596; 4 N. J. L. J. 197, 229; 8 Harv. L. Rev. 93; Harriman, Contr.

Construction and interpretation in reference to contracts. The intention of the parties is the pole-star of construction; but their intention must be found expressed in the contract and be consistent with rules of law. The court will not make a new contract for the parties, nor will words be forced from their real signification.

The subject matter of the contract and the situation of the parties are to be fully considered with regard to the sense in which language is used.

The legality of the contract is presumed and is favored by construction.

Words are to be taken, if possible, in their ordinary and common sense.

The whole contract is to be considered with relation to the meaning of any of its parts.

The contract will be supported rather than defeated: *ut res magis valeat quam pereat.*

All parts will be construed, if possible, so as to have effect.

Construction is generally against the grantor—*contra proferentem*—except in the case of the sovereign. This rule of construction is not of great importance, except in the analogous case of penal statutes; for the law favors and supposes innocence.

Construction is against claims or contracts which are in themselves against common right or common law

Neither bad English nor bad Latin invalidates a contract ("which perhaps a classical critic may think no unnecessary caution"); 2 Bla. Com. 379; 6 Co. 59. See CONSTRUCTION; INTERPRETATION.

Parties. There is no contract unless the *parties* assent thereto; and where such assent is impossible from the want, immaturity, or incapacity of mind of one of the parties, there can be no perfect contract. See PARTIES.

Remedy. The foundation of the common law of contracts may be said to be the giving of damages for the breach of contracts. When the thing to be done is the payment of money, damages paid in money are entirely adequate. When, however, the contract is for anything else than the payment of money, the common law knows no other than a money remedy: it has no power to enforce a specific performance of the contract.

The injustice of measuring all rights and wrongs by a money standard, which as a remedy is often inadequate, led to the establishment of the equity power of decreeing specific performance when the remedy has failed at law. For example: contracts for the sale of real estate will be specifically enforced in equity; performance will be decreed, and conveyances compelled.

Where a contract is for the benefit of the contracting party, no action can be maintained by a third person who is a stranger to the contract and the consideration; Freeman v. R. Co., 173 Pa. 274, 33 Atl. 1034.

As to signing a contract without reading it, see SIGNATURE.

See ACCEPTANCE; AGREEMENT; BREACH; CONSIDERATION; CONTRACTUAL OBLIGATION; LETTER; NOVATION; OFFER; PAYMENT; PERFORMANCE; SATISFACTION, STATUS.

For the early history of parol contracts, see Ames, 3 Sel. Essays in Anglo-Amer. L. H. 304; Salmond, *id.* 321.

See IMPAIRING OBLIGATION OF A CONTRACT; THIRD PARTIES, CONTRACTS FOR.

In Roman and Mediæval Law. "Formal contracts *(legitimæ conventiones)* gave a right of action irrespective of their subject matter In Justinian's time the only form of contract in use was the Stipulation or verbal contract by question and answer Its origin is believed to have been religious, though the precise manner of its adoption remains uncertain It appears as a formal contract capable of being applied to any kind of subject matter. Its application was in time extended by the following steps 1. The question and answer were not required to be in Latin 2. An exact verbal correspondence between them was not necessary. 3 An instrument in writing purporting to be the record of a Stipulation was treated as strong evidence of the Stipulation having taken place Hence the mediæval development of operative writings.

"Informal agreements *(pacta)* did not give any right of action without the presence of something more than the mere fact of the agreement This something was called *causa.* Practically the term covers a somewhat wider ground than our modern 'consideration executed'; but it has no general notion corresponding to it, at least none co-extensive with the notion of contract, it is simply the mark which distinguishes any particular class from the common herd of *pacta* and makes them actionable. Informal agreements not coming within any of the privileged classes were called *nuda pacta* and could not be sued on. The term *nudum pactum* is sometimes used however with a special and rather different meaning to express the rule that a contract without delivery will not pass property.

"The further application of this metaphor by speaking of the *causa* when it exists as the clothing or vesture of the agreement is without classical authority, but very common; it is adopted to the full extent by our early writers.

"The privileged informal contracts were the following: 1. *Real* contracts, where the *causa* consisted in the delivery of money or goods; namely, *mutui datio, commodatum, depositum, pignus,* corresponding to our bailments. This class was expanded within historical times to cover the so-called *innominate* contracts denoted by the formula *do ut des,* etc. 2. Consensual contracts, being contracts of constant occurrence in daily life in which no *causa*

was required beyond the nature of the contract itself. Four such contracts were recognized, the first three of them at all events, from the earliest times from which we knew anything, namely, Sale, Hire, Partnership, and Mandate *(Emptio Venditio, Locatio Conductio, Societas, Mandatum)*. To this class great additions were made in later times. Subsidiary contracts *(pacta adiecta)* entered into at the same time and in connection with contracts of an already enforceable class became likewise enforceable; and divers kinds of informal contracts were specially made actionable by the Edict and by imperial constitutions, the most material of these being the *constitutum* covering the English heads of *account stated* and *guaranty*. Justinian added the *pactum donationis*, it seems with a special view to gifts to pious uses. Even after all these extensions, however, matters stood thus: 'The Stipulation, as the only formal agreement existing in Justinian's time gave a right of action. Certain particular classes of agreements also gave a right of action even if informally made All other informal agreements *(nuda pacta)* gave none. This last proposition, that *nuda pacta* gave no right of action, may be regarded as the most characteristic principle of the Roman law of Contract' (Sav. Obl. 2, 231) It is desirable to bear in mind that in Roman and also in early English law-text *nudum pactum* does not mean an agreement without consideration Many *nuda pacta* according to the classical Roman law would be quite good in English law, as being made on sufficient consideration, while in many cases obligations recognized by Roman law as fully binding (e. g. from mandate or *negotiorum gestio*) would be unenforceable as being without consideration, in the common law

". . . In Western Christendom the natural obligation admitted to arise from an informal agreement was gradually raised to full validity, and the difference between *pactum* and *legitima contentio* ceased to exist. The process however was not completed until English law had already struck out its own line.

"The identification of Stipulation with formal writing, complete on the Continent not later than the 9th Century, was adopted by our mediæval authors" Pollock, Contracts 743.

CONTRACT LABOR ACT. See LABOR.

CONTRACTION (Lat. *con*, together, *traho*, to draw). A form of a word abbreviated by the omission of one or more letters. This was formerly much practised, but in modern times has fallen into general disuse. Much information in regard to the rules for contraction is to be found in the Instructor Clericalis.

CONTRACTOR. One who enters into a contract. Generally used of those who undertake to do public work or the work for a company or corporation on a large scale, or to furnish goods to another at a fixed or ascertained price 2 Pard. n. 300. See Sullivan v. Johns, 5 Whart. (Pa.) 366; Mason v. U. S., 14 Ct. Cl. 59; Neal v. U. S., *id.* 280; Merriam v. U. S., *id.* 289; Carr v. U. S., 13 Ct. Cl. 136; Denver Pacific Ry. Co. v. U. S., *id.* 392. As to liability of a party for the negligence of a contractor employed by him, see INDEPENDENT CONTRACTOR.

CONTRACTUAL. Of the nature of or pertaining to a contract, as, contractual liability or contractual obligation, which see. A term used by writers on the Roman law to designate the class of obligations described in the classification of the civilians as *ex contractu*, and recently much used in English and American law in connection with the more modern method of classifying contracts referred to in connection with Quasi-Contract. See CONTRACT.

CONTRACTUAL OBLIGATION. The obligation which arises from a contract or agreement.

In the *Roman law* the expression was a familiar one, and, taking the result of the discussions of the subject by writers on the civil law, and keeping in view both the etymology and the use of the word obligation, we may define it, as there used, to be a tie binding one to the performance of a duty arising from the agreement of parties.

The term is resorted to as a relief from what he considers the misuse of the word contract and the difficulty of defining it, by Prof. Harriman, who uses it in this sense. "Nevertheless in the case of many 'contracts,' using the word in its broadest sense, we find existing an obligation with certain definite characteristics which can easily be recognized. This obligation we shall venture to call contractual" He divides "the endless variety of obligations which the courts enforce" into irrecusable and recusable obligations The former are those which are imposed upon the person without his consent and without regard to any act of his own, the latter are the result of a voluntary act on the part of the person on whom they are imposed. These terms are adopted by him from an article by Professor John H Wigmore in 8 Harv. L. Rev. 200, and he again divides recusable obligations into definite and indefinite, meaning thereby to express whether the extent of the undertaking is determined by the act of the party upon whom the obligation rests or not, and to differentiate still further the precise character of definite recusable obligations, which he terms contractual obligations, Professor Harriman originates the terms unifactoral and bifactoral, as the obligation is created by the act of the party bound, or requires two acts, one by the party bound and the other by the party to be benefited. The term contractual was of constant use by writers on the civil law, and Maine, in his Early Law and Custom, refers to the German Salic Law as elaborately discussing contractual obligation Professor Harriman's definition of this term is "that obligation which is imposed by the law in consequence of a voluntary act, and which is determined as to its nature and extent by that act" Harr Cont. 27 The idea of contractual obligation he thinks was unknown to our Anglo-Saxon ancestors, *id* 15. It is undoubtedly true, as Professor Harriman asserts, that the best considered theory of contract at the present time has been a slow and tedious development; but it is equally true that among the writers who have given most attention to the study of the historical development of the law there remain wide differences of opinion as to the time and manner of its development It is likewise to be observed that the theories of Professor Harriman and those who have preceded him, in the views which he has so logically and comprehensively treated, do in fact include much that is familiar to the student of the Roman law, while there is exhibited a reluctance to give to that system due credit for the principles which were fully developed in it. In his preface the author here cited quotes with approval the remark of Sir F Pollock, that English speaking lawyers "must seek a genuine philosophy of the common law, and not be put off with a surface dressing of Romanized generalities." It may be suggested that when, after centuries of an unscientific development of the English law of contract (due to causes which Professor Harriman well sketches in Part II of his introduction), what seems to be not only a better, but the true theory has come to be recognized and developed; the coincidence of that theory with the root idea of the subject, as expressed in so scientific a system as the Roman law, should be acknowledged and utilized, rather than ignored, or characterized as "recasting

English ideas and institutions in a Roman mould." It may be safely asserted that neither contract nor contractual obligation is an English idea or institution, but an idea of human civilization. Maine says we have no society disclosed to us destitute of the conception; Anc. Law 303. It is equally creditable to us to have discovered and developed the correct idea of it after it has been overlaid with the misconceptions of the common law, as to its true nature, as it was to the Civilians to have formulated it correctly as part of their scientifically constructed system. That a concurrence is reached by these distinct processes is strong confirmation of the accuracy of the result. The reader is also referred to Keener, Quasi-Contracts; Holmes, Common Law; Sandars, Inst of Justinian; Howe, Studies in the Civil Law, which contains a statement of the subject of obligations in the Roman law.

CONTRADICT. To prove a fact contrary to what has been asserted by a witness.

A party cannot *impeach* the character of his witness, but may contradict him as to any particular fact; 1 Greenl. Ev. § 443; 3 B. & C. 746; Lawrence v. Barker, 5 Wend. (N. Y.) 305; Stockton v. Demuth, 7 Watts (Pa.) 39, 32 Am. Dec. 735; Brown v. Bellows, 4 Pick. (Mass.) 179, 194; Dennett v. Dow, 17 Me. 19.

CONTRAESCRITURA. **In Spanish Law.** Counter-letter. An instrument, usually executed in secret, for the purpose of showing that an act of sale, or some other public instrument, has a different purpose from that imported on its face. Acts of this kind, though binding on the parties, have no effect as to third persons.

CONTRAFACTIO (Lat.). Counterfeiting: as, *contrafactio sigilli regis* (counterfeiting the king's seal). Cowell; Reg. Orig. 42. See COUNTERFEIT.

CONTRAROTULATOR (Fr. *contrerouleur*). A controller. One whose business it was to observe the money which the collectors had gathered for the use of the king or the people. Cowell.

CONTRAROTULATOR PIPÆ. An officer of the exchequer that writeth out summons twice every year to the sheriffs to levy the farms (rents) and debts of the pipe. Blount.

CONTRAVENTION. **In French Law.** An act which violates the law, a treaty, or an agreement which the party has made. That infraction of the law punished by a fine which does not exceed fifteen francs and by an imprisonment not exceeding three days.

CONTRE-MAITRE. **In French Law.** The second officer in command of a ship.

CONTRECTATIO. **In Civil Law.** The removal of a thing from its place amounting to a theft. The offence is purged by a restoration of the thing taken. Bowy. Com. 268.

CONTREFAÇON. **In French Law.** The offence of those who print or cause to be printed, without lawful authority, a book of which the author or his assigns have a copyright. Merlin, *Répert.*

CONTRIBUTION. Payment by one or more persons who are liable, in company with others, of a proportionate part of the whole liability or loss, to one or more of the parties so liable upon whom the whole loss has fallen or who has been compelled to discharge the whole liability; Dupuy v. Johnson, 1 Bibb (Ky.) 562; Lawrence v. Cornell, 4 Johns. Ch. (N. Y.) 545; Pars. Part. 198.

"The principle is that parties having a common interest in a subject-matter shall bear equally any burden affecting it. *Qui sentit commodum sentire debet et onus.* Equality is equity. One shall not bear a common burden in ease of the rest. Hence, if, (as often may be done), a lien, charge, or burden of any kind, affecting several, is enforced at law against one only, he should receive from the rest what he has paid or discharged on their behalf. This is the doctrine of equitable contribution, resting on as simple a principle of natural justice as can be put." Per Bates, Ch., in Eliason v. Eliason, 3 Del. Ch. 260; 3 Co. 11 *b;* 1 Cox, C. C. 318; 1 B. & P. 270; 1 Sto. Eq. 477; 1 Wh. & Tud. L. Cas. in Eq. 66. Though its most common application is to sureties and owners of several parcels of land subject to a lien, the application of the principle is said to be universal by Lord Redesdale in 3 Bligh 59; and it applies equally to dower as to other incumbrances; Eliason v. Eliason, 3 Del. Ch. 260; Bank of United States v. Delorac's Ex'rs, Wright (Ohio) 285.

A right to contribution exists in the case of debtors who owe a debt jointly which has been collected from one of them; Davis v. Burnett, 49 N. C. 71, 67 Am. Dec. 263; Haupt v. Mills, 4 Ga. 545; Mills v. Hyde, 19 Vt. 59, 46 Am. Dec. 177; Norton v. Coons, 3 Denio (N. Y.) 130; Fletcher v. Brown, 7 Humphr. (Tenn.) 385. See Russell v. Failor, 1 Ohio St. 327, 59 Am. Dec. 631. It also exists where land charged with a legacy, or the portion of a posthumous child, descends or is devised to several persons, when the share of each is held liable for a proportionate part; Armistead v. Dangerfield, 3 Munf. (Va.) 20, 5 Am. Dec. 501; Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 425, 7 Am. Dec. 499; Blaney v. Blaney, 1 Cush. (Mass.) 107; Taylor v. Taylor, 8 B. Monr. (Ky.) 419, 48 Am. Dec. 400. As to contribution under the maritime law, see GENERAL AVERAGE.

Originally this right was not enforced at law, but courts of common law in modern times have assumed a jurisdiction to compel contribution among sureties in the absence of any positive contract, on the ground of an implied assumpsit, and each of the sureties may be sued for his respective quota or proportion; Wh. & Tud. Lead. Cas. 66; Carroll v. Bowie, 7 Gill (Md.) 34; Ellicott v. Nichols, 7 Gill (Md.) 85, 48 Am. Dec. 546; Lindell v. Brant, 17 Mo. 150. The remedy in equity is, however, much more effective; Couch v. Terry's Adm'rs, 12 Ala. 225; Mc-

Kenna v. George, 2 Rich. Eq. (S. C.) 15; Bisp. Eq. § 329. For example, a surety who pays an entire debt can, in equity, compel the solvent sureties to contribute towards the payment of the entire debt; 1 Ch. Cas. 346; Finch 15, 203; while at law he can recover no more than an aliquot part of the whole, regard being had to the number of co-sureties; 2 B. & P. 268; 6 B. & C. 697; Powers v. Gowen, 32 Me. 381. See SUBROGATION. See, as to co-sureties, 1 Lead. Cas. Eq. 100.

There is no contribution, as a general rule, between joint tort-feasors; 8 T. R. 186; Nichols v. Nowling, 82 Ind. 488; Percy v. Clary, 32 Md. 245; Miller v. Fenton, 11 Paige (N. Y.) 18; Jacobs v. Pollard, 10 Cush. (Mass.) 287, 57 Am. Dec. 105; Acheson v. Miller, 2 Ohio St. 203, 59 Am. Dec. 663; but this rule does not apply when the person seeking redress did not in fact know that the act was unlawful, and is not chargeable with knowledge of that fact; 4 Bing. 72; Moore v. Appleton, 26 Ala. 633; Bailey v. Bussing, 28 Conn. 455; Armstrong County v. Clarion County, 66 Pa. 218, 5 Am. Rep. 368.

It is not the admiralty rule; Erie R. Co. v. Transp. Co., 204 U. S. 225, 27 Sup. Ct. 246, 51 L. Ed. 450.

The rule against contribution between wrongdoers is not universal. If the parties are not equally at fault, the principal delinquent may be responsible to the others for damages incurred by their joint offence. With respect to offences in which is involved any moral delinquency, all parties are equally guilty, and the courts will not inquire into their relative guilt. But where the offence is merely *malum prohibitum* and in no sense immoral, the court will inquire into their relative delinquency and administer justice between them; Lowell v. R. Co., 23 Pick. (Mass.) 32, 34 Am. Dec. 33, cited in Washington Gas Co. v. Dist. of Columbia, 161 U. S. 316, 327, 16 Sup. Ct. 564, 40 L. Ed. 712, where it is said that the cases are too numerous for citation; they are collected in Whart. Neg. 246; 2 Thomp. Neg. 789, 1061; 2 Dill. Mun. Corp. § 1035.

The rule stated also fails when the injury grows out of a duty resting primarily upon one of the parties, and but for his negligence there would have been no cause of action against the other. A servant is consequently liable to his master for the damages recovered against the latter in consequence of the negligence of the servant; Merryweather v. Nixan, 2 Sm. Lead. Cas. 483. Where a recovery is had against a municipal corporation for an injury resulting from an obstruction to the highway, or other nuisance, occasioned by the act or default of its servant, or even of a citizen, the municipality has a right of action against the wrongdoer for indemnity; Chicago v. Robbins, 2 Black (U. S.) 418, 17 L. Ed. 298.

In Civil Law. A partition by which the creditors of an insolvent debtor divide among themselves the proceeds of his property proportionably to the amount of their respective credits. *La. Code*, art. 2522, n. 10. It is a division *pro rata*. Merlin, *Répert.*

CONTRIBUTORY. A person liable to contribute to the assets of a company which is being wound up, as being a member or (in some cases) a past-member thereof. 3 Steph. Com. 24; Moz. & W. Law Dict.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE.

CONTROLLER. A comptroller, which see.

CONTROVER. One who invents false news. Co. 2d Inst. 227.

CONTROVERSY. A dispute arising between two or more persons.

In the federal jurisdiction clause relating to controversies "between two or more states," etc., it means those that are justiciable between the parties thereto. Louisiana v. Texas, 176 U. S. 1, 24, 20 Sup. Ct. 251, 44 L. Ed. 347.

It differs from case, which includes all suits, criminal as well as civil, whereas controversy is a civil and not a criminal proceeding. Chisholm v. Georgia, 2 Dall. (U. S.) 419, 431, 432, 1 L. Ed. 440; 1 Tuck. Bla. Com. App. 420, 421.

By the constitution of the United States, the judicial power extends to controversies to which the United States shall be a party. Art. III. sec. 2. The meaning to be attached to the word controversy in the constitution is that above given.

CONTUBERNIUM. In Civil Law. A marriage between two slaves; it was not a legal relation, and the children were not legitimate. Bryce, Studies in Hist. etc., Essay XVI.

CONTUMACE CAPIENDO. A writ provided by 53 Geo. III. c. 127, in place of the writ *de excommunicato capiendo* to enable Ecclesiastical Courts to enforce an appearance and punish for contempt. 1 Holdsw. Hist. Engl. Law App. XVIII. See EXCOMMUNICATION.

CONTUMACY (Lat. *contumacia*, disobedience). The refusal or neglect of a party accused to appear or answer to a charge preferred against him in a court of justice.

Actual contumacy is the refusal of a party actually before the court to obey some order of the court.

Presumed contumacy is the act of refusing or declining to appear upon being cited. 3 Curt. Ecc. 1.

One who has been convicted *in contumaciam* in a foreign country is to be regarded, not as convicted of, but only charged with, the offence; Ward, C. J., in Ex parte Fudera, 162 Fed. 591, adopting Moore, Extrad. art. 102.

CONTUMAX. One accused of a crime who refuses to appear and answer to the charge. An outlaw.

CONTUSION. In Medical Jurisprudence. An injury or lesion, arising from the shock

of a body with a large surface, which presents no loss of substance and no apparent wound. If the skin be divided, the injury takes the name of a contused wound. See 4 C. & P. 381, 558, 565; 6 *id.* 684; Thomas, Med. Dict. *sub v.*; 2 Beck, Med. Jur. 18, 23.

CONUSANCE, CLAIM OF. See COGNIZANCE.

CONUSANT. One who knows; as, if a party knowing of an agreement in which he has an interest makes no objection to it, he is said to be conusant. Co. Litt. 157.

CONUSOR. A cognizor.

CONVENE. **In Civil Law.** To bring an action.

CONVENTICLE. A private assembly of a few folks under pretence of exercise of religion. The name was first given to the meetings of Wickliffe, but afterwards applied to the meetings of the non-conformists. Cowell.

The meetings were made illegal by 16 Car. II. c. 4, and the term in its later signification came to denote an unlawful religious assembly.

CONVENTIO (Lat. a coming together). **In Canon Law.** The act of summoning or calling together the parties by summoning the defendant.

When the defendant was brought to answer, he was said to be convened,—which the canonists called *conventio*, because the plaintiff and defendant met to contest. Story, Eq. Pl. 402.

In Contracts. An agreement; a covenant. Cowell.

Often used in the maxim *conventio vincit legem* (the express agreement of the parties supersedes the law). Story, Ag. § 368. But this maxim does not apply, it is said, to prevent the application of the general rule of law. Broom, Max 690. See MAXIMS.

CONVENTION. **In Civil Law.** A general term which comprehends all kinds of contracts, treaties, pacts, or agreements. The consent of two or more persons to form with each other an engagement, or to dissolve or change one which they had previously formed. Domat, l. 1, t. 1, s. 1; Dig. lib. 2, t. 14, l. 1; lib. 1, t. 1, l. 1, 4 and 5.

In Legislation. This term is applied to a meeting of the delegates elected by the people for other purposes than usual legislation. It is used to denote an assembly to make or amend the constitution of a state; also an assembly of the delegates of the people to nominate candidates to be supported at an election. As to the former use, see Jameson, Constit. Conv.; Cooley, Const. Lim.; CONSTITUTIONAL CONVENTION.

CONVENTION PARLIAMENTS. Parliaments which met in 1660 (and restored Charles II) and in 1688-9 (and brought William and Mary to the throne). So called because they were not summoned by the king's writ. The acts of the former were confirmed by the succeeding Parliament summoned in due form, but this was not deemed necessary as to those of the latter. Tasw.-Langmead, Engl. Const. Hist. 575.

CONVENTIONAL. Arising from, and dependent upon, the act of the parties, as distinguished from *legal*, which is something arising from act of law. 2 Bla. Com. 120.

CONVENTIONES LEGITIMÆ. See CONTRACT.

CONVENTUS (Lat. *convenire*). An assembly. *Conventus magnatum vel procerum.* An assemblage of the chief men or nobility; a name of the English parliament. 1 Bla. Com. 248.

In Civil Law. A contract made between two or more parties.

A multitude of men, of all classes, gathered together.

A standing in a place to attract a crowd.

A collection of the people by the magistrate to give judgment. Calvinus, Lex.

CONVENTUS JURIDICUS. A Roman provincial court for the determination of civil causes.

CONVERSANT. One who is in the habit of being in a particular place is said to be conversant there. Barnes 162.

Acquainted; familiar.

CONVERSION. **In Equity.** The exchange of property from real to personal or from personal to real, which takes place under some circumstances in the consideration of the law, such as, to give effect to directions in a will or settlement, or to stipulations in a contract, although no such change has actually taken place. 1 Bro. C. C. 497; 1 Lead. Cas. Eq. 619; *id.* 872; Lawrence v. Elliott, 3 Redf. (N. Y.) 235; Dodge v. Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; Maddock v. Astbury, 32 N. J. Eq. 181.

A *qualified* conversion is one directed for some particular purpose; Harker v. Reilly, 4 Del. Ch. 72. Where the purpose of conversion totally fails no conversion takes place, but the property remains in its original state, but where there is a partial failure of the purpose of conversion of land the surplus results to the heir; 1 Bro. C. C. 503; as money and not as land, and therefore if he be dead it will pass to his personal representatives even if the land were sold in his lifetime; 4 Madd. 492. The English authorities strongly favor the heir, and the authorities are collected by Bispham (Eq. pt. ii. ch. v.) and by Bates, Ch. (Harker v. Reilly, 4 Del. Ch. 72), who held that where there was a qualified conversion by will, if one of the legacies fail, whether it be void *ab origine* or lapse, that portion of the fund which fails of its object will result to the party who would have been entitled to the real estate unsold. Bispham considers the American authorities less favorable to the heir than the English, citing Craig v. Leslie, 3 Wheat. (U. S.) 563, 4 L. Ed. 460, where it was held that if the intent of the testator appears to have been

to stamp upon the proceeds of the land described to be sold the character of personalty, to all intents and purposes the claim of the heir is defeated and the estate is considered personal (see also Morrow v. Brenizer, 2 Rawle [Pa.] 185). But in the Delaware case cited it was considered that the English doctrine of qualified conversion was fully sustained by the American cases at large as collected in the American note to Ackroyd v. Smithson, 1 Wh. & Tud. L. Cas. in Eq. 590; and the case cited by Bispham from 3 Wheat., as appears from the foregoing statement of it, does not conflict with the English doctrine, as it is expressly limited to cases in which the intention is clear that the heir shall not take.

Land is held to be converted into money, in equity, when the owner has contracted to sell; and if he die before making a conveyance, his executors will be entitled to the money, and not his heirs; 1 W. Bla. 129; Masterson v. Pullen, 62 Ala. 145.

When land is ordered by a will to be sold, it is regarded as converted into personality; Hough's Estate, 3 D. R. (Pa.) 187; so of a direction to sell after 20 years; Handley v. Palmer, 103 Fed. 39, 43 C. C. A. 100; but a mere power of sale will not have that effect until it is exercised; Chew v. Nicklin, 45 Pa. 84. Lands taken under the right of eminent domain are converted.

Money may be held to be converted into land under various circumstances: as where, for example, a man dies before a conveyance is made to him of land which he has bought. 1 P. Wms. 176; Peter v. Beverly, 10 Pet. (U. S.) 563, 9 L. Ed. 522. See Giraud v. Giraud, 58 How. Pr. (N. Y.) 175; Orrick v. Boehm, 49 Md. 72.

Where land forming part of a decedent's estate is sold in foreclosure to pay off a debt, the sale converts the real estate into money. But the conversion is effectual only to the extent and for the purposes for which the sale was authorized, whether by will or by the order of the court. So far as these purposes do not extend, and in so far as any of them do not take effect, in fact or in law, the property retains its former character in respect of the rights of its owner and passes accordingly; 2 Woerner, Am. L. of Adm. § 481; Kitchens v. Jones, 87 Ark. 502, 113 S. W. 29, 19 L. R. A. (N. S.) 723, 128 Am. St. Rep. 36.

In case of foreclosure of a mortgage, as to whether the heir or personal representative takes the surplus depends upon whether the mortgagor died before or after the foreclosure; 2 Sim. St. 323; although in one case, where foreclosure was before mortgagor's death, still it was held that the surplus went to his heirs; 124 L. T. 503. A conditional direction to sell land can cause no equitable conversion until the condition is satisfied; L. R. 26 Ch. Div. 601.

When a binding option for the purchase of land is not exercised until after the death of the vendor, the conversion relates back as between the heir and the personal representative to the date of the contract by which the option was given; 14 Ves. 591; D'Arras v. Keyser, 26 Pa. 249; Newport Water-Works v. Sisson, 18 R. I. 411, 28 Atl. 336; *contra*, Smith v. Loewenstein, 50 Ohio 346, 34 N. E. 159.

Courts of equity have power to order the conversion of property held in a trust from real estate into personal estate, or *vice versa*, when such conversion is not in conflict with the will of the testator, expressly or by implication, and is for the interest of the *cestui que trust;* Ex parte Jordan, 4 Del Ch. 615; Johnson v. Payne, 1 Hill (S. C.) 112. The English court of chancery largely exercised this jurisdiction; 2 Sto. Eq. Jur. § 1357; 6 Ves. Jr. 6; 6 Madd. 100.

At Law. An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights. Stickney v. Munroe, 44 Me. 197; Gilman v. Hill, 36 N. H. 311; Aschermann v. Brewing Co., 45 Wis. 262.

A constructive conversion takes place when a person does such acts in reference to the goods or personal chattels of another as amount, in view of the law, to appropriation of the property to himself.

A direct conversion takes place when a person actually appropriates the property of another to his own beneficial use and enjoyment, or to that of a third person, or destroys it, or alters its nature.

Every such unauthorized taking of personal property; Pollock, Torts 435; Kennet v. Robinson, 2 J. J. Mar. (Ky.) 84; Hutchinson v. Bobo, 1 Bailey (S. C.) 546; Murray v. Burling, 10 Johns. (N. Y.) 172; Howitt v. Estelle, 92 Ill. 218; and all intermeddling with it beyond the extent of authority conferred, in case a limited authority over it has been given; Cummings v. Perham, 1 Mete (Mass.) 555; Grant v. King, 14 Vt. 367; Seymour v. Ives, 46 Conn. 109; People v. Bank, 75 N. Y. 547; Liptrot v. Holmes, 1 Ga. 381; with intent so to apply or dispose of it as to alter its condition or interfere with the owner's dominion; Stevens v. Curtis, 18 Pick. (Mass.) 227; 8 M. & W. 540; constitutes a conversion, including a *taking* by those claiming without right to be assignees in bankruptcy; 3 Brod. & B. 2; *using* a thing without license of the owner; Holland v. Osgood, 8 Vt. 281; Silsbury v. McCoon, 6 Hill (N. Y.) 425, 41 Am. Dec. 753; Johnson v. Weedman, 4 Scam. (Ill.) 495; Scruggs v. Davis, 5 Sneed (Tenn.) 261; Johnson's Adm'rs v. The Arabia, 24 Mo 86; or in excess of the license; Hart v. Skinner, 16 Vt. 138, 42 Am. Dec. 500; Wheelock v. Wheelwright, 5 Mass. 104; Disbrow v. Ten Broeck, 4 E. D. Sm. (N.

Y.) 397; Creach v. McRae, 50 N. C. 122; *misuse* or *detention* by a finder or other bailee; Wheelock v. Wheelwright, 5 Mass. 104; Marriam v. Yeager, 2 B. Monr. (Ky.) 339; Cargill v. Webb, 10 N. H. 199; Ripley v. Dolbier, 18 Me. 382; Spencer v. Pilcher, 8 Leigh (Va.) 565; Gentry v. Madden, 3 Ark. 127; Horsely v. Branch, 1 Humph. (Tenn.) 199; Disbrow v. Ten Broeck, 4 E. D. Sm. (N. Y.) 397; Fail v. McArthur, 31 Ala. 26; see Harvey v. Epes, 12 Gratt. (Va.) 153; *delivery* by a bailee in violation of orders; St. John v. O'Connel, 7 Port. (Ala.) 466; *non-delivery* by a wharfinger, carrier, or other bailee; Langford v. Cummings, 4 Ala. 46; Judah v. Kemp, 2 Johns. Cas. (N. Y.) 411; Ewart v. Kerr, Rice (S. C.) 204; Greenfield Bank v. Leavitt, 17 Pick. (Mass.) 1, 28 Am. Dec. 268; *a wrongful sale* by a bailee, under some circumstances; 10 M. & W. 576; 11 *id.* 363; Everett v. Coffin, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551; Carraway v. Burbank, 12 N. C. 306; Howitt v. Estelle, 92 Ill. 218; Baylis v. Cronkite, 39 Mich. 413; a sale of stolen goods by an auctioneer, though made without notice of the lack of title; [1892] 1 Q. B. 495; where one, who has authority to sell, sells below the authorized price, it does not constitute conversion; Sarjeant v. Blunt, 16 Johns. (N. Y.) 74; *contra*, Chase v. Baskerville, 93 Minn. 402, 101 N. W. 950. It is not conversion to sell for credit, when authorized to sell only for cash; Loveless v. Fowler, 79 Ga. 134, 4 S. E. 103, 11 Am. St. Rep. 407; but exchanging the goods has been held a conversion; Ainsworth v. Partillo, 13 Ala. 460; *a failure to sell* when ordered; Barton v. White's Adm'r, 1 Harr. & J. (Md.) 579; Ainsworth v. Partillo, 13 Ala. 460; *improper* or *informal* seizure of goods by an officer; Sanborn v. Hamilton, 18 Vt. 590; Reynolds v. Shuler, 5 Cow. (N. Y.) 323; Burk v. Baxter, 3 Mo. 207; Martin v. England, 5 Yerg. (Tenn.) 313; Burgin v. Burgin, 23 N. C. 453; Calkins v. Lockwood, 17 Conn. 154, 42 Am. Dec. 729; Fiedler v. Maxwell, 2 Blatchf. 552, Fed. Cas. No. 4,760; Ferguson v. Clifford, 37 N. H. 86; *informal sale* by such officer; Pierce v. Benjamin, 14 Pick. (Mass.) 356, 25 Am. Dec. 396; or *appropriation* to himself; Perkins v. Thompson, 3 N. H. 144; as against such officer in the last three cases; the *adulteration* of liquors as to the whole quantity affected; 3 A. & E. 306; Young v. Mason, 8 Pick. (Mass.) 551; an *excessive levy* on a defendant's goods, followed by a sale; 6 Q. B. 381; but *not including* a *mere trespass* with no further intent; 8 M. & W. 540; Stevens v. Curtis, 18 Pick. (Mass.) 227; nor an *accidental loss* by mere omission of a carrier; 2 Greenl. Ev. § 643; 5 Burr. 2825; Dwight v. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; Hawkins v. Hoffman, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; nor mere *nonfeasance;* 2 B. & P. 438; Cairnes v. Bleecker, 12 Johns. (N. Y.) 300. A manual taking is not necessary.

Trover will lie for the value of property illegally withheld under an unlawful claim for freight charges; Marsh v. R. Co., 9 Fed. 873; Richardson v. Rich, 104 Mass. 156, 6 Am. Rep. 210; Beasley v. R. Co., 27 App. D. C. 595, 6 L. R. A. (N. S.) 1048; though the refusal to surrender was conditional, for the purpose of ascertaining whether the bill of lading or the waybill was the true statement of the sum due; Beasley v. R. Co., 27 App. D. C. 595, 6 L. R. A. (N. S.) 1048. It is not conversion for a common carrier, who has received property from one not rightfully entitled to its possession, to deliver it in accordance with the contract of carriage, unless the true owner intervenes before the goods are delivered and demands them; Shellnut v. R. Co., 131 Ga. 404, 62 S. E. 294, 18 L. R. A. (N. S.) 494; Gurley v. Armstead, 148 Mass. 267, 19 N. E. 389, 2 L. R. A. 80, 12 Am. St. Rep. 555; Burditt v. Hunt, 25 Me. 419, 43 Am. Dec. 289; *contra*, Southern Express Co. v. Palmer, 48 Ga. 85.

Where the carrier has been notified by the true owner while the goods are still in its possession, however, it is a conversion to deliver them according to the directions of the shipper; Atchison, T. & S. F. R. Co. v. Jordon, 67 Kan. 86, 72 Pac. 533; Charleston & W. C. R. Co. v. Pope, 122 Ga. 577, 50 S. E. 374.

The intention required is simply an intent to use or dispose of the goods, and the knowledge or ignorance of the defendant as to their ownership has no influence in deciding the question of conversion; Lee v. McKay, 25 N. C. 29; Thayer v. Wright, 4 Denio (N. Y.) 180, Thrall v. Lathrop, 30 Vt. 307, 73 Am. Dec. 306; Riley v. Water Power Co., 11 Cush. (Mass.) 11; Newkirk v. Dalton, 17 Ill. 413; Bartlett v. Hoyt, 33 N. H. 151.

A license may be presumed where the taking was under a necessity, in some cases; 6 Esp. 81; or, it is said, to do a work of charity; 2 Greenl. Ev. § 643; or a *kindness* to the owner; 4 Esp. 195; Sparks v. Purdy, 11 Mo. 219; Plumer v. Brown, 8 Metc. (Mass.) 578; without intent, in the last two cases, to injure or convert it; Plumer v. Brown, 8 Metc. (Mass.) 578. As to what constitutes a conversion as between joint owners, see Lowthorp v. Smith, 2 N. C. 255; White v. Osborn, 21 Wend. (N. Y.) 72; Campbell v. Campbell, 6 N. C. 65; Bradley v. Arnold, 16 Vt. 382; and as to a joint conversion by two or more, see White v. Demary, 2 N. H. 546; Forbes v. Marsh, 15 Conn. 384; Guerry v. Kerton, 2 Rich. (S. C.) 507; White v. Wall, 40 Me. 574. A tenant in common can maintain trover for the sale or attempted sale of the common chattel; Williams v. Chadbourne, 6 Cal. 559; Dyckman v. Valiente, 42 N. Y. 549; *contra*, Barton v. Burton, 27 Vt. 93; 9 Ex. 145; some cases hold that

nothing short of the destruction of the plaintiff's property is a conversion, because a sale passes only the vendor's title and the co-tenant continues a co-tenant with the purchaser; Big. Torts 204. It is held also that trover lies, between co-tenants, for a mere withholding of the chattel, or the misuse of it, or for a refusal to terminate the common interest; Agnew v. Johnson, 17 Pa. 373, 55 Am. Dec. 565; Fiquet v. Allison, 12 Mich. 328, 86 Am. Dec. 54.

An original unlawful taking is in general conclusive evidence of a conversion; Davis v. Duncan, 1 McCord (S. C.) 213; Farrington v. Payne, 15 Johns. (N. Y.) 431; Hyde v. Noble, 13 N. H. 494, 38 Am. Dec. 508; Garrard v. R. Co., 29 Pa. 154; Skinner v. Brigham, 126 Mass. 132; as is the existence of a state of things which constitutes an actual conversion; Everett v. Collin, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551; Combs v. Johnson, 12 N. J. L. 244; Newsum v. Newsum, 1 Leigh (Va.) 86, 19 Am. Dec. 739; Jewett v. Patridge, 12 Me. 243, 27 Am. Dec. 173; Himes v. McKinney, 3 Mo. 382; Grant v. King, 14 Vt. 367; without showing a demand and refusal; but where the original taking was lawful and the detention only is illegal, a demand and refusal to deliver must be shown; Witherspoon v. Blewett, 47 Miss. 570; 5 B. & C. 146; Kennet v. Robinson, 2 J. J. Marsh. (Ky.) 84; Thompson v. Rose, 16 Conn. 71, 41 Am. Dec. 121; Polk's Adm'r v. Allen, 19 Mo. 467; Rogers v. Huie, 2 Cal. 571, 56 Am. Dec. 363; but this evidence is open to explanation and rebuttal; Cooley, Torts 532; 2 Wms. Saund. 47 *c*; 5 B. & Ald. 847; Thompson v. Rose, 16 Conn. 71, 41 Am. Dec. 121; Jacoby v. Laussatt, 6 S. & R. (Pa.) 300; Lockwood v. Bull, 1 Cow. (N. Y.) 322, 13 Am. Dec. 539; Munger v. Hess, 28 Barb. (N. Y.) 75; Dietus v. Fuss, 8 Md. 148; even though absolute; 2 C. M. & R. 495. Demands and unlawful refusal constitute a conversion; Big. Torts 200; mere refusal is only evidence of conversion; *id.* 202.

There has been a conspicuous lack of harmony in the decisions as to whether a pledgee or purchaser from one guilty of conversion is himself guilty, before demand and refusal. In England the law is briefly summarized in 46 Solicitor's Journ. 24. In 11 Q. B. Div. 99, it is held that there is no conversion until detention after demand; so also Rawley v. Brown, 18 Hun (N. Y.) 456; but by the weight of American authority demand is not necessary; Riley v. Water Power Co., 11 Cush. (Mass.) 11, and see an article in 15 Am. L. Rev. 363.

The refusal, to constitute such evidence, must be unconditional, and not a reasonable excuse; 3 Ad. & E. 106; Robinson v. Burleigh, 5 N. H. 225; Wood v. Dudley, 8 Vt. 433; Thompson v. Rose, 16 Conn. 76, 41 Am. Dec. 121; Bowman v. Eaton, 24 Barb. (N. Y.) 528; or accompanied by a condition which the party has no right to impose; 6 Q. B. 443; Dowd v. Wadsworth, 13 N. C. 130, 18 Am. Dec. 567; if made by an agent, it must be within the scope of his authority, to bind the principal; 6 Jur. 507; Cass v. R. R. Co., 1 E. D. Sm. (N. Y.) 522; but is not evidence of conversion where accompanied by a condition which the party has a right to impose; 6 Q. B. 443; 5 B. & Ald. 247; Shotwell v. Few, 7 Johns. (N. Y.) 302; Dowd v. Wadsworth, 13 N. C. 130, 18 Am. Dec. 567; Watt v. Potter, 2 Mas. 77, Fed. Cas. No. 17,291. It may be made at any time prior to bringing suit; 2 Greenl. Ev. § 644; 11 M. & W. 366; Storm v. Livingston, 6 Johns. (N. Y.) 44; if before he has parted with his possession; Knapp v. Winchester, 11 Vt. 351. It may be inferred from non-compliance with a proper demand; 7 C. & P. 339; Judah v. Kemp, 2 Johns. Cas. (N. Y.) 411. The demand must be a proper one; White v. Demary, 2 N. H. 546; La Place v. Aupoix, 1 Johns Cas. (N. Y.) 406; Spence v. Mitchell, 9 Ala. 744; made by the proper person; see 2 Brod. & B. 447; Watt v. Potter, 2 Mas. 77, Fed. Cas. No. 17,291; Carr v. Farley, 12 Me. 328; and upon the proper person or persons; 3 Q. B. 699; White v. Demary, 2 N. H. 546. The plaintiff must have at least the right to immediate possession; Hardy v. Munroe, 127 Mass. 64.

CONVEYANCE. The transfer of the title of land from one person or class of persons to another. Dickerman v. Abrahams, 21 Barb. (N. Y.) 551; Abendroth v. Town of Greenwich, 29 Conn. 356.

There is no magical meaning in this word; it denotes an instrument which carries from one person to another an interest in land; Cairns, L. C., in L. R. 10 Ch. App. 12.

The instrument for effecting such transfer. It includes leases; Jones v. Marks, 47 Cal. 242; and mortgages; Odd Fellows Savings Bank v. Banton, 46 Cal. 603.

When there is no express agreement to the contrary, the expense of the conveyance falls upon the purchaser; 2 Ves. 155, note; who must prepare and tender the conveyance. But see, *contra*, Fairfax v. Lewis, 2 Rand. (Va.) 20; Warvelle, Vend. 347. The expense of the execution of the conveyance is, on the contrary, usually borne by the vendor; Sugd. Vend. & P. 296; *contra*, Fairfax v. Lewis, 2 Rand. (Va.) 20; Cooper v. Brown, 2 McLean 495, Fed. Cas. No. 3,191. See Livermore v. Bagley, 3 Mass. 487; Dudley v. Sumner, 5 *id.* 472; Eunom. 2, § 12.

The forms of conveyance have varied widely from each other at different periods in the history of the law, and in the various states of the United States. The mode at present prevailing in this country is by bargain and sale.

A lease is a conveyance; Shimer v. Town of Phillipsburg, 58 N. J. L. 506, 33 Atl. 852; Sanford v. Johnson, 24 Minn. 172; Jones v.

Marks, 47 Cal. 242; Crouse v. Michell, 130 Mich. 347, 90 N. W. 32, 97 Am. St. Rep. 479; Koeber v. Somers, 108 Wis. 497, 84 N. W. 991, 52 L. R. A. 512; Milliken v. Faulk, 111 Ala. 658, 20 South. 594; *contra*, Stone v. Stone, 1 R. I. 425 (under a general recording statute; and is it where a married woman's act requires a husband to join in all conveyances?); Heal v. Oil Co., 150 Ind. 483, 50 N. E. 482; Perkins v. Morse, 78 Me. 17, 2 Atl. 130, 57 Am. Rep. 780; Sullivan v. Barry, 46 N. J. L. 1; nor within meaning of an act declaring that no covenants shall be implied in any conveyance of real estate; Tone v. Brace, 11 Paige Ch. (N. Y.) 566; Mayor, etc., of City of New York v. Mabie, 13 N. Y. 151, 64 Am. Dec. 538; Shaft v. Carey, 107 Wis. 273, 83 N. W. 288. Where a statute allowed appeals in cases involving conveyances of real estate, it was held that an order directing a lease to be executed was not within the statute; Tuohy's Estate, 23 Mont. 305, 58 Pac. 722.

CONVEYANCER. One who makes it his business to draw deeds of conveyance of lands for others and to investigate titles to real property. They frequently act as brokers for the sale of real estate and obtaining loans on mortgage, and transact a general real estate business.

CONVEYANCING. A term including both the science and art of transferring titles to real estate from one man to another.

It includes the examination of the title of the allenor, and also the preparation of the instruments of transfer. It is, in England and Scotland, and, to a less extent, in the United States, a highly artificial system of law, with a distinct class of practitioners. A profound and elaborate treatise on the English law of conveyancing is Mr Preston's. Geldart and Thornton's works are also important; and an interesting and useful summary of the American law is given in Washburn on Real Property. See Clerke; Martindale, Morris; Yeakle, Conveyancing.

CONVEYANCING COUNSEL TO THE COURT OF CHANCERY. Certain counsel, not less than six in number, appointed by the Lord Chancellor, for the purpose of assisting the court of chancery, or any judge thereof, with their opinion in matters of title and conveyancing. Stat. 15 & 16 Vict. c. 80, §§ 40, 41.

CONVICIUM. In Civil Law. The name of a species of slander or injury uttered in public, and which charged some one with some act *contra bonos mores*. Vicat; Bac. Abr. *Slander*, 29.

CONVICT. One who has been condemned by a competent court. One who has been convicted of a crime or misdemeanor.

He differs from a slave, not being mere property without civil rights, but having all the rights of an ordinary citizen not taken from him by the law. While the law takes his liberty and imposes a duty of servitude and observance of discipline, it does not deny his right of personal security against unlawful invasion; Westbrook v. State, 133 Ga. 578, 66 S. E. 788, 26 L. R. A. (N. S.) 591, 18 Ann. Cas. 295. See PRISONER; PRISON LABOR.

To condemn. To find guilty of a crime or misdemeanor. 4 Bla. Com. 362.

CONVICT-MADE GOODS. See PRISON LABOR.

CONVICTED. Attaint. Thayer, Evidence.

CONVICTION (Lat. *convictio;* from *con*, with, *vincire*, to bind). In Practice. That legal proceeding of record which ascertains the guilt of the party and upon which the sentence or judgment is founded. Nason v. Staples, 48 Me. 123; Com. v. Lockwood, 109 Mass. 323, 12 Am. Rep. 699; Com. v. Gorham, 99 Mass. 420.

Finding a person guilty by verdict of a jury. 1 Bish. Cr. L. § 223; see 45 Alb. L. J. 1.

A record of the summary proceedings upon any penal statute before one or more justices of the peace or other persons duly authorized, in a case where the offender has been *convicted* and sentenced. Holthouse, Dict.

In its popular sense a verdict of guilty is said to be a conviction; Smith v. Com., 14 S. & R. (Pa.) 69. In its strict legal sense it means judgment on a plea or verdict of guilty; Com. v. McDermott, 224 Pa. 363, 73 Atl. 427, 24 L. R. A. (N. S.) 431.

The first of the definitions here given undoubtedly represents the accurate meaning of the term, and includes an ascertainment of the guilt of the party by an authorized magistrate in a summary way, or by confession of the party himself, as well as by verdict of a jury. The word is also used in each of the other senses given. It is said to be sometimes used to denote final judgment. Dwar. 2d ed. 683.

Summary conviction is one which takes place before an authorized magistrate without the intervention of a jury.

Conviction must precede judgment or sentence; In re McNeill, 1 Cai. (N. Y.) 72; State v. Cross, 34 Me. 594; see Faunce v. People, 51 Ill. 311; but it is not necessarily or always followed by it; 1 Den. C. C. 568; Ex parte Dick, 14 Pick. (Mass.) 88; Kane v. People, 8 Wend. (N. Y.) 204; Smith v. Eames, 3 Scam. (Ill.) 76, 36 Am. Dec. 515. Generally, when several are charged in the same indictment, some may be convicted and the others acquitted; 2 Den. C. C. 86; State v. Allen, 11 N. C. 356; Bloomhuff v. State, 8 Blackf. (Ind.) 205; but not where a joint offence is charged; Stephens v. State, 14 Ohio, 386; State v. Mainor, 28 N. C. 340. A person cannot be convicted of part of an offence charged in an indictment, except by statute; Com. v. Newell, 7 Mass. 250; State v. Shoemaker, 7 Mo. 177; State v. Bridges, 5 N. C. 134; Cameron v. State, 13 Ark. 712. A conviction prevents a second prosecution for the same offence; Whart. Cr. Pl. § 456;

U. S. v. Keen, 1 McLean 429, Fed. Cas. No. 15,510; State v. Benham, 7 Conn. 414; Mount v. State, 14 Ohio 295, 45 Am. Dec. 542; State v. Norvell, 2 Yerg. (Tenn.) 24, 24 Am. Dec. 458; Solliday v. Com., 28 Pa. 13. But the recovery in a civil suit, of a fine, part of a penalty under a statute, does not prevent the prosecution of the defendant for the purpose of enforcing the full penalty by imprisonment; In re Leszynsky, 16 Blatchf. 9, Fed. Cas. No. 8,279. A conviction of a less offence may be had where the indictment charges a greater offence, which necessarily includes the less; State v. Outerbridge, 82 N. C. 621; Green v. State, 8 Tex. App. 71; De Lacy v. State, 8 Baxt. (Tenn.) 401; State v. O'Kane, 23 Kan. 244; State v. Schele, 52 Ia. 608, 3 N. W. 632. As to the rule where the indictment under which the conviction is procured is defective and liable to be set aside, see 1 Bish. Cr. L. §§ 663, 664; 4 Co. 44 *a*.

At common law conviction of certain crimes when accompanied by judgment disqualifies the person convicted as a witness; Keithler v. State, 10 Smedes & M. (Miss.) 192. And see Utley v. Merrick, 11 Metc. (Mass.) 302. But where a statute making *defendants* witnesses is without exception, a conviction rendering such defendant infamous will not disqualify him; Delamater v. People, 5 Lans. (N. Y.) 332; Newman v. People, 63 Barb. (N. Y.) 630. See Com. v. Wright, 107 Mass 403.

Summary convictions, being obtained by proceedings in derogation of the common law, must be obtained strictly in pursuance of the provisions of the statute; 1 Burr. 613; and the record must show fully that all proper steps have been taken; Welman v. Polhill, R. M. Charlt. (Ga.) 235; Singleton v. Com'rs of Tobacco Inspection, 2 Bay (S. C.) 105; Bigelow v. Stearns, 19 Johns. (N. Y.) 39, 41, 10 Am. Dec. 189; Chase v. Hathaway, 14 Mass. 224; Cumming's Case, 3 Greenl. (Me.) 51; Keeler v. Milledge, 24 N. J. L. 142; and especially that the court had jurisdiction; Brackett v. State, 2 Tyler (Vt.) 167; Powers v. People, 4 Johns. (N. Y.) 292; Mayor, etc., of City of Philadelphia v. Nell, 3 Yeates (Pa.) 475.

As to payment of costs upon conviction, see 1 Bish. Cr. Pr. § 1317, n.

CONVIVIUM. A tenure by which a tenant was bound to provide meat and drink for his lord at least once in the year. Cowell.

CONVOCATION (Lat. *con*, together, *voco*, to call). **In Ecclesiastical Law.** The general assembly of the clergy to consult upon ecclesiastical matters. See COURT OF CONVOCATION; CHURCH OF ENGLAND.

CONVOY. A naval force, under the command of an officer appointed by government, for the protection of merchant-ships and others, during the whole voyage, or such part of it as is known to require such protection. Marsh. Ins. b. 1, c. 9, s. 5; Park. Ins. 388.

Warranties are sometimes inserted in policies of insurance that the ship shall sail with convoy. To comply with this warranty, five things are essential: first, the ship must sail with the regular convoy appointed by the government; secondly, she must sail from the place of rendezvous appointed by the government; thirdly, the convoy must be for the voyage; fourthly, the ship insured must have sailing instructions; fifthly, she must depart and continue with the convoy till the end of the voyage, unless separated from it by necessity. Marsh. Ins. b. 1, c. 9, s. 5.

CO-OBLIGOR. One who is bound together with one or more others to fulfil an obligation. See PARTIES; JOINDER.

COOL BLOOD. Tranquillity, or calmness. The condition of one who has the calm and undisturbed use of his reason. In cases of homicide, it frequently becomes necessary to ascertain whether the act of the person killing was done in cool blood or not, in order to ascertain the degree of his guilt. Bacon, Abr. *Murder* (B); Kel. 56; Sid. 177; Lev. 180.

COOLING-TIME. Time for passion to subside and reason to interpose. Cooling-time destroys the effect of provocation, leaving homicide murder the same as if no provocation had been given; 1 Russ. Cr. 667; Whart. Hom. 418; McWhirt's Case, 3 Gratt. (Va.) 594, 46 Am. Dec. 196. See HOMICIDE; SELF-DEFENCE.

COPARCENARY, ESTATES IN. Estates of which two or more persons form one heir. 1 Washb. R. P. 414.

The title to such an estate is always by descent. The shares of the tenants need not be equal. The estate is rare in America, but sometimes exists; Manchester v. Doddridge, 3 Ind. 360; Purcell v. Wilson, 4 Gratt. (Va.) 16; Rector v. Waugh, 17 Mo. 13, 57 Am. Dec. 251; Gilpin v. Hollingsworth, 3 Md. 190, 56 Am. Dec. 737. See Watk. Conv. 145.

COPARCENERS. Persons to whom an estate of inheritance descends jointly, and by whom it is held as an entire estate. 2 Bla. Com. 187.

In the old English and the American sense the term includes males as well as females, but in the modern English use is limited to females. 4 Kent 366. But the husband of a deceased coparcener, if entitled as tenant by the curtesy, holds as a coparcener with the surviving sisters of his wife, as does also the heir-at-law of his deceased wife upon his own death; Brown, Dict.

COPARTNER. One who is a partner with one or more other persons; a member of a partnership.

COPARTNERSHIP. A partnership.

COPARTNERY. **In Scotch Law.** The contract of copartnership. Bell, Dict.

COPE. A duty charged on lead from certain mines in England. Blount.

COPIA LIBELLI DELIBERANDA. A writ to enable a man accused to get a copy of the libel from the judge ecclesiastical. Cowell.

COPULATIVE TERM. One which is plac-

ed between two or more others to join them together.

COPY. A true transcript of an original writing.

Exemplifications are copies verified by the great seal or by the seal of a court. 1 Gilb. Ev. 19.

Examined copies are those which have been compared with the original or with an official record thereof.

Office copies are those made by officers intrusted with the originals and authorized for that purpose.

The papers need not be exchanged and read alternately; 2 Taunt. 470; 1 Stark. 183; 4 Camph. 372; 1 C. & P. 578. An examined copy of the books of an unincorporated bank is not evidence *per se;* Ridgway v. Bank, 12 S. & R. (Pa.) 256, 14 Am. Dec. 681; Vance v. Reardon, 2 N. & M'C. 290; 1 Greenl. Ev. § 508.

Copies cannot be given in evidence, unless proof is made that the original is lost or in the power of the opposite party, and, in the latter case, that notice has been given him to produce the original; 1 Greenl. Ev. § 508.

A translation of a book is not a copy; Stowe v. Thomas, 2 Wall. Jr. 547; 2 Am. L. Reg. 229, Fed. Cas. No. 13,514; a copy of a book means a transcript of the entire work; Rogers v. Jewett, 12 Mo. Law Rep. N. S. 339, Fed. Cas. No. 12,012.

As to copies mechanically made being originals, see International Harvester Co. of America v. Elfstrom, 101 Minn. 263, 112 N. W. 252, 12 L. R. A. (N. S.) 343, 118 Am. St. Rep. 626, 11 Ann. Cas. 107.

COPYHOLD. A tenure by copy of court-roll. Any species of holding by particular custom of the manor. The estate so held.

A copyhold estate was originally an estate at the will of the lord, agreeably to certain customs evidenced by entries on the roll of the courts baron Co. Litt 58 *a;* 2 Bla. Com 95; 1 Poll. & M. 351, 357. It is a villenage tenure deprived of its servile incidents. The doctrine of copyhold is of no application in the United States. Winn R P. 257, 258, Rawle's note; 1 Washb R P. 26 See VILLEIN.

COPYHOLDER. A tenant by copyhold tenure (by copy of court-roll). 2 Bla. Com. 95.

COPYRIGHT. The exclusive privilege, secured according to certain legal forms, of printing, or otherwise multiplying, publishing, and vending copies of certain literary or artistic productions.

According to the practice of legislation in England and America, the term *copyright* is confined to the exclusive right secured to the author or proprietor of a writing or drawing, which may be multiplied by the arts of printing in any of its branches. Property in the other classes of intellectual objects is usually secured by letters-patent, and the interest is called a *patent-right.* But the distinction is arbitrary and conventional.

The foundation of all rights of this description is the natural dominion which every one has over his own ideas, the enjoyment of which, although they are embodied in visible forms or characters, he may, if he chooses, confine to himself or impart to others. But, as it would be impracticable in civil society to prevent others from copying such characters or forms without the intervention of positive law, and as such intervention is highly expedient, because it tends to the increase of human culture, knowledge, and convenience, it has been the practice of civilized nations in modern times to secure and regulate the otherwise insecure and imperfect right which, according to the principles of natural justice, belongs to the author of new ideas.

This has been done by securing an exclusive right of multiplying copies for a limited period, as far as the municipal law of the particular country extends. But, inasmuch as the original right, founded in the principles of natural justice, is of an imperfect character, and requires, in order to be valuable, the intervention of municipal law, the law of nations has not taken notice of it as it has of some other rights of property; and therefore all copyright is the result of some municipal regulation, and exists only in the limits of the country by whose legislation it is established. The international copyright which is established in consequence of a convention between any two countries is not an exception to this principle; because the municipal authority of each nation making such convention either speaks directly to its own subjects through the treaty itself, or is exerted in its own limits by some enactment made in pursuance of the international engagement.

It was formerly doubtful in England whether copyright, as to books, existed at common law. The subject was much discussed in 4 H. L. c 815. It is said that "the negative conclusion is now generally accepted by lawyers" Sir F. Pollock, First Book of Jurispr. 200. It was held that the common law copyright for protection exists in favor of works of literature, art or science to this limited extent only, that while they remain unpublished no person can copyright them; 10 Ir. Ch. Rep 121, followed in [1908] 2 Ch 441, and that the publisher of a copyrighted unpublished picture is liable for damages for infringement of the owner's common law right of property therein; [1908] 2 Ch. 441.

The following judgment states the law in the United States: "Statutory copyright is not to be confounded with the common law right. At common law the exclusive right to copy existed in the author until he permitted a general publication. Thus, when a book was published in print, the owner's common law right was lost. At common law an author had a property in his manuscript, and might have an action against any one who undertook to publish it without authority. The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period. This statutory right is obtained in a certain way and by the performance of certain acts which the statute points out. That is, the author having complied with the statute and given up his common law right of exclusive duplication prior to general publication, obtained by the method pointed out in the statute an exclusive right to multiply copies and publish the same for the term of years named in the statute Congress did not sanction an existing right; it created a new one." Caliga v. Newspaper Co., 215 U S 188, 30 Sup. Ct. 38, 54 L. Ed. 150. The Act March 4, 1909, expressly reserves the common law rights of an author of an unpublished work in law or in equity.

By art. 1, § 8, of the federal constitution, power was given to congress "to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The following is a concise and substantial abstract of the Act of March 4, 1909, in effect July 1, 1909:

The exclusive rights secured under the act are to print, reprint, publish, copy and

vend the copyrighted work; to translate into other languages or make other versions, if a literary work; to dramatize it if non-dramatic; to convert it into a novel or other non-dramatic work, if a drama; to arrange or adapt it if it be a musical work; to complete it if it be a model or a design for a work of art; to deliver or authorize its delivery in public for profit if it be a lecture, etc.; to perform or represent it publicly if it be a drama, or if it be a dramatic work and not reproduced for sale, to vend any manuscript or record of it; to make any transcription or record of it which may be exhibited, etc.; to exhibit it, etc., in any manner whatsoever; if it be a musical composition, to perform it publicly for profit, and for the purpose of publishing and vending copies to make any arrangement or setting of it or of the melody of it in any system of notation or form of record from which it may be reproduced, provided that the act so far as it secures copyright controlling the parts of instruments serving to reproduce mechanically the musical work shall not include the works of a foreign author or composer unless the nation of such composer grants to citizens of the United States similar rights, and provided that whenever the owner of the musical copyright has used or permitted it, etc., to be used mechanically, any other person may make similar use of it upon the payment of a royalty of two cents on each part manufactured. The reproduction of a mechanical composition on coin-operating machines is not to be deemed a public performance for profit unless a fee is charged for admission to the place where it occurs.

Nothing in the act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication or use of his work without his consent, and to obtain damages therefor.

By section 4, copyright works include all the writings of an author; and by section 5 the subject-matter of copyright is in the following classes:

Books, including composite and cyclopedic works, directories, gazetteers, and other compilations; periodicals, including newspapers; lectures, sermons, addresses (prepared for oral delivery); dramatic or dramatico-musical compositions; musical compositions; maps; works of art; models or designs for works of art; reproductions of a work of art; drawings or plastic works of a scientific or technical character; photographs; prints and pictorial illustrations; but this classification shall not limit the subject-matter as defined in section 4, and error in classification shall not invalidate a copyright. By Act of Aug. 24, 1912, two classes were added: Motion-picture photo-plays and motion-pictures other than photo-plays.

Compilations, abridgments, dramatizations, translations, etc., of works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright or works republished with new matter, are new works and are subjects of copyright.

No copyright shall subsist in the text of any work which is in the public domain, or in any work which was published in this country or a foreign country prior to the going into effect of the act and not already copyrighted in the United States, or in any publication of the United States government.

Alien authors or proprietors are within the act if domiciled within the United States at the time of the first publication, or if the nation of such alien has extended reciprocal rights to citizens of the United States.

A copyright is secured by publication with notice of copyright attached to each copy of the work.

Registration of a claim to a copyright is obtained by complying with the terms of the act, including the deposit of copies, and upon such compliance the register of copyrights shall issue the prescribed certificate.

Copyrights may be had on the works of an author, of which copies are not reproduced for sale, upon the deposit of one copy of such work, if it be a lecture, etc., or a dramatic or musical, etc., composition; of a title and description, with one print taken from each scene or act, if the work be a motion-picture photo-play; of a photographic print if a photograph; of a title and description, with not less than two prints taken from different sections of a complete motion-picture, if the work be a motion-picture other than a photo-play; or of a photograph or other identifying reproduction, if a work of art, plastic work or drawing.

After securing copyright by publication, with notice, two complete copies of the best edition of the work shall be promptly deposited in the copyright office at Washington.

There are provisions for the manufacture of books, etc., within the limits of the United States.

"Notice of copyright shall consist either of the word 'Copyright' or the abbreviation 'Copr.,' accompanied by the name of the copyright proprietor, and if the work be a printed, literary, musical or dramatic work, the year of the copyright," except that on maps, works of art, photographs, etc., it may consist of the letter "C" in a circle, with the initials, monogram or symbol of the proprietor, but on some accessible portions of such copies the name must appear. In a printed publication, the copyright notice must be on the title page or the page immediately following, or, if a periodical, upon the first page of text of each separate number, or under the title heading, or in a musical work either on the title page or the first page of music.

Copyright is for twenty-eight years from the date of first publication, whether the

copyrighted work bears the author's true name or is published anonymously or under an assumed name. If the work is posthumous, a periodical, an encyclopædia, or other composite work, or was copyrighted by a corporation (not being the author's assignee or licensee) or by an employer for whom a work was made for hire, there may be a renewal for twenty-eight years, if applied for within one year before expiration. In case of any other copyrighted work, the author, or if not living, his widow or children, or failing all such, his executors or next of kin, may renew for twenty-eight years, if application is made more than one year before expiration.

Jurisdiction of all suits is vested in the district court of the United States in the district in which the defendant or his agent is an inhabitant or in which he may be found.

Section 25 (Act of March 4, 1909, as amended by Act of Aug. 24, 1912) provides for injunctions in cases of infringement, and specifies the measure of damages in certain cases; also provides for the surrender and destruction of infringing copies, etc. Injunctions may be served on the parties anywhere in the United States, and shall be operative throughout the United States and enforceable by any other court or judge. Such proceedings may be reviewed as in any other cases No criminal proceeding shall be maintained unless commenced within three years.

Assignments of copyright shall be recorded in the copyright office within three months after execution if within the United States or within six months after execution without the United States; but otherwise shall be void as against any mortgagee or subsequent purchaser for a valuable consideration without notice, whose assignment has been recorded. The assignee's name may be substituted in the statutory notice of copyright.

The fee for the registration of any work deposited under the act is one dollar, which includes the certificate of registration under seal, except in cases of photographs, for which the fee is fifty cents when a certificate is not demanded.

The date of publication is the earliest day when copies of the first authorized edition were placed on sale or publicly distributed. "Author" includes an employer in the case of works made for hire.

Oratorios, cantatas, etc., may be performed for charity by public schools, church choirs or vocal societies, when obtained from a public library, or from a public school, church choir or vocal society library, without constituting infringement.

The prohibition of the importation of piratical copies does not apply: To works in raised characters for the blind; to foreign newspapers or magazines, although containing copyright matter printed or reprinted by authority of the copyright proprietor, unless they contain also copyright matter printed or reprinted without such authorization; to an authorized edition of a book in a foreign language, of which only an English translation has been copyrighted here; to books published abroad, with the author's authority, when imported one copy at a time for individual use and not for sale (but excepting a foreign reprint of a book by an American author copyrighted here); or to books imported for the United States or for libraries, etc.; or when such book is part of a library bought *en bloc;* or when brought personally into the United States.

Cases in the former revision under former acts are retained as likely to be useful under the act of 1909.

What may be copyrighted. Private letters may be copyrighted by their author; Folsom v. Marsh, 2 Sto. 100, Fed. Cas. No. 4,901; and so may abstracts of title; Banker v. Caldwell, 3 Minn. 94 (Gil. 46).

The compilations of existing material selected from common sources arranged and combined in original and useful form are the subject of a copyright, whether it consists wholly of selected matter or partly of original composition; Drone, Copyr. 152. Thus: Dictionaries; 2 Sim. & Stu. 1; gazetteers; 5 Beav. 6; road and guide books, 1 Drew. 353, directories; L. R. 1 Eq. 697; calendars; 12 Ves. 270; catalogues; L. R. 18 Eq. 444; trade catalogues; Da Prato Statuary Co. v Guiliani Statuary Co., 189 Fed. 90; mathematical tables; 1 Russ & Myl 73; a list of hounds; L. R. 9 Eq. 324; a collection of statistics; L. R. 3 Eq. 718.

An abridgment, one not a mere transcript of the part of an original, may be copyrighted; Gray v. Russell, 1 Story 11, Fed. Cas. No. 5,728; so may a digest; Drone, Copyr. 158. One who prepares reports of decided cases may obtain a valid copyright for the parts of which he is the author or compiler; Wheaton v. Peters, 8 Pet (U. S) 591, 8 L. Ed. 1055; Little v. Gould, 2 Blatchf. 165, Fed. Cas. No. 8,394; Paige v. Banks, 13 Wall. (U. S.) 608, 20 L. Ed 709; but the reporter is not entitled to a copyright in the opinion of the court, even though he took it down from the lips of the judge, nor in the head notes when prepared by the judge; Chase v. Sanborn, 6 U. S. Pat. Off Gaz 932, Fed. Cas. No. 2,628.

The collection and arrangement of advertisements in a trade directory are the subject of copyright, though each single advertisement is not; [1893] 1 Ch. 218. A compilation made from voluminous public documents may be copyrighted; Hanson v. Jaccard Jewelry Co., 32 Fed. 202. A compilation of prices and quotations on the stock exchange, printed on sheets and issued daily as a newspaper; Exchange Telegraph Co. v. Gregory & Co., 73 Law Times Rep. 120.

A photographer, who makes no charge for photographing an actress in her public character, has the right to secure a copyright for

his own exclusive benefit; Press Pub. Co. v. Falk, 59 Fed. 324; and where he produces by an arrangement of lights and shadows, an original effect representing his conception of her in a certain character, he is entitled to the protection of the copyright laws; Falk v. Donaldson, 57 Fed. 32. So of an artistic photograph of a woman and child; Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349; Falk v. Brett Lithographing Co., 48 Fed. 678.

A "book" may be printed on one sheet; Clayton v. Stone, 2 Paine 383, Fed. Cas. No. 2,872; Drury v. Ewing, 1 Bond 540, Fed. Cas. No. 4,095. As a general rule a printed publication is a book within the copyright laws when its contents are complete in themselves, deal with a single subject, need no continuation, and have appreciable size; Smith v. Hitchcock, 226 U. S. 53, 33 Sup. Ct. 6, 57 L. Ed. 119.

A diagram with directions for cutting ladies' garments printed on a single sheet of paper is a "book"; Drury v. Ewing, 1 Bond 540, Fed. Cas. No. 4,095; a manufacturer of women's wearing apparel issued a book containing illustrations of the latest modes and information as to materials and prices, it was held a proper subject of copyright, though used for advertisements; National Cloak & Suit Co. v. Kaufman, 189 Fed. 215; and so is a cut in an illustrated newspaper; Harper v. Shoppell, 26 Fed. 519; information in a guide-book may be copyrighted; L. R. 1 Eq. 697.

A scene in a play representing a series of dramatic incidents, but with very little dialogue, may be copyrighted; Daly v. Webster, 56 Fed. 483, 4 C. C. A. 10; so of the introduction, chorus, and skeleton of a "topical song"; Henderson v. Tompkins, 60 Fed. 758,

A manufacturer of records for mechanically producing a musical composition may enjoin another from copying his records; Æolian Co. v. Music Roll Co., 196 Fed. 926.

When a new edition differs substantially from the former one, a new copyright may be acquired, provided the alteration shall materially affect the work; Gray v. Russell, 1 Sto. 11, Fed. Cas. No. 5,728; Bonks v. McDivitt, 13 Blatchf. 163, Fed. Cas. No. 961. New editions of a copyright work are protected by the original copyright, but not new matter; Lawrence v. Dana, 4 Cliff. 1, Fed. Cas. No. 8,136; Farmer v. Lithographing Co., 1 Flipp. 228, Fed. Cas. No. 4,651.

What may not be copyrighted. No copyright can be obtained on racing tips published in a copyrighted newspaper; [1895] 2 Ch. 29; nor on a daily price current; Clayton v. Stone, 2 Paine 382, Fed. Cas. No. 2,872; nor on a blank; Baker v. Selden, 101 U. S. 99, 25 L. Ed. 841; nor cuts contained in a trade catalogue; J. L. Mott Iron Works v. Clow, 72 Fed. 168.

Where a judge of a supreme court of a state prepares the opinion of the court, the statement of the case, and the syllabus, and the reporter of the court takes out a copyright in his own name for the state, the copyright is invalid; Banks v. Manchester, 128 U. S. 244, 9 Sup. Ct. 36, 32 L. Ed. 425. Where a reporter of decisions is employed on condition that his reports shall belong to the state, he is not entitled to a copyright; Little v. Gould, 2 Blatchf. 165, Fed. Cas. No. 8,394; Banks & Bros. v. Pub. Co., 27 Fed. 50.

Publications of an improper kind will not be protected by the courts; Martinetti v. Maguire, 1 Deady (U. S.) 223, Fed. Cas. No. 9,173.

An author cannot acquire any right to the protection of his literary products by using an assumed name or pseudonym. Without the protection of a copyright, his work is dedicated to a public when published; The "Mark Twain" Case, 14 Fed. 728.

The compilation of the statutes of a state may be so original as to entitle the author to a copyright, but he cannot obtain one for the laws alone, and the legislature of the state cannot confer any such exclusive privilege upon him; Davidson v. Wheelock, 27 Fed. 61. Such a compilation of statutes may be copyrighted as to the manner in which the work was done, but not as to the laws alone; *id.*

A stage dance illustrating the poetry of motion by a series of graceful movements, etc., is not a dramatic composition within the act; Fuller v. Bemis, 50 Fed. 926. The copyright of a book describing a new system of stenography does not protect the system apart from the language by which it is explained; Griggs v. Perrin, 49 Fed. 15.

An opinion is not the subject-matter of copyright; nor is a printed expression of it, unless it amount to a literary composition; [1895] 2 Ch. 29.

As to notice. In the notice of copyright of a photograph the abbreviation "'94," representing the year, is a substantial compliance with the act; Snow v. Mast, 65 Fed. 995. The following notice on a map: "Copyright entered according to Act of Congress, 1889, by T. C. Hefel, Civil Engineer," was held sufficient, since it differed from the prescribed formula only by including words which were surplusage; Hefel v. Land Co., 54 Fed. 179. The words "1889. Copyrighted by B. J. Falk, New York," were held sufficient; Falk v. Schumacher, 48 Fed. 222; Falk v. Seidenberg, 48 Fed. 224. The words "Copyrighted 1891. All rights reserved," were held not a sufficient notice of copyright; Osgood v. Instrument Co., 69 Fed. 291.

The initial of the Christian name is sufficient if the full surname be given; Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349. Where the printed title was deposited by E. B. Meyers

& Chandler and the printed notice of the entry of the copyright showed that the copyright was entered by E. B. Meyers alone, it was held immaterial; Callaghan v. Myers, 128 U. S. 657, 9 Sup. Ct. 177, 32 L. Ed. 547.

A copyright may be taken in the name of a trustee for the benefit of some third party who is the author or proprietor; Hanson v. Jewelry Co., 32 Fed. 202; Black v. Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433; *id.*, 56 Fed. 764.

One who does business under a fictitious partnership name may receive a copyright under that name; Scribner v. Henry G. Allen Co., 49 Fed. 854. An author of an article intended for a foreign encyclopædia obtained a copyright therefor under an agreement with the publisher. It was held that the agreement was a license only to use the article, and that the copyright was properly in the author's name; Black v. Henry G. Allen Co., 56 Fed. 764. An author of a painting, who, not being a subject of a foreign state with which the United States has copyright relations, is excluded from benefit of copyright, cannot convey such right to a person whose citizenship is within the statute; Boug v. Art Co., 214 U. S. 236, 29 Sup. Ct. 628, 53 L. Ed. 979, 16 Ann. Cas. 1126.

As to what will constitute a sufficient publication to deprive an author of his copyright: The public performance of a play is not such publication; Boucicault v. Wood, 2 Biss. 34, Fed. Cas. No. 1,693; Boucicault v. Hart, 13 Blatchf. 47, Fed. Cas. No. 1,692; the private circulation of even printed copies of a book is not; Bartlett v. Crittenden, 5 McLean 32, Fed. Cas. No. 1,076; Keene v. Wheatley & Clarke, 9 Am. L. Reg. 33, Fed. Cas. No. 7,644; 1 Macn. & G. 25; the deposit of a chart with the secretary of the navy with an express agreement that it was not to be published, is not; Blunt v. Patten, 2 Paine, 393, Fed. Cas. No. 1,579; see generally, Palmer v. De Witt, 47 N. Y. 532, 7 Am. Rep. 488. Publication of a manuscript constitutes a dedication to the public; Carte v. Duff, 25 Fed. 183; Tompkins v. Halleck, 133 Mass. 32, 43 Am. Rep. 480; the sale of a picture unconditionally carries with it the right of making copies of it and the publication thereof; Parton v. Prang, 3 Cliff. 537, Fed. Cas. No. 10,784. A picture which is publicly exhibited without having inscribed upon some visible portion of it, or upon the substance on which it was mounted, the notice required by the statute, is published; Pierce & Bushnell Mfg. Co. v. Werckmeister, 72 Fed. 54, 18 C. C. A. 431. But entering an original painting with the copyright reserved at an exhibition of the Royal Academy whose by-laws prohibit copying, was held not such a publication; American Tobacco Co. v. Werckmeister, 207 U. S. 284, 28 Sup. Ct. 72, 52 L. Ed. 208, 12 Ann. Cas. 595.

The remedy for an infringement of copyright is threefold. By an action of debt for certain penalties and forfeitures given by the statute. By an action on the case at common law for damages, founded on the legal right and the injury caused by the infringement. The action must be case, and not trespass; Atwill v. Ferrett, 2 Blatchf. 39, Fed. Cas. No. 640. By a bill in equity for an injunction to restrain the further infringement, as an incident to which an account of the profits made by the infringer may be ordered by the court; 2 Morg. Lit. 706; 6 Ves. 705; 8 *id.* 323; 9 *id.* 341; 1 Russ. & M. 73, 159; 1 Y. & C. 197; 2 Hare 560; though it cannot embrace penalties; Stevens v. Cady, 2 Curt. C. C. 200, Fed. Cas. No. 13,395; Atwill v. Ferrett, 2 Blatchf. 39, Fed. Cas. No. 640.

An injunction may go against an entire work or a part; 2 Russ. 393; Emerson v. Davies, 3 Sto. 768, Fed. Cas. No. 4,436; 2 Beav. 6; 2 Brown, Ch. 80; though the court will not interfere where the extracts are trifling; 2 Swanst. 428; 1 Russ. & M. 73; 2 *id.* 247.

The remedies of forfeiture and penalty and of injunction given to the owner of a copyrighted map under the former act in case of infringement are exclusive and preclude any resort to an action at law to recover damages sustained; Globe Newspaper Co. v. Walker, 210 U. S. 356, 28 Sup. Ct. 726, 52 L. Ed. 1096.

An injunction to restrain the infringement of the rights of the owner of one directory by another will be limited to the extent to which the two books are identical; List Pub. Co. v. Keller, 30 Fed. 772.

Where the extracts of a copyrighted work are scattered through the defendant's book in such manner that the two cannot be distinguished and separated, the court may enjoin the defendant's book as a whole, but if the matters can be separated the injunction should extend only to the copyrighted matter; Farmer v. Elstner, 33 Fed. 494. Where the author's pirated paragraphs of a digest can be separated from paragraphs not subject to criticism, the injunction should be restricted to the infringing paragraphs, even though it might consume a decade to examine the paragraphs of the digest and compare them. This will not relieve the complainant from the burden of proving his case; West Pub. Co. v. Pub. Co., 64 Fed. 360, 25 L. R. A. 441. Although the court is not convinced that a compilation which wrongfully appropriates extracts from the plaintiff's copyrighted work will injure its sale, yet an injunction in a proper case may be granted. Actual pecuniary damage is not the sole right to enjoining violation of copyright; Farmer v. Elstner, 33 Fed. 494.

The practice of one newspaper copying literary matter from another is no defence to an action for the infringement of a copyright; [1892] 3 Ch. 480, where the cases are collected.

There may be a piracy: 1st. By *reprinting* the whole or part of a book *verbatim*. The mere quantity of matter taken from a book is not of itself a test of piracy; 3 M. & C. 737; the court will look at the value or quality more than the quantity taken; Gray v. Russell, 1 Sto. 11, Fed. Cas. No. 5,728. Extracts and quotations fairly made, and not furnishing a substitute for the book itself, or operating to the injury of the author, are allowable; 17 Ves. 422; 1 Campb. 94; Ambl. 694; 2 Swanst. 428; Folsom v. Marsh, 2 Sto. 100, Fed. Cas. No. 4,901; 2 Russ. 383; 2 Beav. 6; 11 Sim. 31. A "fair use" of a book, by way of quotation or otherwise, is allowable; Lawrence v. Dana, 4 Cliff. 1, Fed. Cas. No. 8,136; L. R. 8 Ex. 1; L. R. 18 Eq. 444; L. R. 5 Ch. 251; it may be for purposes of criticism, but so as not to supersede the work itself; Lawrence v. Dana, 4 Cliff. 1, Fed. Cas. No. 8,136; L. R. 8 Ex. 1; Harper v. Shoppell, 26 Fed. 519; or in a later work to the extent of fair quotation; 11 Sim. 31; Folsom v. Marsh, 2 Sto. 100, Fed. Cas. No. 4,901; in compiling a directory, but not so as to save the compiler all independent labor; List Pub. Co. v. Keller, 30 Fed. 772; L. R. 1 Eq. 697; 7 *id.* 31; *id.* 5 Ch. 279; a descriptive catalogue of fruit, etc.; L. R. 18 Eq. 444; a book on ethnology; L. R. 5 Ch. 251; a dictionary, provided the new book may fairly be considered a new work; 31 L. T. R. 16. See West Pub. Co. v. Pub. Co., 64 Fed. 360, 25 L. R. A. 441, for a full discussion.

2d. By *imitating* or copying, with colorable alterations and disguises, assuming the appearance of a new work. Where the resemblance does not amount to identity of parallel passages, the criterion is whether there is such similitude and conformity between the two books that the person who wrote the one must have used the other as a model, and must have copied or imitated it; see 5 Ves. 24; 16 *id.* 269, 422; 2 Brown, Ch. 80; 2 Russ. 385; 2 S. & S. 6; 1 Campb. 94; Gray v. Russell, 1 Sto. 11, Fed. Cas. No. 5,728; Emerson v. Davies, 3 Sto. 768, Fed. Cas. No. 4,436; Webb v. Powers, 2 W. & M. 497, Fed. Cas. No. 17,323; Blunt v. Patten, 2 Paine 393, Fed. Cas. No. 1,579, which was the case of a chart. A fair and *bona fide* abridgment has in some cases been held to be no infringement of the copyright; 1 Morg. Lit. 319, 343; 2 Atk. 141; 1 Brown, Ch. 451; 5 Ves. 709; Lawrence v. Dana, 4 Cliff. 1, Fed. Cas. No. 8,136; 1 Y. & C. 298; Story v. Holcombe, 4 McLean 306, Fed. Cas. No. 13,497; Folsom v. Marsh, 2 Sto. 105, Fed. Cas. No. 4,901; 2 Kent 382; see 3 Am. L. Reg. 129. But Drone, Copyright 440, maintains the contrary doctrine. A booklet entitled "Opera Stories," consisting of mere fragmentary statements of the story and characters of the operas, taken from descriptions other than librettos, is not an infringement of the copyrights on the librettos; Ricordi & Co. v. Mason, 201 Fed. 182.

"The true test of piracy, then, is not whether a composition is copied in the same language or the exact words of the original, but whether in substance it is reproduced; not whether the whole or whether a material part is taken. In this view of the subject it is no defence of piracy that the work entitled to protection has not been copied literally; that it has been translated into another language; that it has been dramatized; that the whole has not been taken; that it has been abridged; that it is reproduced in a new and more useful form. The controlling question always is whether the substance of the work is taken without authority;" Drone, Copyr. 385.

An author may resort with full liberty to the common sources of information and make use of the common materials open to all, but his work must be the result of his own independent labor; Simms v. Stanton, 75 Fed. 6.

A subsequent compiler of a directory is only required to do for himself that which the first compiler has done. He may not use a previous compilation to save himself trouble, though he do so but to a very limited extent; but he may use the former work to verify the spelling of names or the correctness of the addresses; List Pub. Co. v. Keller, 30 Fed. 772.

The compiler of a digest may compare notes, abstracts, and paragraphs from opinions of the courts and from syllabi prepared by the courts, and may digest such opinions and syllabi from printed copies and published in a copyrighted system, but he may not copy the original work of the reporter, or use his work in any way in order to lighten his labors, though he may use it to verify his own accuracy, to detect errors, etc.; West Pub. Co. v. Pub. Co., 64 Fed. 360, 25 L. R. A. 441. The author of a law book may copy the citations of a prior author if he examines and verifies the cases cited and may use them in the same order and with additions and subtractions; White v. Bender, 185 Fed. 921. A copyrighted law book is not infringed by the collection by another author of the cases cited therein for use in another publication; Thompson Co. v. Law Book Co., 122 Fed. 922, 59 C. C. A. 148, 62 L. R. A. 607.

The singing of a single verse and chorus of a copyrighted song without musical accompaniment, in imitation of the voice, postures and mannerisms of another, is not an infringement; Green v. Minzensheimer, 177 Fed. 286; but *contra*, where one sings an entire copyrighted song with musical accompaniment she is guilty of infringement, though she intends merely to mimic another; Green v. Minzensheimer, 177 Fed. 287.

Mere fragmentary scenes of various operas do not infringe the copyrighted librettos; Ricordi & Co. v. Mason, 201 Fed. 184.

Moving pictures depicting the story of an author's work are a dramatization of it and infringe the copyright; Kalem Co. v. Harper Bros., 222 U. S. 55, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285.

A translation has been held not to be a violation of the copyright of the original; Stowe v. Thomas, 2 Wall. Jr. 547, Fed. Cas. No. 13,514. The correctness of this decision is questioned in Drone, Copyr. 455.

When the infringement of a copyright is established the question of intent is immaterial; Fishel v. Lueckel, 53 Fed. 499.

A copyrighted compilation, comprising lists of trotting and pacing horses with their speed, is infringed by one who uses the table to make up records of horses of 2.30 or better, notwithstanding the fact that the latter compilation might have been made by the defendant from other publications valuable to him; American Trotting Register Ass'n v. Gocher, 70 Fed. 237.

Damages. Where the infringing material is so intermingled with the rest of the contents as to be almost incapable of separation, the infringer is liable for the entire profit realized from the book; Callaghan v. Myers, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547; National Hat Pouncing Mach. Co. v. Hedden, 148 U. S. 488, 13 Sup. Ct. 680, 37 L. Ed. 529. Where the infringing publication uses only a part of the original matter and is issued in a cheaper form, the measure of damages is the profit realized by the infringer, and not what the copyright owner would have realized by a sale of an equal number of the original copyright work; Scribner v. Clark, 50 Fed. 473

The owner of a copyright who wishes to sell the published work directly and only to individual subscribers, through canvassers employed by him, will be protected from interference by other dealers who have surreptitiously obtained copies without his consent and offered them for sale; Bill Pub. Co. v. Smythe, 27 Fed. 914. But it has been held that the owner of a copyright transferring the title of copyrighted books under an agreement restricting their use, cannot, under the copyright statutes, restrain sales of books in violation of the agreement; Harrison v. Maynard, Merrill & Co., 61 Fed. 689, 10 C. C. A. 17; the remedy is confined to the breach of the contract; *id.*

A notice on a copyright book that it must not be sold for less than a specified price does not reserve any right to the copyright owner, nor limit the absolute title acquired by purchaser; Bobbs-Merrill Co. v. Straus, 139 Fed. 155, affirmed in 147 Fed. 15, 77 C. C. A. 607, and 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086.

The words "Webster's Dictionary" are public property by reason of the expiration of the copyright in the dictionary; Merriam v. Clothing Co., 47 Fed. 411.

One who buys copies of a publication which violates copyright and sells them again is liable for the profit on his sales; Myers v. Callaghan, 24 Fed. 636.

Copyright is based on statute, while unfair competition, except as affected by legislative enactment in connection with patents, trade-marks, etc., is dependent on abstract principles of law. Copyright relates to the printed material of a publication, while unfair competition may be concerned with any article of trade whether having words or letters in its composition and appearance or not; West Pub. Co. v. Edward Thompson Co., 176 Fed. 833, 100 C. C. A. 303.

The British copyright code went into effect July 1, 1912. Australia adopted a code in 1905 and Canada in 1911.

See LITERARY PROPERTY; Bowker, Copyright.

International Copyright. Under the reciprocity clause of the Act of March 4, 1909, the President made proclamations April 9, 1910, that the following countries were entitled to all the benefits of the acts, excepting those under section 1 (e): Austria, Belgium, Chile, Costa Rica, Cuba, Denmark, France, Germany, Great Britain and possessions, Italy, Mexico, Netherlands and possessions, Norway, Portugal, Spain and Switzerland. A like proclamation was made as to Luxemburg, June 29, 1910; as to Sweden, May 26, 1911; as to Tunis, October 4, 1912.

The benefits of the act as to section 1 (e) were extended by proclamation: to Germany, December 8, 1910; Belgium, June 14, 1911; Cuba, November 27, 1911; Luxemburg, June 14, 1911; and Norway, June 14, 1911.

A copyright convention with Hungary went into effect October 15, 1912.

The United States, as a party only to the Pan-American Union and not a member of the International Copyright Union under the Berne-Berlin Conventions, has not secured for its citizens general rights of copyright in other countries, without repetition of formalities, and such rights are secured only by reciprocity in the countries designated by presidential proclamation and according to the formalities of their domestic legislation. The International Copyright Union held a convention in Berlin, 1908, which replaced, in the relations between the contracting states, the Convention of Berne of 1886, with the additional act and the interpretative declaration of 1896. Fifteen signatory powers of the Union attended, including France, Germany and Great Britain; the United States was not a signatory power. Twenty non-Union powers also attended the Conference, including the United States whose delegate, Thorvald Solberg, while stating that it was not deemed possible by the Unit-

ed States to send a plenipotentiary delegate, also expressed the sympathy of the United States with the purposes of the Union. See Bowker, Copyright.

CORAAGIUM or CORAAGE. Measures of corn. An unusual and extraordinary tribute, arising only on special occasions. They are thus distinguished from services. Mentioned in connection with *hidage* and *carvage*. Cowell.

CORAM IPSO REGE (Lat.). Before the king himself. Proceedings in the court of king's bench are said to be *coram rege ipso*. 3 Bla. Com. 41.

CORAM NOBIS. A writ of error on a judgment in the king's bench is called a *coram nobis* (before us). 1 Archb. Pr. 234. See CORAM VOBIS.

CORAM NON JUDICE. Acts done by court which has no jurisdiction either over the person, the cause, or the process, are said to be *coram non judice*. Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200. Such acts have no validity. If an act is required to be done before a particular person, it would not be considered as done before him if he were asleep or *non compos mentis;* Wickes' Lessee v. Caulk, 5 Harr. & J. (Md.) 42; Griffith v. Frazier, 8 Cra. (U. S.) 9, 3 L. Ed. 471; Fisher v. Harnden, 1 Paine 55, Fed. Cas. No. 4,819; 1 Prest. Conv. 266.

CORAM PARIBUS. In the presence of the peers or freeholders. 2 Bla. Com. 307.

CORAM VOBIS. A writ of error directed to the same court which tried the cause, to correct an error in fact. Bridendolph v. Zellers' Ex'rs, 3 Md. 325; 3 Steph. Com. 642.

If a judgment in the King's Bench be erroneous in matter of fact only, and not in point of law, it may be reversed in the same court by writ of error *coram nobis* (before us), or *quæ coram nobis residant*, so called from its being founded on the record and process, which are stated in the writ to remain in the court of the king before the king himself. But if the error be in the *judgment* itself, and not in the process, a writ of error does not lie in the same court upon such judgment. 1 Rolle, Abr. 746. In the Common Pleas, the record and proceedings being stated to remain before the king's justices, the writ is called a writ of error *coram vobis* (before you) or *quæ coram vobis residant*. 3 Chit. Bla. Com. 406, n.

CORD. A measure of wood, containing 128 cubic feet. See Kennedy v. R. Co., 67 Barb. (N. Y.) 169.

CO-RESPONDENT. Any person called upon to answer a petition or other proceeding, but now chiefly applied to a person charged with adultery with the husband or wife, in a suit for divorce, and made jointly a respondent to the suit. See DIVORCE.

CORN. In its most comprehensive sense, this term signifies every sort of grain, as well as peas and beans; this is its meaning in the memorandum usually contained in policies of insurance. But it does not include rice; Park, Ins. 112; 1 Marsh. Ins. 223, n.; Wesk. Ins. 145. See Com. Dig. *Biens* (G, 1). In the United States it usually means maize, or Indian corn; Sullins v. State, 53 Ala. 474.

CORN-LAWS. Laws regulating the trade in bread-stuffs.

The object of corn laws is to secure a regular and steady supply of the great staples of food; and for this object the means adopted in different countries and at different times widely vary, sometimes involving restriction or prohibition upon the export, and sometimes, in order to stimulate production, offering a bounty upon the export. Of the former character was the famous system of corn laws of England, initiated in 1773 by Burke, and repealed in 1846 under Sir Robert Peel. See Cobden's Life

CORN RENTS. Rents reserved in wheat or malt in certain university leases in England. Stat. 18 Eliz. c. 6; 2 Bla. Com. 322.

CORNAGE. A species of tenure in England, by which the tenant was bound to blow a horn for the sake of alarming the country on the approach of an enemy. Bac. Abr. *Tenure* (N.).

CORNET. A commissioned officer in a regiment of cavalry, abolished in England in 1871, and not existing in the United States army.

CORODY. An allowance of meat, drink, money, clothing, lodging, and such like necessaries for sustenance. 1 Bla. Com. 283; 1 Chit. Pr. 225. An allowance from an abbey or house of religion, to one of the king's servants who dwells therein, of meat and other sustenance. Fitzh. N. B. 230.

An assize lay for a corody; Cowell. Corodies are now obsolete; Co. 2d Inst. 630; 2 Bla. Com. 40.

CORONATION. It "is but a royal ornament and solemnization of the royal descent, but no part of the title." By the laws of England there can be no interregnum; 7 Co. Rep. 10 *b*.

CORONATION OATH. The oath administered to a sovereign in England before coronation. Whart. Law Dic. Its form was somewhat changed at the coronation of Edward VII.

CORONATOR (Lat.). A coroner. Spel.

CORONATORE EXONERANDO. A writ for the removal of a coroner, for a cause therein assigned.

CORONER. An officer whose principal duty it is to hold an inquisition, with the assistance of a jury, over the body of any person who may have come to a violent death, or who has died in prison.

It is his duty, in case of the death of the sheriff or his incapacity, or when a vacancy occurs in that office, to serve all the writs and processes which the sheriff is usually bound to serve; Gunby v. Welcher, 20 Ga. 336; Brown v. Barker, 10 Humph. (Tenn.)

346; Manning v. Keenan, 73 N. Y. 45; 1 Bla. Com. 349. See SHERIFF.

Coroners were county officers placed beside the sheriff to look after the administration of criminal justice and the revenue to the king resulting therefrom; Brunner, 2 Sel. Essays in Anglo-Amer. L. H. 31. See Gross, History of Coroners. It is supposed that the first institution of coroners dates from 1194. The office may have existed before then. 2 Holdsw. Hist. E. L. 45; Pollock, King's Peace, 2 Sel. Essays in Anglo-Amer. L. H. 410.

It was also the coroner's duty to inquire concerning shipwreck, and to find who had possession of the goods; concerning treasure-trove, who were the finders, and where the property was; 1 Bla. Com. 349. The stat. 4 Edw. I. ch. 2 (1276), entitled "*De Officio Coronatoris*," empowered the coroner to inquire who was slain and who were there, who and in what manner they were culpable of the act or force. Whoever was found culpable was turned over to the sheriff, and whoever was not culpable was attached until the coming of the justices. The Chief Justice of the King's Bench was the chief coroner of all England; though he did not perform the active duties of that office in any one county; 4 Co. 57 *b*; Bac. Abr. Coroner; 3 Com. Dig. 242; 5 *id.* 212.

Coroners were abolished in Massachusetts in 1877, and "men learned in the science of medicine" are appointed to make autopsies and in case of a violent death to report it to a justice of the district.

In England a coroner (one in every county and in certain boroughs) holds a court of record; his jury of inquest consists of not less than 12 nor more than 23 persons. Upon a verdict of the jury, the coroner can commit the accused for trial and he may be arraigned without any presentment by a grand jury. Odgers, C. L. 1031.

A coroner is a "judicial officer" within a bribery act; People v. Jackson, 191 N. Y. 293, 84 N. E. 65, 15 L. R. A. (N. S.) 1173, 14 Ann. Cas. 243.

It is proper for a coroner in most cases of homicide to cause an examination to be made by a physician, and in many cases it is his duty so to do; 4 C. & P. 571. See Jameson v. Board of Com'rs of Bartholomew County, 64 Ind. 524; Sanford v. Lee County, 49 Ia. 148; Cook v. Multnomah County, 8 Or. 170.

In Coroner's Duties, 20 D. R. (Pa.) 685, Sulzberger, P. J., instructed the coroner as to his duties in Pennsylvania, where the practice has been much modified, to the effect that the district attorney should always be present at the coroner's inquest and that he has power to cross-examine witnesses; also that if the district attorney is of opinion that there is no evidence to hold the person charged, he should be discharged, but not otherwise.

CORPORAL (Lat. *corpus*, body). Bodily; relating to the body: as, corporal punishment.

A non-commissioned officer of the lowest grade in an infantry, cavalry, or artillery company.

CORPORAL OATH. An oath which the party takes laying his hand on the gospels. Cowell. It is now held to mean solemn oath. Jackson v. State, 1 Ind. 184.

CORPORAL TOUCH. Actual, bodily contact with the hand.

It was once held that before a seller of personal property could be said to have stopped it *in transitu*, so as to regain the possession of it, it was necessary that it should come to his corporal touch; but the contrary is now settled. These words were used merely as a figurative expression. 3 Term 464; 5 East 184.

CORPORATION. A body, consisting of one or more natural persons, established by law, usually for some specific purpose, and continued by a succession of members.

"An artificial being created by law and composed of individuals who subsist as a body politic under a special denomination with the capacity of perpetual succession and of acting within the scope of its charter as a natural person." Fletsam v. Hay, 122 Ill. 293. By fiction it is partly a person and partly a citizen, yet it has not the inalienable rights of a natural person; Northern Securities Co. v. United States, 193 U. S. 200, 24 Sup. Ct. 436, 48 L. Ed 679.

A corporation aggregate is a collection of individuals united in one body by such a grant of privileges as secures succession of members without changing the identity of the body and constitutes the members for the time being one artificial person or legal being capable of transacting the corporate business like a natural person. Bronson, J., People v. Assessors of Village of Watertown, 1 Hill (N. Y.) 620.

For a long time the prevailing theory on the Continent of Europe of the true nature of corporate bodies was that the personality of a corporation was a mere legal fiction, and its rights derived in every case from a special creation by the state. But of late years writers of considerable authority have taken the view that the legal existence or personality of a corporation, though limited in various ways, is quite as real as that of an individual; Pollock, First Book of Jurispr. 113, where various authorities are referred to, and the author expresses his belief that the latter view is sounder. The corporation in England was the joint result of certain groups in ecclesiastical life and certain other groups active in temporal affairs. For centuries the development of each was wholly independent of the other. The boroughs first began to secure from the king franchises to hold their own courts, to their own customs and freedom from toll. A borough had two organizations—gild and governmental. They were connected, but not identical. The franchises were in the form of a grant from the king and were made to the burgesses. No legal person was created, but the burgesses died and their privileges were continued to their successors. When individual inhabitants of the borough offended the king

by their acts, he took away the franchise of the borough as a punishment, which punishment fell on the community. Once in such a case the Londoners prayed that only the guilty might be punished; Riley, Chronicles 84. The king treated the burgesses as a group and the burgesses in respect to their property acted as a group.

The same idea developed in ecclesiastical life. For wholly different reasons, religious groups were formed. The basic doctrines of the Christian church require co-operation and also continuity of thought and effort. Monasteries, convents and chapters were the result. It became evident that this indefinite something produced by the association of several should be given a name and its status established There was much blind groping after the nature of this indefinite something. For a time the idea naturally suggested by the analogy of the human body was applied to these groups. The chief officer, as the mayor or the bishop, was the head and the members were the arms, legs, etc. This was called the anthropomorphic theory and for a long time obscured the true corporate idea, 1 Poll. & Maitl (2d ed) 491, and citations of the year books there given; 19 Harv. L Rev. 350.

Finally, however, the oneness of these groups was given a definite recognition, not as a real, but as an ideal or legal person. The conception of an ideal person having legal rights and duties was borrowed directly from the early English theory as to church ownership. In very early times, several centuries at least before the reign of Edward I, there were in England what were vaguely known as church lands. At first the land was given direct to God. Sometimes it was given to a particular saint, who was supposed to guard and protect it Little by little, the saint and the buildings became merged in each other and the church itself was thought to be the property owner. The functions of ownership were necessarily performed by human beings—by the clergy—and the theory was naturally extended to cases where there was only one cleric. Thus was introduced the corporation sole, characterized as "that unhappy freak of English law"; 1 Poll & Maitl 488 In ecclesiastical affairs, the corporation aggregate was almost resolved into a mere collection of corporations sole; *id.* 507. See *infra.*

It was not until about the middle of the 15th century that it was settled as a matter of positive law that the corporation must be created by the sovereign power, which rule arose simply from considerations of political expediency. Recognizing that boroughs, organized communities and gilds might become dangerous, the king made them a source of revenue by selling the privilege to exist. In 1440 the first municipal charter was granted. The mayor, burgesses and their successors, mayors and burgesses of the town of Kingston-upon-Hull, were incorporated so as to form "one perpetual corporate commonalty." 19 Harv L Rev 350.

"What we call a corporation was first called 'un corps' or a body, whence our 'body politic,' or 'body corporate'; or 'un gros' or something that had an existence in itself, apart from its constituents. Thus there was gradually evolved the idea of an abstract artificial individuality, composed of members for the time being, to be succeeded by others after them, but continuing after their death This became the *persona ficta* of a later time" A. M. Eaton in 1902 Amer. Bar Assoc Repts. 320. Referring to the earlier historical days, the same author says, (p 322): "There was no intention on either part to form a corporation, indeed neither knew what a corporation was, for the name did not exist, but the thing itself was being gradually evolved."

For the history of corporations before 1800, see Williston, 2 Harv. L. Rev. 149 (3 Sel Essays in Anglo-Amer. L H. 195), Baldwin, History of Private Corp., 3 Sel. Essays in Anglo-Amer. L. H. 236.

For centuries the leading case on corporations in England was the case of Sutton's Hospital, 10 Co. 1 (1612), where the king, on the petition of Sutton, had granted a charter to a hospital. Sutton conveyed land to such corporation. Against the contention of the heir that there was no corporation and that the conveyance was void, it was held that both the incorporation and the deed were valid and that the incorporation of the persons might precede the foundation of the hospital; 21 Harv. L. Rev. 305.

It was considered at that time that corporations aggregate could not commit treason, nor be outlawed nor excommunicated, for they have no souls. Neither can they appear in person, but by attorney; they cannot do fealty, for an invisible body can neither be in person nor swear; 10 Coke 32 b. Blackstone said it can neither maintain nor be defendant to an action of battery or such like personal injuries, for a corporation can neither beat, nor be beaten, in its body politic; 1 Bla. Com. 476. It could not be executor or administrator or perform any personal duties, for it could not take an oath for the due execution of the office, *id.*

The fiction that a corporation can do nothing but by an attorney, that it was an artificial being, guarded by the body of associates forming it, led to the theory that its administrative officers could exercise only a delegated authority; 21 Harv. L. Rev. 535. It is said that under the pressure of modern analysis this fiction tends to yield to more rational ideas, and corporate action is perceived more truly as simple group action; *id.* A corporation represents the most advanced attainment of the group idea; 19 *id* 350.

The first business corporate charter in the United States was in 1768: "The Philadelphia Contributionship for Insuring Houses from Loss by Fire."

Aggregate corporations are those which are composed of two or more members at the same time.

Civil corporations are those which are created to facilitate the transaction of business.

Ecclesiastical corporations are those which are created to secure the public worship of God.

Eleemosynary corporations are those which are created for the purposes of charities, such as schools, hospitals, and the like.

Lay corporations are those which exist for secular purposes.

Municipal corporations are those created for the purpose of administering some portion of the government in a political subdivision of the state, as a city, county, etc.

Private corporations are those which are created wholly or in part, for purposes of private emolument. Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 668, 4 L. Ed. 629; Bank of United States v. Bank, 9 Wheat. (U. S.) 907, 6 L. Ed. 244.

Public corporations are those which are exclusively instruments of the public interest.

Corporations sole are those which by law consist of but one member at any one time, as a bishop in England. But see *infra;* also *supra.*

In the Dartmouth College Case, 4 Wheat. (U. S.) 666, 4 L. Ed. 629, Mr. Justice Story defined the various kinds of corporations as follows:

"An aggregate corporation at common law is a collection of individuals united into one collective body, under a special name, and possessing certain immunities, privileges, and capacities in its collective character, which do not belong to the natural

persons composing it. . . . A great variety of these corporations exist in every country governed by the common law; . . . some of these corporations are, from the particular purposes to which they are devoted, denominated *spiritual*, and some *lay*; and the latter are again divided into *civil* and *eleemosynary* corporations. Eleemosynary corporations are such as are constituted for the perpetual distribution of the free alms and bounty of the founder. . . . In this class are ranked hospitals, and colleges, etc. Another division of corporations is into *public* and *private*. Public corporations are generally esteemed such as exist for public and political purposes only, such as towns, cities, etc. Strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the Government, the corporation is private. . . . For instance, a bank created by the Government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation. So a hospital created and endowed by the government for general charity. But a bank, whose stock is owned by private persons, is a private corporation. . . . The same doctrine may be affirmed of insurance, canal, bridge, and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private. . . . This reasoning applies in its full force to eleemosynary corporations. . . . This is the unequivocal doctrine of the authorities; and cannot be shaken but by undermining the most solid foundations of the common law."

Kent divides corporations into ecclesiastical and lay, and lay corporations into eleemosynary and civil; 2 Kent 274.

It has been held that a public corporation is one that cannot carry out the purposes of its organization without certain rights under its charter from the commonwealth, and that mere private corporations are those that need no franchise from the state to carry out such purposes; Allegheny Co. v. Diamond Market, 123 Pa. 164, 16 Atl. 619. But Judge Thompson doubts as to whether these divisions promote clear conceptions of the law; 1 Thomp. Corp. § 22; he considers that a more practical conception would divide them into three classes: public-municipal corporations, to promote the public interest; corporations technically private but of *quasi* public character, such as railroads etc.; and corporations strictly private; *id.* § 37.

The essence of a corporation consists "in a capacity (1) to have perpetual succession in a special and in an artificial form; (2) to take and grant property, contract obligations, sue and be sued by its corporate name as an individual; (3) to receive and enjoy in common grants of privileges and immunities; Thomas v. Dakin, 22 Wend. (N. Y.) 71.

By both the civil and the common law, the *sovereign* authority only can create a corporation,—a corporation by prescription, or so old that the license or charter which created it is lost, being presumed, from the long-continued exercise of corporate powers, to have been entitled to them by sovereign grant. In England, corporations are created by royal charter or parliamentary act; in the United States, by legislative act of any state, or of the congress of the United States,—congress having power to create a corporation, as, for instance, a national bank when such a body is an appropriate instrument for the exercise of its constitutional powers; McCulloch v. Maryland, 4 Wheat. (U. S.) 424, 4 L. Ed. 579. In many or most of the states general acts have been passed for the creation of certain classes of some corporations. And some state constitutions have taken from the legislature the power to create them by special act.

All corporations, of whatever kind, are moulded and controlled, both as to what they may do and the manner in which they may do it, by their charters or acts of incorporation, which to them are the laws of their being, which they can neither dispense with nor alter. Subject, however, to such limitations as these, or such as general statute or constitutional law, may impose, every corporation aggregate has, by virtue of incorporation and as incidental thereto, *first*, the power of perpetual succession, including the admission, and, except in the case of mere stock corporations, the removal for cause, of members; *second*, the power to sue and be sued, to grant and to receive grants, and to do all acts which it may do at all, in its corporate name; *third*, to purchase, receive, and to hold lands and other property, and to transmit them in succession; *fourth*, to have a common seal, and to break, alter, and renew it at pleasure; and, *fifth*, to make by-laws for its government, so that they be consistent with its charter and with law. It may, within the limits of its charter or act of incorporation express or implied, lawfully do all acts and enter into all contracts that a natural person may do or enter into, so that the same be appropriate as means to the end for which the corporation was created.

It is not obliged to use all its powers unless its charter especially so requires; Illinois Trust & Savings Bank v. Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481.

A corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not

authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and ascertain if it has exceeded its powers; Wilson v. U. S., 221 U. S. 382, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912A, 558. A corporation of one state may be made a corporation of another state in regard to property and acts within its territorial jurisdiction; Ohio & M. R. Co. v. Wheeler, 1 Black (U. S.) 286, 17 L. Ed. 130; Baltimore & O. R. Co. v. Harris, 12 Wall. (U. S.) 65, 20 L. Ed. 354; Chicago & N. W. R. Co. v. Whitton, 13 Wall. (U. S.) 270, 20 L. Ed. 571; St. Louis R. Co. v. Vance, 96 U. S. 450, 24 L. Ed. 752; Clark v. Barnard, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780; Martin v. R. Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311; Louisville, N. A. & C. R. Co. v. Trust Co., 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081; Mackay v. R. Co., 82 Com. 73, 72 Atl. 583, 24 L. R. A. (N. S.) 768; but the mere grant of privileges and powers to it as an existing corporation, without more, does not confer the power usually exercised over corporations by the state or by the legislature. The language used must imply creation or adoption; Pennsylvania R. Co. v. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; Goodlett v. R. R., 122 U. S. 391, 7 Sup. Ct. 1254, 30 L. Ed. 1230; St. Louis & S. F. R. Co. v. James, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802. Where a corporation is incorporated simultaneously in several states, it exists in each state; Pinney v. Nelson, 183 U. S. 149, 22 Sup. Ct. 52, 46 L. Ed. 125. Where it is sued in one of such states it cannot escape the jurisdiction thereof and remove the cause to the federal court; Patch v. R. Co., 207 U. S. 277, 28 Sup. Ct. 80, 52 L. Ed. 204, 12 Ann. Cas. 518, distinguishing Southern R. Co. v. Allison, 190 U. S. 326, 23 Sup. Ct. 713, 47 L. Ed. 1078. Where several corporations, each of a different state, are so consolidated by the co-operating legislation of those states as to assume a new corporate form and name, the consolidated corporation is, in each of those states, a corporation of such state; Patch v. R. Co., 207 U. S. 277, 28 Sup. Ct. 80, 52 L. Ed. 204, 12 Ann. Cas. 518. See MERGER.

Where property is involved, a corporation is regarded as a person separate and distinct from its stockholders, or any or all of them; Home Fire Ins. Co. v. Barber, 67 Neb. 644, 93 N. W. 1024, 60 L. R. A. 927, 108 Am. St. Rep. 716, per Pound, Com'r. The entirely separate identity of the rights and remedies of a corporation itself and the individual shareholders is settled; Big Creek Gap Coal & Iron Co. v. Trust Co., 127 Fed. 626, 62 C. C. A. 351; Bronson v. R. Co., 2 Wall. (U. S.) 283, 17 L. Ed. 725; Davenport v. Dows, 18 Wall. 626, 21 L. Ed. 938; Church v. R. Co., 78 Fed. 526; Forbes v. R. Co., Fed. Cas. No. 4,926.

But it is held that while a corporation is ordinarily considered a legal entity, yet it may, in the interest of justice, be considered as an association of persons; and where one corporation is organized and owned by the stockholders and officers of another, they may be treated as identical; U. S. v. Transit Co., 142 Fed. 247.

Its residence is fixed by artificial conditions, such as the location of its principal office, or (if a foreign corporation) the personal residence of its duly appointed attorney in fact on whom service is to be made in a state where it is registered as a foreign corporation; Lemon v. Glass Co., 199 Fed. 927.

A corporation having stockholders is *organized* when the first meeting has been called, the act of incorporation accepted, officers elected, and by-laws providing for future meetings adopted, within the meaning of a statute providing that incorporators and subscribers shall hold the franchise until the corporation is *organized;* Roosevelt v. Hamblin, 199 Mass. 127, 85 N. E. 98, 18 L. R. A. (N. S.) 748; or when the officers provided for in the law of its being have been appointed and taken upon themselves the burden of their offices; Com. v. Mann Co., 150 Pa. 64, 24 Atl. 601; Walton v. Oliver, 49 Kan. 107, 30 Pac. 172, 33 Am. St. Rep. 355. It has been held not to be organized where it had not recorded a certificate of complete organization; Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99; North Chicago Electric Ry. Co. v. Peuser, 190 Ill. 67, 60 N. E. 78; or filed its articles of incorporation; Capps v. Prospecting Co., 40 Neb. 470, 58 N. W. 956, 24 L. R. A. 259, 42 Am. St. Rep. 677; or its certificate that the requisite capital stock had been deposited; Gent v. Ins. Co., 107 Ill. 652.

In civil cases a corporation is liable for the malice of its officers and servants; [1900] 1 Q. B. 22; [1904] A. C. 423.

Ordinarily in England it cannot be prosecuted for a crime; but it may be for a misdemeanor, which is merely a civil wrong; (*e. g.*) for breaches of the Food and Drug Act; Odger, C. L. 1405. In the United States it may be indicted for crime, but not for every species; 5 Thomps. Cap. § 6418. It may be for a criminal libel; Brennan v. Tracy, 2 Mo. App. 540 (dictum); for keeping a disorderly house; State v. Agricultural Soc., 54 N. J. L. 260, 23 Atl. 680; for obstructed public navigation by not constructing a draw bridge; Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339; for a public nuisance; State v. City of Portland, 74 Me. 268, 43 Am. Rep. 586; Delaware Division Canal Co. v. Com., 60 Pa. 367, 100 Am. Dec 570; for failure to perform public duties (as of a municipality failing to keep highways in repair); State v. Town of Murfreesboro, 11 Humph. (Tenn.) 217; for usury; State v. Bank, 2 S. D. 538, 51 N. W. 337; for conspiracy to aid a lynching mob; Rogers v.

R. Co., 194 Fed. 65, 114 C. C. A. 85; and of course for offences under modern industrial statutes.

It is held that it can be indicted only when the legislation has so provided; State v. Hotel Co., 42 Ind. App. 282, 85 N. E. 724.

The definition at the beginning of this title of a corporation sole is the one usually given in the books. It is said, in England, to include the Crown, all bishops, rectors, vicars and the like; 3 Steph. Com. 15 ed. 2. So of the supervisor of a town; Jansen v. Ostrander, 1 Cow. (N. Y.) 670; the governor of a state; Governor v. Allen, 8 Humphr. (Tenn.) 176. It has been defined as a "term established by usage indicating a person some of whose rights and liabilities are permitted by law to pass to his successors in a particular office, rather than to his heirs, executors or administrators. Such a corporation was unknown in the civil law." 21 Harv. L. Rev. 306. But the conception has been disapproved by modern authors. Thus, Sir F. Pollock (note to Maine, Anc. Law 226) says: "Our English category of corporations sole is not only, as Maine calls it, a fiction, but modern, anomalous, and of no practical use. When a parson or other solely corporate office-holder dies, there is no one to act for the corporation until a successor is appointed, and when appointed, that successor can do nothing which he could not do without being called a corporation sole. . . . As for the King, or 'the Crown,' being a corporation sole, the language of our books appears to be nothing but a clumsy and, after all, ineffective device to avoid openly personifying the state. . . . The whole thing seems to have arisen from the technical difficulty of making grants to a parson and his successors after the practice of making them to God and the patron saint had been discontinued. . . . All this we may now think makes for historical curiosity rather than philosophical edification."

"A bishop is not a corporation sole"; per Strong, J., in Kain v. Gibboney, 101 U. S. 362, 25 L. Ed. 813, referring to a Roman Catholic bishop.

See Maitland, Corporation Sole (16 L. Q. R. 335); The Crown as a Corporation (17 *id.* 131). Judge Thompson has said (Corp. vol. 1, § 8) that the conception of a corporation sole is "passing out of American law."

See CHARTER; STOCK; STOCKHOLDER; DIRECTOR; MEETINGS; OFFICER; TRUST FUND THEORY; DISSOLUTION; MERGER; EMINENT DOMAIN; DE FACTO; ECCLESIASTICAL CORPORATIONS.

CORPORATOR. A member of a corporation.

The corporators are not the corporation, for either may sue the other; Culbertson v. Wabash Nav. Co., 4 McLean, 547, Fed. Cas. No. 3,464; Rogers v. Universalist Society, 19 Vt. 187; Peirce v. Partridge, 3 Metc. (Mass.) 44; Omaha Hotel Co. v. Wade, 97 U. S. 13, 24 L. Ed. 917.

CORPOREAL HEREDITAMENTS. Substantial permanent objects which may be inherited. The term land will include all such. 2 Bla. Com. 17.

CORPOREAL PROPERTY. In Civil Law. That which consists of such subjects as are palpable.

In the common law, the term to signify the same thing is *property in possession*. It differs from *incorporeal property*, which consists of choses in action and easements, as a right of way, and the like.

CORPSE. The dead body of a human being. 1 Russ. & R. 366, n.; 2 Term 733; 1 Leach 497; Com. v. Loring, 8 Pick. (Mass.) 370; Dig. 47. 12. 3. 7; 11. 7. 38; Code, 3. 44. 1. Stealing a corpse is an indictable offence, but not larceny at common law; Co. 3d Inst. 203; 1 Russ. Cr. 629. See DEAD BODY.

CORPUS (Lat.). A body. The substance. Used of a human body, a corporation, a collection of laws, etc. The capital of a fund or estate as distinguished from the income.

CORPUS COMITATUS. The body of the county; the inhabitants or citizens of a whole county, as distinguished from a part of the county or a part of its citizens. U. S. v. Grush, 5 Mas. 290, Fed. Cas. No. 15,268.

CORPUS CUM CAUSA. See HABEAS CORPUS CUM CAUSA.

CORPUS DELICTI. The body of the offence; the essence of the crime.

It is a general rule not to convict unless the *corpus delicti* can be established, that is, until the fact that the crime has been actually perpetrated has been first proved. Hence, on a charge of homicide, the accused should not be convicted unless the death be first distinctly proved, either by direct evidence of the fact or by inspection of the body; Best, Pres. § 201; 1 Stark. Ev. 575. See 6 C. & P. 176; 2 Hale, P. C. 290; Whart. Cr. Ev. § 324. Instances have occurred of a person being convicted of having killed another, who, after the supposed criminal has been put to death for the supposed offence, has made his appearance alive. The wisdom of the rule is apparent; but it has been questioned whether, in extreme cases, it may not be competent to prove the basis of the *corpus delicti* by presumptive evidence; 3 Benth. Jud. Ev. 234; Wills, Cir. Ev. 105; Best, Pres. § 204; 3 Greenl. Ev. 30. In cases of felonious homicide, the *corpus delicti* consists of two fundamental and necessary facts: first, the death; and secondly, the existence of criminal agency as its cause; Pitts v. State, 43 Miss. 472. A like analysis would apply in the case of any other crime. When the body of a murdered man was mutilated and burned beyond recognition, testimony that a piece of charred cloth found

in the ashes with the body were like the trousers that a certain man wore, and that a slate pencil found there was identical with one he carried about him, was competent evidence to establish the identity of the body; State v. Martin, 47 S. C. 67, 25 S. E. 113.

The presumption arising from the possession of the fruits of crime recently after its commission, which in all cases is one of fact rather than of law, is occasionally so strong as to render unnecessary any direct proof of the *corpus delicti*. Thus, to borrow an illustration from Mr. Justice Maule, if a man were to go into the London docks quite sober, and shortly afterwards were to be found very drunk, staggering out of one of the cellars, in which above a million gallons of wine are stowed, "I think," says the learned judge, "that this would be reasonable evidence that the man had stolen some of the wine in the cellar, though no proof were given that any particular vat had been broached and that any wine had actually been missed." Dears. 284; 1 Tayl. Ev. § 122. In this case it was proved that a prisoner indicted for larceny was seen coming out of the lower room of a warehouse in the London docks, in the floor above which a large quantity of pepper was deposited, and where he had no business to be. He was stopped by a constable, who suspected him from the bulky state of his pockets, and said, "I think there is something wrong about you;" upon which the prisoner said, "I hope you will not be hard upon me;" and then threw a quantity of pepper out of his pocket on the ground. The witness stated that he could not say whether any pepper had been stolen, nor that any pepper had been missed; but that which was found upon the prisoner was of like description with the pepper in the warehouse. It was held by all the judges that the prisoner, upon these facts, was properly convicted of larceny.

The *corpus delicti* in *arson* consists in proof of the burning and of criminal agency in causing it; Spears v. State, 92 Miss. 613, 46 South. 166, 16 L. R. A. (N. S.) 285.

A confession alone ought not to be considered sufficient proof of the *corpus delicti;* Springfellow v. State, 26 Miss. 157, 59 Am. Dec. 247; People v. Henlessey, 15 Wend. (N. Y.) 147; Bines v. State, 118 Ga. 320, 45 S. E. 376, 68 L. R. A. 33. It may be proved by circumstantial evidence; Dimmick v. U. S., 135 Fed. 257, 70 C. C. A. 141; State v. Gillis, 73 S. C. 318, 53 S. E. 487, 5 L. R. A. (N. S.) 571, 114 Am. St. Rep. 95, 6 Ann. Cas. 993.

CORPUS JURIS CANONICI (Lat. the body of the canon law). The name given to the collections of the decrees and canons of the Roman church. See CANON LAW.

CORPUS JURIS CIVILIS. The body of the civil law. The collection comprising the Institutes, the Pandects or Digest, the Code, and the Novels of Justinian. See those several titles, and also CIVIL LAW for fuller information. The name is said to have been first applied to this collection early in the seventeenth century. See BASILICA; CANON LAW.

CORRECTION. Chastisement, by one having authority, of a person who has committed some offence, for the purpose of bringing him into legal subjection

It is chiefly exercised in a parental manner by parents, or those who are placed *in loco parentis*. A parent may therefore justify the correction of the child either corporally or by confinement; and a schoolmaster may justify similar correction; but the correction in both cases must be moderate and in a proper manner; Com. Dig. *Pleader*, (3 M.) 19; Hawk. c. 60, s. 23, c. 62, s. 2, c. 29, s. 5; Johnson v. State, 2 Humph. (Tenn.) 283, 36 Am. Dec. 322; State v. Pendergrass, 19 N. C. 365, 31 Am. Dec. 416; Cook v. Neely, 143 Mo. App. 632, 128 S. W. 233. See ASSAULT; WHIPPING.

The master of an apprentice, for disobedience, may correct him moderately; 1 B. & C. 469; Cro. Car. 179; Mitchell v. Armitage, 10 Mart. O. S. (La.) 38; but he cannot delegate the authority to another. A master has no right to correct his servants who are not apprentices; Matthews v. Terry, 10 Conn. 455; 2 Greenl. Ev. § 97; see ASSAULT for cases of undue correction. A master may be found guilty of murder for whipping a servant so that he dies, although he has a right to inflict the punishment, and the instrument is proper, if the punishment is so prolonged and barbarous as to indicate malice; State v. Shaw, 64 S. C. 566, 43 S. E. 14, 60 L. R. A. 801, 92 Am. St. Rep. 817.

Soldiers were formerly liable to moderate correction from their superiors. For the sake of maintaining discipline in the navy, the captain of a vessel, belonging either to the United States or to private individuals, might formerly inflict moderate correction on a sailor for disobedience or disorderly conduct; Ab. Sh. 160; Brown v. Howard, 14 Johns. (N. Y.) 119; Sampson v. Smith, 15 Mass. 365; Flemming v. Ball, 1 Bay (S. C.) 3; Aertsen v. Aurora, Bee 161, Fed. Cas. No. 95; Thorne v. White, 1 Pet. Adm. 168, Fed. Cas. No. 13,989; Moll. 209; Turner's Case, 1 Ware 83, Fed. Cas. No. 14,248. Such has been the general rule. But flogging and other degrading punishments are now forbidden in the army, navy, merchant service, and military prisons; R. S. §§ 1342, 1624, 4611, 1354.

The husband, by the old law, might give his wife moderate correction; 1 Hawk. P. C. 2. But in later times this power of correction began to be doubted; and a wife may now have security of the peace against her husband, or a husband against his wife; 1 Bla. Com. 444; Stra. 478, 875, 1207; 2 Lev. 128. See MARRIED WOMEN.

Any excess of correction by the parent, master, officer, or captain rendered the par-

ty guilty of an assault and battery and liable to all its consequences; Com. v. Randall, 4 Gray (Mass.) 36. See ASSAULT. In some prisons, the keepers are permitted to correct the prisoners.

The King's Council, in the minority of Henry VI. authorized a subject to chastise the king "when he trespasseth or doth amys." 3 Holdsw. Hist. E. L. 356.

CORREGIDOR. **In Spanish Law.** A magistrate who took cognizance of various misdemeanors, and of civil matters. 2 White, New Rec. 53.

CORREI. **In Civil Law.** Two or more bound or secured by the same obligation.

Correi credendi. Creditors secured by the same obligation.

Correi debendi. Two or more persons bound as principal debtors to pay or perform. Ersk. Inst. 3. 3. 74; Calvinus, Lex.; Bell, Dict.

CORRUPT AND ILLEGAL PRACTICES. A British act of 1883 and supplements forbid certain acts in connection with Parliamentary elections, chiefly bribery, treating, undue influence and personation. Such acts are made criminal offences and may be ground for the loss of the seat if brought home to the candidate personally or through his agent. If by bribery, etc., it appears that the electorate did not really express its will, the election may be declared void. Certain practices are declared illegal, such as payment for the conveyance of electors to or from the polls, paying an elector for the use of his property, paying agents other than those specified in the act, and making a false statement as to the personal character or conduct of a candidate. In certain cases the penalty to the candidate may be disqualification forever from serving for the constituency in question, and, for seven years, from serving for any other constituency. 2 Steph. Com. (15th ed.) 463, 476.

This subject has more recently attracted much attention in the United States, and acts are being passed on the subject, but it cannot be said that the ground is fully covered. Among such acts are those requiring candidates to file, immediately after election, a statement of expenses incurred.

In some states, the state treasury assumes certain nomination expenses. See State Assumption of Expenses, 23 Yale L. Journ. 158, by Simeon E. Baldwin.

CORRUPTION. An act done with an intent to give some advantage inconsistent with official duty and the rights of others.

It includes bribery, but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it be not offered by another. Merlin, *Rép.*

Something against law: as, a contract by which the borrower agreed to pay the lender usurious interest. It is said, in such case, that it was corruptly agreed, etc.

CORRUPTION OF BLOOD. The incapacity to inherit, or pass an inheritance, in consequence of an attainder to which the party has been subject. Abolished by stats. 3 & 4 Will. IV. c. 106, and 33 & 34 Vict. c. 23; 1 Steph. Com. 446.

When this consequence flows from an attainder, the party is stripped of all honors and dignities he possessed, and becomes ignoble.

The constitution of the United States, art. 3, s. 3, n. 2, declares that "no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted."

The act of Congress of July 17, 1862, for the seizure and condemnation of enemies' estates, with the resolution of the same date, does not conflict with this section, the forfeiture being only during the life of the offender; Bigelow v. Forrest, 9 Wall. (U. S.) 339, 19 L. Ed. 696; Miller v. U. S., 11 Wall. (U. S.) 268, 20 L. Ed. 135; Day v. Micou, 18 Wall. (U. S.) 156, 21 L. Ed. 860; Ex parte Lange, 18 Wall. (U. S.) 163, 21 L. Ed. 872; Wallach v. Van Kiswick, 92 U. S. 202, 23 L. Ed. 473.

So far as it prevented descent being traced through a felon, the doctrine of corruption of blood was abolished in England in 1834, the whole law of escheat for felony, together with the king's year, day and waste, was abolished in 1870.

CORSE-PRESENT. **In Old English Law.** A gift of the second best beast belonging to a man at his death taken along with the corpse and presented to the priest. Stat. 21 Hen. VIII. cap. 6; Cowell; 2 Bla. Com. 425.

CORSNED. **In Old English Law.** A piece of barley bread, which, after the pronunciation of certain imprecations, a person accused of crime was compelled to swallow.

A piece of cheese or bread of about an ounce weight was consecrated with an exorcism desiring of the Almighty that it might cause convulsions and paleness, and find no passage, if the man was really guilty, but might turn to health and nourishment if he was innocent. Spelman, Gloss. 439. It was then given to the suspected person, who at the same time received the sacrament. If he swallowed it easily, he was esteemed innocent; if it choked him, he was esteemed guilty. See 4 Bla. Com. 345.

CORTES. The name of the legislative assemblies of Spain and Portugal.

CORVEE. **In French Law.** Gratuitous labor exacted from the villages or communities, especially for repairing roads, constructing bridges, fortifications, etc.

Corvée seigneuriale are *services* due the lord of the manor. Guyot, *Rép. Univ.*; 3 Low. C. 1.

COSBERING. **In Feudal Law.** A prerogative or seignorial right of a lord, as to lie and feast himself and his followers at his tenants' houses. Cowell.

COSENING. **In Old English Law.** An offence whereby anything is done deceitfully,

whether in or out of contracts, which cannot be fitly termed by any especial name. Called in the civil law *Stellionatus*. West. Symb. pt. 2, *Indictment*, § 68; Blount; 4 Bla. Com. 158.

COSINAGE (spelled, also, *Cousinage*, *Cosenage*). A writ to recover possession of an estate in lands when a stranger has entered and abated after the death of the grandfather's grandfather or of certain collateral relations. 3 Bla. Com. *186.

Relationship; affinity. Stat. 4 Hen. III. cap. 8; 3 Bla. Com. 186; Co. Litt. 160 *a*.

COST. The cost of an article purchased for exportation is the price paid, with all incidental charges paid at the place of exportation. Goodwin v. U. S., 2 Wash. C. C. 493, Fed. Cas. No. 5,554. Cost price is that actually paid for goods. Buck v. Burk, 18 N. Y. 337. See ACTUAL COST.

COST-BOOK. In English Law. A book in which a number of adventurers who have obtained permission to work a lode and have agreed to share the enterprise in certain proportions, enter the agreement and from time to time the receipts and expenditures of the mine, the names of the shareholders, their respective accounts with the mine, and transfers of shares. These associations are called "Cost-book mining companies," and are governed by the general law of partnership. Lindl. Partn. *147.

COSTS. The expenses incurred by the parties in the prosecution or defence of a suit.

They are distinguished from fees in being an allowance to a party for expenses incurred in conducting his suit, whereas fees are a compensation to an officer for services rendered in the progress of the cause. Musser v. Good, 11 S. & R. (Pa.) 248.

No costs were recoverable by either plaintiff or defendant at common law. They were first given to plaintiff by the statute of Gloucester, 6 Edw. I. c. 1, which has been substantially adopted in all the United States.

The ultimate power to impose costs must be found in a statute. This may be granted by the legislature in general terms to the courts who may then establish a fee bill. This grant has been made by congress; Jordan v. Woollen Co., 3 Cliff. 239; Fed. Cas. No. 7,516. This was before the Revised Statutes but the fee bill of 1853 which was then under consideration by that court does not differ in any important respect from the appropriate sections of the Revised Statutes; Tesla Electric Co. v. Scott, 101 Fed. 524. The cases are collected in Kelly v. Ry. Co., 83 Fed. 183, and the various statutes are cited in Hathaway v. Roach, Fed. Cas. No. 6,213; Costs in Civil Cases, Fed. Cas. No. 18,284; The Baltimore, 8 Wall. (U. S.) 388, 19 L. Ed. 463.

Statutes which give costs are not to be extended beyond the letter, but are to be construed strictly; 2 Stra. 1006, 1069; 3 Burr. 1287; Com. v. Tilghman, 4 S. & R. (Pa.) 129; Farry v. Thomson, 1 Rich. (S. C.) 4.

They do not extend to the government; and therefore when the United States, or one of the several states, is a party they neither pay nor receive costs, unless it be so expressly provided by statute; Irwin v. Commissioners of Northumberland County, 1 S. & R. (Pa.) 505; U. S. v. Barker, 2 Wheat. (U. S.) 395, 4 L. Ed. 271; U. S. v. Boyd, 5 How. (U. S.) 29, 12 L. Ed. 36; Collier v. Powell, 23 Ala. 579; State v. Kinne, 41 N. H. 238; State v. Harrington, 2 Tyler (Vt.) 44; and in actions of a public nature, conducted solely for the public benefit, costs are rarely given against public officers; Cassady v. Trustees of Schools, 94 Ill. 589; Clare County v. Auditor General, 41 Mich. 182, 1 N. W. 926; Avery v. Slack, 19 Wend. (N. Y.) 50. This exemption is founded on the sovereign character of the state, which is subject to no process; 3 Bla. Com. 400; McKeehan v. Com., 3 Pa. 153. But in Missouri v. Illinois, 202 U. S. 598, 26 Sup. Ct. 713, 50 L. Ed. 1160, it was said: "So far as the dignity of the state is concerned, that is its own affair. The United States has not been above taking costs." U. S. v. Sanborn, 135 U. S. 271, 10 Sup. Ct. 812, 34 L. Ed. 112. Rule 24 of the Supreme Court of the United States provides that no costs shall be allowed to or against the United States in equity. The king neither receives nor pays costs; (1785) T. R. 80.

The right of the state to costs on conviction in criminal cases is generally declared by statute.

In many cases, the right to recover costs is made to depend, by statute, upon the amount of the verdict or judgment. Where there is such a provision, and the verdict is for less than the amount required by statute to entitle the party to costs, the right to costs, in general, will depend upon the mode in which the verdict has been reduced below the sum specified in the act. In such cases, the general rule is that if the amount be reduced by evidence of direct payment, the party shall lose his costs; but if by set-off or other collateral defence he will be entitled to recover them; 8 East 28, 347; 2 Price 19; 4 Bingh. 169; Cooper v. Coats, 1 Dall. (U. S.) 308, 1 L. Ed. 150; Bunner v. Neil, 1 Dall. (U. S.) 457, 1 L. Ed. 222; Stewart v. Mitchell's Adm'rs, 13 S. & R. (Pa.) 287.

When a case is dismissed for want of jurisdiction over the person, no costs are allowed to the defendant unless expressly given by statute. The difficulty in giving costs, in such case, is the want of power. If the case be not legally before the court, it has no more jurisdiction to award costs than it has to grant relief; Burnham v. Rangeley, 2 W. & M. 417, Fed. Cas. No. 2,177; Bank of Cumberland v. Willis, 3 Sumn. 473, Fed. Cas. No. 885; Clark v. Rockwell, 15 Mass. 221; Banks v. Fowler, 3 Litt. (Ky.) 332; Eames v. Carlisle, 3 N. H. 130; Paine v. Commissioners, Wright (Ohio) 417.

In equity, the giving of costs is entirely discretionary, as well with respect to the period at which the court decides upon them as with respect to the parties to whom they are given.

In the exercise of their discretion, courts of equity are generally governed by certain fixed principles which they have adopted on the subject of costs. It was the rule of the civil law that *victus victori in expensis condemnatus est;* and this is the general rule adopted in courts of equity as well as in courts of law, at least to the extent of throwing it upon the failing party to show the existence of circumstances to displace the *prima facie* claim to costs given by success to the party who prevails; 3 Dan. Ch. Pr. 1515.

In patent cases in equity costs will not be allowed a plaintiff where some of the claims are withdrawn at the argument and some adjudged invalid, though others are sustained; Thomson-Houston Electric Co. v. R. Co., 71 Fed. 886.

An executor or administrator suing at law or in equity in his representative capacity is not personally liable to the opposite party for costs in case he is unsuccessful, if the litigation were carried on in good faith for the benefit of the estate; Gratz v. Bayard, 11 S. & R. (Pa.) 47; Callender's Adm'r v. Ins. Co., 23 Pa. 471. But the rule is otherwise where vexatious litigation is caused by the executor or administrator, and where he has been guilty of fraud or misconduct in relation to the suit; 1 Wms. Exec. 451; Show v. Conway, 7 Pa. 136, 137.

Costs, when recovered, belong to the client; Celluloid Mfg. Co. v. Chandler, 27 Fed. 12.

In divorce, the wife's costs can be taxed *de die in diem;* Graves v. Cole, 19 Pa. 171, citing 2 Hagg. Cons. 204.

Ordinarily an appeal does not lie from a decree for costs only in a chancery suit; but there are exceptions to the rule, turning on the question of the discretionary power of the trial court respecting costs. A decree for such costs as are discretionary is not appealable, but one for costs not in the discretion of the court is appealable if the amount is sufficient to confer jurisdiction; Nutter v. Brown, 58 W. Va. 237, 52 S. E. 88, 1 L. R. A. (N. S.) 1083, 6 Ann. Cas. 94.

See DOUBLE COSTS; TREBLE COSTS; SURETY COMPANY; ACTUAL.

COSTS OF THE DAY. Costs incurred in preparing for trial on a particular day. Ad. Eq. 343.

In English practice, costs are ordered to be paid by a plaintiff, who neglects to go to trial according to notice; Mozley & W. Law Dict.; Lush, Pr. 496.

COSTS DE INCREMENTO (Increased costs, costs of increase). Costs adjudged by the court in addition to those assessed by the jury. Day v. Woodworth, 13 How. (U. S.) 372, 14 L. Ed. 181.

The cost of the suit, etc., recovered originally under the statute of Gloucester is said to be the origin of costs *de incremento;* Bull. N. P. 328 *a*. Where the statute requires costs to be doubled in case of an unsuccessful appeal, costs *de incremento* stand on the same footing as jury costs; 2 Stra. 1048; TAXED COSTS. Costs were enrolled in England in the time of Blackstone as *increase* of damages; 3 Bla. Com. 399.

COTERELLUS. A cottager.

Coterellus was distinguished from *cotarius* in this, that the *cotarius* held by socage tenure, but the *coterellus* held in mere villenage, and his person, issue, and goods were held at the will of the lord. Cowell.

COTLAND. Land held by a cottager, whether in socage or villenage. Cowell; Blount.

COTSETUS. A cottager or cottageholder who held by servile tenure and was bound to do the work of the lord. Cowell.

COTTAGE, COTTAGIUM. In Old English Law. A small house without any land belonging to it, whereof mention is made in stat. 4 Edw. I.

But, by stat. 31 Eliz. cap. 7, no man may build such cottage for habitation unless he lay unto it four acres of freehold land, except in market-towns, cities, or within a mile of the sea, or for the habitation of laborers in mines, shepherds, foresters, sailors, etc. Twenty years' possession of cottage gives good title as against the lord, Bull. N. P. 103 *a*, 104. By a grant of a cottage the curtilage will pass; 4 Vin. Abr. 582.

COTTIER TENANCY. A species of tenancy in Ireland, constituted by an agreement in writing, and subject to the following terms: That the tenement consist of a dwelling-house with not more than half an acre of land; at a rental not exceeding 5*l.* a year; the tenancy to be for not more than a month at a time; the landlord to keep the house in good repair. Landlord and Tenant Act (Ireland), 23 & 24 Vict. c. 154, s. 81.

COUCHANT. Lying down. Animals are said to have been *levant* and *couchant* when they have been upon another person's land, damage feasant, one night at least. 3 Bla. Com. 9.

COULISSE. The stock brokers' curb market in Paris.

COUNCIL (Lat. *concilium*, an assembly). The legislative body in the government of cities or boroughs. An advisory body selected to aid the executive. See Opinion of the Justices, 14 Mass. 470; Opinion of the Justices, 3 Pick. (Mass.) 517; In re Adams, 4 Pick. (Mass.) 25.

A governor's council is still retained in some of the states; 70 Me. 570. It is analogous in many respects to the privy council (*q. v.*), of the king of Great Britain and of the governors of the British colonies, though of a much more limited range of duties.

Common council is a term frequently applied to the more numerous branch of the legislative bodies in cities.

The British parliament is the common council of the whole realm.

COUNCIL OF THE BAR. A body composed of members of the English bar which governs the bar. It hears complaints against barristers and reports its findings with recommendations to the benchers of the Inn of Court of which the barrister is a member, who alone can act. Leaming, Phila. Lawy. in Lond. Courts 67.

COUNCIL OF LEGAL EDUCATION. See LEGAL EDUCATION.

COUNSEL. The counsellors who are associated in the management of a particular cause, or who act as legal advisers in reference to any matter requiring legal knowledge and judgment.

The term is used both as a singular and plural noun, to denote one or more. It is usual to say of one concerned in a case that he is "of counsel."

Originally there was no distinction between council and counsel; both were *consilium.* Ilbert, Legisl. Meth. 5.

Knowledge. A grand jury is sworn to keep secret "the commonwealth's *counsel,* their fellows', and their own."

COUNSELLOR AT LAW. An officer in the supreme court of the United States, and in some other courts, who is retained by a party in a cause to conduct the same on its trial on his behalf.

He differs from an attorney at law.

In the supreme court of the United States, the two degrees of attorney and counsel were at first kept separate, and no person was permitted to practise in both capacities, but the present practice is otherwise, Weeks, Att. 54. It is the duty of the counsel to draft or review and correct the special pleadings, to manage the cause on trial, and, during the whole course of the suit, to apply established principles of law to the exigencies of the case; 1 Kent 307. In England the term "counsel" is applied to a barrister.

Generally, in the courts of the various states the same person performs the duties of counsellor and attorney at law.

In giving their advice to their clients, counsel have duties to perform to their clients, to the public and to themselves. In such cases they have thrown upon them something which they owe to their administration of justice, as well as to the private interests of their employers. The interests propounded for them ought, in their own apprehension, to be just, or at least fairly disputable; and when such interests are propounded, they ought not to be pursued *per fas et nefas;* 1 Hagg. Adm. 222. An attorney and counsellor is not an officer of the United States, he is an officer of the court. His right to appear for suitors and to argue causes is not a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can be deprived only by the judgment of the court, for moral or professional delinquency; *Ex parte* Garland, 4 Wall. (U. S.) 333, 18 L. Ed. 366.

See ATTORNEY; PRIVILEGE; CONFIDENTIAL COMMUNICATIONS; DISBAR; BARRISTER.

COUNT (Fr. *comte;* from the Latin *comes).* An earl.

It gave way as a distinct title to the Saxon earl, but was retained in countess, viscount, and as the basis of county. *Termes de la ley;* 1 Bla Com. 398. See COMES.

In Pleading. (Fr. *conte,* a narrative). The plaintiff's statement of his cause of action.

This word is in our old law-books used synonymously with declaration; but practice has introduced the following distinction. When the plaintiff's complaint embraces only a single cause of action, and he makes only one statement of it, that statement is called, indifferently, a declaration or count; though the former is the more usual term. But when the suit embraces two or more causes of action (each of which, of course, requires a different statement), or when the plaintiff makes two or more different statements of one and the same cause of action, each several statement is called a count, and all of them, collectively, constitute the declaration. In all cases, however, in which there are two or more counts, whether there is actually but one cause of action or several, each count purports, upon the face of it, to disclose a distinct right of action, unconnected with that stated in any of the other counts.

One object proposed in inserting two or more counts in one declaration when there is in fact but one cause of action, is, in some cases, to guard against the danger of an insufficient statement of the cause, where a doubt exists as to the legal sufficiency of one or another of two different modes of declaring; but the more usual end proposed in inserting more than one count in such case is to accommodate the statement to the cause, as far as may be, to the possible state of the proof to be exhibited on trial, or to guard, if possible, against the hazard of the proofs varying materially from the statement of the cause of action; so that, if one or more of several counts be not adapted to the evidence, some other of them may be so; Gould, Pl. c. 4, ss. 2, 3, 4; Steph. Pl. 266; *Doctrina Plac.* 178; 3 Com. Dig. 291; Dane, Abr. Index. In real actions, the declaration is usually called a count; Steph. Pl. 29. See COMMON COUNTS.

COUNT SUR CONCESSIT SOLVERE. A claim based upon a promise to pay. An ancient count in the mayor's court of London and now commonly used there. Under it the plaintiff can sue for any liquidated demand, but not for money due under a covenant. Particulars defining more precisely the nature of the claim must be delivered with the declaration. Odger, C. L. 1029.

COUNT AND COUNT-OUT. These words refer to the count of the house of commons by the speaker. Forty members, including the speaker, are required to constitute a quorum. Each day after parliament is opened, the speaker counts the house. If forty

members are not present he waits till four o'clock, and then counts the house again. If forty members are not then present, he at once adjourns it to the following meeting day. May, Parl. Prac. 219.

COUNTER (spelled, also, *Compter*). The name of two prisons formerly standing in London, but now demolished. They were the Poultry Counter and Wood Street Counter. Cowell; Whish. L. D.; Coke, 4th Inst. 248.

COUNTER AFFIDAVIT. An affidavit made in opposition to one already made. This is allowed in the preliminary examination of some cases.

COUNTER-BOND. A bond to indemnify. 2 Leon. 90.

COUNTER-CLAIM. A liberal practice introduced by the reformed codes of procedure in many of the United States, and comprehending RECOUPMENT and SET-OFF, *q. v.*, though broader than either.

The New York code thus defines it:

The counter-claim must tend, in some way, to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action:—

1. A cause of action arising out of the contract or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action on contract, any other cause of action on contract existing at the commencement of the action N. Y. Code, 1889, § 501. See National Fire Ins. Co. v. McKay, 21 N. Y. 191; Waddell v. Darling, 51 *id.* 327; Smith v. Hall, 67 *id.* 48; Elwell v Skiddy, 77 *id.* 282, Ballou v. Ballou, 78 *id* 325; Cook v. Jenkins, 79 *id.* 575; Coffin v. McLean, 80 *id* 360, Ward v Craig, 87 *id* 550; Clapp v. Wright, 21 Hun (N. Y.) 240; Dietrich v. Koch, 35 Wis. 618; Devries v. Warren, 82 N. C. 356; Howe Mach Co. v. Reber, 66 Ind. 498; Brady v. Brennan, 25 Minn. 210.

By such statutes when a counter-claim is established the defendant may recover in the same action the amount by which his claim exceeds that of the plaintiff. A question as to which the cases vary in result is the effect upon the jurisdiction when the counter-claim exceeds the limit of the court. Some courts hold that the jurisdiction is not ousted by reason of excess in the amount of the counter-claim; Howard Iron Works v. Elevating Co., 176 N. Y. 1, 68 N. E. 66; *aliter*, Haygood v. Boney, 43 S. C. 63, 20 S. E. 803; but it is said that the majority of the cases deny the right in such case to file the counter-claim; 17 Harv. L. Rev. 350 (citing Griswold v. Pieratt, 110 Cal. 259, 42 Pac. 820, and Almeida v. Sigerson, 20 Mo. 497), where that view is approved.

A counter-claim is a matter which is capable of use as the basis of a judgment against the plaintiff, and, of course, may be used as a set-off; Marconi Wireless Telegraph Co. of America v. Electric Signaling Co., 206 Fed. 295.

COUNTER-LETTER. An agreement to reconvey where property has been passed by absolute deed with the intention that it shall serve as security only. A defeasance by a separate instrument. Livingston v. Story, 11 Pet. (U. S.) 351, 9 L. Ed. 746.

COUNTER-SECURITY. Security given to one who has become security for another, the condition of which is, that if the one who first became surety shall be damnified, the one who gives the counter-security will indemnify him.

COUNTERFEIT. To make something false in the semblance of that which is true. It always implies a fraudulent intent. It refers usually to imitations of coin or paper money. See Vin. Abr. *Counterfeit;* State v. Calvin, R. M. Charlt. (Ga.) 151; Kirby v. State, 1 Ohio St. 185; FORGERY.

COUNTERMAND. A change or recalling of orders previously given.

Express countermand takes place when contrary orders are given and a revocation of the prior orders is made.

Implied countermand takes place when a new order is given which is inconsistent with the former order.

When a command or order has been given, and property delivered, by which a right vests in a third person, the party giving the order cannot countermand it. For example, if a debtor should deliver to A a sum of money to be paid to B, his creditor, B has a vested right in the money, and, unless he abandon that right and refuse to take the money, the debtor cannot recover it from A. 1 Rolle, Abr. 32, pl. 13; Yelv. 164; Styles 296. See 3 Co. 26 *b*; 2 Ventr. 298; 10 Mod. 432; Vin. Abr. *Countermand* (A, 1), *Bailment* (D); 9 East 49; Bac. Abr. *Bailment* (D); Com. Dig. *Attorney* (B, 9), (C, 8); Dane, Abr. *Countermand.*

COUNTERPART. Formerly, each party to an indenture executed a separate deed: that part which was executed by the grantor was called the original, and the rest the counterparts. It is now usual for all the parties to execute every part; and this makes them all originals. 2 Bla. Com. 296.

In granting lots subject to a ground-rent reserved to the grantor, both parties execute the deeds, of which there are two copies; although both are original, one of them is sometimes called the counterpart. See 12 Vin. Abr. 104; Dane, Abr. Index; 7 Com. Dig. 443; Merlin, *Rép. Double Ecrit.*

COUNTERPLEA. A plea to some matter incidental to the main object of the suit, and out of the direct line of pleadings. Steph. Pl., Andr. ed. 165; 2 Wms. Saund. 45 *h.* Thus, *counterplea of oyer* is the defendant's allegations why oyer of an instrument should

not be granted. *Counterplea to aid prayer* is the demandant's allegation why the vouchee of the tenant in a real action, or a stranger who asks to come in to defend his right, should not be admitted. *Counterplea of voucher* is the allegation of the vouchee in avoidance of the warranty after admission to plead. Counterpleas are of rare occurrence. *Termes de la Ley;* Com. Dig. *Voucher* (B, 1, 2); Dane, Abr.

COUNTEUR. In the time of Edward I, a pleader; also called a *Narrator*, and *Serjeant-Counteur.*

COUNTRY. A word often used in pleading and practice. Usually signifies a jury, or the inhabitants of a district from which a jury is to be summoned. 3 Bla Com. 349; 4 *id.* 349; Steph. Pl. 73, 78, 230.

COUNTY. One of the civil divisions of a country for judicial and political purposes. 1 Bla. Com. 113. Etymologically, it denotes that portion of the country under the immediate government of a count. 1 Bla. Com. 116.

The states are generally divided into counties. Counties are, in many of the states, divided into townships or towns. In the New England states, however, towns are the basis of all civil divisions, and the counties are rather to be considered as aggregates of towns, so far as their origin is concerned. In Pennsylvania, the state was originally divided into three counties by William Penn. See Proud's Hist. Pa. 234; 2 *id.* 258.

In some states, a county is considered a corporation; Coles v. Madison County, Breese (Ill.) 154, 12 Am. Dec. 161; in others, it is held a quasi corporation; Inhabitants of County of Hampshire v. Franklin County, 16 Mass. 87; Emerson v. Washington County, 9 Greenl. (Me.) 88; Jackson v. Cory, 8 Johns. (N. Y.) 385; Boykin's Devisees v. Smith, 3 Munf. (Va.) 102. In regard to the division of counties, see Drake's Adm'r v. Vaughan, 6 J. J. Marsh. (Ky.) 147; State v. Jones, 9 N. J. L. 357, 17 Am. Dec. 483; Gary v. People, 9 Cow. (N. Y.) 640; Walsh v. Com., 89 Pa. 419, 33 Am. Rep. 771; Blount County v. Loudon County, 8 Baxt. (Tenn.) 74; Stuart v. Bair, *id.* 141; Newton v. Commissioners, 100 U. S. 548, 25 L. Ed. 710; Eagle v. Beard, 33 Ark. 497; Cocke v. Gooch, 5 Heisk. (Tenn.) 294. A county may be required by act of legislature to build a public work outside the county limits, where it is of special interest to the people of the county; Carter v. Bridge, 104 Mass. 236; Talbot County Com'rs v. County Com'rs, 50 Md. 245.

A state has a greater latitude of control over a county, than over a town or city, as the latter had a two-fold character—public, as an agency of the state, and private, as affecting matter of local concern; State v. Board of Com'rs, 170 Ind. 595, 85 N. E. 513.

The terms "county" and "people of the county" are, or may be, used interchangeably; St. Louis County Court v. Griswold, 58 Mo. 175.

In the English law, this word signifies the same as *shire*,—county being derived from the French, and *shire* from the Saxon. Both these words signify a circuit or portion of the realm into which the whole land is divided, for the better government thereof and the more easy administration of justice. There is no part of England that is not within some county; and the shirereeve (*sheriff*) was the governor of the province, under the *comes*, earl, or count.

COUNTY COMMISSIONERS. Certain officers generally intrusted with the superintendence of the collection of the county taxes and the disbursements made for the county. They are invested by the local laws with various powers. In some of the states they are called supervisors.

COUNTY CORPORATE. A city or town, with more or less territory annexed constituting a county by itself. 1 Bla. Com. 120. See State v. Finn, 4 Mo. App. 347. They differ in no material points from other counties.

COUNTY COURTS. A number of different local courts existed in England in early times, but their jurisdiction was gradually absorbed by the royal courts of justice to such an extent that in the 18th century practically all the judicial work of the country was done by the common law courts, the Lord Chancellor or the Master of the Rolls; 1 Holdsw. Hist. E. L. 418. See the various titles under COURT. In 1846 courts of limited jurisdiction were established for England and Wales. They were inferior courts of record. Various acts in reference to these courts were consolidated in an act passed in 1888 under which England and Wales were divided in 56 districts, in which, as a rule, a County Court is held by one of the 53 County Court judges once in every month, except September. The judges, who must be barristers of seven years standing, are appointed by the Lord Chancellor (except in the Duchy of Lancaster).

Jurisdiction depends mainly on the place where the defendant resides or the property in dispute is situated, and the nature and amount of the claim. Ordinarily, suit must be brought in the district where defendant resides or carries on business, but there are special exceptions.

The ordinary jurisdiction extends (if the amount in controversy does not exceed £100) to personal actions, ejectment, the trial of title to corporeal or incorporeal hereditaments. A County Court cannot, except by consent, try any action in which the title to any toll, fair, market or franchise (including patents) is in question, or for libel, slander, seduction or breach of promise of mar

riage. It has all the powers in equity of the High Court of Justice (up to the jurisdictional amount of £500) in administration actions by creditors, legatees, devisees, heirs-at-law and next of kin, in actions for the executions of trusts, for the foreclosure of any charge or lien, for the specific performance, reforming or cancelling of agreements for the sale or lease of property, for dissolution or winding up partnerships.

In common law, but not in equity, the parties may agree that a particular court may try an action for a claim of any amount. In the large provincial towns it is a court of bankruptcy with all the powers therein of the High Court. Several of the County Courts have jurisdiction in admiralty. Numerous acts have extended their jurisdiction in special instances.

In American Law. Courts in many of the states of the United States and in Canada, of widely varying powers.

COUNTY PALATINE. An independent principality in England and Wales of the continental type in which the king's writ did not run 1 Holdsw. Hist. E. L. 49. In feudal times political power was distributed among the larger landowners, who procured grants to themselves of the new processes and powers of the Curia Regis. Commissioners were sent out (1274) to enquire by what warrant different landowners were exercising their *jura regalia*. Many franchises were cancelled; the franchises of some remained. The Counties Palatine were Durham, Lancaster and Chester (by prescription). The palatine jurisdiction also existed in Wales and the Stannaries (see STANNARY COURTS) and in a lesser degree in the liberties of Ely, Pembroke (taken away by 27 Henry VIII. c. 26, § 17) and Hescham and the Universities of Oxford and Cambridge. *id.* The name was derived from *palatinus* used on the continent to imply something peculiarly royal. Lapsley, County Palatinate of Durham. Coke says the powers of those that had counties palatinate was Kinglike, for they might pardon treasons, murders, felonies and outlawries and make justices in Eyre, of assize, etc. All writs ran, and criminal process was made, in the name of the person having the County Palatine. 4 Inst. 205.

See COURTS OF THE COUNTIES PALATINE.

COUNTY SESSIONS. In England, the Court of General Quarter Sessions of the Peace held in every county once in every quarter of a year. Mozley & W. Law Dict.

COUPONS. Those parts of a commercial instrument which are to be *cut*, and which are evidence of something connected with the contract mentioned in the instrument. They are generally attached to bonds or certificates of loan, where the interest is payable at particular periods, and, when the interest is paid, they are cut off and delivered to the payor. In England, they are known as *warrants* or *dividend warrants*, and the securities to which they belong, debentures; 13 C. B. 372. In the United States they have been decided to be negotiable instruments, if payable to bearer or order, upon which suit may be brought though detached from the bond; Town of Cicero v. Clifford, 53 Ind. 191; Beaver County v. Armstrong, 44 Pa. 63; Haven v. Depot Co., 109 Mass. 88; Antoni v. Wright, 22 Gratt. (Va.) 833; Lexington v. Butler, 14 Wall. (U. S.) 282, 20 L. Ed. 809; Thompson v. Perrine, 106 U. S. 589, 1 Sup. Ct. 564, 27 L. Ed. 298; Jones, R. R. Sec. § 320; Myers v. R. Co., 43 Me. 232; Horne v. State, 82 N. C. 382; Walker v. State, 12 S. C. 200. Otherwise, in Clarke v. Janesville, 1 Biss. 105, Fed. Cas. No. 2,854, if the bond to which the coupons were attached was not negotiable; see Myers v. R. Co., 43 Me. 232; and otherwise if not payable to bearer or order; Evertson v. Bank, 66 N. Y. 14, 23 Am. Rep. 9; see Crosby v. R. Co., 26 Conn. 121. They are distinct instruments from the bonds, and can be added to the bond thereof to make up a jurisdictional amount; Edwards v. Bates County, 163 U. S. 269, 16 Sup. Ct. 967, 41 L. Ed. 155. Suits on a bond and on coupons cut therefrom are different causes of action; Presidio County, Tex., v. Bond & Stock Co., 212 U. S. 58, 29 Sup. Ct. 237, 53 L. Ed. 402.

In England the question has not been directly decided, but it has been held that they are not promissory notes, and therefore do not require a stamp; 13 C. B. 373. Dividend warrants of the Bank of England made payable to a particular person, but not containing words of transfer, were held not to be negotiable, notwithstanding they had been so by custom for sixty years; 9 Q. B. 396. A purchaser of overdue coupons takes only the title of his vendor; Arents v. Com., 18 Gratt. (Va.) 750; Gilbough v. R. Co., 1 Hughes 410, Fed. Cas. No. 5,419. Negotiable coupons were held entitled to days of grace; Evertson v. Bank, 66 N. Y. 14, 23 Am. Rep. 9; Jones, R. R. Sec. § 326; *contra*, Arents v. Com., 18 Gratt. (Va.) 773; 2 Dan. Neg. Instr., 3d ed. § 1490 *a*.

Interest on coupons may be recovered in a suit on the coupons; Beaver County v. Armstrong, 44 Pa. 75; Hollingsworth v. Detroit, 3 McLean 472, Fed. Cas. No. 6,613; Genoa v. Woodruff, 92 U. S. 502, 23 L. Ed. 586; Cromwell v. Sac County, 96 U. S. 51, 24 L. Ed. 681; Ashuelot R. Co. v. Elliot, 57 N. H. 397; Burroughs v. Richmond County Com'rs, 63 N. C. 234; Connecticut Mut. Life Ins. Co. v. R. Co., 41 Barb. (N. Y.) 9. The *rate* of interest provided for in the bond continues on the coupon till it is merged in judgment; Cromwell v. Sac County, 96 U. S. 51, 24 L. Ed. 681; McLane v. Abrams, 2 Nev. 199; Marietta Iron Works v. Lottimer, 25 Ohio St. 621; *contra*, Brewster v. Wakefield, 22 How. (U. S.) 118, 16 L. Ed.

301; Com. of Virginia v. State, 32 Md. 501; Pearce v. Hennessy, 10 R. I. 223. See Jones, R. R. Sec. § 336. A suit on the coupon is not barred by the statute of limitations unless a suit on the bond would be barred; Lexington v. Butler, 14 Wall. (U. S.) 282, 20 L. Ed. 809; otherwise, when the coupons have passed into the hands of the party who does not hold the bonds; Clark v. Iowa City, 20 Wall. (U. S.) 583, 22 L. Ed. 427. As to practice in actions on coupons, see Kenosha v. Lamson, 9 Wall. (U. S.) 477, 19 L. Ed. 725.

COUR DE CASSATION. In French Law. See COURTS OF FRANCE.

COURSE. The direction of a line with reference to a meridian.

Where there are no monuments, the land is usually described by courses and distances and those mentioned in the patent or deed will fix the boundaries. But when the lines are actually marked, they must be adhered to though they vary from the course mentioned in the deeds. See BOUNDARY.

COURSE OF BUSINESS. What is usually done in the management of trade or business. A statute exempting from distress property deposited with a tavern-keeper "in the usual course of business," only includes property deposited by a guest for safekeeping; Harris v. Boggs, 5 Blackf. (Ind.) 489. Carriages used for carrying the band and performers of a circus in a street parade, are not carriages "used solely for the conveyance of any goods or burdens in the course of trade;" L. R. 9 Exch. 25.

Men are presumed to act for their own interest, and to pursue the way usually adopted by men generally: hence it is presumed in law that men in their actions will pursue the usual course of trade.

COURSE OF THE VOYAGE. By this term is understood the regular and customary track, if such there be, which a ship takes in going from one port to another, and the shortest way. Marsh. Ins. 185; Phill. Ins. 981.

COURT (Fr. *cour*, Dutch, *koert*, a yard). A body in the government to which the administration of justice is delegated.

The presence of a sufficient number of the members of such a body regularly convened in an authorized place at an appointed time, engaged in the full and regular performance of its functions. Wightman v. Karsner, 20 Ala. 446; Brumley v. State, 20 Ark. 77.

The place where justice is judicially administered. Co. Litt. 58 *a*; 3 Bla. Com. 23, 25. See Hobart v. Hobart, 45 Ia. 501.

The judge or judges themselves, when duly convened. See JUDGE.

The term is used in all the above senses, though but infrequently in the third sense given. The application of the term—which orignally denoted the place of assembling—to denote the assemblage, strikingly resembles the similar application of the Laten term *curia* (if, indeed, it be not a mere translation), and is readily explained by the fact that the earlier courts were merely assemblages, in the court-yard of the baron or of the king himself, of those who were qualified and whose duty it was so to appear at stated times or upon summons. Traces of this usage and constitution of courts still remain in the courts baron, the various courts for the trial of impeachments in England and the United States, and in the control exercised by the parliament of England and the legislatures of the various states of the United States over the organization of courts of justice, as constituted in modern times. Indeed, the English parliament is still the *High Court of Parliament*, and in Massachusetts the united legislative bodies are entitled, as they (and the body to which they succeeded) have been from time immemorial, the *Genral Court*.

In England, however, and in those states of the United States which existed as colonies prior to the revolution, most of these judicial functions were early transferred to bodies of a compacter organization, whose sole function was the public administration of justice. The power of impeachment of various high officers, however, is still retained by the legislative bodies both in England and the United States, and is, perhaps, the only judicial function which has ever been exercised by the legislative bodies in the newer states of the United States. These more compact bodies are the *courts*, as the term is used in its modern acceptance.

The one common and essential feature in all courts is a judge or judges—so essential, indeed, that they are even called *the court*, as distinguished from the accessory and subordinate officers; Michigan Cent. R. Co. v. R. Co., 3 Ind. 239; McClure v. McClurg, 53 Mo. 173; see Gold v. R. Co., 19 Vt. 478 Courts of record are also provided with a recording officer, variously known as clerk, prothonotary, register, etc: while in all courts there are counsellors, attorneys, or similar officers recognized as peculiarly suitable persons to represent the parties actually concerned in the causes, who are considered as officers of the court and assistants of the judges, together with a variety of ministerial officers, such as sheriffs, constables, bailiffs, tipstaves, criers, etc For a consideration of the functions of the various members of a court, see the various appropriate titles, as JURY, SHERIFF, etc.

Courts are said to belong to one or more of the following classes, according to the nature and extent of their jurisdiction, their forms of proceeding, or the principles upon which they administer justice, viz.:

Admiralty. See ADMIRALTY.

Appellate, which take cognizance of causes removed from another court by appeal or writ of error. See APPEAL AND ERROR; BILL OF EXCEPTIONS; DIVISION OF OPINION.

Civil, which redress private wrongs. See JURISDICTION.

Criminal, which redress public wrongs, that is, crimes or misdemeanors.

Ecclesiastical. See ECCLESIASTICAL COURTS.

Of equity, which administer justice according to the principles of equity. See EQUITY; COURT OF EQUITY; COURT OF CHANCERY.

Of general jurisdiction, which have cognizance of and may determine causes various in their nature.

Inferior, which are subordinate to other courts. Nugent v. State, 18 Ala. 521. Also, those of a very limited jurisdiction.

Of law, which administer justice according to the principles of the common law.

Of limited or special jurisdiction, which can take cognizance of a few specified matters only.

Local, which have jurisdiction of causes occurring in certain places only, usually the limits of a town or borough, or, in England, of a barony.

Martial. See COURT-MARTIAL.

Not of record. See COURT OF RECORD.

Of original jurisdiction, which have jurisdiction of causes in the first instance. See JURISDICTION.

Of record. See COURT OF RECORD.

Superior. In England the High Court of justice is spoken of a superior court of record; in the United States the term superior courts has come to be applied to courts of intermediate jurisdiction between the inferior and supreme courts; also, those of controlling, as distinguished from those of subordinate, jurisdiction. As to superior and inferior courts, see 34 Amer. L. Rev. 71.

Supreme, which possess the highest and controlling jurisdiction; also, in some states, a court of higher jurisdiction than the superior courts, though not the court of final resort.

A court cannot pass upon the validity of its own organization; State v. Hall, 142 N. C. 710, 55 S. E. 806; but it would at least be a *de facto* court and its authority could not be attacked collaterally; In re Manning, 139 U. S. 504, 11 Sup. Ct. 624, 35 L. Ed. 264. See DE FACTO.

As to holding court with closed doors, see OPEN COURT.

See the various titles following.

Courts of the United States are treated under UNITED STATES COURTS; Courts of Great Britain, Ireland, Scotland, and France, under COURTS OF ENGLAND, IRELAND, SCOTLAND, AND FRANCE, respectively.

COURT OF ADMIRALTY. See ADMIRALTY; UNITED STATES COURTS.

COURT OF ANCIENT DEMESNE. A court of peculiar constitution, held by a bailiff appointed by the king, in which alone the tenants of the king's demesne could be impleaded. 2 Burr. 1046; 1 Spence, Eq. Jur. 100; 2 Bla. Com. 99; 1 Report Eng. Real Prop. Comm. 28; 1 Steph. Com. 224; 1 Poll. & Maitl. 367.

COURT OF APPEAL. In England, one of the two sections of the Supreme Court of Judicature. See COURTS OF ENGLAND.

COURT OF APPEALS. An appellate tribunal which, in Kentucky, Maryland, and New York, is the court of last resort. In New Jersey, it is known as the Court of Errors and Appeals; in Virginia and West Virginia, the Supreme Court of Appeals; in Connecticut, the Supreme Court of Errors; in Massachusetts and Maine, the Supreme Judicial Court; in the other states, and in the federal courts, the Supreme Court. In Texas there is a court of Civil Appeals, and in Illinois, Indiana, Missouri, Pennsylvania, and other states, and the United States, there are appellate courts inferior to the highest court of appeals.

COURT OF ARCHDEACON. The most inferior of the English ecclesiastical courts, from which an appeal lay to the Consistory Court. The archdeacon formerly held it as a deputy of the bishop. Later it had a customary jurisdiction, and the bishops adopted the plan of exercising their jurisdiction through officials; 1 Holdsw. Hist. E. L. 369.

COURT OF THE ARCHES. The usual name for the Court of the "Official Principal" of the Archbishop of Canterbury. It was a court of appeal from all the diocesan courts and also a court of first instance in all ecclesiastical causes.

The most ancient consistory court belonging to the archbishop of Canterbury for the trial of spiritual causes, the judge of which is called the *dean of the arches*, because he anciently held his court in the church of St. Mary *le Bow* (*Sancta Maria de arcubus*,—literally, "St Mary *of the arches*"), so named from the style of its steeple which is raised upon pillars built *archwise*, like so many bent bowes *Termes de la Ley* It is now held, as are also the other spiritual courts, in the hall belonging to the College of Civilians, commonly called Doctor's Commons. It is still a part of the English system.

Its proper jurisdiction is only over the thirteen peculiar parishes of London, which were exempt from the jurisdiction of the bishop of London; but, the office of dean of the arches having been for a long time united with that of the archbishop's "Official Principal," the judge of the arches, in right of such added office, receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province. 3 Bla. Com. 64; 3 Steph. Com. 306; Whart. Law Dict. *Arches Court.* Many suits are also brought before him as original judge, the cognizance of which properly belongs to inferior jurisdictions within the province, but in respect of which the inferior judge has waived his jurisdiction under a certain form of proceeding known in the common law as *letters of request.* 3 Steph. Com. 306; 2 Chitty, Gen. Pr. 496; 2 Add. Eccl. 406.

From the court of arches an appeal formerly lay to the pope, and afterwards, by statute 25 Hen. VIII. c. 19, to the king in chancery (*i. e.*, to the Court of Delegates, *q. v.*), as supreme head of the English church, but now, by 2 & 3 Will. IV. c. 92, and 3 & 4 Will. IV. c. 41, to the Judicial Committee of the Privy Council.

A suit is commenced in the ecclesiastical court by citing the defendant to appear, and exhibiting a libel containing the complaint against him, to which he answers. Proofs are then adduced, and the judge pronounces a decree upon hearing the arguments of advocates, which is then carried into effect.

The corresponding court of the archbishop of York was the Chancery Court.

The Public Worship Regulation Act (37 & 38 Vict.) provides for the appointment by the archbishops of Canterbury and York of a single judge to hold the position of the Official Principal of the Court of the Arches and the Chancery Court, and Master of the Faculties to the Archbishop of Canterbury. He must be either a barrister of 10 years standing or a judge of one of the superior courts.

COURT OF ASSISTANTS. A court in Massachusetts organized in 1630, consisting of the governor, deputy governor and assistants. It exercised the whole power both legislative and judicial of the colony and an extensive chancery jurisdiction as well; S. D. Wilson in 18 Am. L. Rev. 226.

COURTS OF ASSIZE AND NISI PRIUS. Courts composed of two or more commissioners, called judges of assize (or of assize and *nisi prius*), who are twice in every year sent by special commission on *circuits* all round the kingdom, to try, by a jury of the respective counties, the truth of such matters of fact as are then under dispute in the courts of Westminster Hall; there being, however, as to London and Middlesex, this exception, that, instead of their being comprised within any circuit, courts of *nisi prius* are held there for the same purpose, in and after every term, at what are called the London and Westminster sittings.

These judges of assize came into use in the room of the ancient justices in eyre (*justiciarii in itinere*), who were regularly established, if not first appointed, by the Parliament of Northampton, A D. 1176 (the first of these of whom we have any record, were appointed in 1170), with a delegated power from the king's great court or *aula regis*, being looked upon as members thereof, though the present justices of assize and *nisi prius* are more immediately derived from the stat. Westm. 2, 13 Edw. I. c. 30, and consist principally of the judges of the superior courts of common law, being assigned by that statute out of the king's sworn justices, associating to themselves one or two discreet knights of each county. By stat. 27 Edw. I. c 4 (explained by 12 Edw. II. c. 3), assizes and inquests are allowed to be taken before any one justice of the court in which the plea is brought, associating with him one knight or other approved man of the county: by stat. 14 Edw. III. c. 16, inquests of *nisi prius* may be taken before any justice of either bench (though the plea be not depending in his own court), or before the chief baron of the exchequer, if he be a man of the law, or, otherwise, before the justices of assize, so that one of such justices be a judge of the king's bench or common pleas, or the king's sergeant sworn; and, finally, by 2 & 3 Vict. c 22, all justices of assize may, on their respective circuits, try causes pending in the court of exchequer, without issuing (as it had till then been considered necessary to do) a separate commission from the exchequer for that purpose. 3 Steph Com. 352; 3 Bla. Com. 57, 58.

There are eight circuits (formerly seven), viz.: Northern, Northeastern, Midland, Southeastern, Oxford, Western, North Wales and Chester and South Wales. At least one judge of the High Court goes around each circuit three times a year—in the winter, summer and autumn. Two judges attend at the larger towns twice a year. At Liverpool, Manchester and Leeds four assizes are held in each year, two of them by two judges and two by one judge. The judges are under three commissions—oyer and terminer, gaol delivery and assize. The last empowers them *inter alia* to try civil actions; 2 Odger, Com. Law. 985.

Where courts of this kind exist in the United States, they are instituted by statutory provision. Dawson v. Ryan, 4 W. & S. (Pa.) 404. See OYER AND TERMINER; GAOL DELIVERY; COURTS OF OYER AND TERMINER AND GENERAL GAOL DELIVERY; NISI PRIUS; COMMISSION OF THE PEACE.

COURT OF ATTACHMENTS. The lowest of the three courts held in the forests. It has fallen into total disuse. It was held before the verderers of the forest once in every forty days, to view the attachments by the foresters for offences against the vert and the venison. It had cognizance only of small trespasses. Larger ones were enrolled and heard by the Justices in Eyre; 1 Holdsw. Hist. E. L. 343. See COURTS OF THE FOREST, Rawle, Exmoor For. 51.

COURT OF AUDIENCE. The Archbishop of Canterbury possessed a jurisdiction concurrent with that of the Court of the Arches, which he exercised in the Court of Audience, later held by a judge. It does not appear to have been revived after the Restoration. 1 Holdsw. Hist. E. L. 371. The Archbishop of York held a like Court of Audience.

COURT OF AUGMENTATION. A court established by 27 Hen. VIII. c. 27, for managing the revenues and possessions of all monasteries whose income was under £200 a year (which by an act of parliament of the same session had been given to the king), and for determining suits relating thereto.

It was called "The Court of the Augmentations of the Revenues of the King's Crown" (from the *augmentation* of the revenues of the crown derived from the suppression of the monasteries), and was a court of record, with one great seal and one privy seal,—the officers being a chancellor, who had the great seal, a treasurer, a king's attorney and solicitor, ten auditors, seventeen receivers, with clerk, usher, etc.

All dissolved monasteries under the above value, with some exceptions, were in survey of the court, the chancellor of which was directed to make a yearly report of their revenues to the king. The court was dissolved in the reign of queen Mary, but the Office of Augmentation remained long after; and the records of the court are now at the Public Record Office. Cowell.

COURT OF BANKRUPTCY. A court of record, in England, with jurisdiction in bankruptcy, primary and appellate, which is declared a court of law and equity for that

purpose. The Bankrupt Law Consolidation Act, 1849.

By the judicature acts, 1873 and 1875 (*q. v.*) the court of bankruptcy was consolidated into the supreme court of judicature.

COURT BARON. A domestic court, incident to every manor, held by the steward within the manor, for redressing misdemeanors and nuisances therein, and for settling disputes among the tenants relating to property. It is not a court of record. 1 Poll. & Maitl. Hist. E. L. 580.

Coke (1st Inst. 58 *a*) speaks of the Court Baron as of two natures; the first, by the common law, called a court baron, a freeholders' court where they are the judges; the second, a customary court, in which the lord or his steward is the judge. Blackstone (3 Com. 33) says that, though in their nature distinct, they are frequently confounded together. Later writers doubt if there were two courts; 1 Poll. & Maitl. Hist. E. L. 580.

Their jurisdiction was practically abolished by the County Courts Act, 30 and 31 Vict. c. 142, s. 23, 3 Steph. Com. 279. In the state of New York such courts were held while the state was a province See charters in Bolton's Hist. of New Chester A deed of Wm. Penn to Letitia Penn for a manor in Pennsylvania granted the privilege of holding court baron, Myers, Immigration of Quakers 127. They existed in Maryland; Hall, The Lords Baltimore, etc. The court derived its name from the fact that it was the court of the baron or lord of the manor 3 Bla. Com. 33, n.; see Fleta, lib. 2, c. 53; though it is explained by some as being the court of the freeholders, who were in some instances called barons. Co. Litt 58 *a*.

The lord's steward usually presided. From the 13th century he was a lawyer. All kinds of personal actions (where the cause of action did not exceed 40 shillings in value) were tried there; contracts, trespass, libel, slander, assault, etc. Both the common law and chancery courts interfered to protect suitors if injustice were done. The jurisdiction of the customary court declined and all that it was used for was copyhold conveyancing business; 1 Poll. & Maitl. 578.

COURT OF CHANCERY, or CHANCERY. A court formerly existing in England and still existing in several of the United States, which possesses an extensive equity jurisdiction.

The name is said by some to be derived from that of the chief judge, who is called a chancellor; others derive both names directly from the *cancelli* (bars) which in this court anciently separated the press of people from the officers. See 3 Bla. Com. 46, n.; Story, Eq. Jur. 40; CANCELLARIUS.

In American Law. A court of general equity jurisdiction.

The terms equity and chancery, court of equity and court of chancery, are constantly used as synonymous in the United States. It is presumed that this custom arises from the circumstance that the equity jurisdiction which is exercised by the courts of the various states is assimilated to that possessed by the English courts of chancery. Indeed, in some of the states it is made identical therewith by statute, so far as conformable to our institutions.

Separate courts of chancery or equity exist in a few of the states; in others, the courts of law sit also as courts of equity; in others, equitable relief is administered under the forms of the common law; and in others, the distinction between law and equity has been formally abolished or never existed. The federal courts exercise an equity jurisdiction as understood in the English courts at the time of the Revolution; Miller Const. 318; independent of local state law; *id.*; Gordon v. Hobart, 2 Sumn. 401, Fed. Cas. No. 5,609; and the remedies are not according to state practice but as distinguished and defined in that country from which we derive our knowledge of those principles; Robinson v. Campbell, 3 Wheat. (U. S.) 212, 4 L. Ed. 372; whether the state courts in the district are courts of equity or not; Lorman v. Clarke, 2 McLean, 568, Fed. Cas. No. 8,516; Gaines v. Relf, 15 Pet. (U. S.) 9, 10 L. Ed. 642; Bennett v. Butterworth, 11 How. (U. S.) 669, 13 L. Ed. 859.

In English Law. Formerly the highest court of judicature next to parliament. Prior to the judicature acts it was the superior court of chancery, called distinctively "The High Court of Chancery," and consisted of six separate tribunals, viz.: the court of the lord high chancellor of Great Britain; the court of the master of the rolls, or keeper of the records in chancery; the court of appeal in chancery, the three separate courts of the vice-chancellors.

The jurisdiction of this court was fourfold.

The common-law or ordinary jurisdiction. By virtue of this the lord-chancellor was a privy councillor and prolocutor of the house of lords. The writs for a new parliament issued from this department. The Petty Bag Office was in this jurisdiction. It was a common-law court of record, in which pleas of *scire facias* to repeal letters-patent were exhibited, and many other matters were determined, and whence all original writs issued. See 11 & 12 Vict. c. 94; 12 & 13 Vict. c. 109.

The statutory jurisdiction included the power which the lord-chancellor exercised under the *habeas corpus* act, and by which he inquired into charitable uses, but did not include the equitable jurisdiction.

The specially delegated jurisdiction included the exclusive authority which the lord-chancellor and lords justices of appeal had over the persons and property of idiots and lunatics.

The equity or extraordinary jurisdiction was either *assistant* or *auxiliary* to the common law, including discovery for the promotion of substantial justice at the common law, preservation of testimony of persons not litigants relating to suits or questions at law, removal of improper impediments and prevention of unconscientious defences at common law, giving effect to and relieving

from the consequences of common-law judgments; *concurrent* with the common law, including the remedial correction of fraud, the prevention of fraud by injunction, accident, mistake, account, dower, interpleader, the delivery up of documents and specific chattels, the specific performance of agreements; or *exclusive*, relating to trusts, infancy, the equitable rights of wives, legal and equitable mortgages, the assignment of choses in action, partition, the appointment of receivers, charities, or public trusts. Whart. Law Dict.

By the Judicature Acts (1873 and 1875) this court was merged in the High Court of Justice. See COURTS OF ENGLAND.

The inferior courts of chancery are the courts of the Palatine Counties (Lancaster and Durham), the courts of the Two Universities, the lord-mayor's courts in the city of London, and the court of chancery in the Isle of Man. See 18 & 19 Vict. c. 48, and the titles of these various courts. See Story, Eq. Jur.; Dan. Ch. Pr.; Spence, Eq. Jur.; 1 Holdsw. Hist. E. L. 194; Spence, 2 Sel. Essays in Anglo-Amer. L. H. 219; COURTS OF EQUITY; EQUITY; CANCELLARIUS.

COURT OF THE CHIEF JUSTICE IN EYRE. The highest of the courts of the forest, held every three years, by the chief justice, to inquire of purprestures or encroachments, assarts, or cultivation of forest land, claims to franchises, parks, warrens, and vineyards in the forest, as well as claims of the hundred, claims to the goods of felons found in the forest, and any other civil questions that might arise within the forest limits. But it had no criminal jurisdiction, except of offences against the forest laws. In the exercise of this, he passed sentences upon offenders convicted by the verderers in Swanimote (see COURT OF SWANIMOTE) and performed all the duties of a justice in eyre (*q. v.*). It was called also the court of justice seat. Inderwick, King's Peace. See FOREST LAWS, COURTS OF THE FOREST. Since the Restoration the forest laws have fallen into disuse. The office was abolished in 1817.

COURT OF CHIVALRY. An ancient military court, possessing both civil and criminal jurisdiction touching matters of arms and deeds of war. It was held by the constable of England and after that office reverted to the crown in the time of Henry VIII., by the earl-marshal. Davis, Mil. Law 13. It had cognizance, by statute 13 Ric. II. c. 2, "of contracts and other matters touching deeds of arms and war, as well out of the realm as within it." This jurisdiction was of importance while the English kings held territories in France.

As a court of criminal jurisdiction, it had jurisdiction over "pleas of life and member arising in matters of arms and deeds of war, as well out of the realm as within it." It was *curia militaris*.

It was not a court of record and could neither fine nor imprison; 7 Mod. 137 (where it was held to have still survived with doubtful and trifling jurisdiction). It is said to have fallen entirely into disuse; 3 Bla. Com. 68. The last trial before a Court of Chivalry was that of Lord Audeley, in 1497, but the trial of the Earl of Warwick in 1499 took place before the Court of the Lord High Steward. Harcourt, The Steward and Trial of Peers.

COURTS CHRISTIAN. Ecclesiastical courts, which see.

COURTS OF THE CINQUE PORTS. Courts of limited local jurisdiction, formerly held before the mayor and jurats (aldermen) of the Cinque Ports. From the earliest times they had the right to hold pleas and the right to wreck, and were always exempt from the jurisdiction of the admiralty. A writ of error lay to the lord-warden in his Court of Shepway, and from this court to the King's Bench.

In 1856 when the general civil jurisdiction of the lord-warden was abolished, his admiralty jurisdiction was retained. An appeal lies to the lord-warden in admiralty causes from the County Courts within his jurisdiction. Their jurisdiction was not affected by the Judicature Act of 1873. The regular sitting place was in the aisle of St. James' Church, Dover, but the judge now often sits at the Royal Courts of Justice; See 1 Holdsw. Hist. E. L. 305; 3 Bla Com. 79; 2 Steph. Com. 499. This jurisdiction is said to present the type and original of all the admiralty and maritime courts; 1 Holdsw. Hist. E. L. 305.

COURT OF CLAIMS. See UNITED STATES COURTS.

COURT OF THE CLERK OF THE MARKET. A tribunal incident to the market held in the suburbs of the king's court. The *clericus mercati hospitii regis* was the incumbent of an honorable office pertinent to the ancient custom of holding such markets. The clerk in early times witnessed verbal contracts; later he adjudicated on prices of corn, bread, and wine and other commodities as fixed by the justices of the peace; inquired as to the correctness of weights and measures in every city, town, or borough, subject to appeal to the lord high steward, who could fine him for extortion and send him to the tower for a third offence. The clerk also measured land in case of dispute, and he had power to send bakers, brewers, and others to the pillory for unlawful dealings. See Inderwick, King's Peace 104.

The jurisdiction over weights and measures formerly exercised was taken from him by stat. 5 & 6 Will. IV. c. 63; 9 M. & W. 747; 4 Steph. Com. 323.

COURT OF COMMERCE. See UNITED STATES COURTS.

COURT OF COMMISSIONERS OF SEWERS. See COMMISSIONERS OF SEWERS.

COURT OF COMMON PLEAS. In American Law. A court of original and general jurisdiction for the trial of issues of fact and law according to the principles of the common law.

Courts of this name exist in some of the states of the United States, and frequently have a criminal as well as civil jurisdiction. They are, in general, courts of record, being expressly made so by statute in Pennsylvania, April 14, 1834, § 18. In Pennsylvania they exercise an equity jurisdiction also, as well as that at common law. Courts of substantially similar powers to those indicated in the definition exist in all the states, under various names.

In English Law. Formerly one of the three superior courts of common law at Westminster.

This court, which is sometimes called, also, Bancus Communis, Bancus, and Common Bench, was a branch of the *curia regis* At the end of John's reign there was a separation between the court which sat at a certain place to hear common pleas and the court which followed the king with jurisdiction both over common pleas and pleas of the crown. There were not as yet two distinct bodies of judges. There is a reported case in 1237 which shows that the distinction was well recognized In 1272 there was a chief justice of the common pleas, and from that date it may be said that the separation was complete The common pleas was inferior to the court which followed the king, since error lay from it to his court. Magna Carta provided that it should sit at some fixed place, which was usually Westminster. 1 Holdsw. Hist. E. L 74.

The establishment of this court at Westminster, and the consequent construction of the *Inns of Court* and gathering together of the common-law lawyers, enabled the law itself to withstand the attacks of the canonists and civilians. It derived its name from the fact that the causes of *common people* were heard there. It had exclusive jurisdiction of real actions as long as those actions were in use, and had also an extensive and, for a long time, exclusive jurisdiction of all actions between subjects. This latter jurisdiction, however, was gradually encroached upon by the king's bench and exchequer, with which it afterwards had a concurrent jurisdiction in many matters Formerly none but serjeants at law were admitted to practise before this court *in banc.* See SERJEANTS-AT-LAW. Its judges were always serjeants-at-law.

It consisted of a chief justice and four puisne or associate justices

It had a civil, common-law jurisdiction, concurrent with the king's bench and exchequer, of personal actions and actions of ejectment, and a peculiar or exclusive jurisdiction of real actions, actions under the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, the registration of judgments, annuities, etc., 1 & 2 Vict. c. 110; 2 & 3 Vict. c. 11; 3 & 4 Vict. c. 82; 18 Vict. c. 15; respecting fees for conveyances under 3 & 4 Will. IV. c. 74: the examination of married women concerning their conveyances; 11 & 12 Vict. c. 70; 17 & 18 Vict. c. 75; 19 & 20 Vict. c. 108, § 73; and of appeals from the revising barristers' court; 6 & 7 Vict. c. 18. Whart. Law Dict.

See BILL OF MIDDLESEX.

Appeals formerly lay from this court to the King's Bench; and by statutes 11 Geo. IV. and 1 Will. IV. c. 70, writs of error were afterwards taken to the King's Bench and Exchequer Chamber, from whose judgment an appeal lay to the House of Lords. 3 Bla. Com. 40.

Its jurisdiction has been transferred to the High Court of Justice. See COURTS OF ENGLAND.

COURTS OF CONSCIENCE. See COURTS OF REQUESTS.

COURT FOR CONSIDERATION OF CROWN CASES RESERVED. A court established by stat. 11 & 12 Vict. c. 78, composed of such of the judges of the superior courts of Westminster as were able to attend, for the consideration of questions of law reserved by any judge in a court of oyer and terminer, gaol delivery, or quarter sessions, before which a prisoner had been found guilty by verdict. 4 Steph. Com. 442. The trial judge was empowered to "state a case" for the opinion of that court. He could not be compelled to do so, and only a question of law could be raised. If the court considered that the point had been wrongly decided at the trial, the conviction would be quashed. Prior to this act a judge who had a doubt as to the correctness of his opinion in a criminal trial would sentence the prisoner, but would suspend punishment until he could consult his brother judges or serjeants. By Act of 1907, the Court of Criminal Appeal was created and the Court for Crown Cases Reserved was abolished

COURT, CONSISTORY. See CONSISTORY COURT.

COURT OF CONVOCATION. A convocation or ecclesiastical synod, which is in the nature of an ecclesiastical parliament.

There is one for each province. They are composed respectively of the archbishop, all the bishops, deans, and archdeacons of their province, with one proctor, or representative, from each chapter, and, in the province of Canterbury, two proctors for the beneficed parochial clergy in each diocese, while in the province of York there are two proctors for each archdeaconry. In York the convocation consists of only one house; but in Canterbury there are two houses, of which the archbishop and bishops form the upper house, and the lower consists of the remaining members of the convocation In this house a prolocutor, performing the duty of president, is elected. These assemblies meet at the time appointed in the queen's writ. The convocation has long been summoned *pro forma* only, but is still, in fact, summoned before the meeting of every new parliament, and adjourns immediately afterwards, without proceeding to the dispatch of any business.

The purpose of the convocation is stated to be the enactment of canon law, subject to the license and authority of the sovereign, and consulting on ecclesiastical matters.

In their judicial capacity, their jurisdiction extends to matters of heresy, schisms, and other mere spiritual or ecclesiastical causes,—an appeal lying from their judicial proceedings to the king in council, by stat. 2 & 3 Will. IV. c. 92.

But there is a question whether at any time Convocation ever acted as a court. There is some evidence to show that in the 14th and 15th centuries persons accused of heresy were brought before Convocation by the bishop, but the members did not vote on such trials, being probably rather in the nature of a body of assessors to the archbishop. Convocation exercises no jurisdiction at the present day; 1 Holdsw. Hist. E. L. 373.

Cowell; Bac. Abr. *Ecclesiastical Courts*, A, 1; 1 Bla. Com. 279; 2 Steph. Com. 525, 668; 2 Burn, Eccl. Law, 18.

COURT OF THE CORONER. A court the chief duty of which was to inquire, when any one dies in prison, or comes to a violent or sudden death, by what manner he came to his end; 4 Steph. Com. 323; 4 Bla. Com. 274; now generally known as an inquest. See CORONER.

COURTS OF THE COUNTIES PALATINE. In the county palatine of Durham there was a Central Court of Pleas, a body of justices who sat by virtue of commissions of assize, oyer and terminer and gaol delivery. The judges were often the same persons as those who sat in the royal courts. The bishop's council was a court of appeal and had original jurisdiction. The bishop had his Chancery. In 1536 an act was passed by which the independent judicial system was made to depend directly upon the king

In the county palatine of Lancaster, the courts were a Court of Common Pleas, justices of assize, gaol delivery, oyer and terminer and of the peace; a Chancery Court presided over by the Vice-Chancellor; and a Court of Duchy Chamber, presided over by the Chancellor of the duchy, which sat at Westminster and heard appeals from the Chancery Court. It has ceased to exist. The Chancellor of the Duchy is no longer a judicial officer. The Act of 1536 (*supra*) extended to Lancaster and also to Chester.

In the county palatine of Chester, a justice held a Court of Pleas for the Crown and Common Pleas. The Lord Chancellor or Lord Keeper, by act in 1536, could appoint justices of the peace and gaol delivery for Chester and Wales. The chamberlain of Chester, assisted by the vice-chamberlain, exercised the equitable and common-law jurisdiction of the Chancery and of a Court of Exchequer. The palatinate jurisdiction of Chester and Wales ended in 1830. Six counties in Wales were created in 1284 and organized on the English model; other counties in Wales were under the Lords Marchers.

For the existing courts, see COURTS OF ENGLAND; COUNTY PALATINE; 1 Holdsw. Hist. E. L. 47; 1 Steph. Hist. C. L. 138; Coke, 4 Inst. 239; 1 Harg. L. Tr. 378.

COURT OF DELEGATES. A court of appeal for all ecclesiastical cases and called the High Court of Delegates. 25 Henry VIII. c. 19; repealed, 1 & 2 PhH. & Mary, c. 8; revived, 1 Eliz. c. 1. The crown could issue a Commission of Review and rehear the cases. It was held by commissioners appointed under the Great Seal. It was therefore a shifting body, which could not establish general rules of procedure. It was usually composed of junior civilians. By 2 & 3 Will. IV. c. 92, its jurisdiction was transferred to the Privy Council. 1 Holdsw. Hist. E. L. 373.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES. In English Law. A court which had the jurisdiction formerly exercised by the ecclesiastical courts in respect of divorces *a mensa et thoro*, suits of nullity of marriage, suits of jactitation of marriage, suits for restitution of conjugal rights, and all suits, causes, and matters matrimonial.

It consisted of the lord chancellor and the justices of the queen's bench, the common pleas, the exchequer, and the judge of the court of probate, who was entitled judge ordinary.

The judge ordinary exercised all the powers of the court, except petitions for dissolving or annulling marriages and applications for new trials of matters of fact, bills of exception, special verdict and special cases, for hearing which excepted cases he must be joined by two of the other judges. Provision was made for his absence by authorizing the lord chancellor to appoint one of certain judicial persons to act in such absence. Juries were summoned to try matters of fact, and such trials were conducted in the same manner as jury trials at common law. It is now merged in the High Court of Justice. See COURTS OF ENGLAND.

COURT OF THE DUCHY OF LANCASTER. A court of special jurisdiction, which has jurisdiction of all matters of equity relating to lands holden of the king in right of the duchy of Lancaster. See COURTS OF THE COUNTIES PALATINE.

COURT OF THE EARL MARSHAL. In the reign of William the Conqueror the marshal was next in rank to the constable, in command of the army. When the constable's office ceased, his duties devolved upon the earl marshal. The military Court of the Constable came to be known as the Marshal's Court, or, in its modern form, Court-Martial. Aside from its criminal jurisdiction, it had much to do with questions relating to fiefs and military tenures, though not to property rights involved therein. The earl marshal is now the head of the Heralds' College. Davis, Mil. Laws of U. S. 14. See Hale, Hist. C. L. 36; Grose, Mil. Antiq. See COURT OF CHIVALRY; COURTS-MARTIAL; CONSTABLE OF ENGLAND.

COURTS OF ENGLAND. The Judicature Acts (in force November 2, 1875) created the Supreme Court of Judicature. It con-

sists of the High Court of Justice and the Court of Appeal, both of which are superior courts of record. In itself it performs no judicial function.

To the High Court of Justice was transferred every jurisdiction formerly vested in the High Court of Chancery, the Queen's Bench, and the Common Pleas at Westminster, the Exchequer as a court of revenue as well as a common-law court, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, the Court of Common Pleas at Lancaster, the Court of Pleas at Durham, the Courts created by Commissioners of Assize, of Oyer and Terminer, and of Gaol Delivery, or any of such Commissioners, and, by Act of 1883, the jurisdiction of the London Court of Bankruptcy.

To the Court of Appeal were transferred all jurisdiction and powers of the Court of Appeal in Chancery, the Court of Appeal in Chancery of the County Palatine of Lancaster, the Court of the Lord Warden of the Stannaries, the Court of Exchequer Chamber, the Judicial Committee of the Privy Council upon appeal from any judgment or order of the High Court of Admiralty, and many other minor appellate jurisdictions.

The High Court of Justice now consists of three divisions: The King's Bench Division, the Chancery Division, and the Probate, Divorce and Admiralty Division. By the original Judicature Act each of the superior courts of common law was made a separate division of the High Court of Justice, but by an Order in Council, December 16, 1880, the Common Pleas and Exchequer Divisions were merged in the King's Bench Division, and the offices of Lord Chief Justice of the Common Pleas Division and Lord Chief Baron of the Exchequer Division were abolished.

The courts of law give any relief which the Court of Chancery could formerly have given. Law and equity are now administered concurrently. See (1887) 12 App. Cas. 308.

The King's Bench Division. The Lord Chief Justice of England is the President, nominated by the Prime Minister; there are seventeen puisne judges appointed on the recommendation of the Lord Chancellor. They hear cases in London or at the assizes throughout England and Wales. At the commencement of each sitting, one judge is appointed to hear causes in London and one in Liverpool. They are assisted by nine Masters who have power to transact all interlocutory and much other business, by District Registrars in most of the large provincial towns and by Official Referees. It has the bankruptcy jurisdiction formerly vested in the London Court of Bankruptcy, exercised by one of the judges called the Judge in Bankruptcy.

The judges of this division frequently sit as a Divisional Court, consisting of two or more judges. Any number of such courts may sit at the same time. In civil matters its jurisdiction is almost entirely appellate. It deals with appeals from Revising Barristers, from County Courts in Bankruptcy, and from certain inferior courts; with special cases stated by the courts of petty sessions and quarter sessions in civil matters, and by the Railway Commissioners; appeals from the Mayor's Court, London, the Salford Hundred Court, the V. C. Court of Oxford, and in a few cases of appeals from a judge of the High Court in Chambers. On the crown side it deals with indictments and criminal informations, and in civil proceedings with *mandamus, habeas corpus, certiorari,* prohibitions, informations in the nature of *quo warranto,* attachments for contempt of court and petitions of right.

The Chancery Division consists of the Lord Chancellor, who is President, and six puisne judges; the latter are divided into three groups of two each. The work consists chiefly of equity business; it, however, administers law as well as equity, but it tries no cases with a jury. It deals with administering the estates of deceased persons, partnership, mortgages, charitable and private trusts, infants, and other heads of equitable jurisdiction.

The Probate, Divorce and Admiralty Division consist of the President and one puisne judge. Probate matters consist of the probate of wills, but their interpretations and the administrations of the estates are in the Chancery Division. In admiralty matters it hears appeals from the County Courts.

The Court of Appeal consists of the Master of the Rolls and five Lords Justices of Appeal, with the occasional assistance of the Lord Chancellor, any ex-Lord Chancellor, the Chief Justice of England and the President of the P., D. & A. Division. It sits in two divisions; the Master of the Rolls presides in the first and the senior Lord Justice in the second. It has the jurisdiction formerly exercised by the Lord Chancellor and by the Court of Appeal in Chancery, including bankruptcy, and by the Exchequer Chamber, and in admiralty and lunacy, etc.

The House of Lords is not a part of the Supreme Court of Judicature. When sitting as the supreme appellate court, it is usually composed of the Lord Chancellor, the ex-Lord Chancellor, if any, and the six Lords of Appeal in Ordinary; peers who have held high judicial office are entitled to sit. At least three judges are required to form a quorum. It may summon the judges to assist in their deliberations and give their opinion on any point of law. Lay peers have, strictly speaking, a right to vote, but, since 1883, have never exercised that right. It has no original jurisdiction in ordinary civil actions; an appeal lies to it against any judgment or order of the Court of Appeal.

Judicial Committee of the Privy Council, as created in 1833, is a court of final appeal

from the ecclesiastical courts, the courts of India, the colonies, the Channel Islands and the Isle of Man. It is held by the Lord Chancellor, the six Lords of appeal in Ordinary, if Privy Councillors, and such other members of the Privy Council as have held high judicial office in the United Kingdom or the colonies.

There are other courts with local or special jurisdiction which are superior courts of record but are not part of the Supreme Court of Judicature.

The Chancery Court of the County Palatine of Lancaster is held by the V. C. of the Duchy and County Palatine of Lancaster at Liverpool and Manchester. Within the county palatine it has the jurisdiction of the Chancery Division; it is essential that the parties to actions should be within the county palatine.

The Chancery Court of the County Palatine of Durham is held by the Chancellor of the County Palatine at Durham. Either the parties to a suit must reside in the county palatine or the property be situate there. Its jurisdiction is unlimited in amount and is similar to that of the Chancery Division.

The Court of Railway and Canal Commissioners is held by a judge of the High Court and two laymen appointed by the crown, on the nomination of the Board of Trade, one of whom must be an expert in railway matters. The judge alone decides points of law. It deals with transportation facilities, preferences, rates, etc. An appeal lies to the Court of Appeal.

The Inferior Courts of Record. The most important are the County Courts (see that title). There are nineteen borough courts, whose jurisdiction is generally limited to causes of action arising in the borough; in most of them the Recorder is the judge. The most prominent of them are: The Mayor's Court, London; the City of London Court; the Liverpool Court of Passage; the Salford Hundred Court; the Courts of Tolzey and Pie Poudre, Bristol. From the Court of Passage an appeal lies to the Court of Appeal; from the others to the King's Bench Division.

The University Courts are analogous to the borough courts, and claim exclusive jurisdiction over the members of the Universities. See CHANCELLORS' COURTS OF THE TWO UNIVERSITIES.

The Sheriff's Court is held by the undersheriff with a jury of twelve.

A Coroner's Court is held in every county, every county borough and in borough having a court of quarter sessions.

Inferior Courts Not of Record. The *Revising Barrister's Court* annually revises the lists of parliamentary voters, of burgesses and county electors. It is held by one barrister. An appeal lies, in certain cases, on a point of law, to the King's Bench Divisional Court, and from there, but only on special leave, to the Court of Appeal.

The Courts of Petty Sessions, which may be held by a single justice, have jurisdiction in disputes as to contracts between master and servant, or between members of friendly societies, affiliation orders and in certain matrimonial matters.

The ordinary *criminal courts* are: Courts of Petty Session; Courts of Quarter Session; the Assizes; the Central Criminal Court; the King's Bench Division; and the Court of Criminal Appeal. Courts of Borough Quarter Sessions are now held in 131 of the larger cities and towns, having the same jurisdiction as the Quarter Sessions in a county. The judge of each is called a Recorder (*q. v.*).

Peers charged with treason, felony, or misprision are tried either in the House of Lords or in the Court of the Lord High Steward.

Appeals in criminal cases from the Channel Islands, the Isle of Man, the Empire of India and the colonies are heard by the Judicial Committee of the Privy Council.

Courts of Petty Sessions are held by Justices of the Peace appointed by the crown on the recommendation of the Lord Lieutenant of the county. There is no limit to the number in any county. They are unpaid. They elect their own chairmen. They hold office for life, but may be removed by the Lord Chancellor for misconduct. They are appointed for a whole county, but ordinarily act in the sessional division in or near which they reside. Any two or more may in their own division form a Capital Court of Petty Session. An appeal lies to the Court of Quarter Session or the King's Bench Division, the latter only on a point of law.

Courts of Quarter Sessions are inferior Courts of Record. All the justices of the county are justices of this court for their county; two constitute a quorum. They try by jury prisoners committed for trial by the Courts of the Petty Sessions for the county. In boroughs there is a great variety of such courts under their various charters. The judge of a borough court is called a Recorder. Appeals from the Petty Sessions are heard without a jury; the cases are reheard. The King's Bench Division may review on *certiorari* any proceeding of a Court of Quarter Sessions.

The Assizes are held by the judges of the High Court at the capital of each county and other assize towns. There are eight circuits. See ASSIZE.

The Central Criminal Court was created in 1834. It is the Court of Assize and Quarter Session for the City of London and its Liberties, and the Court of Assize for the Counties of London and Middlesex and certain parts of Essex, Kent and Surrey. It sits at least twelve times a year. Its judges include the Lord Chancellor, the Judges of the High Court, the Lord Mayor, Aldermen, Recorder and Common Serjeant of the City of London, and two Commissioners.

The *King's Bench Division* is the successor of the Assize Court for the ancient county of

Middlesex, which could try on indictment any treason, felony, or misdemeanor committed therein, and it still has the same power, though rarely exercised. It can try any misdemeanor committed in any part of England, for which a criminal information has been filed by an officer of the crown, and any crimes committed out of England by public officials of colonies, or by officials of the crown in India. Any indictment from inferior courts may be removed by *certiorari* and tried there either "at bar" (by three judges), or at nisi prius (by one), before a jury of the county where the crime was committed. But this can be done only on the ground that an impartial trial could not be had in the court below, or that some difficult question of law is involved, or a special jury, or a view of certain premises, is necessary to a satisfactory trial. It has general superintendence over all inferior courts of criminal jurisdiction and can review any proceedings of a court of quarter sessions on summary jurisdiction or *certiorari*. Any court of summary jurisdiction may state a case setting forth the facts for the King's Bench Division and the latter may order justices of the petty sessions to state such a case. A court of quarter sessions may state a case for it on a point of law arising in some matter that has come before it on appeal from a court of petty sessions.

The Court of Criminal Appeal has jurisdiction over all criminal cases tried at Quarter Sessions, the Assizes, the Central Criminal Court, or in the King's Bench Division. It consists of the Lord Chief Justice of England and the other judges of the King's Bench Division. Not less than three judges must be present and the number must be uneven. An appeal lies to the House of Lords when the Attorney General has certified that a point of law of exceptional public importance is involved. A convicted prisoner has a right of appeal on any question of law or fact, or of mixed law and fact, if he can obtain leave of the Court of Criminal Appeal or a certificate from the judge who tried the case that it is a fit case for appeal. By leave of the Court of Criminal Appeal a prisoner can appeal against a sentence passed upon him, but in such case that the court may inflict a more serious sentence. It may quash a conviction and may enter a verdict of acquittal. In a proper case it will hear fresh evidence. It cannot grant a new trial.

The House of Lords may try any one impeached by the House of Commons for any high crime or misdemeanor; also temporal peers and peeresses accused of high treason, felony or misprision. At such trial it is presided over by a peer as Lord High Steward appointed by the crown, or in the absence of such appointment, by the Lord Chancellor. All the members of the House are entitled to be present and are equally judges of law and fact. The judges may be summoned to give their opinion on any question of law. The bishops may be present, but may not vote in capital cases. If the House of Lords is not sitting, the accused will be tried in the Court of the Lord High Steward. See that title.

The above is abridged from Odgers, Common Law. See also Halsbury's Laws of England, title *Courts*.

See COUNTY COURTS.

COURT OF EQUITY. A court which administers justice according to the principles of equity.

As to the constitution and jurisdiction of such courts, see COURT OF CHANCERY.

Such courts are not, strictly speaking, courts of record except when made so by statute; Yelv. 226; Evans v. Tatem, 9 S. & R. (Pa.) 252, 11 Am. Dec. 717. Their decrees touch the person only; Post v. Neafie, 3 Cai. (N. Y.) 36; but are conclusive between the parties; Colt v. Tracy, 8 Conn. 268, 20 Am. Dec. 110; Van Riper v. Claxton, 9 N. J. Eq. 302; Hopkins v. Lee, 6 Wheat. (U. S.) 109, 5 L. Ed. 218. See Rice's Heirs v. Lowan, 2 Bibb (Ky.) 149. And as to the personalty, their decrees are equal to a judgment; 2 Madd. 355; 2 Salk. 507; 1 Vern. 214, Post v. Neafie, 3 Cai. (N. Y.) 35; and have preference according to priority; 3 P. Wms. 401, n.; Cas. *temp.* Talb. 217; 4 Bro. P. C. 287; Thompson v. Brown, 4 Johns. Ch. (N. Y.) 638. See Chase, Bla. Com. 843, n. 3. They are admissible in evidence between the parties; Pleasants v. Clements, 2 Leigh (Va.) 474; Goddard v. Long, 5 Smedes & M. (Miss.) 783; Randall v. Parramore, 1 Fla. 409; Whitmore v. Johnson's Heirs, 10 Humphr. (Tenn.) 610; and see Landers v. Beauchamp, 8 B. Monr. (Ky.) 493; Wardlaw v. Hammond, 9 Rich. (S. C.) 454; when properly authenticated; Barbour v. Watts, 2 A. K. Marsh. (Ky.) 290; and come within the provisions of the constitution for authentication of judicial records of the various states for use as evidence in other states; Craig v. Brown, Pet. C. C. 352, Fed. Cas. No. 3,328.

An action may be brought at law on a decree of a foreign court of chancery for an ascertained sum; 1 Campb. 253; Burnett v. Wylie, Hempst. 197, Fed. Cas. No. 2172a; but not for an unascertained sum; Post v. Neafie, 3 Cai. (N. Y.) 37, note; but *nil debet* or *nul tiel record* is not to be pleaded to such an action; Evans v. Tatem, 9 S. & R. (Pa.) 252, 11 Am. Dec. 717. See EQUITY; COURT OF CHANCERY.

COURT OF ERROR. An expression applied especially to the court of exchequer chamber and the house of lords, as taking cognizance of *error* brought. Moz. & W. Dict. 3 Steph. Com. 333. It is applied in some of the United States to the court of last resort in the state. See COURT OF APPEALS.

COURT OF EXCHEQUER. In English Law. A superior court of record, administering justice in questions of law and revenue.

It was the lowest in rank of the three superior common-law courts of record, and had jurisdiction originally only of cases of injury to the revenue by withholding or non-payment. The privilege of suing and being sued in this court in personal actions was extended to the king's accountants, and then, by a fiction that the plaintiff was a debtor of the king to all personal actions. See QUO MINUS, WRIT OF. It had formerly an equity jurisdiction, and the cases were heard before the Treasurer, the Chancellor of the Exchequer and the Barons. By statute in 1842 this jurisdiction was transferred to the court of chancery.

It consisted of one chief and four puisne judges or barons.

As a court of common law, it administered redress between subject and subject in all actions whatever, except real actions.

The appellate jurisdiction from this court was to the judges of the king's bench and common pleas sitting as the court of exchequer chamber, and from this latter court to the house of lords; 3 Steph. Com. 338; 3 Bla. Com. 44. Its jurisdiction has been transferred to the high court of justice. See COURTS OF ENGLAND.

COURT OF EXCHEQUER CHAMBER. In English Law. A court for the correction and prevention of errors of law in the three superior common-law courts of the kingdom.

A court of exchequer chamber was first erected by statute 31 Edw III c. 12, to determine causes upon writs of error from the common-law side of the exchequer court. It consisted of the chancellor, treasurer, and the "justices and other sage persons as to them seemeth." The judges were merely assistants. A second court of exchequer chamber was instituted by statute 27 Eliz c 8, consisting of the justices of the common pleas and the exchequer, or any six of them, which had jurisdiction in error of cases in the king's bench. In 1830 these courts were abolished and the court of exchequer chamber substituted in their place as an intermediate court of appeal between the three common-law courts and Parliament. It consisted of the judges of the two courts which had not rendered the judgment in the court below. It is now merged in the High Court of Justice. See COURTS OF ENGLAND.

There was an early practice, continuing as late as the 17th century, by which cases of difficulty in either of the three common-law courts might be adjourned to be argued before all the judges and the barons in the exchequer chamber; but the judgment was given in the court in which the proceedings had begun. 1 Holdsw. Hist. E. L. 109.

COURT OF FACULTIES. A tribunal of the archbishop in England.

It does not hold pleas in any suits, but creates rights to pews, monuments, and other mortuary matters. It has also various other powers under 25 Hen. VIII. c. 21, in granting licenses, faculties, dispensations, etc., of different descriptions; as, a license to marry, a faculty to erect an organ in a parish church, to level a churchyard, to remove bodies previously buried; and it may also grant dispensations to eat flesh on days prohibited, or to ordain a deacon under age, and the like. The archbishop's office in this tribunal is called *magister ad facultates;* Co. 4th Inst. 337; 2 Chit. Gen. Pr. 507.

It still exists as a registry for marriage licenses. It appoints notaries.

See COURT OF ARCHES.

COURT OF FIRST INSTANCE. See FIRST INSTANCE.

COURTS OF THE FOREST. Courts held for the enforcement of the forest laws. The lowest of these was the Woodmote, or Court of Attachments (*q. v.*). The next was the Swanimote (*q. v.*). The highest was the Court of the Chief Justice (*q. v.*). There was also a Survey of Dogs (see REGARD) held by the Regarders of the Forest every three years for the lawing of dogs. Inderwick, King's Peace. See FOREST LAWS.

COURTS OF FRANCE. Cour de Cassation (from *casser*, to reverse, because it only affirms or reverses) is the highest court in France (the Tribunal des Conflits possibly excepted). It is composed of forty-five Conseillers, with one Premier Président and three Présidents de Chambre. Attached to it are sixty lawyers who are both Avoués and Avocats.

There are twenty-seven Cours d'Appel, sitting in twenty-seven different cities and each having jurisdiction over several departments; also three hundred and fifty-nine district courts of first instance, two hundred and fourteen Tribunals of Commerce, and a large number of Justices of the Peace; also a certain number of Tradesmen's Courts, Conseils de Prud'hommes.

TRIBUNAL DES CONFLITS.—This is a jurisdictional court and nothing else. A dispute as to whether a given question shall be disposed of by a government department or by the law courts is decided by this court. The Minister of Justice is President of this court, *ex officio;* the eight other members are taken from the Conseil d'Etat and the Cour de Cassation.

COURTS OF THE FRANCHISES. Jurisdictions in the early Norman period which rested upon royal grants—often assumed. Edward I., in 1274, sent out commissioners to enquire by what warrant different landowners were exercising their *jura regalia.* Those showing continued possession since the beginning of Richard I. were allowed to stand—chiefly the less important franchises; the exceptions are the palatinate jurisdictions. See COURTS OF THE COUNTIES PALATINE. There were many varieties of lesser franchises, such as those conferred by the old Saxon terms, *sac* and *soc, infangtheft* and *outfangtheft*, view of frankpledge. Some of these franchises were recognized as existing by the County Courts Acts, 1846–1888. 1 Holdsw. Hist. E. L. 61.

COURT OF GENERAL QUARTER SESSIONS OF THE PEACE. **In American Law.** A court of criminal jurisdiction, so-called in many states.

In English Law. A court of criminal jurisdiction, in England, held in each county once in every quarter of a year, but in the county of Middlesex twice a month. 4 Steph. Com. 317. When held at other times than quarterly, the sessions are called "general sessions of the peace."

It is held before two or more justices of the peace, one of whom was a justice of the *quorum*.

Edward III. appointed justices of the peace for each county in England and enacted that they should meet at least four times a year, and the ordinary meetings of the county court appear soon to have merged in, or been extinguished by, these quarterly meetings of justices which are now known as Quarter Sessions of the Peace. 2 Odgers, C. L. 966. See COURTS OF ENGLAND.

COURT OF GREAT SESSIONS IN WALES. A court formerly held in Wales; abolished by 11 Geo. IV. and 1 Will. IV. c. 70, and the Welsh judicature incorporated with that of England. 3 Bla. Com. 77; 3 Steph. Com. 317, n.

COURT OF HIGH COMMISSION. An ecclesiastical court created under the Act of Supremacy, 1 Eliz. c. 1, § 8 (1559). Its duties were to enforce the Acts of Supremacy and Uniformity and to deal generally with ecclesiastical offences. It entertained all important causes of doctrine and ritual; also matters of immorality and misconduct of the clergy and laity and of recusancy and nonconformity. It had concurrent jurisdiction with the ordinary ecclesiastical court. It fell in 1640 and was not revived at the Restoration; 1 Holdsw. Hist. E. L. 375.

COURT-HOUSE. The building occupied for the purposes of a court of record. The term may be used of a place temporarily occupied for the sessions of a court, though not the regular court-house; as, a church used when the court-house was occupied by troops; Kane v. McCown, 55 Mo. 181; and see Hambright v. Brockman, 59 Mo. 52; and where the court-house was burned down, sales required by law to be at its door must be held at the ruins of the door; Waller v. Arnold, 71 Ill. 350.

COURT, HUNDRED. See HUNDRED COURT.

COURT OF HUSTINGS. The county court in the city of London.

It is held nominally before the lord mayor, recorder, and aldermen; but the recorder is practically the sole judge. It has an appellate jurisdiction of causes in the sheriff's court of London. A writ of error lies from the decisions of this court to certain commissioners (usually five of the judges of the superior courts of law), from whose judgment a writ of error lies to the house of lords. No merely personal actions can be brought in this court. See 3 Bla. Com. 80, n.; 3 Steph. Com. 293, n.; Madox, Hist. Exch. c. 20; Co. 2d Inst. 327. Since the abolition of all real and mixed actions except ejectment, the jurisdiction of this court has fallen into comparative desuetude. Pulling on Cust. Lond.

In American Law. A local court in some parts of Virginia. Smith v. Commonwealth, 6 Gratt. 696.

COURT FOR THE TRIAL OF IMPEACHMENTS. A tribunal for determining the guilt or innocence of any person impeached. In England, the House of Lords, and in this country, generally, the more select branch of the legislative assembly, constitutes a court for the trial of impeachments. A peer could always be impeached for any crime, and although Blackstone lays it down that a commoner cannot be impeached for a capital offence, but only for a high misdemeanor, the opinion seems to have prevailed that he could be impeached for high treason; 4 Bla. Com. 260; 4 Steph. Com. 299; May, Parl. Prac. c. 23.

The Commons might impeach any person before the House of Lords. The practice fell into abeyance between 1459 and 1621, and its place was taken by Acts of Attainder. There has been no instance of impeachment since 1805. 1 Holdsw. Hist. E. L. 190.

COURT FOR THE RELIEF OF INSOLVENT DEBTORS IN ENGLAND. A court in London only, which received the petitions of insolvent debtors and decided upon the question of granting a discharge.

It was held by the commissioners of bankruptcy; and its decisions, if in favor of a discharge, were not reversible by any other tribunal. See 3 Steph. Com. 426; 4 *id.* 287. Abolished by the Bankruptcy Act of 1861.

COURT OF INQUIRY. **In English Law.** A court sometimes appointed by the crown to ascertain the propriety of resorting to ulterior proceedings against a party charged before a court-martial. See 2 Steph. Com 590; 1 Coler. Bla. Com. 418, n.; 2 Brod. & B. 130. Also a court for hearing the complaints of private soldiers. Moz. & W. Dict.; Simmons, Cts. Mart. § 341.

In American Law. A court constituted by authority of the articles of war, invested with the power to examine into the nature of any transaction, accusation, or imputation against any officer or soldier.

They are not strictly *courts*, having no power to try and determine guilt or innocence. They are rather *agencies* created by statute to investigate facts and report thereon. They cannot compel the attendance of witnesses nor require them to testify; Davis, Mil. Law 220. They may be convened by any

military commander who has power to convene a court-martial to try the charge which is to be inquired into. The President may convene a court of inquiry at any time; otherwise they can be convened only on the application of the officer or soldier whose conduct is in question. They are composed of from one to three commissioned officers, with a recorder. They give no opinions unless required to do so. 119th Art. of War. Their proceedings are admitted in evidence by a court-martial, in cases not capital nor extending to the dismissal of an officer, if the oral testimony cannot be obtained; 121st Art. of War.

A *naval* court of inquiry may be ordered by the President, Secretary of the Navy, or commander of a fleet or squadron, consisting of not more than three commissioned officers. They "have power to summon witnesses, etc., in the same manner as courts-martial, but they shall only state facts and not give their opinion unless expressly required so to do" in the convening order. The person under inquiry, or his attorney, have a right to cross-examine witnesses (R. S. § 1624). The Act of February 16, 1909, provides for subpœnas to witnesses. See COURTS-MARTIAL (naval).

COURTS OF IRELAND. The *Court of Appeal* consists of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the Lord Chief Baron of the Exchequer and two Lords Justices of Appeal.

The *High Court of Justice*. The Chancery Division consists of the Lord Chancellor, the Master of the Rolls, a Judge and a Land Judge. The King's Bench Division consists of the Lord Chief Justice, the Lord Chief Baron, and five judges, one of which is a probate judge and another a judge in admiralty and bankruptcy cases.

There are 33 County Court judges and chairmen of Quarter Sessions in the different counties.

COURT OF JUSTICE SEAT. See COURT OF THE CHIEF JUSTICE IN EYRE.

COURT OF JUSTICIARY. See COURTS OF SCOTLAND.

COURT OF KING'S BENCH. The supreme court of common law in the kingdom, now merged in the High Court of Justice. See COURTS OF ENGLAND.

It was one of the successors of the *curia regis* and received its name, it is said, because the king formerly sat in it in person, the style of the court being *coram rege ipso* (before the king himself) During the reign of a queen it was called the Queen's Bench, and during Cromwell's Protectorate it was called the Upper Bench. Its jurisdiction was originally confined to the correction of crimes and misdemeanors which amounted to a breach of the peace, including those trespasses which were committed with force *(vi et armis)*, and in the commission of which there was, therefore, a breach of the peace. By aid of a fiction of the law (see COURT OF THE STEWARD AND THE MARSHAL; BILL OF MIDDLESEX), the number of actions which might be alleged to be so committed was gradually increased, until the jurisdiction extended to all actions on the case, of debt upon statutes or where fraud was alleged, and, finally, included all personal actions whatever, and the action of ejectment. See ASSUMPSIT; ARREST; ATTACHMENT. It was from its constitution, ambulatory and liable to follow the king's person, all process in this court being returnable *"coram rege ubicunque tum fuerimus in Anglia"* (wherever in England we [the sovereign] shall then be). It was for centuries held at Westminster As early as Henry IV.'s reign the king could not pronounce judgment.

It consisted of a lord chief justice and four puisne or associate justices, who were, by virtue of their office, conservators of the peace and supreme coroners of the land.

It had original criminal jurisdiction and transferred jurisdiction from inferior courts, by *Certiorari*, where a fair trial could not be had in the inferior court or some difficult question of law was likely to arise, also by writ of error and motion for a new trial. Its civil jurisdiction was original and in error. The former did not exist originally in ordinary civil suits between man and man, but was attained by a fiction that the defendant was in the custody of the marshal *(supra)*. The jurisdiction in error was by *audita querela*, motion for a new trial, and in respect of certain errors in the process of the court. Jurisdiction in error belonged almost exclusively to the King's Bench. It had superintendence over the proper observance of the law by officials and others by means of certain "prerogative writs": *Certiorari*, prohibition, *mandamus*, *quo warranto*, *habeas corpus*, *de homini replegiando*, mainprize, the writ *de odio et atia* (which last three were superseded by *habeas corpus*); 1 Holdsw. Hist. E. L. 78.

COURT LANDS. See DEMESNE.

COURT LEET. In English Law. A court of record for a particular hundred, lordship, or manor, holden therein before the steward of the leet, for the punishment of petty offences and the preservation of the peace. Kitchin, Courts Leet.

The Sheriff's Tourn *(q. v.)* was the Grand Court Leet for the county.

The privilege of holding them was a franchise subsisting in the lord of the manor by prescription or charter, and might be lost by disuse. The court leet had a limited criminal jurisdiction. For some offences of a lower order, punishment by fines, amercements, or other means might be inflicted For the higher crimes, they either found indictments which were to be tried by the higher courts, or made presentment of the case to such higher tribunals. They also took *view of frank-pledge* Among other duties for the keeping of the peace, the court assisted in the election of, or, in some cases, elected certain municipal officers in the borough to which the leet was appended. A court leet is still held in many manors and a few boroughs in England; Odgers, C. L. 965.

Powell, Courts Leet; 1 Reeve, Hist. Eng. Law; Inderwick, King's Peace 11; 1 Poll. & Maitl. 568; 4 Steph. Com. 306.

It was but a specially important moot of the *leta*, the fraction of the hundred or wap-

entake, alienated into private hands. Vinogradoff, Engl. Soc. in Eleventh Cent. 214.

COURT OF THE LORD HIGH ADMIRAL. In the earlier part of the 14th century, the Admiral possessed a disciplinary jurisdiction over his fleet. After 1340 it is reasonable to suppose that the Admiral could hold an independent court and administer justice in piracy and other maritime cases. In 1353 a case was had before the Admiral and the Council. Four years later there is the earliest distinct reference to a Court of Admiralty. There were at first several admirals and several courts. From the early 15th century there was one Lord High Admiral and one Court of Admiralty. 1 Holdsw. Hist. E. L. 313. The term *admiral* appears to have been first used in 1300. *id.*

COURT OF THE LORD HIGH STEWARD. If the House of Lords is not sitting, cases of impeachment and temporal peers and peeresses accused of high treason, felony or misprision are tried in the Court of the Lord High Steward. He is appointed for the occasion, and is usually the Lord Chancellor. All peers who have a right to sit and vote in Parliament must be summoned. They are the sole judges of fact, and the majority, which must consist of twelve at least, decides. The Lord High Steward has a vote, and is judge of all matters of law.

HOUSE OF LORDS; COURTS OF ENGLAND. Trials of peers before it began about 1500. See Harcourt, The Steward and Trial of Peers.

COURT OF THE LORD HIGH STEWARD OF THE UNIVERSITIES. In English Law. A court constituted for the trial of scholars or privileged persons connected with the university of Oxford or Cambridge who are indicted for treason, felony, or mayhem.

The court consists of the lord high steward, or his deputy nominated by the chancellor of the university and approved of by the lord high chancellor of England. The steward issues a precept to the sheriff, who returns a panel of eighteen freeholders, and another to the university beadle, who return a panel of eighteen matriculated laymen. From these panels a jury *de medietate* is selected, before whom the cause is tried. An indictment must first have been found by a grand jury, and cognizance claimed thereof at the first day. 3 Bla. Com. 83; 4 *id.* 277; 1 Steph. Com. 67; 3 *id.* 341; 4 *id.* 261. See CHANCELLORS' COURTS OF THE UNIVERSITIES.

COURT OF MAGISTRATES AND FREEHOLDERS. A court in South Carolina for the trial of slaves and free persons of color for criminal offences. Now abolished.

COURT OF THE MARSHALSEA. See COURT OF THE STEWARD AND THE MARSHAL.

COURT-MARTIAL. A military or naval tribunal, which has jurisdiction of offences against the laws of the service, military or naval, in which the offender is engaged.

Courts-martial have some of the functions of the Court of Chivalry, which title see. They exist and have their jurisdiction by virtue of the military law, the court being constituted and empowered to act in each instance by authority from a commanding officer. The general principles applicable to courts-martial in the army and navy are essentially the same Courts-martial for the regulation of the militia are held in the various states under local statutes, which resemble in their main features those provided for in the army of the United States; and when in actual service the militia, like the regular troops, are subject to courts-martial, of which a majority of members must be militia officers (Act of May 27, 1908) Where all the members of a court-martial convened to try a volunteer officer are officers of the regular army, the court is illegal, McClaughry v. Deming, 186 U. S 49, 22 Sup. Ct 786, 46 L Ed. 1049 (considering at length the historical relations of volunteers to the regular army and approving Deming v. McClaughry, 113 Fed 639, 51 C. C. A. 349).

ARMY COURTS-MARTIAL.—By Act of March 2, 1913, it is provided that after July 1, 1913, courts-martial shall be of three kinds: 1. *General Courts-Martial* (consisting of any number of officers from 5 to 13 inclusive) may try any person, subject to military offence, punishable by the Articles of War, and any other person who by statute or the law of war is subject to trial by military tribunal.

Special Courts-Martial (consisting of any number of officers from 3 to 5 inclusive) shall have power to try any person subject to military law, except an officer, for any crime or offence not capital, punishable by the Articles of War, but the President may make regulations excepting from their jurisdiction any class or classes of persons. They have power to adjudge punishment, not to exceed commement at hard labor for 6 months or forfeiture of pay, or both, with reduction to the ranks of non-commissioned officers and reduction in classification of first-class privates.

Summary Courts-Martial (one officer) may try any soldier, except one having a certificate of eligibility to promotion, for any crime or offence not capital, punishable by the Articles of War. But non-commissioned officers shall not, if they object, be tried without the authority of officers competent to bring them to trial before a General Court-Martial. They may adjudge punishments not to exceed confinement at hard labor for 3 months or forfeiture of 3 months pay, or both, with reduction to the ranks as aforesaid; but when the Summary Court-Martial is also the commanding officer, confinement or forfeiture of pay for more than one month, must be approved by superior authority.

Art. 74 provides that officers who may appoint a court-martial shall be competent to appoint a judge-advocate for the same. He withdraws when the court sits in closed session. His advice must be given in open court. U. S. R. S. § 1342.

The jurisdiction of such courts is limited

to offences against the military law (which title see) committed by individuals in the service; Smith v. Shaw, 12 Johns. (N. Y.) 257; which latter term includes sutlers, retainers to the camp, and persons serving with the army in the field; 60th Art. of War; and persons employed in a *quasi*-military capacity with its troops in time of war and on its theatre; Davis, Mil. L. 478.

While a district is under martial law, by proclamation of the executive, as for rebellion, they may take jurisdiction of offences which are cognizable by the civil courts only in time of peace; 11 Op. Att.-Gen. 137. This rule is said by American writers to apply where the army passes into a district where there are no civil courts in existence; Benet, Mil. Law 15.

Military commissions organized during the Civil War, in a state not invaded and not engaged in rebellion, in which the federal courts were not obstructed in the exercise of their judicial functions, had no jurisdiction to convict, for a criminal offence, a citizen, who was neither a resident of a rebellious state, nor a prisoner of war, nor a person in the military or naval service; and congress could not invest them with any such power; Ex parte Milligan, 4 Wall. (U. S.) 2, 18 L. Ed. 281. Cases arising in the land and naval forces, or in the militia in time of war or public danger, are excepted from the right of trial by jury; *ibid.*

The court must appear from its record to have acted within its jurisdiction; Fox v. Wood, 1 Rawle (Pa.) 143; Brooks v. Adams, 11 Pick. (Mass.) 442; Mills v. Martin, 19 Johns. (N. Y.) 7; Mathews v. Bowman, 25 Me. 168; Ex parte Biggers, 1 McMull. (S. C.) 69; Mitchell v. Harmony, 13 How. (U. S.) 134, 14 L. Ed. 75. A court-martial unlawfully convened is not a *de facto* court; McClaughry v. Deming, 186 U. S. 49, 22 Sup. Ct. 786, 46 L. Ed. 1049. A want of jurisdiction either of the person, Meade v. Deputy Marshall, 1 Brock. 324, Fed. Cas. No. 9,372, or of the offence, will render the members of the court and officers executing its sentence trespassers; Wise v. Withers, 3 Cra. (U. S.) 331, 2 L. Ed. 457. So, too, the members are liable to a civil action if they admit or reject evidence contrary to the rules of the common law; 2 Kent 10; V. Kennedy, Courts-Mart. 13; or award excessive or illegal punishment; V. Kennedy, Courts-Mart. 13. The President may return the proceedings with a recommendation that a more severe sentence be imposed; Swaim v. U. S., 165 U. S. 563, 17 Sup. Ct. 448, 41 L. Ed. 823.

The decision and sentence of a court-martial, having jurisdiction of the person accused and of the offence charged, and acting within the scope of its lawful powers, cannot be reviewed or set aside by writ of ***habeas corpus;*** Johnson v. Sayre, 158 U. S. 109, 15 Sup. Ct. 773, 39 L. Ed. 914. But by ***habeas corpus,*** the legality of the action of a court-martial—whether it was legally constituted and had jurisdiction—may be enquired into; In re Reed, 100 U. S. 23, 25 L. Ed. 538.

"Courts-martial are lawful tribunals, with authority to determine finally any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced." Carter v. Roberts, 177 U. S. 496, 20 Sup. Ct. 713, 44 L. Ed. 861. Quoted with approval in Carter v. McClaughry, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. Ed. 236; Grafton v. U. S., 206 U. S. 333, 347, 27 Sup. Ct. 749, 51 L. Ed. 1084.

The presumptions in favor of official action preclude attack on the sentences of courts-martial, though they are courts of special or limited jurisdiction; In re Chapman, 166 U. S. 670, 17 Sup. Ct. 677, 41 L. Ed. 1154, disapproving Runkle v. U. S., 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. Ed. 1167. They are entitled to the same finality as to the issue involved as the judgment of a civil court, Grafton v. U. S., 206 U. S. 333, 27 Sup. Ct. 749, 51 L. Ed. 1084. Questions of procedure, the improper admission of evidence, and the like, are not grounds of collateral attack on the judgment of a court-martial; Swaim v. U. S., 165 U. S. 553, 17 Sup. Ct. 448, 41 L. Ed. 823. Under Art. 62, general courts-martial may take cognizance of all crimes not capital committed by an officer or soldier in the territory within which he is serving; this is concurrent with civil courts; if the former first obtains jurisdiction, its judgment can be disregarded by the civil courts only for reasons affecting its jurisdiction; Grafton v. United States, 206 U. S. 333, 27 Sup. Ct. 749, 51 L. Ed. 1084.

If the offence is a crime against society, the punishment provided by law may be imposed and also a dishonorable discharge; In re Mason, 105 U. S. 696, 26 L. Ed. 1213.

Acquittal by a court-martial does not bar a prosecution by the civil authorities; In re Fair, 100 Fed. 149. Acquittal in a state court on a charge of murder does not bar a trial by court-martial for "conduct to the prejudice of good order and military discipline," though based on the same act; In re Stubbs, 133 Fed. 1012.

The President, by virtue of his office as Commander-in-Chief, may appoint a general court-martial; Swaim v. U. S., 165 U. S. 553, 17 Sup. Ct. 448, 41 L. Ed. 823.

The presiding officer has no command over the other members; they are all on an equality; Dig. J. Adv. Gen. 609.

No officer shall, when it can be avoided, be tried by officers inferior to him in rank. 79th Art. Whether it "can be avoided" is for the decision of the convening officer; Swaim v.

U. S., 165 U. S. 553, 17 Sup. Ct. 448, 41 L. Ed. 823.

Consent does not give jurisdiction to a court of regular officers to try officers or soldiers of other forces; McClaughry v. Deming, 186 U. S. 49, 22 Sup. Ct. 786, 46 L. Ed. 1049.

Retired army officers are subject to trial by court-martial; Murphy v. U. S., 38 Ct. Cl. 511; Closson v. U. S., 7 App. D. C. 460; so is a minor who has enlisted without consent of his parents or guardians and has deserted; Solomon v. Davenport, 87 Fed 318, 30 C. C. A. 664. When jurisdiction has attached, an enlisted man may be tried and sentenced after his enlistment has expired; Barrett v. Hopkins, 7 Fed. 312; and his sentence carried out; Coleman v. Tennessee, 97 U. S. 509, 24 L. Ed. 1118; so of an officer after he has ceased to be such; Carter v. McClaughry, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. Ed. 236.

Courts-martial should in general follow the rules of evidence of the civil courts and especially of the United States criminal courts; Davis, Mil. L. 251; Town of Lebanon v. Heath, 47 N. H. 359; 2 Op. A.-G. 343. Perhaps more latitude is allowed; Davis, Mil. L. 251. In England (Act of 1881) the ordinary rules of evidence must be applied. The accused is not entitled to counsel but the privilege is usually granted; Davis, Mil. L. 38.

Where a prisoner on trial for a trivial offence is absent for a day, it does not vitiate the proceedings; Weirman v. U. S., 36 Ct. Cl. 236. Where the offence is one punishable by the civil authorities, a court-martial may inflict the same punishment and add a dishonorable discharge; Ex parte Mason, 105 U. S. 696, 26 L. Ed. 1213, cited in Carter v. McClaughry, 183 U. S. 382, 22 Sup. Ct. 181, 46 L. Ed. 236.

A death sentence requires the concurrence of two-thirds of the members; Art. 96.

NAVAL COURTS-MARTIAL.—*Summary courts-martial* (R. S. § 1624, Act of March 2, 1885) may be ordered upon petty officers and persons of inferior ratings, by the commander of any vessel, or by the commandant of any navy-yard, naval station or marine barracks, for the trial of offences which such officer may deem deserving of greater punishment than such officer is authorized to inflict, but not sufficient to require trial by general court-martial. They consist of 3 officers not below the rank of ensign, as members, and a recorder.

The punishments which they can inflict are specified in the act. No sentence shall be carried into execution until the proceedings have been approved by the convening officer and by the commander-in-chief, or, in his absence, by the senior officer present, and, if it involves loss of pay, until approved by the Secretary of the Navy. The convening officer may remit in part or altogether, but not commute, the sentence. Any punishment which a summary court-martial may inflict may also be inflicted by a general court-martial.

No officer shall be dismissed from the service except by order of the President or by sentence of a general court-martial, or, in time of peace, except in pursuance of a sentence of a general court-martial or in mitigation thereof.

A general court-martial shall consist of not more than 13 nor less than 5 commissioned officers, and as many officers, not exceeding 13, as can be convened without injury to the service (which is for the convening officer to decide); Bishop v. U. S., 197 U. S. 334, 25 Sup. Ct. 440, 49 L. Ed. 780, but in no case, where it can be avoided without injury to the service, shall more than one-half, exclusive of the President, be junior to the officer to be tried.

When proceedings have been commenced, they shall not be suspended or delayed on account of the absence of any of the members, provided five or more are assembled. But where a member is absent for legal cause, the witnesses examined during his absence must be recalled and their testimony read to him and acknowledged by them to be correct, and they must be subject to such further examination as he may require. Without compliance with this rule and an entry thereon on the record, such member shall not sit again in that case.

Two-thirds must concur in a death sentence. All other sentences may be determined by a majority.

A convening officer may order a court-martial to reconsider its proceedings and sentence before it has dissolved; In re Reed, 100 U. S. 13, 25 L. Ed. 538; where it has been adjourned by the Secretary of the Navy till further orders, he may reconvene it to reconsider the proceedings; Smith v. Whitney, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. Ed. 601.

Where the sentence of an officer is dismissal from the navy (in time of peace) it is subject to the President's confirmation, disapproval or order. His action thereon is judicial; Bishop v. U. S., 197 U. S. 334, 25 Sup. Ct. 440, 49 L. Ed. 780.

Deck Courts (Act of February 16, 1909) are courts for the trial of enlisted men in the Navy and Marine Corps for minor offences formerly triable by summary court-martial and may be ordered by the commanding officer of a naval vessel, by the commandant of a navy-yard or station, by a commanding officer of marines or by a higher naval authority. They consist of one commissioned officer only, who shall hear and determine cases and impose punishment, but not discharge from the service or impose confinement or forfeiture of pay for longer than 20 days. The officer within whose command the court sits may "remit or mitigate, but not commute, any sentence; no sentence

shall be carried into effect until it shall have been so approved or mitigated, and such officer shall have power to remit any punishment." No person who objects thereto shall be tried before a deck court; in case of objection, trial shall be by summary, or by general, court-martial, as may be appropriate.

The Secretary of the Navy may set aside the proceedings or remit or mitigate the sentence imposed by any court-martial.

General courts-martial may be convened by the President, the Secretary of the Navy, by the commander-in-chief of a fleet, or squadron, and by the commanding officer of any naval station beyond the continental limits of the United States.

The use of irons as a form of punishment in the Navy is abolished, except for the purpose of safe custody, or when part of a sentence as imposed by a general court-martial. Act of May 11, 1908.

A general court-martial or court of inquiry of the Navy may issue like process to witnesses which United States courts of criminal jurisdiction within the state, etc., where the court is ordered to sit, may lawfully issue. Any person duly subpœnaed as a witness, who wilfully neglects or refuses to appear or qualify or to testify or to produce documentary evidence, is guilty of a misdemeanor, excepting persons residing beyond the state, etc., where the court is held. No witness can be compelled to incriminate himself. Depositions may be taken in certain cases.

The sentences of summary courts-martial may be carried into effect upon the approval of the senior officer present, and those of deck courts upon the approval of the convening authority or his successor in office. Act of February 16, 1909.

The ordinary rules of evidence are applied as far as justice requires and are to be departed from in cases of necessity created by the nature of the service, the constitution of the court, and its course of procedure. The accused is entitled to counsel, but he may only address the court by permission, and only in case a stenographer is employed.

No federal tribunal has jurisdiction over a naval court-martial nor can it interfere in the performance of its duties; Wales v. Whitney, 114 U. S. 564, 5 Sup. Ct. 1050, 29 L. Ed. 277; Swaim v. U. S., 165 U. S. 553, 17 Sup. Ct. 448, 41 L. Ed. 823.

Consult Benêt; De Hart, and also Adye; Defalon; Hough; J. Kennedy; V. Kennedy; M'Arthur; Macnaghten; Macomb; Simmons; Tytler; Dudley; Davis, Courts-Martial; Brickhimer; Ives; Merrill; Winthrop, Mil. Law; Opinions J. Adv. Gen. *passim*; Regulations for the Govt. of the Navy (1909); COURT OF INQUIRY.

COURT OF NISI PRIUS. A court of original civil jurisdiction in the city and county of Philadelphia, held by one of the judges of the supreme court of the state. Abolished by the constitution of 1874. See NISI PRIUS; COURTS OF ASSIZE AND NISI PRIUS.

COURT OF THE OFFICIAL PRINCIPAL. See COURT OF THE ARCHES.

COURT OF ORDINARY. A court which has jurisdiction of the probate of wills and the regulation of the management of decedents' estates.

Such a court exists in Georgia (Code 1882, § 318), and formerly existed in New Jersey, South Carolina, and Texas, but has been replaced by other courts. See 2 Kent 409; ORDINARY.

COURT OF ORPHANS. The court of the lord mayor and aldermen of London, which had the care of those orphans whose parents died in London and were free of the city.

By the custom of London this court was entitled to the possession of the person, lands, and chattels of every infant whose parent was free of the city at the time of his death and who died in the city. The executor or administrator of such deceased parent was obliged to exhibit inventories of the estate of the deceased, and give security to the chamberlain for the orphan's part or share. It is now said to be fallen into disuse. 2 Steph. Com. 313; Pull. Cust. Lond. 196, *Orphans' Court*.

COURT OF OYER AND TERMINER. The name of courts of criminal jurisdiction in several of the states, as in Delaware and Pennsylvania. They were abolished in New York and New Jersey in 1895. In Pennsylvania they are held at the same time with the court of quarter sessions, as a general rule, and by the same judges. In Delaware they are specially called by a precept from the judges when there are capital felonies to be tried, and consist of the chief justice and three associate judges.

COURTS OF OYER AND TERMINER AND GENERAL GAOL DELIVERY. **In English Law.** Tribunals for the examination and trial of criminals.

They are held before commissioners selected by the High Court, among whom are usually two justices of that court.

Under the commission of *oyer and terminer* the justices try indictments previously found at the same assizes for treason, felony, or misdemeanors. Under the commission of *general gaol delivery* they may try and deliver every prisoner who is in gaol when the judges arrive at the circuit town, whenever or before whomsoever indicted or for whatsoever crime committed. These commissioners are joined with those of *assize* and *nisi prius* and the commission *of the peace*. 3 Steph. Com. 352. See COURTS OF ASSIZE AND NISI PRIUS.

In American Law. Courts of criminal jurisdiction in some states. See COURT OF OYER AND TERMINER.

COURT OF THE PALACE. See COURT OF THE STEWARD AND THE MARSHAL.

COURT OF PASSAGE. A court, still existing, in Liverpool, having civil jurisdiction. It is an inferior court of record.

COURT OF PECULIARS. Ecclesiastical courts which grew up in England and gradually displaced the jurisdiction of the ordinary diocesan court. There are peculiars of various descriptions in most dioceses, and in some they are very numerous: Royal, archiepiscopal, episcopal, deaconal, subdeaconal, prebendal, rectorial and vicarial. Some of them were wholly exempt from episcopal, and even archiepiscopal control. There was an appeal formerly to the Pope; in later days to the High Court of Delegates. Most of them have been abolished by legislation. 1 Holdsworth, Hist. Engl. Law 352.

COURTS OF PETTY SESSIONS. See COURTS OF ENGLAND.

COURT OF PIE POWDER, PY-POWDER, PIPOWDER, PIE POUDRE, or PIED-POUDRE (Fr. *pied*, foot, and *poudre*, dust or *pied puldreaux* [old French] pedler). A court of special jurisdiction in every fair or market, said to have been so called because the several disputes which arose were adjudged with a dispatch that suited the convenience of transitory suitors,—the men with "dusty feet."

The word *pie powder*, spelled also *pied poudre* and *pypowder*, has been considerd as signifying dusty feet, pointing to the general condition of the feet of the suitors therein; Cowell; Blount; or as indicating the rapidity with which justice is administered, as rapidly as dust can fall from the foot; Co. 4th Inst. 472; or pedler's feet, as being the court of such chapmen or petty traders as resorted to fairs It was not confined to fairs or markets, but might exist, by custom, in cities, boroughs, or vills for the collection of debts and the like, Cro Jac 313; Cro Car. 46, 2 Salk 601 Coke calls them "Courts Pepoudrous" 4 Inst. 272 It was an important court in his time. It was held before the steward of him who was entitled to the tolls from the market.

In an enumeration of common-law institutions which he claims were derived from the Roman law, Mr. Semmes claims that these courts owe both their origin and their name to the Roman law, "as will be seen by referring to the code l. 3, tit. 3, *De Pedaneis Judicibus*." Address, Am. Bar. Assn. Rep. 1886, p. 197.

The *civil* jurisdiction extended to all matters of contract arising within the precinct of the fair or market during the continuance of the particular fair or market at which the court was held, the plaintiff being obliged to make oath as to the time and place. The cases were mostly trade disputes, and accordingly the decisions were law made by merchants, and a good deal of interest attached to them as decisions by juries of experts; 1 Social England 464. Disputes only could be determined which arose *in the fair* and *in fair time;* Inderwick, King's Peace 105.

The *criminal* jurisdiction embraced all offences committed at the particular fair or market at which the court was held. An appeal lay to the courts at Westminster. See Barrington, Stat. 337; 3 Bla. Com. 32; 3 Steph. Com. 317, n.; Skene, *de verb. sig. Pede pulverosus;* Bracton 334; 22 L. Q. R. 244; 1 Holdsw. Hist. E. L. 309.

The court of pie poudre is mentioned in Odgers, C. L. 1021, as being an inferior court not of record, now in existence.

COURT OF POLICIES OF INSURANCE. A court of special jurisdiction which took cognizance of cases involving claims made by those insured upon policies in the city of London.

It was organized by a commission issued yearly by the lord chancellor, by virtue of 43 Eliz. c. 12, and 13 & 14 Car. II. c. 23, to the judge of the admiralty, the recorder of London, two doctors of the civil law, two common-law lawyers, and eight merchants, empowering any three of them (one being a civilian or barrister) to determine in a summary way all causes concerning policies in the city of London. The jurisdiction was confined to actions brought by assured persons upon policies of insurance on merchandise; and an appeal lay by way of a bill to the court of chancery. The court has been long disused, and was formally abolished by stat. 26 & 27 Vict. c. 125. 3 Bl. Com. 74; 3 Steph. Com. 317, n.; Crabb, Hist. Eng. Law 503.

COURT PREROGATIVE. See PREROGATIVE COURT.

COURT OF PROBATE. In American Law. A court which has jurisdiction of the probate of wills and the regulation of the management and settlement of decedents' estates, as well as a more or less extensive control of the estates of minors and other persons who are under the especial protection of the law. In some states, this court has also a limited jurisdiction in civil and criminal actions. For the states in which such courts exist, and the limits of their jurisdiction, see the articles on the various states.

In English Law. A court in England, established under the Probate Act of 1857, having exclusive jurisdiction of testamentary causes or proceedings relating to the validity of wills and the succession to the property of intestates. 2 Steph. Com. 192; 3 *id.* 346. This court is now merged in the High Court of Justice under the Judicature Act of 1873. See COURTS OF ENGLAND.

COURT OF PYPOWDER. See COURT OF PIE-POWDER.

COURT OF QUARTER SESSIONS. See COURTS OF ENGLAND.

COURT OF QUARTER SESSIONS OF THE PEACE. A court of criminal jurisdiction in the state of Pennsylvania. There is one such court in each county of the state.

Its sessions are, in general, held at the same time and by the same judges as the *court of oyer and terminer and general gaol delivery.*

COURT OF QUEEN'S BENCH. See COURT OF KING'S BENCH.

COURT OF RECORD. A judicial organized tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of the common law. Ex parte Gladhill, 8 Metc. (Mass.) 171, per Shaw, C. J.

A court where the acts and proceedings are enrolled in parchment for a perpetual memorial and testimony. 3 Bla. Com. 24.

A court which has jurisdiction to fine and imprison, or one having jurisdiction of civil causes above forty shillings, and proceeding according to the course of the common law. Woodman v. Somerset County, 37 Me. 29,

All courts are either *of record* or *not of record* The possession of the right to fine and imprison for contempt was formerly considered as furnishing decisive evidence that a court was a court of record, Co Litt 117 *b*, 260 *a*; 1 Salk 144, 12 Mod 388, 2 Wms Saund. 101*a*; Viner, Abr. *Courts*; and it is said that the erection of a new tribunal with this power renders it by that very fact a court of record; 1 Salk. 200; 12 Mod 388; 1 Woodd Lect. 98, 3 Bla Com. 24, 25; but every court of record does not possess this power, 1 Sid. 145, 3 Sharsw Bla Com. 25, n The mere fact that a permanent record is kept does not, in modern law, stamp the character of the court, since many courts, as probate courts and others of limited or special jurisdiction, are obliged to keep records and yet are held to be courts not of record See Smith v. Rice, 11 Mass 510, Smith v. Morrison, 22 Pick. (Mass) 430; Scott v Rushman, 1 Cow (N. Y) 212, Thomas v. Robinson, 3 Wend (N Y) 268, Snyder v. Wise, 10 Pa 158, Silver Lake Bank v Harding, 5 Ohio, 545; Bancroft v Stanton, 7 Ala 351, Ellis v White, 25 Ala 540 The definition first given above is taken from the opinion of Shaw, C. J, in Ex parte Gladhill, 8 Metc (Mass) 171, with an additional element not required in that case for purposes of distinction, and is believed to contain all the distinctive qualities which can be said to belong to all courts technically of record at modern law To be a court of record, a court must have a clerk and a seal; Lewis Co v. Adamski, 131 Wis. 311, 111 N. W. 495. As to what are courts of record and courts not of record in England, see 2 Odgers, C. L. 1021.

Courts may be at the same time of record for some purposes and not of record for others; Wheaton v. Fellows, 23 Wend. (N. Y.) 376; Lester v. Redmond, 6 Hill (N. Y.) 590; Ex parte Gladhill, 8 Metc. (Mass.) 168

Courts of record have an inherent power, independently of statutes, to make rules for the transaction of business; but such rules must not contravene the law of the land; Fullerton v. Bank, 1 Pet. (U. S.) 604, 7 L. Ed. 280; Boas v. Nagle, 3 S. & R. (Pa.) 253; Snyder v. Bauchman, 8 S. & R. (Pa.) 336; Risher v. Thomas, 2 Mo. 98. They can be deprived of their jurisdiction by express terms of denial only; Kline v. Wood, 9 S. & R. (Pa.) 298; 2 Burr. 1042; 1 W. Bla. 285. Actions upon the judgments of such courts may, under the statutes of limitations of some of the states of the United States, be brought after the lapse of the period of limitation for actions on simple contracts; and this provision has given rise to several determinations of what are and what are not courts of record. See Smith v. Morrison, 22 Pick. (Mass.) 430; Mowry v. Cheesman, 6 Gray (Mass.) 515; Lester v. Redmond, 6 Hill (N. Y.) 590; Scott v. Rushman, 1 Cow. (N. Y.) 212; Ellis v. White, 25 Ala. 540; Woodman v. Somerset County, 37 Me. 29.

Under the naturalization act of the United States, "every court of record in a state having common-law jurisdiction and a seal and a clerk or prothonotary" has certain specified powers. As to what the requirements are to constitute a court of record under this act, see Carter v. Gregory, 8 Pick. (Mass.) 168; Wheaton v. Fellows, 23 Wend. (N. Y.) 375.

A writ of error lies to correct erroneous proceedings in a court of record; 3 Bla. Com. 407; Gay v. Richardson, 18 Pick. (Mass.) 417, but will not lie unless the court be one, technically, of record; Smith v. Rice, 11 Mass. 510. See WRIT OF ERROR.

COURT OF REFEREES. See REFEREES, COURT OF; LOCUS STANDI.

COURT OF REGARD. See REGARD.

COURT OF REQUESTS (called otherwise *court of conscience*). A court of equity for poor suitors, or for the king's servants privileged to sue there. The first record of a case is in 8 Henry VIII. Originally a standing committee of the Council, its members being the same as those of the Star Chamber. Later it became a separate court and its regular judges were styled Masters of Request. It was virtually abolished by Act of 1640; 1 Holdsw. H. E. L. 208. See 3 Steph Com. 449; Bac. Abridg.; Select Cases in the Court of Requests (Selden Society, Publ. vol. 12).

In the 17th and 18th centuries Courts of Request were established in different parts of England for the collection of small debts; by 1800, fifty-four such courts had been created by fifty-four acts of Parliament

COURT ROLLS. The rolls of a manor court. In the 13th century landowners were beginning to catalogue their possessions and enrol the proceedings of their courts. The court rolls show that there was a large body of law systematically and regularly administered in these local Courts; 2 Holdsw Hist. E. L. 272. See COPYHOLD; ROLL.

COURTS OF SCOTLAND. The *Court of Session* consists of the Inner House, and the Outer House. The former has two divisions, the Lord President and three judges constitute the first division; the Lord Justice Clerk and three judges constitute the second division. In the Outer House are five permanent Lords Ordinary, attached equally to both divisions of the court.

Court of Justiciary is a court of general criminal and limited civil jurisdiction.

It consists of the Lord Justice General, the Lord Justice Clerk, and all the members of the court of session. The kingdom is divided into three circuits, in each of which two sessions, of not less than three days each, are to be held annually. A term may be held by any two of the justices, or by the Lord Justice General alone, or in Glasgow, by a simple justice; except in Edinburgh, where three justices constitute a quorum, and four generally sit in important cases.

Its criminal jurisdiction extends to all crimes committed in any part of the kingdom; and it has the power of reviewing the sentences of all inferior criminal courts, unless excluded by statute. Alison, Pr. 25.

Its civil jurisdiction on circuits is appellate and final in cases involving not more than twelve pounds sterling.

COURT OF SESSIONS. A court of criminal jurisdiction existing in some of the states.

COURT OF SHERIFF'S TOURN. See SHERIFF'S TOURN.

COURT OF STANNARIES. See STANNARY COURTS.

COURTS OF THE STAPLE. See STATUTE STAPLE.

COURT OF STAR CHAMBER. A court which was formerly held by members of the King's Council, together with two judges of the courts of common law.

The name *star chamber* is of uncertain origin. It has been thought to be from the Saxon *steoran*, to govern, alluding to the jurisdiction of the court over the crime of cosenage; and has been thought to have been given because the hall in which the court was held was full of windows, Lambard, Eiren. 148, or, according to Blackstone, because the contracts and obligations of the Jews (called *Starra*, which were enrolled in three places, one of which was the exchequer at Westminster) were originally kept there; 4 Bla Com 266, n. The room so used came to be appropriated to the Council The derivation of Blackstone receives confirmation from the fact that this location (the exchequer) is assigned to the *star chamber* the first time it is mentioned The word *star* acquired at some time the recognized signification of inventory or schedule Stat Acad Cont. 32; 4 Sharsw. Bla Com 266, n; Coke (4 Inst. 66). Sir Thomas Smith (3 Comm. c. 4), and Camden (Britannia 130), derive the name from the fact that the roof of the room where the Council sat, was ornamented with stars. "Sterred Chambre" is first refered to in 1348; 1 Holdsw Hist. E. L 272.

In 1487 an act relating to the King's Council provided that the Chancellor and Treasurer of England, the Keeper of the Privy Seal, or two of them, a bishop and a temporal lord of the Council, the two chief justices, or two other justices in their absence, should have jurisdiction over certain "misdoers." According to Coke and Bacon this act merely confirmed the jurisdiction of the Council and vested it in a committee. This committee became an ordinary court towards the end of the 16th century, though closely connected with the Council. It was officially styled "The Lords of the Council sitting in the Star Chamber." The jurisdiction related to matters in some way concerning the state such as piracy, prize, salvage, disputes arising in the course of trade; punishing libels, conspiracy and false accusations, riots, fraud, forgery, and enforcing the laws against recreants. In private disputes, it was open to all. It protected the weak from the oppression of great offenders. If the poor were oppressed they sought relief in the Star Chamber. Palgrave (Council 104) says that it "became indispensable for the preservation of the rights and liberties of the people."

The court became unpopular and its proceedings in political cases became tyrannical before 1640. In that year it was abolished by Parliament, together with the Council of Wales, the Council of the North, the jurisdiction of the Star Chamber exercised by the Court of the Duchy of Lancaster, and the Court of Exchequer of the County Palatine of Chester. The act provided that neither the King nor his Privy Council have, or should have, jurisdiction by English bill, petition etc. over the lands and chattels of subjects, but that the same ought to be determined in the ordinary courts of justice and by the ordinary course of law. See GRAND REMONSTRANCE.

As the act referred only to English bills or petitions, it did not affect the appellate jurisdiction of the Council over places outside the English law. To this is largely due the present Judicial Committee of the Privy Council, which title see. See 1 Holdsw. Hist. E. L. 271; Encycl. Brit., art. *Star Chamber;* Palgrave, Council; Scofield; Hudson, Star Chamber; 12 Am. L. Rev. 21; COURTS OF ENGLAND; PRIVY COUNCIL.

COURT OF THE STEWARD AND THE MARSHAL. A court which had cognizance of cases which arose within the Verge *i. e.* within 12 miles of the place where the king was actually residing. Its judges had jurisdiction as deputies of the Lord Chief Justice; when he was present, their general authority ceased. When, in 28 Edw. I., the King's Bench was ordered to follow the king, their general jurisdiction practically ceased, though they sometimes tried cases in vacation under a special commission of oyer and terminer.

As judges of the Court of the Marshalsea, the Steward and the Marshal had jurisdiction in debt and covenant (if both parties were of the King's household), and in trespass *vi et armis* (if one was); and it was limited to the Verge (10 Co. Rep. 71). As it was obliged to follow the king it was an extremely inconvenient court to use.

It is probable that the fiction by which the King's Bench ultimately acquired concurrent jurisdiction with the Common Pleas

sprang from its early connection with this court.

Charles I. created a Court of the Palace to be held by the Steward and the Marshal, having jurisdiction over all personal actions arising within the Verge of Whitehall, but cases begun there, if of importance, were usually removed to the King's Bench r Common Pleas; 1 Holdsw. Hist. E. L. 80. The Palace Court was abolished by 12 & 13 Vict. c. 101. 3 Steph. Com. 317.

COURT OF SWANIMOTE or SWEINMOTE (spelled, also, *Swanmote, Swain-gemote;* Saxon, *swang,* an attendant, a freeholder, and *mote* or *gemote,* a meeting).

In English Law. One of the forest courts, now obsolete, held before the verderers, as judges, by the steward, thrice in every year, —the sweins or freeholders within the forest composing the jury.

This court had jurisdiction to inquire into grievances and oppressions committed by the officers of the forest, and also to receive and try presentments certified from the court of attachments, certifying the cause, in turn, under the seals of the jury, in case of conviction, to the court of justice seat for the rendition of judgment. Cowell; 3 Bla. Com. 71, 72; 3 Steph Com. 317, n. See Inderwick, King's Peace 150; FOREST LAWS.

COURTS OF SURVEY. These are courts held in England and Wales under the Merchants' Shipping Act of 1894. The Wreck Commissioner is judge of every such court in the United Kingdom. There are a large number of associate judges in various circuits in England and Wales.

COURTS OF THE TWO UNIVERSITIES. **In English Law.** See CHANCELLOR'S COURTS OF THE TWO UNIVERSITIES.

COURTS OF THE UNITED STATES. See UNITED STATES COURTS.

COURT OF VICAR GENERAL. A court of the Archbishop of Canterbury, in which the bishops of the province are confirmed. 1 Holdsw. Hist. E. L. 372.

COURT OF WARDS AND LIVERIES. A court of record in England, which had the supervision and regulation of inquiries concerning the profits which arose to the crown from the fruits of tenure, and to grant to heirs the delivery of their lands from the possession of their guardians.

The Court of the King's Wards was instituted by stat 32 Hen VIII c 46, to take the place of the ancient *inquisitio post mortem,* and the jurisdiction of the restoration of lands to heirs on their becoming of age (livery) was added by statute 33 Hen. VIII. c 22, when it became the Court of Wards and Liveries. It was abolished in 1660

The jurisdiction extended to the superintendence of lunatics and idiots in the king's custody, granting licenses to the king's widows to marry, and imposing fines for marrying without license; 4 Reeve, Hist. E. L. 259; Crabb, Hist. E. L. 468; 1 Steph. Com 183; 4 *id.* 40; 2 Bla. Com. 68; 3 *id.* 258.

COURTESY. See CURTESY.

COUSIN. The son or daughter of the brother or sister of one's father or mother.

The issue, respectively, of two brothers or two sisters, or of a brother and a sister.

Those who descend from the brother or sister of the father of the person spoken of are called paternal cousins; maternal cousins are those who are descended from the brothers or sisters of the mother. See 2 Brown, Ch. 125; 1 Sim. & S 301; 9 Sim. 386, 457. The word is still applied in Devonshire to a nephew. 1 Ves. Jr. 73.

COUSINAGE. See COSINAGE.

COUTHUTLAUGH. He that willingly receives an outlaw and cherishes or conceals him. In ancient times he was subject to the same punishment as the outlaw. Blount

COUTUM (Fr.). Custom; duty; toll. 1 Bla. Com. 314.

COUTUMIER (Fr.). See GRAND COUTUMIER.

COVENABLE (L. Fr.). Convenient; suitable. Anciently written *convenable.*

COVENANT (Lat. *convenire,* to come together; *conventio,* a coming together. It is equivalent to the *factum conventum* of the civil law).

In Contracts. An agreement between two or more persons, entered into by deed, whereby one of the parties promises the performance or non-performance of certain acts, or that a given state of things does or shall, or does not or shall not, exist.

A contract under seal; a deed.

Affirmative covenants are those in which the covenantor declares that something has been already done, or shall be done in the future.

Affirmative covenants do not operate to deprive covenantees of rights enjoyed independently of the covenants; Dyer 19 *b*; 1 Leon. 251.

Covenants against incumbrances. See COVENANT AGAINST INCUMBRANCES.

Alternative covenants are disjunctive covenants.

Auxiliary covenants are those which do not relate directly to the principal matter of contract between the parties, but to something connected with it. Those the scope of whose operations is in *aid* or *support* of the principal covenant. If the principal covenant is void, the auxiliary is discharged. Anstr. 256; Prec. Chanc 475.

Collateral covenants are those which are entered into in connection with the grant of something, but which do not relate immediately to the thing granted: as, to pay a sum of money in gross, that the lessor shall

distrain for rent on some other land than that which is demised, to build a house on the land of some third person, or the like. Platt, Cov. 69; Shepp. Touchst. 161; 4 Burr. 2439; 3 Term 393; 2 J. B. Moore 164; 5 B. & Ald 7; 2 Wils. 27; 1 Ves. 56.

Concurrent covenants are those which are to be performed at the same time. When one party is ready and offers to perform his part, and the other refuses or neglects to perform his, he who is ready and offers has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act; Platt, Cov. 71; 2 Selw. N. P. 443; Dougl. 698; 18 E. L. & Eq. 81; Goodwin v. Lynn, 4 Wash. C. C. 714, Fed. Cas. No. 5,553; Denny v. Kile, 16 Mo. 450.

Declaratory covenants are those which serve to limit or direct uses. 1 Sid. 27; 1 Hob. 224.

Dependent covenants are those in which the obligation to perform one is made to depend upon the performance of the other. Covenants may be so connected that the right to insist upon the performance of one of them depends upon a prior performance on the part of the party seeking enforcement. Platt, Cov. 71; 2 Selw. N. P. 443; 1 C. B. N. S. 646; Northrup v. Northrup, 6 Cow. (N. Y.) 296; Cassell v. Cooke, 8 S. & R. (Pa.) 268, 11 Am. Dec. 610; Smith v. Lewis, 24 Conn. 624, 63 Am. Dec. 180; Low v. Marshall, 17 Me. 232, Humphries v. Goulding, 3 Ark. 581; Caldwell v. Kirkpatrick, 6 Ala. 60, 41 Am. Dec. 36; Bailey v White, 3 Ala. 330 To ascertain whether covenants are dependent or not, the intention of the parties is to be sought for and regarded, rather than the order or time in which the acts are to be done, or the structure of the instrument, or the arrangement of the covenant; 1 Wms. Saund 320, n.; 5 B. & P. 223; Goodwin v. Lynn, 4 Wash. C. C. 714, Fed. Cas. No 5,553; McCrelish v. Churchman, 4 Rawle (Pa.) 26; Grant v. Johnson, 5 N. Y. 247; Leveret v. Sherman, 1 Root (Conn.) 170; Brockenbrough v. Ward's Adm'r, 4 Rand. (Va.) 352. See note to Cutter v. Powell, 2 Smith Lead. Cas 22

Disjunctive covenants. Those which are for the performance of one or more of several things at the election of the covenantor or covenantee, as the case may be. Platt, Cov. 21; Harmony v. Bingham, 1 Duer (N. Y.) 209

Executory covenants are those whose performance is to be future. Shepp. Touchst. 161.

Express covenants are those which are created by the express words of the parties to the deed declaratory of their intention; Platt, Cov. 25. The formal word covenant is not indispensably requisite for the creation of an express covenant; 5 Q. B. 683; 8 J. B. Moore 546; Marshall v. Craig, 1 Bibb (Ky.) 379, 4 Am. Dec. 647; Hallett v. Wylie, 3 Johns. (N. Y.) 44, 3 Am. Dec. 457; Mitchell v. Hazen, 4 Conn. 508, 10 Am. Dec. 169; Randel v. Canal, 1 Harr. (Del.) 233. The words "I oblige," "agree," 1 Ves. 516; "I bind myself," Hardr. 178; 3 Leon. 119; have been held to be words of covenant, as are the words of a bond; 1 Ch. Cas. 194. Any words showing the intent of the parties to do or not to do a certain thing, raise an express covenant; Lovering v. Lovering, 13 N. H. 513. But words importing merely an order or direction that other persons should pay a sum of money, are not a covenant; 6 J. B. Moore 202.

Covenants for further assurance. See COVENANT FOR FURTHER ASSURANCE.

Covenants for quiet enjoyment. See COVENANT FOR QUIET ENJOYMENT.

Covenants for title are those covenants in a deed conveying land which are inserted for the purpose of securing to the grantee and covenantee the benefit of the title which the grantor and covenantor professes to convey.

Those in common use in England are four in number—of *right to convey*, for *quiet enjoyment*, against *incumbrances*, and for *further assurance*—and are held to run with the land; the covenant for *seisin* has not been generally in use in modern conveyances in England; Rawle, Cov. § 24. In the United States there is, in addition, a covenant of *warranty*, which is more commonly used than any of the others. What are often called 'full covenants' are the covenants for seisin, for right to convey, against incumbrances, for quiet enjoyment, sometimes for further assurance, and, almost always, of warranty—this last often taking the place of the covenant for quiet enjoyment;" Rawle, Cov § 27. The covenants of seisin, for right to convey, and against incumbrances, are generally held to be *in praesenti;* if broken at all, they are broken as soon as made; Rawle, Cov. 318; 4 Kent 471; Whitney v. Dinsmore, 6 Cush. (Mass.) 128; 2 Washb. R. P. 478; see Mitch. R. P. 418; Allen v. Little, 36 Me. 170; and the various titles below for a fuller statement of the law relative to the different covenants for title

Implied covenants or *covenants in law* are those which arise by intendment and construction of law from the use of certain words having a known legal operation in the creation of an estate, so that after they have had their primary operation in the creation of the estate, the law gives them a secondary force, by implying an agreement on the part of the grantor to protect and preserve the estate so by these words already created; 1 C. B. 429; Bacon, Abr. *Covenant*, B; Rawle, Cov. § 270, n. In Co. Litt. 139 *b*, it is said that "of covenants there be two kinds: a covenant personal and a covenant real; a covenant in deed and a covenant in law." In a conveyance of lands in fee, the

words "grant, bargain, and sell," imply certain covenants; see 4 Kent 473; and the word "give" implies a covenant of warranty during the life of the feoffor; Raymond v. Raymond, 10 Cush. (Mass.) 134; Frost v. Raymond, 2 Cai. (N. Y.) 193, 2 Am. Dec. 228; Crouch v. Fowle, 9 N. H. 222, 32 Am. Dec. 350; Young v. Hargrave's Adm'r, 7 Ohio 69, pt. 2; (but this covenant and that implied from the word "grant" are abolished in England by 8 & 9 Vict. c. 106, § 14); and in a lease the use of the words "grant and demise;" Co. Litt. 384; Barney v. Keith, 4 Wend. (N. Y.) 502; "grant;" Cro. Eliz. 214; 1 P. & D. 360; "demise;" 4 Co. 80; 10 Mod. 162; Crouch v. Fowle, 9 N. H 222, 32 Am. Dec. 350; Vernam v. Smith, 15 N. Y. 327; "demisement;" 1 Show. 79; 1 Salk. 137; raise an implied covenant on the part of the lessor, as do "yielding and paying;" Boardman v. Harrington, 9 Vt. 151; on the part of the lessee. In regard to the covenants arising to each grantee by implication on sale of an estate with conditions, in parcels to several grantees, see Brouwer v. Jones, 23 Barb. (N. Y.) 153.

Covenants in deed. Express covenants.

Covenants in gross. Such as do not run with the land.

Covenants in law. Implied covenants.

Illegal covenants are those which are expressly or impliedly forbidden by law. Covenants are absolutely void when entered into in violation of the express provisions of statutes; Hall v. Mullin, 5 Har. & J. (Md.) 193; Seidenbender v. Charles' Adm'rs, 4 S. & R. (Pa.) 159, 8 Am. Dec. 682; Weaver v. Wallace, 9 N. J. L. 252; (see VOID); or if they are of an immoral nature; 1 B. & P. 340; Winebrinner v. Weisiger, 3 T. B. Monr. (Ky.) 35; against public policy; Ayer v. Hutchins, 4 Mass. 370, 3 Am. Dec. 232; Hodsdon v. Wilkins, 7 Greenl. (Me.) 113, 20 Am. Dec. 347; Gulick v. Ward, 10 N. J. L. 87, 18 Am. Dec. 389. Nichols v. Ruggles, 3 Day (Conn.) 145, 3 Am. Dec. 262; Clippinger v. Hepbaugh, 5 W. & S. (Pa.) 315, 40 Am. Dec. 519; Cowen v. Boyce, 5 How. (Miss.) 769; Scudder v. Andrews, 2 McLean, 464, Fed. Cas. No. 12,564; Toler v. Armstrong, 4 Wash. C. C. 297, Fed. Cas. No. 14,078; Armstrong v. Toler, 11 Wheat. (U. S.) 258, 6 L. Ed 468; in general restraint of trade; Ross v. Sadgheer, 21 Wend. (N. Y.) 166; Pierce v. Woodward, 6 Pick. (Mass.) 206; or fraudulent as between the parties; Duncan v. McCullough, 4 S. & R. (Pa.) 483; Banorgee v. Hovey, 5 Mass. 16, 4 Am. Dec. 17; or as to third persons; Bailey v. Lewis, 3 Day (Conn.) 450; Martin v. Mathiot, 14 S. & R. (Pa.) 214, 16 Am. Dec. 491; Case v. Gerrish, 15 Pick. (Mass.) 49.

Independent covenants are those the necessity of whose performance is determined entirely by the requirements of the covenant itself, without regard to other covenants between the parties relative to the same subject-matter or transactions or series of transactions.

Covenants are generally construed to be independent; Platt, Cov. 71; Barruso v. Madan, 2 Johns. (N. Y.) 145; Mill Dam Foundery v. Hovey, 21 Pick. (Mass.) 438; 3 Bingh. N. S. 355; unless the undertaking on one side is *in terms* a condition to the stipulation of the other, and then only consistently with the intention of the parties; 3 Maule & S. 308; or unless dependency results from the nature of the acts to be done, and the order in which they must necessarily precede and follow each other in the progress of performance; Willes 496; or unless the non-performance on one side goes to the entire substance of the contract, and to the whole consideration; Grant v. Johnson, 5 N. Y. 247. If once independent, they remain so; Evans v. Harris, 19 Barb. (N. Y.) 416.

Inherent covenants are those which relate directly to the land itself, or matter granted. Shepp. Touchst. 161. Distinguished from collateral covenants.

If real, they run with the land; Platt, Cov. 66.

Intransitive covenants are those the duty of performing which is limited to the covenantee himself, and does not pass over to his representative.

Joint covenants are those by which several parties agree to do or perform a thing together, or in which several persons have a joint interest as covenantees. Cheesbrough v. Agate, 26 Barb. (N. Y.) 603; Calvert v. Bradley, 16 How. (U. S.) 580, 14 L. Ed. 1066; Capen v. Barrows, 1 Gray (Mass.) 376; Evans v. Sanders, 10 B. Monr. (Ky.) 291. They may be in the negative; Wing v. Chase, 35 Me. 260.

Negative covenants are those in which the party obliges himself *not* to do or perform some act. Courts are unwilling to construe a negative covenant a condition precedent, inasmuch as it cannot be said to be performed till a breach becomes impossible; 2 Wms. Saund. 156; 1 Mod. 64; 2 Kebl. 674.

Obligatory covenants are those which are binding on the party himself. 1 Sid. 27; 1 Kebl. 337. They are distinguished from declaratory covenants.

Personal Covenants. See PERSONAL COVENANT.

Principal covenants. Those which relate directly to the principal matter of the contract entered into between the parties. They are distinguished from auxiliary.

Real covenants. See REAL COVENANT.

Covenants of rights to convey. See COVENANT OF RIGHT TO CONVEY.

Covenants of seisin. See COVENANT OF SEISIN.

Covenants to stand seized, etc. See COVENANT TO STAND SEIZED TO USES.

Transitive covenants are those personal

covenants the duty of performing which passes over to the representatives of the covenantor.

Covenants of warranty. See COVENANT OF WARRANTY.

Covenants are subject to the same rules as other contracts in regard to the qualifications of *parties*, the *assent* required, and the nature of the *purpose* for which the contract is entered into. See PARTIES; CONTRACTS.

No peculiar words are needed to raise an express covenant; Midgett v. Brooks, 34 N. C. 145, 55 Am. Dec. 405; 5 Q. B. 683; 3 Ex. 237, per Parke, B.; and by statute in Alabama, Arkansas, Delaware, Illinois, Indiana, Mississippi, Missouri, Montana, Nevada, New Mexico, Pennsylvania, and Texas, the words *grant*, *bargain*, and *sell*, in conveyances in fee, unless specially restricted, amount to covenants that the grantor was seized in fee, freed from incumbrances done or suffered by him, and for quiet enjoyment against his acts; 4 Kent 473, Gratz's Lessee v. Ewalt, 2 Binn. (Pa.) 95; Dickson v. Desire's Adm'r, 23 Mo. 151, 66 Am. Dec. 661; Chambers' Adm'r v. Smith's Adm'r, 23 Mo. 174; Griffin v. Reynolds, 17 Ala. 198; Prettyman v. Wilkey, 19 Ill 235; Davis v. Tarwater, 15 Ark 289; but do not imply any general warranty of title in Alabama, Arkansas, Pennsylvania, and North Carolina; 4 Kent 474, Winston v. Vaughan, 22 Ark. 72, 76 Am Dec. 418; Ricketts v. Dickens, 5 N. C. 343, 4 Am. Dec. 555; Roebuck v. Duprey, 2 Ala. 535. In Iowa, by the statute of 1843, the same rule was authorized, and upon this it was held that all covenants were express; Brown v. Tomlinson, 2 G. Greene (Ia.) 525, but no such provisions are to be found in the revised code of 1884. In Ohio the statute of 1795 was almost exactly copied from the Pennsylvania statute, but was repealed in 1824 and reenacted in substance, and entirely repealed in 1831, and the latest Revised Statutes (1884), like those of Iowa, are silent on the subject. The Wisconsin statute, providing that no covenant shall be implied, makes an exception in the case of the short form of conveyance provided by statute, and declares that such a deed shall have the effect of a conveyance in fee simple to the grantee, his heirs and assigns, etc: Rev. Stat. 1878. In Tennessee there is no statutory provision as to implied covenants, but a statutory short form of conveyance was held to authorize the broadest construction of the granting words unless their effect was specially limited by the instrument itself; Daly v. Willis, 5 Lea (Tenn.) 100. In California and North and South Dakota the same rule substantially is prescribed by statute in the first-named state, the implied covenants do not run with the land; Lawrence v. Montgomery, 37 Cal. 183. In Georgia a covenant of general warranty is held to include covenants of a right to convey, quiet enjoyment, and freedom from incumbrances; Burk v. Burk, 64 Ga. 632. See generally on this subject, Rawle, Cov. § 286.

Describing lands in a deed as bounded on a street of a certain description raises a covenant that the street shall be of that description; Loring v. Otis, 7 Gray (Mass.) 563; and that the purchaser shall have the use thereof; Moale v. Mayor, etc., of Baltimore, 5 Md. 314, 61 Am. Dec. 276; Greenwood v. R. R., 23 N. H. 261; which binds subsequent purchasers from the grantor; Thomas v. Poole, 7 Gray (Mass.) 83.

In New York it is provided by statute that no covenants can be implied in any conveyance of real estate; 4 Kent 469; but this provision does not extend to leases for years; Tone v Brace, 11 Paige (N. Y.) 566; Mack v. Patchin, 42 N. Y. 174, 1 Am. Rep. 506

The New York statute has been enacted in Michigan, Minnesota, Oregon, Wisconsin, and Wyoming, and no covenants for title seem to be implied in states other than those above named. In some cases where the covenants relate to lands, the rights and liabilities of the covenantor, or covenantee, or both, pass to the assignee of the thing to which the covenant relates. In such cases the covenant is said to run with the land. If rights pass the *benefit* is said to run; if liabilities, the *burden*. Only real covenants run with the land, and these only when the covenant has entered into the consideration for which the land, or some interest therein to which the covenant is annexed, passed between the covenantor and the covenantee; 2 Sugd. Vend. 468, 481; 2 M. & K. 535; Morse v. Aldrich, 19 Pick. (Mass.) 449; Hurd v. Curtis, 19 Pick. (Mass.) 464; Van Rensselaer v. Bonesteel, 24 Barb. (N. Y.) 366; Lyon v. Parker, 45 Me. 474; see 1 Washb. R. P. 526; and they die with the estate to which they are annexed; Lewis v. Cook, 35 N. C. 193; but an estoppel to deny passage of title is said to be sufficient; Trull v. Eastman, 3 Metc. (Mass.) 124, 37 Am. Dec. 126; and the passage of mere possession, or defeasible estate without possession, enables the covenant to run: Dickson v. Desire's Adm'r, 23 Mo. 151, 66 Am. Dec. 661; Chambers' Adm'r v. Smith's Adm'r, 23 Mo. 174.

It is said by some authorities that the benefit of a covenant to do acts upon land of the covenantee, made with the "covenantee and his assigns," will run with the land though no estate passed between the covenantor and covenantee; Rawle, Cov. 335; Year B. 42 Edw. III. 13; Allen v. Culver, 3 Den. (N. Y.) 301; but the weight of authority is otherwise; 2 Sugd. Vend. 468; Platt, Cov. 461. Covenants concerning title generally run with the land; Carter v. Denman's Ex'rs, 23 N. J. L. 260; except those that are broken before the land passed; 4 Kent 473; Swasey v. Brooks, 30 Vt. 692. See COVENANT OF SEISIN, etc. "*Until breach*, covenants for title, without distinction between them, run with the land to heirs and

assigns. But while this is well settled, a strong current of American authority has set in favor of the position that the covenants for seisin, for right to convey, and, perhaps, against incumbrances, are what are called covenants *in præsenti*,—if broken at all, their breach occurs at the moment of their creation. . . . These covenants, it is held, are then turned into a mere right of action, which is not assignable at law and can neither pass to an heir, a devisee, or a subsequent purchaser. A distinction is considered, by this class of cases, to exist, in this respect, between the covenants first named, and those for quiet enjoyment, of warranty, and for further assurance, which are held to be prospective in their character;" Rawle, Cov. §§ 204, 205. See also Greenby v. Wilcocks, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379.

Covenants in leases, by virtue of the statute 32 Hen. VIII. c. 34, which has been reenacted in most of the states, are assignable as respects assignees of the reversion and of the lease. The lessee continues liable on express covenants after an assignment by him, but not on implied ones; 4 Term 98; but he is liable to the assignee of the lessor on implied covenants, at common law; Platt, Cov. 532; 2 Sugd. Vend. 466; Burton, R. P. § 855. See 1 Washb. R. P. 526.

In case of the assignment of lands in parcels, the assignees may recover *pro rata*, and the original covenantee may recover according to his share of the original estate remaining. 2 Sugd. Vend. 508; Rawle, Cov. § 215; Allen v. Little, 36 Me. 170; McClure's Ex'rs v. Gamble, 27 Pa. 288; White v. Whitney, 3 Metc. (Mass.) 87; Dickinson v. Hoomes's Adm'r, 8 Gratt. (Va.) 407; Dougherty v. Duvall's Heirs, 9 B. Monr. (Ky.) 58. But covenants are not, in general, apportionable. McClure's Ex'rs v. Gamble, 27 Pa. 288. See Spencer's case, 1 Sm. Lead. Cas. 206.

In Practice. A form of action which lies to recover damages for breach of a contract under seal. It is one of the *brevia formata* of the register, and is sometimes a concurrent remedy with *debt*, though never with *assumpsit*, and is the only proper remedy where the damages are unliquidated in nature and the contract is under seal; Fitzh. N. B. 340; Chit. Pl. 112, 113; 2 Steph. N. P. 1058. As to the early history of the action, see Salmond, 3 Sel. Essays, Anglo-Amer. L. H. 324.

The action lies, generally, where the covenantor does some act contrary to his agreement, or fails to do or perform that which he has undertaken; 4 Dane, Abr. 115; or does that which disables him from performance; Cro. Eliz. 449; 15 Q. B. 88; Heard v. Bowers, 23 Pick. (Mass.) 455.

To take advantage of an oral agreement modifying the original covenant in an essential point, the covenant must be abandoned and assumpsit brought; Lehigh Coal & Nav. Co. v. Harlan, 27 Pa. 429; Sherwin v. R. R. Co., 24 Vt. 347.

The venue is local when the action is founded on privity of estate; 1 Wms. Saund. 241 *b*, n.; and transitory when it is founded upon privity of contract. As between original parties to the covenant, the action is transitory; and, by 32 Hen. VIII. c. 34, an action of covenant by an assignee of the reversion against a lessor, or by a lessee against the assignee of the reversion, is also transitory; 1 Chit. Pl. 274.

The declaration must, at common law, aver a contract under seal; 2 Ld. Raym. 1536; and either make profert thereof or excuse the omission; 3 Term 151; at least of such part as is broken; Bender v. Fromberger, 4 Dall. (U. S.) 436, 1 L. Ed. 898, Killian v. Herndon, 4 Rich. (S. C.) 196; and a breach or breaches; Fortenbury v. Tunstall, 5 Ark. 263; Steele v. Curle, 4 Dana (Ky.) 381; which may be by negativing the words of the covenant in actions upon covenants of seisin and right to convey; Rawle, Cov. § 176; or according to the legal effect; but must set forth the incumbrance in case of a covenant against incumbrances; *id.* § 86; and must allege an eviction in case of warranty; *id.* § 155. The disturbance must be averred to have been under lawful title; *id.* No consideration need be averred or shown, as it is said to be implied from the seal; but performance of an act which constitutes a condition precedent to the defendant's covenant, if there be any such, must be averred; 2 Greenl. Ev. § 235; Nesbitt v. McGehee, 26 Ala. 748. The damages laid must be large enough to cover the real amount sought to be recovered; Clarke v. McAnulty, 3 S. & R. (Pa.) 364; Jordan v. Cooper, *id.* 567.

There is no plea of general issue in this action. Under *non est factum*, the defendant may show any facts contradicting the making of the deed; Haggart v. Morgan, 5 N. Y. 422, 55 Am. Dec. 350; Agent of State Prison v. Lathrop, 1 Mich. 438; as, personal incapacity; 2 Campb. 272; that the deed was fraudulent; Lofft 457; was not delivered; 4 Esp. 255; or was not executed by all the parties; 6 Maule & S. 341.

Non infregit conventionem and *nil debet* have both been held insufficient; Com. Dig. *Pleader*, 2 V, 4. As to the effect of covenant performed, see COVENANTS PERFORMED.

The judgment is that the plaintiff recover a named sum for the damages which he has sustained by reason of the breach or breaches of covenant, together with costs.

COVENANT TO CONVEY. A covenant by which the covenantor undertakes to convey to the covenantee the estate described in the covenant, under certain circumstances.

This form of conditional alienation of lands is in frequent use; Espy v. Anderson, 14 Pa. 308; Atkins v. Bahrett, 19 Barb. (N. Y.) 639. Marshall v. Haney 4 Md. 498, 59 Am. Dec. 92, Morgan v. Smith, 11 Ill. 194; Campbell v. Gittings, 19 Ohio, 347. Substantially the same effect is secured as by a conveyance

and a mortgage back for the purchase-money, with this important difference, however, that the title remains in the covenantor until he actually executes the conveyance.

The remedy for breach may be by action on the covenant; Haverstick v. Gas Co., 29 Pa. 254; but the better remedy is said to be in equity for specific performance; Poor Directors v. McFadden, 1 Grant Cas. (Pa.) 230.

It is satisfied only by a perfect conveyance of the kind bargained for; Atkins v. Bahrett, 19 Barb. (N. Y.) 639; otherwise where an imperfect conveyance has been accepted; Marshall v. Haney, 4 Md. 498, 59 Am. Dec. 92.

COVENANT FOR FURTHER ASSURANCE. One by which the covenantor undertakes, at the requirement of the covenantee, to do such reasonable acts in addition to those already performed as may be necessary for the completion of the transfer made, or intended to be made. It relates both to the title of the vendor and to the instrument of conveyance, and operates as well to secure the performance of all acts for supplying any defect in the former, as to remove all objections to the sufficiency and security of the latter. Platt Cov. 341.

The covenant is of frequent occurrence in English conveyances; but its use here seems to be limited to some of the middle states; 2 Washb. R. P. 648; Griffin v. Fairbrother, 10 Me. 91; Prescott v. Trueman, 4 Mass. 627, 3 Am. Dec. 246; Raymond v. Raymond, 10 Cush. (Mass.) 134. It is usual in railroad and other corporation mortgages.

The covenantor, in execution of his covenant, is not required to do unnecessary acts; Yelv. 44; 9 Price 43. He must in equity grant a subsequently acquired title; 2 Ch. Cas 212; 2 P. Wms. 630; must levy a fine; 16 Ves. 366; 4 Maule & S. 188; must remove a judgment or other incumbrance; 5 Taunt. 427; but a mortgagor with such covenant need not release his equity; 1 Ld. Raym. 36. It may be enforced by a bill in equity for specific performance, or an action at law to recover damages for the breach; 2 Co. 3 *a*; 6 Jenk. Cas. 24; Rawle, Cov. § 362; 2 Washb. R. P. 666.

COVENANT AGAINST INCUMBRANCES. One which has for its object security against those rights to, or interests in, the land granted which may subsist in third persons to the diminution of the value of the estate, though consistently with the passing of the fee by the deed of conveyance. See INCUMBRANCE.

The mere existence of an incumbrance constitutes a breach of this covenant; 2 Washb. R. P. 658; McLemore v. Mabson, 20 Ala. 137; without regard to the knowledge of the grantee; 2 Greenl. Ev. § 242; Butler v. Gale, 27 Vt. 739; Medler v. Hiatt, 8 Ind. 171.

Such covenants, being *in præsenti*, do not run with the land in Massachusetts and most of the other states; but the rule is otherwise, either by statute or decision in *Maine*, R. S. 1883, p. 697, tit. 9, § 18; *Colorado*, R. S. 1883, 172; *Georgia*, Code 1882, 672; *New York*, Hall v. Dean, 13 Johns. 105; Colby v. Osgood, 29 Barb. 339; *Ohio*, Foote v. Burnet, 10 Ohio, 327, 36 Am. Dec. 90; *Minnesota*, Kimball v. Bryant, 25 Minn. 496; *Missouri*, Magwire v. Riggin, 44 Mo. 512; Hall v. Scott Co., 7 Fed. 341, 2 McCrary 356, *Indiana*, Martin v. Baker, 5 Blackf. 232; *Wisconsin*, Mecklem v. Blake, 22 Wis. 495, 99 Am. Dec. 68 (reversing the rule adopted in Pillsbury v. Mitchell, 5 Wis. 17); *Iowa*, Knadler v. Sharp, 36 Ia. 232; *South Carolina*, Brisbane v. M'Crady's Ex'rs, 1 N. & McC. 104, 9 Am. Dec. 676; *Vermont*, Cole v. Kimball, 52 Vt. 639; and possibly in Michigan. See Rawle, Cov. § 212. If the covenant is so linked with another covenant as to have a prospective operation it runs with the land; *id.* This covenant is usually coupled with that of seisin in considering this question, but it was not treated as running with the land in this country so readily as the latter; Rawle, Cov. § 212.

Yet the incumbrance may be of such a character that its enforcement may constitute a breach of the covenant of warranty; as in case of a mortgage; Hamilton v. Cutts, 4 Mass. 349, 3 Am. Dec. 222; Sprague v. Baker, 17 Mass. 586; Tufts v. Adams, 8 Pick. (Mass.) 547.

The measure of damages is the amount of injury actually sustained; Delavergne v. Norris, 7 Johns. (N. Y.) 358, 5 Am. Dec. 281; Bean v. Mayo, 5 Greenl. (Me.) 94; Wyman v. Ballard, 12 Mass. 304; Batchelder v. Sturgis, 3 Cush. (Mass.) 201; Morrison v. Underwood, 20 N. H. 369; Willson v. Willson, 25 N. H. 229, 57 Am. Dec. 320; Rawle, Cov. § 188.

The covenantee may extinguish the incumbrance and recover therefor, at his election, in the absence of agreement; Lawless v. Collier's Ex'rs, 19 Mo. 480; Willson v. Willson, 25 N. H. 229, 57 Am. Dec. 320. See COVENANT; REAL COVENANT.

COVENANT OF NON-CLAIM. A covenant sometimes employed, particularly in the New England States, and in deeds of extinguishment of ground rents in Pennsylvania, that neither the vendor, nor his heirs, nor any other person, etc., shall claim any title in the premises conveyed. Rawle, Cov. § 22. It is substantially the same as the covenant of warranty, *q. v.*; *id.* § 231.

COVENANT NOT TO SUE. One entered into by a party who has a cause of action at the time of making it, by which he agrees not to sue the party liable to such action.

A *perpetual* covenant not to sue is one by which the covenantor agrees not to sue the covenantee at any time. Such a covenant operates as a release to the covenantee, and may be pleaded as such. Cro. Eliz. 623; Hastings v. Dickinson, 7 Mass. 153, 5 Am.

Dec. 34; Shed v. Pierce, 17 Mass. 623; Harvey v. Harvey, 3 Ind. 473; 34 L. J. Q. B. 25. And see Wolf v. Wyeth, 11 S. & R. (Pa.) 149.

A covenant of this kind with one of several, jointly and severally bound, will not protect the others so bound; 12 Mod. 551; Ward v. Johnson, 6 Munf. (Va.) 6, 8 Am. Dec. 729; Walker v. McCulloch, 4 Greenl. (Me.) 421; Mason v. Jouett's Adm'r, 2 Dana (Ky.) 107; Shed v. Pierce, 17 Mass. 623. It is equivalent to a release with a reserve of remedies, and hence is properly used in composition deeds in preference to a release, which discharges all sureties and co-debtors; 3 B. & C. 361.

A covenant by one of several partners not to sue cannot be set up as a release in an action by all; 3 P. & D. 149.

A *limited* covenant not to sue, by which the covenantor agrees not to sue for a limited time, does not operate a release; and a breach must be taken advantage of by action; Carth. 63; 1 Show. 46; 2 Salk. 573; 11 Q. B. 852; Howland v. Marvin, 5 Cal. 501. See Keep v. Kelly, 29 Ala. 322, as to requisite consideration. See Leake, Contr. 928.

COVENANT FOR QUIET ENJOYMENT. An assurance against the consequences of a defective title, and of any disturbances thereupon. Platt, Cov. 312; 11 East 641; Rawle, Cov. § 91. By it, when general in its terms, the covenantor stipulates at all events; 1 Mod. 101; to indemnify the covenantee against all acts committed by virtue of a paramount title; Platt, Cov. 313; 4 Co. 80 *b*; Cro. Car 5; 3 Term 584; Howard v. Doolittle, 3 Duer (N. Y.) 464; Parker v. Dunn, 47 N. C. 203; Hagler v. Simpson, 44 N. C. 384; Carter v. Denman's Ex'rs, 23 N. J. L. 260; not including the acts of a mob; Surget v. Arighi, 11 Smedes & M. (Miss.) 87, 49 Am. Dec. 46; Rantin v. Robertson, 2 Strobh. (S. C.) 367; nor a mere trespass by the lessor, Mayor, etc., of New York v. Mabie, 13 N. Y. 151, 64 Am. Dec. 538.

But this rule may be varied by the terms of the covenant; as where it is against acts of a particular person, Cro. Eliz. 212; 5 Maule & S. 374; or those "claiming or pretending to claim;" 10 Mod. 383; or molestation by any person. See Surget v. Arighi, 11 Smedes & M. (Miss.) 87, 49 Am. Dec. 46.

It has practically superseded the ancient doctrine of warranty as a guaranty of title, in English conveyances; 2 Washb. R. P. 661; but the latter is more common in conveyances in America; Rawle, Cov. § 91.

It occurs most frequently in leases; 1 Washb. R. P. 325; Rawle, Cov. § 91; and is usually the only covenant used in such cases; it is there held to be raised by the words grant, demise, lease, yielding and paying, give, etc.; 1 P. & D. 360; Crouch v. Fowle, 9 N. H. 222, 32 Am. Dec. 350; Vernam v. Smith, 15 N. Y. 327; 6 Bingh. 656; 4 Kent 474, n.; and exists impliedly in a parol lease; 20 E. L. & Eq. 374; Carter v. Denman's Ex'rs, 23 N. J. L. 260; see Blydenburgh v. Cotheal, 1 Duer (N. Y.) 176. It is usual in ground-rent deeds in Pennsylvania, Rawle, Cov. § 91.

COVENANT OF RIGHT TO CONVEY. An assurance by the covenantor that the grantor has sufficient capacity and title to convey the estate which he by his deed undertakes to convey.

In modern English conveyancing, this covenant has taken the place of the covenant of seisin; 2 Washb. R. P. 648. It is said to be the same as a covenant of seisin; Griffin v. Fairbrother, 10 Me. 91; Prescott v. Trueman, 4 Mass. 627, 3 Am. Dec. 246; but is not necessarily so, as it includes the capacity of the grantor; T. Jones 195; Cro. Jac. 358.

The breach takes place on execution of the deed, if at all; Freem. 41; Chapman v. Holmes' Ex'rs, 10 N. J. L. 20; and the covenantee need not wait for a disturbance to bring suit; 5 Taunt. 426; but a second recovery of damages cannot be had for the same breach; Platt, Cov. 310; 1 Maule & S. 365, 4 *id.* 53.

COVENANT OF SEISIN. An assurance to the grantee that the grantor has the very estate, both in quantity and quality, which he professes to convey. Platt, Cov. 306. It has given place in England to the covenant of right to convey, but is in use in several states; 2 Washb. R. P. 648.

In England; 1 Maule & S. 355; 4 *id.* 53, and in several states of the United States, *e. g.* Colorado, Georgia, New York, Ohio, Minnesota and other states (see Rawle, Cov. § 211); by decisions; Martin v. Baker, 5 Blackf. (Ind.) 232; Devore v. Sunderland, 17 Ohio 52, 49 Am. Dec. 442; Mecklem v. Blake, 22 Wis. 495, 99 Am. Dec. 68; Schofield v. Homestead Co., 32 Ia. 317, 7 Am. Rep. 197; Maguire v. Riggin, 44 Mo. 512; or by statute; 2 Washb. R. P. 650, this covenant runs with the land, and may be sued on for breach by an assignee; in other states it is held that a mere covenant of *lawful seisin* does not run with the land, but is broken, if at all, at the moment of executing the deed; Bearce v. Jackson, 4 Mass. 408; Prescott v. Trueman, 4 Mass. 627, 3 Am. Dec. 246; Raymond v. Raymond, 10 Cush. (Mass.) 134; Fowler v. Poling, 2 Barb. (N. Y.) 303; Cushman v. Blanchard, 2 Greenl. (Me.) 269, 11 Am. Dec. 76; Wilson v. Forbes, 13 N. C. 30; Dickinson v. Hoomes's Adm'r, 8 Gratt. (Va.) 396; Kincaid v. Buttain, 5 Sneed (Tenn.) 119; Bottorf v. Smith, 7 Ind. 673; Brady v. Spurck, 27 Ill. 482; Lawrence v. Montgomery, 37 Cal. 188; Pate v. Mitchell, 23 Ark. 590, 79 Am. Dec. 114. See COVENANT AGAINST INCUMBRANCES.

A covenant for *indefeasible seisin* is everywhere held to run with the land; Garfield v. Williams, 2 Vt. 328; Wilson v. Forbes, 13 N. C. 30; Bender v. Fromberger, 4 Dall. (Pa.)

439, 1 L. Ed. 898; Kincaid v. Brittain, 5 Sneed (Tenn.) 123; Abbott v. Allen, 14 Johns. (N. Y.) 248; Smith v. Strong, 14 Pick. (Mass.) 128; Collier v. Gamble, 10 Mo. 467; and to apply to all titles adverse to the grantor's; 2 Washb. R. P. 656.

A covenant of *seisin* or *lawful seisin*, in England and most of the states, is satisfied only by an indefeasible seisin; Rawle, Cov. § 41; 7 C. B. 310; Mills v. Catlin, 22 Vt. 106; Parker v. Brown, 15 N. H. 176; Lockwood v. Sturdevant, 6 Conn. 374; while in other states possession under a claim of right is sufficient; Catlin v. Hurlburt, 3 Vt. 403; Raymond v. Raymond, 10 Cush. (Mass.) 134; Bearce v. Jackson, 4 Mass. 408; Marston v. Hobbs, 2 Mass. 439, 3 Am. Dec. 61; Wilson v. Widenham, 51 Me. 567; Montgomery v. Reed, 69 Me. 510; Watts v. Parker, 27 Ill. 229; Scott v. Twiss, 4 Neb. 133; Vancourt v. Moore, 26 Mo. 92; Backus' Adm'rs v. McCoy, 3 Ohio 211, 17 Am. Dec. 585; Robinson v. Neil, 3 Ohio 525.

A covenant of seisin, of whatever form, is broken at the time of the execution of the deed if the grantor has no possession either by himself or another; and no rights can pass to the assignee of the grantee, Greenby v. Wilcocks, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379; Garfield v. Williams, 2 Vt. 327; Mitchell v. Warner, 5 Conn. 497; Bartholomew v. Candee, 14 Pick. (Mass.) 170, Devore v. Sunderland, 17 Ohio 60, 49 Am. Dec. 442, Dickinson v. Hoomes's Adm'r, 8 Gratt. (Va.) 397; Pollard v. Dwight, 4 Cra. (U. S.) 430, 2 L. Ed. 666; Allen v. Little, 36 Me. 170; Abernathy v. Boazman, 24 Ala. 189, 60 Am. Dec. 459; 4 Kent 471. But it is said that this is only a technical breach, and that a cause of action for a substantial breach does not accrue, and the statute of limitations commence to run, till there has been some substantial injury; Foshay v. Shafer, 116 Ia. 302, 89 N. W. 1106; but other cases hold that the full consideration paid may be recovered immediately upon breach. The cases will be found in 8 Am. & Engl. Enc. Law 186.

The existence of an outstanding life-estate; Mills v. Catlin, 22 Vt. 106; a material deficiency in the amount of land, Pringle v. Witten's Ex'rs, 1 Bay (S. C.) 256, 1 Am. Dec. 612; see Phipps v. Tarpley, 24 Miss. 597; non-existence of the land described; Wheelock v. Thayer, 16 Pick. (Mass.) 68; the existence of fences or other fixtures on the premises belonging to other persons, who have a right to remove them, Mott v. Palmer, 1 N. Y. 564; West v. Stewart, 7 Pa. 122; Van Wagner v. Van Nostrand, 19 Ia. 427; or of a paramount right in another to divert a natural spring; Clark v. Conroe's Estate, 38 Vt. 471; or to prevent the grantee from damming water to a certain height when that right is reserved to him by his deed; Hall v. Gale, 20 Wis. 293; Traster v. Snelson's Adm'r, 29 Ind. 96; concurrent seisin of another as tenant in common; Wheeler v. Hatch, 12 Me. 389; Morrison v. McArthur, 43 Me. 567; adverse possession of a part by a stranger; Sedgwick v. Hollenback, 7 Johns. (N. Y.) 376; a conveyance by one of two tenants in common of the entire estate (so far as his half is concerned); Downer's Adm'rs v. Smith, 38 Vt. 464; constitute a breach of this covenant. But the existence of such easements or incumbrances as do not affect the seisin of the purchaser does not constitute a breach of the covenant; Rawle, Cov. § 59. For instance, the existence of a highway over a part of the land; Jackson v. Hathaway, 15 Johns. (N. Y.) 449, 8 Am. Dec. 263; Lewis v. Jones, 1 Pa. 336, 44 Am. Dec. 138; Peck v. Smith, 1 Conn. 103, 6 Am. Dec. 216; Vaughn v. Stuyaker, 16 Ind. 340; or of a judgment, mortgage, or right of dower, Rawle, Cov. § 59; Fitzhugh v. Croghan, 2 J. J. Marsh. (Ky.) 430, 19 Am. Dec. 139; Tuite v. Miller, 10 Ohio 383; Sedgwick v. Hollenback, 7 Johns. (N. Y.) 380; (otherwise if the mortgagee has entered; Rawle, Cov. § 59); the removal of fixtures; Loughran v. Ross, 45 N. Y. 792, 6 Am. Rep. 173. But see Whitney v. Dinsmore, 6 Cush. (Mass.) 124.

In the execution of a power, a covenant that the power is subsisting and not revoked is substituted; Platt, Cov. 309.

COVENANT TO STAND SEISED TO USES. A covenant by means of which under the statute of uses a conveyance of an estate may be effected. Burton, R. P. §§ 136, 145.

Such a covenant cannot furnish the ground for an action of covenant broken, and in this respect resembles the ancient real covenants.

The consideration for such a covenant must be relationship either by blood or marriage; 2 Washb. R. P. 129; See Corwin v. Corwin, 6 N. Y. 342, 57 Am. Dec. 453.

As a mode of conveyance it has fallen into disuse; though the doctrine is often resorted to by courts in order to give effect to the intention of the parties who have undertaken to convey lands by deeds which are insufficient for the purpose under the rules required in other forms of conveyance; 2 Washb. R. P. 155; 2 Sand. Uses 79, 83; Wallis v. Wallis, 4 Mass. 136, 3 Am. Dec. 210; Gale v. Coburn, 18 Pick. (Mass.) 397; Allen v. Sayward, 5 Greenl. (Me.) 232, 17 Am. Dec. 221; Jackson v. Staats, 11 Johns. (N. Y.) 351, 6 Am. Dec. 376, Cains' Lessee v. Jones, 5 Yerg. (Tenn.) 249.

COVENANT OF WARRANTY. An assurance by the grantor of an estate that the grantee shall enjoy the same without interruption by virtue of paramount title. Parker v. Dunn, 47 N. C. 203; Howard v. Doolittle, 3 Duer (N. Y.) 464; Rindskopf v. Trust Co., 58 Barb. (N. Y.) 36; Moore v. Lanham, 3 Hill (S. C.) 304.

It is not in use in English conveyances, but is in general use in the United States; 2 Washb. R. P. 659; and in several states

is the *only* covenant in general use; Rawle, Cov. § 21; Leary v. Durham, 4 Ga. 593; Dickinson v. Hoome's Adm'r, 8 Gratt. (Va.) 353; Caldwell v. Kirkpatrick, 6 Ala. 60, 41 Am. Dec. 36.

A special warranty is not a covenant against incumbrances; Washington City Sav. Bank v. Thornton, 83 Va. 157, 2 S. E. 193. See Bender v. Fromberger, 4 Dall. (Pa.) 436, 1 L. Ed. 898.

The form in common use is as follows: "And I the said [grantor], for myself, my heirs, executors, and administrators, do covenant with the said [grantee], his heirs and assigns, that I will, and my heirs, executors, and administrators shall, *warrant* and *defend* the same to the said [grantee], his heirs and assigns forever, against the lawful claims and demands of all persons [or, of all persons claiming by, through, or under me, but against none other]," [or other special covenant, as the case may be]. When *general*, it applies to lawful adverse claims of all persons whatever; when *special*, it applies only to certain persons or claims to which its operation is limited or restricted; 2 Washb. R. P. 665. See a form in Rawle, Cov. § 21, n.

This limitation may arise from the nature of the subject-matter of the grant; Tufts v. Adams, 8 Pick. (Mass.) 547; Wheelock v. Henshaw, 19 Pick. (Mass.) 341; Patterson's Lessee v. Pease, 5 Ohio 190.

Such covenants give the covenantee and grantee the benefit of subsequently acquired titles; Jackson v. Matsdorf, 11 Johns. (N. Y.) 91, 6 Am. Dec. 355; Brown v. McCormick, 6 Watts (Pa.) 60, 31 Am. Dec. 450; Terrett v. Taylor, 9 Cra. (U. S.) 43, 3 L. Ed. 650; Wark v. Willard, 13 N. H. 389; Patterson's Lessee v. Pease, 5 Ohio 190; Somes v. Skinner, 3 Pick. (Mass.) 52; Lawry v. Williams, 13 Me. 281; to the extent of their terms, Blake v. Tucker, 12 Vt. 39; Trull v. Eastman, 3 Metc. (Mass.) 121, 37 Am. Dec. 126; Jackson v. Hoffman, 9 Cow. (N. Y.) 271, Larrabee v. Larrabee, 34 Me. 483; but not if an interest actually passes at the time of making the conveyance upon which the covenant may operate; Lewis v. Baird, 3 McLean 56, Fed. Cas. No. 8,316; Blanchard v. Brooks, 12 Pick. (Mass.) 47; Wynn v. Harmon's Devisees, 5 Gratt. (Va.) 157; in case of terms for years, as well as conveyances of greater estates; Wms. R. P. 229, 4 Kent 261, n.; Cro. Car. 109; Barney v. Keith, 4 Wend. (N. Y.) 502; as against the grantor and those claiming under him; 2 Washb. R. P. 479; including purchasers for value; Bates v. Norcross, 14 Pick. (Mass.) 224; Kimball v. Blaisdell, 5 N. H. 533, 22 Am. Dec. 476; Allen v. Sayward, 5 Me. 231, 17 Am. Dec. 221; Jackson v. Murray, 12 Johns. (N. Y.) 201; Terrett v. Taylor, 9 Cra. (U. S.) 53, 3 L. Ed. 650; but see Jackson v. Bradford, 4 Wend. (N. Y.) 619. And this principle does not operate to prevent the grantee's action for breach of the covenant, if evicted by such title; Jarvis v. Aikens, 25 Vt. 635; Curtis v. Deering, 12 Me. 499. See Wheeler v. Wheeler, 33 Me. 347. A deed of land is not void as between the parties because of a want of consideration, and such want is no answer to an action upon a breach of covenant of warranty; Comstock v. Son, 154 Mass. 389.

In case of a *release* of right and title, covenants limited to those claiming under the grantor do not prevent the assertion by the grantor of a subsequently acquired title; Bell v. Twilight, 26 N. H. 401; Jackson v. Peck, 4 Wend. (N. Y.) 300; Doane v. Willcutt, 5 Gray (Mass.) 328, 66 Am. Dec. 369; Kinsman's Lessee v. Loomis, 11 Ohio 475; Ham v. Ham, 14 Me. 351; Cole v. Persons Unknown, 43 Me. 432; Gee v. Moore, 14 Cal. 472.

It is a real covenant, and runs with the estate in respect to which it is made, into the hands of whoever becomes the owner, 2 Washb. R. P. 659; Chal. R. P. 279; Laurence v. Senter, 4 Sneed (Tenn.) 52; Marbury v. Thornton, 82 Va. 702, 1 S. E. 909; Succession of Cassidy, 40 La. Ann. 827, 5 South. 292; against the covenantor and his personal representatives; McClures' Ex'rs v. Gamble, 27 Pa. 288; Carter v. Denman's Ex'rs, 23 N. J. L. 260; see Mygatt v. Coe, 142 N. Y. 78, 36 N. E. 870, 24 L. R. A. 850; to the extent of assets received, and cannot be severed therefrom; Lewis v. Cook, 35 N. C. 193.

The covenant of warranty and that of seisin or of right to convey are not equivalent covenants. Defect of title will sustain an action upon the latter, while disturbance of possession is requisite to recover upon the former; Douglass v. Lewis, 131 U. S. 75, 9 Sup. Ct. 634, 33 L. Ed. 53. Grantors having made an express contract of warranty, cannot set up knowledge of vice in their title, to exonerate themselves from the obligation of their contract; New Orleans v. Gaines, 138 U. S. 595, 11 Sup. Ct. 428, 34 L. Ed. 1102.

The action for breach should be brought by the owner of the land and, as such, assignee of the covenant at the time it is broken; Bickford v. Page, 2 Mass. 455; Elder v. Elder, 10 Me. 81, 25 Am. Dec. 205; Thompson v. Sanders, 5 T. B. Monr. (Ky.) 357; Chase v. Weston, 12 N. H. 413; but may be by the original covenantee, if he has satisfied the owner. Withy v. Mumford, 5 Cow. (N. Y.) 137, Wheeler v. Sohier, 3 Cush. (Mass.) 222; Thompson v. Sanders, 5 T. B. Monr. (Ky.) 357; Booth v. Starr, 1 Conn. 244, 6 Am. Dec. 233; Markland v. Crump, 18 N. C. 94, 27 Am. Dec. 230. Redwine v. Brown, 10 Ga. 311; Smith v. Perry, 26 Vt. 279.

To constitute a breach there must be an eviction by paramount title; Rawle, Cov. § 131; Fowler v. Poling, 6 Barb. (N. Y.) 165; Evans v. Lewis, 5 Harr. (Del.) 162; Faries v. Smith's Adm'r, 11 Rich. (S. C.) 80; Norton

v. Jackson, 5 Cal. 262; Hannah v. Henderson, 4 Ind. 174; Picket's Adm'r v. Picket's Adm'r, 6 Ohio St. 525; Vancourt v. Moore, 26 Mo. 92; Moore v. Vail, 17 Ill. 185; Reed v. Pierce, 36 Me. 455, 58 Am. Dec. 761; Higgins v. Johnson, 14 Ark. 309, 60 Am. Dec. 544; Cheney v. Straube, 35 Neb. 521, 53 N. W. 479; McGregor v. Tabor (Tex.) 26 S. W. 143; Gleason v. Smith, 41 Vt. 296; which may be constructive; Curtis v. Deering, 12 Me. 199; Moore v. Vail, 17 Ill. 185; and it is sufficient if the tenant yields to the true owner, or if, the premises being vacant, such owner takes possession; St. John v. Palmer, 5 Hill. (N. Y.) 599; Hamilton v. Cutts, 4 Mass. 349, 3 Am. Dec. 222; Beebe v. Swartwout, 3 Gil. (Ill.) 162; Wilmington & R. R. Co. v. Robeson, 27 N. C. 393; Ogden v. Ball, 40 Minn. 94, 41 N. W. 453; Hodges v. Latham, 98 N. C. 239, 3 S. E. 495, 2 Am. St. Rep. 333; Succession of Cassidy, 40 La. Ann. 827, 5 South. 292; McGary v. Hastings, 39 Cal. 560, 2 Am. Rep. 456; Kellog v. Platt, 33 N. J. L. 328. But in such case the grantee must prove the existence and assertion of such paramount, outstanding, hostile title; Brown v. Corson, 16 Or. 388, 19 Pac. 66, 21 Pac. 47; Claycomb v. Munger, 51 Ill. 377; Crance v. Collenbaugh, 47 Ind. 256; Ryerson v. Chapman, 66 Me. 557; Merritt v. Morse, 108 Mass. 276; Smith v. Sprague, 40 Vt. 43; and assume the burden of proof with as much particularity as if suing in ejectment; Rawle, Cov. § 136; Thomas v. Stickle, 32 Ia. 76; Westrope v. Chambers' Estate, 51 Tex. 178, unless the adverse right has been established by a judgment or decree in a suit of which the covenantor had been properly notified; Rawle, Cov. § 136; in which case the judgment or decree will be conclusive evidence of the validity of the paramount title; *id.* See *id.* § 123 *et seq.*

Exercise of the right of eminent domain does not render the covenantor liable; Taylor v. Young, 71 Pa. 83; Kimball v. Semple, 25 Cal. 452; Raymond v. Raymond, 10 Cush. (Mass.) 134; Brown v. Jackson, 3 Wheat. (U. S.) 452, 4 L. Ed. 432.

When the covenantee is threatened with eviction, it is usual and proper for him to give notice to the covenantor to appear and defend the suit. If it appears on the record that the covenantor received the notice or if he defends the suit, recovery therein will be conclusive against him in an action by the covenantee; otherwise the question of notice will go to the jury on the facts. If no notice was given, the record of the adverse suit is not even *prima facie* evidence that the adverse title was paramount. Notice of the adverse suit is not indispensable to a recovery against the covenantor; Rawle, Cov. § 125.

COVENANTS PERFORMED. A plea to an action of covenant, in use in Pennsylvania, whereby the defendant, upon proper notice to the plaintiff, may give anything in evidence which he might have pleaded. Bender v. Fromberger, 4 Dall. (U. S.) 439, 1 L. Ed. 898; Neave v. Jenkins, 2 Yeates (Pa.) 107; Roth v. Miller, 15 S. & R. (Pa.) 105. And this evidence, it seems, may be given in the circuit court without notice, unless called for; Webster v. Warren, 2 Wash. C. C. 456, Fed. Cas. No. 17,339.

COVENANTEE. One in whose favor a covenant is made. Shepp. Touch. 150.

COVENANTOR. One who becomes bound to perform a covenant.

COVENTRY ACT. The common name for the statute 22 & 23 Car. II. c. 1,—it having been enacted in consequence of an assault on Sir John Coventry in the street, and slitting his nose, in revenge, as was supposed, for some obnoxious words uttered by him in parliament.

By this statute it is enacted that if any person shall, of malice aforethought, and by lying in wait, unlawfully cut or disable the tongue, put out an eye, slit the nose, cut off the nose or lip, or cut off or disable any limb or member, of any other person, with intent to maim or disfigure him, such person, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy. The act was repealed by 9 Geo. IV. c. 31.

COVERING DEED. A trust deed executed by a trading company to secure an issue of debentures.

Such deed usually contains a conveyance to the trustees of the holders of debentures or debenture stock with provisions authorizing the company to retain possession and carry on the business until forfeiture. Simonson, Debentures, 38. It corresponds to the general corporation mortgage to secure an issue of bonds, as used in this country. They did not formerly include a charge on personal chattels because of decisions that trust deeds containing charges on personalty must be framed and registered under the Bills of Sales acts; 34 Ch. Div. 43; but it having been held that a covering deed is not subject to the registration provisions; (1891) 1 Ch. (C. A.) 627; (1896) 2 Ch. 212; they now usually contain such a charge; Simonson, Debentures, 39. See DEBENTURE.

COVERT BARON. A wife. So called from being under the protection of her husband, baron, or lord. 1 Bla. Com. 442.

COVERTURE. The condition or state of a married woman.

During coverture the civil existence of the wife is, for many purposes, merged in that of her husband; 2 Steph. Com. 263. See ABATEMENT; PARTIES; MARRIED WOMEN.

COVIN. A secret contrivance between two or more persons to defraud and prejudice another in his rights. Co. Litt. 357 *b*; Comyns,

Dig. *Covin*, A; 1 Viner, Abr. 473; Mix v. Muzzy, 28 Conn. 186. See COLLUSION; DECEIT; FRAUD.

COW. In a penal statute which mentions both cows and heifers, it was held that by the term cow must be understood one that had had a calf. 2 East, Pl. Cr. 616; 1 Leach 103. See Taylor v. State, 6 Humph. (Tenn.) 285.

COWARDICE. Pusillanimity; fear; misbehavior through fear in relation to some duty to be performed before an enemy. O'Brien, Court M. 142.

By both the army and navy regulations of the United States this is an offence punishable in officers or privates with death, or such other punishment as may be inflicted by a court-martial; Rev. Stat. §§ 1342, 1624.

CRAFT. Art or skill; dexterity in particular manual employment, hence the occupation or employment itself; manual art; a trade Webster.

This word is also now applied to all kinds of sailing vessels. Owners of the Wenonah v. Bragdon, 21 Gratt. (Va.) 693. See 23 L. J. Rep. 156; 3 El. & Bl. 888.

CRANAGE. A toll paid for drawing merchandise out of vessels to the wharf; so called because the instrument used for the purpose is called a crane. 8 Co. 46.

CRASTINUM, CRASTINO (Lat. to morrow). On the day after. The return day of writs is made the second day of the term, the first day being some saint's day, which gives its name to the term. In the law Latin, *crastino* (the morning, the day after) would then denote the return day. 2 Reeve, Hist. Eng. Law 56. In the United States the return day is the first day of the term.

CRAVE. To ask; to demand.

The word is frequently used in pleading; as, to crave oyer of a bond on which the suit is brought, and in the settlement of accounts the accountant general craves a credit or an allowance. 1 Chit. Pr. 520. See OYER.

CRAVEN. A word denoting defeat, and begging the mercy of the conqueror.

It was used (when used) by the vanquished party in trial by battle Victory was obtained by the death of one of the combatants, or if either champion proved *recreant*,—that is, yielded, and pronounced the horrible word "*craven*." Such a person became infamous, and was thenceforth unfit to be believed on oath. 3 Bla. Com. 340. See WAGER OF BATTEL.

CRÉANCE. In French Law. A claim; a debt; also belief, credit, faith. 1 Bouvier, Inst. n. 1040.

CREANSOR. A creditor. Cowell.

CREATE. To create a charter is to make an entirely new one, and differs from renewing, extending, or continuing an old one. Moers v. City of Reading, 21 Pa. 188; People v. Marshall, 1 Gilm. (Ill.) 672; Syracuse City Bank v. Davis, 16 Barb. (N. Y.) 188. See McClellan v. McClellan, 65 Me. 500; Palmer v. Preston, 45 Vt. 154, 12 Am. Rep. 191.

CREDENTIALS. In International Law. The instruments which authorize and establish a public minister in his character with the state or prince to whom they are addressed. If the state or prince receive the minister, he can be received only in the quality attributed to him in his credentials. They are as it were his letter of attorney, his mandate patent, *mandatum manifestum*. Vattel, liv. 4, c. 6, § 76. See FULL POWERS; LETTER OF CREDENCE.

CREDIBILITY. Worthiness of belief. The credibility of witnesses is a question for the jury to determine, as their competency is for the court; Best, Ev. § 76; 1 Greenl. Ev. §§ 49, 425; Tayl. Ev. 1257. See IMPEACHMENT.

CREDIBLE WITNESS. One who, being competent to give evidence, is worthy of belief. Armory v. Fellowes, 5 Mass. 229; 2 Curt. Eccl. 336.

In deciding upon the credibility of a witness, it is always pertinent to consider whether he is capable of knowing thoroughly the thing about which he testifies, whether he was actually present at the transaction, whether he paid sufficient attention to qualify himself to be a reporter of it, and whether he honestly relates the affair fully as he knows it, without any purpose or desire to deceive, or to suppress or add to the truth

In some of the states, wills must be attested by credible witnesses In several of the states, *credible witness* is used, in certain connections, as synonymous with *competent witness*, and in Connecticut, in a statute providing for the certification of copies of records, it refers to a witness giving testimony under the sanction of the witness's oath. Dibble v. Morris, 26 Conn. 416; Hall v. Hall, 18 Ga. 40; Garland v. Crow's Ex'rs, 2 Rail (S. C.) 24; Hawes v. Humphrey, 9 Pick. (Mass.) 350, 20 Am. Dec. 481; Sears v. Dillingham, 12 Mass. 358; Fuller v. Fuller, 83 Ky. 350; Lord v. Lord, 58 N. H. 8, 42 Am. Rep. 565; Jarm. Wills, 124.

See WITNESS.

CREDIT. The ability to borrow, on the opinion conceived by the lender that he will be repaid.

A debt due in consequence of a contract of hire or borrowing of money.

The time allowed by the creditor for the payment of goods sold by him to the debtor.

That which is due to a merchant, as distinguished from debt, that which is due by him.

That influence connected with certain social positions. 20 Toullier, n. 19.

In a statute making credits the subject of taxation, the term is held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or services, due or to become due to the person liable to pay taxes thereon, when added together (estimating every such claim or demand at its true value in money) over and above the sum of all legal *bona fide* debts owing by such person; Payne v. Watterson, 37 Ohio St. 123.

See, generally, 5 Taunt. 338; Dry Dock Bank v. Trust Co., 3 N. Y. 344; Rindge v. Judson, 24 N. Y. 64, 71; People v. Loan Soc., 51 Cal. 243, 21 Am. Rep. 704.

As to the "full faith and credit" to be given in one state to the records, etc., of another state, see FOREIGN JUDGMENTS.

CREDIT, BILL OF. See BILL OF CREDIT.

CREDIT INSURANCE. See INSURANCE.

CREDITOR. He who has a right to require the fulfillment of an obligation or contract.

A person to whom any obligation is due. New Jersey Ins. Co. v. Meeker, 37 N. J. L. 300. See Pettibone v. Roberts, 2 Root (Conn.) 261.

Preferred creditors are those who, in consequence of some provision of law, are entitled to some special privilege in the order in which their claims are to be paid.

CREDITOR, JUDGMENT. One who has obtained a judgment against his debtor, under which he can enforce execution.

CREDITORS' BILL. A bill in equity, filed by one or more creditors, for the purpose of collecting their debts out of assets, or under circumstances as to which an execution at law would not be available.

It is a proceeding *in rem*, to make effective a judgment against the debtor's property which is concealed; Houghton & Co. v. Axelsson, 64 Kan. 274, 67 Pac. 825. Such bills are usually filed by and on behalf of the complainant and all other creditors who shall come in under the decree. They may be either against the debtor in his lifetime or for an account of the assets and a due settlement of the estate of a decedent.

They are divided by Bispham (Equity) into two classes, numbered in the order here stated. In bills of the second class, or those which in effect seek for the administration of a decedent's estate, the usual decree against the executor or administrator is *quod computet;* it directs the master to take the accounts between the deceased and all his creditors, and to cause the creditors, upon due public notice, to come before him to prove their debts, and to take an account of all the personal estate of the deceased in the hands of the executor or administrator, and the same to be applied in payment of the debts and other charges in a due course of administration. 1 Story, Eq. Jur. 546.

Generally speaking, this jurisdiction has been transferred to probate courts in most of the states, but in some states the original jurisdiction of equity over the administration of estates remains unabridged by the statutes and is concurrent with that of probate courts See 3 Pom. Eq. Jur. § 1154.

Creditors' suits of the other class are brought while the debtor is living and for the collection of a debt against him. This jurisdiction had its origin in the inadequacy of common-law remedies by writs of execution. These writs at common law often did not extend to estates and interests which were equitable in their nature, and creditors' suits were therefore permitted to be brought where the relief at common law by execution was ineffectual, as for the discovery of assets, to reach equitable and other interests not subject to levy and sale at law, and to set aside fraudulent conveyances.

Statutes in England and America have extended the common-law remedies and provided adequate legal relief in many cases where formerly a resort to equity was necessary; Pom Eq. Jur. § 1415.

The jurisdiction of chancery in suits brought by judgment creditors to enforce the collection of their judgments, after having exhausted their remedy at law, although it may have previously existed, is in some states expressly declared and defined by statutes.

Before a creditor can resort to the equitable estate of his debtor, he must first obtain judgment and seek to collect the debt by execution, exhausting his remedy at law; Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Taylor v. Bowker, 111 U. S 110, 4 Sup. Ct. 397, 28 L. Ed 368; Newman v. Willetts, 52 Ill. 98, Lawson's Ex'r v Grubbs's Adm'r, 44 Ga. 466, and it must appear that a judgment has been recovered, execution issued thereon and returned "*nulla bona;*" Preston v. Colby, 117 Ill. 477, 4 N. E. 375; Taylor v. Bowker, 111 U. S. 110, 4 Sup. Ct. 397, 28 L. Ed. 368; but this rule is said to be too general; 3 Pom. Eq. Jur. § 1415, it probably would not apply where the judgment was a lien, *id;* Fleming v. Grafton, 54 Miss 79; and in the federal court the objection that the claim has not been reduced to judgment can be raised only by defendant and may be waived, Pennsylvania Steel Co. v. Ry. Co., 157 Fed. 440. A judgment cannot be questioned upon a creditor's bill brought to secure its payment; Mattingly v. Nye, 8 Wall. (U. S.) 370, 19 L. Ed 380.

In a few jurisdictions the equitable rule has been changed by statute, so that suits to set aside fraudulent conveyances may be maintained by simple contract creditors; Builders' & Painters' Supply Co. v. Bank, 123 Ala. 203, 26 South 311; Riggin v. Hillard, 56 Ark. 476, 20 S. W. 402, 35 Am St. Rep. 113; Huntington v. Jones, 72 Conn 45, 43 Atl. 564; Phelps v. Smith, 116 Ind. 399, 17 N. E. 602, 19 N. E. 156, Balls v. Balls, 69 Md. 388, 16 Atl. 18; Sandford v. Wright, 164 Mass. 85, 41 N. E. 120; Dawson Bank v. Harris, 84 N. C. 206; Greene v. Starnes, 1 Heisk. (Tenn.) 582; Stovall v. Bank, 78 Va. 188; Frye v. Miley, 54 W. Va. 324, 46 S. E. 135. A judgment of a court of record is ordinarily sufficient; Chalmers v. Shechy, 132 Cal. 459, 64 Pac. 709, 84 Am. St. Rep. 62; Schaible v. Ardner, 98 Mich. 70, 56 N. W.

1105; Thorp v. Leibrecht, 56 N. J. Eq. 499, 39 Atl. 361; but a judgment may be dispensed with when a creditor desires to reach assets of a deceased debtor; Mallow v. Walker, 115 Ia. 238, 88 N. W. 452, 91 Am. St. Rep. 158; or when a debtor has absconded and cannot be found within the state; First Nat. Bank of Riverside v. Eastman, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95, 1 Ann. Cas. 626; Quarl v. Abbett, 102 Ind. 234, 1 N. E. 476, 52 Am. Rep. 662; or where the debtor is insolvent and the claim is undisputed; Talley v. Curtain, 54 Fed. 43, 4 C. C. A. 177. An attachment which creates a lien upon real property may be the foundation of a creditor's bill to set aside a fraudulent conveyance; Chicago & A. Bridge Co. v. Packing Co., 46 Fed. 584; Evans v. Loughton, 69 Wis. 138, 33 N. W. 573. Where execution after judgment is necessary to form part of basis for a bill, it should be directed to and returned either from the county where the judgment was obtained or where the debtor resides; Nashville, C. & St. L. R. Co. v. Mattingly, 101 Ky. 219, 40 S. W. 673; Illinois Malleable Iron Co. v. Graham, 55 Ill. App. 266.

Creditors cannot attack the interest of third parties, alleged to have been obtained by fraud, until they have gained a standing in court by legal proceedings; Scott v. Chambers, 62 Mich. 532, 29 N. W. 94; Goode v. Garrity, 75 Ia. 713, 38 N. W. 150; Tift v. Collier, 78 Ga. 194, 2 S. E. 943; McMurtry v. Masonic Temple Co., 86 Ky. 206, 5 S. W. 570.

Judgments of the federal court cannot be made the basis of a creditor's bill in a state court; Winslow v. Leland, 128 Ill. 304, 21 N. E. 588; *contra*, First Nat. Bank of Chicago v. Sloman, 42 Neb. 350, 60 N. W. 589, 47 Am. St. Rep. 707; Chicago & A. Bridge Co. v. Fowler, 55 Kan. 17, 39 Pac. 727. The plaintiff in a creditor's bill is not concluded by sworn answer of defendant, Edwards v. Rodgers, 41 Ill. App. 405.

A creditor's bill is not maintainable against a debtor and his fraudulent grantee, after the return of an execution satisfied; Davis v. Walton, 80 Me. 461, 15 Atl. 48. A judgment creditor's bill may be framed for the double purpose of aiding an execution and to reach property not open to execution, Vanderpool v. Notley, 71 Mich. 431, 42 N. W. 680.

The debtor should be made a party; U. S. v. Howland, 4 Wheat. (U. S.) 108, 4 L. Ed. 526; the person who has possession of the property sought to be reached must be joined; Dobbins v. Coles, 59 N. J. Eq. 80, 45 Atl. 441; and in general all who have interests which will be affected by the decree in the property sought to be reached must be made parties; State v. Superior Court, 14 Wash. 686, 45 Pac. 670; Marshall's Ex'r v. Hall, 42 W. Va. 641, 26 S. E. 300. A single creditor may file a bill on his own behalf and he is entitled to retain the priority thereby gained over other creditors; Senter v. Williams, 61 Ark. 189, 32 S. W. 490, 54 Am. St. Rep. 200; Pullis v. Robison, 73 Mo. 201, 39 Am. Rep. 497; Clark v. Figgins, 31 W. Va. 157, 5 S. E. 643, 13 Am. St. Rep. 860 (*contra*, where other creditors intervene; Johnston v. Paper Co., 153 Pa. 189, 25 Atl. 560, 885); except in certain suits, where a trust or *quasi-trust* exists for all creditors; Fauch v. De Socarras, 56 N. J. Eq. 524, 39 Atl. 381; Coddington v. Bispham's Ex'rs, 36 N. J. Eq. 574, Baker v. Kinnaird, 94 Ky. 5, 21 S. W. 237; Day v. Washburn, 24 How. (U. S.) 355, 16 L. Ed. 712.

It is the filing of the bill and service of process after the return of execution which gives the plaintiff a specific lien; Hines v. Duncan, 79 Ala. 112, 58 Am. Rep. 580; Beith v. Porter, 119 Mich. 365, 78 N. W. 336, 75 Am. St. Rep. 402

A court of equity has jurisdiction to sequestrate property in a creditor's suit, where the bill charges fraud as well as insolvency; Robinson v. Ins. Co., 162 Fed. 794. Intangible property can be reached by creditor's bill, such as patents and copyrights; Stephens v. Cady, 14 How. (U. S.) 528, 14 L. Ed. 528; Ager v. Murray, 105 U. S. 126, 26 L. Ed. 942; probably the majority rule is that, in the absence of statutory authorization, a creditor's bill cannot reach choses in action unless the case presents some independent ground of equity jurisdiction; Greene v. Keene, 14 R. I. 388, 51 Am. Rep. 400.

Alimony awarded to a wife cannot be applied by creditor's bill to the payment of a debt contracted before the decree of divorce; Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. Rep. 544; a contingent interest, such as devise under a will, may be subjected to the payment of debts; Jacob v. Howard (Ky.) 22 S. W. 332; so of any equitable interest; Galveston, H. & S. A. R. R. Co. v. McDonald, 53 Tex. 510 Fraudulent transfers of personalty may be set aside, but the bill is seldom used for this purpose, the general practice being to levy on personal property and determine the ownership by action of replevin; O'Brien v. Stambach, 101 Ia. 40, 69 N. W. 1133, 63 Am. St. Rep. 368; Pierstoff v. Jorges, 86 Wis. 128, 56 N. W. 735, 39 Am. St. Rep. 881; Highley v. Bank, 185 Ill. 565, 57 N. E. 436

Motives of public policy prohibit a bill to reach the salary of a state official; Bank of Tennessee v. Dibrell, 3 Sneed (Tenn.) 379; or of an employé of a municipal corporation, Addyston Pipe Co. v. City of Chicago, 170 Ill. 580, 48 N. E. 967, 44 L. R. A. 405; Morgan v. Rust, 100 Ga. 346, 28 S. E. 419; but if the court can ascertain that no inconvenience can result to the public in a given case, the suit may be maintained; Berton v. Anderson, 56 Ark. 476, 20 S. W. 250; Knight v. Nash, 22 Minn. 452; Pendleton v. Perkins, 49 Mo. 565. There are various statutory exemp-

tions, such as homesteads; Jayne v. Hymer, 66 Neb. 785, 92 N. W. 1019; Hines v. Duncan, 79 Ala. 112, 58 Am. Rep. 580. Money *in custodia legis*, as in the hands of a clerk of court in his official capacity, cannot be made the subject of a creditor's bill; Anheuser-Busch Brewing Ass'n v. Hier, 52 Neb. 424, 72 N. W. 588; U. S. v. Eisenbeis, 88 Fed. 4. A creditor's bill will lie against municipal corporation, though the same be not subject to garnishment. See Addison Pipe & Steel Co. v. Chicago, 28 Chicago Leg. News 256.

State statutes authorizing suits in the nature of creditors' bills against corporations do not give the federal courts jurisdiction to entertain such suits when the creditor has not first exhausted his legal remedy, since the equity jurisdiction of those courts cannot be enlarged by a state statute; Morrow Shoe Mfg. Co. v. Shoe Co., 60 Fed. 341, 8 C. C. A. 652, 24 L. R. A. 417; nor will such a bill lie to obtain the seizure of the property of an insolvent corporation which has failed to collect stock subscriptions and executed an illegal trust deed, as these facts do not change the rule of those courts that simple contract creditors cannot obtain the aid of equity to effect the seizure of the debtor's property and its application to their claims; Hollins v. Coal & Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113. But see Atlanta & F. R. Co. v. Ry. Co., 35 Cent. L. J. 207.

See Bisph. Eq. 525-528; Richmond v. Irons, 121 U. S. 44, 7 Sup. Ct. 788, 30 L. Ed. 864; 4 Harv. L. Rev. 99; 5 *id.* 101; Ad. Eq. 250.

CREEK. Such small inlets of the sea, whether within the precinct or extent of a port or without, as are narrow passages, and have shore on either side of them. Callis, Sew. 56; 5 Taunt. 705.

Such inlets that though possibly for their extent and situation they might be ports, yet are either members of or dependent upon other ports.

In England the name arose thus The king could not conveniently have a customer and comptroller in every port or haven But such custom-officers were fixed at some eminent port, and the smaller adjacent ports became by that means creeks, or appendants of that port where these custom-officers were placed. 1 Chit. Com Law, 726, Hale, *de Portibus Maris*, pt. 2, c 1, vol 1, p. 46, Comyns, Dig. *Navigation* (C); Callis, Sew 34.

A small stream, less than a river. Baker v. Boston, 12 Pick. (Mass.) 184, 22 Am. Dec. 421; Schermerhorn v. R. Co., 38 N. Y. 103.

A creek passing through a deep level marsh and navigable by small craft, may, under legislative authority, be obstructed by a dam, or wholly filled up and converted into house-lots,—such obstructions not being in conflict with any act of congress regulating commerce; Willson v. Marsh Co., 2 Pet. (U. S.) 245, 7 L. Ed. 412; Com. v. Charlestown, 1 Pick. (Mass.) 180, 11 Am. Dec. 161; Rowe v. Bridge Corp., 21 Pick. (Mass.) 344; Charlestown v. County Com'rs, 3 Metc. (Mass.) 202; Glover v. Powell, 10 N. J. Eq. 211.

CREEK NATION. See INDIAN TRIBE.

CREMATION. The act or practice of reducing a corpse to ashes by means of fire. Act Pa. 1891, June 8; P. L. 212.

To burn a dead body instead of burying it is not a misdemeanor unless it is so done as to amount to a public nuisance. If an inquest ought to be held upon a dead body it is a misdemeanor so to dispose of the body as to prevent the coroner from holding an inquest; L. R. 12 Q. B. D. 247. In L. R. 20 Ch. D. 659, it was doubted as to whether it is lawful to burn a body, but the question was not decided. See 43 Alb. L. J. 140. See DEAD BODY.

CREMENTUM COMITATUS. The increase of the county. The increase of the king's rents above the old vicontiel rents for which the sheriffs were to account. Wharton, Dict.

CREPUSCULUM. Daylight; twilight. The light which immediately precedes or follows the rising or setting of the sun. 4 Bla. Com. 224. Housebreaking during the period in which there is sunlight enough to discern a person's face (*crepusculum*) is not burglary; Co. 3d Inst. 63; 1 Russell, Cr. 820; 3 Greenl. Ev. § 75.

CRETIO. Time for deliberation allowed an heir (usually 100 days), to decide whether he would or would not take an inheritance. Calvinus, Lex.; Taylor, Gloss.

CREW. The word crew used in a statute in connection with *master*, includes officers as well as seamen. U. S. v. Winn, 3 Sumn. 209, Fed. Cas. No. 16,740; U. S. v. Winn, 1 Law Rep. 63, Fed. Cas. No. 16,739a. Sometimes also the master is included; Millaudon v. Martin, 6 Rob. (La.) 534; but a passenger would not be; U. S. v. Libby, 1 W. & M. 231, Fed. Cas. No. 15,597. See FULL CREW.

CRIER (Norman, to proclaim). An officer whose duty it is to make the various proclamations in court, under the direction of the Judges. The office of crier in chancery is now abolished in England. Wharton.

CRIM. CON. An abbreviation for criminal conversation, of very frequent use, denoting adultery, unlawful sexual intercourse with a married woman. Bull. N. P. 27; Bacon, Abr. *Marriage* (E) 2; Nixon v. Brown, 4 Blackf. (Ind.) 157; 3 Bla. Com. 139.

The term is used to denote the act of adultery in a suit brought by the husband of the married woman with whom the act was committed, to recover damages of the adulterer. That the plaintiff connived at or assented to his wife's infidelity, or that he prostituted her for gain, is a complete answer to the action. But the fact that the wife's character for chastity was bad before the plaintiff married her, that he lived with her after he knew of the criminal intimacy with the defendant that he had connived at her intimacy with

other men, or that the plaintiff had been false to his wife, only go in mitigation of damages; Sanborn v. Neilson, 4 N. H. 501; Sherwood v. Titman, 55 Pa. 77; as will the fact that the wife willingly consented or threw herself in the way of her paramour; Ferguson v. Smethers, 70 Ind. 520, 36 Am. Rep. 186.

The wife cannot maintain an action for criminal conversation with her husband; and for this, among other reasons, because her husband, who is *particeps criminis*, must be joined with her as plaintiff. But the husband may maintain the action after a divorce granted; 2 Bish. Marr. Div. & Sep. § 727; Ratcliff v. Wales, 1 Hill (N. Y.) 63. This action is rare in the United States, and has been abolished in England by 20 & 21 Vict. c. 85, § 59. The husband may, however, in suing for a divorce, claim damages from the adulterer; 3 Steph. Com. 437. The right to an action for damages is not barred by the fact that the act was done by violence, and that a criminal action will lie; Egbert v. Greenwalt, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260. See 15 Am. L. Reg. (N. S.) 451. That the defendant was ignorant that the woman was married is immaterial; Wales v. Miner, 89 Ind. 119; 4 C. & P. 499.

CRIME. An act committed or omitted in violation of a public law forbidding or commanding it.

A wrong which the government notices as injurious to the public, and punishes in what is called a criminal proceeding in its own name. 1 Bish. Cr. Law § 43. See People v. Supervisors of Ontario County, 4 Denio (N. Y.) 260; Rector v. State, 6 Ark. 187; Durr v. Howard, *id.* 461; Clark, Cr. Law 1. See INTENT, MENS REA.

The word crime generally denotes an offence of a deep and atrocious dye When the act is of an inferior degree of guilt, it is called a misdemeanor, 4 Bla Com. 4. Crime, however, is often used as comprehending *misdemeanor* and even as synonymous therewith, and also with *offence;* in short, as embracing every indictable offence, State v. Corporation of Savannah, T. U. P Charlt (Ga) 235, 4 Am Dec 708, Van Meter v People, 60 Ill 168, In re Bergin, 31 Wis. 383; In re Clark, 9 Wend. (N Y) 212, Kentucky v. Dennison, 24 How. (U. S) 102, 16 L. Ed. 717; In re Voorhees, 32 N. J. L. 144, People v. Board of Police Comrs, 39 Hun (N Y.) 510; People v French, 102 N. Y 583, 7 N E 913, but it is not synonymous with felony; County of Lehigh v. Schock, 113 Pa 379, 7 Atl 52.

Crimes are defined and punished by statutes and by the common law. Most common-law offences are as well known and as precisely ascertained as those which are defined by statutes: yet, from the difficulty of exactly defining and describing every act which ought to be punished, the vital and preserving principle has been adopted that all immoral acts which tend to the prejudice of the community are punishable criminally by courts of justice; 2 East 5, 21; State v. Doud, 7 Conn. 386, People v. Smith, 5 Cow. (N. Y.) 258; Com. v. Harrington, 3 Pick. (Mass) 26.

As to "moral turpitude" as ground of deportation, see that title.

There are no common-law offences against the United States; U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591; Pettibone v. U. S., 148 U. S. 203, 13 Sup. Ct. 542, 37 L. Ed. 419. See COMMON LAW. There can be no constructive offences, and before a man can be punished, his case must be plainly and unmistakably within the statute; U. S. v. Lacher, 134 U. S. 624, 10 Sup. Ct. 625, 33 L. Ed. 1080; Todd v. U. S., 158 U. S. 282, 15 Sup. Ct. 889, 39 L. Ed. 982.

Deliberation and premeditation to commit crime need not exist in the criminal's mind for any fixed period before the commission of the act, Thiede v. Utah, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. Ed. 237.

A crime *malum in se* is an act which shocks the moral sense as being grossly immoral and injurious. With regard to some offences, such as murder, rape, arson, burglary, and larceny, there is but one sentiment in all civilized countries, which is that of unqualified condemnation. With regard to others, such as adultery, polygamy, and drunkenness, in some communities they are regarded as *mala in se;* while in others they are not even *mala prohibita.*

An offence is regarded as strictly a *malum prohibitum* only when, without the prohibition of a statute, the commission or omission of it would in a moral point of view be regarded as indifferent. The criminality of the act or omission consists not in the simple perpetration of the act, or the neglect to perform it, but in its being a violation of a positive law.

The nature of the offense and the amount of punishment prescribed, rather than its place in the statutes, determine whether it is to be placed among the serious or petty offenses, whether among crimes or misdemeanors; Schick v. U. S., 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99, 1 Ann. Cas. 585. The purchase or receipt for sale of oleomargarine which has not been branded or stamped according to law was held a misdemeanor, not a crime; *id.*

A corrupt purpose, a wicked intent to do evil, is indispensable to conviction of a crime which is morally wrong. But no evil intent is essential to an offence which is a mere *malum prohibitum.* A simple purpose to do the act forbidden in violation of the statute is the only criminal intent requisite to a conviction of a statutory offense which is not *malum in se;* Armour Packing Co. v. U. S., 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400.

It may be by act of omission, *e. g.*, where a public officer, charged with the duty of rescuing bathers, neglects his duty and one is drowned.

The following is, perhaps, as complete a classification as the subject admits:

Offences against the sovereignty of the state. 1. Treason. 2. Misprision of treason.

Offences against the lives and persons of individuals. 1. Murder. 2. Manslaughter.

3. Attempts to murder or kill. 4. Mayhem. 5. Rape. 6. Robbery. 7. Kidnapping. 8. False imprisonment. 9. Abduction. 10. Assault and battery. 11. Abortion. 12. Cruelty to children.

Offences against public property. 1. Burning or destroying public property. 2. Injury to the same.

Offences against private property. 1. Arson. 2. Burglary. 3. Larceny. 4. Obtaining goods on false pretences. 5. Embezzlement. 6. Malicious mischief.

Offences against public justice. 1. Perjury. 2. Bribery. 3. Destroying public records. 4. Counterfeiting public seals. 5. Jailbreach. 6. Escape. 7. Resistance to officers. 8. Obstructing legal process. 9. Barratry. 10. Maintenance. 11. Champerty. 12. Contempt of court. 13. Oppression. 14. Extortion. 15. Suppression of evidence. 16. Compounding felony. 17. Misprision of felony.

Offences against the public peace. 1. Challenging or accepting a challenge to a duel. 2. Unlawful assembly. 3 Rout. 4. Riot. 5. Breach of the peace. 6. Libel.

Offences against chastity. 1. Sodomy. 2. Bestiality. 3. Adultery. 4. Incest. 5. Bigamy. 6. Seduction. 7. Fornication. 8. Lascivious carriage. 9. Keeping or frequenting house of ill-fame.

Offences against public policy. 1. False currency. 2. Lotteries. 3. Gambling. 4. Immoral shows. 5. Violations of the right of suffrage. 6. Destruction of game, fish, etc. 7. Nuisance.

Offences against the currency, and public and private securities. 1. Forgery. 2. Counterfeiting. 3. Passing counterfeit money.

Offences against religion, decency, and morality. 1. Blasphemy. 2. Profanity. 3. Sabbath-breaking. 4. Obscenity. 5. Cruelty to animals. 6. Drunkenness. 7. Promoting intemperance. See 2 Sharsw. Bla. Com. 42.

Offences against the public, individuals, or their property. 1. Conspiracy.

Under recent legislation certain new offences have been created, such as conspiracies in restraint of trade; infractions of rules affecting commerce and carriers and the like. These have been called commercial crimes; such, for instance, as infractions of the Sherman Anti-Trust Act.

As to state compensation to one unjustly accused of crime, see RESTITUTION.

See CONTINUING OFFENCE; LETTER; INTENT; PROSECUTOR; CRIMINAL LAW.

CRIME AGAINST NATURE. Sodomy or buggery. Ausman v. Veal, 10 Ind. 355, 71 Am. Dec. 331.

CRIMEN FALSI. In Civil Law. A fraudulent alteration, or forgery, to conceal or alter the truth, to the prejudice of another. This crime may be committed in three ways, namely: by forgery; by false declarations or false oath,—perjury;' by acts, as by dealing with false weights and measures, by altering the current coin, by making false keys, and the like; see Dig. 48. 10. 22; 34. 8. 2; Code 9. 22; 2. 5. 9. 11. 16. 17. 23. 24; Merlin, *Répert.;* 1 Bro. Civ. Law 426; 1 Phill. Ev. 26; 2 Stark. Ev. 715.

At Common Law. Any crime which may injuriously affect the administration of justice, by the introduction of falsehood and fraud. Johnston v. Riley, 13 Ga. 97; Webb v. State, 29 Ohio St. 351, 358; Harrison v. State, 55 Ala. 239; U. S. v. Block, 4 Sawy. 211, Fed. Cas. No. 14,609. See MAXIMS (*crimen falsi dicitur*, etc.).

The meaning of this term at common law is not well defined. It has been held to include forgery; 5 Mod 74; perjury, subornation of perjury; Co. Litt. 6 *b*; Comyns, Dig. *Testmoigne* (A 5); suppression of testimony by bribery or conspiracy to procure the absence of a witness; Ry. & M. 434; conspiracy to accuse of crime; 2 Hale, Pl. Cr. 277; 2 Leach 496; 2 Dods. 191; barratry; 2 Salk 690; the fraudulent making or alteration of a writing, to the prejudice of another man's right; or of a stamp, to the prejudice of the revenue; 4 Steph. Comm. (15th ed.) 119, citing 2 East P. C. Ch. xix, § 60. The effect of a conviction for a crime of this class is infamy, and incompetence to testify, Barbour v. Com., 80 Va. 288. Statutes sometimes provide what shall be such crimes.

CRIMEN LÆSÆ MAJESTATIS. See LÆSA MAJESTAS.

CRIMINA EXTRAORDINARIA. In South African Law. Certain crimes have been so called by Voet and the classification is sometimes broadly used. They include interfering with another's marital rights, seducing a girl, polluting streams, procuring abortion, blackmail and many others. The classification does not seem valuable. See 28 So. Afr. L. J. 490.

CRIMINAL CONVERSATION. See CRIM. CON.

CRIMINAL INFORMATION. A criminal suit brought, without interposition of a grand jury, by the proper officer of the king or state. Cole, Cr. Inf.; 4 Bla. Com. 398. See INFORMATION.

CRIMINAL INTENT. The intent to commit a crime; malice, as evidenced by a criminal act. Black, Dict.

CRIMINAL LAW. That branch of jurisprudence which treats of crimes and offences.

From the very nature of the social compact on which all municipal law is founded, and in consequence of which every man, when he enters into society, gives up part of his natural liberty, result those laws which, in certain cases, authorize the infliction of penalties the privation of liberty and even the destruction of life with a view to the future prevention of crime and to insuring the safety and well-being of the public. *Salus populi suprema lex.*

The extreme importance of a knowledge of the criminal law is evident. For a mistake in point of law, which every person of discretion not only may know but is bound and presumed to know, is in criminal cases no defence. *Ignorantia eorum quæ quis scire tenetur non excusat.* This law is administered upon the principle that every one must be taken conclusively to know it without proof that he does know it; per Tindal, C. J., in 10 Cl. & F. 210 See U. S. v. Anthony, 11 Blatchf 200, Fed. Cas. No. 14,459; Hoover v. State, 59 Ala. 57; State v. Goodenow, 65 Me. 30; State v. Halsted, 39 N. J. L. 402. And this is true though the statute making an act illegal is of so recent promulgation as to make it impossible to know of its existence; Branch Bank at Mobile v. Murphy, 8 Ala 119; Heard v. Heard, 8 Ga. 380; The Ann, 1 Gall. C. C. 62, Fed. Cas. No. 397. This doctrine has been carried so far as to include the case of a foreigner charged with a crime which was no offence in his own country; 7 C. & P. 456; Russ. & R. 4. See Sumner v. Beeler, 50 Ind 341, 19 Am. Rep. 718. And, further, the criminal law, whether common or statute, is imperative with reference to the conduct of individuals; so that, if a statute forbids or commands a thing to be done, all acts or omissions contrary to the prohibition or command of the statute are offences at common law, and ordinarily indictable as such; Hawk. Pl. Cr. bk. 2, c. 25, § 4; 8 Q. B. 883. An offence which may be the subject of criminal procedure is an act committed or omitted in violation of a public *law* either forbidding or commanding it; U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591.

In seeking for the sources of our law upon this subject, when a statute punishes a crime by its legal designation, without enumerating the acts which constitute it, then it is necessary to resort to the common law for a definition of the crime with its distinctions and qualifications. So if an act is made criminal, but no mode of prosecution is directed or no punishment provided, the common law furnishes its aid, prescribing the mode of prosecution by indictment, and as a mode of punishment, fine, and imprisonment. This is generally designated the common law of England; but it might now be properly called the common law of this country. It was adopted by general consent when our ancestors first settled here. So far, therefore, as the rules and principles of the common law are applicable to the administration of criminal law and have not been altered and modified by legislative enactments or judicial decisions, they have the same force and effect as laws formally enacted; Tully v. Com., 4 Metc. (Mass.) 358; Com. v. Chapman, 13 Metc. (Mass.) 69. "The common law of crimes is at present that *jus vagum et incognitum* against which jurists and vindicators of freedom have strenuously protested. It is to be observed that the definitions of crimes, the nature of punishments, and the forms of criminal procedure originated, for the most part, in the principles of the most ancient common law, but that most of the unwritten rules touching crimes have been modified by statutes which assume the common-law terms and definitions as if their import were familiar to the community. The common law of crimes has, partly from humane and partly from corrupt motives, been pre-eminently the sport of judicial constructions. In theory, indeed, it was made for the state of things that prevailed in this island and the kind of people that inhabited it in the reign of Richard I.; in reality, it is the patchwork of every judge in every reign, from Cœur de Lion to Victoria." Ruins of Time Exemplified in Hale's Pleas of the Crown, by Amos, Pref. x.

Some of the leading principles of the English and American system of criminal law are: *First.* Every man is presumed to be innocent until the contrary is shown; and if there is any reasonable doubt of his guilt, he is entitled to the benefit of the doubt. See Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed 205 *Second.* In general, no person can be brought to trial until a grand jury on examination of the charge has found reason to hold him for trial. Ex parte Bain, 121 U. S. 1, 7 Sup Ct 781, 30 L. Ed. 849. *Third.* The prisoner is entitled to trial by a jury of his peers, who are chosen from the body of the people with a view to impartiality, and whose decision on questions of fact is final *Fourth.* The question of his guilt is to be determined without reference to his general character. By the systems of continental Europe, on the contrary, the tribunal not only examines the evidence relating to the offence, but looks at the probabilities arising from the prisoner's previous history and habits of life. *Fifth.* The prisoner cannot be required to criminate himself. (The general rule, however, now seems to be in jurisdictions where there is no statutory prohibition, that an accused person testifying in his own behalf may be cross-examined like any other witness; People v. Tice, 131 N. Y. 651, 30 N. E. 494, 15 L. R. A. 669; People v. Howard, 73 Mich. 10, 40 N. W 789; Boyle v. State, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218; Keyes v. State, 122 Ind. 527, 23 N. E. 1097; State v. Pfefferle, 36 Kan. 90, 12 Pac. 406; State v. Huff, 11 Nev. 17; Chambers v. People, 105 Ill. 413. See for a full discussion of this question, Rice, Ev. § 223 and note; Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110.) *Sixth.* He cannot be twice put in jeopardy for the same offence. See Simmons v. U. S., 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968; In re Nielsen, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118. *Seventh.* He cannot be punished for an act which was

not an offence by the law existing at the time of its commission; nor can a severer punishment be inflicted than was declared by law at that time.

See CRIME; IGNORANCE; INTENT; JEOPARDY; INFAMOUS CRIME; INFAMY; PRISONER.

As to the identification of criminals, see ANTHROPOMETRY; ROGUE'S GALLERY.

As to circulating photographs of criminals, to assist in detecting crime, see PRIVILEGED COMMUNICATIONS.

CRIMINAL LAW CONSOLIDATION ACTS. Passed in England in 1861, for the consolidation of the criminal law of England and Ireland. 4 Steph. Com. 227. They are a codification of the modern criminal law of England. See Bruce's Archb. Pl. & Ev. in Cr. Ca. 1875.

CRIMINAL PROCEDURE. The method pointed out by law for the apprehension, trial, or prosecution, and fixing the punishment of those persons who have broken or violated, or are supposed to have broken or violated, the laws prescribed for the regulation of the conduct of the people of the community, and who have thereby laid themselves liable to fine or imprisonment, or both. A. & E. Encyc. Law. See PROCEDURE.

CRIMINAL PROCESS. Process which issues to compel a person to answer for a crime or misdemeanor. Ward v. Lewis, 1 Stew. (Ala.) 26.

CRIMINALITER. Criminally; on criminal process.

CRIMINATE. To exhibit evidence of the commission of a criminal offence.

It is a rule that a witness cannot be compelled to answer any question which has a tendency to expose him to a penalty, or to any kind of punishment, or to a criminal charge; 4 St. Tr. 6; 6 *id.* 649; 10 How. St. Tr. 1090; Johnson v. Goss, 2 Yerg. (Tenn.) 110; Grannis v. Branden, 5 Day (Conn.) 260, 5 Am. Dec. 143; Bellinger v. People, 8 Wend. (N. Y.) 598; Parry v. Almond, 12 S. & R. (Pa.) 284; State v. Quarles, 13 Ark. 307. Such a statement cannot be used to show guilt and a confession must be free and voluntary; In re Emery, 107 Mass. 180, 9 Am. Rep. 22. If a defendant offers himself as a witness to disprove a criminal charge, he cannot excuse himself from answering on the ground that by so doing he may criminate himself; Spies v. People, 122 Ill. 235, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320. See INCRIMINATION.

An accomplice admitted to give evidence against his associates in guilt is bound to make a full and fair confession of the whole truth respecting the subject-matter of the prosecution; Com. v. Knapp, 10 Pick. (Mass.) 477, 20 Am. Dec. 534; 2 Stark. Ev. 12, note; but he is not bound to answer with respect to his share in other offences, in which he was not concerned with the prisoner; People v. Whipple, 9 Cow. (N. Y.) 721, note (a); 2 C. & P. 411.

CRIMINOLOGY. The science which treats of crimes and their prevention and punishment.

CRIMP. One who decoys and plunders sailors under cover of harboring them. Wharton.

CRITICISM. The art of judging skilfully of the merits or beauties, defects or faults, of a literary or scientific composition, or of a production of art. When the criticism is reduced to writing, the writing itself is called a criticism.

Liberty of criticism must be allowed, or there would be neither purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of literature and science. That publication, therefore, is not a libel which has for its object not to injure the reputation of an individual, but to correct misrepresentations of facts, to refute sophistical reasoning, to expose a vicious taste for literature, or to censure that which is hostile to morality; 1 Campb. 351. As every man who publishes a book commits himself to the judgment of the public, any one may comment on his performance; if he does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. The critic does a good service to the public who writes down any such vapid or useless publication as should never have appeared; and, although the author may suffer a loss from it, the law does not consider such loss an injury; because it is a loss which the party ought to sustain It is the loss of fame and profit to which he was never entitled; 1 Campb. 358, n. See 1 Esp. 28; Stark. Lib and Sl. 228; 4 Bingh. N. S. 92; 3 Scott 340; 1 Mood. & M. 74, 187; Cooke, Def. 52; 20 Q. B. D. 275. See LIBEL; SLANDER.

CROFT. A little close adjoining a dwelling-house, and enclosed for pasture and tillage or any particular use. Jacob, Law Dict. A small place fenced off in which to keep farm-cattle. Spelman, Gloss.

CROP. See EMBLEMENTS; GROWING CROPS; AWAY-GOING CROP.

CROPPER. One who, having no interest in the land, works it in consideration of receiving a portion of the crop for his labor. Fry v. Jones, 2 Rawle (Pa.) 12; Harrison v. Ricks, 71 N. C. 7.

CROSS. A mark made by a person who is unable to write, instead of his name.

See MARK.

CROSS-ACTION. An action by a defendant in an action, against the plaintiff in the same action, upon the same contract, or for the same tort. Thus, if Peter bring an action of trespass against Paul, and Paul bring

another action of trespass against Peter, the subject of the dispute being an assault and battery, it is evident that Paul could not set off the assault committed upon him by Peter, in the action which Peter had brought against him; therefore a cross-action becomes necessary. 10 Ad. & E. 643.

CROSS-APPEAL. Where both parties to a judgment appeal therefrom, the appeal of each is called a cross-appeal as regards that of the other. 3 Steph. Com. 581.

CROSS-BILL. One which is brought by a defendant in a suit against a plaintiff in or against other defendants in the same suit, or against both, touching the matters in question in the original bill. Story, Eq. Pl. § 389; Mitf Eq. Pl. 80. It is brought either to obtain a discovery of facts, in aid of the defence to the original bill, or to obtain full and complete relief as to the matters charged in the original bill; Ayers v. Carver, 17 How. (U. S.) 595, 15 L. Ed 179.

It is considered as a defence to the original bill, and is treated as a dependency upon the original suit; 1 Eden, Inj. 190; 3 Atk. 312; 19 E. L. & Eq. 325; Cockrell v. Warner, 14 Ark. 346; McDougald v. Dougherty, 14 Ga. 674; Slason v. Wright, 14 Vt. 208; Nelson v. Dunn, 15 Ala. 501; Kidder v. Barr, 35 N. H. 251. It is usually brought either to obtain a necessary discovery, as, for example, where the plaintiff's answer under oath is desired; 3 Swanst. 474; 3 Y. & C. 594; 2 Cox, Ch. 109; or to obtain full relief for all parties, since the defendant in a bill could originally only pray for a dismissal from court, which would not prevent subsequent suits, 1 Ves. 284; 2 Sch. & L. 9, 141; Speer v. Whitfield, 10 N. J. Eq. 107; Jones v. Smith, 14 Ill. 229; Bullock v. Brown, 20 Ga. 472; or where the defendants have conflicting interests; Pattison v. Hull, 9 Cow. (N. Y.) 747; Armstrong v. Pratt, 2 Wis 299; but may not introduce new parties; Shields v. Barrow, 17 How. (U. S.) 130, 15 L. Ed. 158; unless affirmative relief is demanded and justice so requires; Brooks v. Applegate, 37 W. Va. 376, 16 S. E. 585. New parties cannot be brought in by a cross-bill; if the defendant's interest requires their presence, he should object for non-joinder and compel plaintiff to amend; Patton v. Marshall, 173 Fed. 350, 97 C. C. A 610, 26 L. R. A. (N. S.) 127. It is also used for the same purpose as a plea *puis darrein continuance* at law; 2 Ball & B. 140; 2 Atk. 177, 553; Baker v. Whiting, 1 Sto. 218, Fed. Cas. No. 786.

It should state the original bill, and the proceedings thereon, and the rights of the party exhibiting the bill which are necessary to be made the subject of a cross-litigation, on the grounds on which he resists the claims of the plaintiff in the original bill, if that is the object of the new bill; Mitf. Eq. Pl. 81; and it should not introduce new and distinct matters; Gallatian v. Cunningham, 8 Cow. (N. Y.) 361.

It should be brought before publication; Sterry v. Arden, 1 Johns. Ch. (N. Y.) 62; Josey v. Rogers, 13 Ga. 478; and not after,—to avoid perjury; Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 250; Nelson 103.

In England it need not be brought before the same court; Mitf. Eq. Pl. 81. For the rule in the United States, see Carnochan v. Christie, 11 Wheat. (U. S.) 446, 6 L. Ed. 516; Story, Eq. Pl. § 401; Dan. Ch. Pl. & Pr. 1549.

The granting or refusing permission to file a cross-bill is largely in the discretion of the court; Huff v. Bidwell, 151 Fed. 563, 81 C. C. A. 43.

Under the Equity Rules of Supreme Court of United States (Feb. 1, 1913), matter proper for a cross-bill may be set up in the answer, with the same effect. Rule 30 (33 Sup. Ct. xxvi).

CROSS-COMPLAINT. This is allowed when a defendant has a cause of action against a co-defendant, or a person not a party to the action, and affecting the subject-matter of the action. The only real difference between a complaint and a cross-complaint, is, that the first is filed by the plaintiff and the second by the defendant Both contain a statement of the facts, and such demands affirmative relief upon the facts stated. The difference between a counter-claim and a cross-complaint is that in the former the defendant's cause of action is against the plaintiff; and the latter, against a co defendant, or one not a party to the action; White v. Reagan, 32 Ark. 290.

CROSS-DEMAND. A demand is so called which is preferred by B, in opposition to one already preferred against him by A.

CROSS-ERRORS. Errors assigned by the respondent in a writ of error.

CROSS-EXAMINATION. The examination of a witness by the party opposed to the party who called him, and who examined, or was entitled to examine him in chief.

The purpose of the cross examination is to test the truthfulness, intelligence, memory, bias or interest of the witness, and any question to that end within reason is usually allowed; Briggs v. People, 219 Ill. 330, 76 N. E. 499; Real v. People, 42 N. Y. 270; Wroe v. State, 20 Ohio St. 460.

In England and some of the states, when a competent witness is called and sworn, the other party is ordinarily entitled to cross-examine him as to matters not covered by the direct examination; 1 Esp. 357; Moody v. Rowell, 17 Pick. (Mass.) 490, 28 Am. Dec. 317; Varick v. Jackson, 2 Wend. (N. Y.) 166, 19 Am. Dec. 571; Fulton Bank v. Stafford, 2 Wend. (N. Y.) 483; Aiken v. Cato, 23 Ga 154; Mask v. State, 32 Miss. 405; see 3 C. & P. 16; 2 M. & R. 273; Aiken v. Cato, 23

Ga. 154; but see Swift v. Ins. Co., 122 Mass. 578; but it is held in other states and in the federal courts that the cross-examination must be confined to facts connected with the direct examination; Harrison v. Rowan, 3 Wash. C. C. 580, Fed. Cas. No. 6,141; Philadelphia & Trenton R. Co. v. Stimpson, 14 Pet. (U. S.) 448, 10 L. Ed. 535; Ellmaker v. Buckley, 16 S. & R. (Pa.) 77; Floyd v. Bovard, 6 W. & S. (Pa.) 75; Donnelly v. State, 26 N. J. Law, 463; Landsberger v. Gorham, 5 Cal. 450; Cokely v. State, 4 Ia. 477; Pearson v. Hardin, 95 Mich. 360, 54 N. W. 904; Hansen v. Miller, 145 Ill. 538, 32 N. E. 548; In re Westerfield, 96 Cal. 113, 30 Pac. 1104; Winkler v. Roeder, 23 Neb. 706, 37 N. W. 607, 8 Am. St. Rep. 155; Fulton v. Bank, 92 Pa. 112; Monongahela Water Co. v. Stewartson, 96 Pa. 436. It may extend to every fact which is part of the plaintiff's case, but not to matter of defense; Smith v. Philadelphia Traction Co., 202 Pa 54, 51 Atl. 345; New York Iron Mine v. Bank, 39 Mich. 644, affirmative defenses cannot be introduced on cross-examination; McCrea v. Parsons, 112 Fed. 917, 50 C. C. A. 612.

Inquiry may be made in regard to collateral facts in the discretion of the judge; 7 C. & P. 389; Lawrence v. Barker, 5 Wend. (N. Y.) 305; Huntsville Belt Line & Monte Sano Ry. Co. v. Corpening & Co., 97 Ala 681, 12 South. 295; but not merely for the purpose of contradicting the witness by other evidence; 7 C. & P. 789; Com. v. Buzzell, 16 Pick. (Mass.) 157; Ware v. Ware, 8 Greenl. (Me.) 42. And see Howard v. Ins. Co., 4 Denio (N. Y.) 502; State v. Patterson, 24 N. C. 346, 38 Am. Dec. 699; Philadelphia & T. R. Co. v. Stimpson, 14 Pet. (U. S.) 461, 10 L. Ed. 535. Considerable latitude should be allowed in cross-examining witnesses as to value, in order that the ground of their opinion may appear; Phillips v. Inhabitants of Marblehead, 148 Mass. 326, 19 N. E. 547.

A written paper identified by the witness as having been written by him may be introduced in the course of cross-examination as a part of the evidence of the party producing it, if necessary for the purposes of the cross-examination; 8 C. & P. 369 A witness may be asked whether he has not made previous statements contradictory to his present testimony; People v. Walker, 140 Cal. 153, 73 Pac. 831; Dillard v. U. S, 141 Fed. 303, 72 C. C. A. 451; but he must be given a chance to explain; Rice v. Rice, 43 App. Div. 458, 60 N. Y. Supp. 97 Where the statement about which he is asked is in writing, it is necessary that his attention be called to the writing and if he denies that he made such statement, the writing must be proved in the ordinary way; Gaffney v. People, 50 N. Y. 416. In Queen Caroline's Case, 2 B. & B. 286, it was held that on cross-examination counsel is not allowed to represent in the statement of a question the contents of a letter and to ask the witness whether the witness wrote a letter to any person with such contents, or contents to the like effect, without first having shown the letter to the witness and asked whether he wrote such letter. This is commonly spoken of as the rule in the Queen's Case. It is severely and ably criticised in Wigmore, Evidence 1259–1263. In England it was unanimously condemned by the bar, and in 1854 a statute was passed which abolished it. In the United States it was adopted in People v. Lambert, 120 Cal. 170, 52 Pac. 307; Simmons v. State, 32 Fla. 387, 13 South. 896; Taylor v. State, 110 Ga. 150, 35 S. E. 161; Momence Stone Co. v. Groves, 197 Ill. 88, 64 N. E. 335; Glenn v. Gleason, 61 Ia. 28, 15 N. W. 659; Hendrickson v. Com. (Ky.) 64 S. W. 954; State v. Cain, 106 La. 708, 31 South. 300; O'Riley v. Clampet, 53 Minn. 539, 55 N. W. 740; Story v. State, 68 Miss. 609, 10 South. 47; State v. Matthews, 88 Mo. 121; Omaha Loan & Trust Co. v. Douglas County, 62 Neb. 1, 86 N. W. 936; Haines v. Ins. Co., 52 N. H. 467; Gaffney v. People, 50 N. Y. 423; State v. Steeves, 29 Or. 85, 43 Pac. 947; Kann v. Bennett, 223 Pa. 36, 72 Atl. 342; Chicago, M. & St. P. Ry. Co. v. Artery, 137 U. S. 520, 11 Sup. Ct. 129, 34 L. Ed. 747; Kalk v. Fielding, 50 Wis. 339, 7 N. W. 296; Mr. Wigmore thinks that its repudiation in England was not known at the time of its early adoption here.

A cross-examination as to matters not otherwise admissible in evidence entitles the party producing the witness to re-examine him as to those matters. 3 Ad. & E. 554; Stuart v. Baker, 17 Tex. 417. If the defendant be permitted on cross-examination to bring out new matter, constituting his own case, which he had not opened to the jury, to the injury of the plaintiff, it may be ground for reversal; Thomas & Sons v. Loose, Seaman & Co, 114 Pa. 35, 6 Atl. 326; Hughes v. Coal Co., 104 Pa. 207.

Leading questions may be put in cross-examination; 1 Stark. Ev. 96; Floyd v. Bovard, 6 W. & S. (Pa.) 75; Moody v. Rowell, 17 Pick. (Mass.) 490, 28 Am. Dec. 317.

The trial court has not such a discretion as to the scope of cross-examination of the defendant in a criminal cause as in the examination of other witnesses; People v. O'Brien, 96 Cal. 171, 31 Pac. 45. See State v. Wright, 40 La. Ann. 589, 4 South. 486

A refusal to permit cross-examination as to relevant matters brought out in direct examination is usually ground for reversal; Prout v. Bernards Land & Sand Co., 77 N. J. L. 719, 73 Atl. 486, 25 L. R. A. (N. S.) 683, note; Eames v. Kaiser, 142 U. S. 488, 12 Sup. Ct. 302, 35 L. Ed. 1091; Graham v. Larimer, 83 Cal. 173, 23 Pac. 286. A full and fair cross-examination is a matter of right and a denial of it is error; after such has been allowed, further cross-examination becomes discretionary; Ressurrection Gold Min. Co. v. Fortune Min. Co., 129 Fed. 668, 64 C. C.

A. 180; City of Florence v. Calmet, 43 Colo. 510, 96 Pac. 183.

It is improper for a trial judge to cross-examine defendant's witnesses in such a manner as to impress the jury with the idea that he thinks the defendant guilty. If he participates in the cross-examination, he should do it in such a way as to indicate his entire impartiality; Adler v. U. S., 182 Fed. 464, 104 C. C. A. 608.

CROSS-REMAINDER. Where a particular estate is conveyed to several persons in common, or various parcels of the same land are conveyed to several persons in severalty, and upon the termination of the interest of either of them his share is to go in remainder to the rest, the remainders so limited over are said to be cross-remainders. In deeds, such remainders cannot arise without express limitation. In wills, they frequently arise by implication; 1 Prest. Est. 94; 2 Hilliard, R. P. 44; 4 Kent 201; Chal. R. P. 241.

CROSS-RULES. Rules entered where each of the opposite litigants obtained a rule *nisi*, as the plaintiff to increase the damages, and the defendant to enter a nonsuit. Wharton.

CROSSED-CHECK. See CHECK.

CROSSING. See GRADE CROSSING.

CROWN. In England. A word often used for the sovereign. As to the Crown as a corporation, see Maitland, 16 L. Q. R. 335, 17 *id.* 131.

See DEMISE OF THE CROWN.

CROWN CASES RESERVED. See COURT FOR CONSIDERATION OF CROWN CASES RESERVED.

CROWN DEBTS. Debts due to the crown, which are put, by various statutes, upon a different footing from those due to a subject.

CROWN LANDS. The demesne lands of the crown. 2 Steph. Com. 534.

CROWN LAW. In England. Criminal law, the crown being the prosecutor.

CROWN OFFICE. The criminal side of the court of king's bench. The king's attorney in this court is called master of the crown office. 4 Bla. Com. 308.

CROWN SIDE. The criminal side of the court of king's bench. Distinguished from the pleas side, which transacts the civil business. 4 Bla. Com. 265.

CROWN SOLICITOR. In England. The solicitor to the treasury.

CRUEL AND UNUSUAL PUNISHMENT. See PUNISHMENT.

CRUELTY. *As between husband and wife.* See LEGAL CRUELTY.

Cruelty towards weak and helpless persons takes place where a party bound to provide for and protect them either abuses them by whipping them unnecessarily, or by neglecting to provide for them those necessaries which their helpless condition requires. Exposing a person of tender years, under one's care, to the inclemency of the weather; 2 Campb. 650; keeping such a child, unable to provide for himself, without adequate food; 1 Leach 137; Russ. & R. 20; or an overseer neglecting to provide food and medical care to a pauper having urgent and immediate occasion for them; Russ. & R. 46; are examples of this species of cruelty.

In many of the principal cities, beginning with New York, in April, 1875, societies for the prevention of cruelty to children have been formed, authorized to prosecute persons who maltreat children, or force them to pursue improper and dangerous employments; N. Y. Act of April 21, 1875; Delafield on Children, 1876. Stat. 42 & 43 Vict. c. 34 regulates certain employments for children. By the act of Congress of February 13, 1885, the association for the prevention of cruelty to animals for the District of Columbia, was authorized to extend its operation, under the name of the Washington Humane Society, to the protection of children as well as animals from cruelty and abuse, and the agents of the society have power to prefer complaints for the violation of any law relating to or affecting the protection of children. They may also bring before the court any child who is subjected to cruel treatment, abuse or neglect, or any child under sixteen years of age found in a house of ill-fame, and the court may commit such child to an orphan asylum or other public charitable institution, and any person wilfully or cruelly maltreating, or wrongfully employing such child, is liable to punishment. 23 Stat L. 302.

Cruelty to animals is an indictable offence. A defendant was convicted of a misdemeanor for tying the tongue of a calf so near the root as to prevent its sucking, in order to sell the cow at a greater price, by giving to her udder the appearance of being full of milk while affording the calf all it needed; Morris & Clark's Cases, 6 City H. Rec. (N. Y.) 62. A man may be indicted for cruelly beating his horse; U. S. v. Jackson, 4 Cra. C. C. 483, Fed. Cas. No. 15,453; 9 L. T. R. (N. S.) 175; Com. v. Lufkin, 7 Allen (Mass.) 579; 3 B. & S. 382; State v. Avery, 44 N. H. 392; Collier v. State, 4 Tex. App. 12; Uecker v. State, 4 Tex. App. 234; State v. Bogardus, 4 Mo. App. 215; State v. Haley, 52 Mo. App. 520; Swartzbaugh v. People, 85 Ill. 457; Com. v. Curry, 150 Mass. 509, 23 N. E. 212; See Com. v. McClellan, 101 Mass. 34; State v. Porter, 112 N. C. 887, 16 S. E. 915; Tinsley v. State (Tex.) 22 S. W. 39; or for cruel treatment of a hen; State v. Neal, 120 N. C. 613, 27 S. E. 81, 58 Am. St. Rep. 810.

Under 12 and 13 Vict. c. 92, § 2, dishorning cattle is not an offence where the operation is skilfully performed; 16 Cox, Cr. Cas. 101. This practice is allowed in Pennsylvania; Act Pa. 1895, June 25, P. L. 286. In Massachusetts it was held that a fox is an animal in the sense of the statute, and a person letting loose a captive fox to be subjected to unnecessary suffering (for the purpose of being hunted by dogs) was liable to punishment; Com. v. Turner, 145 Mass. 296, 14 N. E. 130.

Malice toward the owner is not an ingredient of the offense created by a statute providing for the punishment of every person who shall wilfully and maliciously maim the horse of another; People v. Tessmer, 171 Mich. 522, 41 L. R. A. (N. S.) 433, 137 N. W. 214.

CRUISE. A voyage or expedition in quest of vessels or fleets of the enemy which may be expected to sail in any particular track at a certain season of the year. The region in which these cruises are performed is usually termed the rendezvous, or cruising-latitude.

When the ships employed for this purpose, which are accordingly called *cruisers*, have arrived at the destined station, they traverse the sea backwards and forwards, under an easy sail, and within a limited space, conjectured to be in the track of their expected adversaries. Wesk. Ins.: Lex Merc. Red. 271, 284; Dougl. 509; Marsh. Ins. 196, 199, 520; The Brutus, 2 Gall. 526, Fed. Cas. No. 2,060.

CRY DE PAYS, CRY DE PAIS. A hue and cry raised by the country. This was allowable in the absence of the constable when a felony had been committed.

CRYER. See CRIER.

CUCKING-STOOL. An engine or machine for the punishment of scolds and unquiet women.

Called also a trebucket, tumbrel, and castigatory Bakers and brewers were formerly also liable to the same punishment Being fastened in the machine, they were immersed over head and ears in some pool; Blount, Co. 3d Inst 219, 4 Bla. Com 169.

CUI ANTE DIVORTIUM (L. Lat. The full phrase was, *Cui ipsa ante divortium contradicere non potuit*, whom she before the divorce could not gainsay). A writ which anciently lay in favor of a woman who had been divorced from her husband, to recover lands and tenements which she had in fee-simple, fee-tail, or for life, from him to whom her husband had aliened them during marriage, when she could not gainsay it; Fitzh. N. B. 240; 3 Bla. Com. 183, n.; Stearns, Real Act. 143; Booth, Real Act. 188. Abolished in 1833.

CUI IN VITA (L. Lat. The full phrase was, *Cui in vita sua ipsa contradicere non potuit*, whom in his lifetime she could not gainsay). A writ of entry which lay for a widow against a person to whom her husband had in his lifetime aliened her lands. Fitzh. N. B. 193. It was a method of establishing the fact of death, being a trial with witnesses, but without a jury. The object of the writ was to avoid a judgment obtained against the husband by confession or default. It is obsolete in England by force of 32 Hen. VIII. c. 28, § 6. See 6 Co. 8, 9. As to its use in Pennsylvania, see 3 Binn. Appx.; Rep. Comm. on Penn. Civ. Code, 1835, 90. Abolished in England, 1833. Blackstone is said to have shown little knowledge of its history; Thayer, Evidence.

CUL DE SAC (Fr. bottom of a bag). A street which is open at one end only.

It may be a highway; L. R. 16 Ch. Div. 449; Bartlett v. Bangor, 67 Me. 460; Adams v. Harrington, 114 Ind. 66, 14 N. E. 603; Penick v. Morgan County, 131 Ga. 385, 62 S. E. 300; L. R. 16 Eq. 108. The earlier authorities are generally to the contrary. See 11 East 376, note; 5 Taunt. 137; 5 B. & Ald. 451, Holdane v. Village of Cold Spring, 23 Barb. (N. Y.) 103; Hawk. Pl. Cr. b. 1, c. 76, s. 1; Dig. 50. 16. 43; 43. 12. 1. § 13; 47, 10, 15, § 7. It may be said that *prima facie* it is not a highway; see 18 Q. B. 870; State v. Gross, 119 N. C. 868, 26 S. E. 91.

CULPA. A fault; negligence. Jones, Bailm. 8.

Culpa is to be distinguished from *dolus*, the latter being a trick for the purpose of deception, the former merely a negligence. There are three degrees of *culpa lata culpa*, gross fault or neglect, *levis culpa*, ordinary fault or neglect; *levissima culpa*, slight fault or neglect, and the definitions of these degrees are precisely the same as those in our law. Story, Bailm. § 18, Waltham Bank v. Wright, 8 Allen (Mass.) 122, Woodman v. Nottingham, 49 N. H. 387, 6 Am. Rep. 526 See NEGLIGENCE

CULPABLE. This means not only criminal but censurable; and when the term is applied to the omission by a person to preserve the means of enforcing his own rights, censurable is more nearly equivalent. As he has merely lost a right of action which he might voluntarily relinquish, and has wronged nobody but himself, culpable neglect would seem to convey the idea of neglect for which he was to blame and is ascribed to his own carelessness, improvidence or folly. Waltham Bank v. Wright, 8 Allen (Mass.) 122.

CULPRIT. A person who is guilty, or supposed to be guilty, of a crime.

When a prisoner is arraigned, and he pleads not guilty, in English practice, the clerk, who arraigns him on behalf of the crown, replies that the prisoner is guilty, and that he is ready to prove the accusation. This is done by writing two monosyllable abbreviations,--*cul. prit.* 4 Bla. Com. 339; 1 Chit. Cr. Law 416. See Christian's note to Bla. Com. cited; 3 Sharsw. Bla. Com. 340, n. 9. The technical meaning has disappeared, and the compound is used in the popular sense as above given.

CULVERTAGE. A base kind of slavery. The confiscation or forfeiture which takes

place when a lord seizes his tenant's estate. Blount; Du Cange.

CUM ONERE (Lat.). With the burden; subject to the incumbrance; subject to the charge. A purchaser with knowledge of an incumbrance takes the property *cum oncre*. Co. Litt. 231 *a;* 7 East 164.

CUM TESTAMENTO ANNEXO (Lat.). With the will annexed. The term is applied to administration when there is no executor named in a will, or if he who is named is incapable of acting, or where the executor named refuses to act. If the executor has died, an administrator *de bonis non cum testamento annexo* (of the goods not [already] administered upon with the will annexed) is appointed. Often abbreviated d. b. n. c. t. a.

CUMULATIVE EVIDENCE. That which goes to prove what has already been established by other evidence. Waller v. Graves, 20 Conn. 305; Glidden v. Dunlap, 28 Me. 379; Parker v. Hardy, 24 Pick. (Mass.) 246; Parshall v. Klinck, 43 Barb. (N. Y.) 203; Able & Co. v. Frazier, 43 Iowa, 175.

Newly discovered evidence, if cumulative merely, is not sufficient ground for a new trial. Hill v. Helman, 33 Neb 731, 51 N. W. 128; Johnson v. Palmour, 87 Ga. 244, 13 S. E. 637; White v. Ward, 35 W. Va. 418, 14 S. E. 22; Link v. R. Co., 3 Wyo 680, 29 Pac. 741; Louisville, N. O. & T. Ry. Co. v. Crayton, 69 Miss. 152, 12 South. 271; Davis v. Mann, 43 Ill. App. 301.

CUMULATIVE LEGACY. See LEGACY.

CUMULATIVE REMEDY. A remedy created by statute in addition to one which still remains in force.

CUMULATIVE SENTENCE. A second or additional judgment given against one who has been convicted, the execution or effect of which is to commence after the first has expired. Clifford v. Dryden, 31 Wash. 545, 72 Pac. 96.

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

Upon an indictment for misdemeanor containing two counts for distinct offences, the defendant may be sentenced to imprisonment for consecutive terms of punishment, although the aggregate of the punishments may exceed the punishment allowed by law for one offence, and this rule is in many states prescribed by statute; 1 Bish. New Crim. Proc. § 1327 (2); Whart. Cr. Pl. & Pr. § 932; In re White, 50 Kan. 299, 32 Pac. 36; In re Walsh, 37 Neb. 454, 55 N. W. 1075; In re Wilson, 11 Utah, 114, 39 Pac. 498. But it may in some cases be the means of perpetrating great injustice. See O'Neil v. Vermont, 144 U. S. 323, 12 Sup Ct. 693, 36 L. Ed. 450, where a justice of the peace imposed a fine of $6633, and on failure to pay it, a sentence of nearly 60 years' imprisonment, for selling intoxicating liquors. The Supreme Court of the United States refused to interfere. See 31 Am. L. Reg. 619

In the absence of a statute, it is generally held that the court has power to impose cumulative sentences upon conviction under separate indictments for separate offences, the imprisonment under one to commence at the termination of that under the other, Howard v. U. S., 75 Fed 986, 21 C. C. A. 586, 34 L. R. A. 509, 43 U. S. App. 678, Simmons v. Coal Co., 117 Ga. 315, 43 S. E. 780, 61 L. R. A 739, In re Breton, 93 Me 39, 44 Atl. 125, 74 Am. St. Rep. 335, Rigor v State, 101 Md. 465, 61 Atl 631, 4 Ann. Cas 719, State v Hamby, 126 N. C 1066, 35 S. E 614, *Contra*, Ex parte Meyers, 44 Mo. 279, Lockwood v. Dills, 74 Ind 57. A statute giving this authority is *ex post facto;* Baker v. State, 11 Tex. App 262, where a court imposes sentences exceeding, in the aggregate, its jurisdiction, only the excess is void, Harris v. Lang, 27 App. D. C. 84, 7 L. R. A (N. S.) 134, 7 Ann. Cas. 141 If the second conviction of three is erroneous, the third at once follows the first, U. S. v. Carpenter, 151 Fed. 214, 81 C. C. A 194, 9 L. R. A. (N. S.) 1043, 10 Ann. Cas. 509

Upon an indictment for perjury charging offences committed in different suits, the defendant, upon conviction, may be sentenced to distinct punishments, although the suits were instituted with a common object; 5 Q. B. Div. 490.

Where, upon trial of an indictment—containing several counts—charging separate and distinct misdemeanors, identical in character, a general verdict of guilty is rendered, or a verdict of guilty upon two or more specified counts, the court has no power to impose a sentence or cumulative sentences exceeding in the aggregate what is prescribed by statute as the maximum punishment for one offence of the character charged. People v. Liscomb, 60 N. Y. 559, 19 Am Rep 211; but this case is said to stand alone. See 1 Bish New Cr. Proc. § 1327 (2), 6 App Cas. 241.

CUMULATIVE VOTING. A method of voting in which a voter, in voting for a class of officers, can distribute his votes among the candidates in such proportion as he sees fit. It does not exist except by a constitutional or statutory provision; State v. Stockley, 45 Ohio St. 304, 13 N. E. 279; this appears to be the settled rule; the cases found in the books are all on statutory provisions.

The right of a stockholder to vote cumulatively cannot be exercised on a single proposition, such as a question of adjournment; Bridgers v. Staton, 150 N. C. 216, 63 S. E. 892; the motives in exercising this right cannot be inquired into; Chicago Macaroni Mfg. Co. v. Boggiano, 202 Ill. 312, 67 N. E. 17. The law providing for cumulative voting of stock is not applicable to an election of managers of a partnership association; Attorney General v. McVichie, 138 Mich. 387, 101 N. W. 552.

CUNEATOR. A coiner. Du Cange. *Cuneare*, to coin. *Cuneus*, the die with which to coin. *Cuncata*, coined. Du Cange; Spelman, Gloss.

CUR. ADV. VULT. See CURIA ADVISARE VULT.

CURATE. One who represents the incumbent of a church, parson or vicar, and takes care of the church and performs divine services in his stead. An officiating temporary minister in the English church who represents the proper incumbent. Burn, Eccl. Law; 1 Bla. Com. 393. See CURE OF SOULS.

CURATIO (Lat.). **In Civil Law.** The power or duty of managing the property of him who, either on account of infancy or some defect of mind or body, cannot manage his own affairs. The duty of a curator or guardian. Calvinus, Lex.

CURATOR. In Civil Law. One legally appointed to take care of the interests of one who, on account of his youth, or defect of his understanding, or for some other cause, is unable to attend to them himself; a guardian.

There are curators *ad bona* (of property), who administer the estate of a minor, take care of his person, and intervene in all of his contracts, curators *ad litem* (of suits), who assist the minor in courts of justice, and act as curators *ad bona* in cases where the interests of the curator are opposed to the interests of the minor. There are also curators of insane persons, and of vacant successions and absent heirs.

In Missouri the term has been adopted from the civil law and it is applied to the guardian of the ward's estate, as distinct from the guardian of his person; Duncan v. Crook, 49 Mo. 117. In Scotland, it is pronounced Cúrator.

Under the Roman law, the guardian of a minor, both as to person or property, was called a tutor *(q. v.)*; and if, after being of an age to exercise his rights, he needed a person to look after his rights, such person was called a curator. Sandars, Inst. Just. Introd. xl. A person who had attained the age of puberty was not required to have a curator, but if he had much property he was almost certain to have one, as it was part of his tutor's duty to urge him to do so; *id.* 74, Dig. xxvi. 7. 5. 5.

Interim Curator In England. A person appointed by justices of the peace to take care of the property of a felon convict until the appointment by the crown of an administrator for the same purpose, Stat. 33 & 34 Vict. c. 23; 4 Steph. Com. 462.

CURATOR BONIS (Lat.). **In Civil Law.** A guardian to take care of the property. Calvinus, Lex.

In Scotch Law. A guardian for minors, lunatics, etc. Halkers, Tech. Terms; Bell, Dict.

CURATOR AD HOC. A guardian for this special purpose.

A *curator ad hoc* can be appointed to proceed against the tutor for an accounting or his removal only when there is no undertutor; Welch v. Baxter, 45 La. Ann. 1062, 13 South. 629.

CURATOR AD LITEM (Lat.). Guardian for the suit. In English law, the corresponding phrase is guardian *ad litem*.

CURATORSHIP. The office of a curator.

Curatorship differs from tutorship *(q. v.)* in this, that the latter is instituted for the protection of property in the first place, and secondly, of the person, while the former is intended to protect, first, the person, and, secondly, the property. 1 *Leçons Elem. du Droit Civ. Rom.* 241.

CURATRIX. A woman who has been appointed to the office of a curator.

CURE BY VERDICT. See AIDER BY VERDICT.

CURE OF SOULS. The ordinary duties of an officiating clergyman.

Curate more properly denotes the incumbent in general who hath the *cure of souls*, but more frequently it is understood to signify a clerk not instituted to the *cure of souls*, but exercising the spiritual office in a parish under the rector or vicar. 2 Burn, Eccl. Law 54; 1 H. Bla. 424.

CURFEW (French, *couvre*, to cover, and *feu*, fire). This is generally supposed to be an institution of William the Conqueror, who required, by ringing of the bell at eight o'clock in the evening, that all lights and fires in dwellings should then be extinguished. But the custom is evidently older than the Norman; for we find an order of King Alfred that the inhabitants of Oxford should at the ringing of that bell cover up their fires and go to bed. And there is evidence that the same practice prevailed at this period in France, Normandy, Spain, and probably in most of the other countries of Europe. Henry, Hist. of Britain, vol. 3, 567. It was doubtless intended as a precaution against fires, which were very frequent and destructive when most houses were built of wood.

That it was not intended as a badge of infamy is evident from the fact that the law was of equal obligation upon the nobles of court and upon the native-born serfs. And yet we find the name of *curfew law* employed as a by-word denoting the most odious tyranny.

The curfew is spoken of in 1 Social England 373, as having been ordained by William I. in order to prevent nightly gatherings of the people of England.

It appears to have met with so much opposition that in 1103 we find Henry I. repealing the enactment of his father on the subject; and Blackstone says that, though it is mentioned a century afterwards, it is rather spoken of as a time of night than as a still subsisting custom. Shakespeare frequently refers to it in the same sense. This practice is still pursued, in many parts of England (Lincoln's Inn, among them) and of this country, as a very convenient mode of apprising people of the time of night. It was enacted in Utah (1903) and other states.

CURIA. In Roman Law. One of the divisions of the Roman people. The Roman people were divided by Romulus into three tribes and thirty *curiæ:* the members of each *curia* were united by the tie of common religious rites, and also by certain common political and civil powers. Dion. Hal. l. 2, p. 82; Liv. l. 1, cap. 13; Plut. *in Romulo*, p. 30; Festus Brisson, *in verb.*

In later times the word signified the senate or aristocratic body of the provincial cities of the empire. Brisson, *in verb.*; Or-

tolan, *Histoire*, no. 25, 408; Ort. Inst. no. 125.

The senate-house at Rome; the senate-house of a provincial city. Cod. 10. 31. 2; Spelman, Gloss.

In English Law. The king's court; the palace; the royal household. The residence of a noble; a manor or chief manse; the hall of a manor. Spelman, Gloss.

A court of justice, whether of general or special jurisdiction. Fleta, lib. 2, l. 72, § 1; Feud. lib. 1, 2, 22; Spelman; Cowell; 3 Bla. Com. c. iv. See COURT.

A court-yard or enclosed piece of ground; a close. Stat. Edw. Conf. 1, 6; Bracton, 76, 222 *b*, 335 *b*, 356 *b*, 358; Spelman, Gloss. See CURIA CLAUDENDA.

The civil or secular power, as distinguished from the church. Spelman, Gloss.

CURIA ADVISARE VULT (Lat.). The court wishes to consider (the matter).

The entry formerly made upon the record to indicate the continuance of a cause until final judgment should be rendered.

It is commonly abbreviated thus: *cur. adv. vult*, or *c. a. v.* Thus, in 2 B. & C. 172, after the report of the argument we find "*cur. adv. vult*," then, "on a subsequent day judgment was delivered," etc.

CURIA CLAUDENDA. See DE CURIA CLAUDENDA.

CURIA MILITARIS. See COURT OF CHIVALRY; COURT-MARTIAL; Harcourt, His Grace the Steward, etc.

CURIA REGIS (Lat.). The king's court.

In English Law. A court established in England by William the Conqueror in his own hall.

It was the "great universal" court of the kingdom, from the dismemberment of which are derived the present four *superior courts* in England, viz., the High Court of Chancery, and the three *superior courts of common law*, to-wit, The Queen's Bench, Common Pleas, and Exchequer. It was composed of the king's great officers of state resident in his palace and usually attendant on his person, such as the lord high constable and lord marescal (who chiefly presided in matters of honor and of arms), the lord high steward and lord great chamberlain, the steward of the household, the lord chancellor (whose peculiar duty it was to keep the king's seal, and examine all such writs, grants, and letters as were to pass under that authority), and the lord high treasurer, who was the principal adviser in all matters relating to the revenue. These high officers were assisted by certain persons learned in the laws, who were called the king's justiciars or justices, and by the greater barons of parliament, all of whom had a seat in the *aula regia*, and formed a kind of court of appeal, or rather of advice in matters of great moment and difficulty. These, in their several departments, transacted all secular business, both civil and criminal, and all matters of the revenue; and over all presided one special magistrate, called the chief justiciar, or *capitalis justiciarius totius Angliæ*, who was also the principal minister of state, the second man in the kingdom, and, by virtue of his office, guardian of the realm in the king's absence. This court was bound to follow the king's household in all his expeditions; on which account the trial of common causes in it was found very burdensome to the people, and accordingly the 11th chapter of *Magna Charta* enacted that *"communia placita non sequantur curiam regis, sed teneantur in aliquo certo loco,"* which certain place was established in Westminster Hall (where the *aula regis* originally sat, when the king resided in that city), and there it has ever since continued, under the name of Court of Common Pleas, or Common Bench. It was under the reign of Edward I. that the other several officers of the chief justiciar were subdivided and broken into distinct courts of judicature. A court of chivalry, to regulate the king's domestic servants, and an august tribunal for the trial of delinquent peers, were erected; while the barons reserved to themselves in parliament the right of reviewing the sentences of the other courts in the last resort, but the distribution of common justice between man and man was arranged by giving to the court of chancery jurisdiction to issue all original writs under the great seal to other courts; the exchequer to manage the king's revenue, the common pleas to determine all causes between private subjects, and the court of king's bench retaining all the jurisdiction not cantoned out to the other courts, and particularly the sole cognizance of pleas of the crown, or criminal causes. 3 Steph. Com. 397, 3 Bla. Com. 38; Bract. l. 3, tr. 1, c. 7; Fleta, Abr. 2, cc. 2, 3; Gilbert, Hist. C. Pleas, Introd. 18; 1 Reeve, Hist. E. L. 48.

The Council of the King. Its early nature is not well understood. Probably its working body consisted of the king's great officers of state and the judges; perhaps others were added to it on particular occasion. It transacted business of state, sometimes taxation and legislation. It was a court of appeal and exercised original jurisdiction. It answered petitions, which was its chief duty. It might send the petition to one of the ordinary courts or lay it before the king. It came to provide new remedies for new wrongs and distribute justice for each man's deserts. Later it was tending to become an executive body.

Formerly the Chancellor was the leading legal member of the Council. By the end of the Middle Ages the Chancery has become a court, but its connection with the Council is so close that in most cases the Council gives the judgment of the court. In the Tudor period the Council was re-organized and the Chancery became separate from it.

At the end of the 13th and the beginning of the 14th century, Parliament gradually became separate from the Council; a hundred years later a division began to take place within the Council—into the Privy or Ordinary Council, the great officers of state and certain other trusted advisers of the king, and the Great Council, which consisted of the Privy Council and the great body of the nobility, spiritual and temporal. The early records speak of the *Council;* about the time of Henry VI the term *Privy Council* is met with.

The royal authority was exercised through the Council.

Towards the end of the 16th century, a committee of practically the whole Council sitting in the Star Chamber gradually absorbed the judicial work of the Council, but the process was gradual and there are few data. The Star Chamber had the title of the "Lords of the Council Sitting in the Star

Chamber." Every member of the Privy Council had the right to sit there.

At the beginning of the Tudor period the court of Star Chamber had begun to present the appearance of a court more or less separate from the Council acting as an executive body.

The Long Parliament abolished the greater part of the judicial business of the Council but only as to English bills or petitions. Its appellate jurisdiction as to places outside the ordinary English law was retained.

The act of 1833 provided "for the better administration of justice in His Majesty's Privy Council."

The Judicial Committee of the Privy Council is a committee of an Executive Council. Though spoken of as a court, it has not a self-contained and independent judicial function; its legal operation receives its final consummation and sole efficacy from the direct official action of the sovereign in council.

Historically it is the oldest of the royal courts. The act of the crown in allowing or dismissing an appeal, according to the advice contained in the report of the Judicial Committee, is the direct lineal descendant of the judgment given by the king in person in the Curia Regis. See 1 Holdsw. Hist. E. L. 23.

See JUDICIAL COMMITTEE OF THE PRIVY COUNCIL; COURT OF STAR CHAMBER; Dicey, Privy Council. A collection of cases (1616–1626) called *Abbreviatio Placitorum* contains the earliest information of the working of the Curia Regis. See REPORTS; 2 Sel. Essays, Anglo-Amer. L. H. 209.

See Procedure in the Curia Regis, by G. B. Adams (13 Columb. L. Rev. 277).

CURRENCY. A term commonly used for whatever passes among the people for money, whether gold or silver coin or bank notes. Osgood v. McConnell, 32 Ill. 74; Cockrill v. Kirkpatrick, 9 Mo. 697; Dugan v. Campbell, 1 Ohio 115, 119; Pilmer v. Bank, 16 Ia. 323; Klauber v. Biggerstaff, 47 Wis. 560, 3 N. W. 357, 32 Am Rep. 773.

CURRENT MONEY. That which is in general use as a medium of exchange.

It means the same thing as currency of the country. Miller v. McKinney, 5 Lea (Tenn.) 96.

The adjective "current," when qualifying money, is not the synonym of "convertible." It is employed to describe money which passes from hand to hand, and is generally received. Money is current which is received in the common business transactions, and is the common medium in barter and trade; Stalworth v. Blum, 41 Ala. 321.

Current money means that money which is commonly used and recognized as such; current bank notes, such as are convertible into specie at the counter where they were issued. Wharton v. Morris, 1 Dall. (U. S.) 125, 1 L. Ed. 65; Pierson v. Wallace, 7 Ark. 282; see Fry v. Dudley, 20 La. Ann. 368; Kupfer v. Marc, 28 Ill. 388; Conwell v. Pumphrey, 9 Ind. 135, 68 Am. Dec. 611; McChord v. Ford, 3 T. B. Monr. (Ky.) 166; Warren v. Brown, 64 N. C. 381; Stalworth v. Blum, 41 Ala. 321.

CURSITOR. A junior clerk in the court of chancery, whose business it formerly was to write out from the register those forms of writs which issued of course. 1 Poll. & M. Hist. Engl. Law 174.

Such writs were called writs *de cursu* (of course), whence the name, which had been acquired as early as the reign of Edward III. The body of cursitors constituted a corporation, each clerk having a certain number of counties assigned to him Coke, 2d Inst 670; 1 Spence, Eq. Jur. 238. The office was abolished by 5 & 6 Will. IV. c. 82.

CURSITOR BARON. An officer of the court of exchequer, appointed by patent under the great seal to be one of the barons of the exchequer. Abolished by 19 & 20 Vict. c. 86. Wharton, Dict.

CURTESY. The estate to which by common law a man is entitled, on the death of his wife, in the lands or tenements of which she was seised in possession in fee simple or in tail during their coverture, provided they have had lawful issue born alive which might have been capable of inheriting the estate. Chal. R. P. 314.

An estate for life which a husband takes at the death of his wife, having had issue by her born alive during coverture, in all lands of which she was seised in fact of an inheritable estate during coverture.

The right of the husband to enjoy during his life land of which his wife is at any time during coverture seised in fee simple (absolute or defeasible) or in fee tail, provided there was issue, born alive, of the marriage Demb. Land Tit. § 109.

It is a freehold estate for the term of his natural life. 1 Washb. R. P. 127. In the common law the word is used in the phrases *tenant by curtesy*, or *estate by curtesy*, but seldom alone; while in Scotland of itself it denotes the estate. The phrase "tenant by the law of England" was also used, and is said to have been of earlier origin; 2 Poll. & M. Hist. E. L. 412.

Some question has been made as to the derivation both of the custom and its name. It is said that the term is derived from *curtis*, a court, and that the custom, in England at least, is of English origin, though a similar custom existed in Normandy, and still exists in Scotland. 1 Washb. R. P. 128, n.; Wright, Ten. 192; Co. Litt. 30 *a*; 2 Bla. Com. 126; Ersk. Inst. 380; Grand Cout. de Normandie, c. 119. But this derivation "is considered more ingenious than satisfactory," and it is suggested that it is possible to explain the phrase by "some royal concession," as "being reasonable enough." 2 Poll. & M. Hist. E. L. 412.

A husband has an estate by curtesy after

the death of his wife in lands which he had voluntarily settled upon her, if he did not expressly or by implication relinquish such rights in the settlement; Depue v. Miller, 65 W. Va. 120, 64 S. E. 740, 23 L. R. A. (N. S.) 775; In re Kaufmann, 142 Fed. 898; Meacham v. Bunting, 156 Ill. 586, 41 N. E. 175, 28 L. R. A. 618, 47 Am. St. Rep. 239; *contra*, Ratliff v. Ratliff, 102 Va. 887, 47 S. E. 1007. He has curtesy in the equity of redemption of the wife's lands; Jackson v. Printing Co., 86 Ark. 591, 112 S. W. 161, 20 L. R. A. (N. S.) 454. That an estate was purchased by funds from the wife's separate estate and conveyed to the husband and wife jointly will not deprive him of his curtesy in the property; Donovan v. Griffith, 215 Mo. 149, 114 S. W. 621, 20 L. R. A. (N. S.) 825, 128 Am. St. Rep. 458, 15 Ann. Cas. 724. A surviving husband is entitled to curtesy out of a determinable fee owned by his wife with issue born alive notwithstanding the contingency upon which the fee is to terminate exists at the time of her death; Carter v. Couch, 157 Ala. 470, 47 South. 1006, 20 L. R. A. (N. S.) 858; Hatfield v. Sneden, 54 N. Y. 280; Webb v. First Baptist Church, 90 Ky. 117, 13 S. W. 362; McMasters v. Negley, 152 Pa. 303, 25 Atl. 641.

In Pennsylvania, by act of April 8, 1833, issue of the marriage is no longer necessary, so that the husband gains a freehold by the marriage itself; Lancaster County Bank v. Stauffer, 10 Pa. 399; but the law applies only when the estate is devisable, not to an estate tail or defeasible fee; McMasters v. Negley, 152 Pa. 303, 25 Atl. 641. That the wife's title to real estate is not acquired until after the death of the only child of the marriage will not deprive the husband of curtesy in the property; Donovan v. Griffith, 215 Mo. 149, 114 S. W. 621, 20 L. R. A. (N. S.) 825, 128 Am. St. Rep. 458, 15 Ann. Cas. 724. Ohio, Illinois, Kentucky, and Maine reduce the husband's life estate to one-third, calling it "dower," and dispense with birth of issue alive, while dower remains unchanged. In South Carolina and Georgia, curtesy has gone out of use, the husband having under the law greater benefits. Demb. Land Tit. § 109. Louisiana, Texas, California, Nevada, Washington, and Idaho, and Arizona and New Mexico have the "community" system and no curtesy; *id.* § 111. And in Indiana, Iowa, Minnesota, the Dakotas, Kansas, Colorado, Wyoming, and Mississippi, dower is applied by a forced lienship of the widow and there is no curtesy; *id.* § 108. See DOWER.

CURTILAGE. The enclosed space immediately surrounding a dwelling-house, contained within the same enclosure.

It is defined by Blount as a yard, backside, or piece of ground near a dwelling-house, in which they sow beans, etc., yet distinct from the garden. Blount; Spelman. By others it is said to be a waste piece of ground so situated. Cowell.

It has also been defined as "a fence or enclosure of a small piece of land around a dwelling-house, usually including the buildings occupied in connection with the dwelling-house, the enclosure consisting either of a separate fence or partly of a fence and partly of the exterior of buildings so within this enclosure." Com. v. Barney, 10 Cush. (Mass.) 480.

It usually includes the yard, garden, or field which is near to and used in connection with the dwelling. Cook v. State, 83 Ala. 62, 3 South. 849, 3 Am. St. Rep. 688. See Ivey v. State, 61 Ala. 58.

The term is used in determining whether the offence of breaking into a barn or warehouse is burglary. See 4 Bla. Com. 224; 1 Hale Pl. Cr. 558; 2 Russell, Cr. 13; Russ & R. 289; 1 C. & K. 84.

In Michigan the meaning of curtilage has been extended to include more than an enclosure near the house. People v. Taylor, 2 Mich. 250. See Coddington v. Dry Dock & Wet Dock Co., 31 N. J. L. 485; State v. Shaw, 31 Me. 523.

CURTILLUM. The area or space within the enclosure of a dwelling-house. Spelman, Gloss.

CURTIS. The area about a building; a garden; a hut or farmer's house; a farmer's house with the land enrolled with it.

A village or a walled town containing a small number of houses.

The residence of a nobleman; a hall or palace.

A court; a tribunal of justice. 1 Washb. R. P. 120; Spelman, Gloss.; 3 Bla. Com. 320.

CUSTODES. Keepers; guardians; conservators.

Custodes pacis (guardians of the peace). 1 Bla. Com. 349.

Custodes libertatis Anglicæ auctoritate parliamenti (guardians of the liberty of England by authority of parliament). The style in which writs and all judicial process ran during the grand rebellion, from the death of Charles I. till Cromwell was declared Protector. Jacob, Law Dict.

CUSTODIA LEGIS. In the custody of the law.

When property is lawfully taken, by virtue of legal process, it is in the custody of the law, and not otherwise; Gilman v. Williams, 7 Wis. 334, 76 Am. Dec. 219.

Where a sheriff has taken under attachment more than enough property to satisfy it, the property is not in *custodia legis* in a sense that will prevent a levy by a U. S. marshal in a suit in the federal court, so as to give the latter creditor a lien on the excess after satisfying the first attachment; Goodbar v. Brooks, 57 Ark. 450. Nor are executions issued on void judgments and their returns admissible against subsequent attaching creditors, to show that the goods were *in custodia legis;* Burr v. Mathers, 51 Mo. App. 470.

For cases on property and funds in the custody of the courts not subject to attachment, see Curtis v. Ford, 10 L. R. A. 529, note.

CUSTODY. The detainer of a person by virtue of a lawful authority. 3 Chit. Pr. 355.

The care and possession of a thing.

Custody has been held to mean nothing less than actual imprisonment; Smith v. Com., 59 Pa. 320; Rolland v. Com., 82 Pa. 306, 22 Am. Rep. 758. See CUSTODIA LEGIS.

As to custody of children, see PARENT AND CHILD; INFANT; DIVORCE.

CUSTOM. Such a usage as by common consent and uniform practice has become the law of the place, or of the subject-matter, to which it relates.

Custom is a law established by long usage. Wilcox v. Wood, 9 Wend. (N. Y.) 349. See Pollock, 1st Bk. of Jurispr. 263.

It differs from prescription, which is personal and is annexed to the person of the owner of a particular estate; while the other is local, and relates to a particular district. An instance of the latter occurs where the question is upon the manner of conducting a particular branch of trade at a certain place, of the former, where a certain person and his ancestors, or those whose estates he has, have been entitled to a certain advantage or privilege, as to have common of pasture in a certain close, or the like. 2 Bla. Com. 263. The distinction has been thus expressed: "While prescription is the making of a right, custom is the making of a law," Laws Us & Cust. 15, n. 2.

General customs are such as constitute a part of the common law of the country and extend to the whole country.

Particular customs are those which are confined to a particular district; or to the members of a particular class; the existence of the former are to be determined by the court, of the latter, by the jury. Laws. Us. & Cust. 15, n. 3; see Bodfish v. Fox, 23 Me. 90, 39 Am. Dec. 611.

In general, when a contract is made in relation to matter about which there is an established custom, such custom is to be understood as forming part of the contract, and may always be referred to for the purpose of showing the intention of the parties in all those particulars which are not expressed in the contract; 2 Pars. Contr. 652, 663, Fulton Bank of New York v. Benedict, 1 Hall (N. Y.) 602; Van Ness v. Pacard, 2 Pet. (U. S.) 138, 7 L. Ed. 374; Stultz v. Dickey, 5 Binn. (Pa.) 285, 6 Am. Dec. 411; 1 M. & W. 176; L. R. 17 Eq. 358; Robinson v. Fiske, 25 Me. 401; Bragg v. Bletz, 7 D. C. 105.

Evidence of a usage is admissible to explain technical or ambiguous terms; 3 B. & Ad. 728; Lane v. Bank, 3 Ind. App 299, 29 N. E. 613; Nonantum Worsted Co. v. Mfg. Co., 156 Mass. 331, 31 N. E. 293. But evidence of a usage contradicting the terms of a contract is inadmissible; 2 Cr. & J. 244; Brown v. Foster, 113 Mass. 136, 18 Am. Rep. 463; Farmers' & Mechanics' Nat. Bank of Buffalo v. Logan, 74 N. Y. 586; Exchange Bank of Virginia v. Cookman, 1 W. Va. 69; Gilbert v. McGinnis, 114 Ill. 28, 28 N. E. 382, De Cernea v. Cornell, 1 Misc. 399, 20 N. Y. Supp. 895; Globe Milling Co. v. Elevator Co., 44 Minn. 153, 46 N. W. 306. Nor can a local usage affect the meaning of the terms of a contract unless it is known to both contracting parties; Chateaugay Ore & Iron Co. v. Blake, 144 U. S. 476, 12 Sup. Ct. 731, 36 L. Ed. 510; nor can it affect a contract made elsewhere; Insurance Co. of North America v. Ins. Co., 140 U. S. 565, 11 Sup. Ct. 909, 35 L. Ed. 517.

"Merely that it varies the apparent contract is not enough to exclude the evidence, for it is impossible to add any material incident to the written terms of a contract, without altering its effect more or less. To fall within the exception of repugnancy the incident must be such as, if expressed in the written contract, would make it insensible or inconsistent;" *Per cur.* in 3 E. & B. 715. See Leake, Contr. 197; 7 E. & B. 274.

In order to establish a custom, it will be necessary to show its existence for so long a time that "the memory of man runneth not to the contrary," and that the usage has continued without any interruption of the right; for, if it has ceased for a time for such a cause, the revival gives it a new beginning, which will be what the law calls within memory. It will be no objection, however, that the exercise of the right has been merely suspended. 1 Bla. Com. 76; 2 *id* 31; Freary v. Cooke, 14 Mass. 488; L. R. 7 Q. B. 214; Ulmer v. Farnsworth, 80 Me. 500, 15 Atl. 65. See Hyde v. News Co., 32 Mo. App. 298. It must not have begun within legal memory, i. e. A. D. 1189; L. R. [1905] 2 Ch. 538, but a jury may find an immemorial custom upon proof of a period of twenty years or so; 21 L. J. Q. B. 196.

It must also have been peaceably acquiesced in and not subject to dispute, for, as customs owe their origin to common consent, their being disputed, either at law or otherwise, shows that such consent was wanting; Wood v. Hickok, 2 Wend. (N. Y.) 501, Rapp v. Palmer, 3 Watts (Pa.) 178. In addition to this, customs must be reasonable and certain. A custom, for instance, that land shall descend to the most worthy of the owner's blood is void; for how shall this be determined? But a custom that it shall descend to the next male of the blood, exclusive of females, is certain, and therefore good; 2 Bla. Com. 78; Browne, Us. & Cust. 21. See Minis v. Nelson, 43 Fed. 777.

Evidence of usage is never admissible to oppose or alter a general principle or rule of law so as, upon a given state of facts, to make the legal right and liabilities of the parties other than they are by law; Browne, Us. & Cust. 135, n; Stoever v. Whitman's Lessee, 6 Binn. (Pa.) 416; 16 C. B. N. S. 616; Barnard v. Kellogg, 10 Wall. (U. S.) 383, 19 L. Ed. 987; Warren v. Ins. Co., 104 Mass. 518; East Birmingham Land Co. v. Dennis, 85 Ala. 565, 5 South. 317, 2 L. R. A. 836, 7 Am. St. Rep. 73; Hopper v. Sage, 112 N. Y. 530, 20 N. E. 350, 8 Am. St. Rep. 771; but the rule is said by Lawson to extend no further than to usages which "conflict with an established rule of public policy, which it is not to the general interest to disturb."

Laws. Us. & Cust. 486. With respect to a usage of trade, however, it is sufficient if it appears to be known, certain, uniform, reasonable, and not contrary to law; Collings v. Hope, 3 Wash. C. C. 150, Fed. Cas. No. 3,003; U. S. v. Macdaniel, 7 Pet. (U. S.) 1, 8 L. Ed. 587; Lowry v. Russell, 8 Pick. (Mass.) 360; 4 B. & Ald. 210; 1 C. & P. 59; Grissom v. Bank, 87 Tenn. 350, 10 S. W. 774, 3 L. R. A. 273, 10 Am. St. Rep. 669. See Pickering v. Weld, 159 Mass. 522, 34 N. E. 1081. But if not directly known to the parties to the transaction, it will still be binding upon them if it appear to be so general and well established that knowledge of it may be presumed; Smith v. Wright, 1 Cai. (N. Y.) 43, 2 Am. Dec. 162; 4 Stark. 452; 1 Dougl. 510. A usage of trade is sufficiently long continued if it has existed so long as to show that the parties to a contract meant to employ the expression in the sense defined by it; Hyde v. News Co., 32 Mo. App 298. And one who seeks to avoid the effect of a notorious and uniform usage of trade must show that he was ignorant of it; Robertson v. S. S. Co., 139 N. Y. 416, 34 N. E. 1053. Whether a trade custom is established by the evidence in a case, and whether, if so, it was known to the party contracting or was so well established that he must be presumed to have known of it and contracted with reference to it, are questions for the jury; New Roads Oilmill & Mfg. Co. v. Kline, Wilson & Co., 154 Fed 296, 83 C. C. A 1.

Parties to a contract may contract to exclude a custom of trade therefrom; *id.* To read a usage into a contract, it must be consistent with the terms of the writing; *id.*

In an action for negligence, proof of a custom on the part of engine drivers to uncouple the locomotive and run ahead a short distance was offered to show the measure of duty. It was held that such a custom, to have the force of law, or to furnish a standard for the rights and acts of men, must be certain and uniform and so well known that no man dealing with the subject would be ignorant of it; per Sanborn, C. J., in Chicago, M. & St. P. Ry. Co. v. Lindeman, 143 Fed. 946, 75 C. C. A. 18 (C. C. A., Eighth Circuit).

A local custom is usage which has obtained the force of law and is in truth the binding law in a particular district or at a particular place of the persons or things that it concerns; 9 A. & E. 421. A local custom, so far as it extends, supersedes the local law; 5 Bingh. 253; but it cannot prevail against an express act of parliament; [1899] App. Cas. 41. The particular custom must have been asserted openly and acquiesced in by the persons who were affected and the enjoyment must have been peaceable. It must have been reasonable. It ought to be certain.

A local custom cannot supersede or modify a statute; Gore v. Lewis, 109 N. C. 539, 13 S. E. 909; Palmer v. Transportation Co., 76 Hun 181, 27 N. Y. Supp. 561.

See 26 L. J. Ex. 219; Stevens v. Reeves, 9 Pick. (Mass.) 198; Seagar v. Sligerland, 2 Cai. (N. Y.) 219; 2 F. & F. 131; Metcalf v. Weld, 14 Gray (Mass.) 210; Renner v. Bank, 9 Wheat. (U. S.) 582, 6 L. Ed. 166; Gordon v. Little, 8 S. & R. (Pa.) 533, 11 Am. Dec. 632; Dougl. 201; 4 Taunt. 848; Waring v. Grady's Ex'r, 49 Ala. 465, 20 Am. Rep. 286; Goodenow v. Tyler, 7 Mass 36, 5 Am. Dec. 22; L. R. 2 Ex. 101; Cooper v. Kane, 19 Wend. (N. Y.) 386, 32 Am. Dec. 512; Raisin v. Clark, 41 Md. 158, 20 Am Rep. 66. See Lawson; Browne; Us. & Cust.; note to Wigglesworth v. Dallison, 1 Sm. Lead. Cas. 900; [1892] Prob. 411; Metropolitan St. R. Co. v. Johnson, 91 Ga. 466, 18 S. E. 816. See USAGE.

CUSTOM-HOUSE. A place appointed by law, in ports of entry, where importers of goods, wares, and merchandise are bound to enter the same, in order to pay or secure the duties or customs due to the government.

CUSTOM-HOUSE BROKER. A person authorized to act for parties, at their option, in the entry or clearance of ships and the transaction of general business. Wharton. See act of July 13, 1866, § 9, 14. U. S. Stat. L. 117.

CUSTOM OF LONDON. Particular regulations in force within the city of London, in regard to trade, apprentices, widows and orphans, etc., which form part of the common law. 1 Bla. Com. 75; 3 Steph. Com. 588. See DEAD MAN'S PART. The custom of London, as regards intestate succession, was abolished by 19 & 20 Vict. c. 94; as regards foreign attachment, it was extended to all England and Wales by the Common Law Procedure Act of 1854, and is the basis of the law on that subject in this country. See ATTACHMENT.

Their influence on the early institutions of Pennsylvania was very great; Com. v. Hill, 185 Pa. 392, 39 Atl. 1055.

CUSTOM OF MERCHANTS. A system of customs acknowledged and taken notice of by all nations, and which are, therefore, a part of the general law of the land See LAW MERCHANT; 1 Chit. Bla. Com. 76, n. 9.

CUSTOM OF THE REALM. A current description of the common law of England, which is said not to be unhistorical. Pollock, First Book of Jurispr. 252. See James C. Carter, Law, Its Origin, etc.

CUSTOM OF YORK. A custom of intestacy in the province of York similar to that of London. Abolished by 19 & 20 Vict. c. 94.

CUSTOMARY COURT BARON. See COURT BARON.

CUSTOMARY ESTATES. Estates which owe their origin and existence to the custom

of the manor in which they are held. 2 Bla. Com. 149.

CUSTOMARY FREEHOLD. A class of freeholds held according to the custom of the manor, derived from the ancient tenure in villein socage. Holders of such an estate have a freehold interest, though it is not held by a freehold tenure. 2 Bla. Com. 149. In reference to customary freehold, outside the ancient demesne all the tenures of the non-freeholding peasantry are in law one tenure, tenure in villeinage; 1 Poll. & M. Hist. Engl. Law 384.

CUSTOMARY SERVICE. A service due by ancient custom or prescription only. Such is, for example, the service of doing suit at another's mill, where the persons resident in a particular place, by usage, time out of mind have been accustomed to grind corn at a particular mill. 3 Bla. Com. 234.

CUSTOMARY TENANTS. Tenants who hold by the custom of the manor. 2 Bla. Com. 149.

CUSTOMS. Taxes levied upon goods and merchandise imported or exported. Story, Const. § 949; Bacon, Abr. *Smuggling.*

The duties, toll, tribute, or tariff payable upon merchandise exported or imported. These are called customs from having been paid from time immemorial Expressed in law Latin by *custuma*, as distinguished by *consuetudines*, which are usages merely. 1 Bla. Com. 314.

Nine general appraisers are appointed by the president (not more than five from the same political party). They are employed at such ports and within such limits as the Secretary of the Treasury shall prescribe. Three of them constitute a board of general appraisers at the port of New York. It is a part of their duties to make reappraisements of the dutiable value of goods on demand of the importer, etc., or the collector. There is an appeal from the appraiser or person acting as such, or from the general appraiser in cases of reappraisement (either by the importer, etc., or by the collector) to the general board in New York or another board of three general appraisers designated by the Secretary.

The collector fixes the rate and amount of duties chargeable. If an importer, etc., gives the required notice, the papers are then transmitted to the general board in New York, or to another such board designated by the Secretary. From its decision, an appeal lies to the district court in the district, which may, upon request of the importer, etc., the Secretary, or the collector, direct a general appraiser to procure further evidence. The court then determines the classification and the rate of duty. It may, if it deems the case of such importance, allow an appeal to the Supreme Court, and shall allow one whenever the Attorney-General requests it within 30 days from a decision. Provision is made for giving publicity to the rulings of the general appraisers and the boards. Act of June 10, 1890, as amended Aug. 5, 1909.

See SMUGGLING; TARIFF; PROTEST, PAYMENT UNDER.

CUSTOS BREVIUM (Lat.). Keeper of writs. An officer of the court of common pleas whose duty it is to receive and keep all the writs returnable to that court and put them upon file, and also to receive of the prothonotaries all records of *nisi prius*, called *posteas*. Blount. An officer in the king's bench having similar duties. Cowell; *Termes de la Ley.* The office is now abolished.

CUSTOS MARIS (Lat.). Warden or guardian of the seas. Among the Saxons, an admiral. Spelman, Gloss. *Admiralus.*

CUSTOS MORUM. Applied to the court of king's bench, as "the guardian of the morals" of the nation. 4 Steph. Com. 311.

CUSTOS PLACITORUM CORONÆ (Lat.). Keeper of the Pleas of the Crown (the criminal records). Said by Blount and Cowell to be the same as the *Custos Rotulorum.*

CUSTOS ROTULORUM (Lat.). Keeper of the rolls of the peace. The principal justice of the peace of a county, who is the keeper of the records of the county. 1 Bla. Com. 349. He is always a justice of the peace and *quorum*, is the chief civil officer of the king in the county, and is nominated under the king's sign-manual. He is rather to be considered a minister or officer than a judge. Cowell; Lambard, Eiren. 373; 4 Bla. Com. 272; 3 Steph. Com. 37. The office has come to be united with that of the lord-lieutenant of the county. Maitland, Justice, etc., 82.

CUSTUMA. Duties. See CONSUETUDO.

CUSTUMA ANTIQUA SIVE MAGNA (Lat. ancient or great duties). The duties on wool, sheepskin or wool-pelts and leather exported were so called, and were payable by every merchant, stranger as well as native, with the exception that merchant strangers paid one-half more than natives. 1 Bla. Com. 314.

CUSTUMA PARVA ET NOVA (Lat.). An impost of threepence in the pound sterling on all commodities exported or imported by merchant strangers. Called at first the alien's duty, and first granted by stat. 31 Edw. I. Maddox, Hist. Exch. 526, 532; 1 Bla. Com. 314.

CUT. A wound made with a sharp instrument. State v. Patza, 3 La. Ann. 512; 1 Russ. & R. 104. See Binns v. Lawrence, 12 How. (U. S.) 9, 13 L. Ed. 871.

CYNEBOTE. A mulct anciently paid, by one who killed another, to the kindred of the deceased. Spelman, Gloss.

CY PRES (L. Fr. as near as). The rule of construction applied to a will (but not to a deed) by which, where the testator evinces a general intention to be carried into effect in a particular mode which cannot be followed, the words shall be so construed as to give effect to the general intention. 3 Hare 12; 2 Term 254; 2 Bligh 49; Sugd. Pow. 60; 1 Spence, Eq. Jur. 532; Bisph. Eq. § 126; McGrath, *Cy Pres*.

The doctrine of approximation, whereby the intent of the testator or grantor, which is impracticable to carry out literally, is carried out as near as possible. Mott v. Morris, 249 Mo. 137, 155 S. W. 434.

As commonly understood it has two features—one the right to exercise prerogative authority, enabling a court to deal with a bequest to a charitable use having no designated particular purpose as a bequest to charity generally, treating the purpose as the legatee, or a bequest for an illegal purpose, or some purpose impossible of execution for some reason; and the other, the right by liberal rules of construction to deal with a trust having a designated particular purpose, though in general terms, and enforce it within the limits of such purpose, supplying the trustee if necessary; Tincher v. Arnold, 147 Fed. 665, 77 C. C. A. 649, 7 L. R. A. (N. S.) 471, 8 Ann Cas. 917; Harrington v. Pier, 105 Wis. 485, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924.

The principle is applied to sustain wills in which perpetuities are attempted to be created, so that, if it can possibly be done, the devise is not regarded as utterly void, but is expounded in such a manner as to carry the testator's intention into effect as far as the law respecting perpetuities will allow. This is called a construction *cy pres*. Its rules are vague, and depend chiefly upon judicial discretion applied to the particular case. Sedgwick, Stat. Law 265; Story, Eq. Jur. § 1167. A limitation void because it offends the doctrine of perpetuity will be void altogether, and cannot be held under the *cy pres* rule of construction to be good as to that part which keeps within the period of perpetuity, and void only as to the excess; Post v. Rohrbach, 142 Ill. 606, 32 N. E. 687.

It is also applied to sustain devises and bequests for charities (*q. v.*). In its origin the doctrine was applied, in the exercise of the royal prerogative, delegated to the Lord Chancellor under the sign manual of the crown. Where there was a definite charitable purpose which was illegal and could not take place, the chancellor would substitute another. The judicial doctrine under this name is that if charity be the general substantial intention, though the mode provided for its execution fails, the English chancery will find some means of effectuating it, even by applying the fund to a different purpose from that contemplated by the testator, but as near to it as possible, provided only it be charitable; Bisph. Eq. § 129; Boyle, Char. 147, 155; Shelf, Mortm. 601; 3 Bro. C. C. 379; 7 Ves. 69, 82. Where a legacy is given to a charitable institution which exists at the testator's death, but ceases to exist before the legacy is paid over, it becomes the property of the charity on the death of the testator, and upon the charity ceasing to exist it is applicable to charitable purposes according to the doctrine of *cy pres;* [1891] 2 Ch. 236. Most of the cases carry the doctrine beyond what is allowed where private interests are concerned, and have in no inconsiderable degree to draw for their support on the prerogative of the crown and the statute of charitable uses; 43 Eliz. c. 4. This doctrine does not universally obtain in this country to the disinherison of heirs and next of kin. See CHARITABLE USES; Jackson v. Phillips, 14 Allen (Mass.) 580; Vidal v. Philadelphia, 2 How. (U. S.) 127, 11 L. Ed. 205; Perin v. Carey, 24 How. (U. S.) 465, 16 L. Ed. 701; Loring v. Marsh, 6 Wall. (U. S.) 337, 18 L. Ed. 802; Williams v. Williams, 8 N. Y. 518.

The doctrine of *cy pres* with reference to charitable trusts is that where a definite function or duty is to be performed, which cannot be done in exact conformity with the plan of the person who has provided therefor, such function or duty will be performed with as close approximation to the original plan as is reasonably practicable; Ingraham v. Ingraham, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320; MacKenzie v. Trustees, 67 N. J. Eq. 652, 61 Atl. 1027, 3 L. R. A. (N. S.) 227.

In cases where there has been an intention to make an unconditional gift to a non-existent corporation or society, then the gift will be regarded as immediate supported upon the doctrine of *cy pres;* Russell v. Allen, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397; Swasey v. American Bible Soc., 57 Me. 523; Cumming v. Reid Memorial Church, 64 Ga. 105; Andrews v. Andrews, 110 Ill. 223; Dodge v. Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103. In some states, however, the power to administer a charitable trust *cy pres* is declared not to exist, and therefore gifts to corporations not in being are void for remoteness; Shipman v. Rollins, 98 N. Y. 311; Little v. Willford, 31 Minn. 173, 17 N. W. 282; Methodist Church of Newark v. Clark, 41 Mich. 730, 3 N. W. 207; Barnum v. Council of Baltimore, 62 Md. 275, 50 Am. Rep. 219; Williams v. Pearson, 38 Ala. 299. Though the disallowance of charitable gifts to corporations not in being seems to be the logical consequence of repudiating the doctrine of *cy pres*, yet there are some states whose courts repudiate the doctrine of *cy pres* and yet support such gifts; Literary Fund v. Dawson, 10 Leigh (Va.) 147; Bridges v. Pleasants, 39 N. C. 30, 44 Am. Dec. 94; Zeisweiss v. James, 63 Pa. 465, 3 Am. Rep. 558.

Upon the dissolution of a charitable corporation, its property will be appropriated by the court to the purpose most nearly akin to the intent of the donors and will not be distributed to the donors; In re Centennial & Memorial Ass'n of Valley Forge, 235 Pa. 206, 83 Atl. 683.

Where the perpetuity is attempted to be created by deed, all the limitations based upon it are void; Cruise, Dig. t. 38, c. 9, § 34. See, 1 Vern. 250; 2 Ves. 336, 337, 364, 380; 3 *id.* 141, 220; 4 *id.* 13; Com. Dig. *Condition* (L, 1); 1 Roper, Leg. 514; Dane, Abr. Index; Domat, Lois Civ. liv. 6, t. 2, § 1; Shelf. Mortm.; Highmore, Mortm.; 8 H. L. R. 69.

The *cy pres* doctrine has been repudiated by the states of Alabama, Iowa, Indiana, Maryland, Michigan, Minnesota, North Carolina, Tennessee, South Carolina, Virginia, West Virginia and Wisconsin (*quære*). But the doctrine has been approved in all the New England states, also Pennsylvania and New York; in Mississippi and Illinois, and in some other states, the question has not been decided. Bisph. Eq. § 130; Eliot's Appeal, 74 Conn. 586, 51 Atl. 544; Duggan v. Slocum, 83 Fed. 244; Lennig's Estate, 154 Pa. 209, 25 Atl. 1049; Allen v. Stevens, 161 N. Y. 122, 55 N. E. 568; Howard v. Society, 49 Me. 302.

In England, a gift to a charity which failed in the testator's lifetime is not within the doctrine; [1898] 1 Ch. 19; otherwise, if the charity never existed; [1902] 1 Ch. 276; or if the name be left blank; [1896] 2 Ch. 451, C. A. It applies where there is a gift to a charity which has failed, though there be a gift over to a second charity; 1 Myl. & K. 410. It does not apply if the gift is not charitable; 1 De G. F. & J. 399; or in case of a gift for masses; 2 Drew. 425. The *cy pres* scheme will be settled as near as possible to the testator's intention; 10 Cl. & F. 908.

CYROGRAPHARIUS. In Old English Law. A cyrographer. An officer of the common pleas court.

CYROGRAPHUM. A chirograph, which see.

D

D. B. N., or D. B. N. C. T. A. See EXECUTORS AND ADMINISTRATORS.

D. S. B. See DEBET SINE BREVE.

D. V. N. See DEVISAVIT VEL NON.

DACION. **In Spanish Law.** The real and effective delivery of an object in the execution of a contract.

DAILY. Every day; day by day. Web. Where a statute requires an advertisement to be published in a daily newspaper it is such if it uses the term "daily newspaper" in contradistinction to the term "weekly," "semi-weekly," or "tri-weekly" newspaper. The term was used and is to be understood in its popular sense, and in this sense it is clear that a paper which, according to its usual custom, is published every day of the week except one, is a daily newspaper; otherwise a paper which is published every day except Sunday would not be a daily newspaper. Richardson v. Tobin, 45 Cal. 30. It may include a legal journal; Kellogg v. Carrico, 47 Mo. 157.

DAM. A construction of wood, stone, or other materials, made across a stream of water for the purpose of confining it; a mole. See People v. Gaige, 23 Mich. 93; Colwell v. Water Power Co., 19 N. J. Eq. 245.

It is an instrument for turning the water of a stream to the use of a mill; Burnham v. Kempton, 44 N. H. 78.

The word is sometimes used for the pond formed by the obstruction; Colwell v. Water Power Co., 19 N. J. Eq. 245; Natoma Water & Mining Co. v. Hancock, 101 Cal. 42, 31 Pac. 112, 35 Pac. 334; Hutchinson v. Ry. Co., 37 Wis. 582; and it is held to be synonymous with dyke; Com. v. Tolman, 149 Mass. 229, 21 N. E. 377, 3 L. R. A. 747, 14 Am. St. Rep. 414. The water collected by a dam is not properly termed a reservoir, as its object is not storage of water; Natoma Water & Mining Co. v. Hancock, 101 Cal. 42, 31 Pac. 112, 35 Pac. 334.

The construction of dams in floatable streams to facilitate their use is in some states authorized by statute; Brooks v. River Imp. Co., 82 Me. 17, 19 Atl. 87, 7 L. R. A. 460, 17 Am. St. Rep. 459; Kretzschmar v. Meehan, 74 Minn. 211, 77 N. W. 41; Field v. Log Driving Co., 67 Wis. 569, 31 N. W. 17; McLaughlin v. Mfg. Co., 103 N. C. 100, 9 S. E. 307; and incidental injuries to land of riparian proprietors thereby damaged are held to be consequential injuries incident to their proprietorship; Brooks v. River Imp. Co., 82 Me. 17, 19 Atl. 87, 7 L. R. A. 460, 17 Am. St. Rep. 459. See LOGS; RIPARIAN RIGHTS.

The owner of a stream not navigable may erect a dam across it, provided he do not thereby materially impair the rights of the proprietors above or below to the use of the water in its accustomed flow; Gould, Waters 110, n.; Tyler v. Wilkinson, 4 Mas. 401, Fed. Cas. No. 14,312; Vandenburgh v. Van Bergen, 13 Johns. (N. Y.) 212; Hooker v. Cummings, 20 Johns. (N. Y.) 90, 11 Am. Dec. 249; Boynton v. Rees, 9 Pick. (Mass.) 528; Wadsworth v. Tillotson, 15 Conn. 366, 39 Am. Dec. 391; Hetrich v. Deachler, 6 Pa. 32; Shrunk v. Nav. Co., 14 S. & R. (Pa.) 71; Scott v. Willson, 3 N. H. 321; Daniels v. Sav. Inst., 127 Mass. 534; Voter v. Hobbs, 69 Me. 19; Hanna v. Clarke, 31 Gratt. (Va.) 36, Decorah Woolen Mill Co. v. Greer, 49 Ia. 490; 28 Am. L. Reg. 147, n. He may even detain the water for the purposes of a mill, for a reasonable time, to the injury of an older mill,—the reasonableness of the detention in each particular case being a question for the jury; Hartzall v. Sill, 12 Pa. 248; Thomas v. Brackney, 17 Barb. (N. Y.) 654; Snow v. Parsons, 28 Vt. 459, 67 Am. Dec. 723. Parker v. Hotchkiss, 25 Conn. 321; Phillips v. Sherman, 64 Me. 171; Drake v. Woolen Co., 99 Mass. 574; Hoxsie v. Hoxsie, 38 Mich. 77; Holden v. Lake Co., 53 N. H. 552. But he must not unreasonably detain the water; Dilling v. Murray, 6 Ind. 324, 63 Am. Dec. 385; and the jury may find the constant use of the water by night and a detention of it by day to be an unreasonable use, though there be no design to injure others; Barrett v. Parsons, 10 Cush. (Mass.) 367; see Bullard v. Mfg. Co., 77 N. Y. 525. Nor has such owner the right to raise his dam so high as to cause the stream to flow back upon the land of supra-riparian proprietors; 1 B. & Ald. 258; Cowles v. Kidder, 24 N. H. 364, 57 Am. Dec. 287; Union Canal Co. v. Keiser, 19 Pa. 134; Pitman v. Poor, 38 Me. 237; Ellington v. Bennett, 59 Ga. 286; Drew v. Inhabitants of Westfield, 124 Mass. 461. And see BACK-WATER. These rights may, of course, be modified by contract or prescription.

An owner maintaining a dam across a floatable stream is entitled to an injunction against the operation of a splash dam by an upper riparian owner in such manner as to interfere materially with the continuity of his power and to fill his pond and race with dirt; Trullinger v. Howe, 53 Or. 219, 97 Pac. 548, 99 Pac. 880, 22 L. R. A. (N. S.) 545.

A mill proprietor may erect and maintain dams in a floatable stream, but he must keep open, for the use of those that wish, a convenient and considerable passageway for logs through or by his dam; Lancey v. Clifford, 54 Me. 487, 92 Am. Dec. 561; Connecticut River Lumber Co. v. Olcott Falls Co., 65 N. H. 290, 21 Atl. 1090, 13 L. R. A. 826; Powell v. Lumber Co., 12 Idaho, 723, 88 Pac. 97; he may erect dividing piers to separate

his logs from the common mass, but he must make reasonable provision for the passage of other logs without unreasonable hindrance; A. C. Conn. Co. v. Mfg. Co., 74 Wis. 652, 43 N. W. 660.

One erecting fences and culverts across a stream is not liable for injuries to an upper riparian proprietor because they are not sufficient to pass an extraordinary flood, due to the giving way of a dam or to an unprecedented rainfall; American Locomotive Co. v. Hoffman, 105 Va. 343, 54 S. E. 25, 6 L. R. A. (N. S.) 252, 8 Ann. Cas. 773. Riparian owners upon navigable fresh water lakes may construct in the shore waters in front of their lands wharves, piers, landings, and booms; Revell v. People, 177 Ill. 468, 52 N. E. 1052, 43 L. R. A. 790, 69 Am. St. Rep. 257; Mobile Transp. Co. v. City of Mobile, 153 Ala. 409, 44 South. 976, 13 L. R. A. (N. S.) 352, 127 Am. St. Rep. 34.

A state has full power, in the absence of legislation by congress, to authorize dams across interior streams although previously navigable to the sea; Manigault v. Springs, 199 U. S. 473, 26 Sup. Ct. 127, 50 L. Ed. 274.

If there be no license or act from which a license will necessarily follow, a person erecting a dam so as to flood the land of another, is a trespasser and acts at his peril; De Vaughn v. Minor, 77 Ga. 809, 1 S. E. 433.

When one side of the stream is owned by one person and the other by another, neither, without the consent of the other, can build a dam which extends beyond the *filum aquæ*, thread of the river, without committing a trespass, Cro. Eliz. 269; Tyler v. Wilkinson, 4 Mas. 397, Fed. Cas. No. 14,312; Lindeman v. Lindsey, 69 Pa. 93, 8 Am. Rep. 219. See *Lois des Bât.* p. 1, c. 3, s. 1, a. 3; Pothier, *Traité du Contrat de Société*, second app. 236; Stiles v. Hooker, 7 Cow. (N. Y.) 266; McCalmont v. Whitaker, 3 Rawle (Pa.) 90, 23 Am. Dec. 102; Anthony v. Lapham, 5 Pick. (Mass.) 175; Goodwin v. Gibbs, 70 Me. 243.

Many of the states have statutes enabling persons to build dams on their own land, although in so doing the land of a higher riparian owner may be overflowed; and in some cases this permission is given although the party may own the land on one side only. In all these instances, however, a remedy is provided for assessing the damages resulting from such dam. See Angell, Waterc. §§ 482, 484.

Where the natural flow of water has been collected by a permanent artificial dam into an artificial channel, and such condition has continued for more than twenty years, the riparian owners acquire a prescriptive right to have the water remain at such high stage, and the person who placed the permanent obstruction in the stream, and all other persons claiming under him are estopped from restoring the water to its original state; 4 Hurlst. & C. 714; Jones, Easem. 808; Washb. Easem. § 47; Woodbury v. Short, 17 Vt. 387, 44 Am. Dec. 344; Belknap v. Trimble, 3 Paige Ch. (N. Y.) 577; Shepardson v. Perkins, 58 N. H. 354; Delaney v. Boston, 2 Harr. (Del.) 489; Mathewson v. Hoffman, 77 Mich. 120, 43 N. W. 879, 6 L. R. A. 349; Smith v. Youmans, 96 Wis. 103, 70 N. W. 1115, 37 L. R. A. 285, 65 Am. St. Rep. 30; Murchie v. Gates, 78 Me. 300, 4 Atl. 698; Canton Iron Co. v. Biwabik Bessemer Co., 63 Minn. 367, 65 N. W. 643; City of Reading v. Althouse, 93 Pa. 400; Kray v. Muggli, 84 Minn. 90, 86 N. W. 882, 54 L. R. A. 473, 87 Am. St. Rep. 332, where the owner of the dam acquired his right to maintain it by prescription. The owners of the land flooded by the dam had improved their property with reference to the changed conditions, the court held that a reciprocal right accrued to the owners of the flooded lands to have the dam remain, and that the person who maintained it could not by any affirmative act restore the stream to its original condition. The decision is criticised, as are certain expressions to the same effect in Belknap v. Trimble, 3 Paige Ch. (N. Y.) 577, as not being in accord with the weight of authority, Farnham, Waters 2399; Lake Drummond Canal & Water Co. v. Burnham, 147 N. C. 41, 60 S. E. 650, 17 L. R. A. (N. S.) 945, 125 Am. St. Rep. 527. It is of the essence of such an easement (to divert a stream by an artificial way) that it exists for the benefit of the dominant tenement alone. Being in its very nature a right created for the benefit of the dominant owner, its exercise by him cannot create a new right for the benefit of the servient owner. Like any other right its exercise may be discontinued if it becomes onerous or ceases to be beneficial to the party entitled; L. R. 6 Q. B. 578. In Lake Drummond Canal & Water Co. v. Burnham, 147 N. C. 41, 60 S. E. 650, 17 L. R. A. (N. S.) 945, 125 Am. St. Rep. 527, it is said that decisions upholding the rights of the servient owner may be upheld under the doctrines of dedication and estoppel.

The degree of care which a party who constructs a dam across a stream is bound to use, is in proportion to the extent of injury which will be likely to result to third persons provided it should prove insufficient. It is not enough that the dam is sufficient to resist ordinary floods; for if the stream is occasionally subject to great freshets, these must likewise be guarded against; and the measure of care required in such cases is that which a discreet person would use if the whole risk were his own; Lapham v. Curtis, 5 Vt. 371, 26 Am. Dec. 310; Gray v. Harris, 107 Mass. 492, 9 Am. Rep. 61; Washb. Easem. *288; Bristol Hydraulic Co. v. Boyer, 67 Ind. 236; State v. Water Co., 51 Conn. 137.

If a mill-dam be so built that it causes a watercourse to overflow the surrounding

country, where it becomes stagnant and unwholesome, so that the health of the neighborhood is sensibly impaired, such dam is a public nuisance, for which its owner is liable to indictment; Douglass v. State, 4 Wis. 387.

The owners of a mill dam cannot interfere with the right of the public to float logs on a stream; Lancey v. Clifford, 54 Me. 487, 92 Am. Dec. 561; but one injuring the dam of a riparian owner by running logs down a stream must show that the stream was navigable; 26 U. C. C. P. 539. As to the right of a riparian proprietor on a navigable stream to recover for injuries to his dam by the floating of logs down stream, see Logs, which see also as to the conflicting rights of dam owners and log driving companies. See Carlson v. Imp. Co., 73 Minn 128, 75 N. W. 1044, 41 L. R. A. 372, 72 Am. St. Rep. 610; Coyne v. Boom Co., 72 Minn. 533, 75 N. W. 748, 41 L. R. A. 491, 71 Am. St. Rep. 508. So it is an indictable nuisance to erect a dam so as to overflow a highway; State v. Phipps, 4 Ind. 515; Com. v. Fisher, 6 Metc. (Mass.) 433; see Stone v. Peckham, 12 R. I. 27; or so as to obstruct the navigation of a public river, Newark Plank Road Co v Elmer, 9 N. J. Eq 754, Tyrrell v. Lockhart, 3 Blackf. (Ind.) 136; Williams v. Beardsley, 2 Ind. 591; Morgan v. King, 18 Barb. (N. Y.) 277; Bacon v. Arthur, 4 Watts (Pa.) 437; Hoxsie v. Hoxsie, 38 Mich 77; Lagrone v. Trice, 57 Miss. 227; Ellis v. Harris' Ex'r, 32 Gratt. (Va.) 684. See Irrigation; River; Watercourse; Riparian Proprietor; Police Power.

DAMAGE. The loss caused by one person to another, or to his property, either with the design of injuring him, or with negligence and carelessness, or by inevitable accident.

In England, in the common law courts, it was held that neither in common parlance nor in legal phraseology is the word "damage" used as applicable to injuries done to property; 40 L. J. Q. B. 218; 41 L. J. C. P. 128

The admiralty courts on the other hand contended that the word did include claims for personal injury and even for loss of life; 37 L. J. Adm. 14; 38 *id.* 12, 50; 46 L. J. P. D & A. 71; 2 P. D. 8.

But the House of Lords construing section 7 of the Admiralty Court Act, 24 Vict. c. 10, providing that "the High Court of Admiralty shall have jurisdiction over any claim for damages done by any ship" established the former doctrine, and held that a claim for loss of life under Lord Campbell's Act is not a claim for damage within the provisions of the Admiralty Court Act; 54 L. J. P. D. & A. 9; 10 App. Cas. 59.

But the word may be controlled by the context and can mean personal injury; 52 L. J. Q. B. 395; and there seems in this country to be no distinction between the meaning of the words damage and injury.

Damage to the person as used in the Massachusetts statute relating to survival of actions, does not extend to torts not directly affecting the person, but includes every action the substantial cause of which is bodily injury, as the negligent sale of deadly poison for a harmless drug as the result of which a man dies; Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298.

He who has caused the damage is bound to repair it; and if he has done it maliciously he may be compelled to pay beyond the actual loss; Fay v. Parker, 53 N. H. 342, 16 Am. Rep. 270. When damage occurs by accident without blame to any one, the loss is borne by the owner of the thing injured: as, if a horse run away with his rider, without any fault of the latter, and injure the property of another person, the injury is the loss of the owner of the thing. When the damage happens by the act of God, or inevitable accident, as by tempest, earthquake, or other natural cause, the loss must be borne by the owner. See Comyns, Dig; Sedgwick; Mayne; Sutherland; Joyce; Hale; Field, Damages; 1 Rutherf. Inst. 399; Compensation; Damages; Measure of Damages.

DAMAGE CLEER. The tenth part in the common pleas, and the twentieth part in the king's bench and exchequer courts, of all damages beyond a certain sum, which was to be paid the prothonotary or chief officer of the court in which they were recovered before execution could be taken out. At first it was a gratuity, and of uncertain proportions. Abolished by stat. 17 Car. II. c. 6. Cowell; *Termes de la Ley.*

DAMAGE FEASANT (French, *faisant dommage*, doing damage). A term usually applied to the injury which animals belonging to one person do upon the land of another, by feeding there, treading down his grass, corn, or other production of the earth. 3 Bla. Com. 6; Co. Litt. 142, 161; Com. Dig. *Pleader* (3 M, 26).

It "is the strictest distress, for the thing distrained must be taken in the very act;" Lord Holt in 12 Mod. 658; 3 Bla. Com. 6, 7. By the common law, a distress of animals or things damage feasant is allowed. Gilb. Distr. 21; Poll. Torts 473, 478. It was also allowed by the ancient customs of France. 11 Toullier 402; Merlin, *Report. Fourriere;* 1 Fournel, *Abandon.* See Animal.

DAMAGED GOODS. Goods subject to duties, which have received some injury either in the voyage home, or while bonded in warehouse.

DAMAGES. The indemnity recoverable by a person who has sustained an injury, either in his person, property, or relative rights, through the act or default of another.

The sum claimed as such indemnity by a plaintiff in his declaration.

The injury or loss for which compensation is sought.

Compensatory damages. Those allowed as a recompense for the injury actually received. They cannot include an allowance for inconvenience as well as injuries; Jenson v. R. Co., 86 Wis. 589, 57 N. W. 359, 22 L. R. A. 680.

Consequential damages. Those which, though directly, are not immediately, consequential upon the act or default complained of.

Double or treble damages. See MEASURE OF DAMAGES.

Exemplary damages. Those allowed for torts committed with fraud, actual malice, or deliberate violence or oppression, as a punishment to the defendant, and as a warning to other wrong doers. Mayer v. Frobe, 40 W. Va. 246, 22 S. E. 58; Hale, Dam. 200; MEASURE OF DAMAGES.

General damages. Those which necessarily and by implication of law result from the act or default complained of.

They are such as the jury may give when the judge cannot point out any measure by which they are to be ascertained, except the opinion and judgment of a reasonable man. They are such as by competent evidence are directly traceable to a failure to discharge a contract, obligation or duty imposed by law. Bank of Commerce v. Goos, 39 Neb. 437, 58 N. W. 84, 23 L. R. A. 190.

Liquidated damages. See that title.

Nominal damages. See that title.

Punitive damages. See MEASURE OF DAMAGES.

Special damages. Such as arise directly, but not necessarily or by implication of law, from the act or default complained of.

These are either superadded to general damages, arising from an act injurious in itself, as when some particular loss arises from the uttering of slanderous words, actionable in themselves, or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as when the words become actionable only by reason of special damage ensuing.

Unliquidated damages. See LIQUIDATED DAMAGES.

Vindictive damages. See MEASURE OF DAMAGES.

In modern law, the term damages is not used in a legal sense to include the costs of the suit, though it was formerly so used. Co Litt 257 *a*; Dougl 751

The various classes of damages here given are those commonly found in the text-books and in the decisions of courts of common law. Other terms are of occasional use (as *resulting*, to denote consequential damages), but are easily recognizable as belonging to some one of the above divisions. The question whether damages are to be limited to an allowance compensatory merely in its nature and extent, or whether they may be assessed as a punishment upon a wrong-doer in certain cases for the injury inflicted by him upon the plaintiff, received much attention from the courts and was very fully and vigorously discussed by Greenleaf and Sedgwick, the latter of whom, though supporting the doctrine admitted that it was exceptional and anomalous and could not be logically supported; Sedgw. Dam § 353. He attributes the origin of the principle to the rule making juries the judges of the damages; *id.* § 354. In cases of aggravated wrong there were large verdicts and the courts were powerless, although the early cases consisted mainly of setting them aside. Originating in the unrestrained expressions of judges in justifying verdicts, there grew up this doctrine of exemplary damages characterized as "a sort of hybrid between a display of ethical indignation, and the imposition of a criminal fine." The current of authorities set strongly (in numbers, at least) in favor of allowing punitive damages, Day v. Woodworth, 13 How. (U. S.) 363, 14 L. Ed 181; and that rule of decision has prevailed in most of the states, though in some it is repudiated entirely; Stilson v. Gibbs, 53 Mich. 280, 18 N W. 815; Hawes v. Knowles, 111 Mass. 518, 19 Am. Rep. 383; Greeley, S. L & P. R. Co. v. Yeager, 11 Colo 345, 18 Pac. 211; Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep 475, and in others the doctrine is also denied but exemplary damages were permitted on the ground that they were compensatory merely for mental suffering; Quigley v. R. Co., 11 Nev 350, 21 Am Rep 757, Union Pac R. R. Co. v. Hause, 1 Wyo 27 This rule prevailed in West Virginia; Pegram v Stortz, 31 W. Va 229, 6 S. E. 485, Beck v Thompson, 31 W Va. 453, 7 S. E 447, 13 Am. St. Rep 870; but has been over-ruled, Mayer v. Frobe, 40 W Va 246, 22 S. E 58 The argument against such damages was based on the objection that it admits of the infliction of pecuniary punishment to an almost unlimited extent by an irresponsible jury, a view which is theoretically more obnoxious (supposing that there is no practical difference) than that which considers damages merely as a compensation, of the just amount of which the jury may well be held to be proper judges. It also seemed to savor somewhat of judicial legislation in a criminal department to extend such damages beyond those cases where an injury is committed to the feelings of an innocent plaintiff. See 2 Greenl Ev § 253, 2 Sedgw. Dam 323, 1 Kent 630, Grand Trunk R R. Co. v. Richardson, 91 U. S. 465, 23 L. Ed. 356, Fay v Parker, 53 N H 342, 16 Am Rep 270, where the terms exemplary, vindictive and punitive or punitory are considered as synonymous, and the cases and authorities are exhaustively reviewed

Direct is here used in opposition to *remote*, and *immediate* to *consequential*

In Pleading. In personal and mixed actions (but not in penal actions, for obvious reasons), the declaration must allege, in conclusion, that the injury is to the damage of the plaintiff, and must specify the amount of damages; Com. Dig. *Pleader* (C. 84); 10 Co. 116 *b*.

In personal actions there is a distinction between actions that sound in damages and those that do not; but in either of these cases it is equally the practice to lay damages. There is, however, this difference: that, in the former case, damages are the main object of the suit, and are, therefore, always laid high enough to cover the whole demand; but in the latter, the liquidated debt, or the chattel demanded, being the main object, damages are claimed in respect of the detention only of such debt or chattel, and are, therefore, usually laid at a small sum. The plaintiff cannot recover greater damages than he has laid in the conclusion of his declaration; Com. Dig. *Pleader* (C. 84); 10 Co. 117 *a*, *b*; Viner, Abr. *Damages* (R.); 1 Bulstr. 49; 2 W. Bla. 1300; Curtiss v. Lawrence, 17 Johns. (N. Y.) 111; Fish v. Dodge, 4 Denio (N. Y.) 311, 47 Am. Dec. 254; Fowlkes v. Webber, 8 Humphr. (Tenn.) 530; New Jersey Flax Cotton Wool Co. v. Mills, 26 N. J. L. 60. See AD DAMNUM. A verdict

for larger damages than are alleged or proved should be set aside; Texas & P. R. Co. v. Morin, 66 Tex. 133, 18 S. W. 345.

In real actions no damages are to be laid, because in these the demand is specially for the land withheld, and damages are in no degree the object of the suit; Steph. Pl. 426; 1 Chit. Pl. 397–400.

General damages need not be averred in the declaration; nor need any specific proof of damages be given to enable the plaintiff to recover. The legal presumption of injury in cases where it arises is sufficient to maintain the action. Whether special damage be the gist of the action, or only collateral thereto, it must be particularly stated in the declaration, as the plaintiff will not otherwise be permitted to go into evidence of it at the trial, because the defendant cannot also be prepared to answer it. See 2 Sedgw. Dam. 606; 4 Q. B 493; 7 C. & P. 804; Agnew v. Johnson, 22 Pa. 471, 62 Am. Dec. 303; Patten v. Libbey, 32 Me. 379; Town of Troy v. R. Co., 23 N. H. 83, 55 Am. Dec. 177; Brizsee v. Maybee, 21 Wend. (N. Y.) 144; Rice v. Coolidge, 121 Mass. 393, 23 Am. Rep. 279; Nunan v. San Francisco, 38 Cal. 689; Tomlinson v. Town of Derby, 43 Conn. 562; Parker v. Burgess, 64 Vt. 442, 24 Atl. 743; Oliver v. Perkins, 92 Mich. 304, 52 N. W. 609; Roberts v. Graham, 6 Wall. (U. S.) 578, 18 L. Ed. 791.

In Practice. To constitute a right to recover damages, the party claiming damages must have sustained a loss; the party against whom they are claimed must be chargeable with a wrong; the loss must be the natural and proximate consequence of the wrong.

There is no right to damages, properly so called, where there is no *loss*. A sum in which a wrong-doer is mulcted simply as punishment for his wrong, and irrespective of any loss caused thereby, is a "fine," or a "penalty," rather than damages. Damages are based on the idea of a loss to be compensated, a damage to be made good. Yates v. Joyce, 11 Johns. (N. Y.) 136; Smith v. Sherwood, 2 Tex. 460; Allison v. McCune, 15 Ohio 726, 45 Am. Dec 605; Webb v. Mfg Co., 3 Sumn. 192, Fed. Cas. No. 17,322; Linton v. Hurley, 104 Mass. 353; 16 Q. B. D. 613. See Dayton v. Parke, 142 N. Y. 391, 37 N. E. 642, Hale, Dam. 3. This loss, however, need not always be distinct and definite, capable of exact description or of measurement in dollars and cents. A sufficient loss to sustain an action may appear from the mere nature of the case itself. The law in many cases presumes a loss where a wilful wrong is proved; and thus also damages are awarded for injured feelings, bodily pain, grief of mind, injury to reputation, and for other sufferings which it would be impossible to make subjects of exact proof and computation in respect to the amount of the loss sustained; Tilden v. Metcalf, 2 Day (Conn.) 259; Johnson v. Courts, 3 H. & McH. (Md.) 510; Ratliff v. Huntly, 27 N. C. 545; Wilkins v. Gilmore, 2 Humphr. (Tenn.) 140; Huntley v. Bacon, 15 Conn. 267; Jennings v. Maddox, 8 B. Monr. (Ky.) 432; Hatt v. News Ass'n, 94 Mich. 119, 54 N. W. 766; White v. Barnes, 112 N. C. 323, 16 S. E. 922; Lake Erie & W. R. Co. v. Christian, 39 Ill. App 495; Hale v. Bonner, 82 Tex. 33, 17 S. W. 605, 14 L. R. A. 336, 27 Am. St. Rep. 850. See MENTAL SUFFERING. The rule is not that a loss must be proved by evidence, but that one must appear, either by evidence or by presumption, founded on the nature of the case.

There is no right to damages where there is no *wrong*. It is not necessary that there should be a tort, strictly so called,—a wilful wrong, an act involving moral guilt. The wrong may be either a wilful, malicious injury, as in the case of assault and battery, libel, and the like, or one committed through mere motives of interest, as in many cases of conversion of goods, trespasses on land, etc.; or it may consist in a mere neglect to discharge a duty with suitable skill or fidelity, as where a surgeon is held liable for malpractice, a sheriff for the escape of his prisoner, or a carrier for the neglect to deliver goods; or a simple breach of contract, as in case of refusal to deliver goods sold, or to perform services under an agreement. or it may be a wrong of another person for whose act or default a legal liability exists, as where a master is held liable for an injury done by his servant or apprentice, or a railroad company for an accident resulting from the negligence of its engineer. But there must be something which the law recognizes as a wrong, some breach of a legal duty, some violation of a legal right, some default or neglect, some failure in responsibility, sustained by the party claiming damages. For the sufferer by accident or by the innocent or rightful acts of another cannot claim indemnity for his misfortune. It is called *damnum absque injuria*,—a loss without a wrong, for which the law gives no remedy; Pollock, Torts 22, 175; Bartholomew v. Bentley, 15 Ohio 659, 45 Am. Dec. 596; 11 M. & W. 755; Howland v. Vincent, 10 Metc. (Mass.) 371, 43 Am. Dec. 442; Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; Marshall v. Welwood, 38 N. J. L. 339, 20 Am Rep. 394; Brown v. Collins, 53 N. H. 442, 16 Am. Rep. 372; Chase v. Silverstone, 62 Me. 175, 16 Am. Rep. 419; Trustees, etc., of Village of Delhi v. Youmans, 50 Barb. (N. Y.) 316; Baltimore & P. R. Co. v. Reaney, 42 Md. 119; Shipley v. Fifty Associates, 106 Mass. 194, 8 Am. Rep. 318; L. R. 3 H. L. 330; Egan v. Hart, 45 La. Ann. 1358, 14 South. 244; Booth v. R. Co., 140 N. Y. 267, 35 N. E. 592, 24 L. R. A. 105, 37 Am. St. Rep. 552.

See DAMNUM ABSQUE INJURIA.

The obligation violated must also be one *owed to the plaintiff*. The neglect of a duty,

which the plaintiff had no legal right to enforce, gives no claim to damages, though perhaps it is better said, gives no right of action. Thus where a postmaster was required by law to advertise in the newspaper in his city having the largest circulation, and chose another newspaper, it was merely a breach of a duty he owed to the public and not to the owner of the newspaper having the largest circulation; Strong v. Campbell, 11 Barb. (N. Y.) 135.

Whether when the law gives judgment on a contract to pay money—*e. g.* on a promissory note—this is to be regarded as enforcing performance of the promise, or as awarding damages for the breach of it, is a question on which jurisconsults have differed. Regarded in the latter point of view, the default of payment is the wrong on which the award of damages is predicated.

The loss must be the *natural and proximate consequence* of the wrong; 2 Greenl. Ev. § 256; 2 Sedgw. Dam. 362; Field. Dam. 42; Hale, Dam. 4. Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. 39, 33 L. Ed. 279. Or, as others have expressed the idea, it must be the "direct and necessary," or "legal and natural," consequence. It must not be "remote" or "consequential." The loss must be the *natural* consequence. Every man is expected —and may justly be—to foresee the usual and natural consequences of his acts, and for these he may justly be held accountable; but not for consequences that could not have been foreseen; Dickinson v. Boyle, 17 Pick. (Mass.) 78, 28 Am. Dec. 281; Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59; Vedder v. Hildreth, 2 Wis. 427; Walker & Langford v. Ellis & Moore, 1 Sneed (Tenn.) 515; Young v. Tustin, 4 Blackf. (Ind.) 277; 6 Q. B. 928; Fritts v. R. Co., 62 Conn. 503, 26 Atl. 347; Swain v. Schieffelin, 134 N. Y. 471, 31 N. E. 1025, 18 L. R. A. 385. See Malone v. R. R., 152 Pa. 390, 394, 25 Atl. 628; Taylor Mfg. Co. v. Hatcher Mfg. Co., 39 Fed. 440, 3 L. R. A. 587. It must also be the *proximate* consequence. Vague and indefinite results, remote and consequential, and thus uncertain, are not embraced in the compensation given by damages. It cannot be certainly known that they are attributable to the wrong, or whether they are not rather connected with other causes; Hatchell v. Kimbrough, 49 N. C. 163; 1 Sm. L. Cas. 362. See Engelsdorf v. Sire, 64 Hun 209, 18 N. Y. Supp. 907; Brooke v. Bank, 69 Hun 202, 23 N. Y. Supp. 802.

In cases of tort the rule has been thus stated: "The question is not what cause was nearest in time or place to the catastrophe. This is not the meaning of the maxim *causa proxima non remota spectatur*. The proximate cause is the efficient cause, the one that sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes, and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster;" Ætna Insurance Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395. See CAUSA PROXIMA NON REMOTA SPECTATUR.

"The true inquiry is, whether the injury sustained was such as, according to common experience and the usual course of events, might reasonably be anticipated;" Derry v. Flitner, 118 Mass. 131. See L. R. 10 Q. B. 111; Pullman Palace Car Co. v. Barker, 4 Colo. 344, 34 Am. Rep. 89; Lake Erie & W. R. Co. v. Close, 5 Ind. App. 444, 32 N. E. 588.

The foregoing are the general principles on which the right to recover damages is based. Many qualifying rules have been established, of which the following are among the more important instances. In an action for damages for an injury caused by negligence, the plaintiff must himself appear to have been free from fault; for if his own negligence in any degree contributed directly to produce the injury, he can recover nothing. The law will not attempt to apportion the loss according to the different degrees of negligence of the two parties; 1 C. & P. 181; Miller v. Trustees of Mariner's Church, 7 Me. 51, 20 Am. Dec. 341; Loker v. Damon, 17 Pick. (Mass.) 284; Hay v. Cohoes Co., 3 Barb. (N. Y.) 49; Murphy v. Diamond, 3 La. Ann. 441; Galbraith v. Fleming, 60 Mich. 403, 27 N. W. 581; though this rule has in some cases been relaxed in favor of the plaintiff; L. R. 1 Ap. Ca. 754; *e. g.*, if the injury would have occurred although the plaintiff had been free from negligence; 8 C. B. N. S. 115; Newhouse v. Miller, 35 Ind. 463; Walsh v. Transp. Co., 52 Mo. 434; Lindsey v. Town of Danville, 45 Vt. 72; or if the injury is wilful; Cook v. R. & Bank. Co., 67 Ala. 533; Terre Haute & I. R. Co. v. Graham, 95 Ind. 286, 48 Am. Rep. 719; Lake Shore & M. S. R. Co. v. Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218. See NEGLIGENCE. There is no right of action by an individual for damages sustained from a public nuisance, so far as he only shares the common injury inflicted on the community; 5 Co. 72. For any special loss suffered by himself alone, he may recover; 4 Maule & S. 101; 2 Bingh. 263; 1 Bingh. N. C. 222; 2 *id.* 281; Baxter v. Turnpike Co., 22 Vt. 114, 52 Am. Dec. 84; Proprietors of Quincy Canal v. Newcomb, 7 Metc. (Mass.) 276, 39 Am. Dec. 778; Mayor, etc., of Pittsburgh v. Scott, 1 Pa. 309; O'Brien v. R. Co., 17 Conn. 372; but in so far as the whole neighborhood suffer together, resort must be had to the public remedy; 7 Q. B. 339; Proprietors of Quincy Canal v. Newcomb, 7 Metc. (Mass.) 276, 39 Am. Dec. 778; Barr v. Stevens, 1 Bibb (Ky.) 293. Judicial officers are not liable in damages for erroneous decisions. See JUDGE; LAST CLEAR CHANCE.

Where the wrong committed by the defendant amounted to a felony, the English rule was that the private remedy by action was stayed till conviction for the felony was had. This was in order to stimulate the exertions of private persons injured by the commission of crimes to bring offenders to justice. This rule has, however, been changed in some of the United States. Thus, in New York it is enacted that when the violation of a right admits of both a civil and criminal remedy, one is not merged in the other. And see Boardman v. Gore, 15 Mass. 336; Ocean Ins. Co. v. Fields, 2 Stor. 59, Fed. Cas. No. 10,406; Turner's Case, Ware 78, Fed. Cas. No. 14,248. A criminal prosecution and conviction for an assault and battery is not a bar to the recovery of punitive damages in a civil action for the same offence; but it may be shown in mitigation of damages; Rhodes v. Rodgers, 151 Pa. 634, 24 Atl. 1044; but see Roach v. Caldbeck, 64 Vt. 593, 24 Atl. 989. When a servant is injured through the negligence of a fellow-servant employed in the same enterprise or avocation, the common employer is not liable for damages. The servant, in engaging, takes the risk of injury from the negligence of his fellow-servants; McKinn. Fellow-Serv. 18; Farwell v. R. Corporation, 4 Metc. (Mass.) 49, 38 Am. Dec. 339; Hubgh v. R. Co., 6 La. Ann. 495; Ryan v. R. Co., 23 Pa. 384; Coon v. R. Co., 5 N. Y. 493; Shields v. Yonge, 15 Ga. 349, 60 Am. Dec. 698; Honner v. R. Co., 15 Ill. 550; Cleveland, C. & C. R. Co. v. Keary, 3 Ohio St. 201; 5 Exch. 343. But this rule does not exonerate the master from liability for negligence of a servant in a different employment. See MASTER AND SERVANT. But this rule has been altered in some states, and by act of congress in certain cases; see EMPLOYERS' LIABILITY ACTS.

By the common law, no action was maintainable to recover damages for the death of a human being; 1 Campb. 493; Carey v. R. Co., 1 Cush. (Mass.) 475, 48 Am. Dec. 616; Hendrick v. Walton, 69 Tex. 192, 6 S. W. 749. As to the right under statutes, see DEATH.

Excessive or inadequate damages. Even in that large class of cases in which there is no fixed measure of damages, but they are left to the discretion of the jury, the court has a certain power to review the verdict, and to set it aside if the damages awarded are grossly excessive or unreasonably inadequate. The rule is, however, that a verdict will not be set aside for excessive damages unless the amount is so large as to satisfy the court that the jury have been misled by passion, prejudice, ignorance, or partiality; Field, Dam. 683; Clapp v. R. Co., 19 Barb. (N. Y.) 461; Treanor v. Donahoe, 9 Cush. (Mass.) 228; Kountz v. Brown, 16 B. Monr. (Ky.) 577; Nicholson v. R. Co., 22 Conn. 74, 56 Am. Dec. 390; Bell v. Morrison, 27 Miss. 68; Lang v. Hopkins, 10 Ga. 37; Marshall v. Gunter, 6 Rich. (S. C.) 419; Payne v. Steamship Co., 1 Cal. 33; George v. Law, *id.* 363; Farish v. Reigle, 11 Grat. (Va.) 697, 62 Am. Dec. 666; Dwyer v. R. Co., 52 Fed. 87; City of Delphi v. Lowery, 74 Ind. 520, 39 Am. Rep. 98; Gale v. R. Co., 76 N. Y. 594; Tennessee Coal & Railroad Co. v. Roddy, 85 Tenn. 400, 5 S. W. 286. But this power is very sparingly used; and cases are numerous in which the courts have expressed themselves dissatisfied with the verdict, but have refused to interfere, on the ground that the case did not come within this rule. See Potter v. Thompson, 22 Barb. (N. Y.) 87; Woodson v. Scott, 20 Mo. 272; Sexton v. Brock, 15 Ark. 345; Barnette v. Hicks, 6 Tex. 352; Spencer v. McMasters, 16 Ill. 405; Whipple v. Mfg. Co, 2 Sto. 661, Fed. Cas. No. 17,516; Vreeland v. Berry, 21 N. J. L. 183; McDermott v. Ry. Co., 85 Wis. 102, 55 N. W. 179; Slette v. Ry. Co., 53 Minn. 341, 55 N. W. 137.

As a general rule, in actions of tort the court will not grant a new trial on the ground of the smallness of damages; 12 Mod. 150; 2 Stra. 940; 24 E. L. & Eq. 406. But they have the power to do so in a proper case; and in a few instances in which the jury have given no redress at all, when some was clearly due, the verdict has been set aside; Richards v. Sandford, 2 E. D. Sm. (N. Y.) 349; 4 Q. B. 917.

An important case sustaining this view is reported in 5 Q. B. D. 78; there two verdicts of £7,000 and £16,000, respectively, were successively set aside as inadequate.

In the cases in which there is a fixed legal rule regulating the measure of damages, it must be stated to the jury by the presiding judge upon the trial. His failure to state it correctly is ground of exception; and if the jury disregard the instructions of the court on the subject, their verdict may be set aside. In so far, however, as the verdict is an honest determination of questions of fact properly within their province, it will not, in general, be disturbed. Sedgw. Dam. 604. See CONSEQUENTIAL DAMAGES; MEASURE OF DAMAGES; DAMAGE.

DAME. A woman of rank, high social position, or culture; specifically, in Great Britain, the legal title of the wife or widow of a knight or baronet. Cent. Dict.

DAMNA (Lat. *damnum*). Damages, both inclusive and exclusive of costs.

DAMNATUS. In Old English Law. Condemned; prohibited by law; unlawful *Damnatus coitus*, an unlawful connection Black, L. Dict.

DAMNI INJURIÆ ACTIO (Lat.). **In Civil Law.** An action for the damage done by one who intentionally injured the beast of another. Calvinus, Lex.

DAMNOSA HÆREDITAS. A name given by Lord Kenyon to that species of property of a bankrupt which, so far from being valuable, would be a charge to the creditors: for

example, a term of years where the rent would exceed the revenue.

The assignees are not bound to take such property; but they must make their election, and having once entered into possession they cannot afterwards abandon the property; 7 East 342; 3 Campb. 340.

DAMNUM (Lat.). That which is taken away; loss; damage; legal hurt or harm. Anderson, L. Dict.

DAMNUM ABSQUE INJURIA (Lat. injury without wrong). A wrong done to a man for which the law provides no remedy. Broom, Max. 1. See DAMAGES.

Injuria is here to be taken in the sense of *legal injury*, and where no malice exists, there are many cases of wrong or suffering inflicted upon a man for which the law gives no remedy; 2 Ld Raym 595; 11 M & W. 755; Lamb v Stone, 11 Pick. (Mass.) 527. Thus, if the owner of property, in the prudent exercise of his own right of dominion, does acts which cause loss to another, it is *damnum absque injuria*, Gardner v. Heartt, 2 Barb (N Y) 168, Howland v. Vincent, 10 Metc. (Mass.) 371, 43 Am. Dec 442, Trout v. McDonald, 83 Pa. 144, see Pennsylvania Coal Co. v Sanderson, 113 Pa 126, 6 Atl 453, 57 Am Rep 445, 10 M & W. 109. A railroad company which exercises due care in blasting on its own land, in order to lay its tracks, is not liable for injury to adjoining property arising merely from the incidental jarring, Booth v. R. Co, 140 N. Y. 267, 35 N E. 592, 24 L. R A. 105, 37 Am. St. Rep. 552. See BLASTING. The location and operation of a railroad in a street, the bed of which does not belong to an abutting property owner, is, as to him, *damnum absque injuria*; otherwise if he own the bed of the street; Grand Rapids & I R Co. v Heisel, 38 Mich 62, 31 Am. Rep. 306. The ringing of bells, sounding of whistles and other noises, and the emission of smoke by railroads, are *damnum absque injuria*; Aldrich v R Co, 195 Ill 456, 63 N E. 155, 57 L R A 237.

So, too, acts of public agents within the scope of their authority, if they cause damage, cause simply *damnum absque injuria* (*q v*), Sedgw. Dam 29, 111; Callender v. Marsh, 1 Pick (Mass.) 418, Bridge over River Lehigh v Nav. Co, 4 Rawle (Pa.) 9, 26 Am Dec. 111, Graves v. Otis, 2 Hill (N. Y.) 466, Hollister v. Union Co, 9 Conn. 436, 25 Am Dec 36, Hatch v R Co, 25 Vt 49, Miller v New York, 109 U S 395, 3 Sup Ct 228, 27 L Ed 971; Hamilton v. R Co, 119 U. S 284, 7 Sup. Ct 206, 30 L. Ed. 393; Hart v. Aqueduct Corp, 133 Mass 489, 2 B & Ald. 646 See Ashby v White, 1 Smith, Lead. Cas 244, and Weeks, Doc. of Dam Abs. Inj

The state, in locating its public levees, acts in the exercise of its police powers, and private injury resulting therefrom is *damnum absque injuria*; Egan v. Hart, 45 La. Ann 1358, 14 South. 244.

See MENTAL SUFFERING

DAMNUM FATALE. **In Civil Law.** Damages caused by a fortuitous event or inevitable accident; damages arising from the act of God.

Among these were included losses by shipwreck, lightning, or other casualty; also losses by pirates, or by *vis major*, by fire, robbery, and burglary; but theft was not numbered among these casualties. In general, bailees are not liable for such damages; Story, Bailm. 471.

DANEGELD. A tax or tribute imposed upon the English when the Danes got a footing in their island. From about the year 991 the Danegeld was levied and paid to the Danes as a tribute. In its later form, from 1012, it was a tax levied to pay the wages of a Danish fleet in the service of the English crown. It was abolished about 1051. It was levied again by William in 1083-4, and it was with a view of amending its assessment that the survey of the kingdom called Domesday was undertaken; 2 Holdsw. Hist. E. L. 119. A detailed history of the Danegeld cannot be written; Maitl. Domesday and Beyond 3.

DANE LAGE, or DANE LAW. The laws of the Danes which obtained in the eastern counties and part of the midland counties of England in the eleventh century. 1 Bla. Com. 65.

DANGEROUS WEAPON. One dangerous to life. Cosby v. Com, 115 Ky. 221, 72 S. W. 1089. One likely to produce death. State v. Johns, 6 Pennewill (Del.) 174, 65 Atl. 763; or great bodily injury; People v. Fuqua, 58 Cal 245. This must often depend upon the manner of using it; Hunt v. State, 6 Tex App. 663; and the question should go to the jury. A distinction is made between a dangerous and a deadly weapon; United States v. Small, 2 Curt. 241, Fed. Cas. No. 16,314. It is said to be anything with which death can be easily and readily produced, with a reference to the manner in which it was used and the part of the body upon which the blow was struck with it; Acers v. U. S., 164 U. S. 388, 17 Sup. Ct. 91, 41 L. Ed. 481. The following have been held to be deadly weapons: A chisel; Com. v. Branham, 8 Bush (Ky.) 387; a heavy iron weight or other ponderous instrument; State v. West, 51 N. C. 506; Killer v. Com, 124 Pa. 92, 16 Atl. 495; McReynolds v. State, 4 Tex. App 327; a sledgehammer; Philpot v. Com, 86 Ky 595, 6 S. W. 455; a heavy pistol used as a bludgeon; Prior v. State, 41 Ga. 155; a club; State v. Phillips, 104 N. C. 786, 10 S. E. 463; a piece of timber; State v. Alfred, 44 La Ann 582, 10 South. 887; a pocket knife; State v. Scott, 39 La. Ann. 943, 3 South. 83; a razor; Scott v. State, 42 Tex. Cr. R. 607, 62 S W. 419; an axe; Dollarhide v. U. S., Morris (Ia.) 233, 39 Am. Dec. 460; State v. Shields, 110 N. C. 497, 14 S. E. 779; but where its size, weight, character and kind are not shown, it is held that it cannot be so regarded; Melton v. State, 30 Tex. App. 273, 17 S. W. 257; Gladney v. State (Tex.) 12 S. W. 868 A jacknife may be a dangerous weapon in fact, but whether it was such as matter of law was not decided; Com. v. O'Brien, 119 Mass. 342, 20 Am. Rep. 325. A heavy oak stick, three feet long and an inch thick, is a dangerous weapon but not a "deadly" weapon in the sense that from the use of it alone an attack would be as matter of law an aggravated assault under a Texas statute; Pinson v. State, 23 Tex. 579. See ARMS; WEAPONS. And to the same effect,

People v. Perales, 141 Cal. 581, 75 Pac. 170; Renon v. State, 56 Tex. Cr. R. 343, 120 S. W. 174; Taylor v. State, 108 Ga. 384, 34 S. E. 2; Kelly v. State, 68 Miss. 343, 8 South. 745.

In one way it may be true that sticks or clubs are not deadly weapons. Carrying them does not import any hostile intent, nor, even in view of an expected affray, a design to take life. But when a fight is actually going on, they may become weapons of a very deadly character; Allen v. U. S., 157 U. S. 675, 15 Sup. Ct. 720, 39 L. Ed. 854. When its size and the manner of its use is shown, it may be left to the jury to say whether a stick or club or piece of plank is a deadly weapon of a character likely to produce death or great bodily harm; State v. Nueslein, 25 Mo. 111; Allen v. State, 148 Ala. 588, 42 South. 1006; State v. Brown, 67 Ia. 289, 25 N. W. 218. A weapon cannot be said as a matter of law to be deadly, without reference to the manner of its use; Crow v. State, 55 Tex. Cr. R. 200, 116 S. W. 52, 21 L. R. A. (N. S.) 497, where a baseball bat is held not to be *per se* a deadly weapon, though it has been said, if viciously used, it would probably be so considered; State v. Brown, 67 Ia. 289, 25 N. W. 218. A piece of gas pipe 4 feet long and weighing about 4 pounds was held a deadly weapon *per se;* State v. Drumm, 156 Mo. 216, 56 S. W. 1086; as was a hoe; Hamilton v. People, 113 Ill. 34, 55 Am. Rep. 396; Krehnavy v. State, 43 Neb. 337, 61 N. W. 628; a pitchfork; Evans v Com., 12 S. W. 767, 11 Ky. L. Rep. 551. a stone may be; State v. Wilson, 16 Mo. App. 550; North Carolina v. Gosnell, 74 Fed. 734. Whether a rock used for a missile was a deadly weapon was held to be for the jury; State v. Shipley, 174 Mo. 512, 74 S. W. 612; Tribble v. State, 145 Ala. 23, 40 South. 938; but in State v. Speaks, 94 N. C. 865, the question was said to be one of law. An indictment for assault with a deadly weapon, to wit, a brick, sufficiently charges the use of a deadly weapon; State v. Sims, 80 Miss. 381, 31 South. 907. But it was held that whether a brickbat is a deadly weapon is for the jury; State v. Harper, 69 Mo. 425. Pushing a pin down the throat of an infant is a killing with a deadly weapon; State v. Norwood, 115 N. C. 789, 20 S. E. 712, 44 Am. St. Rep. 498. A stocking loaded with salt and plaster which had been hardened by wetting, used by a prisoner in assaulting his jailer while attempting to escape, may be found by the jury to be a deadly weapon; People v. Valliere, 123 Cal. 576, 56 Pac. 433. And one may be found guilty of an assault with a deadly weapon who has placed a tin box filled with gunpowder in the stove of the prosecuting witness, where it exploded; People v. Pape, 66 Cal. 366, 5 Pac. 621. See Crow v. State, 55 Tex. Cr. R. 200, 116 S. W. 52, 21 L. R. A. (N. S.) 497.

A mere trespass on land does not justify an assault with a deadly weapon; Montgomery v. Com., 98 Va. 840, 36 S. E. 371; State v. Lightsey, 43 S. C. 114, 20 S. E. 975; State v. Zellers, 7 N. J. L. 220; as where one threw down a fence and drove over a wheat field, on account of snow drifts; State v. Talley, 9 Houst. (Del.) 417, 33 Atl. 181; or where one tore down and carried away a fence; State v. Matthews, 148 Mo. 185, 49 S. W. 1085, 71 Am. St. Rep. 594; or went on another's land to remove crops; Rauck v. State, 110 Ind. 384, 11 N. E. 450. Other cases hold that if force be necessary, a deadly weapon may be used; People v. Flanagan, 60 Cal. 2, 44 Am. Rep. 52; or if the owner has reasonable ground for believing that he is in danger; People v. Dann, 53 Mich. 490, 19 N. W. 159, 51 Am. Rep. 151. If the trespasser assault him, he may be justified in killing; Ayers v. State, 60 Miss. 709; he may oppose force with force; Wenzel v. State, 48 Tex. Cr. R. 625, 90 S. W. 28; in the defence of his house; People v. Coughlin, 67 Mich. 466, 35 N. W. 72; so if the killing is believed, in good faith and upon reasonable grounds, to be necessary in order to repel the assailant or prevent his forcible entry; State v. Peacock, 40 Ohio St. 333. In ejecting a trespasser or preventing a trespass, a deadly weapon is not justified unless the owner reasonably believes that he is in danger of personal violence; State v. Howell, 21 Mont. 165, 53 Pac. 314; Sage v. Harpending, 49 Barb. (N. Y.) 166. In Pryse v. State, 54 Tex. Cr. R. 523, 113 S. W. 938, it was held that a person may use all the force necessary to protect his property, and if in danger of death or serious injury he may kill. In Higgins v. Monaghan, 78 Wis. 602, 47 N. W. 941, 11 L. R. A. 138, 23 Am. St. Rep 428, it was held that effectual means, by shooting or otherwise, was justifiable to drive away a charivari party who were causing fright to the owner's family and endangering their lives.

DANGERS OF THE RIVER. In a bill of lading this term means only the natural accidents incident to river navigation, and does not embrace such as may be avoided by the exercise of that skill, judgment, and foresight which are demanded from persons in a particular occupation. Hill v. Sturgeon, 35 Mo. 212, 86 Am. Dec. 149. See Hibernia Ins. Co. v. Transp. Co., 17 Fed. 478

DANGERS OF THE SEA. See PERILS OF THE SEA.

DAPIFER. The name of the first officer of state in France until 1191, after which it was never conferred. The name came to England with the Normans, but the office was less important, and there was a staff of dapifers. After the accession of Richard I. the style Seneschal began to take its place. Harcourt, The Steward and Trial of Peers.

DARREIN (Fr. *dernier*). Last. *Darrein continuance*, last continuance. See PUIS DARREIN CONTINUANCE; CONTINUANCE.

DARREIN PRESENTMENT. See ASSIZE OF DARREIN PRESENTMENT.

DARREIN SEISIN (L. Fr. last seisin). A plea which lay in some cases for the tenant in a writ of right. Hunt v. Hunt, 3 Metc. (Mass.) 184; Jackson, Real Act. 285. See 1 Roscoe, Real Act. 206; 2 Prest. Abstr. 345.

DATE. The designation or indication in an instrument of writing of the time and place when and where it was made.

In the Anglo-Saxon land charters dates were given by the year of the *Induction (q. v.)*. Dating by the year of our Lord was invented in 532. At a council in 816 it was adopted for the acts of the synod and became general in documents from that date, 2 Holdsw. Hist. E. L. 19. Some early charters were not dated; some referred to the regnal year, or a church festival, or a remarkable event; 3 *id.* 196.

When the place is mentioned in the date of a deed, the law intends, unless the contrary appear, that it was executed at the place of the date. Plowd. 7 *b*. The word is derived from the Latin *datum* (given); because when the instruments were in Latin the form ran *datum*, etc (given the —— day of, etc).

A date is necessary to the validity of a policy of insurance; but where there are separate underwriters, each sets down the date of his own signing, as this constitutes a separate contract; Marsh. Ins. 336; 2 Pars. Marit. Law 27. Written instruments generally take effect from the day of their date, but the actual date of execution may be shown, though different from that which the instrument bears; and it is said that the date is not of the essence of a contract, but is essential to the identity of the writing by which it is to be proved; 2 Greenl. Ev. §§ 12, 489, n.; Cloyes v. Sweetser, 4 Cush. (Mass.) 403; Jackson v. McKenny, 3 Wend. (N. Y.) 233, 20 Am. Dec. 690; Gammon v. Freeman, 31 Me. 243; Bement v. Mfg. Co., 32 N. J. L. 513; McSparran v. Neeley, 91 Pa. 17; 17 E. L. & Eq. 548. See Knisely v. Sampson, 100 Ill. 573; 19 L. J. Q. B. 435. And if the written date is an impossible one, the time of delivery must be shown; Shepp. Touchst. 72; Cruise, Dig. c. 2, s. 61.

An indictment charging the commission of a crime on an impossible date (in the year 18903) was held fatally defective; Terrell v. State, 165 Ind. 443, 75 N. E. 884, 2 L. R. A. (N. S.) 251, 112 Am. St. Rep. 244, 6 Ann. Cas. 851; see also State v. Sexton, 10 N. C. 184, 14 Am. Dec. 584; State v. Litch, 33 Vt. 67; even when the mistaken date appears to have been merely a clerical error; Robles v. State, 5 Tex. App. 347; and one charging the commission of an offense upon a date not yet arrived was held to allege no offense as having been already committed; Com. v. Doyle, 110 Mass. 103. Where the date alleged for the commission of a statutory offense occurred before the statute was enacted, and even before the state became a member of the Union, it was held an impossible date; State v. O'Donnell, 81 Me. 271, 17 Atl. 66. See INDICTMENT; TIME.

A date in a note or bill is required only for the purpose of fixing the time of payment. If the time of payment is otherwise indicated, no date is necessary; 1 Ames, Bills and Notes 145, citing Brewster v. McCardell, 8 Wend. (N. Y.) 478; Walker v. Geisse, 4 Whart. (Pa.) 252, 33 Am. Dec. 60. When a note payable at a fixed period after date has no date, a holder may fill the date with the day of issue; *ibid.*

It is usually presumed that a deed was delivered on the day of its date; but proof of the date of delivery must be given if the circumstances were such that collusion might be practised; Steph. Dig. Ev. 138; Raines v. Walker, 77 Va. 92; Harman v. Oberdorfer, 33 Gratt. (Va.) 497; Saunders v. Blythe, 112 Mo. 1, 20 S. W. 319. See 6 Bing. 296; Ellsworth v. R. Co., 34 N. J. L. 93; Cutts v. Mfg. Co., 18 Me. 190. But this presumption does not hold in respect to deeds in fee, unattested and unacknowledged; Genter v. Morrison, 31 Barb. (N. Y.) 155. Parol evidence is admissible to show that the date stated in the *in testimonium* clause of a mortgage deed of personal property is not its true date; Shaughnessey v. Lewis, 130 Mass. 355; Orcutt v. Moore, 134 Mass. 52, 45 Am. Rep. 278. There is a presumption as to a note that it was delivered on the day of its date; Cranson v. Goss, 107 Mass. 439, 9 Am. Rep. 45.

Where a date is given, both as a day of the week and a day of the month, and the two are inconsistent, the day of the month governs; Minor v. Michie, Walker (Miss.) 27.

DATION. In Civil Law. The act of giving something. It differs from donation, which is a gift; dation, on the contrary, is giving something without any liberality; as, the giving of an office.

DATION EN PAIEMENT. In Civil Law. A giving by the debtor and receipt by the creditor of something in payment of a debt instead of a sum of money.

It is somewhat like the accord and satisfaction of the common law. 16 Toullier, n. 45; Pothier, *Vente*, n. 601. *Dation en paiement* resembles in some respects the contract of sale; *dare in solutum est quasi vendere*. There is, however, a very marked difference between a sale and a *dation en paiement*. *First*. The contract of sale is complete by the mere agreement of the parties; the *dation en paiement* requires a delivery of the thing given; Donoven & Daley v. Travers, 122 La. 458, 47 South. 769. *Second*. When the debtor pays a certain sum which he supposed he was owing, and he discovers he did not owe so much, he may recover back the excess; not so when property other than money has been given in payment. *Third*. He who has in good faith sold a thing of which he believed himself to be the owner, is not precisely required to transfer the property of it to the buyer; and while he is not troubled in the possession of the thing, he cannot pretend that the seller has not fulfilled his obligations. On the contrary, the *dation en paiement* is good only when the debtor transfers to the creditor the property in the thing which he has agreed to take in payment;

and if the thing thus delivered be the property of another, it will not operate as a payment. Pothier, *Vente*, nn. 602, 603, 604. See 1 Low. C. 53; Keough v. J. Meyers & Co., 43 La. Ann. 952, 9 South. 913.

DATIVE. A word derived from the Roman law, signifying "appointed by public authority." Thus, in Scotland, an executor-dative is an executor appointed by a court of justice, corresponding to an English *administrator*. Mozley & W. Dict.

DAUGHTER. A female child; an immediate female descendant.

DAUGHTER-IN-LAW. The wife of one's son.

DAY. The space of time which elapses while the earth makes a complete revolution on its axis.

A portion of such space of time which, by usage or law, has come to be considered as the whole for some particular purpose.

The space of time which elapses between two successive midnights. 2 Bla. Com. 141.

That portion of such space of time during which the sun is shining.

Generally, in legal signification, the term included the time elapsing from one midnight to the succeeding one, 2 Bla. Com. 141, Kane v Commonwealth, 89 Pa 522, 33 Am Rep 787, see Helphenstine v Bank, 65 Ind 589, 32 Am Rep 86, but it is also used to denote those hours during which business is ordinarily transacted (frequently called a *business* day), Hinton v. Locke, 5 Hill (N Y) 437, as well as that portion of time during which the sun is above the horizon (called, sometimes, a *solar* day), and, in addition, that part of the morning or evening during which sufficient of its light is above for the features of a man to be reasonably discerned, Co 3d Inst 63; Trull v Wilson, 9 Mass 154 Where a party is required to take action within a given number of days in order to secure or assert a right, the day is to consist of twenty-four hours, that is the popular and legal sense of the term; Zimmerman v. Cowan, 107 Ill 631, 17 Am Rep 176, also in a marine insurance policy "for 30 days after arrival" means thirty successive periods of twenty-four hours each, "commencing as soon as moored at anchor"; [1904] 1 K B 40

By custom, the word *day* may be understood to include working-days only; 3 Esp 121; Sorensen v. Keyser, 52 Fed. 163, 2 C. C. A. 650 In a similar manner only, a certain number of hours less than the number during which the work actually continued each day. Hinton v. Locke, 5 Hill (N. Y.) 437.

Sundays and other public holidays falling within the number of days specified by a statute for the performance of an act, are often omitted from the computation, as not being judicial days, Abrahams v Comm., 1 Rob. (Va) 676, Michie v. Michie's Adm'r, 17 Gratt. (Va) 109; Neal v Crew, 12 Ga. 93, National Bank of the Metropolis v Williams, 46 Mo. 17, Caupfield v. Cook, 92 Mich 626, 52 N. W. 1031; McChesney v. People, 145 Ill. 614, 34 N. E. 431; Danielson v Fuel Co, 55 Fed. 49; Sorensen v. Keyser, 52 Fed 163, 2 C. C. A 650. But see Miles v McDermott, 31 Cal 271 Where the last day of the six months within which an appeal or writ of error may be taken to review in the circuit court of appeals, the judgment or decree of a lower court, falls on Sunday, the appeal cannot be taken or the writ sued out on any subsequent day; Johnson v. Meyers, 54 Fed. 417, 4 C. C. A. 399. When the day of performance of contracts, other than instruments upon which days of grace are allowed, falls on Sunday, or other public holiday, it is not counted, and the contract may be performed on Monday; Salter v. Burt, 20 Wend. (N. Y.) 205, 32 Am. Dec. 530; Stryker v. Vanderbilt, 27 N. J. L. 68; Johnson v. Merritt, 50 Minn. 303, 52 N. W. 863. See Broome v. Wellington, 1 Sandf. (N. Y.) 664.

The time for completing commercial contracts is not limited to banking hours; Price v. Tucker, 5 La. Ann. 514.

A day is generally, but not always, regarded in law as a point of time; and fractions will not be recognized; 2 B. & Ald. 586; In re Welman, 20 Vt. 653, Fed. Cas. No. 17,407, Seward v. Hayden, 150 Mass. 158, 22 N. E. 629, 5 L. R. A. 844, 15 Am. St. Rep. 183; State v. Winter Park, 25 Fla. 371, 5 South. 818. And see Brainard v. Bushnell, 11 Conn. 17; 3 Op. Att. Gen. 82; Phelan v. Douglass, 11 How. Pr. (N. Y.) 193; Duffy v. Ogden, 64 Pa. 240. See FRACTION OF A DAY.

It is said that there is no general rule in regard to including or excluding days in the computation of time from the day of a fact or act done, but that it depends upon the reason of the thing and the circumstances of the case; 9 Q. B. 141; 6 M. & W. 55; Presbrey v. Williams, 15 Mass. 193; Weeks v. Hull, 19 Conn. 376, 50 Am. Dec. 249; Taylor v. Brown, 5 Dak. 325, 40 N. W 525. And see, also, 5 Co. 1 *a*; Dougl. 463; 4 Nev. & M. 378; Atkins v. Ins. Co, 5 Metc. (Mass) 439, 39 Am. Dec. 692; Wilcox v. Wood, 9 Wend. (N. Y.) 346; Blake v. Crowninshield, 9 N. H. 304; Ewing v. Bailey, 4 Scam. (Ill.) 420; Marys v. Anderson, 24 Pa. 272; State v. Water Co., 56 N. J. L. 422, 28 Atl. 578. Perhaps the most general rule is to exclude the first day and include the last, Weld v. Barker, 153 Pa. 465, 26 Atl. 239; Miner v. Tilley, 54 Mo. App. 627; Seward v. Hayden, 150 Mass. 159, 22 N. E. 629, 5 L. R. A. 844, 15 Am. St. Rep. 183; 12 A & E. 635; Blackman v. Nearing, 43 Conn. 56, 21 Am. Rep. 634, Warren v. Slade, 23 Mich. 1, 9 Am. Rep. 70. Such is the rule as to negotiable paper; 1 Dan. Neg. Instr. 496; Mark's Ex'rs v. Russell, 40 Pa. 372. See, generally, 2 Sharsw. Bla. Com. 141, n.; and so in the Uniform Negotiable Instruments Act, § 86.

The rule now generally followed seems to be that not only in mercantile contracts, but also in wills and other instruments, and in the construction of statutes, the day of the date, or the day of the act from which a future time is to be ascertained, is to be excluded, Weeks v. Hull, 19 Conn 376, 50 Am Dec 249, People v. R. Co, 28 Barb. (N Y) 284, Hahn v Dierkes, 37 Mo. 574; Faure v. Exp. Co, 23 Ind 48

A statutory rule for computing time does not apply to ascertain the day, or the last day, on which a thing may be done, where such day is expressed by its date; Northwestern Guaranty Loan Co. v. Channell, 53 Minn. 269, 55 N. W. 121.

See TIME.

DAY BOOK. An account-book in which merchants and others make entries of their daily transactions. This is generally a book of original entries, and, as such, may be giv-

en in evidence to prove the sale and delivery of merchandise or of work done.

DAY RULE. In English Practice. A rule or order of the court by which a prisoner on civil process, and not committed, is enabled, in term-time, to go out of the prison and its rule or bounds. Tidd. Pr. 961. Abolished by 5 & 6 Vict. c. 22.

DAYS IN BANK. In English Practice. Days of appearance in the court of common pleas, usually called *banc*um. They are at the distance of about a week from each other, and are regulated by some festival of the church.

By the common law, the defendant is allowed three full days in which to make his appearance in court, exclusive of the day of appearance or return-day named in the writ, 3 Bla. Com. 278. Upon his appearance, time is usually granted him for pleading, and this is called giving him day, or, as it is more familiarly expressed, a continuance 3 Bla. Com. 316. When the suit is ended by discontinuance or by judgment for the defendant, he is discharged from further attendance, and is said to go thereof *sine die*, without day See CONTINUANCE

DAYS OF GRACE. Certain days allowed to the acceptor of a bill or the maker of a note in which to make payment, in addition to the time contracted for by the bill or note itself.

They are so called because formerly they were allowed as a matter of favor; but the custom of merchants to allow such days of grace having grown into law, and been sanctioned by the courts, all bills of exchange are by the law merchant entitled to days of grace as of right. The statute of Anne making promissory notes negotiable confers the same right on those instruments. This act has been generally adopted throughout the United States; and the days of grace allowed are three; Thomas v. Shoemaker, 6 W. & S. (Pa.) 179; Chitty, Bills; Byles, Bills.

The Uniform Negotiable Instruments Act passed in most of the states abolishes days of grace, but three days of grace are allowed on sight drafts in the Rhode Island Act, and on notes, acceptances, and sight drafts in the North Carolina act; the Massachusetts act was amended so as to allow days of grace on sight drafts; also by the English Bills of Exchange Act (1882); Selover, Negot. Instr. 253. The following cases are retained as having at least historical interest:

Bank checks are due on presentation and are not entitled to days of grace; Wood River Bank v. Bank, 36 Neb. 744, 55 N. W. 239.

The principle deducible from all the authorities is, that, as to every bill not payable on demand, the day on which payment is to be made to prevent dishonor is to be determined by adding three days of grace, where the bill itself does not otherwise provide, to the time of payment as fixed by the bill. This principle is formulated into a statutory provision in England in the Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, § 14; Bell v. Bank, 115 U. S. 383, 6 Sup. Ct. 105, 29 L. Ed. 409; President, etc., of Bank of Washington v. Triplett, 1 Pet. (U. S.) 31, 7 L. Ed. 37.

Where there is an established usage of the place where the bill is payable to demand payment on the fourth or other day instead of the third, the parties to it will be bound by such usage; Renner v. President, etc., of Bank, 9 Wheat. (U. S.) 582, 6 L. Ed. 166; Price v. Earl of Torrington, 1 Smith, Lead. Cas. 417. When the last day of grace happens on Sunday or a general holiday, as the Fourth of July, Christmas day, etc., the bill is due on the day previous, and must be presented on that day in order to hold the drawer and indorsers; Big Bills & N. 90, Mechanics' & Farmers' Bank v. Gibson, 7 Wend. (N. Y.) 460; Bank of North America v. Pettit, 4 Dall. (U. S.) 127, 1 L. Ed. 770; Fisher v. Evans, 5 Binn. (Pa.) 541; Brown v. Lusk, 4 Yerg. (Tenn.) 210; McRae v. Kennon, 1 Ala. 295, 34 Am. Dec. 777, Leavitt v. Simes, 3 N. H. 14; *contra*, First Nat. Bank of Hastings v. McAllister, 33 Neb. 616, 50 N. W. 1010; unless changed by statute as in some states. Days of grace are, for all practical purposes, a part of the time the bill has to run, and interest is charged on them; President, etc., of the Bank of Utica v. Wager, 2 Cow. (N. Y.) 712; 1 Dan. Neg. Instr. 489. According to the usage and custom of merchants to fix the liability of the indorser of negotiable paper, it should be protested on the last day of grace; Carey Lombard Lumber Co. v. Bank, 86 Tex. 299, 24 S. W. 260.

In computing the days of grace allowed in a bond for the payment of interest, the day when the interest became payable will not be counted; Serrell v. Rothstein, 49 N. J. Eq. 385, 24 Atl. 369. A bill payable in thirty days having been drawn and accepted on February 11th, of a leap year, the last day of grace falls on March 15th, the 29th of February being counted as a distinct day, Helphenstine v. Bank, 65 Ind. 582, 32 Am. Rep. 86.

Our courts always assume that the same number of days are allowed in other countries; and a person claiming the benefit of a foreign law or usage must prove it; Bowen v. Newell, 13 N. Y. 290, 64 Am. Dec. 550; Ripley v. Greenleaf, 2 Vt. 129; President, etc., of the Farmers' Bank of Maryland v. Duvall, 7 Gill & J. (Md.) 78; President, etc., of the Bank of Alexandria v. Swann, 9 Pet. (U. S.) 33, 9 L. Ed. 40; Wood v. Corl, 4 Metc. (Mass.) 203. When properly proved, the law of the place where the bill or note is payable prescribes the number of days of grace and the manner of calculating them; Dollfus v. Frosch, 1 Denio (N. Y.) 367; Story, Pr. Notes §§ 216, 247. The tendency to adopt as laws local usages or customs has been materially checked; Bowen v. Newell, 8 N. Y. 190.

DAYS OF THE WEEK. The courts will always take judicial notice of the days of the week; for example, when a writ of inquiry was stated in the pleadings to have been executed on the fifteenth of June, and upon an examination it was found to be Sunday, the proceeding was held to be defective; Fortesc. 373; Stra. 387.

DAYSMAN. An arbitrator, umpire, or elected judge. Cowell.

DAYWERE. As much arable land as could be ploughed in one day's work. Cowell.

DE ADMENSURATIONE or AMENSURACIONE, in Maitland (2 Sel. Essays in Anglo-Amer. L. H. 585). Of admeasurement.

Used of the writ of admeasurement of dower, which lies where the widow has had more dower assigned to her than she is entitled to It is said by some to lie where either an infant heir or his guardian made such a assignment at suit of the infant heir whose rights are thus prejudiced. 2 Bla. Com 136, Fitzh N B 318 It seems, however, that an assignment by a guardian binds the infant heir, and that after such assignment the heir cannot have his writ of admeasurement, Boyers v. Newbanks, 2 Ind 388, Jones v. Brewer, 1 Pick. (Mass.) 314, Young v Tarbell, 37 Me 509, 1 Washb R. P. 226

Used also of the writ of admeasurement of pasture, which lies where the quantity of common due each one of several having rights thereto, has not been ascertained 3 Bla Com 38 See ADMEASUREMLNT OF DOWER

DE ÆTATE PROBANDA (Lat. for proving age). A writ which lay to summon a jury for the purpose of determining the age of the heir of a tenant *in capite* who claimed his estate as being of full age. Fitzh. N. B. 257.

DE ALLOCATIONE FACIENDA (Lat for making an allowance) A writ to allow the collectors of customs, and other such officers having charge of the king's money, for sums disbursed by them.

It was directed to the treasurer and barons of the exchequer.

DE ALTO ET BASSO (Of high and low). A phrase anciently used to denote the absolute submission of all differences to arbitration. Cowell

DE ANNUA PENSIONE (Lat. of annual pension). A writ by which the king, having due unto him an annual pension from any abbot or prior for any of his chaplains which he will name who is not provided with a competent living, demands it of the said abbot or prior for the one that is named in the writ. Fitzh. N. B. 231; *Termes de la Ley, Annua Pensione.*

DE ANNUO REDITU (Lat. for a yearly rent). A writ to recover an annuity, no matter how payable. 2 Reeve, Hist. Eng. Law 258.

DE APOSTATA CAPIENDO (Lat. for taking an apostate). A writ directed to the sheriff for the taking the body of one who, having entered into and professed some order of religion, leaves his order and departs from his house and wanders in the country. Fitzh. N. B. 233; *Termes de la Ley, Apostata Capiendo.*

DE ARBITRATIONE FACTA (Lat. of arbitration had). A writ formerly used when an action was brought for a cause which had been settled by arbitration. Watson, Arb. 256.

DE ASSISA PROROGANDA (Lat. for proroguing assize). A writ to put off an assize issuing to the justices where one of the parties is engaged in the service of the king.

DE ATTORNATO RECIPIENDO (Lat. for receiving an attorney). A writ to compel the judges to receive an attorney and admit him for the party. Fitzh. N. B. 156 *b.* Sometimes *de attornato faciendo;* see Maitland, 2 Sel. Essays in Anglo-Amer. L. H. 576.

DE AVERIIS CAPTIS IN WITHERNAM (Lat. for cattle taken in withernam). A writ which lies to take other cattle of the defendant where he has taken and carried away cattle of the plaintiff out of the country, so that they cannot be reached by replevin. *Termes de la Ley;* 3 Bla. Com. 149.

DE AVERIIS REPLEGIANDIS (Lat.). A writ to replevy beasts. 3 Bla. Com. 149.

DE AVERIIS RETORNANDIS (Lat. for returning cattle). Used of the pledges in the old action of replevin. 2 Reeve, Hist. Eng. Law 177.

DE BENE ESSE (Lat. formally; conditionally; provisionally). A technical phrase applied to certain acts deemed for the time to be well done, or until an exception or other avoidance. It is equivalent to provisionally, with which meaning the phrase is commonly employed. For example, a declaration is filed or delivered, special bail is put in, a witness is examined, etc., *de bene esse,* or provisionally; 3 Bla. Com. 383.

The examination of a witness *de bene esse* takes place where there is danger of losing the testimony of an important witness from death by reason of age or dangerous illness, or where he is the only witness to an important fact; Lingan v. Henderson, 1 Bland, Ch (Md.) 238; Ails v. Sublit, 3 Bibb (Ky) 204; Clark v. Dibble, 16 Wend. (N. Y.) 601; 13 Ves. 261; May's Heirs v. May's Adm'r, 28 Ala. 141. In such case, if the witness be alive at the time of trial, his examination is not to be used; 2 Dan. Ch. Pr. 1111. See Haynes, Eq. 183; Mitf. Eq. Pl 52, 149.

To declare *de bene esse* is to declare in a bailable action subject to the contingency of bail being put in; and in such case the declaration does not become absolute till this is done; Grah. Pr. 191.

When a judge has a doubt as to the propriety of finding a verdict, he may direct the jury to find one *de bene esse;* which verdict, if the court shall afterwards be of opinion that it ought to have been found,

shall stand. Bac. Abr. *Verdict* (A). See, also, Blair v. Weaver, 11 S. & R. (Pa.) 84.

DE BIEN ET DE MAL. See DE BONO ET MALO.

DE BIENS LE MORT (Fr.). Of the goods of the deceased. Dyer 32.

DE BONIS ASPORTATIS (Lat. for goods carried away). The name of the action for trespass to personal property is trespass *de bonis asportatis*. Bull. N. P. 836; 1 Tidd, Pr. 5.

DE BONIS NON. See EXECUTORS AND ADMINISTRATORS.

DE BONIS PROPRIIS (Lat. of his own goods). A judgment against an executor or administrator which is to be satisfied from his own property.

When an executor or administrator has been guilty of a *devastavit*, he is responsible for the loss which the estate has sustained *de bonis propriis*. He may also subject himself to the payment of a debt of the deceased *de bonis propriis* by his false plea when sued in a representative capacity; as, if he plead *plene administravit* and it be found against him, or a release to himself when false. In this latter case the judgment is *de bonis testatoris si, et si non, de bonis propriis*. 1 Wms. Saund. 336 *b*, n. 10; Bacon, Abr. *Executor* (B, 3).

DE BONIS TESTATORIS (Lat. of the goods of the testator). A judgment rendered against an executor which is to be satisfied out of the goods or property of the testator; distinguished from a judgment *de bonis propriis*.

DE BONIS TESTATORIS AC SI (Lat. from the goods of the testator, *if he has any*, and, if *not, from those of the executor*). A judgment rendered where an executor falsely pleads any matter as a release, or, generally, in any case where he is to be charged in case his testator's estate is insufficient. 1 Wms. Saund. 366 *b*; Bacon, Abr. *Executor* (B, 3); 2 Archb. Pr. 148.

DE BONO ET MALO (Lat. for good or ill). A writ which apparently allowed a person to be delivered from gaol if he were willing to put himself upon a jury. The French phrase *de bien et de mal* has the same meaning.

A special writ of gaol delivery, one being issued for each prisoner: now superseded by the general commission of gaol delivery. 4 Bla. Com. 270.

DE CALCETO REPARANDO (Lat.). A writ for repairing a highway, directed to the sheriff, commanding him to distrain the inhabitants of a place to repair the highway. Reg. Orig. 154; Blount.

DE CARTIS REDDENDIS (Lat. for restoring charters). A writ to secure the delivery of charters; a writ of detinue. Reg. Orig. 159 *b*.

DE CATALLIS REDDENDIS (Lat. for restoring chattels). A writ to secure the return specifically of chattels detained from the owner. Cowell.

DE CAUTIONE ADMITTENDA (Lat. for admitting bail). A writ directed to a bishop who refused to allow a prisoner to go at large on giving sufficient bail, requiring him to admit him to bail. Fitzh. N. B. 63 *c*. It seems to have been applicable only to secure the release of a person who had been taken on a writ of *de excommunicato capiendo (q. v.)* and who was willing to purge himself of contumacy.

DE CERTIFICANDO. A writ requiring a thing to be certified. A kind of certiorari. Reg. Orig. 152.

DE COMMUNI DIVIDENDO. In Civil Law. A writ of partition of common property. See COMMUNI DIVIDENDO.

DE COMPUTO. Writ of account. A writ commanding a defendant to render a reasonable account to the plaintiff, or show cause to the contrary. The foundation of the modern action of account. Blount; Registr. Br. 135.

DE CONTUMACE CAPIENDO. A writ issuing from the English court of chancery for the arrest of a defendant who is in contempt of the ecclesiastical court. 1 N. & P. 685; 5 Dowl. 213, 646; 5 Q. B. 335.

DE CURIA CLAUDENDA (Lat. of enclosing a court). An obsolete writ, to require a defendant to fence in his court or land about his house, where it was left open to the injury of his neighbor's freehold. 1 Crabb, R. P. 314; Rust v. Low, 6 Mass. 90.

DE CURSU. See CURSITOR.

DE DOMO REPARANDA (Lat.). The name of an ancient common-law writ, by which one tenant in common might compel his co-tenant to concur in the expense of repairing the property held in common. 8 B. & C. 269; 1 Thomas, Co. Litt. 216, note 17, and p. 787.

DE DONIS, THE STATUTE (more fully, *De Donis Conditionalibus;* concerning conditional gifts). The statute of Westminster the Second. 13 Edw. I. c. 1.

The object of the statute was to prevent the alienation of estates by those who held only a partial interest in the estate in such a manner as to defeat the estate of those who were to take subsequently. This was effected by providing that, in grants to a man and the heirs of his body or the heirs male of his body, the will of the donor should be observed according to the form expressed in the deed of gift *(per formam doni)*; that the tenements so given should go, after the grantee's death, to his issue (or

issue male), if there were any, and if none, should revert to the donor. This statute was the origin of the estate in fee tail, or estate tail, and by introducing perpetuities, it built up great estates and strengthened the power of the barons. See Bac. Abr. *Estates Tail;* 1 Cruise, Dig. 70; 1 Washb. R. P. 271. See CONDITIONAL FEE TAIL.

DE DOTE ASSIGNANDA (Lat. for assigning dower). A writ commanding the king's escheator to assign dower to the widow of a tenant *in capite*. Fitzh. N. B. 263, *c*.

DE DOTE UNDE NIHIL HABET (Lat. of dower in that whereof she has none). A writ of dower which lay for a widow where no part of her dower had been assigned to a widow. It is now much disused; but a form closely resembling it is still used in the United States. 4 Kent 63; Stearns, Real Act. 302; 1 Washb. R. P. 230.

DE EJECTIONE CUSTODIÆ. A writ which lay for a guardian who had been forcibly ejected from his wardship. Reg Orig. 162; Black, L. Dict.

DE EJECTIONE FIRMÆ. A writ which lay at the suit of the tenant for years against the lessor, reversioner, remainderman, or stranger who had himself deprived the tenant of the occupation of the land during his term. 3 Bla. Com 199. Originally lying to recover damages only, it came to be used to recover the rest of the term, and then generally the possession of lands. Involving, in the question of who should have possession, the further question of who had the title, it gave rise to the modern action of ejectment. Brooke, Abr.; Adams, Ejectm.; 3 Bla. Com. 199 *et seq.*

DE ESTOVERIIS HABENDIS (Lat. to obtain estovers). A writ which lay for a woman divorced *a mensa et thoro* to recover her alimony or estovers. 1 Bla. Com. 441.

DE EXCOMMUNICATO CAPIENDO (Lat. for taking one who is excommunicated). A writ commanding the sheriff to arrest one who was excommunicated, and imprison him till he should become reconciled to the church. 3 Bla. Com. 102.

DE EXCOMMUNICATO DELIBERANDO (Lat. for freeing one excommunicated). A writ to deliver an excommunicated person, who has made satisfaction to the church, from prison. 3 Bla. Com. 102.

DE EXONERATIONE SECTÆ. A writ to free the king's ward from suit in any court lower than the court of common pleas during the time of such wardship.

DE FACTO. Actually; in fact; in deed. A term used to denote a thing actually done.

An officer *de facto* is one who performs the duties of an office with apparent right, and under claim and color of an appointment, but without being actually qualified in law so to act. Brown v. Lunt, 37 Me. 423.

One who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. 6 East 368, where Lord Ellenborough and a full court of K. B. adopted this definition of Lord Holt in 1 Raym. 658, which it is said "has never been questioned since in England," per Butler, C. J., in the leading case of State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409, where the common-law learning on the subject is collected.

Where there is an office to be filled, and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto*, and are binding on the public; McDowell v. U. S., 159 U. S. 596, 16 Sup. Ct. 111, 40 L. Ed. 271.

An officer in the actual exercise of executive power would be an officer *de facto*, and as such distinguished from one who, being legally entitled to such power, is deprived of it,—such a one being an officer *de jure* only. An officer holding without strict legal authority; 2 Kent 295.

An officer *de facto* is frequently considered an officer *de jure*, and legal validity allowed his official acts; State v. Anderson, 1 N. J. L. 318, 1 Am. Dec. 207; Com. v. Fowler, 10 Mass. 290; Laver v. McGlachlin, 28 Wis. 364; Conover v. Devlin, 24 Barb. (N. Y.) 587; Whiting v. City of Ellsworth, 85 Me. 301, 27 Atl. 177; Petition of Town of Portsmouth, 19 N. H. 115; Burton v. Patton, 47 N. C. 124, 62 Am. Dec. 194; Gregg Tp. v. Jamison, 55 Pa. 468; Kimball v. Alcorn, 45 Miss. 151; Hussey v. Smith, 99 U. S. 20, 25 L. Ed. 314; People v. Weber, 86 Ill. 283; State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409; State v. Davis, 111 N. C. 729, 16 S. E. 540; State v. Lee, 35 S. C. 192, 14 S. E. 395; Zabel v. Harshman, 68 Mich. 273, 42 N. W. 44; 7 L. R. H. L. 894. But this is so only so far as the rights of the public and third persons are concerned. In order to sue or defend in his own right as a public officer, he must be so *de jure;* People v. Weber, 89 Ill. 347. An officer *de facto* incurs no liability by his mere omission to act; Olmstead v. Dennis, 77 N. Y. 378; Snyder v. Schram, 59 How. Pr. (N. Y.) 404; but see Thayer v. Printing Co., 108 Mass. 523; Providence Steam-Engine Co. v. Hubbard, 101 U. S. 192, 25 L. Ed. 786.

An officer *de facto* must be submitted to as such until displaced by a regular direct proceeding for that purpose; Ex parte Moore, 62 Ala. 471; 4 East 327; Buncombe Turnpike Co. v. McCarson, 18 N. C. 306; he is a legal officer until ousted; Board of Auditors of Wayne County v. Benoit, 20 Mich. 176, 4 Am. Rep. 382.

An officer acting under an unconstitutional law, acts by color of title, and is an officer *de facto;* Com. v. McCombs, 56 Pa. 436;

Watson v. McGrath, 111 La. 1097, 36 South. 204; State v. Gardner, 54 Ohio St. 31, 42 N. E. 999, 31 L. R. A. 660; Lang v. City of Bayonne, 74 N. J. L. 455, 68 Atl. 90, 15 L. R. A. (N. S.) 93, 122 Am. St. Rep. 391, 12 Ann. Cas. 961; State v. Poulin, 105 Me. 224, 74 Atl. 119, 24 L. R. A. (N. S.) 408, 134 Am. St. Rep. 543; State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409; Donough v. Dewey, 82 Mich. 309, 46 N. W. 782; Cocke v. Halsey, 16 Pet. (U. S.) 71, 10 L. Ed. 891, where the office was an existing one; *contra*, Norton v. Shelby County, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178, where the office was created by the same act. The discussion of this point has in almost every case included the consideration of what may be assumed to be a rule, when properly understood, that there cannot be a *de facto* officer without a *de jure* office; Dill. Mun. Corp. § 276. In one case it was said that a *de facto* office cannot exist under a constitutional government; Hawker v. Seldenridge, 2 W. Va. 271, 94 Am. Dec. 532; and speaking through Mr. Justice Field in the much discussed case of Norton v. Shelby County, above cited from 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178, the court held that acts done by officers appointed under an unconstitutional statute before it was declared unconstitutional were void. In an L. R. A. note to the New Jersey case above cited, which may be referred to for a collection of cases, it is assumed that the doctrine of the Supreme Court case is supported by a "decided preponderance of authority." The cases cited in the note, however, while making a strong showing for a rule that there must be a *de jure* office, seem to establish an overwhelming weight of authority in support of the doctrine above stated, that until the act is declared unconstitutional there is a *de jure* office and therefore a *de facto* officer whose acts are to be considered valid. The opinions in the Connecticut, New Jersey and Maine cases, the last two of which take direct issue with Mr. Justice Field, and the first of which was decided before it, seem to leave no logical support for his opinion.

When a special judge is duly elected, qualifies, and takes possession of the office according to law, he becomes judge *de facto*, though his official oath is not filed as required by law; and the proceedings of the court, if unchallenged during his incumbency, cannot afterwards be questioned collaterally; State v. Miller, 111 Mo. 542, 20 S. W. 243. See In re Powers' Estate, 65 Vt. 399, 26 Atl. 640; Keith v. State, 49 Ark. 439, 5 S. W. 880; Campbell v. Com., 96 Pa. 344; People v. Weber, 86 Ill. 283.

A notary who continues to act after his commission has expired, long enough to afford a reasonable presumption of reappointment, is a *de facto* notary; Cary v. State, 76 Ala. 78; and so of one who has failed to file his bond; Keeney v. Leas, 14 Ia. 464; and of an alien appointed a notary; Wilson v. Kimmel, 109 Mo. 260, 19 S. W. 24. But where a notary's commission had expired seven months before he took an acknowledgment, and it did not appear that he had continued to act and hold himself out as a notary, he was not a *de facto* notary; Sandlin v. Dowdell, 143 Ala. 518, 39 South. 279, 5 Ann. Cas. 459.

There can be no *de facto* officer in the case of an office abolished by statute; Stenson v. Koch, 152 N. Y. 89, 46 N. E. 176; People v. Welsh, 225 Ill. 364, 80 N. E. 313; Walker v. Ins. Co., 62 Mo. App. 223; Gorman v. People, 17 Colo. 596, 31 Pac. 335, 31 Am. St. Rep. 350; Farrier v. Dugan, 48 N. J. L. 613, 7 Atl. 881, affirming Dugan v. Farrier, 47 N. J. L. 383, 1 Atl. 751; but there are cases *contra*, which, however, appear to be all cases of municipal officers; Adams v. Lindell, 5 Mo. App. 197; Hilgert v. Pav. Co., 107 Mo. App. 385, 81 S. W. 496; Keeling v. R. Co., 205 Pa. 31; 54 Atl. 485; Perkins v. Fielding, 119 Mo. 149, 24 S. W. 444, 27 S. W. 1100.

An injunction does not lie to restrain a *de facto* officer from performing the duties of his office, on account of irregularity of election, his acts being valid as to third persons; Chambers v. Adair, 110 Ky. 942, 62 S. W. 1128; but a mandamus may be directed to one, to compel him to perform the duties of his office, and he cannot set up in defense that he is not in possession of his office *de jure*; Kelly v. Wimberly, 61 Miss. 548; Harvey v. Philbrick, 49 N. J. L. 374, 8 Atl. 122.

Where the defects in the title of the officer are notorious, such as to make those relying on his acts chargeable with such knowledge, persons relying upon such acts will not be protected; Oliver v. Jersey City, 63 N. J. L. 634, 44 Atl. 709, 48 L. R. A. 412, 76 Am. St. Rep. 228. Officers of a corporation cease to be officers *de facto* after a judgment of a court of last resort adjudging that they have no rightful title (notwithstanding an appeal pending to the supreme court of the United States and no judgment of ouster appearing of record); Rochester & G. V. R. Co. v. Bank, 60 Barb. (N. Y.) 234.

Contracts and other acts of *de facto* directors of corporations are valid; Green's Brice, *Ultra Vires*, 522, n. c.; Atlantic, T. & O. R. Co. v. Johnston, 70 N. C. 348; Ohio & M. R. Co. v. McPherson, 35 Mo. 13, 86 Am. Dec. 128; Delaware & H. Canal Co. v. Coal Co., 21 Pa. 131.

An officer *de facto* is *prima facie* one *de jure*; Allen v. State, 21 Ga. 217, 68 Am. Dec. 457.

When the inspectors of an election fail to issue a certificate of election, one who has received the highest number of legal votes cast, and holding over as the present incumbent, has sufficient apparent authority or color of title to be considered an officer

de facto; Montgomery v. O'Dell, 67 Hun 169, 22 N. Y. Supp. 412.

A government *de facto* signifies one completely, though only temporarily, established in the place of the lawful government; Thomas v. Taylor, 42 Miss. 651, 703, 2 Am. Rep. 625; Chisholm v. Coleman, 43 Ala. 204, 94 Am. Dec. 677. See DE JURE; Austin, Jur. Lect. vi. p. 336.

A wife *de facto* only is one whose marriage is voidable by decree; 4 Kent 36.

Blockade *de facto* is one actually maintained; 1 Kent 44.

De Facto Corporations. A colorable corporate organization of persons intending in good faith to form a corporation, under a law authorizing it, who have failed to comply with one or more provisions of the statute, but have used some of the powers which, if a *de jure* corporation, it would have possessed.

An apparent corporate organization, asserted to be a corporation by its members, and actually acting as such, but lacking the creative fiat of the law In re Gibbs' Estate, 157 Pa. 59, 27 Atl 383, 22 L. R. A. 276.

There must have been: (1) A colorable corporate organization; Bergeron v. Hobbs, 96 Wis 641, 71 N. W. 1056, 65 Am. St. Rep 85; Abbott v. Refining Co, 4 Neb. 416; Finnegan v. Noerenberg, 52 Minn. 243, 53 N. W. 1150, 18 L R A 778, 38 Am St. Rep 552; McLeary v. Dawson 87 Tex. 521, 538, 29 S W. 1041; Tulare Irr District v. Shepard, 185 U. S. 13, 22 Sup. Ct. 531, 46 L. Ed. 773. An agreement to do business as a corporation, fulfilling part of the requisites but purposely stopping short of complete incorporation is not sufficient; Card v. Moore, 173 N. Y. 598, 66 N. E. 1105

(2) A statute authorizing the proposed corporation; American Loan & Trust Co v. R Co., 157 Ill. 641, 42 N. E. 153; Imperial BTg Co v Board of Trade, 238 Ill. 100, 87 N. E. 167; Eaton v. Walker, 76 Mich 579, 43 N W. 638, 6 L R. A. 102; Bradley v. Reppill, 133 Mo. 545, 32 S W. 645, 34 S. W. 841, 54 Am. St. Rep 685; Duke v. Taylor, 37 Fla. 64, 19 South. 172, 31 L R A. 484, 53 Am. St Rep. 232; Davis v. Stevens, 104 Fed. 235; Snyder v. Studebaker, 19 Ind. 462, 81 Am. Dec. 415; Tulare Irr. District v. Shepard, 185 U. S. 13, 22 Sup. Ct. 531, 46 L. Ed. 773; which, though in most cases a general incorporation act, may be a special charter, of which there has been a failure to perform some condition; Utica Ins. Co v. Tilman, 1 Wend. (N. Y.) 555; Bank of Manchester v. Allen, 11 Vt. 302; Society of Middlesex Husbandmen & Manufacturers v. Davis, 3 Mete. (Mass.) 133; Buncombe Turnpike Co. v. M'Carson, 18 N. C. 306; Gaines v. Bank of Mississippi, 12 Ark. 769; and it may be under a law passed by a *de facto* legislature; U. S. v. Ins. Companies, 22 Wall. (U. S.) 99; or under a law passed subsequently to the organization providing for the recognition of existing corporations on filing a certificate, which it failed to do; Tennessee Automatic Lighting Co. v. Massey (Tenn.) 56 S. W. 35; or if there is a law authorizing it, and the attempt was under a different law, it is sufficient; Georgia S. & F. R. Co. v. Trust Co., 94 Ga. 306, 21 S. E. 701, 32 L. R. A. 208, 47 Am. St. Rep. 153. But where two corporations of different states attempted to merge, without any enabling statute, it was a nullity and they did not become a corporation *de facto;* Whaley v. Bankers' Union of the World, 39 Tex. Civ. App. 385, 88 S. W. 259; American Loan & Trust Co. v. R. Co, 157 Ill. 641, 42 N. E. 153.

(3) A user of corporate powers conferred; Elgin Nat. Watch Co. v. Loveland, 132 Fed. 41; Emery v. De Peyster, 77 App. Div. 65, 78 N. Y. Supp. 1056; Tulare Irr. Dist. v. Shepard, 185 U. S. 13, 22 Sup. Ct. 531, 46 L. Ed. 773.

(4) Good faith in the transaction; Tulare Irr. Dist. v. Shepard, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. Ed. 773; Williamson v. Loan Fund Ass'n, 89 Ind 389; Hasselman v. Mortgage Co., 97 Ind. 365; Vanneman v. Young, 52 N. J. L. 403, 20 Atl. 53; Elizabethtown Gaslight Co. v. Green, 49 N. J. Eq. 329, 338, 24 Atl. 560; Society Perun v. Cleveland, 43 Ohio St. 481, 3 N. E 357; American Loan & Trust Co. v. R. Co., 157 Ill. 641, 652, 42 N. E. 153; Stanwood v. Metal Co., 107 Ill. App. 569; Gilkey v. Town of How, 105 Wis. 41, 45, 81 N. W. 120, 49 L. R. A. 483; Slocum v. Head, 105 Wis. 431, 81 N. W. 673, 50 L. R. A. 324; Haas v. Bank, 41 Neb. 754, 60 N. W. 85.

The second and third conditions were given as a sufficient definition in Methodist Episcopal Union Church v. Pickett, 19 N. Y. 482, and this was adopted in Trustees of East Norway Lake Norwegian Evangelical Lutheran Church v. Froislie, 37 Minn. 447, 35 N W. 260; but criticised in Finnegan v. Noerenberg, 52 Minn. 243, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. Rep. 552, where the first was added and the definition, so amended, repeated in Johnson v. Okerstrom, 70 Minn. 303, 73 N. W. 147, was, in preference to that of the New York court, adopted in Gibbs' Estate, 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276. It is believed, however, that the fourth must be added to make a definition completely expressing all the conditions which are required by due consideration of the authorities which create and support the doctrine of *de facto* corporations Indeed in Tulare Irr. Dist. v. Shepard, 185 U. S. 1, 14, 22 Sup. Ct. 531, 46 L. Ed. 773, Peckham, J., while enumerating the first three conditions as the requisites proceeds in the same paragraph to state the "*bona fide* attempt to organize" under a general law, and "actual user of the corporate franchise" as the elements which constituted the defendant a *de facto* corporation. The four conditions are given substantially as requisites in many

cases; Clark v. Coal Co., 35 Ind. App. 65, 73 N. E. 727; Mackay v. R. Co., 82 Conn. 73, 72 Atl. 583, 24 L. R. A. (N. S.) 768; Marsh v. Mathias, 19 Utah 350, 56 Pac. 1074; Franke v. Mann, 106 Wis. 118, 81 N. W. 1014, 48 L. R. A. 856; Stevens v. History Co., 140 App. Div. 570, 125 N. Y. Supp. 573; and are all combined under three heads in Stanwood v. Metal Co., 107 Ill. App. 569.

The mere carrying on, under a company name, of a business of such character as may well be conducted by an individual, or partnership, does not constitute a *de facto* corporation; Elgin Nat. Watch Co. v. Loveland, 132 Fed. 41; nor is a bank, exclusively owned by one person, such a corporation; Longfellow v. Barnard, 59 Neb. 455, 81 N. W. 307.

Such corporations are recognized by the same rule which recognizes *de facto* officers, and this is necessary for public and private security; Clement v. Everest, 29 Mich. 19. There cannot be a corporation *de facto* where it could not exist *de jure;* Davis v. Stevens, 104 Fed. 235; Brown v. Power Co., 113 Ga. 462, 39 S. E. 71; State v. Stevens, 16 S. D. 369, 92 N. W. 420; Evenson v. Ellingson, 67 Wis. 634, 31 N. W. 342; nor can one exist under an unconstitutional statute; Clark v. Coal Co., 165 Ind. 213, 73 N. E. 1083, 112 Am. St. Rep. 217; Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135, 3 L. R. A. (N. S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400.

The state only can proceed against such corporation, by *quo warranto* to test the validity of its corporate existence; Hon v. State, 89 Ind. 249, Savings Bank Co. v. Miller, 24 Ohio C. C. 198; Los Angeles Holiness Band v. Spires, 126 Cal. 541, 58 Pac. 1049; Armour v. E. Bement's Sons, 123 Fed. 56, 62 C. C. A. 142; Mayor, etc., of City of Wilmington v. Addicks, 8 Del. Ch. 310, 43 Atl. 297, Wyandotte Electric-Light Co. v. City of Wyandotte, 124 Mich. 43, 82 N. W. 821; and this is a rule of public policy; Continental Trust Co. v. R. Co., 82 Fed. 642, 649; and the *de facto* corporation may be made sole defendant in such proceeding without joining the associates; New Orleans Debenture, etc., Co. v. Louisiana, 180 U. S. 320, 21 Sup. Ct. 378, 45 L. Ed. 550; and a decree at the suit of the state avoiding the charter does not deny to the incorporators the equal protection of the laws or take away their property without due process of law; *id.;* but a private individual cannot institute proceedings by *quo warranto* for the forfeiture of a corporate charter; Attorney General v. Adonai Shomo Corp., 167 Mass. 424, 45 N. E. 762; Appeal of Western Pennsylvania R. Co., 104 Pa. 399; Com. v. Bank, 2 Grant, Cas. (Pa.) 392; North v. State, 107 Ind. 356, 8 N. E. 159; State v. Turnpike Co., 21 N. J. L. 9. An action instituted on behalf of the state to vacate a charter for non-compliance with the act under which it purports to have organized may be instituted by "the attorney-general," without a relator, and it is strictly a people's action; People v. Cement Co., 131 N. Y. 143, 29 N. E. 947, 15 L. R. A. 240.

The corporate existence may not be attacked by the associates who have acted as a corporation and are sued as such by one with whom they have dealt as such; Racine & M. R. Co. v. Trust Co., 49 Ill. 331, 95 Am. Dec. 595; Hamilton v. R. Co., 144 Pa. 34, 23 Atl. 53, 13 L. R. A. 779; Rush v. Steamboat Co., 84 N. C. 702; Empire Mfg. Co. v. Stuart, 46 Mich. 482, 9 N. W. 527; Toledo, St. L. & K. C. R. Co. v. Trust Co., 95 Fed. 497, 507, 36 C. C. A. 155; *contra;* Boyce v. Trustees of M. E. Church, 46 Md. 359; or by one of the associates as against the others; Curtis v. Tracy, 169 Ill. 233, 48 N. E. 399, 61 Am. St. Rep. 168; Lincoln Park Chapter No. 177 Royal Arch Masons v. Swatek, 204 Ill. 228, 68 N. E. 429; Franke v. Mann, 106 Wis. 118, 81 N. W. 1014, 48 L. R. A. 856; Merchants' & Planters' Line v. Waganer, 71 Ala. 581, 585; Heald v. Owen, 79 Ia. 23, 44 N. W. 210; Foster v. Moulton, 35 Minn. 458, 29 N. W. 155; or by all the others as against one; Meurer v. Protective Ass'n, 95 Mich. 451, 54 N. W. 954; or by an associate or organizer as against one who is induced by him to deal with the corporation (as to sell property to it); Smith v. Mayfield, 163 Ill. 147, 45 N. E. 157, or by one who deals or contracts with it as a corporation; Commercial Bank of Keokuk, Ia., v. Pfeiffer, 108 N. Y. 242, 15 N. E. 311; Seven Star Grange No. 73, Patrons of Husbandry, v. Ferguson, 98 Me. 176, 56 Atl. 648, Hudson v. Seminary Corp., 113 Ill. 618; Cravens v. Eagle Cotton Mills Co., 120 Ind. 6, 21 N. E. 981, 16 Am. St. Rep. 298; Bartlett v. Wilbur, 53 Md. 485, 498; Butchers' & Drovers' Bank of St. Louis v. McDonald, 130 Mass. 264; Bibb v. Hall, 101 Ala. 79, 14 South. 98; Canfield v. Gregory, 66 Conn. 9, 33 Atl. 536, Way v. Grease Co., 60 N. J. Eq. 263, 47 Atl. 44; Lincoln Park Chapter No. 177 Royal Arch Masons v. Swatek, 204 Ill. 228, 68 N. E. 429; nor can one who contracts with the associates as a corporation hold them individually liable for a breach; Whitford v. Laidler, 94 N. Y. 145, 151, 46 Am. Rep. 131; Vanneman v. Young, 52 N. J. L. 403, 20 Atl. 53; Clausen v. Head, 110 Wis. 405, 85 N. W. 1028, 84 Am. St. Rep. 933; Love v. Ramsey, 139 Mich. 47, 102 N. W. 279; Larned v. Beal, 65 N. H. 184, 23 Atl. 149; Tennessee Automatic Lighting Co. v. Massey (Tenn.) 56 S. W. 35; Richards v. Bank, 75 Minn. 196, 77 N. W. 822; Planters' & Miners' Bank v. Padgett, 69 Ga. 159; Owensboro Wagon Co. v. Bliss, 132 Ala. 253, 31 South. 81, 90 Am. St. Rep. 907; unless under a statute making persons who unlawfully assume corporate powers personally liable; Loverin v. McLaughlin, 161 Ill. 417, 434, 44 N. E. 99; Sweney Bros. v. Talcott, 85 Ia. 103; Thornton v. Balcom, 85 Ia. 198, 52 N. W. 190.

It is a general rule that the validity of the corporate organization cannot be collat-

erally attacked; Doty v. Patterson, 155 Ind. 60, 56 N. E. 668; Gilkey v. Town of How, 105 Wis. 41, 46, 81 N. W. 120, 49 L. R. A. 483; Cochran v. Arnold, 58 Pa. 399; Monongahela Bridge Co. v. Traction Co., 196 Pa. 25, 46 Atl. 99, 79 Am. St. Rep. 685; State v. Fuller, 96 Mo. 165, 9 S. W. 583; Keene v. Van Reuth, 48 Md. 184; Saunders v. Farmer, 62 N. H. 572; People v. La Rue, 67 Cal. 526, 8 Pac. 84; Atchison, T. & S. F. R. Co. v. Com'rs of Sumner County, 51 Kan. 617, 33 Pac. 312; Crowder v. Town of Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; Otoe County Fair & Driving Park Ass'n v. Doman, 1 Neb. (Unof.) 179, 95 N. W. 327; Terry v. Packing & Provision Co., 105 Ill. App. 663; People v. Irr. Dist., 128 Cal. 477, 61 Pac. 86, Harris v. Land Co., 128 Ala. 652, 29 South. 611. Collateral attack has been permitted in a suit to enjoin the collection of assessments for turnpike construction on the ground of want of legal organization; Busenback v. Road Co., 43 Ind. 265; also as a defense to a suit against an original associate for his stock subscription; Indianapolis Furnace & Mining Co. v. Herkimer, 46 Ind. 142; Dorris v. Sweeney, 60 N. Y. 463 (where it was said that one contracting with a *de facto* corporation after its formation cannot set up its invalidity); and where capital stock agreed upon is not fully subscribed, a subscriber who has not participated in, or had notice of, the organization, is not estopped from setting up the illegality of the assessment for his subscriptions, Haskell v. Worthington, 94 Mo. 560, 7 S. W. 481. In Buffalo & A. R. Co. v. Cary, 26 N. Y. 75, it was held that very slight proof of user (election of officers by the persons calling themselves directors) was sufficient to prevent a subscriber from setting up the defense of defective organization in a suit against him for his stock subscription. The validity of a conveyance to or by a corporation *de facto* cannot be questioned in a collateral proceeding; Finch v. Ullman, 105 Mo. 255, 16 S. W. 863, 24 Am. St. Rep. 383, where it was said that "this rule is not based on estoppel . . . but on the requirements of public policy that the security of titles be not impaired."

Collateral attack is usually permitted in defence against an attempt by a *de facto* corporation to exercise the right of eminent domain; Tulare Irrigation District v. Shepard, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. Ed. 773; In re Union El. R. Co. of Brooklyn, 112 N. Y. 61, 19 N. E. 664, 2 L. R. A. 359; Williamson v. Bldg. & Loan Fund Ass'n, 89 Ind. 389; Kinston & C. R. Co. v. Stroud, 132 N. C. 413, 43 S. E. 913 (see Wellington & P. R. Co. v. Lumber Co., 111 N. C. 690, 19 S. E. 646); Powers v. R. Co., 33 Ohio St. 429; St. Joseph & I. R. Co. v. Shambaugh, 106 Mo. 557, 17 S. W. 581; Hampton v. Water Supply Co., 65 N. J. L. 158, 46 Atl. 650; *contra*, Eddleman v. Power Co., 217 Ill. 409, 75 N. E. 510; Terre Haute & P. R. Co. v. Robbins, 247 Ill. 376, 93 N. E. 398; Detroit & T. S. L. R. Co. v. Campbell, 140 Mich. 384, 103 N. W. 856; Central of Georgia R. Co. v. R. Co., 144 Ala. 639, 39 South. 473, 2 L. R. A. (N. S.) 144; Postal Tel. Cable Co. v. R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705; and see Portland & G. Turnpike Co. v. Bobb, 88 Ky. 226, 10 S. W. 794; and it is open to collateral attack where there is no law under which it could become a corporation *de jure;* Clark v. Coal Co., 165 Ind. 213, 73 N. E. 1083, 112 Am. St. Rep. 217. As to the right of a *de facto* corporation to exercise the power of eminent domain, see 2 L. R. A. (N. S.) 144, note.

In some cases where a tort was committed for which the remedy would have been against the corporation, if *de jure*, because of the defective organization the associates were held personally liable; Vredenburg v. Behan, 33 La. Ann. 627; Smith v. Warden, 86 Mo. 382; and a similar remedy against associates has been given for breach of contract where the intention was for corporate action, but the other party did not know it; Guckert v. Hacke, 159 Pa. 303, 28 Atl. 247; New York Nat. Exch. Bank v. Crowell, 177 Pa. 313, 35 Atl. 613 (see Vanhorn v. Corcoran, 127 Pa. 255, 268, 18 Atl. 16, 4 L. R. A. 386); Christian & Craft Grocery Co. v. Lumber Co., 121 Ala. 340, 25 South. 566; Slocum v. Head, 105 Wis. 431, 81 N. W. 673, 50 L. R. A. 324; Field v. Cooks, 16 La. Ann. 153; but if he elects to proceed against them as a corporation and fails he is estopped afterwards to sue them as individuals; Clausen v. Head, 110 Wis. 405, 85 N. W. 1028, 84 Am. St. Rep. 933.

The immunity from personal liability of the associates who form a *de facto* corporation is limited to transactions with those who deal with them as a corporation, entered into in good faith, and it is based upon that and the estoppel arising from the dealing with the supposed organization as a corporation, generally believed to be and treated as such; Slocum v. Head, 105 Wis. 431, 434, 81 N. W. 673, 50 L. R. A. 324; Gartside Coal Co. v. Maxwell, 22 Fed. 197.

An injunction has been refused against a *de facto* corporation exercising powers which would belong to it if *de jure;* Elizabethtown Gas Light Co. v. Green, 49 N. J. Eq. 329, 331, 332, 24 Atl. 560; but equity has assumed jurisdiction to ascertain whether the organization of a corporation is legal; Union Water Co. v. Kean, 52 N. J. Eq. 111, 27 Atl. 1015.

Such a corporation may "maintain an action against any one, other than the state, who has contracted with the corporation, or who has done it a wrong;" Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 572, 11 Sup. Ct. 185, 34 L. Ed. 784; Tar River Nav. Co. v. Neal, 10 N. C. 520, 537; and in some states there are statutes forbidding one suing or sued by a corporation to set up the lack of legal organization, as *e. g.* Ia-

Code (1897) § 1636; Ky. Comp. St. 1903, § 566; Comp. Laws S. D. § 2892, which last statute is held to be merely declaratory of the law as it previously existed; Davis v. Stevens, 104 Fed. 235.

It may seek an injunction to restrain irreparable injury to property; Williams v. Ry. Co., 130 Ind. 71, 29 N. E. 408, 15 L. R. A. 64, 30 Am. St. Rep. 201; Cincinnati, L. & C. R. Co. v. Ry. Co., 75 Ill. 113; or sue any one, other than the state, either for breach of contract or a wrong done to it; Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 572, 11 Sup. Ct. 185, 34 L. Ed. 784; as for infringement of a patent; American Cable Ry. Co. v. City of New York, 68 Fed. 227; for the protection of its property from a tortfeasor; Searsburgh Turnpike Co. v. Cutler, 6 Vt. 315, 323; for trespass on personal property; Persse & Brooks Paper Works v. Willett, 1 Rob. (N. Y.) 131; for conversion; Remington Paper Co. v. O'Dougherty, 65 N. Y. 570; or as indorsee or assignee of a note or *chose* in action; Wilcox v. R. Co., 43 Mich. 584, 590, 5 N. W. 1003; Cozzens v. Brick Co., 166 Ill. 213, 46 N. E. 788; Haas v. Bank, 41 Neb. 754, 60 N. W. 85; or for use and occupation of land; Philippine Sugar Estates Development Co. v. U. S., 39 Ct. Cl. 225.

Where the existence of the corporation is only collaterally in issue, slight proof only is required to make a *prima facie* case of *de facto* incorporation; Lucas v. Bank, 2 Stew. (Ala.) 147; Memphis & St. F. Plank Road Co. v. Rives, 21 Ark. 302; Mix v. Bank, 91 Ill. 20, 33 Am. Rep. 44; Eakright v. R. Co., 13 Ind. 404; Merchants' Nat. Bank v. Glendon Co., 120 Mass. 97; United States Vinegar Co. v. Schlegel, 143 N. Y. 537, 543, 38 N. E. 729; President, etc., of Bank of Manchester v. Allen, 11 Vt. 302.

A *de facto* corporation may be a conduit of title, to protect a mortgagee, Hackensack Water Co. v. De Kay, 36 N. J. Eq. 559; Duggan v. Inv. Co., 11 Colo. 113, 17 Pac. 105; Georgia S. & F. R. Co. v. Trust & Deposit Co., 94 Ga. 306, 21 S. E. 701, 32 L. R. A. 208, 47 Am. St. Rep. 153, or a grantee; Society Perun v. Cleveland, 43 Ohio St. 481, 3 N. E. 357 (where the state had maintained *quo warranto*); or a lessee; City of Denver v. Mullen, 7 Colo. 358, 3 Pac. 693; and the grantee of such corporation has maintained a writ of entry; Saunders v. Farmer, 62 N. H. 572; Lusk v. Riggs, 70 Neb. 713, 97 N. W. 1033; *id.*, 70 Neb. 718, 102 N. W. 88; Crenshaw v. Ullman, 113 Mo. 633, 20 S. W. 1077; or ejectment; Finch v. Ullman, 105 Mo. 255, 16 S. W. 863, 24 Am. St. Rep. 383; though against one who has not dealt with the associates as a corporation, Chiniquy v. Catholic Bishop, 41 Ill. 148; East Norway Lake Church v. Froislie, 37 Minn. 447, 35 N. W. 260.

A *de facto* corporation may proceed against its grantor for reformation of a deed; Otoe County Fair & Driving Park Ass'n v. Doman, 1 Neb. (Unof.) 179, 95 N. W. 327; or to have land discharged from the lien of a judgment against its grantor; Keyes v. Smith, 67 N. J. L. 190, 51 Atl. 122; and may acquire, hold and convey land; New York, B. & E. R. Co. v. Motil, 81 Conn. 466, 71 Atl. 563.

If the associates deal as partners and continue to do so after being incorporated, without giving notice, they are still liable as partners; Perkins v. Rouss, 78 Miss. 343, 29 South. 92; Martin v. Fewell, 79 Mo. 401, 412; and where one has no knowledge of the existence of a charter, and there is nothing to put him on inquiry, he may hold the supposed incorporators personally liable as partners; Guckert v. Hacke, 159 Pa. 303, 28 Atl. 249.

The theory that a *de facto* corporation has no real existence has no foundation, either in reason or authority. A *de facto* corporation is a reality. It has an actual and substantial legal existence. It is, as the term implies, *a corporation;* Society Perun v. Cleveland, 43 Ohio St. 481, 490, 3 N. E. 357.

See discussions of *de facto* corporations in 20 Harv. L. Rev. 456; 25 *id.* 623.

De Facto Court. A court established by statute apparently valid, which has organized with a judge appointed, and has exercised authority as a court. Burt v. R. Co., 31 Minn. 472, 18 N. W. 285, 289.

"A *de facto* court cannot exist by virtue of a statute under a written constitution which ordains one supreme court, and defines the qualifications and duties of its judges, and prescribes the mode of appointing them. The attempt of the legislature to abolish the constitutional court of appeals and establish a new one was ineffectual to create either a *de facto* or *de jure* court for want of legislative power"; Hildreth's Heirs v. McIntire's Devisee, 1 J. J. Marsh. (Ky.) 206, 19 Am. Dec. 61.

De Facto Judge. One duly elected, qualified and acting as such, under conditions on which one might be properly appointed, but who failed to comply with some necessary act to qualify him, as taking the oath of office. State v. Miller, 111 Mo. 542, 20 S. W. 243. There must be a duly constituted office and a vacancy therein before the election or appointment; Caldwell v. Barrett, 71 Ark. 310, 74 S. W. 718.

One has been recognized as a *de facto* judge, though the statute under which he was appointed was unconstitutional and void, when the office was originally created under a valid law; Walcott v. Wells, 21 Nev. 47, 24 Pac. 367, 9 L. R. A. 59, 37 Am. St. Rep. 478. And when the incumbent was ill and an acting judge was appointed, qualified, assumed the duties and the public acquiesced, he was held to be a *de facto* judge; Dredla v. Baache, 60 Neb. 655, 83 N. W. 916.

DE FAIRE ÉCHELLE. **In French Law.** A clause commonly contained in French in-

surance policies, which is equivalent to a license for a vessel to touch and trade at intermediate ports. American Ins. Co. v. Griswold, 14 Wend. (N. Y.) 491.

DE HÆRETICO COMBURENDO (Lat. for burning a heretic). A writ which lay where a heretic had been convicted of heresy, had refused to abjure or had abjured, and had relapsed into heresy. 4 Bla. Com. 46.

DE HOMINE CAPTO IN WITHERNAM (Lat. for taking a man in withernam). A writ to take a man who had carried away a bondman or bondwoman into another country beyond the reach of a writ of replevin. 3 Bla. Com. 129.

DE HOMINE REPLEGIANDO (Lat. for replevying a man). A writ which lies to replevy a man out of prison, or out of the custody of a private person, upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him. Fitzh. N. B. 66; 3 Bla. Com. 129. If the latter eloigned his captive he could be summarily imprisoned by a *capias in withernam*. It was inefficient against wrongful imprisonment because it excepted the party if he had been arrested on the king's order.

The statute—which had gone nearly out of use, having been superseded by the writ of *habeas corpus*—has been revived within a few years in some of the United States in an amended and more effectual form. It can be used only for the benefit of the person imprisoned. 1 Kent 404, n.; Hutchings v. Van Bokkelen, 34 Me. 126.

See MAINPRIZE.

A case is mentioned in Jackson & Gross, Land. & Ten. § 788, where this writ was issued by the supreme court of Pennsylvania while the writ of *habeas corpus* was suspended during the war between the states.

DE IDIOTA INQUIRENDO. An old common-law writ, long obsolete, to inquire whether a man be an idiot or not. 2 Steph. Com. 509.

DE INCREMENTO (Lat. of increase). Costs *de incremento*, costs of increase—that is, which the court assesses in addition to the damages established by the jury. See COSTS DE INCREMENTO.

DE INJURIA (Lat. The full term is, *de injuria sua propria absque tali causa*, of his own wrong without such cause; or, where part of the plea is admitted, *absque residuo causæ*, without the rest of the cause).

In Pleading. The replication by which in an action of tort the plaintiff denies the effect of excuse or justification offered by the defendant.

It can only be used where the defendant pleads matter merely in excuse and not in justification of his act. It is confined to those instances in which the plea neither denies the original existence of the right which the defendant is charged with having violated, nor alleges that it has been released or extinguished, but sets up some new matter as a sufficient excuse or cause for that which would otherwise and in its own nature be wrongful. It cannot, therefore, be properly used when the defendant's plea alleges any matter in the nature of title, interest, authority, or *matter of record;* 8 Co. 66; 1 B. & P. 76; Hyatt v. Wood, 4 Johns. (N. Y.) 159, note, 4 Am. Dec. 258; Griswold v. Sedgwick, 1 Wend. (N. Y.) 126; Oystead v. Shed, 12 Mass. 506; Ridgefield Park R. Co. v. Ruckman, 38 N. J. L. 98, Steph. Pl. 276; Pepper, Pl. 35.

The English and American cases are at variance as to what constitutes such legal authority as cannot be replied to by *de injuria*. Most of the American cases hold that this replication is bad whenever the defendant insists upon a right, no matter from what source it may be derived; and this seems to be the more consistent doctrine.

If the plea in any sense *justifies* the act, instead of merely excusing it, *de injuria* cannot be used. Coburn v. Hopkins, 4 Wend. (N. Y.) 577; Stickle v. Richmond, 1 Hill (N. Y.) 78; Allen v. Scott, 13 Ill. 80. The English cases, on the other hand, hold that an authority derived from a court *not of record* may be traversed by the replication *de injuria;* 3 B. & Ad. 2.

The plaintiff may confess that portion of a plea which alleges an authority in law or an interest, title, or matter of record, and aver that the defendant did the act in question *de injuria sua propria absque residuo causæ*, of his own wrong without the residue of the cause alleged; Stickle v. Richmond, 1 Hill (N. Y.) 78; Curry v. Hoffman, 2 Am. Law Reg. 246; Steph. Pl. 276.

The replication *de injuria* puts in issue the whole of the defence contained in the plea; and evidence is, therefore, admissible to disprove any material averment in the whole plea; McKelv. Pl. 50; 8 Co. 66; 11 East 451; 10 Bingh. 157; Tubbs v. Caswell, 8 Wend. (N. Y.) 129; Erskine v. Hohnbach, 14 Wall. (U. S.) 613, 20 L. Ed. 745. See 2 Cr. M. & R. 338. In England, however, by a uniform course of decisions in their courts, evidence is not admissible under the replication *de injuria* to a plea, for instance, of *molliter manus imposuit*, to prove that an excess of force was used by the defendant; but it is necessary that such excess should be specially pleaded. There must be a new assignment; 2 Cr. M. & R. 338; 1 Bingh. 317; 1 Bingh. N. C. 380; 3 M. & W. 150.

In this country, on the other hand, though some of the earlier cases followed the English doctrine, later cases decide that the plaintiff need not plead specially in such a case. It is held that there is no new cause to assign when the act complained of is the same that is attempted to be justified by plea. Therefore the fact of the act being

moderate is a part of the plea, and is one of the points brought in issue by *de injuria;* and evidence is admissible to prove an excess; Hannen v. Edes, 15 Mass. 351; Bennett v. Appleton, 25 Wend. (N. Y.) 371; Elliot v. Kilburn, 2 Vt. 474; Bartlett v. Churchill, 24 Vt. 218; Vreeland v. Berry, 21 N. J. L. 183.

Though a direct traverse of several points going to make up a single defence in a plea will be bad for duplicity, yet the general replication *de injuria* cannot be objected to on this ground, although putting the same number of points in issue; 3 B. & Ad. 1; Marshall v. Aiken, 25 Vt 330; 2 Bingh. N. C. 579; 3 Tyrwh. 491. Hence this mode of replying has a great advantage when a special plea has been resorted to, since it enables the plaintiff to traverse all the facts contained in any single point, instead of being obliged to rest his cause on an issue joined on one fact alone.

In England it is held that *de injuria* may be replied in assumpsit; 2 Bingh. N. C. 579.

In this country it has been held that the use of *de injuria* is limited to actions of tort; Coffin v. Bassett, 2 Pick. (Mass.) 357. But in New Jersey it may be used in actions *ex contractu* wherever a special plea in excuse of the alleged breach of contract can be pleaded, as a general traverse to put in issue every material allegation in the plea; Ridgefield Park R. Co. v. Ruckman, 38 N. J. L. 98. Whether *de injuria* can be used in actions of replevin seems, even in England, to be a disputed question. The following cases decide that it may be so used; 9 Bingh. 756; 3 B. & Ad. 2; *contra*, 1 Chit. Pl. 622.

The improper use of *de injuria* is held to be only a ground of general demurrer, 6 Dowl 502; but see 3 M. & W. 230; Coffin v. Bassett, 2 Pick. (Mass.) 357. Where it is improperly employed, the defect will be cured by a verdict; Lytle v. Lee, 5 Johns. (N. Y.) 112; Hob. 76; 1 T. Raym. 50. See Crogate's Case, 1 Sm. Lead. Cas. 247.

DE JUDAISMO, STATUTUM. The name of a statute passed in the reign of Edward I., which enacted severe penalties against the Jews. Barringt. Stat. 197.

DE JURE. Rightfully; of right; lawfully; by legal title. Contrasted with *de facto* (which see). 4 Bla. Com. 77.

Of right: distinguished from *de gratia* (by favor). By law: distinguished from *de æquitate* (by equity).

The term is variously applied; as, a king or officer *de jure*, or a wife *de jure*.

A government *de jure*, but not *de facto*, is one deemed lawful, which has been supplanted; a government *de jure* and also *de facto* is one deemed lawful, which is present or established; a government *de facto* is one deemed unlawful, but which is present or established. Any established government, be it deemed lawful or not, is a government *de facto*. Austin, Jur. sec. vi. 336. See DE FACTO.

DE LA PLUS BELLE (Fr. of the fairest). A kind of dower; so called because assigned from the best part of the husband's estate. It was connected with the military tenures, and was abolished, with them, by stat. 12 Car. II. cap. 24. Littleton § 48; 2 Bla. Com. 132, 135; Scrib. Dower 18; 1 Washb. R. P. 149, n. See DOWER. In Law French, *de la pluis beale.*

DE LIBERTATIBUS ALLOCANDIS (Lat. for allowing liberties). A writ, of various forms, to enable a citizen to recover the liberties to which he was entitled. Fitzh. N. B. 229; Reg. Orig. 262.

DE LUNATICO INQUIRENDO (Lat. to inquire as to lunacy). The name of a writ directed to the sheriff, directing him to inquire by good and lawful men whether one therein named is a lunatic or not. See Hutchinson v. Sandt, 4 Rawle (Pa.) 234, 26 Am. Dec. 127; Den v. Clark, 10 N. J. L. 217, 18 Am. Dec. 417; Hart v. Deamer, 6 Wend. (N. Y.) 497; In re McAdams, 19 Hun (N. Y.) 292; In re Kings County Insane Asylum, 7 Abb. N. C. (N. Y.) 425; In re Hill, 31 N. J. Eq. 203.

An inquisition in lunacy proceedings must show that the imbecility of the mind is such as to render the imbecile unfit for the government of himself and his property; In re Lindsley, 44 N. J. Eq. 564, 15 Atl. 1, 6 Am. St. Rep. 913.

The English practice is now regulated by the Lunacy Acts (16 & 17 Vict. c. 70, and 25 & 26 Vict. c. 86), under which the lord chancellor, upon petition or information, grants a *commission* in the nature of this writ, 2 Steph Com 511 In the U S the practice is similar, and a commission of lunacy is appointed. See Ray's Med. Jur. Ins., Oldron. Jud. Asp. Ins. 225; In re Staudermann, 3 Abb N. C. (N. Y.) 187.

DE MANUCAPTIONE (Lat. of mainprize). A writ, now obsolete, directed to the sheriff, commanding him to take sureties for the prisoner's appearance,—usually called mainpernors—and to set him at large. Fitzh. N. B. 250; 1 Hale, Pl. Cr. 141; Coke, *Bail & Mainp.* c. 10; Reg. Orig. 268 *b*. According to its form, it was only available for persons indicted for larceny before the sheriff by inquest of office.

DE MEDIETATE LINGUÆ. A jury half aliens and half natives. See JURY.

DE MEDIO (Lat. of the *mesne*). A writ in the nature of a writ of right, which lies where upon a subinfeudation the *mesne* (or middle) lord suffers his under-tenant or tenant *paravail* to be distrained upon by the lord paramount for the rent due him from the *mesne* lord. Booth, Real Act. 136; Fitzh. N. B. 135; 3 Bla. Com. 234; Co. Litt. 100 *a*.

DE MELIORIBUS DAMNIS (Lat.). Of the better damages. When a plaintiff has sued several defendants, and the damages

have been assessed severally against each, he has the choice of selecting the best, as he cannot recover the whole. This is done by making an election *de melioribus damnis*.

DE MERCATORIBUS, THE STATUTE. The statute of Acton Burnell. See ACTON BURNELL.

DE MINIS. Writ of threats. A writ which lay where a person was threatened with personal violence, or the destruction of his property, to compel the offender to keep the peace. Reg. Orig. 88 *b*. 89; Fitzh. Nat. Brev. 79, G. 80; Black, L. Dict.

DE MODO DECIMANDI (Lat. of a manner of taking tithes).

A prescriptive manner of taking tithes, different from the general law of taking tithes in kind It is usually by a compensation either in work or labor, and is generally called a *modus;* Cro. Eliz. 446; 2 P. Wms. 462; 2 Russ. & M. 102; 4 Y. & C. 269, 283; 2 Bla. Com. 29; 3 Steph. Com. 130.

DE NATURA BREVIUM (Lat.). Concerning the Nature of Writs The title of more than one text-book of English Mediæval law. Maitland, 2 Sel. Essays in Anglo-Amer. Leg. Hist. 549. See REGISTER OF WRITS.

DE NON DECIMANDO (Lat. of not taking tithes). An exemption by custom from paying tithes is said to be a prescription *de non decimando*. A claim to be entirely discharged of the payment of tithes, and to pay no compensation in lieu of them. Cro. Eliz. 511; 3 Bla. Com. 31.

DE NOVI OPERIS NUNCIATIONE (Lat.). **In Civil Law.** A form of injunction or interdict which lies in some cases for the party aggrieved, where a thing is intended to be done against his right. Thus, where one buildeth a house contrary to the usual and received form of building, to the injury of his neighbor, there lieth such an injunction, which being served, the offender is either to desist from his work or to put in sureties that he shall pull it down if he do not in a short time avow, *i. e.* show, the lawfulness thereof. Ridley, Civ. & Eccl. Law, pt. 1, c. 1, 8.

DE NOVO (Lat.). Anew; afresh. When a judgment upon an issue in part is reversed on error for some mistake made by the court in the course of the trial, a *venire de novo* is awarded, in order that the case may again be submitted to a jury.

DE ODIO ET ATIA (Lat. of hatred and ill will). A writ directed to the sheriff, commanding him to inquire whether a person charged with murder was committed upon just cause of suspicion, or merely *propter odium et atiam;* and if upon the inquisition due cause of suspicion did not appear, then there issued another writ for the sheriff to admit him to bail. 3 Bla. Com. 128. "A writ for one who says he is imprisoned on a false accusation of crime." Maitland, in 2 Sel. Essays in Anglo-Amer. Leg. Hist. 589.

This was one of the many safeguards by which the English law early endeavored to protect the innocent against the oppression of the powerful through a misuse of its forms. The writ was to issue of course to any one, without denial, and *gratis*. Bracton, l. 3, tr. 2, ch. 8; Magna Carta, c. 26; Stat. Westm. 2 (13 Edw. I.), c. 29. It has now passed out of use. 3 Bla. Com. 129. It was superseded by *habeas corpus*. See ASSIZE; HABEAS CORPUS.

DE PARCO FRACTO (Lat. of pound-breach). A writ which lay where cattle taken in distress were rescued by their owner after being actually impounded. Fitzh. N. B. 100; 3 Bla. Com. 146; Reg. Orig. 116 *b*; Co. Litt. 47 *b*.

DE PARTITIONE FACIENDA (Lat. for making partition). The ancient writ for the partition of lands held by tenants in common.

DE PERAMBULATONE FACIENDA (Lat. for making a perambulation). A writ which lay where there was a dispute as to the boundaries of two adjacent lordships or towns, directed to the sheriff, commanding him to take with him twelve discreet and lawful knights of his county and make the perambulation and set the bounds and limits in certainty. Fitzh. N. B. 309, D. A similar provision existed in regard to town-lines in Connecticut, Maine, Massachusetts, and New Hampshire, by statute. See PERAMBULATION.

DE PLEGIIS ACQUIETANDIS (Lat. for clearing pledges). A writ which lay where one had become surety for another to pay a sum of money at a specified day, and the principal failed to pay it. If the surety was obliged to pay, he was entitled to this writ against his principal. Fitzh. N. B. 37 C; 3 Reeve, Hist. Eng. Law 65.

DE PRÆROGATIVA REGIS (Lat. of the king's prerogative). The statute 17 Edw. I. st. 1, c. 9, defining the prerogatives of the crown on certain subjects, but especially directing that the king shall have ward of the lands of idiots, taking the profits without waste and finding them necessaries. 2 Steph. Com. 509.

DE PROCEDENDO AD JUDICIUM. A writ proceeding out of chancery and ordering the judges of any court to proceed to judgment. 3 Bla. Com. 109.

DE PROPRIETATE PROBANDA (Lat. for proving property). A writ which issues in a case of replevin, when the defendant claims property in the chattels replevied and the sheriff makes a return accordingly. The writ directs the sheriff to summon an inquest to determine on the validity of the claim; and, if they find for the defendant, the sheriff merely returns their finding. The plain-

tiff is not concluded by such finding; he may come into the court and traverse it. Hamm. N. P. 456.

This writ has been superseded in England by the "summons to interplead;" in Pennsylvania and Delaware the "claim property bond" is a convenient substitute for the old practice, and similar to this is the practice under the New York Code. Morr. Repl. 304.

It was pointed out in Weaver v. Lawrence, 1 Dall. (U. S.) 156, 1 L. Ed. 79, that in England there were two kinds of replevin—when the writ issued out of chancery, and under the statute of Marlbridge, which enabled the sheriff to replevin without a writ; in the latter case the writ *de proprietate probanda* issued at once on claim of property being presented and was tried by inquest; if the finding was for defendant, the sheriff forbore.

In replevin at common law the writ *de proprietate probanda* did not issue until after return on a *pluries* writ of replevin and the finding on it for defendant, being only an inquest of office, did not prevent a new replevin.

DE QUOTA LITIS (Lat.). **In Civil Law.** A contract by which one who has a claim difficult to recover agrees with another to give a part, for the purpose of obtaining his services to recover the rest. 1 Duval, n. 201. See CHAMPERTY.

DE RATIONABILI PARTE BONORUM (Lat. of a reasonable part of the goods). A writ, long since obsolete, to enable the widow and children of a decedent to recover their proper shares of his personal estate. 2 Bla. Com. 492. The writ is said to be founded on the customs of the counties, and not on the common-law allowance. Fitzh. N. B. 122, L. See CUSTOM OF LONDON.

DE RATIONABILIBUS DIVISIS (Lat. for reasonable boundaries). A writ which lies to determine the boundaries between the lands of two proprietors which lie in different towns. The writ is to be brought by one against the other. Fitzh. N. B. 128, M; 3 Reeve, Hist. Eng. Law 48.

DE RECTO DE ADVOCATIONE (Lat. of right of advowson; called, also, *le droit de advocatione*). A writ which lay to restore the right of presentation to a benefice, for him who had an advowson, to himself and heirs in fee simple, if he was disturbed in the presentation. Year B. 39 Hen. VI. 20 *a*; Fitzh. N. B. 30, D.

DE REPARATIONE FACIENDA (Lat.). The name of a writ which lies by one tenant in common against the other, to cause him to aid in repairing the common property. 8 B. & C. 269.

DE RETORNO HABENDO (Lat.). The name of a writ issued after a judgment has been given in replevin that the defendant should have a return of the goods replevied. The judgment for defendant at common law is *pro retorno habendo*. Plaintiff's pledges are also so called. See Morr. Repl.; REPLEVIN.

DE SALVA GUARDIA (Lat. of safeguard). A writ to protect the persons of strangers seeking their rights in English courts. Reg. Orig. 26.

DE SCUTAGIO HABENDO (Lat. of having scutage). A writ which lay in case a man held lands of the king by knight's service, to which homage, fealty, and escuage were appendant, to recover the services or fee due in case the knight failed to accompany the king to the war. It lay also for the tenant *in capite*, who had paid his fee, against his tenants. Fitzh. N. B. 83, C.

DE SECTA AD MOLENDINUM (Lat. of suit to a mill). A writ which lieth to compel one to continue his custom of grinding at a mill. 3 Bla. Com. 235; Fitzh. N. B. 122, M; 2 Reeve, Hist. Eng. Law 55.

DE SON TORT (Fr.). Of his own wrong. This term is usually applied to a person who, having no right to meddle with the affairs or estate of a deceased person, yet undertakes to do so, by acting as executor of the deceased. See EXECUTORS AND ADMINISTRATORS.

DE SON TORT DEMESNE (Fr.). Of his own wrong. See DE INJURIA.

DE SUPERONERATIONE PASTURÆ (Lat. of surcharge of pasture). A writ lying where one who had been previously impleaded in the county court was again impleaded in the same court for surcharging common of pasture, and the cause was removed to Westminster Hall. Reg. Jur. 36 *b*.

DE TALLAGIO NON CONCEDENDO (Lat. of not allowing tallage). The name given to the statutes 25 and 34 Edw. I., restricting the power of the king to grant tallage. Co. 2d Inst. 532; 2 Reeve, Hist. Eng. Law 104. See TALLAGE.

DE UNA PARTE (Lat.). A deed *de una parte* is one where only one party grants, gives, or binds himself to do a thing to another. It differs from a deed *inter partes* (*q. v.*). See DEED POLL.

DE UXORE RAPTA ET ABDUCTA (Lat. of a wife ravished and carried away). A kind of writ of trespass. Fitzh. N. B. 89, O; 3 Bla. Com. 139.

DE VENTRE INSPICIENDO (Lat. of inspecting the womb). A writ to inspect the body where a woman feigns to be pregnant, to see whether she is with child. It lies for the heir presumptive to examine a widow suspected to be feigning pregnancy in order to enable a supposititious heir to obtain the estate. 1 Bla. Com. 456; 2 Steph. Com. 287; Cro. Eliz. 556; Cro. Jac. 685; 2 P. Wms. 693; 21 Viner, Abr. 547. There was a like procedure in Rome in cases of divorce; Voet. Com. 25, 42.

A jury of 12 matrons was impanelled to decide whether she was quick with child; if so found, sentence was suspended; Archb. Cr. Pr. 23d ed. 229.

It lay also where a woman sentenced to death pleaded pregnancy; 4 Bla. Com. 395. This writ has been recognized in America; 2 Chandl. Am. Cr. Tr. 381.

DE VICINETO (Lat. from the neighborhood). The sheriff was anciently directed in some cases to summon a jury *de vicineto;* 3 Bla. Com. 360.

DE WARRANTIA CHARTÆ (Lat. of warranty of charter). This writ lieth properly where a man doth enfeoff another by deed and bindeth himself and heirs to warranty. Now, if the defendant be impleaded in an assize, or in a writ of entry in the nature of an assize, in which actions he cannot vouch, then he shall have the writ against the feoffor or his heirs who made such warranty; Fitzh. N. B. 134, D; Cowell; *Termes de la Ley;* 3 Reeve, Hist. Eng. Law 55. Abolished by 3 & 4 Will. IV. c. 27.

DE WARRANTIA DIEI. A writ which lay for a party in the service of the king who was required to appear in person on a certain day, commanding the justices not to record his default, the king certifying to the fact of such service. Fitzh N. B. 36

DEACON. The lowest degree of holy orders in the Church of England. 2 Steph. Com. 660.

DEAD BODY. A corpse.

There is no right of property, in the ordinary sense of the word, in a dead human body; Co. Inst. 202; 4 Bla. Com. 235; Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759; Pierce v. Proprietors of Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667; 3 Edw. Ch. 155; 5 W. R. 318; 2 Wms. on Ex., 7th Am. ed. 165 n.; but there are rights attached to it which the law will protect; 10 Cent. L. J. 304; and for the health and protection of society, it is a rule of the common law, and this has been confirmed by statutes in civilized states and countries, that public duties are imposed upon public officers, and private duties upon the husband or wife and the next of kin of the deceased, to protect the body from violation and see that it is properly interred, and to protect it after it is interred; 1 Witthaus & Becker's Med. Jur. 297.

It has been suggested that the right of the living in their dead might be classified with those rights which arise out of the family relation; 5 Harv. L. Rev. 285; 13 *id.* 63; Larson v. Chase, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370. In Pierce v. Proprietors of Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667, it is said there is a quasi property right. The clear legal right of exemption from wrongful acts is in itself the property. An injury to such right need not include an injury to physical property, or to person or to character, but is of itself sufficient to support an action; Koerber v. Patek, 123 Wis. 453, 102 N. W. 40, 68 L. R. A. 956. Executors have a right to possession of it and it is their duty to bury it; 2 Wms. on Ex. 7th Am. ed. 165; Hapgood v. Houghton, 10 Pick. (Mass.) 154; Wynkoop v. Wynkoop, 42 Pa. 293, 82 Am. Dec. 506; but this case is referred to in a subsequent one in the same court as not deciding what is stated in the syllabus, which is characterized as "much too broad and as an improvident generalization"; Pettigrew v. Pettigrew, 207 Pa. 313, 56 Atl. 878, 64 L. R. A. 179, 99 Am. St. Rep. 795.

The right of the widow to control the place of burial is also sustained in other cases; O'Donnell v. Slack, 123 Cal. 285, 55 Pac. 906, 43 L. R. A. 388, Buchanan v. Buchanan, 28 Misc. Rep. 261, 59 N. Y. Supp. 810, which, while recognizing the right of the widow, held that she could not maintain replevin for the body against one who had caused it to be properly buried; and where the decedent did not in his lifetime live with his wife and there was no executor or administrator, the sister was held entitled to control the burial. It was also held in Louisville & N. R. Co. v. Wilson, 123 Ga. 62, 51 S. E. 24, 3 Ann. Cas. 128, that the widow has an interest in the unburied body of her deceased husband which the courts will recognize. The right to make testamentary direction concerning the disposal of the body has been conferred by statute in several states; *e. g.* New York, Maine, Oklahoma, and Minnesota. The question of the right of disposal of the body is ably discussed by Mr. R. S. Guernsey in 10 Cent. L. J. 303, 325, and he concludes upon the authorities that in the absence of testamentary disposition the right and duty of burial devolves upon relatives "as follows: 1. Husband or wife. 2. Children. 3. If none—(1) Father. (2) Mother. 4. Brothers and sisters. 5. Next of kin according to the course of the common law, according to the law of descent of personal property;" *id.* 327. Probably the rule may be fairly stated that there being no husband or wife of the deceased, the nearest of kin in order of right to administration is charged with the duty of burial. And to the same effect it is said: First, the paramount right is in the surviving husband or widow, and if the parties were living in the normal relations of marriage, it will require a very strong case to justify a court in interfering with the wishes of the survivor. Secondly, if there is no surviving husband or wife, the right is in the next of kin in the order of their relation to the decedent, as, children of a proper age, parents, brothers and sisters, or more distant kin, modified, it may be, by circumstances of special intimacy or association with the decedent.

Thirdly, how far the desires of the decedent should prevail against those of a surviving husband or wife is an open question, but as against remoter connections, such wishes, especially if strongly and recently expressed, should usually prevail. Fourthly, with regard to a re-interment in a different place, the same rules should apply, but with a presumption against removal growing stronger with the remoteness of connection with the decedent and reserving always the right of the court to require reasonable cause to be shown for it; Pettigrew v. Pettigrew, 207 Pa. 313, 56 Atl. 878, 64 L. R. A. 179, 99 Am St. Rep. 795.

Where a deceased person had not lived with his wife and there was no executor or administrator, his sister was permitted to control his burial; Kitchen v. Wilkinson, 26 Pa. Super. Ct. 75.

The leaving unburied the corpse of a person for whom the defendant is bound to provide Christian burial, as a wife or child, is an indictable misdemeanor, if he is shown to have been of ability to provide such burial; 2 Den. C. C. 325; or preventing a dead body from being buried; 2 Term 734; 4 East 460; 1 Russ. Cr. 415, n.; or interring one found in a river without first sending for the coroner; 1 Ld Ken. 250; or to cast one into a river; Kanavan's Case, 1 Greenl (Me.) 226. And every householder in whose house a dead body lies is bound by the common law, if he has the means to do so, to inter the body decently; and this principle applies where a person dies in the house of a parish or a union; 12 A. & E. 773. The expense for such burial may be paid out of the effects of deceased; 3 Camp. 298.

It is the duty of the coroner after death by violence to cause an autopsy to be made; the surgeon who makes it can recover from the county for his labor; Allegheny County v. Shaw, 34 Pa. 301; Board of Com'rs of Bartholomew County v. Jameson, 86 Ind. 154. If the work be done with ordinary care, he is not liable to the family for a mutilation of the body, even though acting without their consent; Young v. College of Physicians & Surgeons, 81 Md. 358, 32 Atl. 177, 31 L. R. A. 540; and though he removes and keeps in his possession by direction of the coroner, portions of the body; Palmer v. Broder, 78 Wis. 483, 47 N. W. 714. Where a rule of a board of health requires a certificate as to the cause of death before issuing a burial permit, an attending physician is not liable for performing an autopsy without the family's consent; Meyers v. Clarke, 122 Ky. 866, 90 S. W. 1049, 93 S. W. 43, 5 L. R. A. (N. S.) 727; so where a mere incision was made to ascertain the cause of death, as authorized by the board of health and a city ordinance; Rushing v. Medical College, 4 Ga. App. 823, 62 S. E. 563.

The purchaser of land upon which is located a burial ground may be enjoined from removing bodies therefrom against the wishes of the relatives or next of kin of the deceased. Every interment is a concession of the privilege which cannot afterward be repudiated, and the purchaser's title to the ground is fettered with the right of burial; First Presbyterian Church v. Church, 2 Brewster (Pa.) 372. But the right of municipal or state authorities, with the consent of the owner of the burial lot or in the execution of eminent domain, to remove dead bodies from cemeteries is well settled; Craig v. Church, 88 Pa. 42, 32 Am. Rep. 417; Hamilton v. City of New Albany, 30 Ind. 482; Page v. Symonds, 63 N. H. 17, 56 Am. Rep. 481.

The law of Indiana (2 R. S. p. 473) prohibits the removal of a dead body without the consent of a near relative or of the deceased in his lifetime. It is held there that the bodies of the dead belong to the surviving relations in the order of inheritance, as property; Bogert v. Indianapolis, 13 Ind. 134. The laws of Louisiana, California, Connecticut, Vermont, and Ohio, recognize the interest of the relatives of a deceased person in his body.

In 4 Bradf. Sur. (N. Y.) 502, a learned report by S. B. Ruggles lays down these conclusions, substantially:

1. Neither a corpse nor its burial is subject to ecclesiastical cognizance.

2. The right to bury a corpse and preserve it is a legal right.

3. Such right, in the absence of testamentary disposition, is in the next of kin (so in Bogert v. Indianapolis, 13 Ind. 138).

4. The right to protect the corpse includes the right to preserve it by burial, to select the place of sepulture, and to change it at pleasure.

5. If the burial-place be taken for public use, the next of kin must be indemnified for removal and reinterring, etc. Approved by the Sup. Ct. N. Y. (1856).

The exhumation of the body of the deceased should be ordered, if at all, only on a strong showing that, without its examination, a fraud is likely to be accomplished, as where an insurance company has exhausted every other legal means of exposing a fraud; Grangers' Life Ins. Co. v. Brown, 57 Miss. 308, 34 Am. Rep. 446. But the right of interment and the right to disinter are subordinate to public health, and disinterment may be compelled by public authorities whenever conditions become such as that the public health is threatened; or where an examination may disclose facts which prove an accused person innocent of a crime; Gray v. State, 55 Tex. Cr. R. 90, 114 S. W. 635, 22 L. R. A. (N. S.) 513.

In a murder trial, the court may, at the prisoner's instance, order an exhumation and autopsy, if in the interest of justice; Gray v. State, 55 Tex. Cr. R. 90, 114 S. W. 635, 22 L. R. A. (N. S.) 513; such order was

refused in Moss v. State, 152 Ala. 30, 44 South. 598, because it appeared that two reputable physicians, available at the trial, had examined the body before burial. There is said to be no law requiring a court, at the prisoner's request, but at the expense of the state, to order exhumation; Salisbury v. Com., 79 Ky. 425. In Com. v. Grether, 204 Pa. 203, 53 Atl. 753, the court refused to set aside a conviction of murder in the first degree because the district attorney and not the coroner had caused the body to be exhumed. In an insurance case, exhumation was ordered to obtain evidence bearing on the question of suicide; the marshal was directed to exhume the body and the court appointed a pathologist and a chemist to make the examination, it was held also that such order could only be made in a case where the widow was a party; Mutual Life Ins. Co. of New York v. Griesa, 156 Fed. 398. The right to make the order in an insurance case was recognized in People v. Fitzgerald, 105 N. Y. 146, 11 N. E. 378, 59 Am. Rep. 483; Grangers' Ins. Co. v. Brown, 57 Miss 308, 34 Am Rep. 446; but in the latter case the order was refused on the ground of delay; see Gray v. State, 55 Tex. Cr R 90, 114 S. W. 635, 22 L. R. A. (N. S.) 513.

To disinter a dead body, without lawful authority, even for the purpose of dissection, is a misdemeanor, for which the offender may be indicted at common law; 1 D. & R. 13; State v. McClure, 1 Blackf. (Ind.) 328; Com. v. Slack, 19 Pick. (Mass) 304; Kanavan's Case, 1 Greenl. (Me) 226 This offence is punished by statute in most of the states; see 1 Russ. 414, n A; as is its unauthorized sale for gain and profit; Thompson v. State, 105 Tenn. 177, 58 S. W. 213, 51 L. R. A. 883, 80 Am. St. Rep. 875 To seize a dead body on pretence of arresting for debt is *contra bonos mores;* 4 East 460. There can be no larceny of a dead body; 2 East, Pl. Cr. 652; 12 Co. 106; but may be of the clothes or shroud upon it; Wonson v. Sayward, 13 Pick. (Mass) 402, 23 Am. Dec. 691; 12 Co. 113; Co. 3d Inst. 110; Kanavan's Case, 1 Greenl. (Me) 226; State v. Doepke, 68 Mo. 208, 30 Am Rep. 785.

After the right of burial has once been exercised by the person charged with the duty of burial, or where such person has consented to the burial by another person, no right to the corpse remains except to protect it from unlawful interference; Peters v. Peters, 43 N. J. Eq. 140, 10 Atl. 742; Lowrie v. Plitt, 11 Phila. (Pa.) 303; 10 B. & S. 298. But see Weld v. Walker, 130 Mass. 422, 39 Am. Rep. 465. It has been held that it then becomes a part of the ground to which it has been committed; Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759; Wilson v. Read, 74 N. H. 322, 68 Atl. 37, 16 L. R. A. (N. S.) 332, 124 Am. St. Rep. 973; *contra*, Cohen v. Congregation Shearith Israel in City of New York, 85 App. Div. 65, 82 N. Y. Supp. 918. In England, where a son had removed, without leave, the body of his mother from the burial-ground of a congregation of Protestant dissenters, to bury it in church ground, it was held that he was guilty of a misdemeanor at common law, and that it was no defence that his motives were pious and laudable; 1 Dearsl. & B. 160, 7 Cox C. C. 214.

A widow who allows her husband to be buried in a certain place may not disturb his remains; her right to the body of her deceased husband being terminated by the burial, and any further disposition of such body belonging thereafter exclusively to his next of kin; Wynkoop v. Wynkoop, 42 Pa. 293, 82 Am. Dec. 506; but see a criticism of that case *supra*. Where one in accordance with his own wishes was buried in his own lot by his widow, and she removed his remains, she was ordered, in equity to restore them; Pierce v. Proprietors of Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep 672, and note. A son is not allowed to remove his father's remains against his mother's wishes; Johnston v. Marinus, 18 Abb N. C. (N. Y.) 78. After interment, the control over a dead body is in the next of kin living But if they differ about its disposal, equity will not help its removal. Where a corpse has been properly buried, it is doubtful if even the next of kin can remove it, Lowry v. Plitt, 16 Am. L. Reg. 155, and note. Where a wife allowed her husband's remains to be placed temporarily in a vault in New York, and his father removed them to his own vault, held, that, in the absence of a request by the deceased husband in his lifetime, the widow might control the place of burial, but that she could not, under the circumstances, disturb their repose and take them to Kentucky; Southworth v. Southworth, in the New York Supreme Court, 1881, not reported, referred to in an article in 17 Can. L. J. 184. The husband having in a time of great distress of mind after his wife's death consented to her burial in a lot of the husbands of two of her sisters, and sought to remove her body to the lot owned by himself and his co-heirs, the defendants, being the lot owners, refused permission, and on application for injunction to restrain their interference, it was held that he had never consented to her burial in the lot as a final resting place, and that the defendants might be required by a court of chancery to permit the removal. Chief Justice Gray said: Neither the husband nor the next of kin, have, strictly speaking, any right of property in a dead body; but controversies between them as to the place of its burial are, in this country where there are no ecclesiastical courts, within the jurisdiction of a court of equity; Weld v. Walker, 130 Mass. 423, 33 Am. Rep. 465; Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759;

2 Bla. Com. 429; Snyder v. Snyder, 60 How. Pr. (N. Y.) 368.

Where a widow ordered a funeral of her husband, it was held that she was liable for the expense, although she was an infant at the time, the court holding that the expenses fell under the head of necessaries, for which infants' estates are liable; 13 M. & W. 252.

See Bingh. Christ. Antiq.; Tyler, Am. Eccl. Law; Burton, The Burial Question; Cooley, Torts 280; The Law of Burials, Anon.; 1 Witthaus & Becker, Med. Jur. 297; note in Johnston v. Marinus, 18 Abb. N. C. (N. Y.) 75, containing a list of law literature on this and kindred topics; notes to Moak's Eng. Rep. 656; CEMETERY; CREMATION; MEASURE OF DAMAGES; FUNERAL EXPENSES

DEAD-BORN. A dead-born child is to be considered as if it had never been conceived or born; in other words, it is presumed it never had life, it being a maxim of the common law that *mortuus exitus non est exitus* (a dead birth is no birth). Co. Litt. 29 *b*. See Marsellis v. Thalhimer, 2 Paige, Ch. (N. Y.) 35, 21 Am. Dec. 66; 4 Ves. 334.

This is also the doctrine of the civil law, Dig. 50 16. 129. *Non nasci, et natum mori, paria sunt* (not to be born, and to be born dead, are equivalent). La. Civ. Code, art. 28; Domat, liv. prél. t. 2, s. 1, nn. 4, 6.

DEAD FREIGHT. The amount paid by a charterer for that part of the vessel's capacity which he does not occupy although he has contracted for it.

When the charterer of a vessel has shipped part of the goods on board, and is not ready to ship the remainder, the master, unless restrained by his special contract, may take other goods on board, and the amount which is not supplied, required to complete the cargo, is considered *dead freight*. The dead freight is to be calculated according to the actual capacity of the vessel. 3 Chit. Com. Law 399; 2 Stark 450; McCull. Com. Dic. See L. R. 6 Q. B. 528. See FREIGHT.

DEAD LETTER. Acts that have become obsolete by long disuse are often so called. See OBSOLETE.

DEAD LETTERS. Letters transmitted through the mails according to direction, and remaining for a specified time uncalled for by the persons addressed, are called dead letters.

DEAD MAN'S PART. That portion of the personal estate of a person deceased which by the custom of London became the administrator's.

If the decedent left wife and children, this was one-third of the residue after deducting the widow's chamber; if only a widow, or only children, it was one-half; 1 P. Wms. 341; Salk. 246; if neither widow nor children, it was the whole; 2 Show. 175. This provision was repealed by the statute 1 Jac. II, c. 17, and the same made subject to the statute of distributions. 2 Bla. Com. 518. See CUSTOMS OF LONDON; LEGITIME.

DEAD'S PART. In Scotch Law. The part remaining over beyond the shares secured to the widow and children by law. Of this the testator had the unqualified disposal. Stair, Inst. lib. iii. tit. 4, § 24; Bell Dict.; Paterson, Comp. §§ 674, 848, 902. It obtained in the province of York till 1692. See LEGITIME.

DEAD-PLEDGE. A mortgage; *mortuum vadium*.

DEADLY WEAPON. See DANGEROUS WEAPON; ARMS.

DEAF AND DUMB. A person deaf and dumb is *doli capax;* but with such persons who have not been educated, and who cannot communicate their ideas in writing, a difficulty sometimes arises on the trial.

A case occurred of a woman deaf and dumb who was charged with a crime. She was brought to the bar, and the indictment was then read to her; and the question, in the usual form, was put, Guilty or not guilty? The counsel for the prisoner then rose, and stated that he could not allow his client to plead to the indictment until it was explained to her that she was at liberty to plead guilty or not guilty. This was attempted to be done, but was found impossible, and she was discharged from the bar *sine plicatur*. Case of Jean Campbell, 1 Wh. & St. Med. Jur. § 468. When the party indicted is deaf and dumb, he may, if he understands the use of signs, be arraigned and the meaning of the clerk who addresses him conveyed to him by signs, and his signs in reply explained to the court, so as to justify his trial and the infliction of punishment; Com. v. Hill, 14 Mass. 207; 1 Leach 102, 1 Chit. Cr. L. 417. See State v. Harris, 53 N. C. 136, 78 Am. Dec. 272. It was formerly said that persons deaf and dumb were presumably idiots; 1 Hale, P. C. 34; but that doctrine was formulated at a period when the subject of the education of such unfortunate persons had received little or no attention. One deaf and dumb is not *consequently* insane, nor is he presumed to be an idiot; Alexier v. Matzke, 151 Mich. 36, 115 N. W. 251, 123 Am. St. Rep. 255, 14 Ann. Cas. 52; and his capacity appearing, he may be tried; 1 Bish. Cr. L. § 395; the ordinary presumption of sound mind and criminal responsibility, as was said by Gilpin, C. J., in a case of homicide by a person so afflicted, "does not apply to a deaf and dumb person when charged with the commission of a crime. On the contrary, the legal presumption is then directly reversed; for in such case it is incumbent upon the prosecution to prove to the satisfaction of the jury that the accused had capacity and reason sufficient to enable him to distinguish between right and wrong as to the act at the time when it was committed by him,

and had a knowledge and consciousness that the act he was doing was wrong and criminal and would subject him to punishment; 1 Moust. Cr. Rep. 291. In that case the prisoner was acquitted "under circumstances wherein plainly they would not have done it if he had been endowed with hearing and speech;" 1 Bish. Cr. L. § 395.

A person deaf and dumb may be examined as a witness, provided he can be sworn; that is, if he is capable of understanding the terms of the oath, and assents to it, and if, after he is sworn, he can convey his ideas, with or without an interpreter, to the court and jury; Phill. Ev. 14. If he is able to communicate his ideas perfectly by writing, he will be required to adopt that as the more satisfactory method; but, if his knowledge of that method is imperfect, he will be permitted to testify by means of signs; 1 Greenl. Ev. § 366; Tayl. Ev. 1170.

Such person may execute a deed; 1 H. L. Cas 724; Barnett v. Parnett, 54 N. C. 221; but it is said in an old case that he is prima facie unable to make a contract or deed; Brown v. Brown, 3 Conn. 299, 8 Am. Dec 187; in Culley v. Jones, 164 Ind 168, 73 N. E. 94, the question of capacity was left to the jury. See a note in 14 Ann. Cas. 52.

Where a defendant is deaf and dumb and cannot hear the testimony of the witnesses of the state, the presiding judge should permit some reasonable mode of having their evidence communicated to him; Ralph v. State, 124 Ga. 81, 52 S. E. 298, 2 L. R. A. (N. S.) 509, where it was said that in such case opportunity should be given for the communication to the defendant of the testimony, but the exact method of doing it must be left to the discretion of the court.

A deaf person was convicted of murder. Held due process of law, Felts v. Murphy, 201 U. S. 123, 26 Sup. Ct. 366, 50 L. Ed. 689.

DEAF, DUMB, AND BLIND. See IDIOT.

DEAFFOREST, DISAFFOREST. In Old English Law. To discharge from being forest. To free from forest laws.

DEALER. A dealer in the popular, and therefore in the statutory sense of the word, is not one who buys to keep, or makes to sell, but one who buys to sell again. Norris v. Com., 27 Pa. 494; Com. v. Campbell, 33 Pa. 385.

DEAN. An ecclesiastical officer, who derives his name from the fact that he presides over ten canons, or prebendaries, at least. He is addressed as Very Reverend.

There are several kinds of deans, namely: deans of chapters; deans of peculiars; rural deans; deans in the colleges; honorary deans; deans of provinces.

DEAN AND CHAPTER. In Ecclesiastical Law. The council of a bishop, to assist him with their advice in the religious and also in the temporal affairs of the see. 3 Co. 75; 1 Bla. Com. 382; Co. Litt. 103, 300; *Termes de la Ley*; 2 Burn, Eccl. Law 120.

DEAN OF THE ARCHES. The presiding judge of the court of the arches. He was also an assistant judge in the court of admiralty. 1 Kent 371; 3 Steph. Com. 727. See DOCTORS COMMONS; COURT OF THE ARCHES.

DEATH. The cessation of life. The ceasing to exist.

Civil death is the state of a person who, though possessing natural life, has lost all his civil rights, and as to them, is considered as dead.

A person convicted and attainted of felony and sentenced to the state prison for life is, in the state of New York, in consequence of the act of 29th of March, 1799, and by virtue of the conviction and sentence of imprisonment for life, to be considered as civilly dead; Platner v. Sherwood, 6 Johns. Ch (N. Y.) 118, Troup v. Wood, 4 Johns. Ch (N. Y.) 228, 260. And a similar doctrine anciently prevailed in other cases at common law in England. See Co. Litt. 133, 1 Sharsw. Bla. Com. 132, n.

Natural death is the cessation of life.

It is also used to denote a death which occurs by the unassisted operation of natural causes, as distinguished from a *violent* death, or one caused or accelerated by the interference of human agency.

In Medical Jurisprudence. The cause, phenomena, and evidence of violent death are of importance.

An ingenious theory as to the cause of death has been brought forward by Philip, in his work on Sleep and Death, in which he claims that to the highest form of life three orders of functions are necessary,—viz. the muscular, nervous, and sensorial, that of these the two former are independent of the latter, and continue in action for a while after its cessation, that they might thus continue always, but for the fact that they are dependent on the process of respiration, that this process is a voluntary act, depending upon the will, and that this latter is embraced in the sensorial function. In this view, death is the suspension or removal of the sensorial function, and that leads to the suspension of the others through the cessation of respiration. Philip, Sleep & D., Dean, Med. Jur. 413 *et seq.*

Its phenomena, or signs and indications. Real is distinguishable from apparent death by the absence of the heart-beats and respiration. These conditions are, however, not always easy to determine positively when the following tests may be applied:—1. Temperature of body the same as the surrounding air. 2. Intermittent shocks of electricity at different tensions give no indications of muscular irritability. 3. Movements of the joints of the extremities and of the jaw showing more or less *rigor-mortis*. 4. A bright needle plunged into the muscles and left there showing no signs of oxidation on withdrawal (Cloquet's test). 5. The opening of a vein showing that the blood vessels are empty, or that in the veins of dependent parts of the body the blood has coagulated. 6. The subcutaneous injection of ammonia causing a dirty brown stain (Monte Verde's test). 7. A fillet applied to the arm causing no filling of the veins on the distal side of the fillet (Richardson's test). 8. "Diaph-

anous test"; after death there is an absence of the translucence seen in the living when the hand is held before a strong light with the fingers extended and in contact. 9. "Eye test"; after death there is loss of pupillary reaction to light and to *mydriatics*, and there is also loss of corneal transparency; H. P. Loomis in Witthaus & Becker, Med. Jur.

Its evidence when produced by violence. This involves the inquiry as to the cause of death in all cases of the finding of bodies divested of life through unknown agencies. It seeks to gather all the evidence that can be furnished by the body and surrounding circumstances bearing upon this difficult and at best doubtful subject. It more immediately concerns the duties of the coroner, but is liable to come up subsequently for a more thorough and searching investigation. As this is a subject of great, general, and growing interest, no apology is deemed necessary for presenting briefly some of the points to which inquiry should be directed, together with a reference to authorities where the doctrines are more thoroughly discussed.

The first point for determination is, whether the death was the act of God or the result of violence. Sudden death is generally produced by a powerful invasion of the living forces that develop themselves in the *heart*, *brain*, or *lungs*—the first being called *syncope*, the second *apoplexy*, and the third *asphyxia*. Dean, Med. Jur. 426.

The last two are the most important to be understood in connection with the subject of persons found dead.

In *death from apoplexy*, the sudden invasion of the brain by effused blood destroys innervation, by which the circulation is arrested. Death from apoplexy is disclosed by the appearances revealed by dissection, particularly in the brain.

Death by asphyxia is still more important to be understood. It is limited to cases where the heart's action is made to cease through the interruption of the respiration. It is accomplished by all the possible modes of excluding atmospheric air from the lungs. The appearances in the body indicating death from asphyxia are, violet discolorations, eyes prominent, firm, and brilliant, cadaveric rigidity early and well marked, venous system of the brain full of blood, lungs distended with thick dark-colored blood, liver, spleen, and kidneys gorged, right cavities of the heart distended, left almost empty.

Many indications as to whether the death is the act of God or the result of violence may be gathered from the position and circumstances in which the body is found. As thorough an examination as possible should be first made of the body before changing its position or that of any of the limbs, or varying in any respect its relations with surrounding bodies. This is more necessary if the death has been apparently caused by wounds. Then the wounds require a special examination before any change is made in position, in order from their nature, character, form, and appearance to determine the instrument by which they were inflicted, and also their agency in causing the death. Their relations with external objects may indicate the direction from which they were dealt, and, if incised, their extent, depth, vessels severed, and hemorrhage produced may be conclusive as to the cause of death.

A thorough examination should be made of the clothes worn by the deceased, and any parts torn or presenting any unusual appearance should be carefully noted. A list should be made of all articles found on the body, and of their state and condition. The body itself should undergo a very careful examination. This should have reference to the color of the skin, the temperature of the body, the existence and extent of the cadaveric rigidity of the muscular system, the state of the eyes and of the sphincter muscles, noting at the same time whatever swellings, ecchymoses, or livid, black, or yellow spots, wounds, ulcers, contusions, fractures, or luxations, may be present. The fluids that have exuded from the nose, mouth, ears, sexual organs, etc., should be carefully examined: and when the deceased is a female, it will be proper to examine the sexual organs with care, with a view of ascertaining whether before death the crime of rape had or had not been committed.

Another point to which the attention should be directed is, the state of the body in reference to the extent and amount of decomposition that may have taken place in it, with the view of determining when the death took place. This is sometimes important to identify the murderer. The period after death at which putrefaction supervenes became a subject of judicial examination in Desha's case, reported in Dean, Med. Jur. 423 *et seq.*, and more fully in 2 Beck, Med. Jur. 44 *et seq.* Another interesting inquiry, where persons are found drowned, is presented in the inquiry as to the existence of *adipocere*, a compound of a yellowish-white color, consisting of calcareous or ammoniacal soap, which is formed in bodies immersed in water in from eight weeks to three years from the cessation of life. Tayl. Med. Jur., Hartsh. ed. 542; 1 Ham. Leg. Med. 104.

Another point towards which it is proper to direct examination regards the situation and condition of the place where the body is found, with the view of determining two facts: *First*, whether it be a case of homicide, suicide, or visitation of God: and *second*, whether, if one of homicide, the murder occurred there or at some other place, the body having been brought there and left. The points to be noted here are whether the ground appears to have been disturbed from its natural condition; whether there are any,

and what, indications of a struggle; whether there are any marks of footsteps, and, if any, their size, number, the direction to which they lead, and whence they came; whether any traces of blood or hair can be found; and whether any, or what, instruments or weapons, which could have caused death, are found in the vicinity; and all such instruments should be carefully preserved, so that they may be identified. Dean, Med. Jur 257; 2 Beck, Med. Jur. 107, nn. 136, 250.

As the decision of the question relating to the cause of death is often important and difficult to determine, it may be proper to notice some of its signs and indications in a few of the most prominent cases where it is induced by violence.

Death by drowning is caused by asphyxia from suffocation, by nervous or syncopal asphyxia, or by asphyxia from cerebral congestion.

In the first, besides other indications of asphyxia, the face is pale or violet, a frothy foam at the mouth, froth in the larynx, trachea, and bronchi, water in the trachea and, sometimes, in the ramifications of the bronchi, and also in the stomach. In the second, the face and skin are pale, the trachea empty, lungs and brain natural, no water in the stomach. In the third, the usual indications of death by apoplexy are found on examination of the brain. See 1 Ham. Leg. Med. 120.

Death by hanging is produced by asphyxia, suspending respiration by compressing the larynx, by apoplexy, pressing upon the veins and preventing the return of blood from the head, by fracture of the cervical vertebræ, laceration of trachea or larynx, or rupture of the ligaments of the neck, or by compressing the nerves of the neck. The signs and indications depend upon the cause of death. Among these are, face livid and swollen, lips distorted, eyelids swollen, eyes red and projecting, tongue enlarged, livid, compressed, froth about the lips and nostrils, a deep ecchymosed mark of the cord about the neck, sometimes ecchymosed patches on different parts of the body, fingers contracted or clenched.

Death by strangulation presents much the same appearances, the mark of the cord being lower down on the neck, more horizontal, and plainer and more distinctly ecchymosed.

Death by cold leaves few traces in the system. Pale surface, general congestion of internal organs, sometimes effused serum in the ventricles of the brain.

Death by burning may show the usual signs consequent upon exposure to great heat, redness, blistering, charring. The unaffected part of the body is usually pale. The extent of the body surface burnt, not the degree of burning, determines death.

Death by lightning usually exhibits a contused or lacerated wound where the electric fluid entered and passed out. Sometimes an extensive ecchymosis appears.

Death by starvation produces general emaciation; eyes and cheeks sunken; bones projecting; face pale and ghastly; eyes red and open; skin, mouth, and fauces dry; stomach and intestines empty; gall-bladder large and distended; body exhaling a fetid odor; heart, lungs, and large vessels collapsed; early commencement of the putrefactive process.

These and all other questions relating to persons found dead will be found fully discussed in works on medical jurisprudence.

The Legal Consequences. Persons who have been once shown to have been in life are always presumed thus to continue until the contrary is shown; so that the burden is on the party asserting the death to make proof of it; 2 East 312; 2 Rolle 461. But proof of a long continued absence unheard from and unexplained will lay a foundation for a presumption of death; Butrick v. Tilton, 155 Mass. 461, 29 N. E. 1088; Bank of Louisville v. Board of Trustees of Public Schools, 83 Ky. 219, 5 S. W. 735. Various periods of time are found in the adjudged cases to warrant such presumption. It was held to arise after twenty-seven years; 3 Bro. C. C. 510; twenty years, sixteen years; 5 Ves. 458; Marden v. Boston, 155 Mass. 359, 29 N. E. 588; fourteen years; Miller v. Beates, 3 S. & R. (Pa.) 490, 8 Am. Dec. 651; twelve years, King v. Paddock, 18 Johns. (N. Y.) 141; eleven years; Baden v. McKenny, 7 Mackey (D. C.) 268. The general rule, as now understood, is that the presumption of the duration of life ceases at the expiration of seven years from the time when the person was last known to be living; and after the lapse of that period there is a presumption of death; Smith v. Knowlton, 11 N. H. 197; Clarke's Ex'rs v. Canfield, 15 N. J. Eq. 119. Eagle v. Emmet, 4 Bradf. Sur. (N. Y.) 117. Chamb. Best Ev. 304, note, collecting the cases; Francis v. Francis, 180 Pa. 644, 37 Atl. 120, 57 Am. St. Rep. 668; 4 U. C. Q. B. 510; 1 Greenl. Ev. § 41; 5 B. & Ad. 86; Henderson v. Bonar, 11 S. W. 809, 11 Ky. L. Rep. 219; French v. McGinnis, 69 Tex. 19, 9 S. W. 323. In most of the states the subject is regulated by statute. It is held also that there must be diligent inquiry among those who would probably hear from such absentee, to raise this presumption; Modern Woodmen of America v. Gerdom, 72 Kan. 391, 82 Pac. 1100, 2 L. R. A. (N. S.) 809; Wentworth v. Wentworth, 71 Me. 74; In re Morrison's Estate, 183 Pa. 155, 38 Atl. 895; In re Board of Education of N. Y., 173 N. Y. 321, 66 N. E. 11. See Modern Woodmen of America v. Gerdom, 72 Kan. 391, 82 Pac. 1100, 2 L. R. A. (N. S.) 809, and cases cited. In In re Freeman's Estate, 18 Pa. Dist. R. 194, it was said that a pre-

sumption of death in consonance with the English rule arises at the end of an unexplained absence of seven years, but contrary to the English rule, a counter-presumption also arises of a continuance of life during and up to the very end of that period, subject to be modified by proof of the presence of imminent peril which menaced the life of the absent one and probably terminated it within the period.

There are cases, however, where a presumption of death may be raised from even a shorter absence; Waite v. Coaracy, 45 Minn. 159, 47 N. W. 537; Cambrelleng v. Purton, 125 N. Y. 610, 26 N. E. 907; Fidelity Mut. Life Assn. v. Mettler, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922; and while seven years is the period in which the presumption of continued life ceases, yet this period may be shortened by proof of such facts and circumstances as, submitted to the test of experience, would produce a conviction of death within a shorter period; Northwestern Mut. Life Ins. Co. v. Stevens, 71 Fed. 258, 18 C. C. A. 107; Davie v. Briggs, 97 U. S. 628, 24 L. Ed. 1086; Hyde Park v. Canton, 130 Mass. 505; Cox v. Ellsworth, 18 Neb. 664, 26 N. W. 460, 53 Am. Rep. 827.

Though there is controversy on the point, the better opinion is that there is no presumption as to the time of death; Davie v. Briggs, 97 U. S. 628, 24 L. Ed. 1086; Chamb. Best Ev. 305; 2 Brett, Com. 941; 2 M. & W. 894; and the *onus* is on the person whose case requires proof of death at a particular period; Howard v. State, 75 Ala. 27; Whiteley v. Assurance Society, 72 Wis. 170, 39 N. W. 369; Spencer v. Roper, 35 N. C. 333; 8 U. C. Q. B. 291. It seems that such continued absence for seven years from the particular state of his residence, without showing an absence from the U. S., is sufficient; Newman v. Jenkins, 10 Pick. (Mass.) 515; Innis v. Campbell, 1 Rawle (Pa.) 373; Spurr v. Trimble, 1 A. K. Marsh. (Ky.) 278; Wambaugh v. Schenk, 2 N. J. L. 229; Woods v. Woods' Adm'rs, 2 Bay (S. C.) 476; and to establish the presumption of death, the last known place of residence is the place to look for the person; Morrison's Estate, 183 Pa. 155, 38 Atl. 895; but the statutory presumption of the death of a person will not be received until all reasonable doubt of his death, at a given time, is removed; Smith v. Combs, 49 N. J. Eq. 420, 24 Atl. 9. There are cases, however, in which an absence of seven years will not raise a presumption of death without issue, as where it is probable that the failure to communicate with friends is intentional; In re Taylor, 66 Hun 626, 20 N. Y. Supp. 960; Doe v. Stockley, 6 Houst. (Del.) 447, where the court refused to instruct the jury that there was a presumption of the death of an entire family after an absence of forty-five or fifty years. And the statutory presumption of death after seven years does not apply to children of tender years incapable of voluntary absence or concealment; Manley v. Pattison, 73 Miss. 417, 19 South. 236, 55 Am. St. Rep. 543. As to this presumption generally, see 8 Eng. Rul. Cas. 512.

The common-law presumption of death after a lapse of years is not sufficient in a criminal prosecution to prove that the wife was unmarried; People v. Weinstock, 140 N. Y. Supp. 453. See ESCHEAT; ABSENTEE, as to the power of the legislature to provide for the administration of estates of persons absent and presumed to be dead.

The record of the probate of a will is not competent evidence of death except where all parties to a subsequent action were also parties before the surrogate; Carroll v. Carroll, 60 N. Y. 121, 19 Am. Rep. 144, and note But it is held that where a foreign court of competent jurisdiction has made a grant of administration on the presumption of death, such grant may be accepted by the court of probate as sufficient proof; [1892] Prob. 255.

Letters of administration were held to be evidence of death, Ruoff v. Bank, 40 Misc. 549, 82 N. Y. Supp. 881; Aultman, Miller & Co. v. Timm, 93 Ind. 158. So is a certificate of the register of births and deaths; Succession of Jones, 12 La. Ann. 397.

A letter contained in an envelope requesting a return to the writer, if not called for, and showing the post office stamp that it had been returned to the writer, is admissible as affording ground for an inference, more or less strong, of the death of the addressee, Hurlburt v. Hurlburt's Estate, 63 Vt. 667, 22 Atl. 850.

Questions of difficulty have arisen where several persons, respectively entitled to inherit from one another, happen to perish all together by the same event, such as a shipwreck, a battle, or a conflagration, without any possibility of ascertaining who died first. In such cases the French civil code and the civil code of Louisiana lay down rules (the latter copying from the former) which are deduced from the probabilities resulting from the strength, age, and difference of sex of the parties.

If those thus perishing together were under fifteen, the eldest shall be presumed the survivor. If they were all above sixty, the youngest shall be presumed the survivor. If some were under fifteen and others above sixty, the former shall be presumed the survivors. If those who have perished together had completed the age of fifteen and were under sixty, the male shall be presumed the survivor where the ages are equal or the difference does not exceed one year. If they were of the same sex, that presumption shall be admitted which opens the succession in the order of nature; and thus the younger must be presumed to have survived the elder. French Civ. Code, arts. 720–722; La. Civ. Code, arts. 930–933; Hollister v. Cordero, 76 Cal. 649, 18 Pac. 855.

The English common law has never adopted these provisions, or gone into the refinement of reasoning upon which they are based. It requires the survivorship to be proved by facts, and not by any settled legal rule or prescribed presumption. In some of the cases that have arisen involving this bare question of survivorship, the court have advised a compromise, denying that there was any legal principle upon which it could be decided. In others, the decision has been that they all died together, and that none could transmit rights to others; 1 W. Bla. 640; Fearne, Posth. Works 38, 39; 2 Phill. 261; Cro. Eliz. 503; 3 Hagg. Eccl. 748; 5 B. & Ad. 91; 1 Y. & C. Ch. 121; Russell v. Hallet, 23 Kan. 276; Stinde v. Goodrich, 3 Redf. (N. Y.) 87; [1892] Prob. 142; Ash v. Hare, 73 Me. 403; that is, the one who bears the burden of proof of survivorship fails in his case; Newell v. Nichols, 75 N. Y. 78, 31 Am. Rep. 424; Russell v. Hallett, 23 Kan. 276 Where a mother and daughter die in the same year, but there is no evidence of the precise date of the death of the mother, an assumption that she died before the daughter is not warranted; Cook v. Caswell, 81 Tex., 678, 17 S. W. 385. Each case must be determined upon its own peculiar facts and circumstances, whenever the evidence is sufficient to support a finding as to survivorship; Estate of Ehle, 73 Wis. 445, 41 N. W. 627.

As to contracts. These are, in general, not affected by the death of either party. The executors or administrators of the decedent are required to fulfil all his engagements, and may enforce all those in his favor. But to this rule there are the following exceptions, in which the contracts are terminated by the death of one of the parties:—

The contract of marriage. See MARRIAGE.

The contract of partnership. See PARTNERSHIP.

Those contracts which are altogether personal: as, where the deceased has agreed to accompany the other party to the contract on a journey, or to serve another; Pothier, Obl. c. 7, art. 3. §§ 2, 3; Howe Sewing-Mach. Co. v. Rosensteel, 24 Fed. 583; Lacy v. Getman, 119 N. Y. 109, 23 N. E. 452, 6 L. R. A. 728, 16 Am. St. Rep. 806; or to instruct an apprentice; Bacon, Abr. *Executor*, P; 1 Burn, Eccl. Law 82; Ans. Contr. 325; Shields v. Owens, 1 Rawle (Pa.) 61; also an instance of this species of contract in 2 B. & Ad. 303. In all those cases where one is acting for another and by his authority, such as agencies and powers of attorney, where the agency or power is not coupled with an interest, the death of the party ordinarily works a revocation; Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. Ed. 589; Lehigh Coal & Nav. Co. v. Mohr, 83 Pa. 228, 24 Am. Rep. 161. Where the power is to transfer stock, signed by the seller of the stock, it is not revoked by his death; Fisher v. Coal Co., 31 W. N. C. (Pa.) 502. See PRINCIPAL AND AGENT.

The continued existence of both parties for the stipulated term is the basis of a contract; and on the death of a master no action will lie against the administrator for refusing to continue a contract of employment; Yerrington v. Greene, 7 R. I. 589, 84 Am. Dec. 578; Lacy v. Getman, 119 N. Y. 109, 23 N. E. 452, 6 L. R. A. 728, 16 Am. St. Rep 806; L. R. 4 C. P. 744; Burdett v. Yale, 6 Allen (Mass.) 125; Harris v. Johnson, 98 Ga 434, 25 S. E. 525; Babcock v. Goodrich, 3 How. Pr. N. S. (N. Y.) 52. But in Harrison v. Conlan, 10 Allen (Mass.) 85, the pastor of a church employed an organist to play for three months for $50. The employer died and the organist did not play thereafter, though ready to do so It was held in an action against the personal representatives of the pastor that the obligation to pay was not discharged by his death, but that the organist could recover only *pro rata* compensation for the portion of the three months during which he had played. Where a landowner hired another for a specified term to raise crops, the contract was held not to end with the employer's death, but to be binding on his personal representatives, if the employment was continued; though most of the services were rendered after the employer's death, the employee was entitled to recover his compensation: Pugh v. Baker, 127 N. C. 2, 37 S. E. 82. In Mendenhall v. Davis, 52 Wash. 169, 100 Pac 336, 21 L. R. A. (N. S.) 914, 17 Ann. Cas 179, a buyer paid cash and notes for the implements and good will of the seller's dentistry business and for the seller's agreement to render for a specified time personal service in that business; the seller died before the expiration of the period and the buyer was held to have a right to counterclaim against his liability on the notes the damages he had suffered by failure to receive the services.

As to torts. In general, when the tort feasor or the party injured dies, the cause of action dies with him; but when the deceased might have waived the tort and maintained assumpsit against the defendant, his personal representative may do the same thing. See ACTIO PERSONALIS MORITUR CUM PERSONA, where this subject is more fully examined. As to the right of action for death by wrongful act, see *infra*.

As to crimes. When a person accused of crime dies before trial, no proceedings can be had against his representatives or his estate.

As to inheritance. By the death of a person seised of real estate or possessed of personal property, his property real and personal, after satisfying his debts, vests, when he has made a will, as he has directed by that instrument; but if he dies intestate, his real estate goes to his heirs at law under the statute of descents, and his personal to his

administrators, to be distributed to the next of kin, under the statute of distributions.

In suits. At common law an original suit abated by reason of the death of the plaintiff; 6 Wait, Act. & Def. 400; Torry v. Robertson, 24 Miss. 192; but in most of the states and England it is otherwise, and the personal representatives may become parties and prosecute the suit; Wms. Ex., 7th Am. ed. pt. ii. b. iii. ch. 4, and American note thereto, pp. 91, 99. The English practice and rules under the procedure acts will be found in the chapter of Williams on Executors above cited and a reference to the American statutes in the note thereto. In case of the death of a plaintiff the usual practice is to make a suggestion of it to the court which is entered of record; and in case of the death of a defendant his executor or administrator may be made a party, either by *scire facias*, or motion for an order of revivor, or other proceeding for giving due notice to the representative, according to the varying practice of the several states. See ABATEMENT.

As to the death of one of the parties in a divorce suit, see DIVORCE.

The death of a defendant will discharge the special bail; Tidd, Pr. 243; but when he dies after the return of the *ca. sa.* and before it is filed, the bail are fixed; 6 Term 284; Boggs v. Teackle, 5 Binn. (Pa.) 332; Champion v. Noyes, 2 Mass. 485; Davidson v. Taylor, 12 Wheat. (U. S.) 604, 6 L. Ed. 743; Olcott v. Lilly, 4 Johns. (N. Y.) 407; Goodwin v. Smith, 4 N. H. 29.

At common law there was no right of action for death by wrongful act; Green v. R. Co., 28 Barb. (N. Y.) 9; Major v. Ry. Co., 115 Ia. 309, 88 N. W. 815; Duncan v. St. Luke's Hospital, 113 App. Div. 68, 98 N. Y. Supp. 867.

Lord Ellenborough, in Baker v. Bolton, 1 Camph. 493, held that "in a civil court the death of a human being cannot be complained of as an injury." Homicide is always a purely criminal matter. In the early English law it was regarded more as a civil than a criminal offence, and damages were paid to the family of the decedent known as wergilds. As, during the continuance of this custom, a process for the recovery of the wergilds was certainly given, it seems that when these offences grew no longer redeemable, the private process was still continued, in order to secure the infliction of punishment upon the offender, though the party injured was allowed no pecuniary compensation; Jac. L. Dict. tit. *Appeal.* This process was known as an appeal of murder, and was permitted by statute to co-exist with the criminal action. The defendant, if found guilty did not pay any damages to the plaintiff, but was punished as in a criminal case. The real advantage to the plaintiff lay in the fact that he could release his rights, and that such releases were frequently of great pecuniary value; 7 Harv. L. Rev. 170. This appeal for murder existed as late as 1818 in the case of Ashford v. Thornton, 1 B. & Ald. 405, where the court held that the appellor had a right to bring the case by writ of appeal, but that the appellee had an equal right to his plea of wager of battel. The appellor declined to accept the decision of the court giving the appellee trial by battel and the latter was discharged. This led to the enactment of a statute the next year abolishing appeal of murder, treason, etc., as well as wager of battel (59 Geo. III. ch. 46). Until 1846 there was no civil remedy. In that year Lord Campbell's Act was passed (9 & 10 Vict. ch. 93), known as the Fatal Accidents Act, allowing a recovery for death caused by negligence or wrongful act. See APPEAL.

In the United States, like statutes have been passed modelled on this act. They differ principally in respect of the person who may bring the action. Their purpose is to provide the means for recovering damages caused by that which is essentially and in its nature a tort. Such statutes are not penal but remedial—for the benefit of the persons injured by the death.

An action to recover damages for a tort is not local, but transitory, and can, as a general rule, be maintained wherever the wrongdoer can be found; Stewart v. R. Co., 168 U. S. 448, 18 Sup. Ct. 105, 42 L. Ed. 537. It may well be that, where a purely statutory right is created, the special remedy provided by the statute for the enforcement of that right must be pursued, but where the statute simply takes away a common-law obstacle to a recovery for what is admitted to be a tort, it would seem not unreasonable to hold that an action for that tort can be maintained where the statute of the state in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced; Stewart v. R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537, citing Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958.

Where the negligence which causes the accident occurs in one state or country, and the accident itself in another, it is the law of the latter place that governs; Rundell v. La Compagnie Gén. Trans., 100 Fed. 655, 40 C. C. A. 625, 49 L. R. A. 92 (in admiralty). It is held that a new action is created for the benefit of the persons named in the statute, and not a continuation of a right of action belonging to decedent before his death; In re Mayo's Estate, 60 S. C. 401, 38 S. E. 634, 54 L. R. A. 660. So a cause of action for personal injuries which survives is held distinct from a cause of ac-

tion in favor of surviving relatives; Brown v. R. Co., 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579; Lubrano v. Mills, 19 R. I. 129, 32 Atl. 205, 34 L. R. A. 797; the two actions, though prosecuted by the same personal representative, are not in the same right, and a recovery in one is not a bar to a recovery in the other; Mahoning Valley R. Co. v. Van Alstine, 77 Ohio St. 395, 83 N. E. 601, 14 L. R. A. (N. S.) 893. That there is but one ground of liability, the wrongful act, and as all claims for damages grow out of the one wrong, it is unreasonable to say that the legislature intended there should be two causes of action based upon it, was held in Holton v. Daly, 106 Ill. 131. In Brown v. R. Co., 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579, it is said of that case. "True, in the circumstances named, there is but one wrongful act, but that is not the sole ground of action in the right of the deceased or the survivor. It takes the wrongful act and the loss to make the complete cause of action, and as the loss to the person upon whom the injury is inflicted must be recovered by or in his right, and the loss to the surviving relatives by or in their right, the causes of action are clearly distinct." "If several persons are made to suffer pecuniary loss by one wrongful act, each may very properly have his independent cause of action and remedy for the loss resulting to him, and, generally, in order to do complete justice, in the absence of some provision for a recovery for the benefit of all and a distribution of the proceeds, separate causes of action must necessarily exist."

The principles on which the decedent's cause of action rested at common law are the same irrespective of the cause of his death. It died with him, but is revived by the statute in favor of his administrator. It includes nothing more than the intestate's cause of action. That act simply revives but does not enlarge the common-law right of the decedent. The provision for surviving relatives introduced principles wholly unknown to the common law, namely, that the value of a man's life to his wife and next of kin constitute part of his estate; Needham v. R. Co., 38 Vt. 294, where it is said that the damages to the widow and next of kin begin where the damage to the intestate ended—with his death. In Clare v. R. Co., 172 Mass. 211, 51 N. E. 1083, it was held that a judgment in an action by an administrator for personal injuries suffered by plaintiff's intestate, and not for his death, is not a bar to the prosecution of an action for damages for his death. But it was further held that where one has both a common-law and a statutory right of action for injuries, and has elected to pursue the statutory remedy, an action on the other is barred; and while the right to maintain the statutory action for death is recognized, yet where damages have already been recovered under the common-law remedy, the statutory right is barred.

It has been held that where the death is instantaneous an action cannot be maintained under the survival statutes; Sweetland v. R. Co., 117 Mich. 329, 75 N. W. 1066, 43 L. R. A. 568; and where the decedent survived the injury about twelve hours, it was held by a divided court that a judgment based on the death act could not be sustained, as that act could apply only to cases where the death was instantaneous, and that in other cases the action must be based on what was termed the survival act; Dolson v. R. Co., 128 Mich. 444, 87 N. W. 629; Belding v. R. Co., 3 S. D. 369, 53 N. W. 750; Sawyer v. Perry, 88 Me. 42, 33 Atl. 660.

Where the plaintiff's husband released the defendant from liability for personal injuries received by her such a release was held a bar to a recovery, when five years later such injuries resulted in her death, on the ground that the wife was privy to the husband, and therefore estopped by his release; and that payment, like pardon, relates back to the original act; Southern Bell Telephone & Telegraph Co. v. Cassin, 111 Ga. 575, 36 S. E. 881, 50 L. R. A. 694.

Collateral relations must show that they suffered pecuniary loss in order to permit a recovery of more than nominal damages; Anderson v. R. Co., 35 Neb. 95, 52 N. W. 840; Paulmier v. R. Co., 34 N. J. L. 151; In re California Nav. & Imp. Co., 110 Fed. 670; Burk v. R. Co., 125 Cal. 364, 57 Pac. 1065, 73 Am. St. Rep. 52; Sorensen v. R. Co., 45 Fed. 407; or reasonable expectation thereof: Thomas v. R. Co., 6 Civ. Proc. R. (N. Y.) 353; The O. L. Hallenbeck, 119 Fed. 468. The amount the deceased would probably have added to his estate has been adopted as the measure of recovery; Chicago, P. & St. L. R. Co. v. Woolridge, 174 Ill. 330, 51 N. E. 701; and probabilities, not possibilities, of benefits; Cleveland, C., C. & St. L. R. Co. v. Drumm, 32 Ind. App. 547, 70 N. E. 286.

The loss of parental care will not be considered in awarding damages; McCabe v. Lighting Co., 27 R. I. 272, 61 Atl. 667; *contra*, Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562, 64 N. E. 1109. As to whether the pain and suffering of the deceased or the grief and wounded feelings of his surviving relatives will be considered in the estimate of damages, see MENTAL SUFFERING.

The mother of an illegitimate child cannot recover; McDonald v. R. Co., 71 S. C. 352, 51 S. E. 138, 2 L. R. A. (N. S.) 640, 110 Am. St. Rep. 576; where the statute gives the right to the mother and other specified relatives; Alabama & V. Ry. Co. v. Williams, 78 Miss. 209, 28 South. 853, 51 L. R. A. 836, 84 Am. St. Rep. 624; Marshall v. R. Co., 46

Fed. 269; although by statute, an illegitimate child and his mother may inherit from each other; Harkins v. R. Co., 15 Phila. (Pa.) 286. These cases follow the English rule, which denies the right of action on the ground that "child" in an act of parliament always applies exclusively to a legitimate child; 2 Hurlst. & C. 735.

On the other hand, where the statute allowed an illegitimate child and its mother to inherit from each other, the mother should be permitted to recover; Marshall v. R. Co., 120 Mo. 275, 25 S. W. 179; so also where the statute gave the right of recovery to the widow and next of kin; Security Title & Trust Co. v. R. R. Co., 91 Ill. App. 332.

When the legislature has created a right of action for wrongful death for the benefit of the next of kin, and has declared that the father, if living, is the next of kin of minor children who leave neither widow nor children, an action for the death of such child must be for the sole benefit of the father, although he has deserted his family, to whose support the deceased child was at the time of his death contributing; Swift & Co. v. Johnson, 138 Fed. 867, 71 C. C. A. 619, 1 L. R. A. (N. S.) 1161; Pineo v. R. Co., 99 N. Y. 644, affirming 34 Hun (N. Y.) 80. It is said, however that he may have only nominal damages in such case; Cook v. Gunpowder Co., 70 N. J. L. 65, 56 Atl. 114; and his right to recover at all is denied in Southern R. Co. v. Flemister, 120 Ga. 524, 48 S. E. 160.

At common law, neither husband nor wife may recover damages for the negligent killing of the other where death is instantaneous, either for loss of services or consortium; Armstrong v. Beadle, Fed. Cas. No. 541; Howell v. Board of Com'rs, 121 N. C. 362, 28 S. E. 362; Johnson v. Electric Co., 39 Wash. 211, 81 Pac. 705; Wyatt v. Williams, 43 N. H. 102; Grosso v. R. Co., 50 N. J. L. 317, 13 Atl. 233; Womack v. Banking Co., 80 Ga. 132, 5 S. E. 63; The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358; Mowry v. Chaney, 43 Ia. 609; Sherlag v. Kelley, 200 Mass. 232, 86 N. E. 293, 19 L. R. A. (N. S.) 633, 128 Am. St. Rep. 414; Green v. R. Co., 28 Barb. (N. Y.) 9, where it is said no action for loss of service can be sustained in case of instantaneous death, because there is no time during her life when it can be said that the husband has lost the society and service of his wife in consequence of the injury complained of. Recovery can be had if death is not instantaneous; Eden v. R. Co., 14 B. Monr. (Ky.) 204; Hyatt v. Adams, 16 Mich. 180; Green v. R. Co., 28 Barb. (N. Y.) 9. See McMillan v. Lumber Co., 115 Wis. 332, 91 N. W. 979, 60 L. R. A. 589, 95 Am. St. Rep. 947. In Ohio the action can be maintained in the courts of that state only when the deceased was an Ohio citizen; Baltimore & O. R. Co. v. Chambers, 73 Ohio St. 16, 76 N. E. 91, 11 L. R. A. (N. S.) 1012, affirmed in Chambers v. R. Co., 207 U. S. 142, 28 Sup. Ct. 34, 52 L. Ed. 143, where it was held that the plaintiff was not denied access to the Ohio courts because she was not a citizen of that state, but because her cause of action was not cognizable in those courts.

Generally, under the statutes, the remedy is open to non-residents; In re Mayo's Estate, 60 S. C. 401, 38 S. E. 631, 54 L. R. A. 660. Non-resident aliens are within the operation of such statute permitting the father, mother, widow or next of kin of one killed by another's negligence (or the personal representatives of the deceased, for their benefit) to maintain an action, although the statute does not expressly declare that they shall be entitled to its benefit; Rietveld v. R. Co., 129 Ia. 249, 105 N. W. 515; Trotta's Adm'r v. Johnson, 121 Ky. 827, 90 S. W. 540, 12 Ann. Cas. 222; Mascitelli v. Union Carbide Co., 151 Mich. 693, 115 N. W. 721; Kellyville Coal Co. v. Petraytis, 195 Ill. 215, 63 N. E. 94, 88 Am. St. Rep. 191; Atchison, T. & S. F. Ry. Co. v. Fajardo, 74 Kan. 314, 86 Pac. 301, 6 L. R. A. (N. S.) 681; Ferrara v. Mining Co., 43 Colo. 496, 95 Pac. 952, 17 L. R. A. (N. S.) 964; Gaska v. Car & Foundry Co., 127 Mo. App. 169, 105 S. W. 3; Low Moor Iron Co. v. La Bianca's Adm'r, 106 Va. 83, 55 S. E. 532, 9 Ann. Cas. 1177; Mulhall v. Fallon, 176 Mass. 266, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. Rep. 309; Kellyville Coal Co. v. Petraytis, 195 Ill. 215, 63 N. E. 94, 88 Am. St. Rep. 191; Szymanski v. Blumenthal, 3 Pennewill (Del.) 558, 52 Atl. 347; Renlund v. Min. Co., 89 Minn. 41, 93 N. W. 1057, 99 Am. St. Rep. 534; Bonthron v. Fuel Co., 8 Ariz. 129, 71 Pac. 941, 61 L. R. A. 563; Alfson v. Bush Co., 182 N. Y. 393, 75 N. E. 230, 108 Am. St. Rep. 815; Pittsburgh, C., C. & St. L. R. Co. v. Naylor, 73 Ohio St. 115, 76 N. E. 505, 3 L. R. A. (N. S.) 473, 112 Am. St. Rep. 701; Cetotonte v. Coke Co., 78 N. J. L. 662, 75 Atl. 913, 27 L. R. A. (N. S.) 1058; Patek v. Rehning Co., 154 Fed. 190, 83 C. C. A. 284, 21 L. R. A. (N. S.) 273 (Colorado); Mahoning Ore & Steel Co. v. Blomfelt, 163 Fed. 827, 91 C. C. A. 390 (Minnesota); Kaneko v. Ry. Co., 164 Fed. 263 (California); Anastasakas v. Contract Co., 51 Wash. 119, 98 Pac. 93, 21 L. R. A. (N. S.) 267, 130 Am. St. Rep. 1089. The courts of Pennsylvania, Wisconsin and Indiana denied this right; Deni v. R. Co., 181 Pa. 525, 37 Atl. 558, 59 Am. St. Rep. 676; Maiorano v. R. Co., 216 Pa. 402, 65 Atl. 1077, 21 L. R. A. (N. S.) 271, 116 Am. St. Rep. 778; affirmed in 213 U. S. 268, 29 Sup. Ct. 424, 53 L. Ed. 792; McMillan v. Lumber Co., 115 Wis. 332, 91 N. W. 979, 60 L. R. A. 589, 95 Am. St. Rep. 947; Cleveland, C., C. & St. L. R. Co. v. Osgood (Ind.) 70 N. E. 839. The federal courts sitting in Pennsylvania followed the Pennsylvania courts; Zeiger v. R. Co., 151 Fed. 348, affirmed in

158 Fed. 809, 86 C. C. A. 69. In Brannigan v. Mining Co., 93 Fed. 164, the United States circuit court for Colorado followed the Pennsylvania decisions in construing the Colorado statute.

In England, too, the rulings have been conflicting. It was held that Lord Campbell's Act does not give a right of action for the benefit of a non-resident alien; [1898] 2 Q. B. 430; but a later case disapproved this ruling and a right of recovery on behalf of a non-resident alien widow was sustained; [1901] 2 K. B. 606.

It was sought in Malorano v. R. Co., 216 Pa. 402, 65 Atl. 1077, 21 L. R. A. (N. S.) 271, 116 Am. St. Rep. 778, to overrule the earlier Pennsylvania decisions by contending that the plaintiff was protected by the existing treaty between the United States and Italy providing that citizens of Italy shall enjoy in states of the Union in the protection and security of their persons and property the same rights which are enjoyed by citizens of the United States. But it was held that such a treaty conferred such rights only upon those citizens of Italy who bring their persons or property within the jurisdiction of the United States; that the plaintiff in this case, being a citizen and resident of Italy, could not recover damages for her husband's death. This was affirmed by the United States Supreme Court; 213 U. S. 268, 29 Sup. Ct. 124, 53 L. Ed. 792.

In New York it was held that since in Pennsylvania no right of action for wrongful death existed in favor of non-resident aliens, upon the principles of comity non-residents could not maintain an action in New York and recover for the death of a person in Pennsylvania; Gurotsky v. R. Co., 121 App. Div. 126, 105 N. Y. Supp. 514.

By a treaty between United States and Italy of 1913, non-resident aliens are given a right of action for injury or death caused by negligence or fault, and they enjoy the same rights as are granted to United States citizens, under like conditions.

It was held in The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358, that no damages can be recovered in admiralty for the death by negligence of a human being on the high seas, or on waters navigable from the seas, in the absence of an act of congress or a state statute. The maritime law, of this country, at least, gives no such right; Butler v. Steamship Co., 130 U. S. 555, 9 Sup. Ct. 612, 32 L. Ed. 1017. It was held that where the law of a state to which a vessel belonged (the law of the domicil or flag) gives a right of action for wrongful death if such death occurred on the high seas, such right of action will be enforced in admiralty as a claim against the fund arising in a proceeding to limit liability; The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264. In La Bourgogne, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973, it was held that the law of France, which authorizes recovery for loss of life against a vessel in fault, will be enforced by the courts of the United States in a proceeding to limit liability for claims against a French vessel found to be in fault for a collision in a fog on the high seas, although the French courts, in applying to the facts found the international rule as to the speed of vessels in a fog, had held such vessel not to be in fault. See 21 Harv. L. Rev. 1, as to the enforcement of a right of action acquired under foreign law for death upon the high seas.

DEATH-BED DEED. A deed made by one who was at the time sick of a disease from which he afterwards died. Bell, Dict

DEATH DUTIES. Used in England to designate inheritance taxes. See TAX.

DEATH'S PART. See DEAD'S PART; DEAD MAN'S PART.

DEATH WARRANT. See EXECUTION.

DEBAUCH. To corrupt one's manners, to make lewd, to mar or spoil; to seduce and vitiate a woman. Koenig v. Nott, 2 Hilt. (N. Y.) 329.

In an action for damages for crim. con., the allegation being that defendant seduced and debauched the plaintiff's wife, *whereby* her affections were alienated, etc., if the charge of adultery be not proved, the word debauch in the petition will not support a verdict for damages for alienation of affection; Wood v. Mathews, 47 Ia. 409.

It is a word of French origin which has come into use in our language in the sense of enticing and corrupting.

DEBENTURE (from *debentur mihi*, Lat., with which various old forms of acknowledgments of debt commenced). A certificate given in pursuance of law, by the collector of a port of entry, for a certain sum due by the United States, payable at a time therein mentioned, to an importer for drawback of duties on merchandise imported and exported by him, provided the duties on the said merchandise shall have been discharged prior to the time aforesaid. U. S. Rev. Stat. §§ 3037-40.

In some government departments a term used to denote a bond or bill by which the government is charged to pay a creditor or his assigns the money due on auditing his account.

An instrument in writing, generally under seal, creating a definite charge on a definite or indefinite fund or subject of property, payable to a given person, etc., and usually constituting one of a series of similar instruments. Cavanagh, Mon. Sec. 267. See 56 L. J. R. Ch. D. 815; Brice, *Ultra Vires* (2d ed.) 279.

A charge in writing on certain property, with the repayment at a time fixed, of money lent by a person therein named at a given interest.

It is frequently resorted to by public com-

panies to raise money for the prosecution of their undertakings.

Any instrument (other than a covering or trust deed) which either creates or agrees to create a debt in favor of one person or corporation, or several persons or corporations, or acknowledges such debt. Simonson, Debentures, 5, where this is given as the result of a critical examination and discussion of the cases bearing on the definition of the term.

As a rule, both text writers and courts content themselves with a statement of inability to define them. An English writer says. "No one seems to know exactly what debenture means," Buckley, Companies Act 169, and Chitty, J, said in one case that "a debenture means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a debenture," 37 Ch D. 260, 264, but in the same case North, J., would not go so far In another case the same judge (Chitty) said: 'The term itself imports a debt and acknowledgment of a debt, and generally if not always imports an obligation to pay," 56 Ch. D 215, and again in another case he thus expresses the doubt existing as to the exact legal idea involved in the expression. "So far as I am aware, the term debenture has never received any precise legal definition It is, comparatively speaking, a new term I do not mean a new term in the English language, because there is a passage in Swift (quoted in Latham's Dict) where the term debenture is used" The lines referred to are

"You modern wits, should each man bring his claim,
Have desperate *debentures* on your fame.
And little would be left you, I'm afraid,
If all your debts to Greece and Rome were paid"

And the judge continued. "But although it is not a term with any legal definition, it is a term which has been used by lawyers frequently with reference to instruments under acts of parliament, which, when you turn to the acts themselves, are not so described;" 56 L J. Ch. 817.

"Debentures, which are the commonest form of security issued by English corporations, are defined to be instruments under seal creating a charge according to their wording upon the property of the corporation, and to that extent conferring a priority over subsequent creditors and over existing creditors not possessed of such charge. This is the true and proper use of the term, although it is frequently applied on the one hand to instruments which do not confer a charge and which are nothing more nor less than ordinary unsecured bonds, and on the other to instruments which are more than a mere charge, being in effect mortgages, and are properly termed mortgage debentures." Jones, Corp. B & M § 32.

In the case of an instrument engaging for the payment of "the amount of this debenture," with coupons for interest payable half-yearly, Grove, J, said "In the several dictionaries which we are in the habit of consulting, no satisfactory definition can be found, and neither of the learned counsel has been able to afford us any I do not remember the term being used otherwise than in an acknowledgment of indebtedness by a corporate body having power by act of parliament or otherwise to increase its capital by borrowing money" It was something different from a promissory note, having a different stamp duty, different form, and a special mode of paying interest. The paper was held a debenture and subject to a higher stamp duty than a promissory note. In the same case Lindley, J, said that what were known as debentures were of various kinds,—mortgage debentures which were charges on some kinds of property, debenture bonds which were not, debentures which were nothing more than an acknowledgment of indebtedness and "a thing like this which is something more." 7 Q. B. D 165.

Manson, treating of 'The Growth of the Debenture" in 13 L. Q. R. 418, says that its origin was a mere acknowledgment of indebtedness from the crown, first for wages, etc., of servants, then to soldiers for arrears due them, and in various cases for amounts due from the exchequer and the custom house; it was in its primitive meaning just what its derivation from debentur implies—an admission of indebtedness, importing, as quoted supra from Chitty, J., an obligation or covenant to pay. From this root, slender as it is," continues the same writer, "have branched all the variety of forms. . . . Debentures to Bearer, Registered Debentures, Perpetual Debentures, Mortgage Debentures, Debenture Bonds, Debenture Stock, Trust or Covering Deeds, Debenture Stock Certificate to Bearer." Originally not one of a series, now inseparably connected with serial form "An issue of debentures is in effect one great contributory charge made up of a series of securities, identical in form and amount." *id.*

Its character springs from its genesis, as the writer above quoted remarks, and is moulded by the combination of necessities: (1) Of giving security to the holders; (2) of leaving the company free to manage its business. From this combination arises the idea of the "floating charge" which binds the property of the company and the continuance of which as a mere charge is based upon the continued existence of the company as a going concern See FLOATING CHARGE. The property charged, changing as it does in *specie* from time to time is by English courts termed the UNDERTAKING, which title see.

If the company makes by default or is wound up or "ceases to be a going concern," the right of the holders arises to ask for a receiver and to realize their interest, 56 L. J. Ch 536, 35 W. R 574, L. R. 15 Ch D 465. A sale of its entire property assets, good will, etc., is not in the ordinary course of business and was enjoined, *id*

"A floating charge, though it nets all the available assets, is only an equitable security, and . . . may vanish altogether. Hence, where the sum borrowed is large, it has become usual to supplement the floating charge by a mortgage of specific property embodied in what is commonly called a covering or trust deed," 13 L Q R 422, which has two purposes (1) To fasten the security upon the property, (2) to organize the debenture holders into a compact body and name trustees to act for them, *id*

The mere fact that an instrument is on its face termed a debenture does not make it such, if on an examination of its substance it is found not to contain an acknowledgment of, or agreement to pay, a debt; 36 Ch. D. 215, 37 *id* 260

Debentures may be issued by a single person, a firm, or corporation, and it is an attribute implied in the definition of debenture that the holders are entitled without priority among themselves. They are, it is said, usually made a primary charge on the corporate property or undertaking, and as such will have priority over judgments obtained by general creditors and over the claims of shareholders; Cav. Mon. Sec 358.

"Such debentures are in effect statutory mortgages. . . . In England each creditor is secured by a separate mortgage, while in America one secures all; and by statute in England, holders of mortgage debentures have no priority *inter se*." Jones, Corp. B. & M. Sec. 32.

Sometimes the nature of a debenture holder's charge is that of a floating mortgage or security attaching only to the subjects which are for the time being the property of the company, and not preventing the latter from disposing of the subject charged free from

incumbrance; *id.;* L. R. 15 Ch. D. 465; 10 *id.* 530.

A debenture is distinguished (1) from a mortgage which is an actual transfer of property, (2) from a bond which does not directly affect property, and (3) from a mere charge on property which is individualized and does not form part of a series of similar charges; Cav. Mon. Sec. 267, citing L. R. 10 Ch. D. 530, 681; 15 *id.* 465; 21 *id.* 762; L. R. 7 App. Cas. 673. Debentures strictly so called differ from mortgages in not conferring on the grantee the legal title or any of the ordinary rights of ownership of the property upon which the charge is created. A leading American writer says of this class of securities as understood in England that the charge created by them confers only equitable rights either as against other creditors or as against the corporation creating them. It is a test whether an instrument is a debenture or mortgage to ascertain whether the holder has any legal right to interfere with the company's use or control of the property in whatever way it pleases. If the instrument confers a charge which can be protected and enforced only in equity it is strictly a debenture; Jones, Corp. B. & M. § 32. See 10 H. L. C. 191. Of course, the effect and extent of the charge depend entirely upon the language used; L. R. 2 Ch. D. 337.

A debenture holder in England differs from a mortgagee in that the latter has a lien upon tolls and traffic receipts and may have a receiver appointed while the former has not, Jones, Corp. B. & M. § 232; 2 Ir. Eq. 524; L. R. 7 Ch. 655.

Debentures issued by an English company owning land in Italy and binding their "assets, property, and effects" were held to create no mortgage or lien, 26 W. R. 123; and debenture bonds, principal and interest payable to bearer, secured by mortgage of the company to certain persons as trustees for the holders, which was void for non-recording, were held to create no charge; 19 Q. B. D. 568.

Where a company had power "to issue bonds, debentures, or mortgage debentures," which would entitle holders to be paid *pari passu* out of the company's property, evidences of debt expressed as "obligations" by which the company bound "themselves and their successors and all their estate property, etc," were held to be debentures and to create a charge; 10 Ch. Div. 530.

As issues of debentures are frequently, if not in most cases, made payable to the bearer, the question has been much litigated in England whether in that form they are transferable by delivery. There being no statute under which they are negotiable, they must be so if at all under the law merchant *(q. v.)*. Debentures were at first held not negotiable under that law; L. R. 8 Q. B. 371; but in the Exchequer Chamber upon a critical examination the decision was otherwise; L. R. 10 Ex. 346; which was affirmed by the House of Lords, which distinguished the cases and did not review the earlier case; 1 App. Cas. 476; and finally it was held that debentures issued in England by a home company payable to bearer are negotiable by the law merchant and their transfer gives a good title against anybody to a *bona fide* purchaser, [1898] Q. B. 658. The same ruling was applied to those of a foreign company, commonly treated as negotiable in the market; [1892] 3 Ch. 527.

Where a number of debentures are sealed one after another in numerical order they *prima facie* rank in priority accordingly, but if it is so provided, they rank *pari passu;* 21 Ch. D. 762; 38 *id.* 156, 171; Buckley, Companies Acts 172. They are generally issued in a series, but need not be so, as a single debenture may be issued to one man; 36 Ch. D. 221.

Debentures are not issued until they are delivered; *id.;* 34 Ch. D. 58. A contract to make or take debentures will not be specifically enforced, but the party is left to his action for damages; [1897] 1 Q. B. 692, affirmed [1898] A. C. 309.

The exact nature of debentures has been much discussed in England as arising in cases where the question was whether a paper required registration under the Bills of Sales Act which excepted from its provisions "debentures" issued by any mortgage, loan, or other incorporated company and secured upon the capital stock of goods, chattels, and effects of such company.

A memorandum of agreement which contained a covenant by a company to pay to each of nine persons, who were mentioned in it as lenders, the sum set opposite their names *pari passu*, and charged all the property of the company, was a debenture; 36 Ch. D. 215; and the covering deed which usually accompanies debentures as a security for the payment of the debentures when due is not a debenture; 34 Ch. D. 43; though why it should be so held, it has been remarked, it is difficult to see in view of the judicial definitions of the word "debenture" quoted *supra;* Simonson, Debentures, 4 (and see remarks of Lord North; 37 Ch. D. 281, 291); but it need not be registered under the Bills of Sales Act; [1891] 1 Ch. (A. C.) 627; [1896] 2 Ch. 212.

A mere memorandum in writing by a coal and fireclay working and brick-making company, of a deposit with bankers of title deeds, as a security for balances due or to become due, but which did not admit any specific debt, or contain an agreement to pay otherwise than by an agreement to execute a legal mortgage, was not a debenture; 37 Ch. D. 281.

The act referred to speaks of "debentures issued . . . and secured upon," and an

English writer of authority considers that this means a borrowing money for the benefit of several lenders; Buckley, Companies Acts 170; but it has been held that the statutory term debenture applied when there were several lenders but only one security given for the benefit of all; 36 Ch. D. 215; it may consist of one document, not necessarily of a series of documents; *id.;* and a single security to a single lender, not purporting in terms to be a debenture, was one in law; 37 Ch. D. 260. A security to a lender on some part of a company's property is not one, while an issue secured upon its entire stock in trade and undertaking is, and between these two is to be sought the line of demarcation; Buckley, Companies Acts 172.

The remedy upon a default was formerly by an action to realize the security commenced by one holder on behalf of all and the appointment of a receiver and manager to carry on the business; this was followed by a winding up petition, but more recently the proceeding has been for a decree of foreclosure; [1897] 1 Ch. 11. A power of sale may be, and usually is, included in the trust deed; 13 L. Q. Rev. 424.

Debenture holders with a floating charge were held to be superior to execution creditors; [1891] 1 Ch. 627, C. A. 3 *id.* 260

As to *spent* debentures, see BONDS. See COVERING DEED. See PROMISSORY NOTES as to *scaled* debentures.

See Simonson, Debentures.

DEBENTURE BONDS. See DEBENTURES.

DEBENTURE STOCK. An issue of stock usually irredeemable and transferable in any amount, not including a fraction of a pound.

The terminability and fixity in amount of debentures being inconvenient to lenders has led to their being in many cases superseded by debenture stock. Whart. Lex.

The issue of debenture stock is not borrowing at all; it is the sale, in consideration of a sum of money, of the right to receive a perpetual annuity; 9 Ch. D. 337; Buckley, Companies Acts 172; and none the less so if redeemable at the option of the company; *id.*

DEBET ET DETINET (Lat. he owes and withholds). An action of *debt* is said to be in the *debet et detinet* when it is alleged that the defendant owes and unjustly withholds or detains the debt or thing in question. The action is so brought between the contracting parties. See DETINET.

DEBET ET SOLET (Lat. he owes and is used to). Where a man sues in a writ of right or to recover any right of which he is for the first time disseised, as of a suit at a mill or in case of a writ of *quod permittat,* he brings his writ in the *debet et solet.* Reg. Orig. 144 *a;* Fitzh. N. B. 122, M.

DEBET SINE BREVE (Lat. He owes without declaration filed). Used in relation to a confession of judgment.

DEBIT. A term used in book-keeping, to express the left hand page of the ledger, or of an account to which are carried all the articles supplied or amounts paid on the subject of an account, or that are charged to that account.

The balance of an account where it is shows that something remains due to the party keeping the account.

An amount which is set down as a debt or owing.

DEBITA LAICORUM (Lat.). Debts of the laity. Those which may be recovered in civil courts.

DEBITUM IN PRÆSENTI SOLVENDUM IN FUTURO (Lat.). An obligation of which the binding force is complete and perfect, but of which the performance cannot be required till some future period.

DEBT (Lat. *debere,* to owe; *debitum,* something owed). **In Contracts.** A sum of money due by certain and express agreement. 3 Bla. Com. 154. See Fisher v. Consequa, 2 Wash. C. C. 386, Fed. Cas. No. 4,816.

All that is due a man under any form of obligation or promise. Gray v. Bennett, 3 Metc. (Mass) 522. See Appeal of City of Erie, 91 Pa. 402.

Active debt. One due to a person. Used in the civil law.

Ancestral debt. One of an ancestor which the law compels the heir to pay. Watkins v. Holman, 16 Pet. (U. S.) 25, 10 L. Ed 873. A. & E. Encyc.

Doubtful debt. One of which the payment is uncertain. *Clef des Lois Romaines.*

Fraudulent debt. A debt created by fraud implies confidence and deception. It implies that it arose out of a contract, express or implied, and that fraudulent practices were employed by the debtor, by which the creditor was defrauded. Howland v. Carson, 28 Ohio St. 628.

Hypothecary debt. One which is a lien upon an estate.

Judgment debt. One which is evidenced by matter of record.

Liquid debt. One which is immediately and unconditionally due.

Passive debt. One which a person owes.

Privileged debt. One which is to be paid before others in case a debtor is insolvent.

The privilege may result from the *character* of the *creditor,* as where a debt is due to the United States; or the *nature* of the *debt,* as funeral expenses, etc. See PREFERENCE; PRIVILEGE; LIEN; PRIORITY; DISTRIBUTION.

Specialty. A debt by specialty or special contract is one whereby a sum of money becomes, or is acknowledged to be, due by deed or instrument under seal; 2 Bla. Com. 465; Probate Court for Dist. of Orleans v. Child, 51 Vt. 86.

A debt may be evidenced by matter of record, by a contract under seal, or by a simple contract. The distinguishing and necessary feature is that a fixed and specific amount is owing and no future valuation is required to settle it; 3 Bla. Com. 154; Matter of Denny, 2 Hill (N. Y.) 220.

See ACCORD AND SATISFACTION; BANKRUPTCY; COMPENSATION; CONFUSION; DEFEASANCE; DELEGATION; DISCHARGE OF A CONTRACT; EXTINCTION; EXTINGUISHMENT; FORMER RECOVERY; LAPSE OF TIME; NOVATION; PAYMENT; RELEASE; RESCISSION; SET-OFF.

In Practice. A form of action which lies to recover a sum certain. 2 Greenl. Ev. 279; Andr. Steph. Pl. 77, n.

It lies wherever the sum due is certain or ascertained in such a manner as to be readily reduced to a certainty, without regard to the manner in which the obligation was incurred or is evidenced. Crockett v Moore, 3 Sneed (Tenn.) 145; Lee v. Gardiner, 26 Miss. 521; Home v. Semple, 3 McLean, 150, Fed. Cas. No. 6,658, Bullard v Bell, 1 Mas. 243, Fed Cas. No 2,121, U. S v. Claflin, 97 U. S 546, 24 L. Ed 1082, Baum v. Tonkin, 110 Pa 569, 1 Atl 535

It is thus distinguished from *assumpsit*, which lies as well where the sum due is uncertain as where it is certain, and from *covenant*, which lies only upon contracts evidenced in a certain manner

It is said to lie in the *debet* and *detinet* (when it is stated that the defendant owes and detains) or in the *detinet* (when it is stated merely that he detains) Debt in the *detinet* for goods differs from detinue, because it is not essential in this action, as in detinue, that the specific property in the goods should have been vested in the plaintiff at the time the action is brought. Dy. 24 *b*

It is used for the recovery of a debt *eo nomine* and *in numero;* though damages, which are in most instances merely nominal, are usually awarded for the detention. 1 H Bla 550; Cowp 588

The action lies in the debet and detinet to recover money due, on a *record* or a *judgment* of a court of record; Salk. 109; Eby v. Burkholder, 17 S. & R. (Pa.) 9; Allen v. Lyman, 27 Vt. 20; Austin v. Townes, 10 Tex. 24; although a foreign court; Moore v. Adie's Adm'r, 18 Ohio 430; McIntire v. Caruth, 3 Brev. (S. C.) 395; Jordan v. Robinson, 15 Me. 167; Cole v. Driskell, 1 Blackf. (Ind.) 16; Williams v. Preston, 3 J. J. Mar. (Ky.) 600, 20 Am. Dec. 179; McKim v. Odom, 12 Me. 94; on *statutes* at the suit of the party aggrieved; Vaughan v. Thompson, 15 Ill. 39; Morrison v. Bedell, 22 N. H. 234; Garman v. Gamble, 10 Watts (Pa.) 382; Israel v. President, etc., of Town of Jacksonville, 1 Scam. (Ill.) 290; Falconer v. Campbell, 2 McLean, 195, Fed. Cas. No. 4,620; Reed v. Davis, 8 Pick. (Mass.) 514; Chaffee v. U. S., 18 Wall. (U. S.) 516, 21 L. Ed. 908; or a common informer; Lewis v. Stein, 16 Ala. 214, 50 Am. Dec. 177; Sims v. Alderson, 8 Leigh (Va.) 479; including awards by a statutory commission; Knowles v. Inhabitants of Eastham, 11 Cush. (Mass.) 429; on *specialties;* 1 Term 40; Little v. Mercer, 9 Mo. 218; Salter v. Richardson, 37 B. Monr. (Ky.) 204; Allen v. R. Co., 32 N. H. 446; Nash v. Nash, 16 Ill. 79; including a recognizance; Dowlin v. Standifer, 1 Hempst. 290, Fed. Cas. No. 4,041 a; Bentley v. Lyman, 21 Conn. 81; State v. Folsom, 26 Me. 209; see Pate v. People, 15 Ill. 221; Gale v. Boyle, 6 Cush. (Mass.) 138; Nesbitt v. Ware, 30 Ala. 68; on a promissory note; Bentley v. Dickson, 1 Ark. 165; Loose v. Loose, 36 Pa. 538; on a bill of exchange; Hollingsworth v. Milton, 8 Leigh (Va.) 50; on *simple contracts*, whether express; Lee v. Gardiner, 26 Miss. 521; Barclay v. Moore, 17 Ala. 634; Gift v. Hall, 1 Humphr. (Tenn.) 480; although the contract might have been discharged on or before the day of payment in articles of merchandise; Young v. Hawkins, 4 Yerg. (Tenn.) 171; or implied; Bull. N. P. 167; Van Deusen v. Blum, 18 Pick. (Mass.) 229, 29 Am. Dec. 582; Thompson v. French, 10 Yerg. (Tenn.) 452; Houghton v. Stowell, 28 Me. 215; Dillingham v. Skeln, 1 Hempst. 181, Fed. Cas. No. 3,912 a; Gray v. Johnson, 14 N. H. 414; to recover a specific reward offered; Disborough v. Outcalt, 1 N. J. Eq 310. An action of debt is the proper remedy of a landlord against his tenant in possession to recover a statutory penalty for willfully cutting trees without the owner's consent; Rogers v. Brooks, 99 Ala. 31, 11 South. 753; and also in favor of the beneficiaries in a certificate of membership in a mutual benefit association; Abe Lincoln Mut. Life & Accident Society v. Miller, 23 Ill. App. 341; but it does not lie on a decree of foreclosure, which orders the money secured by the mortgage to be paid, or in default thereof the mortgaged premises to be sold and the proceeds paid into court; Burges v. Souther, 15 R. I. 202, 2 Atl. 441.

It lies in the detinet for goods; Dy. 24 *b*; Dowlin v. Standifer, 1 Hempst. 290, Fed. Cas. No. 4,041 a; Snell v. Kirby, 3 Mo. 21, 22 Am. Dec. 456; and by an executor for money due the testator; 1 Wms. Saund. 1; see Brown's Adm'r v. Brown, 10 B. Monr. (Ky.) 247; or against him on the testator's contracts; Childress v. Emory, 8 Wheat. (U. S.) 642, 5 L. Ed. 705.

The *declaration*, when the action is founded on a *record*, need not aver consideration. When it is founded on a *specialty*, it must contain the specialty; Huber v. Burke, 11 S & R. (Pa.) 238; but need not aver consideration; Nash v. Nash, 16 Ill. 79; Barrett v. Carden, 65 Vt. 431, 26 Atl. 530, 36 Am. St. Rep. 876; but when the action is for rent, the deed need not be declared on; Gray v. Johnson, 14 N. H. 414. When it is founded on a simple contract, the consideration must be averred; and a liability or agreement, though not necessarily an express promise to pay, must be stated; 2 Term 28, 30.

The *plea* of *nil debet* is the general issue when the action is on a simple contract, on statutes, or where a specialty is matter of inducement merely; Stilson v. Tobey, 2 Mass. 521; Minton v. Woodworth, 11 Johns. (N. Y.) 474; King v. Ramsay, 13 Ill. 619;

McConnell v. Bank, 6 Ark. 250; Dyer v. Cleaveland, 18 Vt. 241; U. S. v. Cumpton, 3 McLean 163, Fed. Cas. No. 14,902; Hyatt v. Robinson, 15 Ohio 372; Trustees of Dartmouth College v. Clough, 8 N. H. 22; Clark v. Mann, 33 Me. 268; Stipp v. Cole, 1 Ind. 146; Matthews v. Redwine, 23 Miss. 233. *Non est factum* is the common plea when on specialty, denying the execution of the instrument; 2 Ld. Raym. 1500; Chambers v. Games, 2 G. Greene (Ia.) 320; Brooks v. Bobo, 4 Strobh. (S. C.) 38; People v. Rowland, 5 Barb. (N. Y.) 449; Brobst v. Welker, 8 Pa. 467; Utter v. Vance, 7 Blackf. (Ind.) 514; Boynton v. Reynolds, 3 Mo. 79; and *nul tiel record* when on a record, denying the existence of the record; Mervin v. Kumbel, 23 Wend. (N. Y.) 293; Hall v. Williams, 6 Pick. (Mass.) 232, 17 Am. Dec. 356. As to the rule when the judgment is one of another state, see Clark v. Mann, 33 Me. 268; Williams v. Preston, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179; Mills v. Duryee, 7 Cra. (U. S.) 481, 3 L. Ed. 411; Town of St. Albans v. Bush, 4 Vt. 58, 23 Am. Dec. 246; Lanning v. Shute, 5 N. J. L. 778; Clarke's Adm'r v. Day, 2 Leigh (Va.) 172; as well as the titles FOREIGN JUDGMENT, CONFLICT OF LAWS.

As to the situs of a debt in attachment and garnishment proceedings, see LEX REI SITÆ.

Other matters must, in general, be pleaded specially; Hays v. Muir, 1 Ind. 174.

The *judgment* is, generally, that the plaintiff receive his debt and costs when for the plaintiff, and that the defendant receive his costs when for the defendant; Chapman v. Wright, 20 Ill. 120; Rutter v. State, 1 Ia. 99; Downs v. Ladd, 4 How. (Miss.) 40. It is reversible error to render judgment not only for the debt sued on, but for damages, as in assumpsit and for interest on the judgment; Reece v. Knott, 3 Utah 451, 24 Pac. 757. See JUDGMENT.

DEBTEE. One to whom a debt is due; a creditor: as, debtee executor. 3 Bla. Com. 18.

DEBTOR. One who owes a debt; he who may be constrained to pay what he owes.

DEBTOR'S ACT, 1869. The statute 32 & 33 Vict. c. 62, abolishing imprisonment for debt in England, and for the punishment of fraudulent debtors. 2 Steph. Com. 159-164. (Not to be confounded with the Bankruptcy Act of 1869.) Mozl. & W. Dict.

DEBTOR'S SUMMONS. In English Law. A summons issuing from a court having jurisdiction in bankruptcy, upon the creditor proving a liquidated debt of not less than £50, which he has failed to collect after reasonable effort, stating that if the debtor fail, within one week if a trader, and within three weeks if a non-trader, to pay or compound for the sum specified, a petition may be presented against him, praying that he may be adjudged a bankrupt. Bkcy. Act, 1869, s. 7; Robson, Bkcy.; Mozl. & W. Dict.

DECALOGUE. The ten commandments.

DECANATUS, DECANIA, DECANA (Lat.). A town or tithing, consisting originally of ten families of freeholders. Ten tithings compose a hundred. 1 Bla. Com. 114; Medley, Orig. Illus. Eng. Const. Hist.

Decanatus, a deanery, a company of ten. Spelman, Gloss.; Calvinus, Lex.

Decania, Decana, the territory under the charge of a dean.

DECANUS (Lat.). A dean; an officer having charge of ten persons. In Constantinople, an officer who has charge of the burial of the dead. Nov. Jus. 43, 59; Du Cange. The term is of extensive use, being found with closely related meanings in the old Roman, the civil, ecclesiastical, and old European law. It is used of civil and ecclesiastical as well as military affairs. There were a variety of *decani*.

Decanus monasticus, the dean of a monastery.

Decanus in majori ecclesia, dean of a cathedral church.

Decanus militaris, a military captain of ten soldiers.

Decanus episcopi, a dean presiding over ten parishes.

Decanus friborgi, dean of a fribourg, tithing, or association of ten inhabitants. A Saxon officer, whose duties were those of an inferior judicial officer. Du Cange; Spelman, Gloss.; Calvinus, Lex.

DECAPITATION (Lat *de*, from, *caput*, a head). The act of beheading. In some countries a method of capital punishment. See CAPITAL PUNISHMENT.

DECEDENT. A deceased person.

The signification of the word has become more extended than its strict etymological meaning. Strictly taken, it denotes a dying person, but is always used in the more extended sense given, denoting any deceased person, testate or intestate.

See EXECUTORS AND ADMINISTRATORS.

DECEIT. A fraudulent misrepresentation or contrivance, by which one man deceives another, who has no means of detecting the fraud, to the injury and damage of the latter. It need not be made in words, if the impression be made on the mind of the other party, upon which he acts, without the exact expression in words of the understanding sought to be created; 17 C. B. N. S. 482; Mizner v. Kussell, 29 Mich. 229. Suspicion by the maker that his statements are false is the legal equivalent of knowledge of their falsity and fraudulency; Shackett v. Bickford, 74 N. H. 57, 65 Atl. 252, 7 L. R. A. (N. S.) 646, 124 Am. St. Rep. 933.

Fraud, or the intention to deceive, is the very essence of this injury; Stewart v. Ranch Co., 128 U. S. 383, 9 Sup. Ct. 101, 32

L. Ed. 439; for if the party misrepresenting was himself mistaken, no blame can attach to him; Poll. Torts 353; Farmers' Stock-Breeding Ass'n v. Scott, 53 Kan. 534, 36 Pac. 978; Wachsmuth v. Wachsmuth, 45 Ill. App. 244. The representation must be made *malo animo;* but whether or not the party is himself to gain by it is wholly immaterial.

It may be by the deliberate assertion of a falsehood to the injury of another, by failure to disclose a latent defect, or by concealing an apparent defect; but, as a rule, mere silence on the part of one party to a transaction as to facts which are important to the other is not deceit, if he is under no obligation to disclose them; Big. Torts 12; L. R. 6 H. L. 377.

Where the seller asked the buyer whether there was any news (of the treaty of Peace in 1815) that would enhance the price of tobacco and the buyer remained silent, it should have gone to the jury to say whether any imposition was practised, the court saying that while the buyer need not, as matter of law, communicate special information known only to him, he must take care not to impose on the seller; Laidlaw v. Organ, 2 Wheat. 178, 4 L. Ed 214. In U. S. v. Bell Telephone Co, 128 U. S. 323, 9 Sup. Ct. 90, 32 L. Ed. 450, it was held that if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact which he is in good faith bound to disclose, that is evidence of or equivalent to a false representation. General assertions, by a vendor or lessor, that the property offered for sale or to be leased is valuable or very valuable, although, such assertions turn out to be untrue, are not misrepresentations amounting to deceit, nor are they to be regarded as statements of existing facts, upon which an action of deceit may be based, but rather as expressions of opinions or beliefs, Lehigh Zinc & Iron Co. v. Bamford, 150 U. S. 665, 14 Sup. Ct. 219, 37 L. Ed. 1215, or as prophecies as to financial prosperity; Kimber v. Young, 137 Fed. 744, 70 C. C. A. 178; Deming v. Darling, 148 Mass. 504, 20 N. E. 107, 2 L. R. A 743.

The party deceived must have been in a situation such as to have no means of detecting the deceit But see Carpenter v. Wright, 52 Kan. 221, 34 Pac. 798.

A person cannot sustain an action for deceit where no harm comes to him; Alden v. Wright, 47 Minn. 225, 49 N. W. 767; Roonie v. Jennings, 2 Misc. 257, 21 N. Y. Supp. 938, nor can he where he does not rely on the misrepresentations; Fowler v. McCann, 86 Wis. 427, 56 N. W. 1085.

In order to constitute deceit it is necessary either that the false representations should be known by the person making them to be untrue, or that he should have no reason to believe them true. Mere ignorance of their falsity is no excuse; Burge v. Stroberg, 42 Ga. 88; see Carondelet Iron Works v. Moore, 78 Ill. 65; Hess v. Young, 59 Ind. 379; Cooper v. Lovering, 106 Mass. 77; Beebe v. Knapp, 28 Mich. 53; Newell v. Horn, 45 N. H. 422; Long v. Warren, 68 N. Y. 426. Deceit may be committed not only with the careful intention of one who knows what he asserts to be true or false, but also, with the reckless intention of one who does not know what he represents to be true or false, but who, for one reason or another, is willing that his reckless representations should be believed; Stimson v. Helps, 9 Colo. 33, 10 Pac. 290; Smith v. Richards, 13 Pet. (U. S.) 26, 10 L. Ed. 42; Busterud v. Farrington, 36 Minn. 320, 31 N. W. 360.

The mere expression of opinion is not deceit, though untrue and made in most positive language; 3 T. R. 51; 2 East 92; Credle v. Swindell, 63 N. C. 305; Hazard v. Irwin, 18 Pick. (Mass.) 95; but the expression of opinion as knowledge may render one liable for fraud; Cabot v. Christie, 42 Vt. 121, 1 Am. Rep. 313; or where the means of forming a correct opinion are within the reach of one party only; Hedin v. Medical & Surgical Institute, 62 Minn. 146, 64 N. W. 158, 35 L. R. A. 417, 54 Am. St. Rep. 628; and the rule has been avoided by the court's finding in a statement of opinion some implied representation of fact; Spead v. Tomlinson, 73 N. H. 46, 59 Atl. 376, 68 L. R. A. 432. Thus a cattle-dealer who expresses an apparent opinion as to the weight of cattle he desires to sell, knowing it to be untrue, is guilty of deceit; Birdsey v. Butterfield, 34 Wis. 62.

Though false representations as to the value of land are not alone sufficient to sustain an action for damages, yet if made in connection with others as to the net revenues derived, they are sufficient to support such an action; Henderson v. Henshall, 54 Fed. 320, 4 C. C. A. 357; and an action for false representation as to title, in a sale of lands, may be maintained though the deed contains no covenants; Barnes v. Ry. Co, 54 Fed. 87, 4 C. C. A. 199.

An action for deceit can only be based upon the misrepresentation of matters of fact, not of matters of law; unless the party who made the misrepresentation did it with knowledge both of the law and of the other's ignorance of it; Townsend v. Cowles, 31 Ala. 434; Dillman v. Nadlehoffer, 119 Ill. 567, 7 N. E. 88; Burt v. Bowles, 69 Ind. 1; L. R. 4 Ch. D. 702; Moreland v. Atchison, 19 Tex. 303; Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203.

If the party complaining of misrepresentations had the same sources of information as the one who made them, he must avail himself of his means of knowledge, or he cannot recover; Slaughter v. Gerson, 13 Wall. (U. S.) 379, 20 L. Ed. 627; Brown v. Leach, 107 Mass. 364; Pigott v. Graham, 48 Wash. 348, 93 Pac. 435, 14 L. R. A. (N. S.) 1176; Farnsworth v. Duffner, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931; Warner v.

Benjamin, 89 Wis. 290, 62 N. W. 179. A clause in a contract providing that the plaintiff should verify defendant's plans does not as a matter of law bar the plaintiff's recovery; but whether or not the plaintiff acted in reliance on the defendant's plans is a question for the jury; [1907] A. C. 351.

But a contracting party may rely upon *express* statements of fact, the truth of which is known or presumed to have been known to the other party, even where the means of information are open to him; Big. Torts 26; especially when the representation has a natural tendency to prevent investigation or is made the basis of the contract; *id.;* where one contracting party has a mental or physical infirmity, or where the parties do not stand upon an equal footing, the duty of investigating the truth of statements may be less; *id.* 28.

The plaintiff must also have acted upon the representation, and sustained injury by so doing; 4 H. & N. 225; Wells v. Waterhouse, 22 Me. 131; Lindsey v. Lindsey, 34 Miss. 432; Phipps v. Buckman, 30 Pa. 401; Enfield v. Colburn, 63 N. H. 218; and they must have been made to him; Insigi v. Brown, 17 How. (U. S.) 183, 15 L. Ed. 208; Lindsey v. Lindsey, 34 Miss. 432; Hunnewell v. Duxbury, 154 Mass. 286, 28 N. E. 267, 13 L. R. A. 733. One who purchases stock in the market, upon the faith of a prospectus received from persons not connected with the corporation, cannot enforce a liability against the directors for false representations therein; L. R. 6 H. L. 377; but where a prospectus is put out by a company to sell its stock, any one of the public may act on it; Big. Torts 33.

The false representations upon which deceit is predicated must also, in order to support the action, be material and relevant, and be the determining factor of the transactions; L. R. 2 Ch. 611; 5 De G., M. & G. 126; Bond v. Ramsey, 89 Ill. 29; Noel v. Horton, 50 Ia. 687; Teague v. Irwin, 127 Mass. 217; Miller v. Barber, 66 N. Y. 558. It must appear that the fraud was an inducing cause of the contract; 9 App. Cas. 190.

Where the effect of the misrepresentations was to bring the parties into relations with each other, express evidence of an intent to defraud is unnecessary; but where by false representations one suffers damage in a transaction with a third person, there must be express evidence that the party making the representation intended it to be acted on, or that the plaintiff was justified in assuming that he so intended; Big. Torts 31. It is sufficient if the representation was made with the direct intent that it should be communicated to the plaintiff, or to a class of which he was one; L. R. 6 H. L. 377.

In order to sustain an action for deceit there must be proof of fraud and nothing short of that will suffice. *Secondly.* Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly careless whether it be true or false; Lord Herschell, in Derry v. Peek, 14 App. Cas. 337. Although treating the second and third as distinct cases, he says: "I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief of the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth and this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. *Thirdly.* If fraud be proved, the motive of the guilty person is immaterial. It matters not that there was no intention to cheat or to injure the person to whom the statement was made." In that case (Derry v. Peek) a special act incorporating a tramway company provided that carriages might be moved by animal power and, with the consent of the Board of Trade, by steam power. The directors issued a prospectus containing a statement that by their special act the company had a right to use steam power, which statement was made in the honest belief that it was true, and the Board of Trade having refused their consent to the use of steam power, persons who had taken shares on the faith of the statement brought an action of deceit against the directors; the House of Lords, reversing the Court of Appeal, held that the defendants were not liable.

In an action of deceit the plaintiff must prove that the untrue statement of the defendant was made with a fraudulent intent; [1912] A. C. 186. It is not sufficient that there is blundering carelessness, however gross, unless there is willful recklessness; [1891] 2 Ch. 449. Recklessly making a statement, intending it to be acted upon, not caring whether it is true or false, may be said to show that a man has a wicked mind and is acting fraudulently; [1893] 1 Q. B. 491, Lord Esher, M. R. His mind is wicked not because he is negligent, but because he is dishonest in not caring about the truth of his statement; *id.*, per Bowen, L. J.; Shackett v. Bickford, 74 N. H. 57, 65 Atl. 252, 7 L. R. A. (N. S.) 646, 124 Am. St. Rep. 933; the grounds of belief and the means of knowledge in possession of the person making the statement are to be considered in determining the honesty of the belief; Hindman v. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 C. C. A. 108.

Derry v. Peek was followed in Kountze v. Kennedy, 147 N. Y. 124, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651, where it was held that where an act is attributable to an honest belief, a fraudulent intent is lacking and a charge of deceit fails. In Watson v. Jones, 41 Fla. 241, 25 South. 678, the leading English case was not followed;

it was there held that the defendant's situation or means of knowledge made it his duty to know; to the same effect, Seale v. Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. Rep. 592; Munroe v. Pritchett, 16 Ala. 785, 50 Am. Dec. 203; Jordan v. Pickett, 78 Ala. 331; Johnson v. Gulick, 46 Neb. 817, 65 N. W. 883, 50 Am. St. Rep. 629.

There may be a duty to use care in the accuracy of representations where the plaintiffs are reasonable in relying upon them and the defendants knew that they would do so and would be damaged if such representations were false; Harriott v. Plimpton, 166 Mass. 585, 44 N. E. 992; Edwards v. Lamb, 69 N. H. 599, 45 Atl. 480, 50 L. R. A. 160; L. R. 5 Exch. 1.

As society becomes more complex and the consequences of negligence more far reaching, the obligation of using care becomes stricter in morals, and will have to become stricter in law, notwithstanding Derry v. Peek; 7 L. Q. R. 107. See 14 Harv. L. R. 184, as to liability for the negligent use of language.

In Nash v. Trust Co., 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753, 47 Am. St. Rep. 489, it was held that a defendant who had written a letter reasonably to be understood as warranting a title, might show that the letter was intended to convey another meaning. Field, C. J., and Holmes, J., dissented, arguing, as does Sir Frederic Pollock in 5 L. Q. R. 410, that a man should be bound by a reasonable interpretation of his words when he knows others will act upon them. See 9 Harv. L. Rev. 214.

One who makes a representation positively, without knowing whether it is false or true, is liable for deceit; L. R. 7 H. L. 102; Stone v. Covell, 29 Mich. 359.

To tell half the truth and to conceal the other half, amounts to a false statement, and differs in no respect from the case of false representations; Mitchell v. McDougall, 62 Ill. 501; Stewart v. Ranche Co., 128 U. S. 383, 388, 9 Sup. Ct. 101, 32 L. Ed. 439; Williams v. Spurr, 24 Mich. 335; L. R. 6 H. L. 403; Mallory v. Leach, 35 Vt. 156, 82 Am. Dec. 625.

An action of tort for deceit in the sale of property does not lie for false and fraudulent representations concerning profits that may be made from it in the future; Pedrick v. Porter, 5 Allen (Mass.) 324.

While an honest belief in the truth of representations is a defence to an action for deceit at common law, it is no defence to a bill in equity to set aside the transaction; 7 Beav. 149; Seeley v. Reed, 25 Fed. 361; Kyle v. Kavanagh, 103 Mass. 356, 4 Am. Rep. 560. It is also a ground for objecting to the enforcement of the contract, and even for a rescission of the contract upon the ground of mistake; Big. Torts 23.

Private corporations are held liable for the wrongful acts and neglect of their agents or servants, done in the course of their employment; Lamm v. Homestead Ass'n, 49 Md. 241, 33 Am. Rep. 246. In England the rule is that if the person has been induced to purchase shares of a corporation by misrepresentations of its directors and suffers damage thereby, he must bring an action of deceit against such directors individually; while in the U. S. it seems to be the rule that a corporation may be sued in such cases; Fogg v. Griffin, 2 Allen (Mass.) 1; Peebles v. Guano Co., 77 N. C. 233, 24 Am. Rep 447; Zabriskie v. R. Co., 23 How. (U. S.) 381, 16 L. Ed. 488; Planters' Rice-Mill Co. v. Olmstead, 78 Ga. 586, 3 S. E. 647; Moran v. Miami County, 2 Black (U. S.) 722, 17 L. Ed. 342; Kennedy v. McKay, 43 N. J. L. 288, 39 Am. Rep. 581. "If the director of a company puts shares forth into the world, and deliberately adopts a scheme of falsehood and fraud, the effect of which is that parties buy the shares in consequence of the falsehood," the action for deceit lies; Pollock, C. B., in 4 H. & N. 538; 2 Q. B. D. 48. See also 2 M. & W. 519; 3 B. & Ad. 114.

The general principles on which the right of action for deceit is based are thus stated in Webb's Poll. Torts 355:

"To create a right of action for deceit there must be a statement made by the defendant, or for which he is answerable as principal, and with regard to that statement all the following conditions must concur:

"It is untrue in fact

"The person making the statement, or the person responsible for it, either knows it to be untrue, or is culpably ignorant (that is, recklessly and consciously ignorant) whether it be true or not.

"It is made to the intent that the plaintiff shall act upon it, or in a manner apparently fitted to induce him to act upon it.

"The plaintiff does act in reliance on the statement in the manner contemplated or manifestly probable, and thereby suffers damage.

"There is no cause of action without both fraud and actual damage, or the damage is the gist of the action.

"And according to the general principles of civil liability, the damage must be the natural and probable consequence of the plaintiff's action on the faith of the defendant's statement.

"The statement must be in writing and signed in one class of cases, namely, where it amounts to a guaranty; but this requirement is statutory, and as it did not apply to the court of chancery, does not seem to apply to the high court of justice in its equitable jurisdiction."

The remedy for a deceit, unless the right of action has been suspended or discharged, is by an action of trespass on the case. The old writ of deceit was brought for acknowledging a fine, or the like, in another name, and, this being a perversion of law to an

evil purpose and a high contempt, the act was laid *contra pacem*, and a fine imposed upon the offender. See Brooke, Abr. *Disceit;* Viner, Abr. *Disceit*.

When two or more persons unite in a deceit upon another, they may be indicted for a conspiracy. See, generally, 1 Rolle, Abr. 106; Com. Dig.; 1 Viner, Abr. 560; 8 *id.* 490; Bigelow, Torts 9; Cooley, Torts 554.

It has been held that an action will not lie for fraudulent misrepresentations of a vendor of real estate as to the price he paid therefor; Mooney v. Miller, 102 Mass. 217, Schumaker v. Mather, 133 N. Y. 590, 30 N. E. 755; Wilkinson v. Clauson, 29 Minn. 91, 12 N. W. 147; Hartman v. Flaherty, 80 Ind. 472; nor ordinarily for false statements as to value of stock; Ellis v. Andrews, 56 N. Y. 83, 11 Am. Rep. 379; Boulden v. Stillwell, 100 Md. 543, 60 Atl. 609, 1 L. R. A. (N. S.) 258, nor for a false certificate of classification of a sailing yacht; 60 L. J. Q. B. 526, nor a representation that a stallion would not produce sorrel colts; Scroggin v. Wood, 87 Ia. 497, 54 N. W. 437; nor generally for a broken promise; Fenwick v. Grimes, 5 Cra. C. C. 603, Fed. Cas. No. 4734; Dickinson v. Atkins, 100 Ill. App. 401; Cerny v. Paxton & Gallagher Co., 78 Neb. 134, 110 N. W. 882, 10 L. R. A. (N. S.) 640; Curdy v. Berton, 79 Cal 425, 21 Pac. 858, 5 L. R. A. 189, 12 Am. St. Rep. 157. In Harrington v. Rutherford, 38 Fla. 321, 21 South. 283, the rule was followed, though the promise was broken without excuse. A fraudulent representation, to vitiate a contract induced by it, is a representation of a past or existing fact, but a promise is not a representation, and, when not a part of the contract, will not affect it; Estes v. Shoe Co., 155 Mo. 577, 56 S. W. 316; and there is a distinction between a representation of an existing fact which is untrue, and a promise to do or not to do something in the future. In order to avoid a contract, the former must be relied upon; Sleeper v. Wood, 60 Fed. 888, 9 C. C. A. 289; McConnell v. Pierce, 116 Ill. App. 103; Love v. Teter, 24 W. Va. 741. If deceit, in order to be actionable, must relate to existing or past facts, it is evident that a promise made in the course of negotiations, if never performed, is not of itself either fraud or the evidence of fraud; Hubbard v. Long, 105 Mich. 442, 63 N. W. 644. Many cases hold that a promise made without intent to perform, and with the secret intent not to perform, is fraudulent, and that an action of deceit will lie; Traber v. Hicks, 131 Mo. 180, 32 S. W. 1145; Dowd v. Tucker, 41 Conn. 197; Cerny v. Paxton & Gallagher Co., 78 Neb. 134, 110 N. W. 882, 10 L. R. A. (N. S.) 640. A promise to do an act in the future certainly carries with it a representation of present intention to perform; see 9 Harv. L. Rev. 424; and that "a representation of present intention is a statement of fact has rarely been disputed since Bowen, L. J., declared in L. R. 29 Ch. Div. 459, that 'the state of a man's mind is as much a fact as the state of his digestion.' If, then, this misrepresentation of a present fact is accompanied by the other elements of deceit, it seems clear, on principle, that the action should be allowed;" see 9 Harv. L. Rev. 424; Bigelow, Fraud 484.

It is, too, generally held that a preconceived design in a buyer not to pay for the goods is such fraud as will vitiate the sale; Stewart v. Emerson, 52 N. H. 301. The real fraud is the express or implied false representation of an intention to pay; Ayres v. French, 41 Conn. 142; Chicago, T. & M. C. Ry. Co. v. Titterington, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39; Goodwin v. Horne, 60 N. H. 485; Wilson v. Eggleston, 27 Mich. 257; Gross v. McKee, 53 Miss. 536.

It has been held that an action for deceit would lie for breach of promise of marriage; Pollock v. Sullivan, 53 Vt. 507, 38 Am. Rep. 702, where the defendant was married at the time. An action for deceit will lie against one who fraudulently induces a woman to enter into a void marriage relation with him, by assurances that an existing marriage with another is void; Sears v. Wegner, 150 Mich. 388, 114 N. W. 224, 14 L. R. A. (N. S.) 819.

"Treating a promise to perform some act in the future as a statement of intention, and treating intention as an existing fact, it follows that if at the time the promise was made there was an intention to perform, subsequent non-performance would constitute fraud; while, on the other hand, if at the time the promise was made no such intention existed there would be a false representation of a material fact;" see 57 Am. L. Reg. 325.

False representations concerning the financial responsibility of another, made for the purpose of procuring him credit, negligently and carelessly, without investigation, when investigation would disclose their falsity, are held to imply a fraudulent intent and are actionable; Nevada Bank of San Francisco v. Bank, 59 Fed. 338; but not when made by a friendly adviser acting without compensation; Knight v. Rawlings, 205 Mo. 412, 104 S. W. 38, 13 L. R. A. (N. S.) 212, 12 Ann. Cas. 325.

In an action of deceit in inducing plaintiff by false representations to take an assignment of a lease executed by one who has no title to the land, no offer of restitution need be made; Cheney v. Powell, 88 Ga. 629, 15 S. E. 750. But one who seeks to rescind a contract of sale because of fraud, but retains the property so sold, cannot maintain an action for deceit; Roome v. Jennings, 2 Misc. 257, 21 N. Y. Supp. 938; Shappirio v. Goldberg, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419; Schagun v. Mfg. Co., 162 Fed. 209, 89 C. C. A. 189; St. John v. Hendrickson, 81 Ind. 350.

As to a principal's liability for an agent's deceit, where there has been no authorization, express or implied, there are numerous conflicting decisions. In 19 Harv. L. Rev. 391, it is said the question commonly arises in litigation for damages caused by the overissue of stock certificates, or by the fraudulent issue of bills of lading. In these cases there is no apparent authority given by the principal to do the acts complained of. Yet some cases have allowed a recovery on the ground that the agent had apparent authority by his own representations, so that the principal is estopped to deny absence of authority. The English doctrine, followed by the supreme court in the case of bills of lading and approved of in the case of fraudulent issue of stock, denies liability because of the absence of any authority whatever in the agent; Robertson v. Salomon, 130 U. S. 415, 9 Sup. Ct. 559, 32 L. Ed. 995. As, however, the act complained of is not contractual in its nature, but tortious, the question of liability should depend, not upon authority conferred or apparently conferred, but solely on whether the agent is acting in the course of his employment—the ordinary rule in cases of tort. "The difficulty, then, is to determine whether the agent is in fact acting within the scope of his employment. In the case of the overissue of stock, it would appear to be plainly the duty of the agent to give just such information as that upon which the holder of the spurious stock has relied, since one of the chief purposes for which a corporation is organized is to enable the shares to be transferred freely"; 19 Harv. L. Rev. 391. "In view of the wide-spread use of the bill of lading as a symbol of property, it seems better to regard it as analogous to a negotiable instrument, relied upon by third parties in much the same way as stock certificates;" *id.*

In Cornfoot v. Fowke, 6 M. & W. 358, it was held that where an agent unknowingly makes an untrue statement, not expressly authorized by the principal, but the true state of facts are, however, known by the principal, the principal is not liable. But it is said that if this case is not overruled by the remarks since made upon it in 2 Sm. L. Cas. 81, 86, and by Willes, J., in (1867) L. R. 2 Ex. 262, it has been cut down to a decision on a point of pleading, which perhaps cannot, and certainly will not, ever arise; Wald's Pollock on Contracts, Williston's ed. 700; and in the last edition of Leake on Contracts it is said in the preface that "the time has now arrived when Cornfoot v. Fowke may be consigned to oblivion."

See an article in 4 Mich. L. Rev. 199; BILL OF LADING.

DECEM TALES (Lat. ten such). A writ requiring the sheriff to appoint ten like men (*apponere decem tales*), to make up a full jury when a sufficient number do not appear. See TALES DE CIRCUMSTANTIBUS.

DECEMVIRI LITIBUS JUDICANDIS. In Roman Law. Ten judges (five being senators and five knights), appointed by Augustus to act as judges in certain cases. Calvinus, Lex.; Anthon, Rom. Ant.

DECENNARIUS (Lat.). One who held one-half a virgate of land. Du Cange. One of the ten freeholders in a *decennary*. Du Cange; Calvinus, Lex.

Decennier. One of the *decennarii*, or ten freeholders making up a tithing. Spelman, Gloss.; Du Cange, *Decenna*; 1 Bla. Com. 114. See DECANUS.

DECENNARY (Lat *decem*, ten). A district originally containing ten men with their families.

King Alfred, for the better preservation of the peace, divided England into counties, the counties into hundreds, and the hundreds into tithings or decennaries, the inhabitants whereof, living together, were sureties or pledges for each other's good behavior. One of the principal men of the latter number presided over the rest, and was called the chief pledge, borsholder, borrow's elder, or tithingman.

DECEPTIONE. A writ that lieth properly against him that deceitfully doth anything in the name of another, for one that receiveth damage or hurt thereby. It is either original or judicial. Fitzh. N. B.

DECIES TANTUM (Lat.). An obsolete writ, which formerly lay against a juror who had taken money for giving his verdict. Called so, because it was sued out to recover from him ten times as much as he took.

DECIMÆ (Lat.). The tenth part of the annual profit of each living, payable formerly to the pope. There were several valuations made of these livings at different times. The *decimæ* (tenths) were appropriated to the crown, and a new valuation established, by 26 Hen. VIII, c. 3; 1 Bla. Com. 284.

DECIMATION. The punishment of every tenth soldier by lot.

DECINERS. Those that had the oversight and check of ten friburgs for the maintenance of the king's peace. Cunningham.

DECISION. A judgment given by a competent tribunal. The French lawyers call the opinions which they give on questions propounded to them, decisions. See Inst. 1. 2. 8; Dig. 1. 2. 2; Hanna v. Com'rs of Putnam County, 29 Ind. 170; Estey v. Sheckler, 36 Wis. 434; also JUDGMENT.

This word is variously defined. It is said that the decision of a court is its judgment, Adams v. R. Co., 77 Miss. 194, 24 South. 200, 317, 28 South. 956, 60 L. R. A. 33; its opinion is the reason given therefor or the views of the judge in relation to a certain subject; In re Estate of Winslow, 12 Misc. 254, 34 N. Y. Supp. 637. The two words are sometimes used interchangeably; Pierce v. State, 109

Ind. 535, 10 N. E. 302; Estey v. Sheckler, 36 Wis. 434; Board of Education of City of Emporia v. State, 7 Kan. App. 620, 52 Pac. 466. The judgment is recorded upon its rendition, and can be changed only through an application to the court. The decision is the property of the judges, subject to modification until transcribed in the records; Houston v. Williams, 13 Cal. 27, 73 Am. Dec. 565; Coffey v. Gamble, 117 Ia. 545, 91 N. W. 813. The term decision is held to be a popular and not a technical word and to mean little more than a concluded opinion. It does not by itself amount to judgment or order as used in section 29 of the Local Government Act of 1888. It is an exercise of a consultative jurisdiction and is not appealable; [1891] 1 Q. B. 725.

The word decision includes: Dismissal of an action for insufficiency of evidence; Volmer v. Stagerman, 25 Minn. 234; dismissal of appeal; Estey v. Sheckler, 36 Wis. 434; the findings of the court upon which a decree or judgment may be entered; Matter of Winslow, 12 Misc. 254, 34 N. Y. Supp 637; an order of a probate court classifying a demand against the estate; Wolfley v. McPherson, 61 Kan. 492, 59 Pac 1054; a subsequent order vacating it and relegating the demand to a different class; *id.*

It is, among other things, an order determining the judgment to be entered; Garr, Scott & Co. v. Spaulding, 2 N. D. 414, 51 N W. 867. It has a broader significance than judgment; Wolfley v. McPherson, 61 Kan. 492, 59 Pac. 1504. A "decision upon the merits" is one upon the justice of the case and not upon technical grounds merely; Mulhern v. R. Co., 2 Wyo. 465. "Surely a non-suit is not a decision;" *id.* A ruling upon the admission of evidence is not included in the words "decision or intermediate order"; State v. O'Brien, 18 Mont. 1, 43 Pac. 1091. 44 Pac. 399; the word is sometimes treated as synonymous with judgment; Estey v. Sheckler, 36 Wis. 434; Board of Education of City of Emporia v. State, 7 Kan. App. 620, 52 Pac. 466; Pierce v. State, 109 Ind. 535, 10 N E 302; it has been said that "in an abstract sense there is a shade of difference between the import of the word 'decision' and the word 'judgment'"; the former "is the resolution of the principles which determine the controversy; the judgment is the formal paper applying them to the rights of the parties"; Buckeye Pipe Line Co. v. Fee, 62 Ohio St. 543, 555, 57 N. E. 446, 78 Am. St. Rep. 743. As used in a statute characterizing the findings of fact and conclusions of law as a "written decision" it means something which must precede the judgment and upon which it is entered as upon a verdict; Corbett v. Job, 5 Nev. 201.

The decisions of courts are not the law, but only evidences of the law, stronger or weaker according to the number and uniformity of adjudications, the unanimity or dissension of the judges, the solidity of the reasons, and the perspicuity and precision with which the reasons are expressed; Yates v. Lansing, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290; United States Savings & Loan Co. v. Harris, 113 Fed. 27; Swift v. Tyson, 16 Pet. (U. S.) 1, 10 L. Ed. 865; Phipps v. Harding, 70 Fed. 468, 17 C. C. A. 203, 30 L. R. A. 513; Falconer v. Simmons, 51 W. Va. 172, 41 S. E. 193.

But on the other hand the term "law" is said to include the decisions of the courts; Miller v. Dunn, 72 Cal. 462, 14 Pac. 27, 1 Am. St. Rep. 67. Possibly, if not probably, the difference is one of expression rather than of substance.

DECISORY OATH. See OATH.

DECLARANT. One who makes a declaration.

DECLARATION. In Pleading. A specification, in a methodical and logical form, of the circumstances which constitute the plaintiff's cause of action. 1 Chit. Pl. 248; Co. Litt. 17 *a*, 303 *a*; Bacon, Abr. *Pleas* (B), Comyns, Dig. *Pleader*, C, 7; Lawes, Pl. 35; Steph Pl. 36; Dixon v. Sturgeon, 6 S. & R. (Pa) 28.

In real actions, it is most properly called the *count;* in a personal one, the declaration: Steph Pl. 36, *Doctr. Plac* 83, Lawes, Pl 33 See Fitzh N B 16 *a*, 60 *d* The latter, however, is now the general term,—being that commonly used when referring to real and personal actions without distinction; 3 Bouvier, Inst n 2815

In an action at law, the declaration answers to the bill in chancery, the libel *(narratio)* of the civilians, and the allegations of the ecclesiastical courts

It may be *general* or *special:* for example, in debt on a bond, a declaration counting on the penal part only is *general;* one which sets out both the bond and the condition and assigns the breach is *special;* Gould, Pl. c. 4, § 50.

The *parts* of a declaration are the *title* of the court and term; the *venue*, see VENUE; the *commencement*, which contains a statement of the names of the parties and the character in which they appear, whether in their own right, the right of another, in a political capacity, etc., the mode in which the defendant has been brought into court, and a brief recital of the form of action to be proceeded in; 1 Saund. 318, n. 3, 111; 6 Term 130; the *statement* of the cause of action, which varies with the facts of the case and the nature of the action to be brought, and which may be made by means of one or of several counts; 3 Wils. 185; Neal v. Lewis, 2 Bay (S. C.) 206, 1 Am. Dec. 640; one count may incorporate, by reference, certain general averments which are in a previous count in the same pleading; Green v. Clifford, 94 Cal. 49, 29 Pac. 331; see COUNT; the *conclusion*, which in personal and mixed actions should be to the damage (*ad damnum*, which title see) of the plaintiff; Com-

yns, Dig. *Pleader* (C, 84); 10 Co. 116 *b*, 117 *a*; 1 M. & S. 236; unless in *scire facias* and in penal actions at the suit of a common informer, but which need not repeat the capacity of the plaintiff; Martin v. Smith, 5 Binn. (Pa.) 16, 21, 6 Am. Dec. 395; the *profert* of letters testamentary in case of a suit by an executor or administrator; Bacon, Abr. *Executor* (C); Dougl. 5, n.; Webb v. Danforth, 1 Day (Conn.) 305; and the *pledges of prosecution*, which are generally disused, and, when found, are only the fictitious persons, John Doe and Richard Roe.

The *requisites* or *qualities* of a declaration are that it must correspond with the process; and a variance in this respect was formerly the subject of a plea in abatement, see ABATEMENT; it must contain a statement of all the facts necessary in point of law to sustain the action, and no more; Co. Litt. 303 *a*; Plowd. 84, 122; Pep. Pl. 8. See Coffin v. Coffin, 2 Mass. 363; Cowp. 682; 6 East 422; Viner, Abr. *Declaration;* Barrett v. Lingle, 15 La. Ann. 935. The omission of a complaint to allege a material fact is cured where such fact is shown by the answer.

The circumstances must be stated with certainty and truth as to *parties;* Bentley v. Smith, 3 Cal. (N. Y.) 170; 1 M. & S. 304; Simonds v. Speed, 6 Rich (S. C.) 390; Jackson v. Alexander, 8 Tex. 169; Totty's Ex'r v. Donald, 4 Munf. (Va.) 430; *time* of occurrence, and in personal actions it must, in general, state a time when every material or traversable fact happened; Atlantic Mut. Fire Ins. Co. v. Sanders, 36 N. H. 252; Givan v. Swadley, 3 Ind. 184; Haven v. Shaw, 23 N. J. L. 309; Hyslop v. Jones, 3 McLean, 96, Fed. Cas. No. 13,953; and when a venue is necessary, time must also be mentioned; 5 Term 620; Com. Dig. *Pleader* (C. 19); Barnes v. Matteson, 5 Barb. (N. Y.) 375; though the precise time is not material; U. S. v. Vigol, 2 Dall. (U. S.) 346, 1 L. Ed. 409; Cheetham v. Lewis, 3 Johns. (N. Y.) 43; Simpson v. Talbot, 25 Ala. 469; unless it constitute a material part of the contract declared upon, or where the date, etc., of a written contract is averred; 2 Campb. 307; Atlantic Mut. Fire Ins. Co. v. Sanders, 36 N. H. 252; Haven v. Shaw, 23 N. J. L. 309; or in ejectment, in which the demise must be stated to have been made after the title of the lessor of the plaintiff and his right of entry accrued; 2 East 257; Van Alen v. Rogers, 1 Johns. Cas. (N. Y.) 283, 1 Am. Dec. 113; the place, see VENUE; and, generally, as to particulars of the demand, sufficient to enable the defendant to ascertain precisely the plaintiff's claim; 2 B. & P. 265; 2 Saund. 74 *b*; Posey v. Hair, 12 Ala. 567; Van Rensselaer v. Jones, 2 Barb. (N. Y.) 643; Corey v. Bath, 35 N. H. 530; Heirn v. McCaughan, 32 Miss. 17, 66 Am. Dec. 588; Fulwood v. Graham, 1 Rich (S. C.) 493.

In Evidence. A statement made by a party to a transaction, or by one having an interest in the existence of some fact in relation to the same.

Such declarations are regarded as original evidence and admissible as such—*first*, when the fact that the declaration was made is the point in question; Bartlet v. Delprat, 4 Mass. 702; Pelletreau v. Jackson, 11 Wend. (N. Y.) 110; Phelps v. Foot, 1 Conn. 387; 2 B. & Ad. 845; 9 Bingh. 359; 1 Br. & B. 269; *second*, including expressions of bodily feeling, where the existence or nature of such feelings is the object of inquiry, as expressions of affection in actions for crim. con.; 1 B. & Ald. 90; Gilchrist v. Bale, 8 Watts (Pa.) 355, 34 Am. Dec. 469; see 2 C. & P. 22; Roosa v. Loan Co., 132 Mass. 439; representations by a sick person of the nature, symptoms, and effects of the malady under which he is laboring; 6 East 188; Gilchrist v. Bale, 8 Watts (Pa.) 355, 34 Am. Dec. 469; see 9 C. & P. 275; Bacon v. Inhabitants of Charlton, 7 Cush. (Mass.) 581; Wilkinson v. Moseley, 30 Ala. 562; Feagin v. Beasley, 23 Ga. 17; Wadlow v. Perryman's Adm'r, 27 Mo. 279; State v. Davidson, 30 Vt. 377, 73 Am. Dec. 312; Collins v. Waters, 54 Ill. 485; in prosecution for rape, the declarations of the woman forced; 1 Russ. Cr. 565; 2 Stark. 241; Laughlin v. State, 18 Ohio 99, 51 Am. Dec. 444; *third*, in cases of pedigree, including the declarations of deceased persons nearly related to the parties in question; 2 C. & K. 701; 1 De G. & S. 40; Jewell v. Jewell, 1 How. (U. S.) 231, 11 L. Ed. 108; Jackson v. Browner, 18 Johns. (N. Y.) 37; Chapman v. Chapman, 2 Conn. 347, 7 Am. Dec. 277; Waldron v. Tuttle, 4 N. H. 371; Dupoyster v. Gagani, 84 Ky. 403; 1 S. W. 652; 5 Ont. 638; 35 U. C. Q. B. 613; Eisenlord v. Clum, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836; Gehr v. Fisher, 143 Pa. 311, 22 Atl. 859; Harland v. Eastman, 107 Ill. 535; family records; 5 Cl. & F. 24; 7 Scott, N. R. 141; Douglass v. Sanderson, 2 Dall. (U. S.) 116, 1 L. Ed. 312; Watson v. Brewster, 1 Pa. 381; Jackson v. Cooley, 8 Johns. (N. Y.) 128; *fourth*, cases where the declaration may be considered as a part of the *res gestæ;* Tucker v. Peaslee, 36 N. H. 167; Banfield v. Parker, *id.* 353; George v. Thomas, 16 Tex. 74; 67 Am. Dec. 612; Hardee v. Langford, 6 Fla. 13; 14 Cox, Cr. Cas. 341; Clayton v. Tucker, 20 Ga. 452; Devency v. Baxter, 157 Mass. 9, 31 N. E. 690; Mobile & B. R. Co. v. Worthington, 95 Ala. 598, 10 South. 839; Lake Shore & M. S. R. Co. v. Herrick, 49 Ohio St. 25, 29 N. E. 1072; Hermes v. R. Co., 80 Wis. 590, 50 N. W. 584, 27 Am. St. Rep. 69; Chick v. Sisson, 95 Mich. 412, 54 N. W. 895; Holmes v. Goldsmith, 147 U. S. 150, 13 Sup. Ct. 288, 37 L. Ed. 118; State v. Martin, 124 Mo. 527, 28 S. W. 12 (in which the cases are reviewed); including those made by persons in the possession of land; 5 B. & Ad. 223; 16 M. & W. 497; Inhabitants of West Cambridge v. Inhabitants of Lexington, 2 Pick. (Mass.) 536; Weidman v.

Kohr, 4 S. & R. (Pa.) 174; Snelgrove v. Martin, 2 McCord (S. C.) 241; Crane v. Marshall, 16 Me. 27, 33 Am. Dec. 631; Perkins v. Webster, 2 N. H. 287; Doe v. Campbell, 23 N. C. 482; Abney v. Kingsland & Co., 10 Ala. 355, 44 Am. Dec. 491; Stark v. Boswell, 6 Hill (N. Y.) 405, 41 Am. Dec. 752; Hayward Rubber Co. v. Duncklee, 30 Vt. 29; Brush v. Blanchard, 19 Ill. 31; Sharp v. Maxwell, 30 Miss. 589; Cunningham v. Fuller, 35 Neb. 58, 52 N. W. 836; and entries made in the ordinary course of business by those whose duty it was to make such entries; as field-book entries by a deceased surveyor; [1905] 2 Ch. 164; reversing [1904] 2 Ch. 525. The question on which the two courts differed was whether the case was within the principle of Price v. Torrington, 1 Salk. 285, 1 Smith, Leading Cases 139, which was recognized as the leading case for the admission of such entries made by a deceased person. But it must be shown that it was the duty of the deceased person to do the particular thing and to record contemporaneously the fact of having done it; [1904] 2 Ch. 534; 2 Ont. App. 247; 8 *id.* 564. The limitation of duty thus adhered to in England and Canada, though suggested in earlier American cases; Nichols v. Goldsmith, 7 Wend. (N. Y.) 161; "did not with us survive"; 2 Wigm. Ev. § 1524.

Such entries have been admitted in this country in a great variety of cases; as a private memorandum of marriages kept by a clergyman and the baptismal registry of a church; Blackburn v. Crawford, 3 Wall (U. S.) 175, 18 L. Ed. 186; American Life Ins. Co. & Trust Co. v. Rosenagle, 77 Pa. 507; Hunt v. Order of Chosen Friends, 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855; Kennedy v. Doyle, 10 Allen (Mass.) 161; Meconce v. Mower, 37 Kan. 298, 15 Pac. 155; Weaver v. Lerman, 52 Md. 708; the minutes of a church conference; Pettyjohn's Ex'r v. Pettyjohn, 1 Houst. (Del.) 332; Rayburn v. Elrod, 43 Ala. 700; Nason v. First Church, 66 Me. 100; the diary of an attorney; Burke v. Baker, 188 N. Y. 561, 80 N. E. 1033; a log book; U. S. v. Mitchell, 3 Wash. C. C. 95, Fed. Cas. No. 15,792; *contra*, Cameron v. Rich, 5 Rich. L. (S. C.) 352, 52 Am. Dec. 747; a physician's entries in the ward book of an asylum; State v. Hinkley, 9 N. J. L. J. 118; a school register; Falls v. Gamble, 66 N. C. 455; a diploma to show that a physician had his degree; Holmes v. Halde, 74 Me. 28, 43 Am. Rep. 567.

The following have been held inadmissible as such entries: Commercial rating of a commercial agency; Richardson v. Stringfellow, 100 Ala. 416, 14 South. 283; Baker v. Ashe, 80 Tex. 356, 16 S. W. 36; Henderson v. Miller, 36 Ill. App. 232; the book of a car inspector; Hicks v. Southern Ry., 63 S. C. 559, 41 S. E. 753; a nurse's record of what transpired at the testator's sick bed; In re Flint's Estate, 100 Cal. 391, 34 Pac. 863; a school catalogue; State v. Daniels, 44 N. H. 383; the certificate of a weigher's assistant, not himself an official; Prew v. Donahue, 118 Mass. 438. See 1 Greenl. Ev. § 115.

Originally such statements, to be admissible, must have been in writing, and the first authority for the admission of oral statements is a dictum of Lord Campbell in the Sussex Peerage Case, 11 Cl. & Fin. 113, for which the only authority cited, 3 B. & Ad. 890, was a case of written evidence, but it was followed by the admission of a statement in the nature of a report by a constable to his superior officer; 13 Cox C. C. 293. Oral statements of deceased physicians were admitted to show the disease of which the insured had died in a suit on a life insurance policy; McNair v. Ins. Co., 13 Hun (N. Y.) 144; but such statements as to the nature of her illness, when offered by respondent in a petition for dissolution of marriage in support of cross charges, were rejected as not made in the course of duty; 22 T. L. R. 52; and verbal reports of a foreman to a superintendent as to matters material to the issue were admitted; Williams v. Walton & Whann Co., 9 Houst. (Del.) 322, 32 Atl. 726. See 19 Harv. L. Rev 301.

Declarations by a party of his intention, where that is of itself a distinct and material fact in a chain of circumstances, are admissible; Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706; such declarations being acts from which intention may be inferred; Com. v. Trefethen, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235; Buel v. State, 104 Wis. 149, 80 N. W. 78.

Declarations regarded as secondary evidence or hearsay are yet admitted in some cases: *first*, in matters of general and public interest, common reputation being admissible as to matters of public interest; 6 M. & W. 234; Noyes v. Ward, 19 Conn. 250; but reputation amongst those only connected with the place or business in question, in regard to matters of general interest merely; 1 Cr. M. & R. 929; 2 B. & Ad. 215; Ellicott v. Pearl, 10 Pet (U. S.) 412, 9 L. Ed. 475; Southwest School Dist. v. Williams, 48 Conn. 504; McCall v. U. S., 1 Dak. 320, 46 N. W. 608; and the matter must be of a *quasi* public nature; 10 B. & C. 657; Ellicott v. Pearl, 10 Pet. (U. S.) 412, 9 L. Ed. 475; Brander v. Ferriday, 16 La 296; see REPUTATION; *second*, in cases of ancient possession where ancient documents are admitted, if found in a place in which and under the care of persons with whom such papers might reasonably (in the opinion of the trial judge; 1 Chase Steph. Dig. Evid. 156) be expected to be found; Inhabitants of Greenfield v. Inhabitants of Camden, 74 Me. 56; Applegate v. Lexington & C. County Min. Co., 117 U. S. 255, 6 Sup. Ct. 742, 29 L. Ed. 892; Quinn v. Eagleston, 108 Ill. 248; if they purport to be a part of the transaction to which they relate; 1 Greenl. Ev. § 144;

see ANCIENT WRITINGS; *third*, in case of declarations and entries made against the interest of the party making them, whether made concurrently with the act or subsequently; 3 B. & Ad. 893; Cramer v. Gregg, 40 Ill. App. 442; Irish-American Bank v. Lidlum, 49 Minn. 255, 51 N. W. 1047; Keesey v. Old, 82 Tex. 22, 17 S. W. 928; Potter v. Ogden, 136 N. Y. 384, 33 N. E. 228; but such declarations and entries, to be so admitted, must appear or be shown to be against the pecuniary interest of the party making them; 11 Cl. & F. 85; 2 Jac. & W. 789; 3 Bingh. N. C. 308; Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451, 15 L. R. A. (N. S.) 190; and if so they may be admitted, whether or not made in the ordinary course of business, as where a solicitor charges himself with receipts on his client's behalf; 53 W. R. 169; but letters written and signed by one deceased, or a memorandum made by him, are not admissible by a party claiming under him if not shown to have been communicated to the party claiming adversely; Elsberg v. Sewards, 66 Hun 28, 21 N. Y. Supp. 10; it was established by the Sussex Peerage Case, 1 Cl. & Fin 85, that the interest must be either pecuniary or proprietary; this excluded the admission by a clergyman that he had unlawfully solemnized a marriage, which was so far against his interest that it would have subjected him to punishment; this ruling has been generally accepted, but that it is so has been said to be "highly unfortunate"; 1 Gr. on Ev. (16th Ed by Wigmore) § 152 d; *fourth*, dying declarations.

Dying declarations, made in cases of homicide where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declarations, are admissible; 2 B. & C. 605; 2 Mood. & R. 53; Jackson v. Kniffen, 2 Johns. (N. Y.) 31, 3 Am. Dec. 390; Wilson v. Boerene, 15 Johns. (N. Y.) 286; Anthony v. State, Meigs (Tenn.) 265, 33 Am. Dec. 143; if made under a sense of impending death; 2 Leach 563; Montgomery v. State, 11 Ohio 424; Dunn v. State, 2 Ark. 229, 35 Am. Dec. 54; Com. v. McPike, 3 Cush. (Mass.) 181, 50 Am. Dec. 727; Smith v. State, 9 Humphr. (Tenn.) 9; Logan v. State, *id.* 24; State v. Umble, 115 Mo. 452, 22 S. W. 378; State v. Aldrich, 50 Kan. 666, 32 Pac. 408; Wallace v. State, 90 Ga. 117, 15 S. E. 700; State v. Cronin, 64 Conn. 293, 29 Atl. 536. And see 3 C. & P. 269; 6 *id.* 386; Vass v. Com., 3 Leigh (Va.) 786, 24 Am. Dec. 695; State v. Poll, 8 N. C. 442, 9 Am. Dec. 655; State v. Whitson, 111 N. C. 695, 16 S. E. 332; King v. State, 91 Tenn. 617, 20 S. W. 169; Mattox v. U. S, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917. Ordinarily they are admissible only in trials for homicide of the declarant, but they have been admitted on trial for attempted abortion on the woman who made them; State v. Meyer, 65 N. J. L. 237, 47 Atl. 486, 86 Am. St. Rep. 634; Montgomery v. State, 80 Ind. 338, 41 Am. Rep. 815, where the question is discussed at large and the conclusion reached that because death resulted and that fact entered into the statutory crime, they were admissible. It was held otherwise in People v. Davis, 56 N. Y. 95, and in State v. Harper, 35 Ohio St. 78, 35 Am. Rep. 596, such declarations were excluded because, although the woman died, her death was not the subject of the charge. The declarations must have been made by the person alleged to have been murdered; State v. Bohan, 15 Kan. 418; Brown v. Com., 73 Pa. 321, 13 Am. Rep. 740, where husband and wife were killed and it was held error to admit declarations of the latter on trial for murder of the former; but it has also been held that, where two or more were killed at the same time, declarations of one were admissible at the trial for the murder of the other; State v. Terrell, 12 Rich. (S. C.) 321, 2 Moo. & Rob. 53. In the Pennsylvania case the court distinguished it from these cases, "supposing them to be good law." The declarations must be connected with the death which is the subject of the trial; People v. Wong Chuey, 117 Cal. 624, 49 Pac. 833; and must concern the *res gestæ*, not previous relations; People v. Smith, 172 N. Y. 242, 64 N. E. 814. They must be made under an actual apprehension of impending death; People v. Evans, 40 Hun (N. Y.) 492; People v. Brecht, 120 App. Div. 769, 105 N. Y. Supp. 436 (in both of which statements were rejected because declarants had not wholly abandoned hope); State v. Hennessy, 29 Nev. 320, 90 Pac. 221, 13 Ann. Cas. 1122 (where they were admitted); after hope of recovery is gone; Small v. Com., 91 Pa. 304; and even a faint hope excludes them; Com. v. Roberts, 108 Mass. 296; People v. Gray, 61 Cal. 164, 44 Am. Rep. 549; but subsequent lingering, with some expression of hope, does not, if at the time they were made there was no hope; Swisher v. Com., 26 Gratt. (Va.) 963, 21 Am. Dec. 330. A statement made in writing before hope was abandoned and confirmed afterwards was admissible; Wilson v. Com., 60 S. W. 400, 22 Ky. L. Rep. 1251; State v. McEvoy, 9 S. C. 208. The fear of death need not be expressed to the person who receives the declaration, if its existence is otherwise established; Worthington v. State, 92 Md. 222, 48 Atl. 355, 56 L. R. A. 353, 84 Am. St. Rep. 506. A statement reduced to writing may be supplemented by others made orally at the same time; Herd v. State, 43 Tex. Cr. R. 575, 67 S. W. 495 (criticised, 11 Y. L. J. 430); *contra;* 1 Str. 499; Whart. Hom. § 766; Gr. Ev. § 160.

Although the time elapsing between the declarations and death is proper to be considered, they will not be made inadmissible by a few subsequent hours of life; People v. Weaver, 108 Mich. 649, 66 N. W. 567; State v. Reed, 53 Kan. 767, 37 Pac. 174, 42 Am.

St. Rep. 322; or even some days; 6 C. & P. 386; Com. v. Haney, 127 Mass. 455; Jones v. State, 71 Ind. 66; State v. Jones, 38 La. Ann. 792; Baxter v. State, 15 Lea (Tenn.) 657; State v. Yee Wee, 7 Idaho, 188, 61 Pac. 588.

It is not necessary that the declarant state that he is expecting immediate death; it is enough if, from all the circumstances, it satisfactorily appears that such was the condition of his mind at the time of the declarations; State v. Wilson, 24 Kan. 189, 36 Am. Rep. 257; but there must be a belief that there is no hope of recovery; Com. v. Roberts, 108 Mass. 296; People v. Brecht, 120 App. Div. 769, 105 N. Y. Supp. 436; State v. Welsor, 117 Mo. 570, 21 S. W. 443; 65 J. P. 426; 67 *id.* 151, where the expression "I'm dying" was used and the declarations were excluded, while in 71 *id.* 152, the same expression was used and they were admitted; as they were also when declarant said he did not know what expectation of recovery he had; State v. Thompson, 49 Or. 46, 88 Pac. 583, 124 Am. St. Rep. 1015. The belief that death is inevitable supplies the place of an oath; Tracy v. People, 97 Ill. 106; People v. Sanford, 43 Cal. 29; Dixon v. State, 13 Fla. 636. Accordingly, although the common law rule was said to require that declarant should have a belief in God and a future state; 1 Str. 499; 17 Y. L. J. 403; that rule was considered abrogated in the cases just cited and the want of such belief has been held to be no ground for excluding declarations; State v. Hood, 63 W. Va. 182, 59 S. E. 971, 15 L. R. A. (N. S.) 448, 129 Am. St. Rep. 964; while other cases hold otherwise, though belief is presumed until the contrary is proved; Donnelly v. State, 26 N. J. L. 463; but if admitted in such case, they should not be relied on; State v. Elliott, 45 Ia. 486. Reckless and profane language will not render declarations inadmissible; Kirby v. State, 151 Ala. 66, 44 South. 38; but will affect their credibility; Nesbit v. State, 43 Ga. 238; and cross-examination will be allowed as to that, as being material in showing both a reckless and irreverent state of mind and hostility towards the accused; Tracy v. People, 97 Ill. 105.

The declaration may have been made by signs; 1 Greenl. Ev. § 161 *b*; and in answer to questions; 7 C. & P. 238; 2 Leach 563; Vass v. Com., 3 Leigh (Va.) 786, 24 Am. Dec. 695. They may be in writing; State v. Kindle, 47 Ohio St. 358, 24 N. E. 485; King v. State, 91 Tenn. 617, 20 S. W. 169. The substance only need be given by the witness; Montgomery v. State, 11 Ohio, 424; Ward v. State, 8 Blackf. (Ind.) 101; but the declaration must have been complete; Vass v. Com., 3 Leigh (Va.) 786, 24 Am. Dec. 695; Mattox v. U. S., 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917; and the circumstances under which it was made must be shown to the court; 3 C. & P. 629; 7 *id.* 187; State v. Poll, 8 N. C. 444, 9 Am. Dec. 655; Hill v. Com., 2 Gratt. (Va.) 594; McDaniel v. State, 8 Smedes & M. (Miss.) 401, 47 Am. Dec. 93. It is for the court to determine whether the preliminary conditions make the evidence admissible; State v. Cronin, 64 Conn. 293, 29 Atl. 536; State v. Doris, 51 Or. 136, 94 Pac. 44, 16 L. R. A. (N. S.) 660; and this includes the question of impending death; Roten v. State, 31 Fla. 514, 12 South. 910; 1 Stark. 521, and note (where the case of Rex v Woodcock, Leach 593, *contra*, is discredited); People v. Smith, 104 N. Y. 491, 504, 10 N. E. 873, 58 Am. Rep. 537; and this decision of the court comprises both fact and law, as to the first of which it is final and as to the second subject to review; State v. Williams, 67 N. C. 12; Com. v. Bishop, 165 Mass. 148, 42 N. E. 560 (Holmes, C. J.); but having been admitted, the weight of the evidence is for the jury; State v. Sexton, 147 Mo. 89, 48 S. W. 452; and this includes consideration of the circumstances under which they were made; Bush v. State, 109 Ga. 120, 34 S. E. 298; State v. Phillips, 118 Ia. 660, 92 N. W. 876; and it is error to charge that they should be treated as of the same weight and value as evidence produced under the usual tests and safeguards; People v. Kraft, 148 N. Y. 631, 43 N. E. 80. The conclusions of the trial court, as to the admissibility of the declarations, should not be disturbed unless it is manifest that the facts did not warrant them; Gipe v. State, 165 Ind. 433, 75 N. E. 881, 1 L. R. A. (N. S.) 419, 112 Am. St. Rep. 238; Swisher v. Com., 26 Gratt. (Va.) 963, 21 Am. Rep. 330.

Such declarations are inadmissible when the witness does not pretend to give either the words or substance of what the deceased said, or all that he said; State v. Johnson, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405. The admissibility of the declaration is not affected by the fact that subsequently to their being made and before death the declarant entertained a belief in recovery; 14 Cox, Cr. Cas. 565, 28 Engl. Rep. 587, and note; State v. Shaffer, 23 Or. 555, 32 Pac. 545.

Dying declarations must be confined to the statement of facts, not conclusions; State v. Horn, 204 Mo. 528, 103 S. W. 69; or opinions; State v. Horn, 204 Mo 528, 103 S. W. 69 (where a statement that declarant shot the accused in self-defense was excluded as a mere conclusion); although it is to be noted that the application of the "opinion rule" to such declarations has been vigorously disputed; 2 Wigm. Ev. § 1447. It is also to be noted that the controversy usually turns on whether *the expression used* is fact or opinion.

The admission of dying declarations has been uniformly held not to contravene the constitutional right of the accused to be confronted with the witnesses against him;

Mattox v. U. S., 156 U. S. 237, 243, 15 Sup. Ct. 337, 39 L. Ed. 409; Brown v. Com., 73 Pa. 321, 13 Am. Rep. 740; State v. Dickinson, 41 Wis. 299; Robbins v. State, 8 Ohio St. 131; Com. v. Carey, 12 Cush. (Mass.) 246; 2 Wigm. Ev. § 1398, and note, citing the cases.

They are admitted either for or against the accused; Mattox v. U. S., 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917; State v. Saunders, 14 Or. 300, 12 Pac. 441.

It has been held that they may be discredited by evidence of previous contradictory statements; State v. Lodge, 9 Houst. (Del.) 542, 33 Atl. 312; but with expressions of doubt and one judge dissenting, and the case has been criticised; 9 Harv. L. Rev. 432.

For full discussion of dying declarations and collections of cases, see 2 Wigm. Ev. §§ 1430–1451; 56 L. R. A. 353, note; also an article by Wilbur Larremore urging that their admission should be abolished by statute; 41 Am. L. Rev. 660.

Other Declarations. Declarations as to the physical or mental condition of the declarant are sometimes admitted as an exception to the rule against hearsay, as the natural and necessary evidence of bodily or mental feelings, where those are material as facts to be proved. The underlying principle is thus expressed by Mellish, L. J., in the St. Leonard's Will case: "Whenever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, then you may prove what he said, because that is the only means by which you can find out what his intentions were." L. R. 1 P. Div. 154, 251. Thus such declarations as to one's own physical condition, as of the existence of pain, have been admitted in a suit by declarant because, as it was said, they "in their very nature must be evidence, though emanating from the party himself who seeks to prove them in his own favor"; Phillips v. Kelly, 29 Ala. 628. Exclamations of pain and suffering were held properly admitted because "this is the natural and ordinary mode in which physical pain and suffering are made known to others, and the only mode by which their nature and extent can be ascertained"; Hyatt v. Adams, 16 Mich. 180, which was an action against a surgeon for malpractice causing death. Such declarations or exclamations are admitted when made to a physician in the course of treatment; State v. Gedicke, 43 N. J. L. 86; but not when he was "called in, not to give medical aid, but to make up medical testimony," and the time was *post litem motam;* Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537, 31 Am. Rep. 321; Consolidated Traction Co. v. Lambertson, 60 N. J. L. 452, 38 Atl. 683, where declarations were held clearly incompetent, though even under such circumstances natural expressions of present pain might not be.

It is suggested in a note on the last two cases that such testimony is admissible without the qualifications of being made to a physician and before the controversy arose; 11 Harv. L. Rev. 467. As to the former point the Alabama case sustains the contention, but the tendency is to extend the cases to which the *post litem motam* rule is to be applied and, as appears *infra*, its limitations are too narrowly stated in the note cited. In the Michigan case, Judge Christiancy leaves the question open whether it applies to this class of cases.

Declarations, to be admissible as original evidence, must have been made at the time of doing the act to which they relate; Enos v. Tuttle, 3 Conn. 250; Scaggs v. State, 8 Smedes & M. (Miss.) 722; In re Taylor, 9 Paige Ch. (N. Y.) 611; Cherry v. McCall, 23 Ga. 193; O'Kelly v. O'Kelly, 8 Metc. (Mass.) 436; Banfield v. Parker, 36 N. H. 353; Tompkins v. Saltmarch, 14 S. & R. (Pa.) 275; 1 B. & Ad. 135. For cases of entries in books, see Sterrett v. Bull, 1 Binn. (Pa.) 234; Ingraham v. Bockius, 9 S. & R. (Pa.) 285, 11 Am. Dec. 730; Faxon v. Hollis, 13 Mass. 427; Hamilton v. State, 36 Ind. 280, 10 Am. Rep. 22.

To authorize their admission as secondary evidence, the declarant must be dead: 11 Price 162; 1 C. & K. 58; Davis v. Fuller, 12 Vt. 178, 36 Am. Dec. 334; and the declaration must have been made before any controversy arose; 3 Campb. 444; 10 B. & C. 657; 4 M. & S. 486; Hamilton v. Smith, 74 Conn. 374, 50 Atl. 884; Elliott v. Peirsol, 1 Pet. (U. S.) 328, 7 L. Ed. 164. The rule that such declarations must have been made *ante litem motam* was applied to cases of pedigree in the Berkeley Peerage Case, 4 Camp. 401; and to matters of public interest in 3 *id.* 444; and, *pari ratione*, the Connecticut cases above cited apply the same principle to boundary cases, the latest one in date excluding declarations made after the controversy arose which would have contradicted those of the same person made before it, which were admitted. In the opinion of the supreme court approving this ruling, Judge Baldwin said that, while it may seem hard that the earlier declarations could not be met by proof of the later inconsistent ones, "the latter, having been uttered after the dispute which resulted in this suit had arisen, do not carry that absolute assurance of sincerity and impartiality on which is rested this exception to the rule excluding hearsay evidence." And yet the opinion had stated that at the time of the later declarations, which were thus excluded, suit had not been brought, and there was no claim that declarant knew of any dispute.

It must also appear that the declarant

was in a condition or situation to know the facts, or that it was his duty to know them; 9 B. & C. 935; 2 Sm. Lead. Cas. 193, note. The test to be applied to dying declarations to determine their admissibility is whether a living witness would have been permitted to testify to the matters contained in the declaration; State v. Foot You, 24 Or. 61, 32 Pac. 1031, 33 Pac. 537.

The declarations of an agent respecting a subject-matter, with regard to which he represents the principal, bind the principal; Story, Ag. §§ 134–137; 2 Q. B. 212; Batchelder v. Emery, 20 N. H. 165; Winter v. Burt, 31 Ala. 33; Wellington v. R. R., 158 Mass. 185, 33 N. E. 393; if made in the line of his duty and within the scope of his authority; Weeks v. Inhabitants of Needham, 156 Mass. 289, 31 N. E. 8; Pittsburgh & L. S. Iron Co. v. Kirkpatrick, 92 Mich. 252, 52 N. W. 628; Van Doren v. Bailey, 48 Minn. 305, 51 N. W. 375; if made during the continuance of the agency with regard to a transaction then pending; 8 Bingh. 451; Mechanics' Bank v. Bank of Columbia, 5 Wheat. (U. S.) 336, 5 L. Ed. 100; Hannay v. Stewart, 6 Watts (Pa.) 487; Woods v. Banks, 14 N. H. 101; Hayward Rubber Co. v. Duncklee, 30 Vt. 29; Raiford v. French, 11 Rich. (S. C.) 367; Winter v. Burt, 31 Ala. 33; Burgess v. Inhabitants of Wareham, 7 Gray (Mass.) 345; Vail v. Judson, 4 E. D. Smith (N. Y.) 165; Idaho Forwarding Co. v. Forwarding Ins. Co., 8 Utah, 41, 29 Pac. 826, 17 L. R. A. 586; and similar rules extend to partners' declarations; 1 Greenl. Ev. § 112; Fail v. McArthur, 31 Ala. 26; Tucker v. Peaslee, 36 N. H. 167; Slipp v. Hartley, 50 Minn. 118, 52 N. W. 386, 36 Am. St. Rep. 629. See PARTNER.

Where several defendants are interested in the relief prayed against them, admissions of one of them, made against his own interest, are admissible in evidence to affect him, although they would not be evidence to affect his co-defendants. See Grace v. Nesbitt, 109 Mo. 9, 18 S. W. 1118; Redding v. Wright, 49 Minn. 322, 51 N. W. 1056; Roberts v. Kendall, 3 Ind. App. 339, 29 N. E. 487.

As to declarations made over a telephone, see TELEPHONE.

When more than one person is concerned in the commission of a crime, as in cases of riots, conspiracies, and the like, the declarations of either of the parties, made *while acting in the common design*, are evidence against the whole; 3 B. & Ald. 566; Com. v. Crowninshield, 10 Pick. (Mass.) 497; State v. Thibeau, 30 Vt. 100; Mack v. State, 32 Miss. 405; Poole v. Gerrard, 9 Cal. 593; McKenzie v. State, 32 Tex. Cr. R. 568, 25 S. W. 426, 40 Am. St. Rep. 795; People v. Collins, 64 Cal. 293, 30 Pac. 847; but the declarations of one of the rioters or conspirators made *after the accomplishment of their object* and when they no longer acted together, are evidence only against the party making them; 2 Russ. Cr. 572; 1 Mood. & M. 501; Brown v. U. S., 150 U. S. 93, 14 Sup. Ct. 37, 37 L. Ed. 1010; Sparf v. U. S., 156 U. S. 58, 15 Sup. Ct. 273, 39 L. Ed. 343. And see 2 C. & P. 232; Chelmsford Co. v. Demarest, 7 Gray (Mass.) 1; Com. v. Ingraham, *id.* 46. If one of two persons accused of having together committed a crime of murder makes a voluntary confession in the presence of the other, under such circumstances that he would naturally have contradicted it if he did not assent, the confession is admissible in evidence against both; Sparf v. U. S., 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343.

See HEARSAY EVIDENCE; BOUNDARY; MARRIAGE; DOMICIL; REPUTATION; PEDIGREE; CONFESSION. And for an extensive collection of cases on the points herein stated see Chamb. Best. Ev. §§ 496–505 and the American notes thereto.

In Scotch Law. The prisoner's statement before a magistrate.

When used on trial, it must be proved that the prisoner was in his senses at the time of making it, and made it of his own free will; 2 Hume 328; Alison, Pr. 557. It must be signed by the witnesses present when it was made; Alison, Pr. 557, and by the prisoner himself; Arkl. Just. 70. See Paterson, Comp. §§ 952, 970.

DECLARATION OF INDEPENDENCE. A public act by which, through the Continental Congress, the thirteen British colonies in America declared their independence, in the name and by the authority of the people, on the fourth day of July, 1776, wherein are set forth:—

Certain natural and inalienable rights of man; the uses and purposes of governments; the right of the people to institute or to abolish them; the sufferings of the colonies, and their right to withdraw from the tyranny of the king of Great Britain;

The various acts of tyranny of the British king;

The petitions for redress of those injuries, and the refusal to redress them; the recital of an appeal to the people of Great Britain, and of their being deaf to the voice of justice and consanguinity;

An appeal to the Supreme Judge of the world for the rectitude of the intentions of the representatives;

A declaration that the United Colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown, and that all political connection between them and the state of Great Britain is and ought to be dissolved;

A pledge by the representatives to each other of their lives, their fortunes, and their sacred honor.

The effect of this declaration was the establishment of the government of the United States as free and independent.

DECLARATION OF INTENTION. The act of an alien who goes before a court of record and in a formal manner declares that it is *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whereof at the time he may be a citizen or subject. See Act of June 29, 1906; R. S. § 2174.

This declaration must, in ordinary cases, be made at least two years before his admission. *Id.* But there are exceptions to this rule. See NATURALIZATION.

DECLARATION OF LONDON. A declaration concerning the laws of naval war, agreed upon February 26, 1909, by the powers assembled at the London Naval Conference. The preamble states that the Declaration was made in view of the desirability of an agreement upon the rules to be applied by the International Prize Court established by the Second Hague Conference A preliminary provision states that it is agreed that the rules adopted "correspond in substance with the generally recognized principles of international law." The subjects dealt with by the Declaration include Blockade, Contraband, Un-neutral Service, Destruction of Neutral Prizes, Transfer to Neutral Flag, Enemy Character, Convoy, Search, and Compensation. The Declaration was signed by all the powers represented at the Conference, but ratifications have not yet been exchanged. Higgins, 538-613.

DECLARATION OF PARIS. A declaration respecting international maritime law set forth by the leading powers of Europe at the Congress of Paris April 16, 1856 The several articles are:

1. Privateering is and remains abolished.

2. The neutral flag covers enemy's goods, except contraband of war

3. Neutral goods, except contraband of war, are not liable to confiscation under a hostile flag.

4. Blockades, to be binding, must be effective.

The states not represented at the Congress were invited to adhere to the Declaration, and the majority did so. The United States refused to accept the Declaration, owing to the rejection by the Congress of the "Marcy Amendment" exempting private property from capture at sea. But the United States adhered to the rules of the Declaration during the war with Spain in 1898. The Convention Relative to the Conversion of Merchant-Ships into War-Ships, adopted at The Hague in 1907, was directed against a threatened evasion of the Declaration of Paris in the form of Volunteer Navies. Higgins, 1-4.

DECLARATION OF ST. PETERSBURG. A declaration made at St. Petersburg in 1868 on behalf of certain of the powers in relation to the prohibition of the use of explosive bullets in time of war.

DECLARATION OF TRUST. The act by which an individual acknowledges that a property, the title of which he holds, does in fact belong to another, for whose use he holds the same.

The instrument in which such an acknowledgment is made.

Such a declaration is not always in writing; though it is highly proper it should be so; Hill, Trust. 49, note y; Sugden, Pow. 200; 1 Washb. R. P. See Tiedm. Eq. Jur. 296; FRAUDS, STATUTE OF; TRUST.

It differs from a declaration of a use. (1) The word "use" is restricted and refers only to real estate. (2) Use was of common occurrence in times when there existed no method by which the moral rights and claims of the *cestui que use* could be enforced, whereas trust, when employed in *pari materia* with use, has always contained within it a necessary implication that the rights and claims of the *cestui que trust* would be enforced in equity, and, since the coming into operation of the Judicature Act of 1873, in England, in courts of law also; Stroud Jud. Dict. See USES.

DECLARATION OF WAR. The public proclamation of the government of a state, by which it declares itself to be at war with the foreign power mentioned, and which forbids all and every one to aid or assist the common enemy.

The power of declaring war is vested in congress by the constitution, art. 1, s. 8, § 12. There is no form or ceremony necessary except the passage of the act. A manifesto stating the causes of the war is usually published; but war exists as soon as the act takes effect.

The necessity of a declaration of war has long been a subject of controversy between publicists. In ancient times it was customary to precede hostilities by a public declaration communicated to the enemy, and to send a herald to demand satisfaction. II Phillipson 197. In modern times wars have more often begun without any declaration, but several instances of declarations during the 19th century show a return to the former practice. At the Hague Conference of 1907 a convention was adopted providing that the contracting powers should not commence hostilities "without a previous and unequivocal warning, which shall take the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war." Higgins, 198-205.

DECLARATORY. Something which explains or ascertains what before was uncertain or doubtful: as, a declaratory statute, which simply declares or explains the

law or the right, as it stood previous to the statute; Sedgw. Stat. & Const. L. 28; they are usually passed to put an end to a doubt as to what the law is, and declare what it is and what it has been. 1 Bla. Com. 86. Very many of the state statutes in this country are declaratory of the common law, and were not passed to quiet a doubt but to incorporate into the law of the state well-settled common-law principles. As to declaratory statutes, see STATUTES.

DECLARE. Often used of making a positive statement, as "declare and affirm." Bassett v. Denn, 17 N. J. L. 432. To assert; to publish, to utter; to announce clearly some opinion or resolution. Knecht v. Ins. Co., 90 Pa. 121, 35 Am. Rep. 641. For its use in pleading, see DECLARATION.

DECLINATORY PLEA. A plea of sanctuary or of benefit of clergy. 4 Bla. Com. 333. Abolished, 6 & 7 Geo. IV. c. 28, s. 6; Mozl. & W. Dict. See BENEFIT OF CLERGY.

DECOCTION. The operation of boiling certain ingredients in a fluid for the purpose of extracting the parts soluble at that temperature; the product of this operation.

In a case in which the indictment charged the prisoner with having administered to a woman a decoction of a certain shrub called savin, it appeared that the prisoner had administered an *infusion*, and not a decoction. The prisoner's counsel insisted that he was entitled to an acquittal on the ground that the medicine was misdescribed, but it was held that infusion and decoction are *ejusdem generis*, and that the variance was immaterial. 3 Camp. 74, 75.

DECOCTOR. In Roman Law. A bankrupt; a person who squandered the money of the state. Calvinus, Lex.

DECOLLATIO. Decollation; beheading.

DÉCONFES. In French Law. A name formerly given to those persons who died without confession, whether they refused to confess or whether they were criminals to whom the sacrament was refused. *Droit de Canon*, par M. l'Abbé André; Dupin, Gloss. to Loisel's Institutes.

DECOY. A pond used for the breeding and maintenance of water-fowl. 11 Mod. 74, 130; 3 Salk. 9; Holt 14, 11 East 571.

DECOY LETTER. A letter prepared and mailed on purpose to detect offenders against the postal and revenue laws. U. S. v. Whittier, 5 Dill. 39, Fed. Cas. No. 16,688.

The use of decoy letters by inspectors of mails for the purpose of ascertaining the depredations upon the mails is proper and justifiable as a means to that end; U. S. v. Dorsey, 40 Fed. 752.

A postal employé who takes from the mail under his charge a package containing things of value, though placed in the mail as a decoy and addressed to a person having no existence, is punishable, under R. S. secs. 3891, 5467, for taking a letter or package entrusted to him; U. S. v. Wight, 38 Fed. 106; U. S. v. Dorsey, 40 Fed. 752; *contra*, U. S. v. Denicke, 35 Fed. 407; U. S. v. Matthews, 35 Fed. 890, 1 L. R. A. 104. The fact that they were decoy letters is immaterial on a prosecution for embezzlement; Walster v. U. S., 42 Fed. 891.

The offence of sending letters by mail giving information where obscene pictures can be obtained does not lose its criminal character, though the letters were sent in response to a decoy letter, since it does not appear that the accused was solicited to use the mails and thus to commit an offence; U. S. v. Grimm, 50 Fed. 528.

A decoy letter placed in a sealed envelope and addressed to a fictitious person in a place where there was no post-office was wrapped up in a newspaper, enclosed in an ordinary paper wrapper, sealed and properly stamped and directed as the envelope inside the packet, and in this condition was handed by a post-office inspector and placed by him as a decoy in a basket kept for improperly illegibly addressed mail matter. It was held that this was not a mailing of the packet, and that it did not become mail matter, U. S. v. Rapp, 30 Fed. 818. A letter with a fictitious address which cannot be delivered is "not intended to be conveyed by mail" within the meaning of R. S. sec. 3891, providing a penalty for embezzling; U. S. v. Denicke, 35 Fed. 407.

Decoys are permissible to entrap criminals, or to present opportunity to those having criminal intent to, or who are willing to, commit crime, but not to create criminals, U. S. v. Healy, 202 Fed. 349 (selling liquor to an Indian).

DECREE. The judicial decision of a litigated cause by a court of equity. It is also applied to the determination of a cause in courts of admiralty and probate. It is accurate to use the word judgment as applied to courts of law and decree to courts of equity, although the former term is now used in a larger sense to include both. There is, however, a distinction between the two which is well understood, and may wisely be preserved as tending to keep before the mind the distinction between the two jurisdictions—quite as fundamental with respect to the final determination of a cause as to the forms of procedure and the principles of jurisprudence applied by the two tribunals. Even the modern tendency of courts of law to avail themselves of equitable forms of procedure and principles of decision has left undisturbed the well-defined line of demarcation between the *judgment* at law and the *decree* in equity. It is stated by an able writer, thus: "A judgment at law was either simply for the plaintiff or for the defendant. There could be no qualifications or modifications of the judgment. But such a judgment does not always touch the true justice of the cause or put the

parties in the position they ought to occupy. While the plaintiff may be entitled, in a given case, to general relief, there may be some duty connected with the subject of litigation which he owes to the defendant, the performance of which, equally with the fulfilment of *his* duty by the defendant, ought, in a perfect system of remedial law, to be exacted. This result was attained by the *decree* of a court of equity which could be so moulded, or the execution of which could be so controlled and suspended, that the relative duties and rights of the parties could be secured and enforced;" Bisph. Eq § 7.

It necessarily springs from the nature of the chancery jurisdiction that its determinations should be cast in a mould differing, *toto cœlo*, from a judgment at law, and it would hardly be an exaggeration to say that the essential character of the decree, as described by the author quoted, is to be found in the literal application of the fundamental maxim, "He who seeks equity must do equity." Accordingly, it is said that a court of equity will always reach, by a direct decree, what would otherwise be accomplished by a circuity of proceedings; Dodd v. Wilson, 4 Del. Ch. 410. And even when a complainant is entitled to relief which it is inequitable to grant except upon a condition to be performed by him springing from an obligation of equity and good conscience, though not from legal right, a chancellor may make a decree only upon such condition; Willard v. Tayloe, 8 Wall. (U. S.) 557, 19 L. Ed. 501; Bisph. Eq. § 43. In such case, when something remains to be done by the party in order to entitle him to relief, while no present decree can be made, as the decree must be absolute and final and not contingent, the court will enter an interlocutory decree and suspend the entry of a final decree until the performance of such condition; Pleasanton v. Raughley, 3 Del. Ch. 124; and in default thereof in a reasonable time dismiss the bill; Pleasanton v. Raughley, 4 Del. Ch. 43. The doctrine of the wife's equity is a familiar instance of this principle.

Decrees are either interlocutory or final. This distinction is well recognized and important; Cornely v. Marckwald, 131 U. S. 159, 9 Sup. Ct. 744, 33 L. Ed. 117; Richmond v. Atwood, 52 Fed. 10, 2 C. C. A. 607, 17 L. R. A. 615 (citing many cases and discussing the distinction at large). In the strictest sense all decrees are interlocutory until signed and enrolled; 2 Dan. Ch. Pr. 6th Am. ed. 987, n. 1; but it is not in this sense that the terms are in practice used. But while there is a distinction well understood, it is not always easy of exact definition. The existence of the two classes is, however, necessary in American chancery courts, as the right of appeal is frequently confined to final decrees, as in the federal courts. The former is entered on some plea or issue arising in the cause which does not decide the main question; the latter settles the matter in dispute; and a final decree has the same effect as a judgment at law; 2 Madd. 462; 1 Ch. Ca. 27; 2 Vern. 89; 4 Brown, P. C. 287. See 7 Viner, Abr. 394; 7 Comyns, Dig. 445; 1 Belt, Suppl. Ves. 223; McGarrahan v. Maxwell, 28 Cal. 75, 85. For forms of decrees, see Seton, Decrees; 2 Dan Ch. Pr. 986.

The federal equity rule No. 71 (in effect Feb. 1, 1913, 33 Sup. Ct. xxxviii) provides that decrees shall not recite the pleadings nor any other prior proceedings.

Final Decree. One which finally disposes of a cause, so that nothing further is left for the court to adjudicate. See 2 Dan. Ch. Pr. 994, n.

A decree which determines the particular cause. It is not confined to those which terminate all litigation on the same right. 1 Kent 316.

A decree which leaves the case in such condition that, if on appeal there be an affirmance, nothing remains for the court below, but to execute it. Lodge v. Twell, 135 U. S. 232, 10 Sup. Ct. 745, 34 L. Ed. 153; Mower v. Fletcher, 114 U. S. 127, 5 Sup. Ct. 799, 29 L. Ed 117; see Haseltine v. Central Bank, 183 U. S 131, 22 Sup Ct. 19, 46 L. Ed. 117.

A decree which disposes ultimately of the suit. Ad. Eq. 375. After such decree has been pronounced, the cause is at an end, and no further hearing can be had; *id.* 388; Lakin v. Lawrence, 195 Mass. 27, 80 N. E. 578.

No court can reverse or annul its decree after the term in which it was entered, nor can a decree be changed or modified so as substantially to vary or affect it; Illinois v. R. Co., 184 U. S. 77, 22 Sup. Ct. 300, 46 L. Ed. 440, citing prior cases; [1904] 1 K. B. 6; Bissell Carpet-Sweeper Co. v. Sweeper Co., 72 Fed. 545, 19 C. C. A. 25; Marshall Engine Co. v. Engine Co., 203 Mass. 410, 89 N. E. 548; nor even on petition for rehearing where error in the findings is shown; Pettit v. One Steel Lighter, 104 Fed 1002; except to correct clerical mistakes; Cameron v. McRoberts, 3 Wheat. 591; Illinois v. R. Co., 184 U. S. 77, 22 Sup. Ct. 300, 46 L. Ed. 440; [1901] 1 K. B. 694; or to reinstate a cause dismissed by mistake; *id.* The Palmyra, 12 Wheat. 10, 6 L. Ed. 531; and a mistake in an order may be rectified while an appeal is pending; [1903] P 88 In equity jurisdiction of the cause is sometimes retained to make further orders for executing the decree which may result in modifying details of the original decree; Mootry v. Grayson, 104 Fed. 613, 44 C. C. A. 83; and in admiralty a bill of review may be allowed after the term, on petition of the libellant, who, being himself free from fraud or negligence, is the victim of what is equivalent to fraud; Hall v. Chisholm, 117 Fed. 807, 55 C. C. A. 31,

where the cases are reviewed; in this case certiorari was refused; Chisholm v. Hall, 191 U. S. 571, 24 Sup. Ct. 843, 48 L. Ed. 307.

A decree may be impeached for fraud in obtaining it, but for this purpose a bill of review is not available, being a continuance of the original litigation; an original bill must be resorted to as a new and independent litigation and it will lie pending an appeal from the original decree; Dowagiac Mfg. Co. v. Mfg. Co., 155 Fed. 524, 84 C. C. A. 38. In such case relief can be granted only on the ground of fraud in procuring the decree and not of error in granting it; McSherry Mfg. Co. v. Mfg. Co., 160 Fed. 948, 89 C. C. A. 26.

Prior to the establishment of the circuit courts of appeals there was an appeal to the United States supreme court only from final decrees of the circuit courts; U. S. Rev. Stat. § 692; and the same is still true of appeals from those courts; U. S. Rev. Stat. 1 Supp. 903; except that special provision is made for an appeal within a limited time directly to the circuit court of appeals from an order granting or refusing an interlocutory injunction or appointing a receiver, notwithstanding that an appeal from a final decree might be taken directly to the supreme court; Jud. Code § 129, U. S. Comp. St. Supp. (1911) 194. An order modifying an interlocutory decree for a broad perpetual injunction, so as to permit a limited sale of the articles of which the sale was restrained, is appealable under this act; Bissell Carpet-Sweeper Co. v. Sweeper Co., 72 Fed. 545, 19 C. C. A. 25, where the right of appeal and the different kinds of decrees in England and the United States are elaborately discussed. The omission of the word "final" in section 5 of the Act of March 3, 1891, does not extend the right of appeal to any question of jurisdiction in advance of final judgment or decree; McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. 118, 35 L. Ed. 893. Accordingly, the question what is a final decree is one of constant occurrence and importance as determining the jurisdiction of the appellate courts. The same question arises under the constitutional and statutory regulations of appeals in many of the states, although in some of them the right of appeal is not limited to final decrees; *e. g.* Delaware, where it is extended to interlocutory decrees or orders, if prayed before the first day of the following term, while it may be taken from a final decree within two years after it is signed.

Another reason why the distinction is important is that a final decree, entered of record and not directed to be without prejudice is a bar to another bill filed between the same parties for the same subject-matter; Cochran v. Couper, 2 Del. Ch. 27.

In England the question whether a decree or order is final or interlocutory is in many cases material, as affecting the right or the time of appeal, and it has been much discussed with some contrariety of opinion. In [1903] 1 K. B. 547 (C. A.), Lord Alverstone, C. J., stated "the real test" to be whether the order did in fact finally dispose of the right of the parties, without respect to what would have been the effect of the order if the case had been decided the other way, and the court of appeal unanimously so decided, following the decision in 9 Q. B. D. 62, and disapproving a later ruling in [1891] 1 Q. B. (C. A.) 734, where it was held that an order would be considered interlocutory unless "whichever way it went it would finally determine the right of the parties," and which was cited as authority in [1902] 1 Ch. 29. Subsequently it was said by Cozens-Hardy, M. R., in [1907] 2 Ch. 145, that only a short time before the full court was summoned "with a view to laying down some definite pronouncement or rule" on the question "what order is interlocutory and what is final," characterized by him as "undoubtedly one of very great difficulty," but the court had declined to do so, confining itself to the decision of the particular case, and this course he proposed to follow. In the case to which he referred, [1906] 2 K. B. 569, Collins, M. R., emphatically disapproved of "the enunciation of any general rule on the question what orders are final and what interlocutory," and considered that it should only be done by general rule of court.

In this country the same difficulty of exact definition was expressed by Mr. Justice Brown, who said that "probably no question of equity practice has been the subject of more frequent discussion in this court," and he reviewed the cases, remarking that they "are not altogether harmonious"; McGourkey v. Ry. Co., 146 U. S. 536, 13 Sup. Ct. 170, 36 L. Ed. 1079; the principal ones being also collected by Mr. Justice Blatchford in Keystone Manganese & Iron Co. v. Martin, 132 U. S. 91, 10 Sup. Ct. 32, 33 L. Ed. 275.

Where the whole law of a case is settled by a decree, and nothing remains to be done, unless a new application be made at the foot of the decree, the decree is a final one so far as respects a right of appeal; French v. Shoemaker, 12 Wall. (U. S.) 86, 20 L. Ed. 270; and so is a decree dismissing a bill with costs, although they be afterwards taxed and decree entered for them; Fowler v. Hamill, 139 U. S. 549, 11 Sup. Ct. 663, 35 L. Ed. 266; but a decree of foreclosure and sale is not final, in the sense which allows an appeal from it, so long as the amount due upon the debt must be determined, and the property to be sold ascertained and defined; North Carolina R. Co. v. Swasey, 23 Wall. (U. S.) 405, 23 L. Ed. 136; see Jones v. Davenport, 45 N. J. Eq. 77, 17 Atl. 570; nor is an order remanding a case to the state court; Joy v. Adelbert College, 146 U. S. 355, 13 Sup. Ct. 186, 36 L. Ed. 1003; but a decree for foreclosure and sale of mortgaged

premises is final and may be appealed from without waiting for the return and confirmation of the sale by a decretal order; Michoud v. Girod, 4 How. (U. S.) 503, 11 L. Ed. 1076. And so is a decree ordering the dismissal of a libel if not amended within ten days, where an appeal is taken without amending it; The Three Friends, 166 U. S. 1, 17 Sup. Ct. 495, 41 L. Ed. 897. When the finality is in doubt, and was negatived by the court below, but is claimed in the Supreme Court, the doubt will be resolved against finality; McGourkey v. Ry. Co., 146 U. S. 536, 13 Sup. Ct. 170, 36 L. Ed. 1079.

A decree fixing the priority of claims against an insolvent corporation, and directing the sale of its property for their payment, is a final decree within equity rule 88, relating to rehearings; Hoffman v. Knox, 50 Fed. 484, 1 C. C. A. 535. A decree is final which disposes of every matter of contention between the parties, except as to the amount of one severable item, not relating to appellant, and refers the case to a master to ascertain that; Hill v. R. Co., 140 U. S. 52, 11 Sup. Ct. 690, 35 L. Ed. 331.

If the decree decides the rights to property and orders it to be delivered up or sold, or adjudges a sum of money to be paid, and the party is entitled to have such decree carried into immediate execution, it is a final decree; Forgay v. Conrad, 6 How. (U. S.) 203, 12 L. Ed. 404. In such cases it is held that the decree is final upon the merits, and the ulterior proceedings, as in the foreclosure case, constitute but a mode of executing the original decree; Michoud v. Girod, 4 How. (U. S.) 503, 11 L. Ed. 1076.

The multiplicity of cases on this subject is too great for citation here, but the principle applied is illustrated by those cited, and as to a particular case the course of decisions must be critically examined. Cases will be found collected in notes to U. S. Rev. Stat. § 692 and to 2 Dan. Ch. Pr., 6th Am. ed. ch. xxvi. sec. 1. See JUDGMENT.

A consent decree binds only the consenting parties; Myllius v. Smith, 53 W. Va. 173, 44 S. E. 542; and is not binding upon the court; Ex parte Loung June, 160 Fed. 259. It cannot be modified without consent, even at the same term; Seiler v. Mfg. Co., 50 W. Va. 208, 40 S. E. 547; and the consent may be withdrawn before entry; Herold v. Craig, 59 W. Va. 353, 53 S. E. 466.

Interlocutory Decree. An adjudication or order made upon some point arising during the progress of a cause which does not determine finally the merits of the question or questions involved. Neither the courts nor the text-writers have satisfactorily defined this term. As was well said by Baldwin, J., "The difficulty is in the subject itself; for, by various gradations, the interlocutory decree may be made to approach the final decree, until the line of discrimination becomes too faint to be readily perceived." Cocke's Adm'r v. Gilpin, 1 Rob. (Va.) 27. The real matter of importance is to define what is a final decree, and that being done, it may be generally stated that every other order or decree made during the progress of a cause in chancery is interlocutory. The test which is to be derived from the cases can hardly be better stated than in a late case, thus:

Where something more than the ministerial execution of the decree as rendered is left to be done, the decree is interlocutory, and not final, even though it settles the equities of the bill; Lodge v. Twell, 135 U. S. 232, 10 Sup. Ct. 745, 34 L. Ed. 153.

As every decree *inter partes* is either final or interlocutory, all that has been said upon the former head, with the citations, must also be read in connection with this.

Decree Pro Confesso. An order or decree of a court of chancery that the allegations of the bill be taken as confessed, as against a defendant in default, and permitting the plaintiff to go on to a hearing *ex parte*.

"A decree *pro confesso* is one entered when the defendant has made default by not appearing in the time prescribed by the rules of court. A decree *nisi* is drawn by the plaintiff's counsel, and is entered by the court as it is drawn. A decree, when the bill is taken *pro confesso*, is pronounced by the court after hearing the pleadings and considering the plaintiff's equity;" Freem. Judg. § 11.

Such a decree is also entered when the defendant, having appeared, has not answered. The effect of such a decree is that the facts set forth in the bill are taken as true, and a decree made thereon according to the equity of the case. It was formerly the practice to put the plaintiff to his proof of the substance of the bill; Rose v. Woodruff, 4 Johns. Ch. (N. Y.) 547; 1 Dan. Ch. Pr., 5th Am. ed. 517, n.; but the practice of taking the bill *pro confesso* is now generally established; *id.* 518; and the subject is, in most courts of chancery, regulated by rule of court.

In such decree, in admiralty as well as in equity, the amount of damages must be ascertained from the evidence and not from the allegations of the libel or bill; Cape Fear Towing & Transp. Co. v. Pearsall, 90 Fed. 435, 33 C. C. A. 161.

The usual modern practice is substantially that provided in Equity Rules 16, 17, of the United States courts (33 Sup. Ct. xxiii). Upon motion, it appearing from the record that the facts warrant it, an *order* is entered that the bill be taken *pro confesso*, and the cause proceeds *ex parte*, and the court may proceed to a final decree after thirty days from the entry of the order.

Such a decree cannot be entered when the bill contains a great lack of precision; Marshall v. Tenant, 2 J. J. Marsh. (Ky.) 155, 19 Am. Dec. 126; but only when the allegations of the bill are specific, and the defendant

has been properly served; Harmon v. Campbell, 30 Ill. 25; Boston v. Nichols, 47 Ill. 353; Colerick v. Hooper, 3 Ind. 316, 56 Am. Dec. 505; Russell v. Lathrop, 122 Mass. 302.

When only one defendant answers, but he disproves the whole case made by the bill, a decree *pro confesso* cannot be entered against those who fail to answer; Ashby v. Bell's Adm'r, 80 Va. 811.

A decree *pro confesso* cannot be safely entered against an infant: 30 Beav. 148; Bank of U. S. v. Ritchie, 8 Pet. (U. S.) 128, 8 L. Ed. 890; Daily's Adm'r v. Reid, 74 Ala. 415; Quigley v. Roberts, 44 Ill. 503; Tucker v. Bean, 65 Me. 352; Wells v. Smith, 44 Miss. 296; Mills v. Dennis, 3 Johns. Ch. (N. Y.) 367; though this is sometimes done on consent of his solicitor; Walsh v. Walsh, 116 Mass. 377, 17 Am. Rep. 162.

Equity Rule 8 (S. C. of U. S.; 33 Sup. Ct. xxi) provides: "If a mandatory order, injunction, or decree for specific performance of any act or contract be not complied with, the court or a judge, besides, or instead of, proceedings against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done, be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him." See WRIT OF ASSISTANCE.

In Legislation. In some countries, as in France, some acts of the legislature or of the sovereign, which have the force of law are called *decrees:* as, the Berlin and Milan decrees.

DECREE NISI. In English Law. A decree for a divorce, not to take effect till after such time, not less than six months from the pronouncing thereof, as the court shall from time to time direct. During this period any person may show cause why the decree should not be made absolute; 29 Vict. c. 32, s. 3; 23 & 24 Vict. c. 144, s. 7; 2 Steph. Com. 281; Mozl. & W. Dict.

The term is also sometimes applied to a decree entered provisionally to become final at a time therein named, unless cause is shown to the contrary.

DECREPIT (Fr. *décrépit;* Lat. *decrepitus*). Infirm; disabled, incapable, or incompetent, from either physical or mental weakness or defects, whether produced by age or other cause, to such an extent as to render the individual comparatively helpless in a personal conflict with one possessed of ordinary health and strength. Hall v. State, 16 Tex. App. 11, 49 Am. Rep. 824.

DECRETAL ORDER. An order made by the court of chancery, upon a motion or petition, in the nature of a decree. 2 Dan. Ch. Pr. 638.

DECRETALES BONIFACII OCTAVI. A supplemental collection of the canon law, published by Boniface VIII. in 1298, called, also, *Liber Sextus Decretalium* (Sixth Book of the Decretals). 1 Kaufm. Mackeldey, Civ. Law 82, n. See DECRETALS.

DECRETALES GREGORII NONI. The decretals of Gregory the Ninth. A collection of the laws of the church, published by order of Gregory IX. in 1227. It is composed of five books, subdivided into titles, and each title is divided into chapters. They are cited by using an X (or *extra);* thus, *Cap.* & X *de Regulis Juris,* etc. 1 Kaufm. Mackeld. Civ. Law 83, n.; Butler, Hor. Jur. 115.

DECRETALS. Canonical epistles, written by the pope alone, or by the pope and cardinals, at the instance or suit of one or more persons, for the ordering and determining of some matter in controversy, and which have the authority of a law in themselves.

The decretals were published in three volumes. The first volume was collected by Raymundus Barcinius, chaplain to Gregory IX., about the year 1227, and published by him to be read in schools and used in the ecclesiastical courts. The second volume is the work of Boniface VIII., compiled about the year 1298, with additions to and alterations of the ordinances of his predecessors. The third volume is called the Clementines, because made by Clement V., and was published by him in the council of Vienna, about the year 1308. To these may be added the Extravagantes of John XXII. and other bishops of Rome, which, relatively to the others, are called *Novellæ Constitutiones.* Ridley's View, etc. 99, 100; 1 Fournel, *Hist. des Avocats* 194, 195.

The false decretals were forged in the names of the early bishops of Rome, and first appeared about A. D. 845-850. The author of them is not known. They are mentioned in a letter written in the name of the council of Quierzy, by Charles the Bald, to the bishops and lords of France. See Van Espen Fleury, *Droit de Canon,* by André.

The decretals constitute the second division of the *Corpus Juris Canonici.*

DECRETUM GRATIANI. A collection of ecclesiastical law made by Gratian, a Bolognese monk, in 1139-1152. It is the oldest of the collections constituting the *Corpus Juris Canonici.* 1 Kaufm. Mackeld. Civ. Law 81; 1 Bla. Com. 82; Butler, Hor. Jur. 113.

DECURIO. In Roman Law. One of the chief men or senators in the provincial towns. The *decuriones,* taken together, had the entire management of the internal affairs of their towns or cities, with powers resembling in some degree those of our modern city councils. 1 Spence, Eq. Jur. 54; Calvinus, Lex.

DEDBANA. An actual homicide or manslaughter. Toml.

DEDI (Lat. I have given). A word used in deeds and other instruments of conveyance when such instruments were made in Latin.

The use of this word formerly carried with it a warranty in law, when in a deed; for example, if in a deed it was said, "*dedi* (I have given), etc., to A B," there was a warranty to him and his heirs. But this is no longer so. 8 & 9 Vict. c. 106, s. 4. Brooke,

Abr. *Guaranty*, pl. 85. The warranty thus wrought was a special warranty, extending to the heirs of the feoffee during the life of the donor only. Co. Litt. 384 *b*; 4 Co. 81; 5 *id.* 17; 3 Washb. R. P. 671. *Dedi* is said to be the aptest word to denote a feoffment; 2 Bla. Com. 310. The future, *dabo*, is found in some of the Saxon grants. 1 Spence, Eq. Jur. 44. See GRANT.

DEDI ET CONCESSI (Lat. I have given and granted). The aptest words to work a feoffment. They are the words ordinarily used, when instruments of conveyance were in Latin, in charters of feoffment, gift, or grant. These words were held the aptest; though others would answer; Co. Litt. 384 *b*; 1 Steph. Com. 114; 2 Bla. Com. 53, 316. See COVENANT.

DEDICATION. An appropriation of land to some public use, made by the owner, and accepted for such use by or on behalf of the public. Barteau v. West, 23 Wis 416; Trustees of M. E. Church of Hoboken v. City of Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696; Smith v. City of San Luis Obispo, 95 Cal. 463, 30 Pac. 591; Brown v. Gunn, 75 Ga. 441.

The intentional appropriation of land by the owner to some proper public use, reserving to himself no rights therein inconsistent with the full exercise and enjoyment of such use. Northport Wesleyan Grove Camp Meeting Ass'n v. Andrews, 104 Me. 342, 71 Atl. 1027, 20 L. R. A. (N. S.) 976

It was unknown to the civil law; New Orleans v U. S., 10 Pet. (U. S.) 662, 9 L. Ed. 573; and is said to have been the only method of conferring certain rights on the public at common law; Post v. Pearsall, 22 Wend. (N. Y.) 425; Stevens v. Nashua, 46 N. H. 192.

It need not be by deed or in writing, but may be by act *in pais*, and the fee need not pass, since it has reference to possession and not to ownership; Benn v. Hatcher, 81 Va. 25, 59 Am. Rep 645. See cases collected in 9 L. R. A. 551, note.

Express dedication is that made by deed, vote, or declaration.

Implied dedication is that presumed from an acquiescence in the public use, or from some act of the owner which operates against him by way of estoppel *in pais;* Wood v. Seely, 32 N. Y. 116; Brown v. Manning, 6 Ohio, 298, 27 Am. Dec. 255.

To be valid it must be made by the owner of the fee; 5 B. & Ald. 454; Ward v. Davis, 3 Sandf. (N. Y.) 502; 4 Campb. 16; Forney v. Calhoun County, 84 Ala. 215, 4 South. 153; or, if the fee be subject to a naked trust, by the equitable owner; Cincinnati v. White, 6 Pet. (U. S.) 431, 8 L. Ed. 452; Williams v. Society, 1 Ohio St. 478; and to the public at large; Post v. Pearsall, 22 Wend. (N. Y.) 425; State v. Wilkinson, 2 Vt. 480, 21 Am. Dec. 560; New Orleans v. U. S., 10 Pet. (U. S.) 662, 9 L. Ed. 573; Doe v. Jones, 11 Ala. 63. The existence of a corporation as grantee is not required, as the public is an ever-existing grantee capable of taking for public use; Cincinnati v. White, 6 Pet. (U. S.) 431, 8 L. Ed. 452; Trustees of M. E. Church of Hoboken v. City of Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696; Rutherford v. Taylor, 38 Mo. 317; Town of Warren v. Town of Jacksonville, 15 Ill. 236, 58 Am. Dec. 610.

In making the appropriation, no particular formality is required, but any act or declaration, whether written or oral, which clearly expresses an intent to dedicate, will amount to a dedication, if accepted by the public, and will conclude the donor from ever after asserting any right incompatible with the public use; Washb. Easem. 133; 11 M. & W. 827; Cincinnati v. White, 6 Pet. (U. S.) 431, 8 L. Ed. 452; Post v. Pearsall, 22 Wend. (N. Y.) 450; Hobbs v. Lowell, 19 Pick. (Mass.) 405, 31 Am. Dec. 145; State v. Wilkinson, 2 Vt. 480, 21 Am. Dec 560, Trustees of Dover v. Fox, 9 B. Monr. (Ky.) 201; Mayor & Council of Macon v. Franklin, 12 Ga. 239; Missouri Institute for Education of Blind v. How, 27 Mo 211; Oswald v. Grenet, 22 Tex. 94; Smith v. City of San Luis Obispo, 95 Cal 463, 30 Pac. 591; Dobson v. Hohenadel, 148 Pa. 367, 23 Atl. 1128; Taylor v. Philippi, 35 W. Va. 554, 14 S. E. 130; Land v. Smith, 44 La. Ann. 931, 11 South. 577; Western Ry. of Alabama v. R. Co., 96 Ala. 272, 11 South. 483, 17 L. R. A. 474; Wolfe v. Town of Sullivan, 133 Ind. 331, 32 N. E. 1017; the vital principle of the dedication being the intention *(animus dedicandi)*, which must be unequivocally manifested, and clearly and satisfactorily appear; Harding v. Jasper, 14 Cal. 642; Village of White Bear v. Stewart, 40 Minn. 284, 41 N. W. 1045; Baker v. Vanderburg, 99 Mo. 378, 12 S. W. 462; Shellhouse v. State, 110 Ind. 509, 11 N. E. 484; Waugh v. Leech, 28 Ill. 491; Lee v. Lake, 14 Mich. 12, 90 Am. Dec. 220; Forney v. Calhoun County, 84 Ala. 215, 4 South. 153; Hope v. Barnett, 78 Cal 9, 20 Pac. 245; State v. Adkins, 42 Kan. 203, 21 Pac. 1069. But it must be determined from the acts and explanatory declarations of the party in connection with the surrounding circumstances; he cannot subsequently testify as to what were his real intentions; Fossion v. Landry, 123 Ind. 136, 24 N. E. 96; Lamar County v. Clements, 49 Tex. 347. If there be doubt as to whether there was a dedication to public use, or only for a temporary purpose, the intention of the owner may be proved; Lamar County v. Clements, 49 Tex. 347.

A mere acquiescence by the owner of land in its occasional and varying use for travel by the public is insufficient to establish a dedication thereof, as a street by adverse user; Com. v. R. Co., 135 Pa. 256, 19 Atl. 1051. And, without any express appropriation by the owner, a dedication may be presumed from twenty years' use of his land by the public, with his knowledge; Hoole v. Atty.

Gen., 22 Ala. 190; Noyes v. Ward, 19 Conn. 250; Larned v. Larned, 11 Metc. (Mass.) 421; Smith v. State, 23 N. J. L. 130; Green v. Oakes, 17 Ill. 249; Com. v. Cole, 26 Pa. 187; or from any shorter period, if the use be accompanied by circumstances which favor the presumption, the fact of dedication being a conclusion to be drawn, in each particular case, by the jury, who as against the owner have simply to determine whether by permitting the public use he has intended a dedication; 5 Taunt. 125; Denning v. Roome, 6 Wend. (N. Y.) 651; Irwin v. Dixion, 9 How. (U. S.) 10, 13 L. Ed. 25; State v. Hill, 10 Ind. 219; Whittaker v. Ferguson, 16 Utah, 240, 51 Pac. 980; Dimon v. People, 17 Ill. 416; 4 El. & Bl. 737. Public use of a right of way over public land for seven years is sufficient under U. S. R. S. § 2477; O'Kanogan County v. Cheetham, 37 Wash. 682, 80 Pac. 262, 70 L. R. A. 1027. But this presumption, being merely an inference from the public use, coupled with circumstances indicative of the owner's intent to dedicate, is open to rebuttal by the proof of circumstances indicative of the absence of such an intent; Bowers v. Mfg. Co., 4 Cush. (Mass.) 332; State v. Inhabitants of Strong, 25 Me. 297; Irwin v. Dixion, 9 How. (U. S.) 10, 13 L. Ed. 25; 7 C. & P. 578; City of St. Louis v. Wetzel, 110 Mo. 260, 19 S. W. 534; McKey v. Hyde Park, 134 U. S. 84, 10 Sup. Ct. 512, 33 L. Ed. 860. Mere non-user for less than the statutory period is not enough unless coupled with evidence of intention; Wood v. Hurd, 34 N. J. L. 91; Hoole v. Atty. Gen., 22 Ala. 190; 3 Bing. 447.

The statute of frauds does not apply to the dedication of lands to the public; Godfrey v. City of Alton, 12 Ill. 29, 52 Am. Dec. 476; Rees v. Chicago, 38 Ill. 338; Harding v. Jasper, 14 Cal. 642.

Before acceptance, a dedication may be revoked; Bridges v. Wyckoff, 67 N. Y. 130; San Francisco v. Canavan, 42 Cal. 541; but only when no rights of other persons intervene. The death of the owner is a revocation of a proffered dedication of streets, and an acceptance thereafter by the village gives it no right in the streets; People v. Kellogg, 67 Hun 546, 22 N. Y. Supp. 490. Where one who has offered to dedicate land for a public street, conveys such land before his offer is accepted, the conveyance operates as a revocation of the offer; Chicago v. Drexel, 141 Ill. 89, 30 N. E. 774; Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. 961.

There must be acceptance of either a common-law or a statutory dedication, either of which is incomplete without it; Schmitz v. Village of Germantown, 31 Ill. App. 284; Village of Grandville v. Jenison, 84 Mich. 54, 47 N. W. 600. The American courts differ to some extent as to whether an acceptance must be more or less formal, by some competent authority, or may be shown by general public use or indirect official recognition or both. The underlying principles are discussed in the leading case of Cincinnati v. White's Lessee, which held that no particular form or ceremony of acceptance is essential, but that "all that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation"; Cincinnati v. White, 6 Pet. (U. S.) 431, 8 L. Ed. 452; David's Heirs v. New Orleans, 16 La. Ann. 404, 79 Am. Dec. 586; Cole v. Sprowl, 35 Me. 161, 56 Am. Dec. 696; but the acts which amount to it must be plain and unequivocal; Baker v. Johnston, 21 Mich. 349. It need not be by the town or other municipal corporation, nor need it be very specific, but acts by the public at large are sufficient; Attorney General v. Abbott, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251; as the construction of sewers through land dedicated for a street, and filing liens against abutting owners; Philadelphia v. Thomas' Heirs, 152 Pa. 494, 25 Atl. 873; or general ordinance or resolution accepting all streets and parks dedicated, where land is marked as such on a recorded plat; Los Angeles v. McCollum, 156 Cal. 148, 103 Pac. 914; or sold under the description of bounding on a certain street; City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. 928, 23 Pac. 1085; but the *use* of a street by the public, to constitute acceptance, must be under a claim of right; City of Eureka v. Croghan, 81 Cal. 524, 22 Pac. 693.

Acceptance is presumed if beneficial, and this is shown by user; Abbott v. Cottage City, 143 Mass. 521, 10 N. E. 325, 58 Am. Rep. 143; Guthrie v. New Haven, 31 Conn. 308; San Francisco v. Canavan, 42 Cal. 541; Boyce v. Kalbaugh, 47 Md. 334, 28 Am. Rep. 464; Summers v. State, 51 Ind. 201. The dedication of a private way to the public without acceptance does not constitute a public way; Slater v. Gunn, 170 Mass. 509, 49 N. E. 1017, 41 L. R. A. 268; Rozell v. Andrews, 103 N. Y. 150, 8 N. E. 513; Bell v. City of Burlington, 68 Ia. 296, 27 N. W. 245; St. Louis v. University, 88 Mo. 155; Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141.

There is no established standard as to what use by the public will be sufficient to constitute an acceptance of a dedication; it is such use as would naturally follow from the character of the place; Winslow v. Cincinnati, 9 Ohio S. & C. P. Dec. 89; the use need only be such as the public needs demand; Taraldson v. Town of Lime Springs, 92 Ia. 187, 60 N. W. 658. Use by a comparatively small number of persons on foot during the summer season of a short way from a street to the seashore, being the kind of use intended by the dedicator, is sufficient; Phillips v. City of Stamford, 81 Conn. 408, 71 Atl. 361, 22 L. R. A. (N. S.) 1114; otherwise of an alley through private land, used in bringing in household supplies and removing

refuse; Brinck v. Collier, 56 Mo. 160; of a wood so grown up with brush as to be impassable by wagons and but little used; Roseuberger v. Miller, 61 Mo. App. 422; of a road to some extent for two or three weeks; Laughlin v. City of Washington, 63 Ia. 652, 19 N. W. 819; a use by a few persons only and merely for local purposes; Green v. Town of Canaan, 29 Conn. 157; and a permitted use by neighbors for hauling wagons; Fairchild v. Stewart, 117 Ia. 734, 89 N. W. 1075. Long continued use by a few persons does not necessarily show an intention on the part of the public authorities to accept the dedication; City of Rock Island v. Starkey, 189 Ill. 515, 59 N. E. 971. See Phillips v. City of Stamford, 81 Conn. 408, 71 Atl. 361, 22 L. R. A. (N. S.) 1114.

In the case of a highway, the question has been raised whether the public itself, as the body charged with the repair, is the proper party to make the acceptance. In England, it has been decided that an acceptance by the public, evidenced by mere use, is sufficient to bind the parish to repair, without any adoption on its part; 5 B. & Ad. 469; 2 N. & M. 583. In this country there are cases in which the English rule seems to be recognized; Remington v. Millerd, 1 R. I. 93; though the weight of decision is to effect that the towns are not liable, either for repair or for injuries occasioned by the want of repair, until they have themselves adopted the way thus created, either by a formal acceptance or by indirectly recognizing it, as by repairing it or setting up guide-posts therein; Thomp. Highw. 52; Page v. Town of Weathersfield, 13 Vt. 424; Com. v. Kelly, 8 Gratt. (Va.) 632; Common Council of Indianapolis v. McClure, 2 Ind. 147; Wright v. Tukey, 3 Cush. (Mass.) 290; Colbert v. Shepherd, 89 Va. 401, 16 S. E. 246; Philadelphia v. Thomas' Heirs, 152 Pa. 494, 25 Atl. 873; Gage v. R. Co., 84 Ala. 224, 4 South. 415; City of Galveston v. Williams, 69 Tex. 449, 6 S. W. 860; Rozell v. Andrews, 103 N. Y. 150, 8 N. E. 513; Bell v. City of Burlington, 68 Ia. 296, 27 N. W. 245; City of St. Louis v. University, 88 Mo. 155; Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141. It has been held that the acceptance, improvement, and user by a city of a street or a portion of a street as platted is equivalent to an acceptance of the whole tract platted; Heitz v. City of St. Louis, 110 Mo. 618, 19 S. W. 735.

The authorities on this subject relate largely to the dedication of land for a highway. Such was the subject matter in the English cases on which the doctrine rests; Dovaston v. Payne, 2 H. Bl. 527, 2 Sm. L. Cas. 1388; 11 East 376, where eight years user was held to show sufficient acceptance; and 2 Str. 909, where four years was held insufficient; while in a much litigated case six years sufficed; 18 Q. B. 870. The English cases have not shown a disposition to extend the principle of dedication except so far as to recognize it in the case of charitable uses (*q. v.*) under 43 Eliz. c. 4, or the general equity jurisdiction. There are cases of bridges; 14 East 317; 1 Man. & Gr. 392; 3 M. & S. 526; and one over a ditch; 2 Str. 1004; and a wharf or landing; 5 B. & Ald. 268; but all these are closely allied to roads or ways.

But in this country there has grown up what is often referred to as the American doctrine, greatly extending the scope and operation of the doctrine of dedication under which it is applied equally well to any other purpose which is for the benefit of the public at large, as for a square, a common, a landing, a cemetery, a school, or a monument; and the principles which govern in all these cases are the same, though they may be somewhat diversified in the application, according as they are invoked for one or another of these objects; Hunter v. Trustees of Sandy Hill, 6 Hill (N. Y.) 407; Klinkener v. School Directors of McKeesport, 11 Pa. 444; Huber v. Gazley, 18 Ohio 18; Langley v. Town of Gallipolis, 2 Ohio St. 107; Mayor, etc., of the City of Macon v. Franklin, 12 Ga. 239; Olcott v. Banfill, 4 N. H. 537; Den v. Drummer, 20 N. J. L. 86, 40 Am. Dec. 213; Rowan's Ex'rs v. Town of Portland, 8 B Monr. (Ky.) 234; Ward v. Davis, 3 Sandf (N. Y.) 502; Doe v. Town of Attica, 7 Ind 641; Gardiner v. Tisdale, 2 Wis. 153, 60 Am Dec. 407; Archer v. Salinas City, 93 Cal 43, 28 Pac. 839, 16 L. R. A. 145; Attorney General v. Abbott, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251; Board of Com'rs of Miami County v. Wilgus, 42 Kan. 457, 22 Pac. 615; Carpenteria School District v. Heath, 56 Cal. 478; Beatty v. Kurtz, 2 Pet. (U. S.) 566, 7 L. Ed. 521; State v. Wilkinson, 2 Vt. 480, 21 Am. Dec. 560; Redwood Cemetery Ass'n v. Bandy, 93 Ind. 246; Village of Mankato v. Willard, 13 Minn. 13 (Gil. 1), 97 Am. Dec. 208.

As to cases upon which rests the extension of the doctrine to large parks and cemeteries, see note in 16 Harv. L. Rev. 128.

It is usually said that land dedicated for one purpose cannot be used for another; so land dedicated for a public square cannot be used for the erection of a city hall; Church v. City of Portland, 18 Or. 73, 22 Pac. 528, 6 L. R. A. (N. S.) 259 and note.

Equity will enjoin the diversion of land from the purpose to which it was dedicated; Le Clercq v. Trustees of Town of Gallipolis, 7 Ohio, 217, pt. 1, 28 Am. Dec. 641; and the legislature cannot divert it to a different use; *id.*; but land dedicated for a specific public use may be used for other purposes reasonably in accord therewith, as modified by changed conditions and circumstances; Codman v. Crocker, 203 Mass. 146, 89 N. E. 177, 25 L. R. A. (N. S.) 980, where an act authorizing a subway under a part of Boston Common was held not a diversion of the

property from the purpose of its dedication "for the common use of the inhabitants of Boston as a training field and cow pasture."

A promise to donate land for public purposes has been enforced, as where the promisee has made improvements; L. R. 4 Ch. D. 73; Freeman v. Freeman, 43 N. Y. 34, 3 Am. Rep. 657; Neale v. Neale, 9 Wall. (U. S.) 1, 19 L. Ed. 590; or where a school house was erected on the faith of the promise; Greenwood v. School Dist. No. 4, 126 Mich. 81, 85 N. W. 241. As the inchoate right of dower is defeated by condemnation of lands to public use; see EMINENT DOMAIN; it seems to be held that dower is barred by the dedication of land to such use; Venable v. R. Co., 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68; French v. Lord, 69 Me. 537; Gwynne v. Cincinnati, 3 Ohio 24, 17 Am. Dec. 576, see 18 L. R. A. 79, note.

The doctrine of dedication has been characterized as an anomaly in our law, due to the public policy of effectuating individual action for public benefit; 21 Harv. L. Rev. 356. And again, it is said that, so far from being hampered in its application by mere technical distinctions, the doctrine was called into existence for the very purpose of escaping from technical rules and limitations. Its very vital breath and its justification for existence lie in the disregard of existing technical limitations and in recognition of the necessity for a resort to broad views. Consequently, as fast as any new subject or phase of public rights has been presented to the courts, they have never hesitated to apply the doctrine to the new situation; 16 Harv. L. Rev. 338, where it is urged that it should be extended to rights not merely of using another's real estate, but of stripping it (or having it stripped) by or for the use of the general public of portions of the soil—as of coal or oil; and it is suggested that on compliance with certain conditions, viz.: 1. Of leaving the private owners in possession and management (as in the case of a public easement acquired by dedication over a private wharf), and, 2. Of paying for the coal or oil as taken, such a dedication might be required by legislation.

A common method of dedicating land for public purposes, particularly in connection with laying out towns, is by recording plats on which are marked streets, public squares and the like, and this is held either by statute or, where there is none, at common law, to be a sufficient dedication to the public; City of Madison v. Mayers, 97 Wis. 399, 73 N. W. 43, 40 L. R. A. 635, 65 Am. St. Rep. 127; London & S. F. Bank v. City of Oakland, 90 Fed. 691, 33 C. C. A. 237; and such dedication upon a plat acknowledged and recorded of land for county buildings has been held to vest the fee in the county, although the town failed to become the county seat; Brown v. Manning, 6 Ohio, 298, 27 Am. Dec. 255. So the sale of land by plat designating streets and public squares operates as a dedication; Price v. Stratton, 45 Fla. 535, 33 South. 644; Florida E. C. R. Co. v. Worley, 49 Fla. 297, 38 South. 618; Corning & Co. v. Woolner, 206 Ill. 190, 69 N. E. 53; Marsh v. Village of Fairbury, 163 Ill. 401, 45 N. E. 236; Van Duyne v. Mfg. Co., 71 N. J. Eq. 375, 64 Atl. 149; Weisbrod v. R. Co., 18 Wis. 35, 86 Am. Dec. 743; Com. v. Beaver Borough, 171 Pa. 542, 33 Atl. 112; Baltimore v. Frick, 82 Md. 77, 33 Atl. 435; Meier v. R. Co., 16 Or. 500, 19 Pac. 610, 1 L. R. A. 856. And see 9 L. R. A. 551, note. But that it may so operate at common law there must be an acceptance by the public in a reasonable time; Village of Grandville v. Jenison, 84 Mich. 54, 47 N. W. 600.

To constitute a common-law dedication by plat requires the same certainty of description (or accuracy of indication on the plat) as in other forms of conveyance; Sanders v. Village of Riverside, 118 Fed. 720, 55 C. C. A. 240, where it is said that "a dedication is a mode of conveyance." When a plat has been altered before filing so as apparently to cut off one half of the street shown on it as originally drawn, it operates as a dedication of what remains only; Elliot v. Atlantic City, 149 Fed. 849.

An offer to dedicate, followed by public user under a claim of right, is a sufficient dedication and acceptance; Delaware, L. & W. R. Co. v. City of Syracuse, 157 Fed. 700; Cook v. Harris, 61 N. Y. 448; Kennedy v. Le Van, 23 Minn. 513; Buchanan v. Curtis, 25 Wis. 99, 3 Am. Rep. 23; Price v. Town of Breckenridge, 92 Mo. 378, 5 S. W. 20; and where the intention is clear a dedication was held complete without acceptance or user, Point Pleasant Land Co. v. Cranmer, 40 N. J. Eq. 81.

The mere making of a survey or a map of a plat, which is not recorded or exhibited to the public and upon which no lots are sold, is not a dedication of the streets thereon; Kruger v. Constable, 128 Fed. 908, 63 C. C. A. 634; and filing maps on which a street was laid out did not make such a street a public highway so far as the public was concerned; Loughman v. R. Co., 83 App. Div. 629, 81 N. Y. Supp. 1097. But filing the plat in a public repository or publishing it and selling lots by reference to it is a dedication; Kruger v. Constable, 116 Fed. 722; and if the lots are sold with reference to a plat showing streets, the purchasers are entitled to have them remain open, whether accepted by the public or not; Village of Augusta v. Tyner, 197 Ill. 242, 64 N. E. 378; Conrad v. Land Co., 126 N. C. 776, 36 S. E. 282; and so of a park; Florida E. C. R. Co. v. Worley, 49 Fla. 297, 38 South. 618. Where lots are sold bounded on an unopened street, the public has a right to the street, though there was no acceptance or user by the public; Harrington v. City of Manchester, 76 N. H. 347, 82 Atl. 716.

The sale by plat is a dedication; Cummings v. St. Louis, 90 Mo. 259, 2 S. W. 130; and acceptance is presumed from purchases by various persons; Carter v. City of Portland, 4 Or. 339; and the plat need not be acknowledged or recorded; Meier v. Ry. Co., 16 Or. 500, 19 Pac. 610, 1 L. R. A. 856. After a sale by plat there can be no revocation;

Brown v. Stark, 83 Cal. 636, 24 Pac. 162. The dedication by plat may apply either to a town site or a small tract. In the former the purchasers and the public are identical, but in the latter there may be an estoppel in favor of purchasers and no acceptance by the public; 9 Harv. L. Rev. 488; but the private rights of the purchasers cannot be enforced by the municipality; Village of Augusta v. Tyner, 197 Ill. 242, 64 N. E. 378.

With respect to the rule that the purchaser of lots by plat is entitled to have streets kept open as shown on a plat, a question may arise whether his right applies only to adjoining streets or to all streets on the plat. As to the former his right is unquestioned, and many cases hold it to be clear in the latter class; Collins v. Land Co., 128 N. C. 563, 39 S. E. 21, 83 Am. St. Rep. 720; Wolfe v. Town of Sullivan, 133 Ind 331, 32 N. E. 1017; Taylor v. Com., 29 Gratt. (Va.) 780; In re Opening of Pearl St., 111 Pa. 565, 5 Atl. 430; *contra;* 11 Ont. App. 416; Mahler v. Brunder, 92 Wis. 477, 66 N W 502, 31 L. R. A. 695; Hawley v Baltimore, 33 Md. 270; Pearson v. Allen, 151 Mass. 79, 23 N. E. 731, 21 Am. St Rep. 426.

The mere filing of a map purporting to show the original plan of a town, but never authenticated nor proved in any manner to be such, is not sufficient evidence of dedication. Terrell v Town of Bloomfield, 20 S. W. 289, 14 Ky. L. Rep. 577; but the streets of a defective plat may be dedicated to the public by conveyances made of lots according to the plat; Smith v. City of St. Paul, 72 Minn 472, 75 N W. 708.

Whether a corporation may dedicate land to a public use is a question not extensively discussed. It seems to be permitted when the dedication is for a use consistent with the object for which the charter is granted; Maywood Co. v. Village of Maywood, 118 Ill. 61, 6 N. E. 866; Mayor, etc., of Jersey City v. Banking Co., 12 N. J. Eq 547; but not otherwise; Stacy v. Hotel & Springs Co., 223 Ill. 546, 79 N. E. 133, 8 L. R. A. (N. S.) 966, and note; and a railroad may, by dedication, establish a street or road across its tracks; Northern Pac. R. Co. v. City of Spokane, 64 Fed. 506, 12 C. C. A. 246; Green v. Town of Canaan, 29 Conn. 157; Southern Pac. Co. v. City of Pomona, 144 Cal. 339, 77 Pac. 929; Central R. Co. of New Jersey v. City of Bayonne, 52 N. J. L. 503, 20 Atl. 69. A trustee of a town site located on public land (under U. S. R. S. § 2387) has no right to dedicate land for a street as against the individual occupants for whom he takes title; McCloskey v. Pacific Coast Co., 160 Fed. 794, 87 C. C. A. 568, 22 L. R. A. (N. S.) 673

Reservations, conditions and restrictions are in some cases sustained, the courts sometimes going to great lengths; Hughes v. Bingham, 185 N. Y. 347, 32 N. E. 78, 17 L. R. A. 454; 11 M. & W. 827; Bayard v. Hargrove, 45 Ga. 342; City of Morrison v. Hinkson, 87 Ill. 587, 29 Am. Rep 77; Warren v. City of Grand Haven, 30 Mich. 24; Rutherford v. Taylor, 38 Mo. 315; but the growing tendency is to hold the condition void; Trustees of M. E. Church of Hoboken v. City of Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696; 5 Q B. 26. The limitation may be sufficient to defeat the dedication by showing an absence of the *animus dedicandi;* White v. Bradley, 66 Me. 254; so the reservation of a right to revoke and devote the land to other uses was held not a good dedication; City of San Francisco v. Canavan, 42 Cal 541. See 21 Harv. L. Rev. 356, where cases on restrictions and conditions are discussed.

See STREET; HIGHWAY; PARK; BRIDGE, and a general note in 27 Am. Dec. 559.

DEDIMUS ET CONCESSIMUS (Lat. we have given and granted). Words used by the king, or where there were more grantors than one, instead of *dedi et concessi*

DEDIMUS POTESTATEM (Lat. we have given power). The name of a writ to commission private persons to do some act in the place of a judge: as, to administer an oath of office to a justice of the peace, to examine witnesses, and the like. Cowell; Com. Dig. *Chancery* (K, 3), (P, 2), *Fine* (E, 7); Dane, Abr. Index; 2 Bla. Com. 351.

DEDIMUS POTESTATEM DE ATTORNO FACIENDO (Lat.). The name of a writ which was formerly issued by authority of the crown in England to authorize an attorney to appear for a defendant, without which a party could not, until the statute of Westminster 2, appear in court by attorney. By that statute, 13 Edw. I. c. 10, all persons impleaded may make an attorney to sue for them, in all pleas moved by or against them, in the superior courts there enumerated. 3 M. & G. 184, n.

DEDITITII (Lat.). **In Roman Law.** Criminals who had been marked in the face or on the body with fire or an iron so that the mark could not be erased, and were subsequently manumitted. Calvinus, Lex.

DEDUCTION FOR NEW. The allowance (usually one-third) on the cost of repairing a damage to the ship by the extraordinary operation of the perils of navigation, the renovated part being presumed to be better than before the damage. In some parts, by custom or by express provision in the policy, the allowance is not made on a new vessel during the first year, or on a new sheathing, or on an anchor or chain-cables; 1 Phill. Ins. § 50; 2 *id.* §§ 1369, 1431; Gray v. Waln, 2 S. & R. (Pa.) 229, 7 Am Dec. 642; Fisk v. Ins. Co., 18 La. 77; Orrok v. Ins. Co., 21 Pick. (Mass.) 456, 32 Am Dec. 271; Depau v. Ins. Co., 5 Cow. (N. Y.) 63, 15 Am. Dec. 431.

DEED. A written instrument under seal, containing a contract or agreement which has been delivered by the party to be bound and accepted by the obligee or covenantee.

Co. Litt. 171; 2 Bla. Com. 295; Shepp. Touchst. 50.

A writing containing a contract sealed and delivered to the party thereto. 3 Washb. R. P. 239.

A writing under seal by which lands, tenements, or hereditaments are conveyed for an estate not less than a freehold. 2 Bla. Com. 294.

A writing or instrument, written on paper or parchment, sealed and delivered, to prove and testify the agreement of the parties whose deed it is to the things contained in the deed. American Button-Hole Overseaming S. M. Co. v. Burlack, 35 W. Va. 647, 14 S. E. 319. See Baker v. Westcott, 73 Tex. 129, 11 S. W. 157.

Any instrument in writing under seal, whether it relates to the conveyance of real estate or to any other matter,—as, for instance, a bond, single bill, agreement, or contract of any kind,—is as much a deed as is a conveyance of real estate, and, after delivery and acceptance, is obligatory. Taylor v. Glaser, 2 S. & R. (Pa.) 504; Taylor v. Morton, 5 Dana (Ky.) 365; Davis v. Brandon, 1 How. (Miss.) 154. The term is, however, often used in the latter sense above given, and perhaps oftener than in its more general signification

Deeds of feoffment. See FEOFFMENT.

Deeds of grant. See GRANT.

Deeds indented are those to which there are two or more parties who enter into reciprocal and corresponding obligations to each other. See INDENTURE.

Deeds of release or of quitclaim. See RELEASE; QUITCLAIM.

Deeds poll are those which are the act of a single party and which do not require a counterpart. See DEED POLL.

Deeds under the statute of uses. See BARGAIN AND SALE; COVENANT TO STAND SEISED; LEASE AND RELEASE.

According to Blackstone, 2 Com 313, deeds may be considered as *conveyances at common law*,—of which the original are feoffment; gift, grant; lease; exchange, partition the derivative are release; confirmation; surrender, assignment; defeasance, —or *conveyances which derive their force by virtue of the statute of uses;* namely, covenant to stand seized to uses; bargain and sale of lands; lease and release; deed to lead and declare uses; deed of revocation of uses.

For a description of the various forms in use in United States, see 2 Washb. R. P. 607.

Requisites of. Deeds must be upon *paper* or parchment; Warren v. Lynch, 5 Johns. (N. Y.) 246; must be completely written before delivery: Perminter v. McDaniel, 1 Hill (S. C.) 267, 26 Am. Dec. 179; 6 M. & W. 216, Am. ed. note; 3 Washb. R. P. 239; but see Cribben v. Deal, 21 Or. 211, 27 Pac. 1046, 28 Am. St. Rep. 746; BLANK; and filling in grantee's name after delivery in escrow is sufficient; Burk v. Johnson, 146 Fed. 209, 76 C. C. A. 567; they may be partly written and partly printed, or entirely printed; must be between competent *parties*, see PARTIES; and certain classes are excluded from holding lands, and, consequenfly, from being grantees in a deed; see 1 Washb. R. P. 73; 2 *id.* 564; must have been made without restraint; Inhabitants of Worcester v. Eaton, 13 Mass. 371, 7 Am. Dec. 155; 2 Bla. Com. 291; must contain the *names* of the grantor and grantee; Hoffman v. Porter, 2 Brock. 156, Fed. Cas. No. 6,577; Morse v. Carpenter, 19 Vt. 613; Shaw v. Loud, 12 Mass. 447; Boone v. Moore, 14 Mo. 420; Games v. Dunn, 14 Pet. (U. S.) 322, 10 L. Ed. 476; Dunn v. Games, 1 McLean 321, Fed. Cas. No. 4,176; Elliot v. Sleeper, 2 N. H. 525; but a variance in the names set forth in the deed will not invalidate it; Jenkins v. Jenkins, 148 Pa. 216, 23 Atl. 985; must relate to suitable property; Browne, Stat. Frauds § 6; 3 Washb. R. P. 331; must contain the *requisite parts*, see *infra;* must at common law be *sealed;* Sicard v. Davis, 6 Pet. (U. S.) 124, 8 L. Ed. 342; Thornt. Conv. 205; see Stanley v. Green, 12 Cal. 166; Munds v. Cassidey, 98 N. C. 558, 4 S. E. 353, 355 (*i. e.* in order to constitute it a *deed*, though an unsealed instrument may operate as a conveyance of land; Mitchell, R. P. 453; Barnes v. Multnomah County, 145 Fed. 695); and should, for safety, be *signed*, even where statutes do not require it; 3 Washb. R. P. 239; but see Newton v. Emerson, 66 Tex. 142, 18 S. W. 348. Previous to the Statute of Frauds, signing was not essential to a deed, provided it was sealed. The statute makes it so; 2 Bla. Com 306; *contra*, Shep. Touch. n. (24), Preston's ed., which latter is of opinion that the statute was intended to affect parol contracts only, and not deeds. See Wms. R. P. 152; 2 Q. B. 580. Sir F. Pollock (Contracts 171) is of opinion that a deed does not require a signature, citing 4 Ex. 631; 3 Bla. Com. 306. Where the grantor is present and authorizes another, either expressly or impliedly, to sign his name to a deed, it then becomes his deed, and is as binding upon him; Gardner v. Gardner, 5 Cush. (Mass.) 483, 52 Am. Dec. 740; Kime v. Brooks, 31 N. C. 218; Frost v. Deering, 21 Me. 158.

They must be *delivered* (see DELIVERY; ESCROW; delivery is said not to be necessary in the case of a body corporate, for the affixing of the common seal to the deed is tantamount to delivery; L. R. 2 H. L. 296); and *accepted;* Canning v. Pinkham, 1 N. H. 353; Buffum v. Green, 5 N. H. 71, 20 Am. Dec. 562; Jackson v. Bodle, 20 Johns. (N. Y.) 187; 13 Cent. L. J. 222; Richardson v. Grays, 85 Ia. 149, 52 N. W. 10; Schwab v. Rigby, 38 Minn. 395, 38 N. W. 101. A deed may be delivered by doing something and saying nothing, or by saying something and doing nothing, or it may be by both; Flint v. Phipps, 16 Or. 437, 19 Pac. 543. Deeds conveying real estate must by statute in some states be *acknowledged and recorded*; Lewis v. Herrera, 208 U. S. 309, 28 Sup. Ct. 412, 52 L. Ed. 506. See ACKNOWLEDGMENT; RECORD. In Pennsylvania this is unnecessary to its validity as between the parties; Cable v. Cable, 146 Pa. 451, 23 Atl. 223.

"A deed is irrevocable and binding on the

promisor from the moment of its delivery by him, even before any acceptance by the promisee. The promisor does not, strictly speaking, thereby create an obligation, but rather declares himself actually bound. The very object of the Anglo-Norman writing under seal was to dispense with any other kind of proof; Pollock, Contr. 7.

The requisite number of *witnesses* is also prescribed by statute in most of the states.

Formal parts. The *premises* embrace the statement of the parties, the consideration, recitals inserted for explanation, description of the property granted, with the intended exceptions. The *habendum* begins at the words "to have and to hold," and limits and defines the estate which the grantee is to have. The *reddendum*, which is used to reserve something to the grantor, see EXCEPTION; the *conditions*, see CONDITION; the *covenants*, see COVENANT; WARRANTY; and the *conclusion*, which mentions the execution, date, etc., properly follow in the order observed here; 3 Washb. R. P. 365.

The *construction* of deeds is favorable to their validity; the principal includes the incident; punctuation is not regarded; a false description does not harm; the construction is least favorable to the party making the conveyance or reservation; the *habendum* is rejected if repugnant to the rest of the deed. Shepp. Touchst. 89; 3 Kent 422. There is a tendency in the modern decisions to uphold conveyances where not clearly repugnant to some well defined rule of law; Love v. Blauw, 61 Kan. 496, 59 Pac. 1059, 48 L. R. A. 257, 78 Am. St. Rep. 334; Abbott v. Holway, 72 Me. 298; Dismukes v. Parrott, 56 Ga. 513; Uhl v. R. Co., 51 W. Va. 106, 41 S. E. 340; Sherwood v. Whiting, 54 Conn. 330, 8 Atl. 80, 1 Am. St. Rep. 116; Love v. Blauw, 61 Kan. 496, 59 Pac. 1059, 48 L. R. A. 257, 78 Am. St. Rep. 334, where an instrument conveying lands to the grantor's children, but the estate not to vest in them until the death of the grantor, was held not to be testamentary, but to be a deed presently passing an estate in remainder to the grantees, reserving a life estate to the grantor. To the same effect: Hunt v. Hunt, 119 Ky. 39, 82 S. W. 998, 68 L. R. A. 180, 7 Ann. Cas. 788.

The true test in such cases is the intention of the maker; Love v. Blauw, 61 Kan. 496, 59 Pac. 1059, 48 L. R. A. 257, 78 Am. St. Rep. 334; Nolan v. Olney, 75 Kan. 311, 89 Pac. 690, 9 L. R. A. (N. S.) 317; Hunt v. Hunt, 119 Ky. 39, 82 S. W. 998, 68 L. R. A. 180, 7 Ann. Cas. 788, where it is said to be the sounder policy in case of doubt to declare the instrument a deed, and thus make it effectual, when holding it to be testamentary would, for want of the requisite number of witnesses, render it nugatory; West v. Wright, 115 Ga. 277, 41 S. E. 602. Such an instrument was held a deed, though the delivery was made dependent upon the performance of a condition as well as upon the happening of a contingency; Hutton v. Cramer, 10 Ariz. 110, 85 Pac. 483, 103 Pac. 497, where the condition (that the grantee should give the grantor a respectable burial) was incapable of performance in the lifetime of the grantor; so in McCurry v. McCurry (Tex.) 95 S. W. 35; but a conveyance reciting that the grantee should come into possession of the property after the death of the grantor on condition that the grantee should care for the grantor as long as he should live, was held to be testamentary; Culy v. Upham, 135 Mich. 131, 97 N. W. 405, 106 Am. St. Rep. 388; in Arnegaard v. Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258, held, that if the grantor reserves the right to recall the deed, the transaction is testamentary; and so in Taft v. Taft, 59 Mich. 185, 26 N. W. 426, 60 Am. Rep. 291, it is held no valid delivery can be accomplished by the deposit of a deed with a custodian who is directed to hold it, not only until the grantor dies, but until the grantee does something on his part, and then deliver it, unless the required act is one intended to be performed or capable of performance while the grantor is yet alive.

An undelivered deed may not be proved to be a will by extrinsic evidence that it was executed with testamentary intent; Noble v. Fickes, 230 Ill. 594, 82 N. E. 950, 13 L. R. A. (N. S.) 1203, 12 Ann. Cas. 282. An instrument using words of conveyance *in praesenti* will be considered as an agreement to convey, and not a conveyance, if it is manifest that further conveyance was contemplated; Williams v. Paine, 169 U. S. 55, 18 Sup. Ct. 279, 42 L. Ed. 658, cited in Mineral Development Co. v. James, 97 Va. 414, 34 S. E. 37. The question is one of intention; Phillips v. Swank, 120 Pa. 76, 13 Atl. 712, 6 Am. St. Rep. 691; Jackson v. Moncrief, 5 Wend. (N. Y.) 26.

All the terms of a deed should be construed together; Lowdermilk Bros. v. Bostick, 98 N. C. 299, 3 S. E. 844; Bradley v. Zehmer, 82 Va. 685; St. Louis v. Rutz, 138 U. S. 226, 11 Sup. Ct. 337, 34 L. Ed. 941; and the words therein should be taken most strongly against the party using them; Douglass v. Lewis, 131 U. S. 75, 9 Sup. Ct. 634, 33 L. Ed. 53; Homer v. Schonfeld, 84 Ala. 313, 4 South. 105; where two clauses in a deed are repugnant, the first prevails; Blair v. Muse, 83 Va. 238, 2 S. E. 31; and if possible a deed should be so construed as to give it effect; Cleveland v. Sims, 69 Tex. 153, 6 S. W. 634.

"Sells" in a deed does not pass title; Taylor v. Burns, 203 U. S. 120, 27 Sup. Ct. 40, 51 L. Ed. 116.

A deed speaks from the time of its delivery, not from its date; U. S. v. Le Baron, 19 How. (U. S.) 73, 15 L. Ed. 525; District of Columbia v. Camden Iron Works, 181 U. S. 454, 21 Sup. Ct. 680, 45 L. Ed. 948; and parol evidence may be admitted to show de-

livery at a date subsequent to that shown on the face of the instrument; *id.*

The *lex rei sitæ* governs in the conveyance of lands, both as to the requisites and forms of conveyance. See LEX REI SITÆ.

Recitals in deeds of payment of the considerations expressed therein are not proof of such payments as against persons not parties thereto; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063; nor is a consideration always necessary to the validity of a deed of land; Baker v. Westcott, 73 Tex. 129, 11 S. W. 157. An alteration in the description of property in a deed cannot be made without re-execution, reacknowledgment, and redelivery, after the deed has been delivered and recorded. Moelle v. Sherwood, 148 U. S. 21, 13 Sup. Ct. 426, 37 L. Ed. 350.

In the Reading Railroad Company Receivership (1895) the court ordered the trustees to execute six original deeds, for convenience in recording, any one of which might be recorded, each to be an original, and all to constitute one deed.

The grantee in a deed is bound by its covenant, though he does not sign; Taft v. Taft, 59 Mich. 185, 26 N. W. 426, 60 Am. Rep. 291; 21 Harv. L. Rev. 587.

See DELIVERY; ESCROW; LOST INSTRUMENT; ATTESTATION; ALIENATION; ANCIENT WRITING.

DEED TO DECLARE USES. A deed made after a fine or common recovery, to show the object thereof.

DEED TO LEAD USES. A deed made before a fine or common recovery, to show the object thereof.

DEED POLL. A deed which is made by one party only.

A deed in which only the party making it executes it or binds himself by it as a deed. 3 Washb. R. P. 311.

The term is now applied in practice mainly to deeds by sheriffs, executors, administrators, trustees, and the like.

The distinction between deed poll and indenture has come to be of but little importance. The ordinary purpose of a deed poll is merely to transfer the rights of the grantor to the grantee. It was formerly called *charta de una parte*, and usually began with these words, *Sciant præsentes et futuri quod ego*, A, etc.; and now begins, "Know all men by these presents (taken from the early language of writs; 3 Holdsw. Hist. E. L. 193) that I, A B, have given, granted, and enfeoffed, and by these presents do give, grant, and enfeoff," etc. Cruise, Dig. tit. 32, c. 1, s. 23. See INDENTURE.

DEED OF SETTLEMENT. A deed formerly used in England for the formation of joint stock companies constituting certain persons trustees of the partnership property and containing regulations for the management of its private affairs. They are now regulated by articles of association.

DEEM. To decide; to judge; to sentence. When by statute certain acts are deemed to be crimes of a particular nature, they are such crimes, and not a semblance of it, nor a mere fanciful approximation to or designation of the offence. Com. v. Pratt, 132 Mass. 247.

When a thing is to be "deemed" something else, it is to be treated as that something else with the attendant consequences, but it is not that something else; 60 L. J. Q. B. 380. When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is bound to ascertain for what purpose and between what persons the statutory fiction is to be resorted to; 50 L. J. Ch. 662.

DEEMSTERS. Judges in the Isle of Man, who decide all controversies without process, writings, or any charges. They were chosen by the people, and are said by Spelman to be two in number. Spelman, Gloss.; Camden, Brit.; Cowell.

DEFACE. To mar or disfigure. It has been held that to write on a license anything, whether true or false, other than the particulars required, defaces it; 15 L. J. C. P. 18; [1895] 1 Q. B. 639.

DEFALCATION. The act of a defaulter.

The reduction of the claim of one of the contracting parties against the other, by deducting from it a smaller claim due from the former to the latter.

The law operates this reduction in certain cases, for, if the parties die or are insolvent, the balance between them is the only claim, but if they are solvent and alive, the defendant may or may not defalcate at his choice. See SET-OFF. For the etymology of this world, see Brackenbridge, Law Misc. 186. Defalcation was unknown at common law; Com. v. Clarkson, 1 Rawle (Pa.) 291.

DEFAMATION. The speaking or writing words of a person so as to hurt his good fame, *de bona fama aliquid detrahere*. Written defamation is termed libel, and oral defamation slander, which titles see. It is a term more used in England than in this country.

See LIBEL; SLANDER.

DEFAULT. The non-performance of a duty, whether arising under a contract or otherwise. In its largest and most general sense, it seems to mean failing. 1 B. & P. 258.

The non-appearance of a plaintiff or defendant at court within the time prescribed by law to prosecute his claim or make his defence.

When the plaintiff makes default, he may be nonsuited; and when the defendant makes default, judgment by default may be rendered against him. Comyns, Dig. *Pleader*, E 42, B 11. See JUDGMENT BY DEFAULT; 7 Viner, Abr. 429; *Doctr. Plac.* 208; Grah. Pr. 631.

DEFEASANCE. An instrument which defeats the force or operation of some other deed or of an estate. That which is in the same deed is called a condition; and that which is in another deed is a defeasance. Comyns, Dig. *Defeasance*.

The defeasance may be subsequent to the

deed in case of things executory; Co. Litt. 237 *a*; 2 Saund. 43; but must be a part of the same transaction in case of an executed contract; Co. Litt. 236 *b*; Lund v. Lund, 1 N. H. 39, 8 Am. Dec. 29; Swetland v. Swetland, 3 Mich. 482; Kelly v. Thompson, 7 Watts (Pa.) 401. Yet, where an instrument of defeasance is executed subsequently in pursuance of an agreement made at the time of making the original deed, it is sufficient; 2 Washb. R. P. 489; as well as where a deed and the defeasance bear different dates but are delivered at the same time; Devl. Deeds 1102; Bodwell v. Webster, 13 Pick. (Mass.) 411; Rottenbaugh v. Ludwick, 31 Pa. 131; Hale v. Jewell, 7 Greenl (Me.) 435, 22 Am. Dec. 212; Freeman v. Baldwin, 13 Ala. 246. The instrument of defeasance must *at law* be of as high a nature as the principal deed; Eaton v. Green, 22 Pick (Mass.) 526; Jaques v Weeks, 7 Watts (Pa.) 261; Kelly v. Thompson, 7 Watts (Pa.) 401; Richardson v. Woodbury, 43 Me. 206. It must recite the deed it relates to, or at least the most material part thereof; and it is to be made between the same persons that were parties to the first deed; Shaw v. Erskine, 43 Me. 371. Defeasances of deeds conveying real estate are generally subject to the same rules as deeds, as to record and notice to purchasers; Brown v Dean, 3 Wend. (N. Y.) 208; Friedley v Hamilton, 17 S. & R. (Pa.) 70, 17 Am. Dec 638; Purrington v. Pierce, 38 Me 447; but in some states actual notice is not sufficient without recording; Mich. Rev Stat. 261; Minn. Stat. at L. 1873, 34, § 23.

In equity, a defeasance could be proved by parol and a deed, absolute on its face, shown to be in legal effect a mortgage; Pearson v. Sharp, 115 Pa 254, 9 Atl. 38; but such evidence must be clear, explicit, and unequivocal, and the parol defeasance must be shown to have been contemporaneous with the deed; *id.* In Pennsylvania, all defeasances are now required to be in writing, executed as deeds and recorded within sixty days after the deed. Act of June 8, 1881.

DEFECT. A lack or absence of something essential to completeness. 66 L. J. Q. B. The want of something required by law.

In pleading, matter sufficient in law must be deduced and expressed according to the forms of law. Defects in matters of substance cannot be cured, because it does not appear that the plaintiff is entitled to recover; but when the defects are in matter of form, they are cured by a verdict in favor of the party who committed them; Robinson v. Clifford, 2 Wash. C. C. 1, Fed. Cas No. 11,948; Hunnicutt v. Carsley, 1 Hen. & M. (Va.) 153; Read v. Inhabitants of Chelmsford, 16 Pick. (Mass.) 128; Worster v. Proprietors of Canal Bridge, *id.* 541; Russell v. Slade, 12 Conn. 455; Minor v. Bank, 1 Pet. (U. S.) 76, 7 L. Ed. 47; Stanley v. Whipple, 2 McL. 35, Fed. Cas. No. 13,286; Bacon, Abr. *Verdict*, X. See Neil v. Board of Trustees, 31 Ohio St. 15; Richtmyer v. Richtmyer, 50 Barb. (N. Y.) 55; Great Western Compound Co. v. Ins. Co., 40 Wis. 373.

DEFECTUM, CHALLENGE PROPTER. See CHALLENGE.

DEFECTUM SANGUINIS. See ESCHEAT.

DEFENCE. *Torts.* A forcible resistance of an attack by force.

A man is justified in defending his person, that of his wife, children, and servants, and for this purpose he may use as much force as may be necessary, even to killing the assailant, remembering that the means used must always be proportioned to the occasion, and that an excess becomes itself an injury; 3 M. & W. 150; Jamison v. Moseley, 69 Miss. 478, 10 South. 582; People v. Bruggy, 93 Cal. 476, 29 Pac. 26; Lovett v. State, 30 Fla. 142, 11 South. 550, 17 L. R. A. 705; Kelly v. State, 27 Tex. App. 562, 11 S. W. 627; Duncan v. State, 49 Ark. 543, 6 S. W. 164; Estep v. Com., 86 Ky. 39, 4 S. W. 820, 9 Am. St. Rep. 260; but it must be in defence, and not in revenge; 1 C. & M. 214; Poll. Torts 255; State v. McGraw, 35 S. C. 283, 14 S. E. 630; for one is not justified in shooting another, if such other party is retreating or has thrown away his weapon; Meurer v. State, 129 Ind. 587, 29 N. E. 392; nor is a mere threat to take one's life, with nothing more, a sufficient defence or excuse for committing homicide; State v. Howard, 35 S. C. 197, 14 S. E. 481.

A man may also repel force by force in defence of his personal property, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, as robbery, by any force short of taking the aggressor's life; 1 Bish. New Cr. L. § 875; or short of wounding or the employment of a dangerous weapon; Com. v. Donahue, 148 Mass. 529, 20 N. E. 171, 2 L. R. A. 623, 12 Am. St. Rep. 591. In the latter case Holmes, J., said: "We need not consider whether this explanation is quite adequate. There are weighty decisions which go further than those above cited, and which can hardly stand on the right of self-defence, but involve other considerations of policy." See Powers v. People, 42 Ill App. 427.

With respect to the defence or protection of the possession of real property, although it is justifiable even to kill a person in the act of attempting to commit a forcible felony, as burglary or arson, yet this justification can only take place when the party in possession is wholly without fault; 1 Hale, Pl. Cr. 440, 444; 1 East, Pl. Cr. 259, 277. And where an illegal forcible attack is made upon a dwelling-house with the intention merely of committing a trespass, and not with any felonious intent, it is generally lawful for the rightful occupant to oppose it by

force; 7 Bing. 305; 20 Eng. C. L. 139. See, generally, 1 Chit. Pr. 589; Grotius, lib. 2, c. 1; Rutherford, Inst. b. 1, c. 16; 2 Whart. Cr. L. § 1019; Bishop; Clark; Wharton, Criminal Law; Thompson, Cases of Self-Defence; ASSAULT; SELF-DEFENCE; JUSTIFICATION.

In Pleading and Practice. The denial of the truth or validity of the complaint. A general assertion that the plaintiff has no ground of action, which is afterwards extended and maintained in the plea. 3 Bla. Com. 296; Co. Litt. 127; Wilson v. Poole, 33 Ind. 448.

In this sense it is similar to the *contestatio litis* of the civilians, and does not include justification. In a more general sense it denotes the means by which the defendant prevents the success of the plaintiff's action, or, in criminal practice, the indictment. The word is commonly used in this sense in modern practice.

Half defence was that which was made by the form "defends the force and injury, and says" (*defendit vim et injuriam, et dicit*).

Full defence was that which was made by the form "defends the force and injury when and where it shall behoove him, and the damages, and whatever else he ought to defend" (*defendit vim et injuriam quando et ubi curia considerabit, et damna et quicquid quod ipse defendere debet, et dicit*), commonly shortened into "defends the force and injury when," etc. 3 B. & P. 9, n.; Co. Litt. 127 *b*; Willes 41. It follows immediately upon the statement of appearance, "comes" (*venit*), thus: "comes and defends" By a general defence the propriety of the writ, the competency of the plaintiff, and the jurisdiction of the court were allowed; by defending the force and injury, misnomer was waived; by defending the damages, all exceptions to the person of the plaintiff; and by defending either when, etc., the jurisdiction of the court was admitted. 3 Bla. Com. 298.

The distinction between the forms of half and full defence was first lost sight of; 8 Term 633; Willes 41; 3 B. & P. 9; 2 Saund. 209 *c*; and no necessity for a technical defence exists, under the modern forms of practice.

DEFENDANT. A party sued in a personal action. The term does not in strictness apply to the person opposing or denying the allegations of the demandant in a real action, who is properly called the tenant. The distinction, however, is very commonly disregarded; and the term is further frequently applied to denote the person called upon to answer, either at law or in equity, and as well in criminal as civil suits.

See Clagget v. Blanchard, 8 Dana (Ky.) 41; Schuyler County v. Mercer County, 4 Gilman (Ill.) 20; Almy v. Platt, 16 Wis. 169; Leavitt v. Lyons, 118 Mass. 470; Com. v. Certain Intoxicating Liquors, 122 Mass. 8; 56 L. J. Ch. D. 400; Waddell v. Lanier, 54 Ala. 440.

DEFENDANT IN ERROR. The distinctive term appropriate to the party against whom a writ of error is sued out.

DEFENDARE. To answer for; to be responsible for. Medley.

DEFENDEMUS (Lat. we will defend). A word anciently used in feoffments or gifts, whereby the donor and his heirs were bound to *defend* the donee against any servitude or incumbrance on the thing granted, other than contained in the donation. Cowell.

DEFENDER. In Scotch and Canon Law. A defendant.

DEFENDER (Fr.). To deny; to defend; to conduct a suit for a defendant; to forbid; to prevent; to protect.

DEFENDER OF THE FAITH. A title originally given to the kings of England by the Pope. It was first given by Leo X. to Henry VIII. It is still part of the title.

DEFENERATION. The act of lending money on usury. Wharton.

DEFENSA. A park or place fenced in for deer, and defended as a property and peculiar for that use and service. Cowell.

DÉFENSE AU FOND EN DROIT (called, also, *défense en droit*). A demurrer. 2 Low. C. 278. See, also, 1 Low. C. 216.

DÉFENSE AU FOND EN FAIT. The general issue. 3 Low. C. 421.

DEFENSIVE ALLEGATION. In Ecclesiastical Practice. The answer of the party defending to the allegations of the party moving the cause. 3 Bla. Com. 100.

DEFENSIVE WAR. A war in defence of national right,—not necessarily defensive in its operations. 1 Kent 50.

DEFENSOR. In Civil Law. A defender; one who takes upon himself the defence of another's cause, assuming his liabilities.

An advocate in court. In this sense the word is very general in its signification, including *advocatus, patronus, procurator*, etc. A tutor or guardian. Calvinus, Lex.

In Old English Law. A guardian or protector. Spelman, Gloss. The defendant; a warrantor. Bracton.

In Canon Law. The advocate of a church. The patron. See ADVOCATUS. An officer having charge of the temporal affairs of the church. Spelman, Gloss.

DEFENSOR CIVITATIS (Lat. defender of the state). **In Roman Law.** An officer whose business it was to transact certain business of the state.

Those officers were so called who, like the tribunes of the people at first, were chosen by the people in the large cities and towns, and whose duty it was to watch over the order of the city, protect the people and the *decuriones* from all harm, protect sailors and naval people, attend to the complaints of those who had suffered injuries, and discharge various

other duties. As will be seen, they had considerable judicial power. Du Cange; Schmidt, Civ. Law, Introd. 16.

DEFENSUM. A prohibition; an enclosure. Medley, Eng. Const. Hist.

DEFERRED STOCK. See STOCK.

DEFICIT (Lat. is wanting). The deficiency which is discovered in the accounts of an accountant, or in the money which he has received.

DEFICIT, DEFICIENCY. That part of a debt which a mortgage was given to secure and not realized from the sale of the mortgaged property. Goldsmith v. Brown, 35 Barb. (N. Y.) 492. See Johnson v. McKinnon, 54 Fla. 221, 45 South. 23, 13 L. R. A. (N. S.) 874, 127 Am. St. Rep. 135, 14 Ann Cas. 180.

DEFINE. In legislation, to determine or fix. People v. Bradley, 36 Mich. 452 (as applied to boundaries). To enumerate. U. S. v. Smith, 5 Wheat. (U. S.) 160, 5 L. Ed. 57. To declare that a certain act shall constitute an offence is defining that offence; U. S. v. Arjona, 120 U. S. 488, 7 Sup. Ct. 628, 30 L. Ed. 728.

DEFINITE. Bounded; determinate; fixed. A definite failure of issue occurs when a precise time is fixed by a will for a failure of issue. An indefinite failure of issue is the period when the issue of the first taker shall become extinct and when there shall no longer be any issue of the grantee, but without reference to a particular time or event; Huxford v. Milligan, 50 Ind. 546.

DEFINITION. An enumeration of the principal ideas of which a compound idea is formed, to ascertain and explain its nature; that which denotes and points out the substance of a thing. Aylife, Pand. 59.

Definitions are always dangerous, because it is always difficult to prevent their being inaccurate, or their becoming so: *omnis definitio in jure civili periculosa est, parum est enim ut non subverti possit.*

All ideas are not susceptible of definition, and many legal terms cannot be defined This inability is frequently supplied, in a considerable degree, by descriptions

It has been said that a definition is the most difficult of all things. There is far greater probability of a correct use of terms than of a correct definition of them; a correct use renders definition unnecessary. 20 Sol. Journ 869, quoted in Thayer, Evid. 190, with a comment that legal scholarship will be best used to clarify and restate the law.

The meaning of ordinary words, when used in acts of parliament, is to be found, not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object which is intended to be attained; L. R. 1 Ex. D. 143; for words used with reference to one set of circumstances may convey an intention quite different from what the selfsame set of words used in reference to another set of circumstances would or might have produced; L. R. 3 App. Cas. 68.

"A general dictionary of the English language is not authority to show, on a trial, the meaning of a word which is relied on as deriving a peculiar meaning from mercantile usage;" 7 C. & P. 701; approved in L. R. 5 Exch. 179, 184.

The definitions of the standard lexicographers are authority as indicating the popular use of words; Burnam v. Banks, 45 Mo. 351. Regard must always be had to the circumstances under which a word is used in a statute; Pennsylvania R. Co. v. Price, 96 Pa. 267. Where inconsistent with code statutes, a definition is modified; Ellis v. Prevost, 13 La. 230. Legal definitions for the most part are generalizations derived from judicial experience. To be complete and adequate they must sum up the results of all that experience; Mickle v. Miles, 31 Pa. 21.

DEFINITIVE. That which terminates a suit; final. A definitive sentence or judgment is put in opposition to an interlocutory judgment.

A distinction has been drawn in the United States supreme court between a final and a definitive judgment in regard to the condemnation of a prize in a court of admiralty; U. S. v. The Peggy, 1 Cra. (U. S.) 103, 2 L. Ed. 49; but for all practical purposes a definitive judgment or decree is final; Appeal of Gesell, 84 Pa. 238. See DECREE; JUDGMENT.

DEFLORATION. The act by which a woman is deprived of her virginity.

When this is done unlawfully and against her will, it bears the name of rape (which see); when she consents, it is fornication (which see); or if the man be married it is adultery on his part; 2 Greenl. Ev. § 48; Com. v. Call, 21 Pick. (Mass.) 509, 32 Am Dec. 284; State v. Hutchinson, 36 Me. 261; Cook v. State, 11 Ga. 53, 56 Am. Dec. 410; Respublica v. Roberts, 2 Dall. (U. S.) 124, 1 L. Ed. 316.

DEFORCEMENT. The holding any lands or tenements to which another has a right.

In its most extensive sense the term includes any withholding of any lands or tenements to which another person has a right, Co Litt. 277; Phelps v Baldwin, 17 Conn 212, so that this includes as well an abatement, an intrusion, a disseisin, or a discontinuance, as any other species of wrong whatsoever, by which the owner of the freehold is kept out of possession. But, as contradistinguished from the former, it is only such a detainer of the freehold from him who has the right of property as falls within none of the injuries above mentioned; 3 Bla Com. 173; Archb. Civ. Pl. 13; Dane, Abr. Index

DEFORCIANT. One who wrongfully keeps the owner of lands and tenements out of the possession of them. 2 Bla. Com. 350.

DEFORCIARE. To withhold lands or tenements from the rightful owner. This is a word of art which cannot be supplied by any other word. Co. Litt. 331 *b*; 3 Thomas, Co. Litt. 3; Bract. lib. 4, 238; Fleta, lib. 5, c. 11.

DEFOSSION. The punishment of being buried alive. Black, L. Dict.

DEFRAUD. To defraud is to withhold from another that which is justly due to him, or to deprive him of a right by deception or artifice. Burdick v. Post, 12 Barb. (N. Y.) 186. It is not synonymous with "hinder and delay"; Crow v. Beardsley, 68 Mo. 435. See FRAUD.

DEFRAUDACION. In Spanish Law. The crime committed by a person who fraudulently avoids the payment of some public tax.

DEGRADATION. The act of depriving a priest of his orders or benefices or of both, either by word of mouth or by public reproach, and a solemn ceremony of stripping from the offender the vestments of his office.

The mode of proceeding in the trial of clergymen is determined by canons in the various dioceses.

The same term is applied to the loss, by a peer, of his rank as such, as when he is deprived thereof by act of parliament. 2 Steph. Com 608. Degradation must be distinguished from disqualification for bankruptcy, under stat. 34 & 35 Vict. c 50

DEGRADING. Sinking or lowering a person in the estimation of the public.

As to compelling a witness to answer questions tending to degrade him, see WITNESS; 13 Howell, St. Tr. 17, 334; 16 *id.* 161; 1 Phill Ev. 269. To write or print of a man what will degrade him in society is a libel; 1 Dowl 674; 2 M. & R. 77. See INCRIMINATION.

DEGREE (Fr. *degré*, from Lat. *gradus*, a step in a stairway; a round of a ladder).

A remove or step in the line of descent or consanguinity.

As used in law, it designates the distance between those who are allied by blood it means the relations descending from a common ancestor, from generation to generation, as by so many steps. Hence, according to some lexicographers, we obtain the word pedigree *(q. v.) par degrez* (by degrees), the descent being reckoned *par degrez* Minshew. Each generation lengthens the line of descent one degree, for the degrees are only the generations marked in a line by small circles or squares, in which the names of the persons forming it are written. See CONSANGUINITY; LINE, Ayliffe, Parerg 209; Toullier, *Droit Civ. Franc.* liv. 3, t. 1, c. 3, n. 153, Aso & M Inst. b 2, t 4, c. 3, § 1.

In criminal law, the word is used to distinguish different grades of guilt and punishment attached to the same act, committed under different circumstances, as murder in the first and second degrees.

The state or civil condition of a person. State v. Bishop, 15 Me. 122.

The ancient English statute of additions, for example, requires that in process, for the better description of a defendant, his *state, degree,* or *mystery* shall be mentioned

An honorable state or condition to which a student is advanced in testimony of proficiency in arts and sciences. See COLLEGE; DIPLOMA.

They are of pontifical origin. See 1 Schmidt, Thesaurus, 144, Vicat, *Doctores;* Minshew, Dict *Bachelor;* Merlin, *Repertoire Univ;* Van Espen. pt 1, tit. 10, Giannone, *Istoria di Napoli,* lib. xi. c. 2, for a full account of this matter.

For the degrees of negligence, see NEGLIGENCE; BAILEE; BAILMENT.

DEHORS (Fr. out of; without). Something out of the record, agreement, will, or other thing spoken of; something foreign to the matter in question. See ALIUNDE.

DEI GRATIA. By the grace of God. An expression used in the titles of sovereigns denoting a claim of authority derived from divine right. It was anciently a part of the titles of inferior magistrates and other officers, civil and ecclesiastical, but was afterwards considered a prerogative of royalty. Abbott; A M. Eaton, in Report of Am. Bar Assoc (1902) 313.

DEI JUDICIUM. See JUDICIUM DEI.

DEJACION. In Spanish Law. A general term applicable to the surrender of his property to his creditors by an insolvent. The renunciation of an inheritance The release of a mortgage upon payment, and the abandonment of the property insured to the insurer.

DEL CREDERE COMMISSION. One under which the agent, in consideration of an additional payment, engages to become surety to his principal for not only the solvency of the debtor, but the punctual discharge of the debt. 21 W. R. 465, L. R. 6 Ch. App. 397. He is liable, in the first instance, without any demand from the debtor. The principal cannot sue the *del credere* factor until the debtor has refused or neglected to pay, 1 Term 112; Paley, Ag. 39. See Pars Contr.; Story; Wharton; Mechem, Agency.

He is virtually a surety; 8 Ex. 40; and the purchaser is the primary debtor; Gindre v. Kean, 7 Misc 582, 28 N. Y. Supp. 4. He is distinguished from other agents by the fact that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them; L. R. 6 Ch. 403.

DELATE. In Scotch Law. To accuse. Bell, Dict.

DELATIO. In Civil Law. An accusation or information. Du Cange.

DELATOR. An accuser or informer. Du Cange.

DELATURA. **In Old English Law.** An accusation. Cunningham. The reward of an informer. Whishaw.

DELAWARE. The name of one of the original states of the United States of America, being the first to adopt the constitution.

In 1623, Cornelius May, with some Dutch emigrants, established a trading-house, but the settlers soon removed to North river. Ten years afterwards De Vries arrived at Cape Henlopen, but the natives shortly destroyed the settlement. In the spring of 1638 the Swedes under Minuit established a settlement at the mouth of the Minquas river, which was called by them the Christiana, in honor of their queen. They purchased all the lands from Cape Henlopen to the falls near Trenton, and named the country New Sweden. Stuyvesant, the Dutch governor of New York, ended the Swedish authority in 1654. The Dutch held the country until 1664, when it fell into the hands of the English, and was granted by Charles II. to his brother James, Duke of York. In 1682, William Penn obtained a patent from the Duke of York, releasing all his title claimed through his patent from the crown to a portion of the territory. By this grant Penn became possessed of New Castle and the land lying within a circle of twelve miles around it, and subsequently of a tract of land beginning twelve miles south of New Castle and extending to Cape Henlopen. In consequence of a dispute between Penn and Lord Baltimore, the south and west lines, dividing his possessions from Maryland, were traced in 1761, under a decree of Lord-Chancellor Hardwicke, by the surveyors Mason and Dixon, and this line, extended westward between Maryland and Pennsylvania, has become historical as *Mason and Dixon's Line* (*q. v.*).

Delaware was divided into three counties, called New Castle, Kent, and Sussex, and by enactment of Penn was annexed to Pennsylvania under the name of the Three Lower Counties upon Delaware. These counties remained for twenty years a part of Pennsylvania, each county sending six delegates to the general assembly. They separated in 1703, with the consent of the proprietary, and were governed by a separate legislature of their own, pursuant to the liberty reserved to them by a clause of their original charter.

Delaware was the first state to ratify the federal constitution, on December 7, 1787.

In 1776 a state constitution was framed, a second in 1792, and a third in 1831, which remained in force until 1897. The agitation for constitutional changes was begun before 1850, and in 1853 a convention was held and a constitution adopted which was, on submission to a popular vote, defeated. After the civil war the efforts to obtain a convention were resumed, but were unsuccessful until 1896.

The present constitution was adopted June 4, 1897, by a constitutional convention which was duly called to meet in December, 1896, delegates having been elected at the general election of that year. The constitution contains the usual declaration of rights, no change being made in that article. Minor amendments were adopted in 1913 relating to the legislative journals and the judiciary.

DELAY. To procrastinate; detain or stop; to prolong.

See HINDER AND DELAY.

As to delay in presenting checks, see CHECK.

As to delay in the execution of contract work, see NEGLIGENCE; BREACH OF CONTRACT; PERFORMANCE; TIME.

DELECTUS PERSONÆ (Lat. the choice of the person). The right of a partner to decide what new partners, if any, shall be admitted to the firm. Story, Partn. §§ 5, 195.

This doctrine excludes even executors and representatives of partners from succeeding to the state and condition of partners; Kingman v. Spurr, 7 Pick. (Mass.) 237; 3 Kent 55; Lindl. Partn. 590.

DELEGATE. One authorized by another to act in his name; an attorney.

A person elected, by the people of an organized territory of the United States, to congress, who has a seat in congress and a right of debating, but not of voting. Ord. July 13, 1787; 2 Story, U. S. Laws 2076.

A person chosen to any deliberative assembly. It is, however, in this sense generally limited to occasional assemblies, such as conventions and the like, and does not usually apply to permanent bodies, as houses of assembly, etc. In Maryland the more numerous branch of the Legislature is called the House of Delegates.

As to its meaning when used as a verb, see DELEGATION.

DELEGATION. **In Civil Law.** A kind of novation by which the original debtor, in order to be liberated from his creditor, gives him a third person, who becomes obliged in his stead to the creditor or to the person appointed by him. See NOVATION.

Perfect delegation exists when the debtor who makes the obligation is discharged by the creditor.

Imperfect delegation exists when the creditor retains his rights against the original debtor. 2 Duvergnoy, n. 169.

It results from the definition that a delegation is made by the concurrence of at least three parties, viz.: the party delegating—that is, the former debtor who procures another debtor in his stead; the party delegated, who enters into the obligation in the place of the former debtor, either to the creditor or to some other person appointed by him; and the creditor, who, in consequence of the obligation contracted by the party delegated, discharges the party delegating. Sometimes there intervenes a fourth party; namely, the person indicated by the creditor in whose favor the person delegated becomes obliged, upon the indication of the creditor and by the order of the person delegating. Pothier, Obl. pt. 3, c. 2, art. 6; Adams v. Power, 48 Miss. 454. See La. Civ. Code 2188, 2189; Kellogg v. Richards, 14 Wend. (N. Y.) 116; Buster v. Newkirk, 20 Johns. (N. Y.) 76; Wentworth v. Wentworth, 5 N. H. 410; Sterling v. Trading Co., 11 S. & R. (Pa.) 179.

The party delegated is commonly a debtor of the person delegating, and, in order to be liberated from the obligation to him, contracts a new one with his creditor. In this case there is a novation both of the obligation of the person delegating, by his giving his creditor a new debtor, and of the person delegated, by the new obligation which he contracts. Pothier, *ut supra.*

In general, where the person delegated contracts a valid obligation to the creditor, the delegant is entirely liberated, and the creditor has no recourse against him in case of the substitute's insolvency. There is an exception to this rule when it is agreed that the debtor shall at *his own risk* delegate another person; but even in that case the creditor must not have omitted using proper diligence to obtain payment whilst the substitute continued solvent. Pothier.

Delegation differs from transfer and simple indication. The transfer which a creditor makes of his debt does not include any novation. It is the original debt which passes from one of the parties, who makes the transfer to the other, who receives it, and only takes place between these two persons, without the consent of the debtor necessarily intervening. Again, when the debtor indicates to the creditor a person from whom he may receive payment of the debt, and to whom the debtor gives the creditor an order for the purpose, it is merely a mandate, and neither a transfer nor a novation. So, where the creditor indicates a person to whom his debtor may pay the money, the debtor does not contract any obligation to the person indicated, but continues the debtor of his creditor who made the indication. Pothier. See NOVATION.

At Common Law. The transfer of authority from one or more persons to one or more others.

Any person, *sui juris*, may delegate to another in authority to act for him in a matter which is lawful and otherwise capable of being delegated; Comyns, Dig. *Attorney*, c. 1; 9 Co. 75 *b*; Story, Ag. § 6.

When a bare power or authority has been given to another, the latter cannot, in general, delegate that authority, or any part of it, to a third person, for the obvious reason that the principal has relied upon the intelligence, skill, and ability of his agent, and cannot have the same confidence in a stranger; Story, Ag. § 13; 2 Kent 633; Broom, Leg. Max. 839; Shankland v. Washington, 5 Pet. (U. S.) 390, 8 L. Ed. 166; Ex parte Winsor, 3 Sto. 411, 425, Fed. Cas. No. 17,884; Entz v. Mills, 1 McMull. (S. C.) 453; Brewster v. Hobart, 15 Pick. (Mass.) 303; Wilson v. R. Co., 11 Gill & J. (Md.) 58; Mason v. Wait, 4 Scam. (Ill.) 127, 133; Smith v. Lowther, 35 W. Va. 300, 13 S. E. 999; Whitlock v. Washburn, 62 Hun 369, 17 N. Y. Supp. 60. A power to delegate his authority may, however, be given to the agent by express terms of substitution; Commercial Bank of Lake Erie v. Norton, 1 Hill (N. Y.) 505. If the power of the agent is created by writing, he cannot go beyond it; Henry v. Lane, 128 Fed. 243, 62 C. C. A. 625.

Sometimes such power is implied, as in the following cases: *First*, when, by the law, such power is indispensable in order to accomplish the end proposed: as, for example, when goods are directed to be sold at auction, and the law forbids such sales except by licensed auctioneers; Laussatt v. Lippincott, 6 S. & R. (Pa.) 386, 9 Am. Dec. 440. *Second*, when the employment of such substitute is in the ordinary course of trade: as, where it is the custom of trade to employ a shipbroker or other agent for the purpose of procuring freight and the like; 2 M. & S. 301; Gray v. Murry, 3 Johns. Ch. (N. Y.) 167; Laussatt v. Lippincott, 6 S. & R. (Pa.) 386, 9 Am. Dec. 440. *Third*, when it is understood by the parties to be the mode in which the particular thing would or might be done; 9 Ves. 234, 251, 252; 2 M. & S. 301, 303, note. See the Guiding Star, 53 Fed. 936. *Fourth*, when the powers thus delegated are merely mechanical in their nature; Commercial Bank of Lake Erie v. Norton, 1 Hill (N. Y.) 501; Sugd. Pow. 176. See PRINCIPAL AND AGENT.

As to the form of the delegation, for most purposes it may be either in writing, not under seal, or verbally without writing; or the authority may be implied. When, however, the act is required to be done under seal, the delegation must also be under seal unless the principal is present and verbally or impliedly authorizes the act; Story, Ag. § 51; Mech. Ag. 81; Gardner v. Gardner, 5 Cush. (Mass.) 483, 52 Am. Dec. 740

Judicial power cannot be delegated; Cohen v. Hoff, 3 Brev. (S. C.) 500; Fertilizer Co. v. Taylor, 112 N. C. 141, 17 S. E. 69; a statute authorizing an attorney to sit in the place of a judge who was disqualified, by reason of prejudice or interest, is void; Van Slyke v. Ins. Co., 39 Wis. 390, 20 Am. Rep. 50

Of Legislative Power. It is the general rule that legislative power cannot be delegated by the legislature to any other body or authority; Brewer Brick Co. v. Brewer, 62 Me. 62, 16 Am. Rep. 395; Farnsworth Co. v. Lisbon, 62 Me. 451; Willis v. Owen, 43 Tex. 41; Appeal of Locke, 72 Pa. 491, 13 Am. Rep. 716; State v. Wilcox, 45 Mo. 458; State v. Parker, 26 Vt. 362; Rice v. Foster, 4 Harring. (Del.) 479; Barto v. Himrod, 8 N. Y. 483, 59 Am. Dec. 506; Cooley, Const. Lim. 141; U. S. v. Bridge Co., 45 Fed. 178; City of St. Joseph v. Wilshire, 47 Mo. App. 125; see Marshall Field & Co. v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; but the taking effect of a statute may be made to depend upon some subsequent event; The Aurora v. U. S., 7 Cra. (U. S.) 382, 3 L. Ed. 378; Mayor, etc., of Baltimore v. Clunet, 23 Md. 449; Lothrop v. Stedman, 42 Conn. 583, Fed. Cas. No. 8,519.

It has often been said that it is elementary law that legislative power cannot be delegated. The difficulty is in determining what authority or discretion may be conferred on a body other than the legislature without

contravening constitutional principle. The general question was the subject of extended discussion in a case sustaining the validity of an act conferring upon railroad commissioners the power to determine what are reasonable rates for transportation; State v. Ry. Co., 38 Minn. 281, 37 N. W. 782.

In that case the court quotes from a previous decision (State v. Young, 29 Minn. 474, 9 N. W. 737) the general rule against the delegation of legislative power, as requiring the legislature to pass upon two things, the authority to make, and the expediency of, the enactment. The court then proceeds to lay down a limitation for the rule growing out of the necessity of the exercise of discretion and judgment in the exercise of certain powers. Attention is directed to the difficulty in many cases of discriminating between what is properly legislative and what may be executive or administrative duty, and it is said that, while still recognizing the difference between the departments of government, "the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry into which a court will not necessarily enter. Wayman v. Southard, 10 Wheat. (U. S.) 1, 46, 6 L. Ed. 253. The principle is repeatedly recognized by all courts that the legislature may authorize others to do things which it might properly, but cannot conveniently or advantageously, do itself. All laws are carried into execution by officers appointed for the purpose, some with more, others with less, but all clothed with power sufficient for the efficient execution of the law. These powers often necessarily involve in a large degree the exercise of discretion and judgment even to the extent of investigating and determining the facts, and acting upon and in accordance with the facts as thus found. In fact, this must be so, if the legislature is to be permitted effectually to exercise its constitutional powers. If this was not permissible, the wheels of government would often be blocked and the sovereign state find itself hopelessly entangled in the meshes of its own constitution." A number of examples are given of statutes granting discretionary powers to officers charged with the execution of the laws; power given to boards in control of public institutions to make contracts, adopt rules, etc.; the assessment of property for the purpose of taxation, the exercise of the police power in requiring and granting licenses, and the conclusion is stated in the exact words of Judge Ranney, quoted *infra*.

The decision of the Minnesota case was reversed upon grounds not affecting this general statement of the doctrine of the delegation of legislative power; Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970.

This question was elaborately considered by the supreme court in Marshall Field & Co. v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294. In this case it was held that the authority conferred by a tariff act upon the president to suspend by proclamation the free introduction of sugar, etc., when he should be satisfied that any country producing such articles imposed duties or other exactions upon agricultural or other products of the United States, did not conflict with the recognized principle that congress could not delegate its legislative power to the president. The law was complete when it was declared that the suspension should take effect upon a named contingency, the president was the mere agent to ascertain the event upon which the legislative will was to take effect. The court quotes with approval the language, often cited, of Ranney, J., in Cincinnati, W. & Z. R. Co. v. County Com'rs, 1 Ohio St. 88: "The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." Two Pennsylvania cases are quoted with approval as follows: "Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law." Moers v. City of Reading, 21 Pa. 188, 202. "To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know." The proper distinction, the court said, was this: "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be subject to inquiry and determination outside of the halls of legislation." Appeal of Locke, 72 Pa. 491, 498, 13 Am. Rep. 716.

While it is difficult to define the line which separates legislative power to make laws and and administrative authority to make regulations, congress may delegate power to fill up details where it has indicated its will in the statute, and it may make violations of such regulations punishable as indicated in the statute. Regulations of the secretary of agriculture as to grazing sheep on forest reserves have the force of law; and violation thereof is punishable under R. S. Sec. 5388; U. S. v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563. The authority given by congress to the secretary of war to prescribe rules and regulations for the use, administration, and control of canals, etc., owned or operated by the United States, is held not to be a delegation of legislative power, and rules made pursuant thereto have the force of law; U. S. v. Ormsbee, 74 Fed. 207. So authority given to the same officer to decide as to whether bridges over navigable rivers interfere with navigation is not a delegation of legislative power; Union Bridge Co. v. U. S., 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; U. S. v. City of Moline, 82 Fed. 592; and see Miller v. New York, 109 U. S. 385,

3 Sup. Ct. 228, 27 L. Ed. 971; nor is the determination of the treasury department of standards of teas that may be imported; Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525. Congress may confer upon the department of commerce and labor the power to determine the right of a Chinese person to enter the United States and may make the decision of that department conclusive on the federal courts in *habeas corpus* proceedings even where citizenship is the ground on which the right of entry is claimed; U. S. v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040.

Where the decision of questions of fact is committed by congress to the judgment of the head of a department, his decision is conclusive; and even upon mixed questions of law and fact, or of law alone, there is a strong presumption of its correctness and the courts will not ordinarily review it, although they may occasionally do so; Bates & Guild Co. v. Payne, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894, where the court refused to interfere with the decision of the postmaster general as to the postal rates to be charged on a certain publication. The findings of the land department are treated by the courts as conclusive, though such proceedings involve, to a certain extent, the exercise of judicial power; Burfenning v. R. Co., 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed 175; Johnson v. Drew, 171 U. S. 93, 18 Sup. Ct. 800, 43 L. Ed. 88 And since the land department is constituted a special tribunal with judicial functions, neither injunction nor mandamus will lie against an officer of that department to control him in discharging an official duty requiring the exercise of his judgment and discretion; U. S. v. Hitchcock, 190 U. S. 316, 23 Sup. Ct. 698, 47 L. Ed. 1074, citing Marquez v. Frisbie, 101 U. S. 473, 25 L. Ed. 800; Gaines v. Thompson, 7 Wall. (U. S.) 347, 19 L. Ed. 62; U. S. v. Black, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354; U. S. v. Windom, 137 U. S. 636, 11 Sup. Ct. 197, 34 L. Ed. 811.

There seems to be a presumption that officers of state making rules under statutory powers have not exceeded their authority; Lord Esher in (1887) 18 Q. B. Div. 383, 400.

The legislature may confer upon commissions the power to determine for what purposes, and upon what terms, conditions, and limitations, an increase of capital stock may be made by railroad corporations; State v. Ry. Co., 100 Minn. 445, 111 N. W. 289, 10 L. R. A. (N. S.) 250. It may not authorize such commission to allow an increase of capital stock for such purposes and on such terms as it may deem advisable, or in its discretion to refuse it; this being an attempt to delegate legislative power; *id.*

It may provide, in appeals from orders of the state railroad commission, that the burden of proof shall rest upon the party seeking to set aside the decision of the commissioners of showing that the order is unreasonable and unjust, and that the record shall be *prima facie* evidence that the order is just and reasonable; Chicago, R. I. & P. R. Co. v. Ry. Commission, 85 Neb. 818, 124 N. W. 477, 26 L. R. A. (N. S.) 444.

It may enact a law, complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials, within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose; State v. R. Co., 56 Fla. 617, 47 South. 969, 32 L. R. A. (N. S.) 639.

The legislature may confer upon the state auditor the right to issue licenses for bookmaking on horse races to persons of good character; State v. Williams, 160 Mo. 333, 60 S. W. 1077, may require consent of park commissioners for orations in a park; Com. v. Abrahams, 156 Mass. 57, 30 N. E. 79; or of a city committee for orations on a common; Com. v. Davis, 140 Mass. 485, 4 N. E. 577, or of the clerk of a market for the use of a stand on the street; In re Nightingale, 11 Pick. (Mass) 168, may require a permit in writing from the board of health to keep swine; Inhabitants of Quincy v. Kennard, 151 Mass. 563, 24 N. E. 860; or from the commissioners of the town to erect wooden buildings; Commissioners of Easton v. Covey, 74 Md 262, 22 Atl. 266; or from the president of the board of trustees of a municipality to beat drums in the travelled streets of a city; In re Flaherty, 105 Cal. 558, 38 Pac 981, 27 L. R. A. 529 A commission may be authorized to select and adopt a uniform series of text-books for the schools of a state; Leeper v. State, 103 Tenn. 500, 53 S. W. 962, 48 L. R. A. 167; or voting machines for use in elections; Elwell v. Comstock, 99 Minn. 261, 109 N. W. 113, 698, 7 L. R. A. (N. S.) 621, 9 Ann. Cas. 270, The McTammany Voting Machine, 23 R. I. 630, 50 Atl. 265; City of Detroit v. Board of Inspectors of Election, 139 Mich. 548, 102 N. W. 1029, 69 L. R. A. 184, 111 Am. St. Rep. 430; Lynch v. Malley, 215 Ill. 574, 74 N. E. 723, 2 Ann Cas. 837; Opinion of Justices to House of Representatives, 178 Mass. 605, 60 N. E. 129, 54 L. R. A. 430 (by a divided court). A statute authorizing measures preventive of smallpox confers authority upon a board to compel vaccination during an epidemic; Blue v. Beach, 155 Ind. 121, 56 N. E. 89, 50 L. R. A. 64, 80 Am. St. Rep. 195; and one giving general sanitary power authorizes a board to keep adulterated milk out of a city; Polinsky v. People, 73 N. Y. 65.

A provision that a boiler inspector's act shall not apply to boilers inspected by insurance companies and certified by their authorized inspectors to be safe; State v. McMahon, 65 Minn. 453, 68 N. W. 77; and an act providing that hogs shall not run at

large in a county, if the county courts on petition of voters direct that the act be enforced therein; Haigh v. Bell, 41 W. Va. 19, 23 S. E. 666, 31 L. R. A. 131; are valid.

Acts held not to be a delegation of legislative power and therefore valid, are authorizing the fish commissioners to give permits to take fish for propagation at times and by methods otherwise prohibited; People v. Brooks, 101 Mich. 98, 59 N. W. 444; requiring carriers of passengers to furnish their agents with certificates of authority to sell tickets, on which a license shall be issued by the state; State v. Corbett, 57 Minn. 347, 59 N. W. 317, 24 L. R. A. 498; authorizing a court to issue certificates of incorporation to municipalities; In re Town of Union Mines, 39 W. Va. 179, 19 S. E. 398; permitting the board of supervisors of counties to determine whether a county shall come within or remain without the provisions of an act to establish law libraries; Board of Law Library Trustees v. Board of Supervisors, 99 Cal. 571, 34 Atl. 244; providing that an act in relation to public roads shall not go into effect until recommended by the grand jury; Haney v. Bartow County Com'rs, 91 Ga. 770, 18 S. E. 28; authorizing railroad and warehouse commissioners to make a schedule of a maximum rate of charges for each railroad company in the state; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278; authorizing the union of two railroad companies and that the united company may discontinue such operations of the road as the directors deem necessary; Farnum v. R. R., 66 N. H. 569, 29 Atl. 541; authorizing railroad commissioners to regulate freights; Georgia R. R. v. Smith, 70 Ga. 694; or to make reasonable regulations for the prevention of excessive charges and unjust discrimination; Atlantic Exp. Co. v. R. Co., 111 N. C. 463, 16 S. E. 393, 18 L. R. A. 393, 32 Am. St. Rep. 805; or to fix rates; Michigan Cent. R. Co. v. Railroad Commission, 160 Mich. 355, 125 N. W. 549; Oregon R. & Nav. Co. v. Campbell, 173 Fed. 957; Southern Indiana Ry. Co v. Railroad Commission, 172 Ind. 113, 87 N. E. 966, Trustees of Village of Saratoga Springs v. Power Co., 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713; or to order a company to remove grade crossings and on its failure to do so to determine the portion of the expense thereof which is to be paid by the company, Appeal of New York & N. E. R. Co., 62 Conn. 527, 26 Atl. 122; to provide that the mayors of cities of a certain class may be elected by the people or appointed by the council as provided by ordinance; Brown v. Holland, 30 S. W. 629, 17 Ky. L. Rep. 149; to authorize park commissioners to determine where and of what material sidewalks and road beds shall be constructed; Turner v. City of Detroit, 104 Mich. 326, 62 N. W. 405; to authorize a state medical board to exercise powers of registration and examination; France v. State, 57 Ohio St. 1, 47 N. E. 1041, 38 Ohio L. J. 239.

A legislative body may delegate to an official the power to find some fact or situation on which the operation of the law is conditioned and to make and enforce regulations for enforcing the act; St. Louis Merchants' Bridge Terminal R. Co. v. U. S., 188 Fed. 191, 110 C. C. A. 63 (C. C. A. 8th). It cannot delegate its lawmaking power or its indispensable discretion to modify a statute; *id.*

Statutes declaring that railroad rates and service shall be reasonable, and creating a commission with power to investigate existing rates and service, and to fix and determine what rates and what service are reasonable, the statute then providing that the rates and service so fixed shall be in force, have been generally upheld, as a valid exercise of the legislative power; Stone v. Trust Co., 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; Reagan v. Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Georgia R. R. v. Smith, 70 Ga. 694; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St Rep. 278; Hopper v. Ry. Co., 91 Ia. 639, 60 N. W. 487; State v. R Co., 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514; Railroad Commission of Texas v. Ry. Co., 90 Tex. 340, 38 S. W. 750; Michigan Cent. R. Co. v. Railroad Commission, 160 Mich. 355, 125 N. W. 549.

The legislature may declare the general rule of law to be in force and take effect upon the subsequent establishment of the facts necessary to make it operative, or to call for its application, as the bankruptcy law of the United States with reference to legislative action regarding exemption laws existing or to be thereafter enacted; Hanover Nat. Bank v. Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113; or a law may be made to take effect conditionally, depending upon the action of the legislature of another state fixing the amount to be enacted; Phœnix Ins. Co. of New York v. Welch, 29 Kan 672; or it may be conditioned upon the legislative act of a city council; Adams v. City of Beloit, 105 Wis. 363, 81 N. W. 869, 47 L. R. A. 441; or upon action of the executive; In re Griner, 16 Wis. 424; Marshall Field & Co. v. Clark, 143 U. S 649, 12 Sup. Ct. 495, 36 L. Ed. 294; or upon judicial action involving the determination of questions of fact; In re Incorporation of Village of North Milwaukee, 93 Wis. 616, 67 N. W 1033, 33 L. R. A. 638; or upon administrative action; State v Burdge, 95 Wis. 390, 70 N. W. 347, 37 L. R. A. 157, 60 Am. St. Rep. 123; or upon a declaration of fact or the creation of a condition by vote of the electors of a municipality; State v. Hinkel, 131 Wis. 103, 111 N. W. 217.

Authority to transfer cases pending in a

territorial court to the federal courts may be delegated to a constitutional convention, upon the admission of the territory as a state; Hecht v. Metzler, 82 Fed. 340.

Acts held invalid as an improper delegation by the legislature of the police power are: An act directing the insurance commissioner to prescribe a standard policy and forbidding the use of any other; O'Neil v. Ins. Co., 166 Pa. 72, 30 Atl. 943, 26 L. R. A. 715, 45 Am. St. Rep. 650; acts authorizing insurance commissioners to adopt a printed form of fire policy with conditions indorsed thereon, which, as nearly as possible, in type and form shall conform to that adopted by another state; Dowling v. Ins. Co., 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112; Anderson v. Fire Assur. Co., 59 Minn. 182, 60 N. W. 1095, 63 N. W. 241, 28 L. R. A. 609, 50 Am. St. Rep. 400, in which it was admitted that an act similar to that of Pennsylvania would be invalid, but it was unsuccessfully contended that the legislative direction to conform as nearly as possible to a specified policy would take the case out of the principle laid down by the Pennsylvania court. So also was an act permitting a justice to put a person charged with drunkenness as a disorderly person under recognizance to take the treatment of a private corporation administering a cure for drunkenness, and providing that on reports showing compliance, he should be acquitted and discharged; Senate of Happy Home Clubs v. Board of Supervisors, 99 Mich. 117, 57 N. W. 1101, 23 L. R. A. 144.

A law providing for the adjustment of state bonds, and authorizing judges to decide which of two sections of the act should take effect, gives them legislative power and is void; State v. Young, 29 Minn. 474, 9 N. W. 737; in this case the subject was very elaborately argued, and the distinction between legislative and judicial power is very clearly stated by the court. See *supra*.

The legislature cannot leave to commissioners the power to decide in what proportion the expense of laying out and opening a public avenue should be imposed on townships of a county or wards of a city; State v. County Com'rs, 37 N. J. L. 12.

The legislature may not delegate the power to make a law prescribing a penalty, but it is competent for the legislature to authorize the railroad commission to prescribe duties upon which the law may operate in imposing a penalty and in effectuating the purpose designed in enacting the law. Where a penalty is imposed by law, it may be incurred for the penal violation of a rule prescribed by the railroad commission within their express authority; State v. R. Co., 56 Fla. 617, 47 South. 969, 32 L. R. A. (N. S.) 639, where the commissioners adopted a rule that all railroads would be liable to the shipper to a charge of $1 per day for detaining cars. Such a charge was held not a penalty, but a monetary obligation incurred for breach of duty that may be enforced by the shipper.

Congress may not delegate its general legislative power to the District of Columbia; Stoutenburgh v. Hennick, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 637; nor its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts with a view to making orders in a particular matter within the rules laid down by the congress; Interstate Commerce Commission v. Transit Co., 224 U. S. 215, 32 Sup. Ct. 436, 56 L. Ed. 729, citing Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; Union Bridge Co. v. U. S., 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; U. S. v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563.

Leaving to the interstate commerce commission the carrying out of details in the exercise of its discretion is not a delegation of legislative authority; Interstate Commerce Commission v. Transit Co., 224 U. S. 194, 32 Sup. Ct. 436, 56 L. Ed. 729. The commission may require common carriers to adopt a uniform system of accounting and bookkeeping and to make annual reports embracing not only their joint rail and water business, but the other business of the carriers as well, such as their port to port business, both intrastate and interstate, and the business of operating amusement parks; Interstate Commerce Commission v. Transit Co., 224 U. S. 194, 32 Sup. Ct. 436, 56 L. Ed. 729.

It is said that the power vested in boards of health to forbid by general regulations the exercise within their respective towns of any trade which is a nuisance is in its nature quasi-judicial. Its exercise requires the officers charged with the duty to use their discretion and judgment in adjudicating on the subject-matter. This is the decisive test that the authority vested in them is judicial and not ministerial merely; Belcher v. Farrar, 8 Allen (Mass.) 325. In Nelson v. State Board of Health, 186 Mass. 330, 71 N. E. 693, it is said there are two classes of regulations—the general and the special. The general regulations are said to be quasi-legislative, while those regarding a particular case are termed quasi-judicial. Where commissioners determined that sawdust from a particular mill might not be discharged into a stream because of injury to fish therein, the court held the commissioners' order to be a legislative one and so valid without notice or hearing; Com. v. Sisson, 189 Mass. 247, 75 N. E. 619, 1 L. R. A. (N. S.) 752, 109 Am. St. Rep. 630. Since the decision in this case, a Massachusetts Act requires commissioners before mak-

ing an order forbidding the discharge of sawdust into a stream, to give notice thereof and a hearing thereon and giving to persons aggrieved thereby a right of appeal to the superior court sitting in equity. See 20 Harv. L. R. 116, where the query is made: Have the commissioners become judicial since the passage of the Act?

Power may be conferred upon a state officer, as such, to execute a duty imposed under an act of congress; Dallemagne v. Moisan, 197 U. S. 169, 25 Sup. Ct. 422, 49 L. Ed. 709.

The legislature may delegate to a commission the power to determine the boundaries of the sections of a city in which buildings of different heights as determined by the legislature shall be erected; Welch v. Swasey, 193 Mass. 364, 79 N. E. 745, 118 Am. St. Rep. 523, 23 L. R. A. (N. S.) 1160; it may confer upon examining boards appointed by the mayors in certain cities in the state, the power to examine plumbers as to their fitness; People v. Warden of City Prison, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718; but it cannot delegate to a board authority to require a knowledge of embalming as a condition to receiving an undertaker's license; Wyeth v. Board of Health, 200 Mass. 474, 86 N. E. 925, 128 Am. St. Rep. 439, 23 L. R. A. (N. S.) 147. See MUNICIPAL CORPORATION.

It may empower the courts on the application of local authorities and, after notice to railway companies, to order that gates be erected at the intersection of a railroad and a street: People v. R. Co., 134 N. Y. 506, 31 N. E. 873.

Sir F. Pollock (First Book of Jurisp. 244) points out the difference in constitutional law between delegated and devolved, applying the latter term, for instance, to the powers given by parliament to the legislatures of British colonies which are plenary within the appointed limits, such a legislature not being "a mere delegate or agent of the imperial parliament."

As to the delegation of power by directors of a corporation to an executive committee, or of a bank to its executive officers, see DIRECTORS; NATIONAL BANK; OFFICER; CASHIER.

As to the delegation of legislative power in the government of the Philippine Islands, see PHILIPPINES.

As to questions relating to the submission of legislation to a popular vote, see LEGISLATIVE POWER, and see also INITIATIVE, REFERENDUM, AND RECALL.

DÉLESTAGE. In French Marine Law. A discharging of ballast from a vessel.

DELIBERATE. To examine, to consult, in order to form an opinion. Thus, a jury deliberate as to their verdict.

DELIBERATION. The act of the understanding by which a party examines whether a thing proposed ought to be done or not to be done, or whether it ought to be done in one manner or another.

The deliberation relates to the end proposed, to the means of accomplishing that end, or to both. It is a presumption of law that all acts are done with due deliberation,—that the party intended to do what he has done. But he may show the contrary. In contracts, for example, he may show that he has been taken by surprise; and when a criminal act is charged, he may prove that it was an accident and not with deliberation,—that, in fact, there was no intention or will. See 18 Am. Dec. 778, n.

By the use of this word in describing the crime of murder in the first degree, the idea is conveyed that the perpetrator weighs the motives for the act, and its consequences, the nature of the crime, or other things connected with his intentions, with a view to a decision thereon, that he carefully considers all these, and the act is not suddenly committed; State v. Boyle, 28 Ia. 524. See State v. Wieners, 66 Mo. 13; Nye v. People, 35 Mich. 16; INTENT; MURDER; MALICE; COOLING TIME; WILL.

In Legislation. Counsel or consultation touching some business in an assembly having the power to act in relation to it.

DELICT. **In Civil Law.** The act by which one person, by fraud or malignity, causes some damage or tort to some other.

In its most enlarged sense, this term includes all kinds of crimes and misdemeanors, and even the injury which has been caused by another, either voluntarily or accidentally, without evil intention. But more commonly by delicts are understood those small offences which are punished by a small fine or a short imprisonment.

Private delicts are those which are directly injurious to a private individual.

Public delicts are those which affect the whole community in their hurtful consequences.

Quasi delicts are the acts of a person, who, without malignity, but by an inexcusable imprudence, causes an injury to another Pothier, Obl. n. 116; Erskine, Pr. 4 4. 1.

DELICTUM (Lat.). A crime or offence; a tort or wrong, as in actions *ex delicto*. 1 Chit. Pl. A challenge of a juror *propter delictum* is for some crime or misdemeanor that affects his credit and renders him infamous. 3 Bla. Com. 363; 2 Kent 241. Some offence committed or wrong done. 1 Kent 552; Cowp. 199, 200. A state of culpability. Occurring often, in the phrase *"in pari delicto melior est conditio defendentis."* So, where both parties to a broken contract have been guilty of unlawful acts, the law will not interfere, but will leave them *in pari delicto*. 2 Greenl. Ev. § 111.

DELIMIT. To mark or lay out the limits or boundary line of a territory or country.

DELINQUENT. One who has been guilty of some crime, offence, or failure of duty.

DELIRIUM FEBRILE. In Medical Jurisprudence. A form of mental aberration incident to febrile disease, and sometimes to the last stages of chronic diseases.

The aberration is mostly of a subjective character, maintained by the inward activity of the mind rather than by outward impressions "Regardless of persons or things around him, and scarcely capable of recognizing them when aroused by his attendants, the patient retires within himself, to dwell upon the scenes and events of the past, which pass before him in wild and disorderly array, while the tongue feebly records the varying impressions, in the form of disjointed, incoherent discourse, or of senseless rhapsody" Ray, Med Jur. 346 It comes on gradually, being first manifested by talking while asleep, and by a momentary forgetfulness of persons and things on waking Fully aroused, however, the mind becomes clear and tranquil, and so continues until the return of sleep, when the same incidents recur. Gradually the mental disorder becomes more intense, and the intervals between its returns of shorter duration, until they disappear altogether. Occasionally the past is revived with wonderful vividness, and acquirements are displayed which the patient, before his illness, had entirely forgotten Instances are related of persons speaking in a language which, though acquired in youth, had long since passed from their memory. See the definition of delirium by Bland, Ch, in Owing's case, 1 Bland, (Md) Ch 386, 17 Am Dec. 311.

The only acts which are liable to be affected by delirium are wills, which are often made in the last illness during the periods when the mind is apparently clear Under such circumstances it may be questioned whether the apparent clearness was or was not real, and it is a question not always easily answered. In the early stages of delirium the mind may be quite clear no doubt, in the interval, while it is no less certain that there comes a period at last when no really lucid interval occurs and the mind is reliable at no time The person may be quiet, and even answer questions with some degree of pertinence, while a close examination would show the mind to be in a dreamy condition and unable to appreciate any nice relations In all these cases the question to be met is, whether the delirium which confessedly existed before the act left upon the mind no trace of its influence; whether the testator, calm, quiet, clear, and coherent as he seemed, was not quite unconscious of the nature of the act he was performing The state of things implied in these questions is not fanciful. In every case it may possibly exist, and the questions must be met

After obtaining all the light which can be thrown on the mental condition of the testator by nurses, servants, and physicians, then the character of the act itself and the circumstances which accompany it require a careful investigation If it should appear that the mind was apparently clear, and that the act was a rational act rationally done, consistent one part with another, and in accordance with wishes or instructions previously expressed, and without any appearance of foreign influence, then it would be established. A different state of things would to that extent raise suspicion and throw discredit on the act. Yet at the very best it will occasionally happen, so dubious sometimes are the indications that the decision will be largely conjectural. 1 Hagg Eccl. 146, 256, 502, 577, 2 *id.* 142; 3 *id* 790; 1 Lee Eccl. 139, 2 *id.* 229. See INSANITY.

DELIRIUM TREMENS (called, also, *mania-a-potu*). **In Medical Jurisprudence.** A form of mental disorder, usually accompanied by tremor, incident to habits of intemperate drinking, which generally appears as a sequel to a period of unusual excess or after a few days' abstinence from stimulating drink. It may also be caused in intemperate subjects by an accident, fright, or acute inflammatory disease, such as pneumonia.

The nature of the connection between this disease and abstinence is not yet clearly understood. Where the former succeeds a broken limb, or any other severe accident that confines the patient to his bed and obliges him to abstain, it would seem as if its development were favored by the constitutional disturbance then existing In other cases, where the abstinence is apparently voluntary, there is some reason to suppose that it is really the incubation of the disease, and not its cause.

Its approach is generally indicated by a slight tremor and faltering of the hands and lower extremities, a tremulousness of the voice, a certain restlessness and sense of anxiety which the patient knows not how to describe or account for, disturbed sleep, and impaired appetite These symptoms having continued two or three days, at the end of which time they have usually increased in severity, the patient ceases to sleep altogether, and soon becomes delirious at intervals After a while the delirium becomes constant, as well as the utter absence of sleep. There is usually an elevation of temperature of two or three degrees This state of watchfulness and delirium continues three or four days, when, if the patient recover, it is succeeded by sleep, which at first appears in uneasy and irregular naps, and lastly in long, sound, and refreshing slumbers. If sleep does not supervene about this time, the disease may prove fatal

The mental aberration of delirium tremens is marked by some peculiar characters Almost invariably the patient manifests feelings of fear and suspicion, and labors under continual apprehensions of being made the victim of sinister designs and practices. He imagines that people have conspired to rob and murder him, and insists that he can hear them in an adjoining room arranging their plans and preparing to rush upon him, or that he is forcibly detained and prevented from going to his own home. One of the most common hallucinations in this disease is that of constantly seeing devils, snakes, or vermin around him and on him Under the influence of the terrors inspired by these notions, the wretched patient often endeavors to cut his throat, or jump out of the window, or murder his wife, or some one else whom his disordered imagination identifies with his enemies

Delirium tremens must not be confounded with other forms of mental derangement which occur in connection with intemperate habits. Hard drinking may produce a paroxysm of maniacal excitement, or a host of hallucinations and delusions, which disappear after a few days' abstinence from drink and are succeeded by the ordinary mental condition In U. S. v. McGlue, 1 Curt cc 1, Fed. Cas. No. 15,679, for instance, the prisoner was defendant on the plea that the homicide for which he was indicted was committed in a fit of delirium tremens There was no doubt that he was laboring under some form of insanity, but the fact, which appeared in evidence, that his reason returned before the recurrence of sound sleep, rendered it very doubtful whether the trouble was delirium tremens, although in every other respect it looked like that disease

By repeated decisions the law has been settled in this country that delirium tremens annuls responsibility for any act that may be committed under its influence: provided, of course, that the mental condition can stand the tests applied in other forms of insanity. The law does not look to the remote causes of the mental affection; and the rule on this point is, that if the act is not committed under the immediate influence of intoxicating drinks, the plea of insanity is not invalidated by the fact that it is the result of drinking at some previous time. Such drinking may be morally wrong; but the same may be said of other vicious indulgences which give rise to much of the insanity which exists in the world; Whart. Cr. L § 48; Beasley v. State, 50 Ala. 149, 20 Am. Rep 292; Cluck v. State, 40 Ind. 263; Roberts v. People, 19 Mich. 401; Carter v. State, 12 Tex. 500, 62 Am. Dec. 539; Fisher v. State, 64 Ind.

435; U. S. v. McGlue, 1 Curt. cc. 1, Fed. Cas. No. 15,679; U. S. v. Drew, 5 Mas. 28, Fed. Cas. No 14,993, State v. Wilson, Ray, Med. Jur. 520; State v. Harrigan, 9 Houst. (Del.) 369, 31 Atl. 1052; Ayres v State (Tex.) 26 S. W. 396. In England, the existence of delirium tremens has been admitted as an excuse for crime for the same reasons; Reg v. Watson and Reg v. Simpson, 2 Tayl. Med Jur. 599, 14 Cox, Cr. Cas 565. In the case of Birdsall, 1 Beck, Med. Jur. 808, it was held that delirium tremens was not a valid defence, because the prisoner knew, by repeated experience, that indulgence in drinking would probably bring on an attack of the disease, see also in Roberts v. People, 19 Mich. 401. See DRUNKENNESS.

DELIVERANCE. In Practice. A term used by the clerk in court to every prisoner who is arraigned and pleads *not guilty*, to whom he wishes a good *deliverance*. In modern practice this is seldom used.

DELIVERY. The transfer of a deed from the grantor to the grantee, or some person acting in his behalf, in such a manner as to deprive the grantor of his right to recall it at his option.

An *absolute* delivery is one which is complete upon the actual transfer of the instrument from the possession of the grantor.

A *conditional* delivery is one which passes the deed from the possession of the grantor, but is not to be completed by possession in the grantee, or a third person as his agent, until the happening of a specified event. A delivery in this manner is an *escrow (q. v.)*.

No particular form is required to effect a delivery. It may be by acts merely, by words merely, or by both combined; but in all cases an intention that it shall be a delivery must exist; Com. Dig. *Fait* (A); 6 Sim. 31; Lindsay v. Lindsay, 11 Vt. 621; Arrison v. Harmstead, 2 Pa. 191; Verplank v. Sterry, 12 Johns. (N. Y.) 536, 7 Am. Dec. 348; Mills v. Gore, 20 Pick. (Mass.) 28; Hughes v. Easten, 4 J. J. Marsh. (Ky.) 572, 20 Am. Dec. 230; Hayes v. Boylan, 141 Ill. 400, 30 N. E. 1041, 33 Am. St. Rep. 326; Nazro v. Ware, 38 Minn. 413, 38 N. W. 359; Stellian v. Bank, 69 Tex. 513, 6 S. W. 623; Flint v. Phipps, 16 Or. 437, 19 Pac. 543. The unconditional delivery of a deed to a third person for the use of a lunatic grantee, not under guardianship, followed by circumstances indicating acceptance by the grantee, is valid; Campbell v. Kuhn, 45 Mich. 513, 8 N. W. 523, 40 Am. Rep. 479. "Anything which signifies the intention of the grantor to part with his control or dominion over the paper, so that it may become a muniment of title in the grantee, operates as a legal delivery. With respect to the measure of proof required, a difference is recognized in the cases depending upon the character of the deed, whether it be voluntary or made to give effect to a sale. In the former case the intention to part with the control of the deed is not presumed and a delivery must be proved strictly. . . . But if the conveyance be for a valuable consideration and absolute on its face, the intention to consummate the conveyance by the delivery of the deed as a muniment of title is inferred from the grantor's parting with the possession of it, whether it be to the grantee directly or to some third person—if he part with it without any condition or reservation." Bates, Ch., in Jamison v. Craven, 4 Del. Ch. 326. In the absence of direct evidence, the delivery of a deed will be presumed from the concurrent acts of the parties recognizing a transfer of title; Gould v. Day, 94 U. S. 405, 24 L. Ed. 232; Turner v. Warren, 160 Pa. 336, 28 Atl. 781; Williams v. Williams, 148 Ill. 426, 36 N. E. 104. So long as a deed is within the control and subject to the dominion of the grantor, there is no delivery, without which there can be no deed; Byars v. Spencer, 101 Ill. 429, 40 Am. Rep. 212; Lang v. Smith, 37 W. Va 725, 17 S. E. 213. The possession of a deed by the grantee therein, is *prima facie* evidence of its delivery; Campbell v. Carruth, 32 Fla. 264, 13 South. 432; McClellan v. Zwingli, 70 Hun 600, 24 N. Y. Supp. 371; Lewis v. Watson, 98 Ala. 479, 13 South. 570, 22 L. R. A. 297, 39 Am St. Rep. 82. The deed of a corporation was said to be delivered by affixing the corporate seal; Co. Litt. 22, n., 36, n.; Cro. Eliz 167; 2 Rolle, Abr. *Fait* (I); L. R. 2 H. L. 296.

It may be made by an agent as well as by the grantor himself; Hatch v. Hatch, 9 Mass. 307, 6 Am. Dec. 67; Belden v. Carter, 4 Day (Conn.) 66, 4 Am. Dec. 185; 5 B. & C. 671; or to an agent previously appointed; Western R. Corp v. Babcock, 6 Metc. (Mass.) 356; or subsequently recognized; Turner v. Whidden, 22 Me. 121; Shirley's Lessee v. Ayres, 14 Ohio, 307, 45 Am. Dec 546; but a subsequent assent on the part of the grantee will not be presumed; Hulick v. Scovil, 4 Gilman (Ill.) 177; Canning v. Pinkham, 1 N. H. 353; Church v. Gilman, 15 Wend. (N. Y.) 656, 30 Am Dec. 82. Where a father in purchasing land has the deed executed in the name of his minor son, the delivery of the deed to the father is sufficient delivery to the son; Hall v. Hall, 107 Mo. 101, 17 S. W. 811.

The delivery of a deed to a third person for the grantee's benefit, followed by an assertion of title by the grantee, is a good delivery; Huenni v. Bleisch, 146 Ill. 262, 34 N. E. 153; as is also such a delivery where the third person is to be custodian, but where the deed is not to go into force until after the grantor's death; Campbell v. Morgan, 68 Hun 490, 22 N. Y. Supp. 1001.

The cases holding that a deed delivered to a third person to take effect on the death of the grantor is valid are collected by Mr. Jones in his work on Real Property, vol. 2, § 1234; see also Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300; Gish v. Brown, 171 Pa. 479, 33 Atl. 60; Baker v. Baker, 159 Ill.

894, 42 N. E. 867; Benzler v. Rieckhoff, 97 Ia. 75, 66 N. W. 147; Haeg v. Haeg, 53 Minn. 33, 55 N. W. 1114; Hutton v. Cramer, 10 Ariz. 110, 85 Pac. 483, 103 Pac. 497; and there are authorities which uphold such transfers even though the grantor reserves a right to recall the deed at any time before his death, provided he does not do so; Belden v. Carter, 4 Day (Conn.) 66, 4 Am. Dec. 185; but it is held that these cases are indefensible on principle, and that such a transaction is testamentary; Arnegaard v. Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258; Phelps v. Pratt, 225 Ill. 85, 80 N. E. 69, 9 L. R. A. (N. S.) 945. Actual delivery passes title, and such title is thereafter as much beyond the control of the grantor as though he had never owned the land; *id.*; Arnegaard v. Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258, citing Connard v. Colgan, 55 Ia. 528, 8 N. W. 351; Seibel v. Rapp, 85 Va. 28, 6 S. E. 478; Douglas v. West, 140 Ill. 455, 31 N. E. 105. For this reason it has been held that the declarations of the grantor subsequent to an alleged delivery are not competent to impeach it. If he has in fact transferred the title, he cannot, by his unsworn declarations made in his own interest, in effect lay the foundation for securing a restoration of the title without the act or even consent of the grantee; Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; Blight v. Schenck, 10 Pa. 285, 51 Am. Dec. 478.

When the maker of a deed parts with the possession of it to anybody, there is a presumption that it was delivered; and it is for the maker to show that it was delivered in escrow; Robbins v. Rascoe, 120 N. C. 79, 26 S. E. 807, 38 L. R. A. 238, 58 Am. St. Rep. 774. As to delivery to a third person to take effect on the grantor's death, some of the cases proceed on the theory that the fee does not pass to the grantee until the delivery of the deed to him, and that then his title relates back to the original delivery. But the better rule is said to be that the deed is immediately operative as against the grantor, and that the condition that delivery to the grantee shall not be made until after the grantor's death is equivalent to the reservation of a life estate in his favor in the land itself; Arnegaard v. Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258. In Taft v. Taft, 59 Mich. 185, 26 N. W. 426, 60 Am. Rep. 291, it is said a deed of conveyance in present terms is inconsistent with the retention of a life estate, and from the time when the deed is delivered as a conveyance the whole title goes with it and becomes irrevocable.

To complete a delivery, acceptance must take place, which may be presumed from the grantee's possession; Clarke v. Ray, 1 Har. & J. (Md.) 319; Ward v. Lewis, 4 Pick. (Mass.) 518; Canning v. Pinkham, 1 N. H. 353; Southern Life Ins. & Trust Co. v. Cole, 4 Fla. 359; Pitts v. Sheriff, 108 Mo. 110, 18 S. W. 1071; from the relationship of a person holding the deed to the grantee; Bryan v. Wash, 2 Gilman (Ill.) 557; Souverbye v. Arden, 1 Johns. Ch. (N. Y.) 240; Methodist Episcopal Church v. Jaques, 1 Johns. Ch. (N. Y.) 456; and from other circumstances; Merrills v. Swift, 18 Conn. 257, 46 Am. Dec. 315; McKinney v. Rhoads, 5 Watts (Pa.) 343. The execution and recording of a deed, and delivery of it to the register for that purpose, do not vest the title in the grantee; he must first ratify these acts; Younge v. Guilbeau, 3 Wall. (U. S.) 636, 18 L. Ed. 262; Maynard v. Maynard, 10 Mass. 456, 6 Am. Dec. 146; Hutton v. Smith, 88 Ia. 238, 55 N. W. 326; but see Glaze v. Ins. Co., 87 Mich. 349, 49 N. W. 595; but they are *prima facie* evidence of delivery; Kille v. Ege, 79 Pa. 15; Davis v. Garrett, 91 Tenn. 147, 18 S. W. 113; Fenton v. Miller, 94 Mich. 204, 53 N. W. 957; Knox v. Clark, 15 Colo. App. 356, 62 Pac. 334.

Ratification of the Recording of an Undelivered Deed. An undelivered deed wrongfully recorded passes no title; Calhoun County v. Emigrant Co., 93 U. S. 124, 23 L. Ed. 826; Gulf Coal & Coke Co. v. Coal & Coke Co., 145 Ala. 228, 40 South. 397; Everts v. Agnes, 6 Wis. 453; Smith v. Bank, 32 Vt. 341, 76 Am. Dec. 179; but a deed secured by the grantee and placed on record without delivery may be ratified by the grantor by treating the property as belonging to the grantee, and inducing him to assert title under the belief that he has the title; Phelps v. Pratt, 225 Ill. 85, 80 N. E. 69, 9 L. R. A. (N. S.) 945; such a delivery was held to have been ratified by the grantor where he had notice of the recording and remained quiet for several years; McNulty v. McNulty, 47 Kan. 208, 27 Pac. 819; Pittman v. Softley, 64 Ill. 155; and where he received and retained the purchase money or a portion thereof; Harkness v. Cleaves, 113 Ia. 140, 84 N. W. 1033; and where the grantor assents to the grantee's raising money to be secured by a mortgage upon the property; Lyman v. Smith, 4 Lack. Leg. News (Pa.) 207; to the same effect, Mays v. Shields, 117 Ga. 814, 45 S. E. 68, where it is said the grantor cannot recognize the grantee's possession as valid for some purposes, and disclaim it for others; and to the same effect, Dixon v. Bank, 102 Ga. 461, 31 S. E. 96, 66 Am. St. Rep. 193.

Negligence by the grantor of an undelivered deed in keeping it in a place to which the grantee had access will not estop him from denying its validity as against a purchaser in good faith from the grantee, where the latter surreptitiously abstracted the deed and recorded it; Garner v. Risinger, 35 Tex. Civ. App. 378, 81 S. W. 343; Tisher v. Beck with, 30 Wis. 55, 11 Am. Rep. 546. It has been held that nothing short of an explicit ratification by the grantor of the delivery, or

such acquiescence after full knowledge of the facts as would raise a presumption of an express ratification, could give the deed vitality; Hadlock v. Hadlock, 22 Ill. 388. And it has been held that failure of successors in title to one whose undelivered deed to real estate has been recorded by the grantee to bring suit to remove it from the record will not estop them from denying the title of a stranger who purchases the property in reliance upon the record; Gulf Coal & Coke Co. v. Coal & Coke Co., 145 Ala. 228, 40 South. 397.

See 14 Harv. L. Rev. 456; ASSENT.

There can ordinarily be but one valid delivery; Verplank v. Sterry, 12 Johns. (N. Y.) 536, 7 Am. Dec. 348; which can take place only after complete execution; McKee v. Hicks, 13 N. C. 379; Moelle v. Sherwood, 148 U. S. 21, 13 Sup. Ct. 426, 37 L. Ed. 350. But there must be one; Stiles v. Brown, 16 Vt. 563; 2 Washb. R. P. 581; and from that one the deed takes effect; Geiss v. Odenheimer, 4 Yeates (Pa.) 278, 2 Am. Dec. 407; Cutts v. Mfg. Co., 18 Me. 190. Elsey v. Metcalf, 1 Denio (N. Y.) 323. Where the date of acknowledgment of a mortgage differed from its date, delivery will be of the former date, in the absence of any evidence; Guaranty Trust Co. of New York v. R. Co., 107 Fed. 311, 46 C. C. A. 305.

See ESCROW, RECORD; DEED.

In Contracts. The transfer of the possession of a thing from one person to another.

Originally, delivery was a clear and unequivocal act of giving possession, accomplished by placing the subject to be transferred in the hands of the transferee or his agent, or in their respective warehouses, vessels, carts, and the like; but in modern times it is frequently symbolical, as by delivery of the key to a room containing goods; Wilkes v. Ferris, 5 Johns. (N. Y.) 335, 4 Am. Dec. 364; Leedom v. Phillips, 1 Yeates (Pa.) 529; 2 Ves. Sen. 415; see, also, 7 East 558; 3 B. & P. 233; Dobinson v. Emmons, 158 Mass. 592, 33 N. E. 706; by marking timber on a wharf, or goods in a warehouse, or by separating and weighing or measuring them; Barney v. Brown, 2 Vt. 374, 19 Am. Dec. 720; Hurff v. Hires, 40 N. J. L. 581, 29 Am. Rep. 282; Farmers' Phosphate Co. v. Gill, 69 Md. 537, 16 Atl. 214, 1 L. R. A. 767, 9 Am. St. Rep. 443; or otherwise constructive, as by the delivery of a part for the whole; Chamberlain v. Farr, 23 Vt. 265; Leggett v. Rogers, 9 Barb. (N. Y.) 416; Packard v. Dunsmore, 11 Cush. (Mass.) 282; Vining v. Gilbreth, 39 Me. 496; 3 B. & P. 69. And see, as to what constitutes a delivery; President, etc., of Portland Bank v. Stacey, 4 Mass. 661, 3 Am. Dec. 253; Burrows v. Whitaker, 71 N. Y. 291, 27 Am. Rep. 42; Gravett v. Mugge, 89 Ill. 218; Thomas' Adm'r v. Lewis, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848; Deming v. Cotton-Press Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518; Brewster v. Reel, 74 Ia. 506, 38 N. W. 381; [1892] 1 Q. B. 582.

Where goods are ordered by a foreign merchant, the title passes, on a delivery to a carrier for shipment, subject only to the right of stoppage *in transitu;* Philadelphia & R. R. Co. v. Wireman, 88 Pa. 264; Smith v. Edwards, 156 Mass. 221, 30 N. E. 1017; Seaman v. Adler, 37 Fed. 268; Rechtin v. McGary, 117 Ind. 132, 19 N. E. 731; First Nat. Bank v. McAndrews, 7 Mont. 150, 14 Pac. 763; Meyer Bros. Drug Co. v. McMahon, 50 Mo. App. 18; Foley v. Felrath, 98 Ala. 176, 13 South. 485, 39 Am. St. Rep. 39. *Prima facie* proof of delivery is made out by proof of delivery to a carrier; Brod v. Dering, 139 Ill. App. 107; but such is not a delivery to the vendee where he dies before they reach their destination; Smith v. Brennan, 62 Mich. 349, 28 N. W. 892, 4 Am. St. Rep. 867. Where the vendor takes the bill of lading deliverable to the order of himself, or of his agent, it prevents the property from passing to the intended vendee until delivery; Berger v. State, 50 Ark. 20, 6 S. W. 15; Blackb. Sales 130.

Delivery is not necessary at common law to complete a sale of personal property as between the vendor and vendee; Benj. Sales § 315; as a sale passes title as soon as the bargain is struck without any delivery or payment; Briggs v. U. S., 143 U. S. 346, 12 Sup. Ct. 391, 36 L. Ed. 180; but as against third parties possession retained by the vendor raises a presumption of fraud conclusive according to some authorities; Hamilton v. Russell, 1 Cra. (U. S.) 309, 2 L. Ed. 118; Alexander v. Deneale, 2 Munf. (Va.) 341; Hudnal v. Wilder, 4 McCord (S. C.) 294, 17 Am. Dec. 744; Ragan v. Kennedy, 1 Ov. (Tenn.) 91; Jarvis v. Davis, 14 B. Monr. (Ky.) 533, 61 Am. Dec. 166; Bowman v. Herring, 4 Harr. (Del.) 458; Thornton v. Davenport, 1 Scam. (Ill.) 296, 29 Am. Dec. 358, Chumar v. Wood, 6 N. J. L. 155; Patten v. Smith, 5 Conn. 196; Wilson v. Hooper, 12 Vt. 653, 36 Am. Dec. 366; Gibson v. Love, 4 Fla. 219; Sturtevant v. Ballard, 9 Johns. (N. Y.) 337, 6 Am. Dec. 281; 1 Campb. 332; Gould v. Hunlley, 73 Cal. 399, 15 Pac. 24; Freedman v. Mfg. Co., 122 Pa. 25, 15 Atl. 690; others holding it merely strong evidence of fraud to be left to the jury; 3 B. & C. 368; Land v. Jeffries, 5 Rand. (Va.) 211; Terry v. Belcher, 1 Bail. (S. C.) 568; Callen v. Thompson, 3 Yerg. (Tenn.) 475, 24 Am. Dec. 587; Hundley v. Webb, 3 J. J. Marsh. (Ky.) 643, 20 Am. Dec. 189; Thompson v. Blanchard, 4 N. Y. 303; Griswold v. Sheldon, *id.* 581; Marden v. Babcock, 2 Metc. (Mass.) 99; Cutter v. Copeland, 18 Me. 127; Erwin v. Bank, 5 La. Ann. 1; Bryant v. Kelton, 1 Tex. 415; but delivery *is* necessary, in general, where the property in goods is to be transferred in pursuance of a previous contract; 1 Taunt. 318; Bean v. Simpson, 16 Me. 49; and also in case of

a *donatio causa mortis;* Wells v. Tucker, 3 Binn. (Pa.) 370; 2 Ves. Ch. 120; 9 *id.* 1; Daniel v. Smith, 64 Cal. 346, 30 Pac. 575; Dobinson v. Emmons, 158 Mass. 592, 33 N. E. 706; Kirk v. McCusker, 3 Misc. 277, 22 N. Y. Supp. 780. To give validity to a gift, there must be such a delivery of the subject thereof as works an immediate change in the dominion of the property; Gartside v. Pahlman, 45 Mo. App 160. The rules requiring actual full delivery are subject to modification in the case of bulky articles; Girard v. Taggart, 5 S. & R. (Pa.) 19, 9 Am. Dec. 327; Bean v. Simpson, 16 Me. 49. See, also, Bailey v. Ogdens, 3 Johns. (N. Y.) 399, 3 Am. Dec. 509; De Ridder v. McKnight, 13 Johns. (N. Y.) 294; Dutilh v. Ritchie, 1 Dall (U. S.) 171, 1 L. Ed. 86; Currier v. Currier, 2 N. H. 75, 9 Am. Dec. 43; Smith v. Wheeler, 7 Or. 49, 33 Am. Rep. 698; Billingsley v. White, 59 Pa. 461; 2 Kent 508; BAILMENT; SALE; C. O. D.; PLACE OF DELIVERY.

The word delivery is used in different senses, which should be borne in mind in considering the cases. Sometimes it denotes transfer of *the property in* the chattel and sometimes transfer of *the possession of* the chattel. When used in the latter sense it may refer either to the *formation* of the contract, or to the *performance* of it. When it refers to the delivery of possession in the performance of the contract, the buyer is sometimes spoken of as being in *possession* although he has only the right of possession, while the actual custody remains with the vendor.

A condition requiring delivery may be annexed as a part of any contract of transfer; Savage Mfg. Co. v. Armstrong, 19 Me 147

In the absence of contract, the amount of transportation to be performed by the seller to constitute delivery is determined by general usage.

The delivery of a contract in writing is necessary to its validity; Ligon v. Wharton (Tex.) 120 S. W. 930.

See ESCROW.

In Medical Jurisprudence. The act of a woman giving birth to her offspring.

Pretended delivery may present itself in three points of view. *First,* when the female who feigns has never been pregnant When thoroughly investigated, this may always be detected. There are signs which must be present and cannot be feigned An enlargement of the orifice of the uterus, and a tumefaction of the organs of generation, should always be present, and if absent are conclusive against the fact. 2 *Annales d'Hygiene,* 227. *Second,* when the pretended pregnancy and delivery have been preceded by one or more deliveries In this case attention should be given to the following circumstances the mystery, if any, which has been affected with regard to the situation of the female; her age; that of her husband; and, particularly, whether aged or decrepit. *Third,* when the woman has been actually delivered, and substitutes a living for a dead child But little evidence can be obtained on this subject from a physical examination.

Concealed delivery generally takes place when the woman either has destroyed her offspring or it was born dead. In suspected cases the following circumstances should be attended to: *First,* the proofs of pregnancy which arise in consequence of the examination of the mother. When she has been pregnant, and has been delivered, the usual signs of delivery, mentioned below, will be present. A careful investigation as to the woman's appearance before and since the delivery will have some weight; though such evidence is not always to be relied upon, as such appearances are not unfrequently deceptive *Second,* the proofs of recent delivery. *Third,* the connection between the supposed state of parturition and the state of the child that is found; for if the age of the child do not correspond to that time, it will be a strong circumstance in favor of the mother's innocence. A redness of the skin and an attachment of the umbilical cord to the navel indicate a recent birth Whether the child was living at its birth, belongs to the subject of infanticide.

The usual signs of delivery are very well collected in Beck's excellent treatise on Medical Jurisprudence, and are here extracted

If the female be examined within three or four days after the occurrence of delivery, the following circumstances will generally be observed: greater or less weakness, a slight paleness of the face, the eye a little sunken and surrounded by a purplish or dark-brown colored ring, and a whiteness of the skin like that of a person convalescing from disease The belly is soft, the skin of the abdomen is lax, lies in folds, and is traversed in various directions by shining reddish and whitish lines, which especially extend from the groin and pubes to the navel. These lines have sometimes been termed *lineæ albicantes,* and are particularly observed near the umbilical region, where the abdomen has experienced the greatest distension The breasts become tumid and hard, and, on pressure, emit a fluid which at first is serous and afterwards gradually becomes whiter. The areolæ round the nipples are dark colored The external genital organs and vagina are dilated and tumefied throughout the whole of their extent, from the pressure of the fœtus The uterus may be felt through the abdominal parietes, voluminous, firm, and globular, and rising nearly as high as the umbilicus Its orifice is soft and tumid, and dilated so as to admit two or more fingers The fourchette, or anterior margin of the perinæum, is sometimes torn, or it is lax, and appears to have suffered considerable distension A discharge (termed the lochial) commences from the uterus, which is distinguished from the menses by its pale color, its peculiar and well-known smell, and its duration. The lochia are at first of a red color, and gradually become lighter until they cease.

These signs may generally be relied upon as indicating recent delivery: yet it requires much experience in order not to be deceived by appearances.

The lochial discharge might be mistaken for menstruation, or leucorrhœa, were it not for its peculiar smell, though this is not absolutely characteristic

Relaxation of the soft parts arises as frequently from menstruation as from delivery, but in these cases the os uteri and vagina are not so much tumefied, nor is there that tenderness and swelling The parts are found pale and flabby when all signs of contusion disappear, after delivery, and this circumstance does not follow menstruation

The presence of milk, though a usual sign of delivery, is not always to be relied upon; for this secretion may take place independent of pregnancy

The wrinkles and relaxations of the abdomen which follow delivery may be the consequence of dropsy, or of lankness following great obesity. This state of the parts is also seldom striking after the birth of the first child, as they shortly resume their natural state Positive proof of the occurrence of birth is furnished only by the discovery of parts of the ovum In most cases the demonstration by the microscope of shreds of the deciduæ with large, nucleated and fatty cells is of itself a sure proof; Winckle, quoted by Witthaus & Becker.

See, generally, 1 Beck, Med Jur c. 7, p. 206; 1 Chit Med. Jur. 411; Ryan, Med. Jur. c. 10, p. 133; 1 Briand, *Méd Leg.* IIère partie, c. 5; Whart. & S.; Witthaus & Becker, Med. Jur.

DELIVERY BOND. An obligation for the return of goods or the payment of their value, taken into the possession of the law, as in seizures under revenue laws. Douglass v. Douglass, 21 Wall. (U. S.) 98, 22 L. Ed. 479; Krippendorf v. Hyde, 110 U. S. 280, 4 Sup. Ct. 27, 28 L. Ed. 145. See FORTHCOMING BOND.

DELIVERY ORDER. An order by the owner of goods to a person holding them on his behalf, requesting him to deliver them to a person named in the order. Such an order is not a document of title and therefore does not transfer the property or divest the vendor's lien for the purchase money until the holder obtains actual delivery, the issue of a dock warrant in his name, or an entry of his title in the wharfinger's books. 2 H. L. Cas. 309; 5 Ch. D. 195.

DELUSION. In Medical Jurisprudence. A perversion of the judgment, obviously erroneous and persistent. A symptom of mental disease, in which persons believe things to exist which exist only, or in the degree they are conceived of only, in their own imaginations, with a persuasion so fixed and firm that neither evidence nor argument can convince them to the contrary. A faulty belief concerning a subject capable of physical demonstration, out of which the person cannot be reasoned by adequate means for the time being. 1 Wood, American Text Book of Med See HALLUCINATION.

The individual is, of course, insane. For example, should a parent unjustly persist, without the least ground, in attributing to his daughter a coarse vice, and use her with uniform unkindness, there not being the slightest pretence or color of reason for the supposition, a just inference of insanity or delusion would arise in the minds of a jury; because a supposition long entertained and persisted in, after argument to the contrary, and against the natural affections of a parent, suggest that he must labor under some morbid mental delusion; Whart. Cr. L. § 37; Whart. & S. Med. Jur.; 1 Redf. Wills; Ray, Med Jur. § 20; Shelf. Lun. 296; 3 Add. Eccl. 70, 90, 180; 1 Hagg. Eccl. 27. See Guiteau's Case, 10 Fed. 170; Mann, Med. Jur. of Insan. 58.

Where one "labors under a partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment." This is the rule as stated by the English judges, cited in 1 Whart. Cr. L. § 37. Shaw, C. J., in Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458, says: "Monomania may operate as an excuse for a criminal act," when "the delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act; as where the belief is that the party killed had an immediate design upon his life, and under that belief the insane man kills in supposed self-defence. A common instance is where he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws and the laws of nature."

Where a testator was laboring under a delusion that his brother was exercising his muscle preparatory to killing him, that of itself would not justify a rejection of his will on the ground of unsound mind; In re Fricke, 64 Hun 639, 19 N. Y. Supp. 315. A person persistently believing supposed facts which have no real existence, against all evidence and probability, and conducting himself on the assumption of their existence, is, so far as such facts are concerned, under an insane delusion; Haines v. Hayden, 95 Mich 332, 54 N. W. 911, 35 Am. St. Rep. 566

See PARANOIA.

DEMAIN. See DEMESNE.

DEMAND. A claim; a legal obligation.

Demand is a term of art of an extent greater in its signification than any other word except claim. Co Litt. 291; In re Denny, 2 Hill (N. Y.) 220. Scott v. Morris, 9 S. & R. (Pa.) 121; Murphy's Appeal, 6 W. & S. (Pa.) 226.

A release of all demands is, in general, a release of all covenants, real or personal, conditions, whether broken or not, annuities, recognizances, obligations, contracts, and the like, In re Denny, 2 Hill (N. Y.) 220, but does not discharge rent before it is due, if it be a rent incident to the reversion; for the rent was not only not due, but the consideration—the future enjoyment of the lands—for which the rent was to be given was not executed; 1 Lev. 99; Bac. Abr. *Release*, I. See 10 Co. 128; Bordman v. Osborn, 23 Pick. (Mass.) 295; Martin v. Martin, 7 Md. 375, 61 Am. Dec. 361; Favors v. Johnson, 79 Ga. 555, 4 S. E. 925.

In Practice. A requisition or request to do a particular thing specified under a claim of right on the part of the person requesting.

In causes of action arising ex contractu it is frequently necessary, to enable plaintiff to bring an action, that he should make a demand upon the party bound to perform the contract or discharge the obligation. Thus, where property is sold to be paid for on delivery, a demand must be made before bringing an action for non-delivery, and proved on trial; 5 Term 409; 3 M. & W. 254; Little v. Banks, 67 Hun 505, 22 N. Y. Supp.

512; but not if the seller has incapacitated himself from delivering; 5 B. & Ald. 712; Wilmouth v. Patton, 2 Bibb (Ky.) 280; Robbins v. Luce, 4 Mass. 474; and this rule and exception apply to contracts for marriage; 2 Dowl. & R. 55; 1 Chit. Pr. 57, note (n), 438, note (e). Nor is a demand necessary where it is to be presumed that it would have been unavailing; Davenport v. Ladd, 38 Minn. 545, 38 N. W. 622; Bogle v. Gordon, 39 Kan. 31, 17 Pac. 857. Where a selling price has been agreed on, the bringing of a suit therefor is a sufficient demand for the money claimed; Maguire v. Durant, 1 Misc. 509, 20 N. Y. Supp. 617. A demand of rent is necessary before re-entry for non-payment; Parks v. Hays, 92 Tenn. 161, 22 S. W. 3. But where rent is payable on the first day of the month, no demand of the rent on the day it falls due is necessary to entitle the landlord to maintain an action therefor; Clarke v. Charter, 128 Mass. 483. See RE-ENTRY. No demand is in general necessary on a promissory note before bringing an action; but after a tender demand must be made of the sum tendered; 1 Campb. 181, 474; 1 Stark. 323. A note payable "on call" may be sued on without demand; Mobile Sav. Bank v. McDonnell, 83 Ala. 595, 4 South. 346; but a demand and notice of non-payment are essential to fix the liability of endorsers unless waived; Presbrey v. Thomas, 1 App. D. C. 171. Where a mortgagor has resolved to default on an interest coupon and provides no funds to pay it, the holder is not required to present it for payment before bringing suit, Conshohocken Tube Co. v. Equipment Co., 161 Pa. 391, 28 Atl. 1119.

Cases in which a demand was held necessary before action were suits upon a partnership; Codman v. Rogers, 10 Pick. 112; moneys received but not accounted for by an attorney to his client; Sheaf v. Dodge, 161 Ind. 270, 68 N. E. 292; Banner v. D'Auby, 34 Misc. 525, 69 N. Y. Supp. 891; Madden v. Watts, 59 S. C. 81, 37 S. E. 209; Taylor v. Bates, 5 Cow. (N. Y.) 376; Sneed v. Hanley, Hemp. 659, Fed. Cas. No. 13,136; moneys received by a corporation officer not accounted for; Landis v. Saxton, 105 Mo. 486, 16 S. W. 912, 24 Am. St. Rep. 403; claim of reinstatement in a body from which one was illegally expelled; Meherin v. Produce Exchange, 117 Cal. 215, 48 Pac. 1074; money realized by a sheriff on execution but not paid over; Keithler v. Foster, 22 Ohio St. 27; a certificate of deposit issued by a bank which by its terms was payable on its return properly endorsed; Elliott v. Bank, 128 Ia. 275, 103 N. W. 777, 1 L. R. A. (N. S.) 1130, 111 Am. St. Rep. 198; Hillsinger v. Bank, 108 Ga. 357, 33 S. E. 985, 75 Am. St. Rep. 42; but in another case it was held that action would lie without demand on a certificate of deposit; McGough v. Jamison, 107 Pa. 336. See Elliott v. Bank, 1 L. R. A. (N. S.) 1130, n. A demand is also required before action to recover a deposit in a bank; Johnson v. Bank, 1 Harring. (Del.) 117; Sickles v. Herold, 149 N. Y. 332, 43 N. E. 852; Tobias v. Morris, 126 Ala. 535, 28 South. 517.

A demand is not necessary before suit for rent, whether payable in money in advance; Clarke v. Charter, 128 Mass. 483; or in labor or property payable at a fixed time and place; Packer v. Cockayne, 3 G. Greene (Ia.) 111; and in a suit for rent the demand need not be proved even where pleaded; Gruhn v. Gudebrod Bros. Co., 21 Misc. 528, 47 N. Y. Supp. 714; for articles charged on land devised to and accepted by residuary devisee; Wiggin v. Wiggin, 43 N. H. 561, 80 Am. Dec. 192; for boarding a man under a contract; Chappell v. Woods, 9 Wash. 134, 37 Pac. 286; for fees of an attorney; Foster v. Newbrough, 66 Barb. (N. Y.) 645; Gibbs v. Davis, 11 Or. 288, 3 Pac. 677; but in New Jersey the rendering of an account is a condition precedent to a suit; Truitt v. Darnell, 65 N. J. Eq. 221, 55 Atl. 692.

In cases arising ex delicto, a demand is frequently necessary. Thus, when the wife, apprentice, or servant of one person has been harbored by another, the proper course is to make a demand of restoration before an action brought, in order to constitute the party a wilful wrong-doer unless the plaintiff can prove an original illegal enticing away; 2 Lev. 63; 5 East 39; 4 J. B. Moo. 12.

So, too, in cases where the taking of goods is lawful but their subsequent detention becomes illegal, it is absolutely necessary, in order to secure sufficient evidence of a conversion on the trial, to give a formal notice of the owner's right to the property and possession, and to make a formal demand in writing of the delivery of such possession to the owner. See TROVER; CONVERSION. And when a nuisance has been erected or continued by a man on his own land, it is advisable, particularly in the case of a private nuisance, to give the party notice, and request him to remove it, either before an entry is made for the purpose of abating it or an action is commenced against the wrong-doer; and a demand is always indispensable in cases of a continuance of a nuisance originally created by another person; 2 B. & C. 302; Cro. Jac. 555; Poll. Torts 314; 5 Co. 100; 5 Viner, Abr. 506; 1 Ayliffe, Pand. 497; Bac. Abr. *Rent*, I.

In cases of contempts, as where an order to pay money or to do any other thing, has been made a rule of court, a demand for the payment of the money or performance of the thing must be made before an attachment will be issued for a contempt; 1 Cr. M. & R. 88, 459; 4 Tyrwh. 369, 2 Scott 193.

Demand should be made by the party having the right, or his authorized agent; 2 B. & P. 464 *a*; West v. Tupper, 1 Bail. (S. C.) 193; Watt v. Potter, 2 Mas. 77, Fed. Cas. No.

17,291; Clough v. Unity, 18 N. H. 75; Sebrell v. Couch, 55 Ind. 122; of the person in default, in cases of torts; 8 B. & C. 528; Shotwell v. Few, 7 Johns. (N. Y.) 302; Bridgeport Bank v. R. Co., 30 Conn. 237; in case of rent; 2 Washb. R. P. 321 and at a proper time and place in case of rents; Jackson v. Kipp, 3 Wend. (N. Y.) 230; Jackson v. Harrison, 17 Johns. (N. Y.) 66; McMurphy v. Minot, 4 N. H. 251; Mackubin v. Whetcroft, 4 Harr. & McH. (Md.) 135; Bradstreet v. Clark, 21 Pick. (Mass.) 389; Pay v. Shanks, 56 Ind. 554; in cases of notes and bills of exchange; Pars. Notes & B.

As to the allegation of a demand in a declaration, see 1 Chit. Pl. 322; 2 *id.* 84; 1 Wms. Saund. 33, note 2; Bunn v. Lett, 65 Hun 43, 19 N. Y. Supp. 728; Com. Dig. *Pleader*.

DEMAND IN RECONVENTION. A demand which the defendant institutes in consequence of that which the plaintiff has brought against him. Used in Louisiana. La. Pr. Code, art. 374.

DEMANDANT. The plaintiff or party who brings a real action. Co. Litt. 127; Com. Dig. See REAL ACTION.

DEMENS (Lat.). Dement. One who has lost his mind through illness or some other cause. One whose faculties are enfeebled. Dean, Med. Jur. 481. See DEMENTIA.

DEMENTIA. In Medical Jurisprudence. That form of insanity which is characterized by mental weakness and decrepitude, and by total inability to reason correctly or incorrectly.

Memory is lost; language is incoherent; actions are inconsistent. The thoughts succeed one another without any obvious bond of association. Delusions, if they exist, are transitory, and leave no permanent impression: and for everything recent the memory is exceedingly weak. In mania, the action of the mind is marked by force, hurry, and intensity; in dementia, by slowness and weakness. It is the natural termination of many forms of insanity. Occasionally it occurs in an acute form in young subjects, and here only it is curable. In old men, in whom it often occurs, it is called senile dementia, and it indicates the breaking down of the mental powers in advance of the bodily decay. Here we may find memory of conditions long since past and some mental power. It is this form of dementia only which gives rise to litigation, for in the others the incompetency is too patent to admit of question. It cannot be described by any positive characters, because it differs in the different stages of its progress, varying from simple lapse of memory to complete inability to recognize persons or things. And it must be borne in mind that often the mental infirmity is not so serious as might be supposed at first sight. Many an old man who seems to be scarcely conscious of what is passing around him, and is guilty of frequent breaches of decorum, needs only to have his attention aroused to a matter in which he is deeply interested, to show no lack of vigor or acuteness. In other words, the mind may be damaged superficially (to use a figure), while it may be sound at the core. And therefore it is that one may be quite oblivious of names and dates, while comprehending perfectly well his relations to others and the interests in which he was concerned. It follows that the impressions made upon casual or ignorant observers in regard to the mental condition are of far less value than those made upon persons who have been well acquainted with his habits and have had occasion to test the vigor of his faculties.

Senile dementia or the imbecility caused by the decay of old age is often the ground on which the wills of old men are contested, and the conflicting testimony of observers, the proofs of foreign influence, and the indications of mental capacity all combine to render it no easy task to arrive at a satisfactory conclusion. The only general rule of much practical value is that competency must be always measured, not by any fancied standard of intellect, but solely by the requirements of the act in question. A small and familiar matter would require less mental power than one complicated in its details and somewhat new to the testator's experience. Less capacity would be necessary to distribute an estate between a wife and child than between a multitude of relatives with unequal claims upon his bounty. Such is the principle; and the ends of justice cannot be better served than by its correct and faithful application. Of course, there will always be more or less difficulty; but generally by discarding all legal and metaphysical subtleties and following the leading of common sense, it will be satisfactorily surmounted.

The legal principles by which the courts are governed are not essentially different whether the mental incapacity proceed from dementia or mania. If the will coincides with the previously expressed wishes of the testator, if it recognizes the claims of those who stood in near relation to him, if it shows no indication of undue influence,—if, in short, it is a rational act rationally done,—it will be established though there may have been considerable impairment of mind. 2 Phill. Eccl. 449; Harrison v. Rowan, 3 Wash. C. C. 580, Fed. Cas. No. 6,141; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97; Taylor v. Pegram, 151 Ill. 106, 37 N. E. 837; Blough v. Parry, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560; Fluck v. Rea, 51 N. J. Eq. 233, 27 Atl. 636; Matter of Jones, 5 Misc. 199, 25 N. Y. Supp. 109; Matter of Pike's Will, 83 Hun 327, 31 N. Y. Supp. 689; Taylor v. Trich, 165 Pa. 586, 30 Atl. 1053, 44 Am. St. Rep. 679.

This species of *dementia* is also frequently alleged and proved as a ground of impeaching deeds. This particular form of mental disease may result either in total incompetency, such as is produced by any form of insanity, or a greatly defective capacity, though short of total insanity, in which the court scrutinizes the act, and sustains it only when there is found to have been capacity sufficient for the act in question and entire freedom of will. Consequently such cases usually include the two elements of mental incompetency of some degree and undue influence; and probably a majority of the cases in which the aid of equity is sought to set aside deeds on the ground of

undue influence involve also the question of the existence of *senile dementia* to a greater or less extent. The principle upon which courts of equity deal with this class of persons is neither as a matter of course to affirm or avoid their acts, but to protect them in the exercise of such capacity as they have. It will scrutinize their transactions; considering the nature of the act done, the inducements leading to it, and the attending circumstances and influences. If the conscience of the court is satisfied that such a grantor comprehended the nature and consequences of the transaction, and exercised a deliberate and free judgment, it will be sustained: but if the nature of the act or the attending circumstances justify the conclusion that the grantor's weakness has been taken advantage of, the deed will be set aside in equity however valid it might be at law. 1 Bro. Ch. 560, 1 Knapp 73. Cruise v. Christopher's Adm'r, 5 Dana (Ky.) 181; Wilson v. Oldham, 12 B. Monr. (Ky.) 55; Tracy v. Sacket, 1 Ohio St. 54, 59 Am. Dec. 610; Gass v. Mason, 4 Sneed (Tenn.) 497. "It may be stated as settled law, that whenever there is great weakness of mind in a person executing a conveyance of law, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate—a court of equity will . . . interfere and set the conveyance aside;" Allore v. Jewell, 94 U. S. 511, 24 L. Ed. 260; 1 Sto Eq. Jur. § 238; Bisph. Eq 288. For a thorough examination and discussion of the subject in a case of *senile dementia* in which a deed was set aside, see Jones v. Thompson, 5 Del. Ch 374. In that case Saulsbury, Ch., thus stated the principle upon which courts of equity deal with such cases: "In cases of alleged mental incapacity, the test is whether the party had the ability to comprehend in a reasonable manner the nature of the affair in which he participated. This is the rule in the absence of fraud. . . . This ability so to comprehend necessarily implies the power to understand the character, legal conditions, and effect of the act performed. . . . The cause of mental weakness is immaterial It may arise from injury to the mind, temporary illness, or excessive old age In such cases any unfairness will be promptly redressed." In a very similar case a deed was set aside on the ground of mental incapacity of the grantor by reason of senile dementia or dotage, by Bland, Ch., whose opinion contains an elaborate discussion of the different species of dementia, which he classifies as, Idiocy, Delirium, Lunacy, and Dotage, under which latter term he describes senile dementia.

See INSANITY.

DEMESNE (Lat. *dominicum*). Lands of which the lord had the absolute property or ownership; as distinguished from feudal lands, which he held of a superior. 2 Bla. Com. 104; Cowell. Lands which the lord retained under his immediate control, for the purpose of supplying his table and the immediate needs of his household; distinguished from that farmed out to tenants, called among the Saxons *bordlands*. Blount; Co. Litt. 17 *a*.

Own; original. *Son assault demesne*, his (the plaintiff's) original assault, or assault in the first place. 2 Greenl. Ev. § 633; 3 Bla. Com 120, 306.

DEMESNE AS OF FEE. A man is said to be seised *in his demesne as of fee* of a corporeal inheritance, because he has a property *dominicum* or *demesne* in the *thing* itself. 2 Bla. Com. 106. But when he has no dominion in the thing itself, as in the case of an incorporeal hereditament, he is said to be *seised* as of fee, and not in his *demesne* as of fee; Littleton § 10; Barnet v. Ihrie, 17 S & R (Pa.) 196; Jones, Land Tit. 166.

Formerly it was the practice in an action on the case—*e. g.* for a nuisance to real estate—to aver in the declaration the seisin of the plaintiff in demesne as of fee, and this is still necessary, in order to estop the record with the land, so that it may run with or attend the title; Archb. Civ. Pl 104; Co. Entr. 9, pl. 8; 1 Saund 346. But such an action may be maintained on the possession as well as on the seisin; although the effect of the record in this case upon the title would not be the same: Steph Pl 322; 4 Term 718; 2 Wms Saund 113 *b*; Cro. Car 500, 575

DEMESNE LANDS. A phrase meaning the same as *demesne*.

DEMESNE LANDS OF THE CROWN. That share of lands reserved to the crown at the original distribution of landed property, or which came to it afterwards by forfeiture or otherwise. 1 Bla. Com. 286; 2 Steph. Com. 550.

DEMIDIETAS. A word used in ancient records for a moiety, or one-half.

DEMI-MARK. A sum of money (6*s.* 8*d.*, 3 Bla. Com. App. v.) tendered and paid into court in certain cases in the trial of a writ of right by the grand assize. Co. Litt. 294 *b*; Booth, Real Act. 98.

It was paid by the tenant to obtain an inquiry by the grand assize into the time of the demandant's seisin; 1 Reeve, Hist. Eng. Law 429, Stearns, Real Act. 378. It compelled the demandant to begin; 3 Chit. Pl. 1373. It is unknown in American practice; Bradstreet v. Supervisors of Oneida County, 13 Wend. (N. Y.) 546.

DEMI-VILL. Half a tithing.

DEMISE. A conveyance, either in fee, for life, or for years.

A lease or a conveyance for a term of years. According to Chief Justice Gibson,

the English word demise, though improperly used as a synonym for *concessi* or *demisi*, strictly denotes a posthumous grant, and no more. Hemphill v. Eckfeldt, 5 Whart. (Pa.) 278. See 4 Bingh. N. C. 678; Voorhees v. Presbyterian Church, 5 How. Pr. (N. Y.) 71. Other words may be used; 18 L. Q. R. 338.

In a conveyance, the word "demise" imports in law a covenant for quiet enjoyment; Crouch v. Fowle, 9 N. H. 219, 32 Am. Dec. 350; 1 M. G. & S. 429; it implies a power to lease; Giannis v. Clark, 8 Cow. (N. Y.) 36. See O'Connor v. Daily, 109 Mass 235; COVENANT. As to the covenants implied, see [1895] 1 Q. B. 820.

See DEMISE OF THE CROWN.

DEMISE OF THE CROWN. The natural dissolution of the king.

The term is said to denote in law merely a transfer of the property of the crown. 1 Bla. Com. 249. By demise of the crown we mean only that, in consequence of the disunion of the king's natural body from his body politic, the kingdom is transferred or demised to his successor, and so the royal dignity remains perpetual. Plowd. 117, 234.

A similar result, viz.: the perpetual and continuous existence of the office of president of the United States, has been secured by the constitution and subsequent statutes. 1 Sharsw. Bla. Com. 249.

DEMISE AND RE-DEMISE. An old form of conveyance by mutual leases made from one to another on each side of the same land, or of something issuing from it. A lease for a given sum—usually a mere nominal amount—and a release for a larger rent. Toullier; Whishaw; Jacob.

DEMOCRACY. That form of government in which the people rule.

But the multitude cannot actually rule: an unorganic democracy, therefore, one that is not founded upon a number of institutions each endowed with a degree of self-government, naturally becomes a one-man government. The basis of the democracy is equality, as that of the aristocracy is privilege, but equality of itself is no guarantee for liberty, nor does equality constitutes liberty. Absolute democracies existed in antiquity and the middle ages: they have never endured for any length of time. On their character, Aristotle's Politics may be read to the greatest advantage. Lieber, in his Civil Liberty, dwells at length on the fact that mere equality, without institutions of various kinds, is adverse to self government, and history shows that absolute democracy is anything rather than a convertible term for liberty. See ABSOLUTISM, GOVERNMENT.

DEMOLISH. To destroy totally or to commence the work of total destruction with the purpose of completing the same. 50 L. J. M. C. 141.

DEMONETIZE. To divest of the character of standard money; to withdraw from use as currency. Stand. Dict.

DEMONSTRATIO (Lat.). Description; addition; denomination. Occurring often in the phrase *falsa demonstratio non nocet* (a false description does not harm). 2 Bla. Com. 382, n.; 2 P. Wms. 140; 1 Greenl. Ev. § 291; Wigr. Wills 208, 233.

DEMONSTRATION (Lat. *demonstrare*, to point out). Whatever is said or written to designate a thing or person.

Several descriptions may be employed to denote the same person or object; and the rule of law in such cases is that if one of the descriptions be erroneous it may be rejected, if, after it is expunged, enough will remain to identify the person or thing intended, for *falsa demonstratio non nocet*. The meaning of this rule is, that if there be an adequate description with convenient certainty of what was contemplated, a subsequent erroneous addition will not vitiate it. The complement of this maxim is, *non accipi debent verba in demonstrationem falsam quæ competent in limitationem veram;* which means that if it stand doubtful upon the words whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former words, the law will never intend error or falsehood. If, therefore, there is some object wherein all the demonstrations are true, and some wherein part are true and part false, they shall be intended words of true limitation to ascertain that person or thing whereof all the circumstances are true; 4 Exch. 604; 8 Bingh. 244; Broom, L. Max. 490; Pettis v. Kellogg, 7 Cush. (Mass.) 460.

Parol and extrinsic evidence for the construction of wills misdescribing the subject of the devise is admitted. Its office is to enable a court to reject whatever part of the description is false, Fairfield v. Lawson, 50 Conn. 501, 47 Am. Rep. 669; Doe v. Roe, 1 Wend. (N. Y.) 541; Benham v. Hendrickson, 32 N. J. Eq. 441, Rose v. Hale, 185 Ill. 379, 56 N. E. 1073, 76 Am. St. Rep. 40; Fitzpatrick v. Fitzpatrick, 36 Ia. 674, 14 Am. Rep. 538; Wales v. Templeton, 83 Mich. 177, 47 N. W. 238; Seebrock v. Fedawa, 33 Neb. 413, 50 N. W. 270, 29 Am. St. Rep. 488; but not where there is a property which every part of the description fits; 16 C. B. N. S. 698, nor where the will contains no language to connect the description in such devise with any land of the testator; *id.*; Lomax v. Lomax, 218 Ill. 629, 75 N. E. 1076, 6 L. R. A. (N. S.) 942.

The rule that *falsa demonstratio* does not vitiate an otherwise good description applies to every kind of statement of fact. Some of the particulars of an averment in a declaration may be rejected if the declaration is sensible without them and by their presence is made insensible or defective; Yelv. 182.

In Evidence. That proof which excludes all possibility of error.

Demonstrative evidence of negligence has been applied to that kind of negligence which is usually expressed by *res ipsa loquitur* (which see). See EVIDENCE.

DEMONSTRATIVE LEGACY. A pecuniary legacy coupled with a direction that it be paid out of a specific fund.

A bequest of a sum of money payable out of a particular fund or thing. A pecuniary legacy given generally, but with a demonstration of a particular fund as the source of its payment. Roquet v. Eldridge, 118 Ind. 147, 20 N. E. 733; Glass v. Dunn, 17 Ohio St. 413. See Harper v. Bibb, 47 Ala. 547; Kunkel v. Macgill, 56 Md. 120.

Such a bequest differs from a specific legacy in this, that if the fund out of which it is payable fails for any cause, it is nevertheless entitled "to come on the estate as a general legacy; and it differs from a general legacy in this, that it does not abate in that class, but in the class of specific legacies." Armstrong's Appeal, 63 Pa. 312, per Sharswood, J. A bequest of "$2,000 of the South Ward Loan of Chester," where the testator owned $10,000 of the loan at the date of the will, which was paid off before death, was held demonstrative; Ives v. Canby, 48 Fed. 718. So, also, "25 shares of capital stock of the State Bank," etc., the testator owning 25 shares; Davis v. Cain's Ex'r, 36 N. C. 309; had the testator said "my" 25 shares, it would have been a specific legacy; *id.* So of a gift of 25½ canal shares of which the testator owned 15½, all of which he sold before his death; 2 Beav. 515. The criterion in all the cases is whether it was the testator's intention to give the specific security then owned by him, or, on the other hand, to give nothing distinctly severed from his estate, but rather such a sum as would suffice to buy the securities named; *id.* See 2 White & T. Lead. Cas. 646; 2 Y. & C. 90; Newton v. Stanley, 28 N. Y. 61; Dryden v. Owings, 49 Md. 356.

DEMPSTER. **In Scotch Law.** A doomsman. One who pronounced the sentence of court. 1 Howell, St. Tr. 937.

DEMURRAGE. The delay of a vessel by the freighter beyond the time allowed for loading, unloading, or sailing.

Payment for such delay.

The amount due by the freighter or charterer to the owner of the vessel for such delay. 5 E. & B. 755; Abb. Adm. Dec. 548; Gronn v. Woodruff, 19 Fed. 144.

Demurrage may become due either by the ship's detention for the purpose of loading or unloading the cargo, either before or during or after the voyage, or in waiting for convoy; 3 Kent 159; Van Etten v. Newton, 134 N. Y. 143, 31 N. E. 334, 30 Am. St. Rep. 630; Donaldson v. McDowell, 1 Holmes 290, Fed. Cas. No. 3,985; Creighton v. Dilks, 49 Fed. 107; Porter, Bills of L. 356.

Where neither the charter nor the bill of lading contained any provisions as to demurrage, and the master made no formal protest against the delay, but signed the bill of lading without objection and did not bring suit until long after, demurrage could not be recovered; McKeen v. Morse, 49 Fed. 253, 1 C. C. A. 237; Gage v. Morse, 12 Allen (Mass.) 410, 90 Am. Dec. 155; and it is said the English authorities are uniformly against such a liability; *id.* 5 El. & B. 755, 589, 10 C. B. N. S. 802. Here the courts have not generally followed the English rule. It is held that maritime demurrage may be collected, even though not provided for in the contract, and that a lien on the cargo for demurrage may be enforced; Donaldson v. McDowell, Fed. Cas. No. 3,985; The Hyperion's Cargo, *id.* 6,987; 275 Tons of Mineral Phosphates, 9 Fed. 209; Hawgood v. 1,310 Tons of Coal, 21 Fed 681; and in England it is held that a lien for demurrage may be given by contract; L. R. 8 Exch. 101; L. R. 15 Q. B. Div. 247.

Under the terms of a charter where demurrage was to be paid for each working day beyond the days allowed for loading, the time lost by reason of storms before the beginning of the lay days, or after their expiration, could not be deducted in computing the demurrage; Wold v. Keyser, 52 Fed. 169, 2 C. C. A. 656.

The term "working days" in maritime affairs means calendar days, on which the law permits work to be done, and excludes Sundays and legal holidays, but not stormy days; Sorensen v. Keyser, 52 Fed. 163, 2 C. C. A. 650. But see Baldwin v. Timber Co., 142 N. Y. 279, 36 N. E. 1060, where it was held that Sundays are properly included in computing demurrage, when demurrage has begun to run. Where there are no agreed demurrage days for loading the case is one of implied contract to load with reasonable diligence; Randall v. Sprague, 74 Fed. 247, 21 C. C. A. 334.

Where a charter party excepted delays by strikes, it was held to apply to the charterer's own workmen; Wood v. Keyser, 84 Fed. 688; but not to a strike of coal operators which overtaxed the capacity of the harbor and caused delay; W. K. Niver Coal Co. v. S. S. Co., 142 Fed. 402, 73 C. C. A. 502, 5 L. R. A. (N. S.) 126.

Demurrage, though a maritime term, has been adopted in railroad practice. A railroad company may charge $2 a day for the detention of cars after 24 hours, as a general rule of the company known to consignees; Miller v. Mansfield, 112 Mass. 260; so in Norfolk & W. R. Co. v. Adams, 90 Va. 393, 18 S. E. 673, 22 L. R. A. 530, 44 Am. St. Rep. 916, where it was said to be not a transportation, nor storage, nor terminal charge, but a charge by the carrier as bailee of the goods after its duties as a carrier had ceased. Where a statute gives a lien for freight and storage, the lien extends to demurrage charges; New Orleans & N. E. R. Co. v. George, 82 Miss. 710, 35 South. 193. A lien was upheld in Southern R. Co. v. Mfg. Co., 142 Ala. 322, 37 South. 667, 68 L. R. A. 227.

110 Am. St. Rep. 32, 4 Ann. Cas. 12; Darlington v. R. Co., 99 Mo. App. 1, 72 S. W. 122; Schumacher v. R. Co., 207 Ill. 199, 69 N. E. 825. It is held, however, that a carrier has no lien; Nicolette Lumber Co. v. Coal Co., 213 Pa. 379, 62 Atl. 1060, 3 L. R. A. (N. S.) 327, 110 Am. St. Rep. 550, 5 Ann. Cas. 387; Wallace v. R. Co., 216 Pa. 311, 65 Atl. 665.

A state cannot enact that a consignee shall have 3 days to unload and as many more as he chooses at $1 a day; Pennsylvania R. Co. v. M. O. Coggins Co., 38 Pa. Super. Ct. 129.

See 3 L. R. A. (N. S.) 327, n. See LAY DAYS; LIEN.

DEMURRER (Lat. *demorari*, Old Fr. *demorrer*, to stay; to abide). **In Pleading.** An allegation, that, admitting the facts of the preceding pleading to be true, as stated by the party making it, he has yet shown no cause why the party demurring should be compelled by the court to proceed further. A declaration that the party demurring will *go no further*, because the other has shown nothing against him. 5 Mod. 232; Co. Litt. 71 *b*. It imports that the objecting party will not proceed, but will wait the judgment of the court whether he is bound so to do. Co. Litt. 71 *b*; Steph. Pl. 61; Pepper, Pl. 11.

In Equity. An allegation of a defendant, which, admitting the matters of fact alleged by the bill to be true, shows that as therein set forth they are insufficient for the plaintiff to proceed upon, or to oblige the defendant to answer; or that, for some reason apparent on the face of the bill, or on account of the omission of some matter which ought to be contained therein, or for want of some circumstances which ought to be attendant thereon, the defendant ought not to be compelled to answer to the whole bill, or to some certain part thereof. Mitf. Eq. Pl. 107.

A demurrer was said to be an answer in law to a bill, though not technically an answer in the common language of practice; New Jersey v. New York, 6 Pet. (U. S.) 323, 8 L. Ed. 414. The purpose of a demurrer being to raise the question whether the case presented by the bill would, if proved, entitle the plaintiff to the relief sought, it necessarily proceeds upon the theory that the truth of the bill is admitted. It is therefore settled that all facts well pleaded in the bill, but no others, are taken to be true, for the purposes of the argument and decision upon the demurrer; Commercial Bank v. Buckner, 20 How. (U. S.) 108, 15 L. Ed. 862; Griffing v. Gibb, 2 Black (U. S.) 519, 17 L. Ed. 353; Goble v. Andruss, 2 N. J. Eq. 66; 1 Ves. Jr. 72; 1 Dan. Ch. Pr. 545. It does not admit conclusions of law stated in the bill; Bryan v. Spruill, 57 N. C. 27; Fogg v. Blair, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104; nor can it supply defects in substance, nor cure a defective title, nor yet establish one defectively set forth; Mills v. Brown, 2 Scam. (Ill.) 549; nor does it admit any allegations repugnant to facts of which the court takes judicial notice; 1 Dan. Ch. Pr. 546; nor a fact manifestly or legally impossible; Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 3 Sup. Ct. 193, 27 L. Ed. 922; nor an averment contrary to the facts set forth in the bill; 3 Ves. 4; Redmond v. Dickerson, 9 N. J. Eq. 507, 59 Am. Dec. 418; nor inferences of other facts from those stated; Dike v. Greene, 4 R. I. 285; nor the construction of a statute; Pennie v. Reis, 132 U. S. 464, 10 Sup. Ct. 149, 33 L. Ed. 426; nor of any instrument set forth in or annexed to the bill; Dillon v. Barnard, 21 Wall. (U. S.) 430, 22 L. Ed. 673; Interstate Land Co. v. Land Grant Co., 139 U. S. 569, 11 Sup. Ct. 656, 35 L. Ed. 278; Lea v. Robeson, 12 Gray (Mass.) 280; Dillon v. Barnard, 1 Holmes 389, Fed. Cas. No. 3,915; U. S. v. Ames, 99 U. S. 35, 25 L. Ed. 295. It admits only facts well pleaded, but not the conclusions of law, nor the correctness of the pleader's opinion as to future results; Equitable Life Assur. Soc. v. Brown, 213 U. S. 26, 29 Sup. Ct. 404, 53 L. Ed. 682; as a rule of evidence it was never supposed that a demurrer admitted anything; Havens v. R. Co., 28 Conn. 69.

As a rule these limitations upon the effect of a demurrer in equity, as admissions, apply equally at law.

Allegations on information and belief are not admitted by a demurrer to be facts; Trimble v. Sugar Refining Co., 61 N. J. Eq. 340, 48 Atl. 912; 1 Ves. 56, 5 Beav. 620; Sto. Eq. Pl. §§ 241, 256; Cameron v. Abbott, 30 Ala. 416; but in a subsequent case it was held that, although the averment that complainant is informed and believes that the fact exists is insufficient, he may state the existence of the fact with the additional words "as he is informed and believes"; Lucas v. Oliver, 34 Ala. 626; and see also Christian v. Mortgage Co., 92 Ala. 130, 9 South. 219 and Dreunen v. Deposit Co., 115 Ala. 592, 23 South. 161, 39 L. R. A. 623, 67 Am. St. Rep. 72. An allegation that the complainant "is informed and believes, and therefore avers," is sufficient; Wells v. Hydraulic Co., 30 Conn. 316, 79 Am. Dec. 250; and so is an allegation that he is informed and believes the fact to be true, followed by a statement that he therefore charges the fact to be true, where it related to matter necessarily within the knowledge of the defendant; Campbell v. R. Co., 71 Ill. 611.

In Kansas v. Colorado, 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838, the court said that "sitting, as it were, as an international, as well as a domestic tribunal" they were "unwilling in this case to proceed on the mere technical admissions made by the demurrer," and they accordingly overruled it without prejudice and forebore to proceed until all the facts were before the court on the evidence.

By Federal Equity Rule 29, 33 Sup. Ct. xxvi (in effect February 1, 1913), demurrers (and pleas) are abolished; every defence in law shall be made by motion to dismiss or in the answer; every such point of law going to the whole or a material part of the cause of action may be disposed of before final hearing at the discretion of the court.

A demurrer may be either to the relief asked by the bill, or to both the relief and the discovery; Higinbotham v. Burnet, 5 Johns. Ch. (N. Y.) 184; Brownell v. Curtis, 10 Paige Ch. (N. Y.) 210; but not to the discovery alone where it is merely incidental to the relief; 2 Bro. C. C. 123; 1 Y. & C. 197; 1 S. & S. 83. It is said by Langdell (Eq. Pl. 60) that every proper demurrer is to relief alone; and that while it always, if well taken, protects the defendant from giving any discovery, that is a legal consequence merely. As to exceptions to avoid self-crimination, see Sharp v. Sharp, 3 Johns. Ch. (N. Y.) 407; Patterson v. Patterson, 2 N. C. 167; Wolf v. Wolf's Ex'r, 2 H. & G. (Md.) 382, 18 Am. Dec. 313. If it goes to the whole of the relief, it generally defeats the discovery if successful, 2 Bro. C. C. 319; Souza v. Belcher, 3 Edw. Ch. (N. Y.) 117; Miller v. Ford, 1 N. J. Eq. 358; Welles v. R. Co., Walk. Ch. (Mich.) 35; Pool v. Lloyd, 5 Metc. (Mass.) 525, otherwise, if to part only; Ad. Eq. 334; Story, Eq. Pl. § 545; Brownell v. Curtis, 10 Paige, Ch. (N. Y.) 210.

It may be brought either to original or supplemental bills; and there are peculiar causes of demurrer in the different classes of supplemental bills; 2 Madd. 387; 4 Sim. 76; 3 Hare, 476; 3 P. Wms. 284; Dias v. Merle, 4 Paige Ch. (N. Y.) 259; Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 250; Whiting v. Bank, 13 Pet. (U. S.) 6, 14, 10 L. Ed. 33; Story, Eq. Pl. § 611.

Demurrers are *general*, where no particular cause is assigned except the usual formulary that there is no equity in the bill, or *special*, where the particular defects are pointed out; Story, Eq. Pl. § 455, Dan. Ch. Pr. 586. General demurrers are used to point out defects of substance; special, to point out defects in form. "The terms have a different meaning [in equity] from what they have at common law;" Langd. Eq. Pl. 58.

The defendant may demur to part of the bill; Whitteck v. Edgar, 2 Barb. Ch. (N. Y.) 106; and plead or answer to the residue, or both plead and answer to separate parts thereof; 3 P. Wms. 80; Clark v. Phelps, 6 Johns. Ch. (N. Y.) 214; Bull v. Bell, 4 Wis. 54; taking care so to apply them to different and distinct parts of the bill that each may be consistent with the others; 3 M. & C. 653; Gray v. Regan, 23 Miss. 304; Story, Eq. Pl. § 442; but if it be to the whole bill, and a part be good, the demurrer must be overruled; Graves v. Hull, 27 Miss. 419; Barnawell v. Threadgill, 40 N. C. 86; Burns v. Hobbs, 29 Me. 273; Robinson v. Guild, 12 Metc. (Mass.) 323; Gay v. Skeen, 36 W. Va. 582, 15 S. E. 64. If it is to the whole bill it cannot be sustained if, for any equity apparent in the bill, complainants are entitled to relief; George v. Banking Co., 101 Ala. 607, 14 South. 752; Merriam v. Pub. Co., 43 Fed. 150. A general demurrer to a bill must be overruled unless it appears that on no possible state of the evidence could a decree be made; Failey v. Talbee, 55 Fed. 892; Darrah v. Boyce, 62 Mich. 480, 29 N. W. 102.

Demurrers lie only for matter apparent on the face of the bill, and not upon any new matter alleged by the defendant; Beames, Ord. in Ch. 26; 6 Sim. 51; 2 Sch. & L. 637; Southern Life Ins. & Trust Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448; Black v. Shreeve, 7 N. J. Eq. 440; Hinchman v. Kelley, 54 Fed. 63, 4 C. C. A. 189. A demurrer which alleges, as cause of demurrer, new matter, in addition to what is contained in the bill, is termed a *speaking demurrer* and must be overruled; 4 Bro. C. C. 251; 4 Drew. 306. Brooks v. Gibbons, 4 Paige Ch. (N. Y.) 374; Ramage v. Towles, 85 Ala. 589, 5 South. 342, Stewart v. Masterson, 131 U. S. 151, 9 Sup. Ct. 682, 33 L. Ed. 114; and so also where an attempt to sustain a demurrer is made by the averment of some fact in an answer it is of the same nature and is not aided thereby; Kuypers v. Reformed Dutch Church, 6 Paige Ch. (N. Y.) 570. To constitute a speaking demurrer, the averment must be necessary to support the demurrer; 2 Mol. 295; Saxon v. Barksdale, 4 Desaus. (S. C.) 522; and cases *supra*; and not mere immaterial matter which, though improper as surplusage, is not fatal to the demurrer, 1 Sim. 5; 2 Sim. & Stu. 127.

The term "speaking demurrer" originated with Lord Hardwicke in Brownswood v. Edwards, 2 Ves. 247, 248, and it was used by the reporters in the syllabi of that case and of Edsell v. Buchanan, 4 Bro. C. C. 254, nearly fifty years later. The editor of Tyler's edition of Mitford, in a note to the word in his index, assumes that Mitford ignored the term because Lord Hardwicke had used it in ridicule and not as a new technical distinction. However that may be, it seems to have been too generally adopted by courts and text-writers to be now disregarded as an apt characterization of what it was meant to express.

A defendant may at the hearing of a demurrer orally assign another cause, different from or in addition to those on the record, which is termed a demurrer *ore tenus*, and may be sustained, although that on the record is overruled; Brinkerhoff v. Brown, 6 Johns. Ch. (N. Y.) 149; Wright v. Dame, 1 Metc. (Mass.) 237; Chase v. Searles, 45 N. H. 512; 8 Ves. 405; as, on demurrer to general relief, the objection of non-joinder may be made *ore tenus;* Garlick v. Strong, 3 Paige Ch. 440; 6 Ves. 779. Causes of demurrer *ore tenus* must be coextensive with those on the record, and if the latter apply to the whole bill, the former will not be allowed to part of it; 1 De G., J. & S. 38; and a cause

overruled cannot be repeated *ore tenus;* 1 Anst. 1; but see 12 W. R. 394; nor, after demurrer to the whole bill has been overruled, can part of it be demurred to *ore tenus;* 2 Yo. & J. 490; Clark v. Davis, Harring. Ch. (Mich.) 227.

Demurrers are not applicable to pleas or answers. If a plea or answer is bad in substance, it may be shown on hearing; and if the answer is insufficient in form, exceptions should be filed; Story, Eq. Pl. §§ 456, 861; Langd. Eq. Pl. 58; Winters v. Claitor, 54 Miss. 341; Travers v. Ross, 14 N. J. Eq. 254.

If the bill contains an allegation of fraud, it must be denied by answer, whatever defence may be adopted to other parts of the bill; because fraud gives jurisdiction to the court and lays a foundation for relief; hence a general demurrer to a bill containing such an allegation cannot be allowed; Niles v. Anderson, 5 How. (Miss.) 366.

Demurrers to relief are usually brought for causes relating to the *jurisdiction,* as that *the subject* is not cognizable *by any court,* as in some cases under political treaties; 1 Ves. 371; Foster v. Neilson, 2 Pet. (U. S.) 253; 7 L. Ed. 415; but see Cherokee Nation v. Georgia, 5 Pet. (U. S.) 1, 8 L. Ed. 25; U. S. v. Clarke, 8 Pet. (U. S.) 436, 8 L. Ed. 1001; Martin v. Hunter, 1 Wheat. (U. S.) 304, 4 L. Ed. 97; Carneal v. Banks, 10 Wheat. (U. S.) 181, 6 L. Ed. 297; Gordon v. Kerr, 1 Wash. C. C. 322, Fed. Cas. No. 5,611.

It is frequently said that by demurring to a bill in chancery, for want of equity, the defendants submit to the jurisdiction of the court, as if that question were to be raised it should have been presented by plea; Bank of Bellows Falls v. R. Co., 28 Vt. 470; 1 Atk. 543, where Lord Hardwicke is represented as having said: "The defendant should not have demurred for want of jurisdiction, for a demurrer is always in bar, and goes to the merits of the case; and therefore it is informal and improper in that respect, for he should have pleaded to the jurisdiction." In a note to section 456 of Sto. Eq. Pl. after quoting these words it is said: "This language is loose and inaccurate. If the court has no jurisdiction, the objection may be taken by demurrer, if it is apparent on the face of the bill; Mitf. Eq. Pl. by Jeremy, 110, 216; 2 Sim. & Stu. 431. And a demurrer may be for causes not going to the merits." This note in Sumner's edition, the first after Judge Story's death, appears from the editor's prefatory note to be the author's own comment. Such objection on demurrer is allowed in the federal courts; Ober v. Gallagher, 93 U. S. 199, 23 L. Ed. 829; Peale v. Coal Co., 172 Fed. 639; but if one cause assigned goes to the merits it operates as a waiver of the objection to the jurisdiction; *id.*

In some states, where the jurisdiction in equity is more or less restricted, it is held that the question of jurisdiction may be raised by general demurrer; Jones v. Newhall, 115 Mass. 244, 15 Am. Rep. 97; Earle v. Humphrey, 121 Mich. 518, 80 N. W. 370; and that it is the proper method of raising it: Pennsylvania R. Co. v. Bogert, 209 Pa. 589, 59 Atl. 100; Love v. Robinson, 213 Pa. 480, 62 Atl. 1065.

So demurrers to relief will lie in certain cases of confiscation; 3 Ves. 424; 10 *id.* 354; see Ware v. Hylton, 3 Dall. (U. S.) 199, 1 L. Ed. 568; and questions of boundaries; Story, Eq. Pl. 347; 1 Ves. 446; as to law in the United States, see Massie v. Watts, 6 Cra. (U. S.) 158, 3 L. Ed. 181; N. Y. v. Connecticut, 4 Dall. (U. S.) 3, 1 L. Ed. 715; State v. People, 5 Pet. (U. S.) 284, 8 L. Ed. 127; State v. State, 14 Pet. (U. S.) 210, 10 L. Ed. 123, or *that it is not cognizable* by a court of equity; Taylor v. Buchan, 16 Ga. 541; Groves' Heirs v. Fulsome, 16 Mo. 543, 57 Am. Dec. 247; Box v. Stanford, 13 Smedes & M. (Miss.) 93, 51 Am. Dec. 142; L. R. 8 Ch. App. 369, *or that some other* court of equity has jurisdiction properly; Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. (U. S.) 1, 4 L. Ed. 499; Mays v. Taylor, 7 Ga. 213; 1 Ves. 203; *or that some other court* has jurisdiction properly; Bingham v. Cabot, 3 Dall. (U. S.) 382, 1 L. Ed. 646; Wallace v. Fletcher, 30 N. H. 414; Louisville, C. & C. R. Co. v. Letson, 2 How. (U. S.) 497, 11 L. Ed. 353; *to the person,* as that the plaintiff is not entitled to sue, by reason of personal disability, as infancy, idiocy, etc.; Jac. 377; bankruptcy and assignment; 1 Y. & C. 172; or has no title to sue in the character in which he sues; 2 P. Wms. 369; Livingston v. Lynch, 4 Johns. Ch. 575; or that the relief prayed is barred by limitation; Mercantile Nat. Bank v. Carpenter, 101 U. S. 567, 25 L. Ed. 815; Parmelee v. Price, 208 Ill. 544, 70 N. E. 725; Nash v. Ingalls, 101 Fed. 645; or a portion of it; City of Memphis v. Cable Co., 145 Fed. 602, 76 C. C. A. 292; *to the substance of the bill,* as that the matter is *too trivial;* Moore v. Lyttle, 4 Johns. Ch. (N. Y.) 183; Carr v. Iglehart, 3 Ohio St. 457; 1 Vern. 359; that the *plaintiff* has *no interest* in the matter; Mitf. Eq. Pl. 154; 2 S. & S. 592; Long v. Majestre, 1 Johns. Ch. (N. Y.) 305; Haskell v. Hilton, 30 Me. 419; Barr v. Clayton, 29 W. Va. 256, 11 S. E. 899; Keyser v. Renner, 87 Va. 249, 12 S. E. 406; or that the *defendant* has no such *interest;* 2 Bro. C. C. 332; 5 Madd. 19; Wakeman v. Bailey, 3 Barb. Ch. (N. Y.) 485; De Wolf v. Johnson, 10 Wheat. (U. S.) 384, 6 L. Ed. 343; or that the bill is *to enforce a penalty;* 4 Bro. Ch. 434; *to the frame and form of the bill,* as that there is a defect or want of form; Mitf. Eq. Pl. 206; 5 Russ. 42; Ulrici v. Papin, 11 Mo. 42; or that the bill is multifarious; Story, Eq. Pl. § 530, n.; 2 S. & S. 79; Layton v. State, 4 Harring. (Del.) 9; White v. Curtis, 2 Gray (Mass.) 471; Oliver v. Platt, 3 How. (U. S.) 412, 11 L. Ed. 622; McDermott v. McGown, 4 Edw. (N. Y.) 592; that there is a want or misjoinder

of plaintiffs; 1 P. Wms. 428; Mitchell v. Lenox, 2 Paige, Ch. (N. Y.) 281; Wormley v. Wormley, 8 Wheat. (U. S.) 451, 5 L. Ed. 651; Southern Life Ins. & Trust Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448; White v. Curtis, 2 Gray (Mass.) 467; Betton v. Williams, 4 Fla. 11; but only when it appears from the facts disclosed by the bill; Farson v. Sioux City, 106 Fed. 278; Walling v. Thomas, 133 Ala. 426, 31 South. 982; for a misjoinder of parties defendant where those only can demur who are improperly joined; Bigelow v. Sanford, 98 Mich. 657, 57 N. W. 1037; or where laches affirmatively appear on the face of a bill; Hinchman v. Kelley, 54 Fed. 63, 4 C. C. A. 189; Thurmond v. Ry. Co., 140 Fed. 697, 72 C. C. A. 191; Tetrault v. Fournier, 187 Mass. 58, 72 N. E. 351; Thompson v. Iron Co., 41 W. Va. 574, 23 S. E. 795; Hawley v. Pound, 76 Neb. 130, 106 N. W. 458; or staleness of claim; Hubbard v. Manhattan Trust Co., 87 Fed. 51, 30 C. C. A. 520; but only when it appears on the face of the bill; Marsh v. Marsh, 78 Vt. 399, 63 Atl. 159; but laches as an equitable defence cannot be raised on demurrer; Drake v. Wild, 65 Vt. 611, 27 Atl. 427; Gleason v. Carpenter, 74 Vt. 399, 52 Atl. 966.

A demurrer to an answer or plea in equity is improper; Pennsylvania Co. v. Bay, 138 Fed. 203; and is not permitted; Stokes v. Farnsworth, 99 Fed. 836. The sufficiency of an answer is properly questioned by setting the cause down for hearing on bill and answer; Barrett v. Twin City Power Co., 111 Fed. 45; or of a plea by setting it down for argument; Roundtree v. Gordon, 8 Mo. 19; but a demurrer to an answer filed and not objected to has been treated as an application to set the cause down on bill and answer; Grether v. Wright, 75 Fed. 712, 23 C. C. A. 498.

Demurrers to discovery may be brought for most of the above causes; 12 Beav. 423; Ocean Ins. Co. v. Fields, 2 Sto. 59, Fed. Cas. No. 10,406; and, generally, that the plaintiff has no right to demand the discovery asked for, either in whole or in part; 8 Ves. 308; 2 Russ. 564; or to ask it of the defendant; Story, Eq. Pl. § 570. "A demurrer to discovery is not, in its nature, a pleading at all, but a mere statement in writing that the defendant refuses to answer certain allegations or charges in the bill, for reasons which appear upon the face of the bill, and which the demurrer points out." Langd. Eq. Pl. 61. See DISCOVERY.

The effect of a demurrer when allowed is to put an end to the suit, unless it is confined to a part of the bill, or the court gives the plaintiff leave to amend; Fleece v. Russell, 13 Ill. 31; it is within the discretion of the court whether the defendant will be ruled to answer after overruling a demurrer; and it may enter a decree against him at once, or hear evidence, or refer to a master to take evidence before entering a decree; Iglehart v. Miller, 41 Ill. App. 439; Bruschke v. Der Nord Chicago Schuetzen Verein, 145 Ill. 433, 34 N. E. 417. If overruled, the defendant must make a fresh defence by answer; Cole County v. Angney, 12 Mo. 132; unless he obtain permission to put in a plea; Ad. Eq. 336. Since, as shown *supra*, the demurrer does not admit the truth of the bill, but only assumes it for the sake of argument, if the demurrer is overruled the plaintiff must proceed to prove his bill; Langd. Eq. Pl. 104. The court will sometimes disallow the demurrer without deciding that the bill is good, reserving that question till the hearing; *id.* 106.

Equity rules usually provide for a certificate of the opinion of counsel that the demurrer is well founded in law, and an affidavit by defendant that it is not interposed for delay.

At Law. A *general* demurrer is one which excepts to the sufficiency of a previous pleading in general terms, without showing specifically the nature of the objection; and such demurrer is sufficient when the objection is on matter of substance; Steph. Pl. 159; Co. Litt. 72 *a*; Flanagan v. Ins. Co., 25 N. J. L. 506, Gordon v. State, 11 Ark. 12; Coffin v. Knott, 2 G. Greene (Ia.) 582, 52 Am. Dec. 537; Tyler v. Canaday, 2 Barb. (N. Y.) 160; Cheek v. Herndon, 82 Tex. 146, 17 S. W. 763. A court, after overruling a general demurrer to a complaint on the ground that it does not state a cause of action, may in its discretion enter final judgment on the demurrer; Alley v. Nott, 111 U. S. 472, 4 Sup. Ct. 495, 28 L. Ed. 491.

A *special demurrer* is one which excepts to the sufficiency of the pleadings on the opposite side, and shows specifically the nature of the objection and the particular ground of exception; Co. Litt. 72 *a*. An objection to a complaint, on the ground of ambiguity or uncertainty, can be taken only by special demurrer; Kirsch v. Derby, 96 Cal. 662, 31 Pac. 567; as must be a demurrer to a plea on the ground of duplicity, Willey v. Carpenter, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853; but see Corpening v. Worthington & Co., 99 Ala. 541, 12 South. 426.

It is necessary where the objection is to the form, by the statutes 27 Eliz. c. 5 and 4 Anne, c. 16; Blakeney v. Ferguson, 18 Ark. 347; Mitchell v. Williamson, 6 Md. 210; Lyon v. Fish, 20 Ohio, 100. Under a special demurrer the party may, on the argument, not only take advantage of the particular faults which his demurrer specifies, but also of all objections in substance.

It is not enough that a special demurrer object in general terms, that the pleading is "uncertain, defective, and informal," or the like, but it is necessary to show in what respect it is uncertain, defective, and informal; 1 Wms. Saund. 161, n. 1, 337 *b*, n. 3; Steph. Pl. 159, 161; 1 Chit. Pl. 642.

A demurrer may be for insufficiency either

in substance or in form; that is, it may be either on the ground that the case shown by the opposite party is essentially insufficient, or on the ground that it is stated in an inartificial manner; Hob. 164; Richmond v. Brookings, 48 Fed. 241. But such a demurrer does not raise the question of the jurisdiction of the court; Saxton v. Seiberling, 48 Ohio St. 554, 29 N. E. 179. It lies to any of the pleadings, except that there may not be a demurrer to a demurrer; Salk. 219; Bacon, Abr. *Pleas* (N 2). But it will not lie to a supplemental complaint; Lewis v. Rowland, 131 Ind. 37, 30 N. E. 796; while it will to a supplemental answer; Eckert v. Binkley, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441. Demurrer may be to the whole or a part of the pleading; but if to the whole, and a part be good, the demurrer will be overruled; 13 East 76; Backus v. Richardson, 5 Johns. (N. Y.) 476; Brown v. Castles, 11 Cush. (Mass.) 348; Tucker v. Hart, 23 Miss. 548; Brown v. Duchesne, 2 Curt. C. C. 97, Fed. Cas. No. 2,003; Walton v. Stephenson, 14 Ill. 77; Scott v. State, 2 Md. 284; Pinkum v. City of Eau Claire, 81 Wis. 301, 51 N. W. 550; Alabama Great Southern R. Co. v. Tapia, 94 Ala. 226, 10 South. 236. But see Barbee v. Road Co., 6 Fla. 262; Whiting v. Heslep, 4 Cal. 327; State v. Clark, 9 Ind. 241; Henderson v. Stringer, 6 Gratt. (Va.) 130; Com. v. Hughes, 8 B. Monr. (Ky.) 400. The objection must appear on the face of the pleadings; 2 Saund. 864; Town of Hartland v. Town of Windsor, 29 Vt. 354; or upon oyer of some instrument defectively set forth therein; 2 Saund. 60, n.; Williams v. Boyle, 1 Misc. 364, 20 N. Y. Supp. 720. A joint demurrer by two defendants to a declaration for want of a cause of action should be overruled if the declaration sets forth a cause of action as to either of them; May v. Jones, 88 Ga. 308, 14 S. E. 552, 15 L. R. A. 637, 30 Am. St. Rep. 154; Lancaster v. Roberts, 144 Ill. 213, 33 N. E. 27.

A demurrer does not reach vagueness and uncertainty in a complaint, but they must be remedied by a motion to make more specific and certain; Sheeks v. Erwin, 130 Ind. 31, 29 N. E. 11; Sluyter v. Ins. Co., 3 Ind. App. 312, 29 N. E. 608; Chamberlain v. Mensing, 51 Fed. 669.

Where the want of jurisdiction in a federal court is apparent on the face of the petition, declaration or complaint, it may be taken advantage of by demurrer; Southern P. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; Hagstoz v. Ins. Co., 179 Fed. 569; and the same is true of the statute of limitations; Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807; Kendall v. U. S., 107 U. S. 123, 2 Sup. Ct. 277, 27 L. Ed. 437.

For the various and numerous causes of demurrer, reference must be had to the law of each state.

As to the effect of a demurrer. It admits all such matters of fact as are sufficiently pleaded; Com. Dig. *Pleader* (A 5); Jones v. Ireland, 4 Ia. 63; Roberts v. State, 14 Ga. 8, 58 Am. Dec. 528; Pierson v. Wallace, 7 Ark. 282; Soule v. Seattle, 6 Wash. 315, 33 Pac. 384, 1080; Jorgensen v. Ministers of Church, 7 Misc. 1, 27 N. Y. Supp. 318. Its office was to test the sufficiency of the preceding pleading both as to form and substance, and it was resorted to by either party who believed that the pleading of the other party was insufficient either because the declaration did not show a good cause of action or the plea did not set up a legal defence; but it does not admit mere epithets charging fraud and allegations of legal conclusions; Kent v. R. & I. Co., 144 U. S. 75, 12 Sup. Ct. 650, 36 L. Ed. 352; nor an erroneous averment of law; Dickerson v. Winslow, 97 Ala. 491, 11 South. 918.

The demurrer reaches back to the first error in the pleading; Terry v. Tubman, 92 U. S. 156, 23 L. Ed. 537; but not where the defect is of form and not of substance; Baltimore & O. R. Co. v. Harris, 12 Wall. (U. S.) 65, 20 L. Ed. 354. On demurrer the court consider the whole record, and give judgment according to the legal right for the party who on the whole seems best entitled to it; 4 East 502; Pickett v. Bank, 8 Ark. 224; Wales v. Lyon, 2 Mich. 276; Townsend v. Jemison, 7 How. (U. S.) 706, 12 L. Ed. 880; Shaw v. White, 28 Ala. 637; Claggett v. Simes, 31 N. H. 22; Freeman v. Freeman, 39 Me. 426; Peoria & O. R. Co. v. Neill, 16 Ill. 269. For example, on a demurrer to the replication, if the court think the replication bad, but perceive substantial fault in the plea, they will give judgment, not for the defendant, but for the plaintiff; 2 Wils. 150; Townsend v. Jemison, 7 How. (U. S.) 706, 12 L. Ed. 880; provided the declaration be good; but if the declaration also be bad in substance, then, upon the same principle, judgment would be given for the defendant; 5 Co. 29 *a*. The court will not look back into the record to adjudge in favor of an apparent right in the plaintiff, unless the plaintiff have himself put his action upon that ground; 5 B. & Ald. 507. If, however, the plaintiff demur to a plea in abatement, and the court decide against the plea, they will give judgment of respondeat ouster, without regard to any defect in the declaration; Carth. 172; Ellis v. Ellis, 4 R. I. 110; Knott v. Clements, 13 Ark. 335; Ryan v. May, 14 Ill. 49. A party waives his demurrer by not calling for action thereon; Phœnix Ins. Co. v. Boren, 83 Tex. 97, 18 S. W. 484.

In Practice. *Demurrer upon evidence* is a declaration that the party making it, generally the defendant, will not proceed, because the evidence offered on the other side is not sufficient to maintain the issue; Shaw v. White, 28 Ala. 637.

It is said that, although generally superseded by motion for nonsuit, binding instructions, or to exclude the evidence from the

jury, the practice is recognized "in nearly half the states" in civil cases; 15 H. L. Rev. 738. Nevertheless, the proceeding is so hedged about with technicalities that it is infrequently resorted to and when invoked has been the subject of the continuing disapproval of the courts ever since it was said by Chief Justice Tilghman that "he who demurs to parol evidence engages in an uphill business"; Dickey v. Schreider, 3 S. & R. (Pa.) 416; and Emery, J., characterized it as "unusual and antiquated practice"; State v. Soper, 16 Me. 293, 33 Am. Dec 665. In 1859 it had long been out of use in New York and refusal to allow it was not cause of exception; Colegrove v. R. Co., 20 N. Y. 492, 75 Am. Dec. 418.

Upon joinder by the opposite party, the jury is generally discharged from giving any verdict; 1 Archb. Pr. 186; and the demurrer being entered on record is afterwards argued and decided by the court in banc; and the judgment there given upon it may ultimately be brought before a court of error; Andr. Steph. Pl. 180. It admits the truth of the evidence given and the legal deductions therefrom; Davis v. Steiner, 14 Pa. 275, 53 Am. Dec. 547; Hopkins v. Bowers, 111 N. C 175, 16 S. E. 1; Doe v. Rue, 4 Blackf (Ind.) 263, 29 Am. Dec. 368; but only such inferences as the jury might have drawn; Union S. S. Co. v. Nottinghams, 17 Gratt. (Va.) 115, 91 Am. Dec. 378; MacKinley v. McGregor, 3 Whart. (Pa.) 369, 31 Am. Dec. 522. An offer, in a civil case, so to demur, is not *strictæ juris*, but is allowable only in the discretion of the court and should be refused if there is not colorable cause for it; Jones v Ireland, 4 Ia. 63; it may be tendered by either party and the court may compel a joinder, but the power should be exercised with discretion, and when exercised, the action of the court is open to review; Eubank's Ex'r v. Smith, 77 Va. 206. See Plant v. Edwards, 85 Ind. 588. All facts proved and legitimate inferences therefrom must be admitted; Hopkins v. R. R., 96 Tenn. 409, 34 S. W. 1029, 32 L. R. A. 354; Illinois Cent R. Co. v. Brown, 96 Tenn. 559, 35 S. W. 560; and until the party demurring does this, the party offering the evidence is not required to join in demurrer; 2 H. Bl. 189 (where the subject and the practice thereon was elaborately considered in the House of Lords); and if the evidence is *prima facie* insufficient the demurrer is sustained; State v. Goetz, 131 Mo 675, 33 S. W. 161; otherwise if there is some evidence on each material point; Hagan v B'l'g & Loan Ass'n, 2 Kan. App. 711, 43 Pac. 1138; Cherokee & P Coal & Mining Co v Britton, 3 Kan. App. 292, 45 Pac. 100. "Since it was determined that a demurrer to evidence could not be resorted to as a matter of right, it has fallen into disuse; and as long ago as 1813 (Young v. Black, 7 Cra. (U. S.) 565, 3 L. Ed. 440) it was regarded as an unusual proceeding, and one to be allowed or denied by the court in the exercise of a sound discretion under all the circumstances of the case;" Suydam v. Williamson, 20 How. (U. S.) 427, 436, 15 L. Ed. 978. A bill of exceptions is more comprehensive, in that it permits the review of rulings upon the admission of evidence, objection to which is waived by the demurrer; *id.* An offer of an instruction to find for the defendant, submitted at the close of the plaintiff's evidence, is equivalent to a demurrer to the evidence; Mitchell v. Ry. Co., 82 Mo. 106; Baker v. State, 31 Ohio St. 314.

The result of a demurrer to evidence must be final judgment for one party or the other —for the defendant if his demurrer were sustained or for the plaintiff if it were overruled, and in the latter case judgment would be given on the verdict if a conditional one had been taken, or if not, a writ of inquiry would issue to assess the damages. This practice appears from the cases already cited and is well stated in Obaugh v. Finn, 4 Ark. 110, 37 Am. Dec. 773, where it was held to be error to retain the jury after joinder in demurrer to evidence and to submit the case to the jury after overruling the demurrer. It would seem therefore that after that has been done the defendant demurrant is precluded from introducing evidence; State v. Groves, 119 N. C. 822, 25 S. E. 819; although it appears to have been done in an Oklahoma case in which, on writ of error, the United States Supreme Court held that where the defendant, after his demurrer to the evidence was overruled, had introduced evidence in his own behalf, he waived any supposed error in the decision on the demurrer; McCabe & Steen Const. Co. v. Wilson, 209 U. S 275, 28 Sup. Ct. 558, 52 L. Ed. 788. And it was also done in Oglesby v. R. Co., 177 Mo. 272, 76 S. W. 623, where, after a demurrer to evidence was overruled, the defendant put in its testimony, which, with the plaintiff's, was considered as a whole and reviewed on appeal, and the court declined to review the judgment that the case was one to go to the jury.

In criminal trials it is entirely discretionary with the court whether it will entertain a demurrer to the evidence, even though counsel for the prisoner and state should both consent to it; Duncan v. State, 29 Fla. 439, 10 South. 815. In some courts, the propriety of the proceeding, in criminal cases, is denied; Nelson v. State, 47 Miss 621; Miller v. State, 79 Ind. 198; Baker v. State, 31 Ohio St. 314; Doss v. Com., 1 Gratt. (Va.) 557; State v. Alderton, 50 W. Va. 101, 40 S. E. 350; while in others it is allowed but not encouraged; Martin v. State, 62 Ala. 240; State v. Soper, 16 Me. 293, 33 Am. Dec. 665. If allowed, it must state facts, and not evidence tending to prove those facts; Crowe v. People, 92 Ill. 231 (and this applies also in civil causes; Story, J., in Fowle v. Alexandria, 1 Wheat. [U. S.] 320, 6 L. Ed. 484);

and if it is resorted to by an accused, and overruled, he cannot introduce further evidence to controvert that which he has admitted; State v. Groves, 119 N. C. 822, 25 S. E. 819.

A demurrer to the evidence in equity has the same effect as at law, and concedes every fact which such evidence tends to prove, and every inference fairly deducible from the facts proved; Healey v. Simpson, 113 Mo. 340, 20 S. W. 881.

For a full discussion of the subject see 32 L. R. A. 354.

Demurrer to interrogatories is the reason which a witness tenders for not answering a particular question in interrogatories; 2 Swanst 194. It is not, strictly speaking, a demurrer, except in the popular sense of the word; Gresl. Eq. Ev. 61. The court are judicially to determine its validity. The witness must state his objection very carefully; for these demurrers are held to strict rules, and are readily overruled if they cover too much; 2 Atk 524; 1 Y. & J. 132

DEMURRER BOOK. In English Practice. A transcript of all the pleadings that have been filed or delivered between the parties made upon the formation of an issue at law. 3 Steph Com 511; Lush, Pr. 787.

DEMURRER UPON EVIDENCE. See DEMURRER

DEMY SANKE, DEMY SANGUE. Half-blood. A corruption of *demi-sang*.

DEN AND STROND. Liberty for ships and vessels to run aground or come ashore (strand themselves). Cowell

DENARII. An ancient general term for any sort of *pecunia numerata*, or ready money. The French use the word *denier* in the same sense; *payer de ses propres deniers*.

DENARIUS DEI. God's penny; earnest money. A certain sum of money which is given by one of the contracting parties to the other as a sign of the completion of the contract. See EARNEST; GOD'S PENNY.

It differs from *arrha* in this, that the latter is a part of the consideration, while the *denarius Dei* is no part of it 1 Duvergnoy, n 132; 3 id. n. 49; *Répert de Jur*, *Denier à Dieu*

DENATIONALIZATION. See EXPATRIATION.

DENIAL. In Pleading. A traverse of the statement of the opposite party; a defence.

DENIER À DIEU. In French Law. A sum of money which the hirer of a thing gives to the other party as evidence, or for the consideration of the contract, which either party may annul within twenty-four hours, the one who gave the *denier à Dieu* by demanding, and the other by returning it. See DENARIUS DEI.

Earnest Money. Bellow's Dict.

DENIZATION. The act by which a foreigner becomes a subject of a country, but without the rights either of a natural-born subject or of one who has become naturalized. It has existed from an early period, and is effected only by letters patent from the sovereign. Denization has no retrospective operation; a denizen is in an intermediate position between an alien and a natural born subject, and partakes of both these characters He may ordinarily take lands by purchase, but not by inheritance; and his issue born before denization cannot inherit from him, but his issue born after it may; Cockburn, Nationality 27; Morse, Citizenship 106. See Priest v. Cummings, 20 Wend. (N. Y.) 352

The difference between denization and naturalization is that the denizen becomes a British subject from the date of the letters while a naturalized person is placed in a position equivalent to that of a natural-born subject; Dicey, Confl Laws 164.

DENIZEN. An alien born who has obtained, *ex donatione legis*, letters patent to make him an English subject.

He is intermediate between a natural-born subject and an alien He may take lands by purchase or devise,—which an alien cannot; but he is incapable of taking by inheritance 1 Bla. Com. 374

In South Carolina, and perhaps in other states, this civil condition is well known to the law, having been created by statute.

The right of making denizens is not exclusively vested in the king, for it is possessed by parliament, but is scarcely ever exercised but by royal power. It may be effected by conquest; 7 Co 6 *a*; 2 Ventr. 6; Com Dig *Alien* (D 1); Chitty, Com. Law 120 See DENIZATION.

In the common law, the word denizen is sometimes applied to a natural-born subject Co. Litt 129 *a*; Levy v. McCartee, 6 Pet (U. S.) 102, 116, 8 L. Ed. 334.

DENOUNCE. A term frequently used in regard to treaties, indicating the act of one nation in giving notice to another nation of its intention to terminate an existing treaty between the two nations. The French *denoncer* means to declare, to lodge an information against. Bellows, Fr. Dict.

DENOUNCEMENT. In Mexican Law. A judicial proceeding for the forfeiture of land held by an alien. See De Merle v. Mathews, 26 Cal. 477; Von Schmidt v. Huntington, 1 Cal. 63; Craig v. Leslie, 3 Wheat. (U. S.) 563, 4 L. Ed. 460.

DENUNCIATION. In Civil Law. The act by which an individual informs a public officer, whose duty it is to prosecute offenders, that a crime has been committed. See 1 Bro. Civ. Law 447; Ayliffe, Parerg. 210; Pothier, Proc. Cr. sect. 2, § 2.

The giving of an information in the ecclesiastical courts by one who was not the accuser.

DENUNTIATIO. In Old English Law. A public notice or summons. Bracton 202 *b*.

DEODAND. Any personal chattel whatever, animate or inanimate, which is the immediate cause of the death of a human creature. It was forfeited to the king to be distributed in alms by his high almoner "for the appeasing," says Coke, "of God's wrath." The word comes from *Deo dandum*, a thing that must be offered to God.

A Latin phrase which is attributed to Bracton has, by mistranslation, given rise to some erroneous statements in some of the authors as to what are deodands. *Omnia quæ ad mortem movent*, although it evidently means all things which *tend* to produce death, has been rendered *move to death*,—thus giving rise to the theory that things in motion only are to be forfeited A difference, however, according to Blackstone, existed as to how much was to be sacrificed Thus, if a man should fall from a cartwheel, the cart being stationary, and be killed, the wheel only would be deodand· while, if he was run over by the same wheel in motion, not only the wheel but the cart and the load became deodand. And this, even though it belonged to the dead man Horses, oxen, carts, boats, mill-wheels, and cauldrons were the commonest deodands. The common name for it was the "bana," the slayer In the thirteenth century the common practice was that the thing itself was delivered to the men of the township where the death occurred, and they had to account to the king's officers In very early records the justices in eyre named the charitable purpose, to which the money was to be applied; 2 Poll. & Maitl 471. In 1840, a railway company in England was amerced £2,000, as a deodand Deodands were not abolished till 1846 See 1 Bla. Com. 301; 2 Steph. Com. 551; Holmes, C. L. 24.

No deodand accrues in the case of a felonious killing; 1 Q. B 818; 1 G. & D. 211, 481; Dow. 1048. Deodands, as droits formerly attaching to the office of the Lord High Admiral, are defined as "things instrumental to the death of a man on shipboard, or goods found on a dead body cast on shore." See 2 Browne, Civ. L. 56

DEPART. To divide or separate actively. The departers of gold and silver were no more than the dividers and refiners of those metals. Cowell.

DEPARTMENT. A portion of a country. In France, the country is divided into departments, which are somewhat similar to the counties in this country. The United States have been divided into military departments, including certain portions of the country. Parker v. U. S., 1 Pet. (U. S.) 293, 7 L. Ed. 150.

A portion of the agents employed by the executive branch of the United States government, to whom a specified class of duties is assigned. They are appointed by the president, by and with the advice of the senate.

The *Department of State* is intrusted with such matters relating to correspondence, commissions, and instructions to or with public ministers and consuls of the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such matters respecting foreign affairs as the president shall assign to said department. U. S. R. S. § 202. It has custody and charge of the seal of the United States, and of the seal of the department of state, and of all of the books, papers, records, etc., in and appertaining to the department, or any that may hereafter be acquired by it; *id.* § 203.

The principal officer is a secretary; he shall conduct the business of the department in such manner as the president shall direct. There are three assistant secretaries of state.

The *Department of the Treasury* has charge of the services relating to the finances. It is the duty of the secretary to digest and prepare plans for the improvement and management of the revenue, and for the support of public credit; to prepare and report estimates of the public revenue and the public expenditures; to superintend the collection of the revenue; to decide on the forms of keeping and stating accounts and making returns, and to grant, under limitations established by law, all warrants for moneys to be issued from the treasury in pursuance of appropriations by law; to make report and give information to either branch of the legislature, in person or in writing, respecting all matters referred to by the senate or house of representatives, or which shall appertain to his office; and, generally, to perform all such services relative to the finances as he shall be directed to perform. The department includes internal revenue; the mint; life saving service; engraving and printing; national banking system; revenue marine; customs; supervising architect. There are three assistant secretaries.

The *Department of War* is intrusted with duties relating to the land forces. There is an assistant secretary. U. S. R. S. § 214. It has charge of the Military Academy.

The *Department of Justice* is presided over by the attorney-general, who is assisted by the solicitor-general and four assistant attorneys-general, and by solicitors for certain departments. There is provision for the employment of special counsel in certain cases.

The attorney-general is required to give his advice and opinion upon questions of law whenever required by the president or the head of any executive department, and on behalf of the United States to procure proper evidence for, and conduct, prosecute or defend all suits in the supreme court or in the court of claims, in which the United States or any officer thereof, as such officer, is a party or may be interested. He exercises general superintendence and direction over the attorneys and marshals of all the districts in the United States and territories, and has power to employ and retain such attorneys and counsellors-at-law as he may

think necessary to assist the district attorneys in the discharge of their duties. U. S. R. S. § 346.

The *Post Office Department* has the general charge of matters relating to the postal service, the establishment of post-offices, appointment of postmasters, and the like. The head of the department is the postmaster-general and there are four assistant postmasters-general. U. S. R. S. §§ 394–396; 1 Supp. 927.

The *Department of the Navy* is intrusted with the charge of the navy. There is an assistant secretary and a judge advocate-general. There are in the navy department certain bureaus: Yards and docks; equipment and recruiting; navigation; ordnance; construction and repair; steam engineering; provisions and clothing; medicine and surgery. It includes the Marine Corps and the Naval Academy.

The *Department of the Interior* has general supervisory and appellate powers over the office of the commissioner of patents, and charge of the land office, Indian affairs, pensions, education, mines, geological survey, government hospitals and asylums and capitol buildings. There is an assistant secretary.

The *Department of Agriculture* is presided over by a secretary of agriculture. The design and duties of this department are to acquire and diffuse useful information on subjects connected with agriculture, and to procure, propagate, and distribute among the people new and valuable seeds and plants; Act Feb. 9, 1889; by act of 1890 the Weather Bureau was added. There is an assistant secretary.

The *Department of Commerce* was provided by Act of Feb. 14, 1903, as the Department of Commerce and Labor; upon the creation (*infra*) of the Department of Labor, it became the Department of Commerce The department includes supervision of corporations, lighthouses, the census, steamship inspection, standards, navigation and foreign and domestic commerce.

The *Department of Labor* was created by Act of March 4, 1913, to promote the welfare of the wage earners of the United States, to improve their working conditions, etc. It includes immigration, naturalization, labor statistics and children's bureau.

As to the succession to the presidency, see CABINET.

DEPARTURE. In Maritime Law. A deviation from the course prescribed in the policy of insurance. See DEVIATION.

In Pleading. The statement of matter in a replication, rejoinder, or subsequent pleading, as a cause of action or defence, which is not pursuant to the previous pleading of the same party, and which does not support and fortify it. 2 Wms. Saund. 84 *a*, n. 1; Co. Litt. 304 *a*. It is not allowable, as it prevents reaching an issue; Kimberlin v. Carter, 49 Ind. 111; White v. Joy, 13 N. Y. 83, 89; 2 Wms. Saund. *a*, n. 1; Steph. Pl. 410.

A replication in tort following a declaration in contract is a departure; 1 B. & S 836; and so it is when evidence of an entirely different character is required to support the declaration and the reply; Johnson v. Bank, 59 Kan. 250, 52 Pac. 860. The change of an immaterial point is no departure; 1 Stra. 21; nor is it if one of the later pleadings merely fortifies the former; 1 Lev. 81; nor where the replication merely answers a *prima facie* defence set up by the plea, as a statute against a claim of common-law right; 2 B. & S. 402; nor the allegation in reply of new matter necessary to meet the allegations of the answer, if not contradictory to the facts stated in the original pleading; Hunter Milling Co. v. Allen, 74 Kan. 679, 88 Pac. 252, 8 L. R. A. (N. S.) 291; McLachlin v. Barker, 64 Mo. App. 511, Mayes v. Stephens, 38 Or. 512, 63 Pac. 760, 64 Pac. 319; McFadden v. Schroeder, 4 Ind App. 305, 29 N. E. 491, 30 N. E. 711; nor the setting out of previous averments in greater detail; Zorn v. Livesley, 44 Or. 501, 75 Pac. 1057.

It is to be taken advantage of by demurrer, general; 5 D. & R. 295; Sterns v. Patterson, 14 Johns. (N. Y.) 132; Keay v. Goodwin, 16 Mass. 1; or special; 2 Saund. 84; Com. Dig. *Pleader* (F 10); Hanover Fire Ins. Co. of City of New York v. Brown, 77 Md 64, 25 Atl. 989, 27 Atl 314, 39 Am. St. Rep. 386.

A departure is cured by a verdict in favor of him who makes it, if the matter pleaded by way of departure is a sufficient answer in substance to what has been before pleaded by the opposite party; that is, if it would have been sufficient if pleaded in the first instance; 2 Saund. 84; 1 Lilly, Abr. 444.

DEPARTURE IN DESPITE OF COURT. This took place where the tenant, having once made his appearance in court upon demand, failed to reappear when demanded; Co. Litt. 139 *a*. As the whole term is, in contemplation of law, but a single day, an appearance on any day, and a subsequent failure to reappear at any subsequent part of the term, is such a departure; 8 Co. 62 *a*; 1 Rolle, Abr. 583; Mete. Yelv. 211.

DEPENDENCY. A territory distinct from the country in which the supreme sovereign power resides, but belonging rightfully to it, and subject to the laws and regulations which the sovereign may think proper to prescribe.

It differs from a *colony*, because it is not settled by the citizens of the sovereign or mother state, and from *possession*, because it is held by other title than that of mere conquest For example, Malta was considered a dependency of Great Britain in the year 1813. U. S. v. The Nancy, 3 Wash C. C. 286, Fed. Cas. No 15,854. See Act of Cong. Mch. 1, 1809, commonly called the non-importation law; TERRITORY; INDIANS.

DEPENDENT. One who derives support from another. Ballou v. Gile, 50 Wis. 618, 7 N. W. 561; Supreme Council American Legion of Honor v. Perry, 140 Mass. 590, 5 N. E. 634; not merely persons who derive a benefit from the earnings of the deceased; [1899] 1 Q. B. 1005. A father is in part dependent on his child, however young, if the wages of the child form part of the common fund to maintain the home, [1900] A. C. 358; Alexander v. Parker, 144 Ill. 355, 33 N. E. 183, 19 L. R. A. 187 (where the term is used with reference to benevolent associations) See DEATH.

DEPENDENT PROMISE. One which it is not the duty of the promisor to perform until some obligation contained in the same agreement has been performed by the other party. Hamm. Partn. 17, 29, 30, 109; Harr Cont. 152. See CONTRACT; COVENANT; INDEPENDENT PROMISE.

DEPONENT. One who gives information, on oath or affirmation, respecting some facts known to him, before a magistrate or other person entitled to administer an oath; he who makes a deposition. Bliss v. Shuman, 47 Me. 248. See AFFIANT.

DEPORTATION. In Roman Law. A perpetual banishment, depriving the banished of his rights as a citizen: it differed from relegation (*q. v.*) and exile (*q. v.*). 1 Bro. Civ. Law, 125, n.; Inst. 1. 12. 1; Dig. 48. 22. 14. 1.

In Modern Law. "The removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken." Fong Yue Ting v. U. S., 149 U. S. 709, 13 Sup. Ct. 1016, 37 L. Ed. 905. It differs from *transportation* (*q. v.*), which is by way of punishment of one convicted of an offence against the laws of the country; and from *extradition* (*q. v.*), which is the surrender to another country of one accused of an offence against its laws, there to be tried, and, if found guilty, punished; *id.* It is not a criminal proceeding; U. S. v. Hing Quong Chow, 53 Fed. 233.

The right of a nation to expel or deport foreigners who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country; Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905, which holds, by a divided court, that this right exists even though such persons be subjects of a friendly power and have acquired a domicile in this country. This case follows Vattel, Law of Nations § 230; Ortolan, *Dipl. de la Mer* 297; 1 Phill. Int. L. § 220; Bar, Int. Law (Gillespie's ed.) 708. None of the guaranties of the United States constitution, first amendment, respecting freedom to worship, speak, publish or petition, are infringed by the immigration act of March 3, 1903, for the exclusion and deportation of alien anarchists; U. S. v. Williams, 194 U. S. 279, 24 Sup. Ct. 719, 48 L. Ed. 979.

So the child of an alien, born abroad, whose father afterwards comes here and is naturalized, can be excluded and deported if found to be suffering from a contagious disease; Zartarian v. Billings, 204 U. S. 170, 27 Sup. Ct. 182, 51 L. Ed. 428.

Deportation is an inherent sovereign power; Tiaco v. Forbes, 228 U. S. 549, 33 Sup. Ct. 585, 57 L. Ed. —. Congress has the power to deport aliens whose presence is deemed hurtful, and this applies to prostitutes, regardless of how long they have been here; Bugajewitz v. Adams, 228 U. S. 585, 33 Sup. Ct. 607, 57 L. Ed. —.

In England, the only question has been whether deportation could be exercised by the king without the consent of parliament. It was formerly exercised by the king, but in later times by parliament. See 2 Inst. 57; 1 Bla. Com. 260; 6 Law Quart. Rev. 27. A British colonial governor has exercised it; 1 Moore, P. C. 460. See App. Cas. (1891) 272.

Congress may exercise the power through the executive, or may call in the judiciary to ascertain contested facts; Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905.

See ALIEN-LABOR; ANARCHIST; CHINESE, CITIZEN; NATURALIZATION; RENVOI.

Under the act of August 18, 1894, the decision of the secretary of commerce of the right of a person of Chinese descent to enter the United States is conclusive on the federal courts, though citizenship, and not domicil, is the ground on which the right of entry is claimed; U. S. v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040. If he enters unlawfully, he may be deported by the secretary of commerce; Prentis v. Seu Leung, 203 Fed. 25, 121 C. C. A. 389.

"Moral turpitude," as ground of exclusion of an alien, means an act of baseness, vileness or depravity in the private and social duties which one owes to society, and as applied to offences includes only such crimes as manifest personal depravity or baseness; U. S. v. Uhl, 203 Fed. 152; publishing a criminal libel against King George V, of which the person seeking entrance had been convicted and sentenced to one year's imprisonment in England is not ground of exclusion; *id.*, affirmed, U. S. v. Uhl, 210 Fed. 860.

DEPOSE. To deprive an individual of a public employment or office against his will. Wolffius, Inst. § 1063. The term is usually applied to the deprivation of all authority of a sovereign.

To give testimony under oath. See DEPOSITION.

DEPOSIT. A naked bailment of goods to be kept for the depositor without reward, and to be returned when he shall require it. Jones, Bailm. 36, 117; Bellows Falls Bank v. Bank, 40 Vt. 380.

A bailment of goods to be kept by the bailee without reward, and delivered according to the object or purpose of the original trust. Story, Bailm. § 41; Richardson v. Futrell, 42 Miss. 544.

A contract by which one of the contracting parties gives a thing to another to keep, who is to do so gratuitously and obliges himself to return it when he shall be requested. See 3 L. R. P. C. C. 101.

An *irregular deposit* arises where one deposits money with another for safekeeping, in cases where the latter is to return, not the specific money deposited, but an equal sum.

A *quasi deposit* arises where one comes lawfully into possession of the goods of another by finding.

A depositary is bound to take only ordinary care of the deposit, which will of course vary with the character of the goods to be kept, and other circumstances; Edw. Bailm. 43. See Vickroy v. Skelley, 14 S. & R. (Pa.) 375; Foster v. Bank, 17 Mass. 479, 9 Am. Dec. 168; Tracy v. Wood, 3 Mas. 132, Fed. Cas. No 14,130; 1 B. & Ald. 59. While gross negligence on the part of a gratuitous bailee is not fraud, it is in effect the same thing; First Nat Bank v. Graham, 100 U. S. 699, 25 L. Ed. 750. He has, in general, no right to use the thing deposited; Bac. Abr. *Bailment*, D; unless in cases where permission has been given or may from the nature of the case be implied, Story, Bailm § 90; Jones, Bailm. 80, 81. He is bound to return the deposit *in individuo*, and in the same state in which he received it: if it is lost, or injured, or spoiled, by his fraud or gross negligence, he is responsible to the extent of the loss or injury; Jones, Bailm. 36, 46, 120; Foster v. Bank, 17 Mass. 479, 9 Am. Dec. 168; Stanton v. Bell, 9 N. C. 145, 11 Am. Dec. 744; 1 Dane, Abr. c. 17, arts. 1 and 2; Hubbell v. Blandy, 87 Mich. 209, 49 N. W. 502, 24 Am. St. Rep. 154. He is also bound to restore, not only the thing deposited, but any increase or profits which may have accrued from it; if an animal deposited bear young, the latter are to be delivered to the owner; Story, Bailm. § 99.

In the case of irregular deposits, as those with a bank, the relation of the bank to its customer is that of debtor and creditor, and does not partake at all of a fiduciary character. It ceases altogether to be the money of the depositor, and becomes the money of the bank. It is his to do what he pleases with it, and there is no trust created; Edw. Bailm. 41, 45; Commercial Bank of Albany v. Hughes, 17 Wend. (N. Y.) 94; 1 Mer. 568; Bank of Marysville v. Brewing Co., 50 Ohio St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660; American Exchange Nat. Bank v. Gregg, 138 Ill. 596, 28 N. E. 839, 32 Am. St. Rep. 171; Collins v. State, 33 Fla. 429, 15 South. 214; Central Nat. Bank v. Ins. Co., 104 U. S. 64, 26 L. Ed. 693. See Jacobus v. Jacobus, 37 N. J. Eq. 18. In Law's Estate, 144 Pa. 507, 22 Atl. 831, 14 L. R. A. 103, it was held to be "a temporary disposition of money for safekeeping," not creating the relation of debtor and creditor; nor is it a loan; *id.*; Elliott v. State Bank, 128 Ia. 275, 103 N. W. 777, 1 L. R. A. (N. S.) 1130, 111 Am. St. Rep. 198. If the jury believe from the evidence that the parties intended that a bank should not receive a check as cash, but only as an agent for collection, then title to the check does not vest in the bank at the time of the deposit; Fayette Nat. Bank v. Summers, 105 Va. 689, 54 S. E. 862, 7 L. R. A. (N. S.) 694.

Where a commission merchant deposits his principal's money in his own account in bank, it cannot be applied to the payment of the former's debt to the bank; Boyle v. Bank, 125 Wis 498, 103 N. W. 1123, 104 N. W. 917, 1 L. R. A. (N. S.) 1110, 110 Am. St. Rep. 844, citing Union Stock Yards Nat. Bank v. Gillespie, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724.

As to deposits in savings banks, etc., for another, see DONATIO MORTIS CAUSA.

See CHECK; INDORSEMENT; NATIONAL BANK.

The legal remedy is a suit at law for debt: the balance cannot be reached by a bill in equity; 2 H. L. Cas. 39; except in some cases of insolvency, when a fund can be followed; Voight v. Lewis, 11 Phila. (Pa.) 511, Fed. Cas. No. 16,989. See *infra*. A bank is not liable for interest unless expressly contracted for; and the deposit is subject to the statute of limitations; 2 H. L. Cas. 39; McLoghlin v. Bank, 139 N. Y. 514, 34 N. E. 1095. Otherwise, in the case of a certificate of deposit payable on demand; Hartman's Appeal, 107 Pa. 333.

The general rule that the title passes upon the deposit does not apply when the subject of the deposit is a sight draft and the bank at the time of the acceptance was insolvent and its officers knew it to be so; St. Louis & S. F. R. Co. v. Johnston, 133 U. S. 566, 10 Sup. Ct. 390, 33 L. Ed. 683. The acceptance of a deposit by a bank irretrievably insolvent will constitute such fraud as will entitle the depositor to his drafts or their proceeds; *id.*; Cragie v. Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; Bruner v. Bank, 97 Tenn. 540, 37 S. W. 286, 34 L. R. A. 532. When checks are received by a bank hopelessly insolvent and not collected until after it closes its doors, the owner may recover the checks or their proceeds; City of Somerville v. Beal, 49 Fed. 790; he may rescind the transfer and stop payment of the check; First Nat. Bank of Meridian v. Strauss, 66 Miss. 479, 6 South. 232, 14 Am. St. Rep. 579; or reclaim it from

the hands of the assignee; Cragie v. Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; or of a third person who did not give value for it; National Citizens' Bank v. Howard, 3 How. Pr. N. Y. (N. S) 511; but not if the check has been turned over to a *bona fide* purchaser for value; Grant v. Walsh, 81 Hun 449, 31 N. Y. Supp. 60. If the subject of the deposit is money and is in a separate package, the depositor may recover it from the receiver; In re Commercial Bank, 1 Ohio N. P. 358; Chaffee v. Fort, 2 Lans. (N. Y.) 81; Furber v. Stephens, 35 Fed. 17; but if it has passed into the hands of the assignee and been mingled with the other funds of the bank, and cannot be traced, the depositor is not entitled to a preference; Lotze v. Hoerner, 25 Ohio L. J. 31; Wilson v. Coburn, 35 Neb. 530, 53 N. W. 466; Blake v. Bank, 12 Wash. 619, 41 Pac 909; In re North River Bank, 60 Hun 91, 14 N. Y. Supp. 261. It has been held that if money and checks are deposited a few minutes before the doors of the bank are closed and the checks are subsequently collected, so that the specific money deposited and the proceeds of the checks come to the hands of the receiver, the owner may recover them from him. The fact that the money cannot be identified will not prevent its recovery if it is still in the mass in the receiver's hands; Wasson v. Hawkins, 59 Fed. 237, followed in Lake Erie & W. R. Co. v. Bank, 65 Fed. 690.

Deposits in the civil law are divisible into two kinds—necessary and voluntary. A necessary deposit is such as arises from pressing necessity; as, for instance, in case of a fire, a shipwreck, or other overwhelming calamity, and thence it is called *miserabile depositum*. La. Civ. Code 2935. A voluntary deposit is such as arises without any such calamity, from the mere consent or agreement of the parties. Dig. 16 3. 2

This distinction was material in the civil law in respect to the remedy, for involuntary deposits the action was only *in simplum*, in the other *in duplum*, or twofold, whenever the depositary was guilty of any default. The common law has made no such distinction. Jones, Bailm. 48

Deposits are again divided by the civil law into simple deposits and sequestrations: the former is when there is but one party depositor (of whatever number composed), having a common interest; the latter is where there are two or more depositors, having each a different and adverse interest These distinctions do not seem to have become incorporated into the common law. See Story, Bailm § 41. See BAILMENT.

Deposit is sometimes used as equivalent to or in the sense of earnest (*q. v.*), when made by way of a forfeiture to bind a bargain. In such case it is forfeited on a breach "even if as a deposit and in part payment of the purchase money," and it cannot be recovered back unless circumstances make it unequitable to retain it; 53 L. J. Ch. 1061; 27 Ch. D. 89.

See GIFT; CERTIFICATE OF DEPOSIT.

DEPOSITARY. A person entrusted with anything by another for safekeeping; a trustee; fiduciary; one to whom goods are bailed to be held without recompense. Stand. Dict.

DEPOSITION. The testimony of a witness reduced to writing, in due form of law, by virtue of a commission or other authority of a competent tribunal, or according to the provisions of some statute law, to be used on the trial of some question of fact in a court of justice. Stimpson v. Brooks, 3 Blatchf. 456. Fed. Cas. No. 13,454; State v. Dayton, 23 N. J. L. 49, 53 Am. Dec. 270.

Depositions were not formerly admitted in common-law courts, and were afterwards admitted from necessity, where the oral testimony of a witness could not be obtained. But in courts of chancery this was formerly the only method of taking testimony; Ad. Eq. 363. In some of the states, however, both oral testimony and depositions are used, the same as in courts of common law.

In criminal cases, depositions cannot be used without the consent of the defendant; 3 Greenl. Ev. § 11; Dominges v. State, 7 Smedes & M. 475, 45 Am. Dec. 315; McLane v. State, 4 Ga. 335. This is a necessary consequence of the provision of the constitution of the United States that in all criminal prosecutions "the accused shall enjoy the right to be confronted with the witnesses against him." Amend. art. 6. This principle is recognized in the constitutions or statutes of most of the states of the Union. 3 Greenl. Ev. § 11; Cooley, Const. Lim. 387.

In some of the states, provision is made for the taking of depositions by the accused. Conn. Comp. Stat. art. 6, § 162; 3 Greenl. Ev. § 11.

Provision has been made for taking depositions to be used in civil cases, by an act of congress and by statutes in most of the states.

U. S. Rev. Stat. §§ 863-876, direct that when, in any civil cause depending in any district in any court of the United States, the testimony of any person shall be necessary who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient, or very infirm, the deposition of such person may be taken, *de bene esse*, before any justice or judge of any of the courts of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or before any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, or judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, or interested in the event of the cause; provided that a notification in writing from the party or his attorney, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party, or his attorney, as either may be nearest. And in all cases *in rem*, the person having the agency or possession of the property at the time of the seizure shall be deemed the adverse party until a claim shall have been put in, and whenever, by reason of the absence from the district, and want of an

attorney of record, or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice, as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose, as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court. And every person deposing as aforesaid shall be carefully examined and cautioned, and sworn or affirmed to testify to *the whole truth*, and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence And the depositions so taken shall be retained by such magistrate until he deliver the same with his own hand into the court for which they are taken, or shall, together with a certificate of the reasons as aforesaid of their being taken, and of the notice, if any given, to the adverse party, be by him the said magistrate sealed up and directed to such court, and remain under his seal until opened in court But unless it appears to the satisfaction of the court that the witness is then dead or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause Provided that nothing herein shall be construed to prevent any court of the United States from granting a *dedimus potestatem*, to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice,—which power they shall severally possess; nor to extend to depositions taken *in perpetuam rei memoriam*, which, if they relate to matters that may be cognizable in any court of the United States, a circuit court, on application thereto, made as a court of equity, may, according to the usages in chancery, direct to be taken.

In any cause before a court of the United States, it shall be lawful for such court, in its discretion to admit in evidence any deposition taken *in perpetuam rei memoriam*, which would be so admissible in a court of the state wherein such cause is pending, according to the laws thereof

The act of January 24, 1827, authorizes the clerk of any court of the United States within which a witness resides, or where he is found, to issue a subpœna to compel the attendance of such witness, and a neglect of the witness to attend may be punished by the court whose clerk has issued the subpœna, as for a contempt. And when papers are wanted by the parties litigant, the judge of the court within which they are may issue a subpœna *duces tecum*, and enforce obedience by punishment as for a contempt R S §§ 863-875, see Blease v. Garlington, 92 U. S. 1, 23 L Ed 521; Bates Fed. Eq. Proc

No witness shall be required, under the provisions of either of the two preceding sections, to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give his deposition, nor shall any witness be deemed guilty of contempt for disobeying any subpœna directed to him by virtue of either of the said sections, unless his fee for going to, returning from, and one day's attendance at the place of examination are paid or tendered to him at the time of the service of the subpœna See R S. § 870, etc.

R S § 863, above quoted, relating to depositions *de bene esse*, applies to equity as well as to common-law causes; Stegner v. Blake, 36 Fed. 183. When a party is represented by counsel at the taking of a deposition and takes part in the examination, that must be regarded as a waiver of irregularities in taking it; Northern Pac R Co v. Urlin, 158 U S. 271, 15 Sup. Ct. 840, 39 L Ed. 977; and after having been read in evidence, without objection, its regularity cannot afterwards be challenged; Evans v. Hettich, 7 Wheat. (U. S.) 453, 5 L Ed. 496; Brown v. Tarkington, 3 Wall. (U. S.) 377, 18 L. Ed. 255. Objections must be taken, and noted at the time, to the competency of a witness; Shutte v Thompson, 15 Wall. (U. S.) 151, 21 L Ed 123; or to irregularities or defects which might have been remedied by retaking the deposition, and mere formal objections must be raised when the deposition is taken or on motion to suppress and not at the trial; Doane v. Glenn, 21 Wall (U. S.) 33, 22 L. Ed 476, Bibb v. Allen, 149 U S 481, 13 Sup. Ct. 950, 37 L Ed 819; York Mfg Co v. R Co, 3 Wall. (U. S.) 107, 18 L. Ed 170, unless the time after the return and before trial is too brief; *id.*; otherwise they are waived, Howard v Mfg. Co, 139 U S 199, 11 Sup Ct 500, 35 L Ed 147, Clogg v. McDaniel, 89 Md 420, 43 Atl. 795, American Pub Co v. C E Mayne Co, 9 Utah, 321, 34 Pac 247, Sugar Pine Lumber Co. v. Garrett, 28 Or. 171, 42 Pac. 129

A deposition *de bene esse* cannot be read, if objected to, if the witness is present in court, Whitford v Clark County, 119 U S 522, 7 Sup Ct 306, 30 L Ed 500; or can be produced, The Samuel, 1 Wheat (U. S.) 9, 4 L. Ed. 23; or, if an away-going witness, a subpœna has not been taken out and effort made to serve it, Mifflin v. Bingham, 1 Dall. (U. S.) 272, 1 L Ed 133, and it must be shown that the disability to attend continues; Patapsco Ins Co v. Southgate, 5 Pet (U. S.) 604, 8 L Ed 243, cross-examination is a waiver of objection to the regularity of the deposition, Mechanics' Bank v Seton, 1 Pet (U. S.) 299 7 L Ed 152, Northern Pacific R Co. v. Urlin, 158 U. S 274, 15 Sup Ct 840, 39 L. Ed 977, but not to the competency of the witness, Mifflin v. Bingham, 1 Dall (U. S.) 272, 1 L. Ed. 133.

A clerical mistake in making out a commission, which in no way misled the opposite party or affected his rights, is no valid ground for the suppression of the deposition; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819 If the deponent is not satisfied with his first deposition, it is his right, without any order of the court, to make a second one; Nash v. Williams, 20 Wall. (U. S.) 226, 22 L. Ed. 254. The subject was fully considered by Shipman, C. J., in White v. R. Co., 79 Fed 133, 24 C. C. A 467. The judiciary act of 1789 provided for the examination of witnesses in open court in equity as well as at law. The act of April 29, 1802, provided that testimony in equity might be taken by depositions in states where that was the practice. The act of August 23, 1842, empowered the Supreme Court to make rules for taking testimony. The former 67th Rule in Equity was formulated in 1861. As amended it enlarged the statutory practice and provided for taking equity evidence orally or by special examiners and for securing the attendance of witnesses, which may be compelled by the court of a district to which the examiner is sent. See, also, Stevens v. R. Co, 104 Fed. 934. The judge of such district may pass on the materiality of evidence and compel answers; In re Allis, 44 Fed. 216.

The United States act of March 9, 1892, authorizing depositions to be taken in the mode prescribed by the state laws, merely provided an additional *method* and did not confer any additional rights to take testimony; National Cash Register Co. v. Leland, 77 Fed. 242.

Reasonable notice under R. S. §§ 863, 865, depends upon the circumstances of the par

ticular case; distance, number of witnesses, and facility of communication are chiefly important; American Exch. Nat. Bank v. Nat. Bank, 82 Fed. 961, 27 C. C. A. 274. Notice of taking proofs in three different states on the same day is not reasonable; Eillert v. Craps, 44 Fed. 792.

A subpœna *duces tecum* may issue to a witness whose testimony is to be taken under R. S. § 863; Davis v. Davis, 90 Fed. 791.

In connection with question of adjournment on the ground that counsel cannot attend, it was said in Uhle v. Burnham, 44 Fed. 729, that the law does not contemplate that a litigant shall be required to go to the expense of hiring numerous counsel to represent him. An examiner may adjourn a meeting for illness and absence; Shapleigh v. Light & Power Co., 47 Fed. 848.

A witness may test the validity of proceedings by refusing to be sworn. He is then in contempt and his rights will be contested under contempt procedure; In re Spofford, 62 Fed. 443.

In taking depositions *de bene esse* in another district under R. S. § 863, the witness may assert his privilege of refusing to testify or produce documents, and in such a case he has the right to be heard before the court of that district. Taking depositions before an examiner in equity is not a judicial trial; the public have no right to be present; U. S. v. Shoe Machinery Co., 198 Fed. 870.

A deposition is not admissible in evidence if the witness was not sworn till after his testimony was reduced to writing; Armstrong v. Burrows, 6 Watts (Pa) 266, per Gibson, C. J.

See Street, Fed. Practice.

The new Equity Rules of the Supreme Court of the United States have considerably changed the practice. In all equity trials the testimony is to be taken orally, in open court, except as otherwise provided by statute or other rules. The court may permit the deposition of named witnesses to be used before the court or upon a reference to a master to be taken before an examiner, etc. The district court may order that the testimony in chief of expert witnesses may be set forth in affidavits, with the right of cross-examination and re-examination before the court at the trial. See EXPERT.

Objections to the evidence before an examiner, etc., must be in short form. The testimony of each witness, after being reduced to writing, must be read over to or by him and be signed by him in the presence of the officer. If the witness refuses to sign, the officer shall sign the deposition, stating thereon the reason for refusal. Objections to questions must be noted by the officer, but he is without power to pass on competency, etc.

Where witnesses live within the district, whose testimony may be taken out of court by the rules, they may be summoned before a commissioner or master or examiner. Their refusal to appear is contempt of court and an attachment may thereupon issue as in the case of contempt for not attending or for refusing to give testimony in court.

In a state criminal trial in Louisiana, reading a deposition taken before a committing magistrate in the presence of the accused, and subject to his counsel's cross-examination, the witness being permanently absent from the state, does not deprive the accused of his liberty without due process; West v. Louisiana, 194 U. S. 258, 24 Sup. Ct 650, 48 L. Ed. 965.

In Ecclesiastical Law. The act of depriving a clergyman, by a competent tribunal, of his clerical orders, to punish him for some offence and to prevent his acting in future in his clerical character. Ayliffe, Parerg. 206.

DEPOSITO. In Spanish Law. A real contract by which one person confides to the custody of another an object on the condition that it shall be returned to him whenever he shall require it.

DEPOSITOR. He who makes a deposit.

DEPOSITUM. A species of bailment. See DEPOSIT.

DEPOT. Within the meaning of statutes obliging railroad companies to fence their tracks excepting depot grounds, mere distance from depots has been held not to be the controlling consideration in determining how far they extend; Rabidon v. R. Co., 115 Mich. 390, 73 N. W. 386, 39 L. R. A. 405. Public convenience is held to be the limit of such an exception; Greeley v. Ry. Co., 33 Minn. 136, 22 N. W. 179, 53 Am. Rep. 16. They may include the terminals and switch stands of all switches or side tracks at all stations; Gulf, C. & S. F. Ry. Co. v. Blankenbeckler, 13 Tex. Civ. App. 249, 35 S. W. 331; ground necessary to take in wood and water; Fowler v. Loan Co., 21 Wis. 77; Jeffersonville, M. & I. R. Co. v. Beatty, 36 Ind. 19; Harvey v. Southern Pac. Co., 46 Or. 505, 80 Pac. 1061; or for switches; Illinois Cent. R. Co. v. Finney, 42 Ill. App. 390; a tract of five or six acres has been held to be included in depot grounds; Davis v. R. Co., 26 Ia. 549.

A place where military supplies and stores are kept. Caldwell's Case, 19 Wall. (U. S.) 264, 22 L. Ed. 114.

DEPRIVATION. A censure by which a clergyman is deprived of his parsonage, vicarage, or other ecclesiastical promotion or dignity. See Ayliffe, Parerg. 206; 1 Bla. Com. 393. See DEGRADATION.

DEPRIVE. Referring to property taken under the power of eminent domain, it means the same as "take." Sharpless v.

Mayor of Philadelphia, 21 Pa. 167, 59 Am. Dec. 759.

The constitution contains no definition of this word "deprive" as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection; Munn v. Illinois, 94 U. S. 123, 24 L. Ed. 77. See DUE PROCESS OF LAW; EMINENT DOMAIN; PRIVILEGES AND IMMUNITIES; FOURTEENTH AMENDMENT.

DEPUTY. One authorized by an officer to exercise the office or right which the officer possesses, for and in place of the latter.

In general, ministerial officers can appoint deputies, Comyns, Dig. *Officer* (D 1), unless the office is to be exercised by the ministerial officer in person; and when the office partakes of a judicial and ministerial character, although a deputy may be made for the performance of ministerial acts, one cannot be made for the performance of a judicial act; a sheriff cannot, therefore, make a deputy to hold an inquisition, under a writ of inquiry, though he may appoint a deputy to serve a writ. Sometimes, however, a general deputy or under-sheriff is appointed, who possesses, by virtue of his appointment, authority to execute all the ordinary duties of sheriff, and may even appoint, in the name of the sheriff, a special deputy; Allen v. Smith, 12 N. J. L. 159, Tillotson v. Cheetham, 2 Johns. (N. Y.) 63.

In general, a deputy has power to do every act which his principal might do; but a deputy cannot appoint a deputy. See Abrams v. Ervin, 9 Ia. 87; Lewis v. Lewis, 9 Mo. 183, 43 Am. Dec. 540; Confiscation Cases, 20 Wall. (U. S.) 111, 22 L. Ed. 320.

A deputy should always act in the name of his principal. The principal is liable for the deputy's acts performed by him as such, and for the neglect of the deputy; 3 Dane, Abr. c. 76, a. 2; and the deputy is liable himself to the person injured for his own tortious acts; Dane, Abr. Index; Com. Dig. *Officer* (D), *Viscount* (B). See 7 Viner, Abr. 556; L. R. 3 Q. B. Div. 741; Willis v. Melvin, 53 N. C. 62.

DERAIGN. The literal meaning of the word seems to be, to disorder or displace, as deraignment out of religion; stat. 31, Hen. VIII, c. 6. But it is generally used in the common law for to prove, as, to deraign the warranty; Glanv., lib. 2, c. 6. See Jacob L. Dict., where the word is discussed. It is used as referring to a decree "which deraigns his title from a false source." Paxson v. Brown, 61 Fed. 874, 884, 10 C. C. A. 135.

DERELICT. Abandoned; deserted; cast away.

Land left uncovered by the receding of water from its former bed. 2 Rolle, Abr. 170; 2 Bla. Com. 262; 1 Crabb, R. P. 109.

Personal property abandoned or thrown away by the owner in such manner as to indicate that he intends to make no further claim thereto. 2 Bla. Com. 9; 1 C. B. 112; Broom, Max. 261; Goodenow v. Tappan 1 Ohio 81; Jones's Adm'rs v. Nunn, 12 Ga. 473.

Dereliction or renunciation properly requires both the intention to abandon and external action. Thus the casting overboard of articles in a tempest to lighten the ship is not dereliction, as there is no intention of abandoning the property in the case of salvage. Nor does the mere intention of abandonment constitute dereliction of property without a throwing away or removal, or some other external acts; Livermore v. White, 74 Me. 455, 43 Am. Rep. 600.

It applies as well to property abandoned at sea as on land; Rowe v. The Brig, 1 Mas. 373, Fed. Cas. No. 12,093; The Emulous 1 Sumn. 207, Fed. Cas. No. 4,480; The Boston, 1 Sumn. 336, Fed. Cas. No. 1,673; 2 Kent 357. A vessel which is abandoned and deserted by her crew without any purpose on their part of returning to the ship, or any hope of saving or recovering it by their own exertions, is derelict; 20 E. L. & Eq. 607; Mason v. The Blaireau, 2 Cra. (U. S.) 240, 2 L. Ed. 266; The John Gilpin, Ole. 77, Fed. Cas. No. 7,345, Evans v. The Charles, 1 Newb. 329, Fed. Cas. No. 4,556; Montgomery v. The T. P. Leathers, 1 Newb. 421, Fed. Cas. No. 9,736; The Attacapas, 3 Ware, 65, Fed. Cas. No. 637; The Laura, 14 Wall. (U. S.) 336, 20 L. Ed. 813.

The title of the owner to property lying at the bottom of the sea is not divested, however long it may remain there; Murphy v. Dunham, 38 Fed. 503; "because as goods lying at the bottom, they always await their owner;" *id.*; after another has taken them, the owner must follow them within a year and a day; *id.*; 5 Co. 105; 1 B. & Ad. 141, where the law is fully discussed; 3 Black Book, Adm. 439.

A vessel at least six miles from shore submerged from midship to bow, her running rigging overboard and snarled fast, her boat gone, her cabin, etc., full of water, a distress flag set, and deserted by her crew, who had left no sign of an intention to return and were not visible, is *prima facie* derelict, though she was anchored and her master was intending to return to save her and had telegraphed for a wrecking vessel; The Ann L. Lockwood, 37 Fed. 233.

However long goods thrown overboard may have been on the ocean, they do not become derelict by time, but will be restored on the payment of salvage, unless there was a voluntary intention to abandon them; Bee 82. The finder can only hold possession to enforce a lien for salvage; Whitwell v. Wells, 24 Pick. (Mass.) 30. See SALVAGE; ABANDONMENT.

DERIVATIVE. Coming from another; taken from something preceding; secondary; as, derivative title, which is that acquired from another person.

There is considerable difference between an original and a derivative title. When the acquisition is original, the right thus acquired to the thing becomes property, which must be unqualified and unlimited, and, since no one but the occupant has any right to the thing, he must have the whole right of disposing of it. But with regard to derivative acquisition it may be otherwise, for the person from whom the thing is acquired may not have an unlimited right to it, or he may convey or transfer it with certain reservation of right. Derivative title must always be by contract.

Derivative conveyances are those which presuppose some precedent conveyance, and serve only to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. 3 Bla. Com. 324.

DEROGATION. The partial abrogation of a law. To derogate from a law is to enact something which impairs its utility and force; to abrogate a law is to abolish it entirely.

DEROGATORY CLAUSE. A sentence or secret character inserted in a will by the testator, of which he reserves the knowledge to himself, with a condition that no will he may make thereafter shall be valid, unless this clause be inserted word for word. This is done as a precaution against later wills being extorted by violence or otherwise improperly obtained. Whart.

DESAFUERO. In Spanish Law. An irregular action committed with violence against law, custom, or reason.

DESCEND. To pass by succession; as when the estate vests by operation of law in the heirs immediately upon the death of the ancestor. Dove v. Torr, 128 Mass. 40. See DESCENT AND DISTRIBUTION.

DESCENDANTS. Those who have issued from an individual, including his children, grandchildren, and their children to the remotest degree. Ambl. 327, 2 Bro. C. C. 30, 230; 1 Roper, Leg. 115.

The descendants from what is called the direct descending line. The term is opposed to that of ascendants.

There is a difference between the number of ascendants and descendants which a man may have; every one has the same order of ascendants, though they may not be exactly alike as to numbers, because some may be descended from a common ancestor. In the line of descendants they fork differently according to the number of children, and continue longer or shorter as generations continue or cease to exist. Many families become extinct, while others continue the line of descendants is, therefore, diversified in each family

DESCENT AND DISTRIBUTION. The division among those legally entitled thereto of the real and personal property of intestates, the term *descent* being applied to the former and *distribution* to the latter. *Descent* is the devolution of real property to the heir or heirs of one who dies intestate; the transmission by succession or inheritance.

Title by descent is the title by which one person, upon the death of another, acquires the real estate of the latter as his heir at law. 2 Bla. Com. 201; Com. Dig. *Descent*.

It was one of the principles of the feudal system that on the death of the tenant in fee the land should *descend*, and not *ascend*. Hence the title by inheritance is in all cases called descent, although by statute law the title is sometimes made to ascend.

The English doctrine of primogeniture, by which by the common law the eldest son takes the whole real estate, has been universally abolished in this country. So, with few exceptions, has been the distinction between male and female heirs

The rules of descent are applicable only to real estates of inheritance. Estates for the life of the deceased, of course, terminate on his death; estates for the life of another are governed by peculiar rules

Distribution is the division by order of the court or legal representative having authority, among those entitled thereto, of the residue of the personal estate of an intestate, after payment of the debts and charges.

The term is sometimes used to denote the division of a residue of both real and personal estate, and also the division of an estate according to the terms of a will, but neither use is accurate, the term being technically applied only to personal estate.

The title to real estate vests in the heirs by the death of the owner; the legal title to personal estate, by such death, vests in the executor or administrator, and is transferred to the persons beneficially interested, by the distribution; Roorbach v. Lord, 4 Conn. 347.

Terms of years, and other estates less than freehold, are regarded as personal estate, and, on the death of the owner, vest in his executor or administrator.

The rules of descent and distribution are prescribed by the statute laws of the several states; and, although they correspond in some respects, it is doubtful whether in any two they are precisely alike.

As to the right of a murderer to take by descent from his victim, see MURDER. And see, generally, NEXT OF KIN; KINDRED; HEIR; EXECUTORS AND ADMINISTRATORS.

DESCENT CAST. Another name for what the older writers called a "descent which tolls entry." When a person had acquired land by disseisin, abatement, or intrusion, and died seised of the land, the descent of it to his heir took away or tolled the real owner's right of entry, so that he could only recover the land by an action. Co. Litt. 237 *b*; Rap. & L. Dict.

DESCENT OF CROWN LANDS. All lands whereof the king is seised *in jure coronæ* attend upon and follow the crown; so

that to whomsoever the crown descends those lands and possessions descend also. And if the heir of the crown be attainted of treason, yet shall the crown descend to him, and without any reversal the attainder is avoided. Plowd. 247; Co. Litt. 15.

DESCENT OF DIGNITIES. A dignity differs from common inheritances, and goes, not according to the rules of the common law, for it descends to the half-blood, and there is no co-partnership in it, but the eldest takes the whole. Co. Litt. 27.

DESCRIPTIO PERSONÆ. Description of the person. In wills, it frequently happens that the word heir is used as a *descriptio personæ:* it is then a sufficient designation of the person. In criminal cases, a mere *descriptio personæ* or addition, if false, can be taken advantage of only by plea in abatement; Com. v. Lewis, 1 Metc. (Mass.) 151. A legacy "to the eldest son" of A would be a designation of the person. See 1 Roper, Leg. c. 2.

The description contained in a contract of the persons who are parties thereto.

In all contracts under seal there must be some *designatio personæ*. In general, the names of the parties appear in the body of the deed, "between A B, of, etc., of the one part, and C D, of, etc., of the other part," being the common formula. But there is a sufficient designation and description of the party to be charged if his name is written at the foot of the instrument; 1 Ld. Raym. 2; 1 Salk. 214; 2 B. & P. 339.

When a person is described in the body of the instrument by the name of James, and he signs the name of John, on being sued by the latter name he cannot deny it; 3 Taunt. 505; Cro. Eliz. 897, n. (*a*). See 11 Ad & E. 594; 3 P. & D. 271.

DESCRIPTION. An account of the accidents and qualities of a thing. Aylliffe, Pand. 60.

A written account of the state and condition of personal property, titles, papers, and the like. It is a kind of inventory, but is more particular in ascertaining the exact condition of the property, and is without any appraisement of it.

In Pleading. One of the rules which regulate the law of variance is that allegations of matter of *essential description* should be proved as laid. It is impossible to explain with precision the meaning of these words; and the only practical mode of understanding the extent of the rule is to examine some of the leading decisions on the subject, and then to apply the reasoning or ruling contained therein to other analogous cases. With respect to criminal law, it is clearly established that the name or nature of the property stolen or damaged is matter of essential description. Thus, for example, if the charge is one of firing a stack of hay, and it turns out to have been a stack of wheat, or if a man is accused of stealing a drake, and it is proved to have been a goose, or even a duck, the variance is fatal. 1 Tayl. Ev. § 233; Steph. Cr. Proc. 177.

The strict rule of pleading which formerly required exact accuracy in the description of premises sought to be recovered, has been relaxed, and a general description held to be good. The provisions of state statutes as to the description of the premises by metes and bounds have been held to be only directory, and a description by name where the property is well known is often sufficient; Glacier Mountain Silver Min. Co. v. Willis, 127 U. S. 480, 8 Sup. Ct. 1217, 32 L. Ed. 172.

See BOUNDARY.

DESERTION. An offence which consists in the abandonment of the public service, in the army or navy, without leave.

An absence without leave, with the intention of returning, will not amount to desertion; Inhabitants of Hanson v. Inhabitants of South Scituate, 115 Mass. 336; Cloutman v. Tumson, 2 Sumn. 373, Fed. Cas. No. 2,907; Coffin v. Jenkins, 3 Sto. 108, Fed. Cas. No. 2,948. An unauthorized absenting of himself from the military service by an officer or soldier with the intention of not returning. It may consist in an original absenting without authority, or in an overstaying of a defined leave of absence. Davis Mil. L. 420. To establish the offense, the *fact* of the unauthorized voluntary withdrawal, and the *intent* permanently to abandon the service, must both be proved; Dig. J. Adv. Gen. 337.

In the navy absence without leave, with a probability that the person does not intend to desert, shall at first be regarded as straggling, but at the end of ten days as desertion. Reg. Navy 815.

A deserter from the navy is, upon conviction, forever incapable of holding any office of trust or profit under the United States or of exercising any rights of citizens thereof. R. S. §§ 1996, 1998. In time of war, the punishment may be death, or as the court-martial may adjudge, and in time of peace, the above.

The act by which a man abandons his wife and children, or either of them.

Wilful desertion, as the term is applied in actions for divorce, is the voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended cohabitation, without justification either in the consent or wrongful conduct of the other. Sisemore v. Sisemore, 17 Or. 542, 21 Pac. 820. If the wife leaves the husband in consequence of a mere expression on his part that she can go where she likes, and refuses to return at his request, the husband is not guilty of desertion; 81 L. T. 272; 65 J. P. 246.

On proof of desertion, the courts possess the power under statute, in many states, to compel support of the wife. And a continued desertion by either husband or wife,

after a certain lapse of time, entitles the party deserted to a divorce, in most states.

There must, however, be an actual and intentional withdrawal from matrimonial cohabitation for a statutory period, against the consent of the abandoned party and without justification; Tiffany, Dom. Rel. 181; and an intention to desert in the mind of the offender; Bennett v. Bennett, 43 Conn. 313; Latham v. Latham, 30 Gratt. (Va.) 307; Appeal of Sowers, 89 Pa. 173, Bish. Mar. Div. & Sep. 1687; 5 Q. B. D. 31; Bradley v. Bradley, 160 Mass. 258, 35 N. E. 482; where parties continue to live together as husband and wife and other marital duties are observed, a refusal to occupy the same bed does not by itself constitute desertion, Segelbaum v. Segelbaum, 39 Minn. 258, 39 N. W. 492.

Desertion is established by proof of a refusal to commence cohabitation; Pilgrim v. Pilgrim, 57 Ia. 370, 10 N. W. 750; a refusal to renew cohabitation, on request of the other party; Hanberry v. Hanberry, 29 Ala. 719; Fellows v. Fellows, 31 Me. 342; Newing v. Newing, 45 N. J. Eq. 498, 18 Atl. 166, Williams v. Williams, 130 N. Y. 193, 29 N. E. 98, 14 L. R. A. 220, 27 Am. St. Rep. 517; Sowers's Appeal, 89 Pa. 173; causing a separation, by driving the other away, or by cruel conduct which has that effect; 14 Ct. of Sess. Cas. (4th Series) 443; Kinsey v. Kinsey, 37 Ala. 393; Johnson v. Johnson, 125 Ill. 510, 16 N. E. 891; Shrock v. Shrock, 4 Bush (Ky.) 682; Lynch v. Lynch, 33 Md. 328; Lea v. Lea, 99 Mass. 493, 96 Am. Dec. 772; Warner v. Warner, 54 Mich. 492, 20 N. W. 557; McVickar v. McVickar, 46 N. J. Eq. 490, 19 Atl. 249, 19 Am. St. Rep. 422; a refusal by the wife to follow the husband when he changes his residence; Hardenbergh v. Hardenbergh, 14 Cal. 654; Kennedy v. Kennedy, 87 Ill. 250; Hunt v. Hunt, 29 N. J. Eq. 96; Beck v. Beck, 163 Pa. 649, 30 Atl. 236; Franklin v. Franklin, 190 Mass. 349, 77 N. E. 48, 4 L. R. A. (N. S.) 145, 5 Ann. Cas. 851; Schuman v. Schuman, 93 Mo. App. 99; unless there be good reason; Buell v. Buell, 42 Wash. 277, 84 Pac. 821; the mere refusal is not enough; Horn v. Horn, 17 Pa. Super. Ct. 486. But a separation by mutual consent is not desertion; Beller v. Beller, 50 Mich. 49, 14 N. W. 696; Chipchase v. Chipchase, 48 N. J. Eq. 549, 22 Atl. 588; Ingersoll v. Ingersoll, 49 Pa. 249, 88 Am. Dec. 500, Throckmorton v. Throckmorton, 86 Va. 768, 11 S. E. 289; Thompson v. Thompson, 53 Wis. 153, 10 N. W. 166; neither is non-cohabitation; Jones v. Jones, 13 Ala. 145; Pidge v. Pidge, 3 Metc. (Mass.) 257; Scott v. Scott, Wright (Ohio) 469; Burk v. Burk, 21 W. Va. 445; to render it desertion withdrawal of consent must be shown; Currier v. Currier, 68 N. J. Eq. 797, 64 Atl. 1133; nor a refusal by the husband to follow the wife to a new residence; for it is her duty to follow him; Frost v. Frost, 17 N. H. 251.

Mere non-support is not always desertion; Bourquin v. Bourquin, 33 N. J. Eq. 7; Davis v. Davis, 1 Hun (N. Y.) 444; but if the husband have the means to support his wife, and does not do so, this is a wilful desertion; James v. James, 58 N. H. 266; but see Van Dyke v. Van Dyke, 135 Pa. 459, 19 Atl. 1061.

Refusal of sexual intercourse is not desertion; Pfannebecker v. Pfannebecker, 133 Ia. 425, 110 N. W. 618, 119 Am. St. Rep. 608, 12 Ann. Cas. 543; Williams v. Williams, 121 Mo. App. 349, 99 S. W. 42; Prall v. Prall, 58 Fla. 196, 50 South. 867, 26 L. R. A. (N. S.) 577; Pratt v. Pratt, 75 Vt. 432, 56 Atl. 86 (even for three years and without physical excuse); Reynolds v. Reynolds, 68 W. Va. 15, 69 S. E. 381, Ann. Cas. 1912A, 889, physical condition may justify refusal; Pfannebecker v. Pfannebecker, 133 Ia. 425, 110 N. W. 618, 119 Am. St. Rep. 608, 12 Ann. Cas. 543; other cases hold it desertion; Raymond v. Raymond (N. J.) 79 Atl. 430; Graves v. Graves, 88 Miss. 677, 41 South. 384 (desertion for three years, followed by return and refusal); Sisemore v. Sisemore, 17 Or. 542, 21 Pac. 667; 83 L. T. R. 224. A wife who, without cause, refuses, cannot set up "desertion without reasonable cause," [1901] P. 317.

Involuntary absence, on account of sickness or business, if not prolonged beyond such a time as is reasonable or necessary, will not constitute desertion; 1 Swab. & T. 88; Neely v. Neely, 131 Pa. 552, 20 Atl. 811; or the confinement of a wife in a lunatic asylum, Pile v. Pile, 94 Ky. 308, 22 S. W. 215. There can be no such thing as desertion by both parties; Wass v. Wass, 41 W. Va. 126, 23 S. E. 537. When a wife is deserted, she need not hunt for her husband or go to the place whence he has fled; Millowitsch v. Millowitsch, 44 Ill. App. 357.

Where parties marry clandestinely and on an agreement to live separately for the present, the separate living is not a desertion by the husband until the wife demands that they should live together; McAllister v. McAllister, 71 N. J. Eq. 13, 62 Atl. 1131.

In England it is held that if a wife refuses to live under the same roof with her husband, except upon his undertaking not to exercise his full marital rights, he is justified in separating himself from her, and is not guilty of desertion without reasonable excuse, even though he may have committed adultery while separated from her; [1901] P. 317.

Desertion is not to be tested merely by ascertaining which of the parties left the matrimonial home first. That fact may be immaterial. The party who by his or her act intends bringing the cohabitation to an end commits the desertion; [1899] P. 278. There is no substantial difference between a husband who puts an end to cohabitation by leaving his wife, and a husband who puts an end to it by persisting in a course of con-

duct which obliges his wife to leave him; [1899] P. 221, 278, where it was held that a husband's conduct amounted to desertion although he did not abandon her or actually force her to leave his house, but refused her request to discharge a servant with whom he had immoral relations or to discontinue such relations. In such a case it is held the husband must be taken to intend the consequences of his own act. The situation is the same as if he had left her, and if the attitude of the parties remain the same for two years the desertion is complete; 33 L. J. P. 66; 62 L. T. 330; 68 L. J. P. 91.

If husband and wife have ceased to cohabit whether by the adverse act of the husband or wife or by the mutual consent of both, desertion becomes from that moment impossible to either, at least until their common life and home have been resumed. There cannot be a desertion by the husband unless the cohabitation is broken by some act of desertion. [1904] P. 389.

The Family Desertion Act has been passed in Kansas, Wisconsin, Massachusetts and North Dakota.

See 9 L. R. A. 696, note; Tiffany; Schouler, Dom. Rel.; DIVORCE, LEGAL CRUELTY.

DESERTION OF A SEAMAN. The abandonment, by a sailor, of a vessel in which he had engaged to perform a voyage, before the expiration of his time, and without leave.

Where a seaman signs articles for a voyage, agreeing to go to the port where the vessel is lying to join her, and fails to do so, he is a deserter; In re Sutherland, 53 Fed. 551; Tucker v. Alexandroff, 183 U. S. 424, 22 Sup. Ct. 195, 46 L. Ed. 264, where a Russian sailor, sent to the United States as one of the force ordered to man a cruiser then building, was held a deserter within the meaning of the treaty of 1832 with Russia, though he never set foot on the vessel and it had not been commissioned

Desertion without just cause renders the sailor liable on his shipping articles for damages, and, will, besides, work a forfeiture of his wages previously earned; 3 Kent 155. It has been decided in England that leaving the ship before the completion of the voyage is not desertion, in case,—*first*, of the seaman's entering the public service, either voluntarily or by impressment; and, *second*, when he is compelled to leave it by the inhuman treatment of the captain; 2 Esp. 269; 1 Bell, Com. 514; 2 C. Rob. 232. And see Cloutman v. Tunison, 1 Sumn. 373, Fed. Cas. No. 2,907; Sims v. Mariners, 2 Pet. Adm. 393, Fed. Cas. No. 12,893; Coffin v. Jenkins, 3 Sto. 109, Fed. Cas. No. 2,948.

To justify the forfeiture of a seaman's wages for absence for more than forty-eight hours, under the provisions of the act of congress of July 20, 1790, an entry in the log-book of the fact of his absence, made by the officer in charge of it on the day on which he absented himself, and giving the name of the absent seaman as absent without permission, is indispensable; 2 Pars. Sh. & Adm. 101; The Phœbe v. Degnum, 1 Wash. C. C. 48, Fed. Cas. No. 11,110; Gilp. 212, 296.

Receiving a marine again on board, and his return to duty with the assent of the master, is a waiver of the forfeiture of wages previously incurred; Whitton v. The Commerce, 1 Pet. Adm. 160, Fed. Cas. No. 17,604.

DESERVING. Worthy or meritorious, without regard to condition or circumstances. In no sense of the word is it limited to persons in need of assistance, or objects which come within the class of charitable uses. Nichols v. Allen, 130 Mass. 211, 39 Am. Rep. 445.

DESIGN. As a term of art, "the giving of a visible form to the conceptions of the mind, or in other words to the invention." Binns v. Woodruff, 4 Wash. C. C. 48, Fed. Cas. No. 1,424. See COPYRIGHT; PATENTS.

Plan, scheme, or intention carried into effect. Catlin v. Fire Ins. Co., 1 Sumn. 434, Fed. Cas. No. 2,522. A project, an idea. 3 H. & N. 301.

As used in an indictment for having in one's possession materials for counterfeiting it may refer to the purpose for which the materials were originally designed, and not to criminal intent in the defendant to use them; Commonwealth v. Morse, 2 Mass. 128.

DESIGNATIO PERSONÆ. See DESCRIPTIO PERSONÆ.

DESIGNATION. The expression used by a testator to denote a person or thing, instead of the name itself.

A bequest of the farm which the testator bought of a person named, or of a picture which he owns, painted by a certain artist, would be a designation of the thing.

DESIRE. The word desire, in a will, raises a trust, where the objects of that desire are specified; Vandyck v. Van Beuren, 1 Cai. (N. Y.) 84. See PRECATORY WORDS.

DESPATCHES. Official communications of official persons on the affairs of government.

In general, the bearer of despatches is entitled to all the facilities that can be given him, in his own country, or in a neutral state; but a neutral cannot, in general, be the bearer of despatches of one of the belligerent parties; 6 C. Rob. 465. See 2 Dods. 54; 1 Edw. 274.

DESPERATE. Of which there is no hope.

This term is used frequently in making an inventory of a decedent's effects, when a debt is considered so bad that there is no

hope of recovering it. It is then called a desperate debt, and, if it be so returned, it will be *prima facie* considered as desperate. See Toll. Ex. 248; 2 Wms. Ex. 644; 1 Chitt. Pr. 580; Schultz v. Pulver, 11 Wend. (N. Y.) 365.

DESPOIL. This word involves in its signification, violence or clandestine means, by which one is deprived of that which he possesses. Sunol v. Hepburn, 1 Cal. 268.

DESPOT. This word, in its original and most simple acceptation, signifies *master and supreme lord;* it is synonymous with monarch; but taken in bad part, as it is usually employed, it signifies a tyrant.

DESPOTISM. That abuse of government where the sovereign power is not divided, but united in the hands of a single man, whatever may be his official title. It is not, properly, a form of government. Toullier. Dr. Civ. Fr. tit prél. n 32; Rutherf. Inst. b. 1, c. 20, § 1. See GOVERNMENT.

DESTINATION. The intended application of a thing.

For example, when a testator gives to a hospital a sum of money to be applied in erecting buildings, he is said to give a destination to the legacy. Mill-stones taken out of a mill to be picked, and to be returned, have a destination, and are considered real estate, although detached from the freehold. Heirlooms, although personal chattels, are, by their destination, considered real estate; and money agreed or directed to be laid out in land is treated as real property; Craig v. Leslie, 3 Wheat. (U. S.) 577, 4 L. Ed 460; 2 Bell, Com. 2; Erskine, Inst. 2. 2. 14; Fonbl. Eq. b. 1, c. 6, § 9. See EASEMENT; FIXTURES.

In Common Law. The port at which a ship is to end her voyage is called her port of destination. Pardessus, n. 600

The phrases "port of destination" and "port of discharge" are not equivalent; U. S. v. Barker, 5 Mason 404, Fed. Cas. No. 14,516. See Sheridan v. Ireland, 66 Me. 65.

Sending goods to their destination means sending them to a particular place, to a particular person who is to receive them there; not sending them to a particular place without saying to whom; 15 A. B. D. 43.

DESTROY. In the act of congress punishing with death any one destroying vessels, it means to unfit the vessel for service, beyond the hopes of recovery, by ordinary means. U. S. v. Johns, 1 Wash. C. C. 363, Fed. Cas. No. 15,481; U. S. v. Johns, 4 Dall. (U. S.) 412, 1 L. Ed. 888.

A will burned, cancelled, or torn, *animo revocandi* is *destroyed;* Johnson v. Brailsford, 2 Nott & McC. (S. C.) 272, 10 Am. Dec. 601. The scratching out of the signature with a knife, in England, has been held to be tearing or otherwise *destroying* a will in the sense of the statute; 56 L. J. R. Pr. & D. 96.

DETACHIARE. By writ of attachment or course of law, to seize or take into custody another's goods or person. Cunningham.

DETAIL. One who belongs to the army, but is only detached, or set apart, for the time to some particular duty or service, and who is liable at any time, to be recalled to his place in the ranks. In re Strawbridge, 39 Ala. 379.

DETAINER. Detention. The act of keeping a person against his will, or of withholding the possession of goods or other personal or real property from the owner.

Detainer and detention are very nearly synonymous. If there be any distinction, it is perhaps that detention applies rather to the act considered as a fact, detainer to the act considered as something done by some person. Detainer is more frequently used with reference to real estate than in application to personal property.

All illegal detainers of the person amount to false imprisonment, and may be remedied by *habeas corpus.* Hurd, Hab. Corp. 209.

A detainer or detention of goods is either lawful or unlawful; when lawful, the party having possession of them cannot be deprived of it. It is legal when the party has a right to the property, and has come lawfully into possession. It is illegal when the taking was unlawful, as in the case of forcible entry and detainer, although the party may have a right of possession; but in some cases the detention may be lawful, although the taking may have been unlawful; Moore v. Shenk, 3 Pa. 20, 45 Am. Dec. 618. So also the detention may be unlawful although the original taking was lawful: as when goods were distrained for rent, and the rent was afterwards paid; or when they were pledged, and the money borrowed and interest was afterwards paid; or if one borrow a horse, to ride from A to B, and afterwards detain him from the owner, after demand, such detention is unlawful, and the owner may either retake his property, or have an action of replevin or detinue; 1 Chit. Pr. 135. In these and many other like cases the owner should make a demand, and, if the possessor refuses to restore them, trover, detinue, or replevin will lie, at the option of the plaintiff. In some cases the detention becomes criminal although the taking was lawful, as in embezzlement.

There may also be a detainer of land; and this is either lawful and peaceable, or unlawful and forcible. The detainer is lawful where the entry has been lawful and the estate is held by virtue of some right. It is unlawful and forcible where the entry has been unlawful and with force, and it is retained by force against right; or even where the entry has been peaceable

and lawful, if the detainer be by force and against right; as, if a tenant at will should detain with force after the will has determined, he will be guilty of a forcible detainer; 2 Chitt. Pr. 238; Com. Dig. *Detainer*, B 2; People v. Rickert, 8 Cow. (N. Y.) 226; People v. Anthony, 4 Johns. (N. Y.) 198; Carpenter v. Shepherd, 4 Bibb (Ky.) 501. See Ladd v. Dubroca, 45 Ala. 421; May v. Luckett, 54 Mo. 437; Doty v. Burdick, 83 Ill. 473. A forcible detainer is a distinct offence from a forcible entry; People v. Rickert, 8 Cow. (N. Y.) 226. See FORCIBLE ENTRY AND DETAINER.

In Practice. A writ or instrument, issued or made by a competent officer, authorizing the keeper of a prison to keep in his custody a person therein named. A detainer may be lodged against one within the walls of a prison, on what account soever he is there; Com. Dig. *Process*, E (3 B). This writ was superseded by 1 & 2 Vict. c. 110, §§ 1, 2. See HABEAS CORPUS.

DETECTIVE. One whose business it is to watch, and furnish information concerning, alleged wrongdoers by adroitly investigating their haunts and habits. In England they are usually police officers in plain clothes, and are the successors of the Bow Street runners. In this country there are usually detectives in the police department of the large cities, but the term is applied more particularly to the persons engaged in the detection of crime and the prosecution of such investigations as in England are made through the private inquiry offices. The latter correspond to the private detective agencies in the United States.

Where a detective is employed to arrest and prosecute persons engaged in unlawful acts, the employer will be liable for the detective's arrest of an innocent person; Evansville & T. H. R. Co. v. McKee, 99 Ind. 519, 50 Am. Rep. 102. It has been said the question is not whether the particular act was authorized, but whether the servant was engaged in the master's business, and acting within the general scope of his authority; Clark v. Starin, 47 Hun (N. Y.) 345. In Chicago City R. Co. v. McMahon, 103 Ill. 485, 42 Am. Rep. 29, a detective, employed to gather evidence in a pending case, offered a bribe to a witness, and it was held to be the act of the employer. Where a detective was employed with general instructions not to make an arrest without first consulting the attorneys of a railroad, but with authority to make an arrest if the proof was clear, the company was held liable for the arrest of an innocent person; Eichengreen v. R. R., 96 Tenn. 229, 34 S. W. 219, 31 L. R. A. 702, 54 Am. St. Rep. 833.

One who joins a conspiracy for the purpose of robbery, in order to expose it, and honestly carries out the plan, is not an accessory before the fact, though he encourages the others to the commission of the crime, with the intent that they shall be punished; Com. v. Hollister, 157 Pa. 13, 27 Atl. 386, 25 L. R. A. 349. See Campbell v. Com., 84 Pa. 187; Tayl. Ev. § 971; Whart. Cr. Ev. § 440.

A detective may aid in the commission of an offence in conjunction with a criminal, and the mere fact will not exonerate the guilty party. The detective must not prompt or urge, or lead in the commission of the offense. The defendant must act freely of his own motion; State v. Currie, 13 N. D. 655, 102 N. W. 875, 69 L. R. A. 405, 112 Am. St. Rep. 687. The assistance of a detective in a burglary is no defence to a person who himself does every act essential to constitute a burglary; *id.* A man may direct his servant to appear to encourage the design of a thief and lead him on until the offense is complete, so long as he does not induce the original intent, but only provides for discovery; McAdams v. State, 8 Lea (Tenn.) 456; Thompson v. State, 18 Ind. 386, 81 Am. Dec. 364; Varner v. State, 72 Ga. 745; State v. Adams, 115 N. C. 775, 20 S. E. 722. But if the scheme was concocted, and the particular building selected (with the consent of the proprietor), and the defendant was persuaded by the detective to assist in breaking and entering no burglary was committed; State v. Douglass, 44 Kan. 618, 26 Pac. 476.

Open "shadowing," so as to proclaim the person a suspect, is actionable; Schultz v. Ins. Co., 151 Wis. 537, 139 N. W. 386, 43 L. R. A. (N. S.) 520.

DETENTION. The act of retaining and preventing the removal of a person or property.

The detention may be occasioned by accidents, as the detention of a ship by calms, or by ice; or it may be hostile, as the detention of persons or ships in a foreign country by order of the government. In general, the detention of a ship does not change the nature of the contract; and therefore sailors will be entitled to their wages during the time of the detention; 1 Bell, Com., 5th ed. 517; Mackeldey, Civ. Law § 210; 2 Pars. Sh. & Adm. 63. See DETAINER.

DETERMINABLE. Liable to come to an end by the happening of a contingency: as, a determinable fee.

DETERMINABLE FEE (also called a *qualified* or *base fee*). One which has a qualification subjoined to it, and which must be determined whenever the qualification annexed to it is at an end. A limitation to a man and his heirs on the part of his father affords an example of this species of estate; Littleton § 254; Co. Litt. 27 *a*, 220; 1 Prest. Est. 449; 2 Bla. Com. 109; Cruise, Dig. tit. 1, § 82. See 1 Washb. R. P. 62; McLane v. Bovee, 35 Wis. 36.

DETERMINATE. That which is ascer-

tained; what is particularly designated: as, if I sell you my horse Napoleon, the article sold is here determined. This is very different from a contract by which I sell you a horse, without a particular designation of any horse.

DETERMINATION. The decision of a court of justice. See DECREE; JUDGMENT.

The end, the conclusion, of a right or authority: as, the determination of a lease, Com Dig. *Estates by Grant* (G 10, 11, 12). The phrase "determination of will" is used of the putting an end to an estate at will. 2 Bla. Com. 146.

The determination of an authority is the end of the authority given, the end of the return day of a writ *determines* the authority of the sheriff; the death of the principal *determines* the authority of a mere attorney.

DETERMINE. To come to an end To bring to an end. 2 Bla. Com. 121; 1 Washb. R. P. 380.

DETINET (Lat. *detinere*, to detain; *detinet*, he detains). **In Pleading.** An action of *debt* is said to be in the *detinet* when it is alleged merely that the defendant withholds or unjustly detains from the plaintiff the thing or amount demanded.

The action is so brought by an executor. 1 Wms. Saund. 1; and so between the contracting parties when for the recovery of such things as a ship, horse, etc.; 3 Bla. Com. 156.

An action of *replevin* is said to be in the detinet when the defendant retains possession of the property until after judgment in the action; Bull. N. P. 52; Chit. Pl 145.

It is said that anciently there was a form of writ adapted to bringing the action in this form; but it is not to be found in any of the books; 1 Chit. Pl. 145.

In some of the states the defendant is allowed to retain possession upon giving a bond similar to that required of the plaintiff in the common-law form; the action is then in the detinet; 3 Sharsw. Bla. Com. 146, n.; Bower v. Tallman, 5 W. & S. (Pa.) 556; Beebe v. De Baun, 8 Ark. 510; Zachrisson v. Ahman, 2 Sandf. (N. Y.) 68; Ingalls v. Bulkley, 13 Ill. 315; Boswell v. Green, 25 N. J. L. 390. The jury are to find the value of the chattels in such case, as well as the damage sustained. See DEBET ET DETINET; DETINUIT.

DETINUE (Lat. *detinere*, to withhold). **In Practice.** A form of action which lies for the recovery, in specie, of personal chattels from one who acquired possession of them lawfully but retains it without right, together with damages for the detention. 3 Bla. Com. 151.

It is generally laid down as necessary to the maintenance of this action that the original taking should have been lawful, thus distinguishing it from replevin, which lies in case the original taking is unlawful. Brooke, Abr *Detinue*, 21, 36, 63. It is said, however, by Chitty, that it lies in cases of tortious taking, except as a distress, and that it is thus distinguished from replevin, which lay originally only where a distress was made, as was claimed, wrongfully; 1 Chit. Pl. 112 See 3 Sharsw. Bla. Com. 152. In England this action has yielded to the more practical and less technical action trover, but was formerly much used for the recovery of slaves; Kent v. Armistead, 4 Munf (Va.) 72; Mansell's Adm'r v. Israel, 3 Bibb (Ky.) 510; Hooper's Adm'r v. Hooper, 1 Ov. (Tenn.) 187; Foscue v. Eubank, 32 N. C. 421

In detinue these points are necessary: 1. The plaintiff must have property in the thing sought to be recovered. 2. He must have the right to its immediate possession. 3. It must be capable of identification. 4. That the property be of some value. 5. The defendant must have had possession at some time prior to the institution of the action. Hefner v. Fidler, 58 W. Va. 159, 52 S. E. 513, 3 L. R. A. (N. S.) 138, 112 Am. St. Rep. 961.

The action lies only to recover such goods as are capable of being identified and distinguished from all others; Andr. Steph Pl. 79, n.; Com Dig. *Detinue*, B, C; Co. Litt 286 *b*; Lewis v. Hoover, 1 J. J. Marsh (Ky.) 500, 19 Am Dec 120; Hail v. Reed, 15 B Monr. (Ky.) 479; Wright v. Ross, 2 G. Greene (Ia.) 266; Goff v. Gott, 5 Sneed. (Tenn.) 562; in cases where the defendant had originally lawful possession, which he retains without right; Melton v. McDonald, 2 Mo. 45, 22 Am Dec. 437; Spaulding v. Scanland, 4 B. Monr. (Ky.) 365; Stoker v. Yerby, 11 Ala. 322, as where goods were delivered for application to a specific purpose; 4 B & P. 140; but a tort in taking may be waived, it is said, and detinue brought; Owings v. Frier, 2 A K Marsh. (Ky.) 268, 12 Am Dec 393; Schulenberg v. Campbell, 11 Mo 491; O'Neill v. Henderson, 15 Ark. 235, 60 Am. Dec. 568. That it lies whether the taking was tortious or not, see Beazley v. Mitchell, 9 Ala. 780; Overfield v. Bullitt, 1 Mo. 749. It may be maintained for the recovery of a policy of insurance where it has been paid for, but is withheld by the agent; Robinson v. Peterson, 40 Ill. App. 132; or to recover a promissory note; Hefner v. Fidler, 58 W. Va. 159, 52 S. E. 513, 3 L. R. A. (N. S.) 138, 112 Am. St. Rep. 961; Brown v. Pollard, 89 Va. 696, 17 S. E. 6. The property must be in existence at the time; Caldwell v. Fenwick, 2 Dana (Ky.) 332; Lindsey v. Perry, 1 Ala. 203; Bethea v. McLennon, 23 N. C. 523; see Haile v. Hill, 13 Mo. 612; but need not be in the possession of the defendant; Pool v. Adkisson, 1 Dana (Ky.) 110; Haley v. Rowan, 5 Yerg. (Tenn.) 301, 26 Am. Dec. 268; Gaines v. Harvin, 19 Ala. 491; Barksdale v. Appleberry, 23 Mo. 389; Easley's Ex'rs v. Easley, 18 B. Monr. (Ky.) 86.

The plaintiff must have had actual possession, or a right to immediate possession; Melton v. McDonald, 2 Mo. 45, 22 Am. Dec. 437; Burnley v. Lambert, 1 Wash. (Va.) 308; Smart v. Clift, 4 Bibb (Ky.) 518; Haynes v. Crutchfield, 7 Ala. 189; Miles v. Allen, 28 N. C. 88; O'Neal v. Baker, 47 N. C.

168; Hughes v. Jones, 2 Md. Ch. Dec. 178; but a special property, as that of a bailee, with actual possession at the time of delivery to the defendant, is sufficient; 2 Wms. Saund. 47 *b*; Boyle v. Townes, 9 Leigh (Va.) 158; Spaulding v. Scanland, 4 B. Monr. (Ky.) 365; Melton v. McDonald, 2 Mo. 45, 22 Am. Dec. 437; Bryan v. Smith, 22 Ala. 534. A mere equitable claim reserved by a vendor on the sale of personal property for the unpaid purchase money, is not sufficient title to authorize a recovery in detinue; Lucas v. Pittman, 94 Ala. 616, 10 South. 603. Either want of title in the plaintiff or the absence of actual possession in defendant, when the action was brought, will prevent plaintiff's recovery, as constructive possession in defendant from the fact that he had the title is not sufficient; Burns v. Morrison, 36 W. Va. 423, 15 S. E. 62. A demand is not requisite except to entitle the plaintiff to damages for detention between demand and the commencement of the action; Cole v. Cole's Adm'r, 4 Bibb (Ky.) 340; Schulenberg v. Campbell, 14 Mo. 191; Jones v. Henry, 3 Litt. (Ky.) 46; Mortimer v. Brumfield, 3 Munf. (Va.) 122; Dunn v. Davis, 12 Ala. 135; Eastman v. Burke County Com'rs, 114 N. C. 524, 19 S. E. 599.

The *declaration* may state a bailment or trover; though a simple allegation that the goods came to the defendant's hands is sufficient; Brooke, Abr. *Detinue*, 10. The bailment or trover alleged is not traversable, Brooke, Abr. *Detinue*, 1, 2, 50. It must describe the property with accuracy, Felt v. Williams, 1 Scam. (Ill.) 206; March v. Lackie, 35 N. C. 172, 55 Am. Dec. 431; Wright v. Ross, 2 Greene (Ia.) 266.

The *plea* of *non detinet* is the general issue, and special matter may be given in evidence under it; Co. Litt. 283; 16 E. L. & Eq. 514; Stratton v. Minnis, 2 Munf. (Va.) 329; Morrow v. Hatfield, 6 Humphr. (Tenn.) 108; Lucas v. Pittman, 94 Ala. 616, 10 South. 603, including title in a third person; Tanner v. Allison, 3 Dana (Ky.) 422; McCurry v. Hooper, 12 Ala. 823, 46 Am. Dec. 280; eviction, or accidental loss by a bailee; Rucker v. Hamilton, 3 Dana (Ky.) 36. The plea of not guilty is not appropriate; Robinson v. Peterson, 40 Ill. App. 132.

The defendant in this action frequently prayed garnishment of a third person, who he alleged owned or had an interest in the thing demanded; but this he could not do without confessing the possession of the thing demanded, and making privity of bailment; Brooke, Abr. *Garnishment*, 1, *Interpleader*, 3. If the prayer of garnishment was allowed, a *sci. fa.* issued against the person named as garnishee. If he made default, the plaintiff recovered against the defendant the chattel demanded, but no damages. If the garnishee appeared, and the plaintiff made default, the garnishee recovered. If both appeared, and the plaintiff recovered, he had judgment against the defendant for the chattel demanded, and a distringas in execution; and against the garnishee a judgment for damages, and a *fi. fa.* in execution.

The judgment is in the alternative that the plaintiff recover the goods, or the value thereof if he cannot have the property itself; Haynes v. Crutchfield, 7 Ala. 189; Garland v. Bugg, 5 Munf. (Va.) 166; Daniel v. Prather, 1 Bibb (Ky.) 484; Thompson v. Thompson's Ex'rs, 7 B. Monr. (Ky.) 421; Waite v. Dolby, 8 Humphr. (Tenn.) 406; Mulliken v. Greer, 5 Mo. 489; Murphy v. Moore, 39 N. C. 118; Wilson v. Buchanan, 7 Gratt. (Va.) 343; Blakely's Adm'r v. Duncan, 4 Tex. 184; Arthur v. Ingles, 34 W. Va. 639, 12 S. E. 872, 11 L. R. A. 557; with damages for the detention; Bethea v. McLennon, 23 N. C. 523; Haile v. Hill, 13 Mo. 612; Hunt's Adm'r v. Martin's Adm'r, 8 Gratt. (Va.) 578; Cole v. Conolly, 16 Ala. 271; and full costs. One cannot recover as damages both hire and the ordinary wear and tear of the property sued for, as hire includes ordinary wear and tear; White v. R. Co., 90 Ala. 253, 7 South. 910.

The verdict and judgment must be such that a special remedy may be had for a recovery of the goods detained, or a satisfaction in value for each parcel in case they or either of them cannot be returned; Haynes v. Crutchfield, 7 Ala. 189, Bell v. Pharr, 7 Ala. 807; Goodman v. Floyd, 2 Humphr. (Tenn.) 59; Glascock v. Hays, 4 Dana (Ky.) 58; Penny v. Davis, 3 B. Monr. (Ky.) 313.

See CONVERSION; TROVER; REPLEVIN.

DETINUE OF CHARTERS. A man may have detinue for deeds and charters concerning land, but if they concern the freehold, it must be in C. B. and no other court. Cunningham.

DETINUE OF GOODS IN FRANK MARRIAGE. A writ formerly available to a wife after a divorce, for the recovery of the goods given with her in marriage. Moz. & W. Dict.

DETINUIT (Lat. he detained). **In Pleading.** An action of replevin is said to be in the *detinuit* when the plaintiff acquires possession of the property claimed by means of the writ. The right to retain is, of course, subject in such case to the judgment of the court upon his title to the property claimed; Bull N. P. 521. The declaration in such case need not state the value of the goods; Britton v. Morss, 6 Blackf. (Ind.) 469; Haynes v. Crutchfield, 7 Ala. 189.

The judgment in such case is for the damage sustained by the unjust taking or detention, or both, if both were illegal, and for costs; 4 Bouvier, Inst. n. 3562.

DEUTEROGAMY. A second marriage after the death of a former husband or wife.

DEVASTATION. Wasteful use of the property of a deceased person: as, for extravagant funeral or other unnecessary expenses. 2 Bla. Com. 508.

DEVASTAVIT. The mismanagement and waste by an executor, administrator, or other trustee, of the estate and effects trusted to him as such, by which a loss occurs.

Devastavit by direct abuse takes place when the executor, administrator, or trustee sells, embezzles, or converts to his own use goods intrusted to him; Com. Dig. *Administration* (1 I); Smith v. Ayer, 101 U. S. 327, 25 L. Ed. 955; releases a claim due to the estate; 3 Bacon, Abr. 700; Cro. Eliz. 43; De Diemar v. Van Wagenen, 7 Johns. (N. Y.) 404; Dawes v. Boylston, 9 Mass. 352, 6 Am. Dec. 72; or surrenders a lease; People v. Pleas, 2 Johns. Cas. (N. Y.) 376; 3 P. Wms. 330; Camp v. Smith, 68 N. C. 537; below its value. These instances sufficiently show that any wilful waste of the property will be considered a direct *devastavit*. See Lacoste v. Splivalo, 64 Cal. 35, 30 Pac. 571.

Devastavit by mal-administration most frequently occurs by the payment of claims which were not due nor owing, or by paying others out of the order in which they ought to be paid, or by the payment of legacies before all the debts are satisfied; Thomas v. Riegel, 5 Rawle (Pa.) 266; Chapin v. Waters, 110 Mass. 195; Lewis v. Mason's Adm'r, 84 Va. 731, 10 S. E. 529.

Devastavit by neglect. Negligence on the part of an executor, administrator, or trustee may equally tend to the waste of the estate as the direct destruction or mal-administration of the assets, and render him guilty of a *devastavit*. The neglect to sell the goods at a fair price, within a reasonable time, or, if they are perishable goods, before they are wasted, will be a *devastavit;* and a neglect to collect a doubtful debt which by proper exertion might have been collected will be so considered. Bacon, Abr. *Executors*, L. See Matter of Childs, 5 Misc. 560, 26 N. Y. Supp. 721; Baer's Appeal, 127 Pa 360, 18 Atl. 1, 4 L. R. A. 609; Mills' Adm'r v. Tulley's Adm'r, 83 Va. 361, 5 S. E. 368; Sterling v. Wilkinson, 83 Va. 791, 3 S. E. 533; Adkins v. Hutchings, 79 Ga. 260, 4 S. E. 887.

The law requires from trustees good faith and due diligence, the want of which is punished by making them responsible for the losses which may be sustained by the property intrusted to them: when, therefore, a party has been guilty of a *devastavit*, he is required to make up the loss out of his own estate. See Com. Dig. *Administration*, I; Belt, Suppl. to Ves. 209; In re Stronz's Estate, 160 Pa. 13, 28 Atl. 480; Franklin v. Low, 1 Johns. (N. Y.) 396; Bacon, Abr. *Executors*, L; 11 Toullier 58.

The return of *nulla bona testatoris nec propria* and *a devastavit* to the writ of execution *de bonis testatoris*, in an action against an executor or administrator, is called a *devastavit*. Upon this return the plaintiff may forthwith sue out an execution against the person or property of the executor or administrator in as full a manner as in an action against him sued in his own right. This is not, however, a common use of the word; Brown, Dict.

DEVENERUNT (Lat. *devenire*, to come to). A writ, now obsolete, directed to the king's escheators when any one of the king's tenants *in capite* dies, and when his son and heir dies within age and in the king's custody, commanding the escheat, or that by the oaths of twelve good and lawful men they shall inquire what lands or tenements by the death of the tenant have come to the king. Dy. 360; Keilw. 199 *a;* Blount; Cowell.

DEVEST or DIVEST. To deprive, to take away; opposite to *invest*, which is to deliver possession of anything to another. Wharton.

DEVIATION. Varying from the risks insured against, as described in the policy, without necessity or just cause, after the risk has begun. 1 Phill. Ins. § 977.

Any unnecessary or unexcused departure from the usual or general mode of carrying on the voyage insured. 15 Am. L. Rev. 108. See also Coffin v. Ins. Co., 9 Mass. 436.

A voluntary departure without necessity or reasonable cause from the regular and usual course of the voyage in reference to the terms of a policy of marine insurance. Hostetter v. Park, 137 U. S. 30, 11 Sup. Ct. 1, 34 L. Ed. 568.

The mere intention to deviate is not a deviation, and if not carried into effect will not vitiate a policy or exempt insurers from a loss happening before the vessel arrives at the dividing port; Marine Ins. Co. v. Tucker, 3 Cra. (U. S.) 357, 2 L. Ed. 466; Maryland Ins. Co. v. Woods, 6 Cra. (U. S.) 29, 3 L. Ed. 143. Usage, in like cases, has a great weight in determining the manner in which the risk is to be run,—the contract being understood to have implied reference thereto in the absence of specific stipulations to the contrary; Folsom v. Ins. Co., 38 Me. 414; Winter v. Ins. Co., 30 Pa. 334; Fletcher v. Ins. Co., 18 Mo. 193; De Peyster v. Ins. Co., 19 N. Y. 272, 75 Am. Dec. 331; Hostetter v. Gray, 11 Fed. 181; Hostetter v. Park, 137 U. S. 30, 11 Sup. Ct. 1, 34 L. Ed. 568. To touch and stay at a port out of its course is not a deviation if such departure is within the usage of the trade; *id;* Marande v. Ry. Co., 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487. A variation from risks described in the policy from a necessity which is not inexcusably incurred does not forfeit the insurance; 1 Phill. Ins. § 1018; as to seek an intermediate port for repairs necessary for the prosecution of the voyage; 1 Phill. Ins. § 1019; changing the course to avoid disaster; Haven v. Holland, 2 Mas. 234, Fed. Cas. No. 6,229; delay in order to succor the distressed at sea; 6 East 54; Mason v. The Blaireau, 2 Cra. (U. S.) 240, 258, 2 L. Ed. 266; if the object is to save life, otherwise,

to save property merely; Crocker v. Jackson, 1 Spra. 141, Fed. Cas. No. 3,398; Bond v. The Cora, 2 Wash. C. C. 80, Fed. Cas. No. 1,621; The Boston, 1 Sumn. 328, Fed. Cas. No. 1,673; damage merely in defence against hostile attacks; 1 Phill. Ins. § 1030; or in taking measures to repel such attacks; Haven v. Holland, 2 Mas. 230, Fed. Cas. No. 6,229. "Liberty to touch" at a particular port, reserved in the policy, does not imply liberty to remain for trading, which, if it involves delay, may amount to deviation; Maryland Ins. Co. v. Le Roy, 7 Cra. (U. S.) 26, 3 L. Ed. 257; nor to touch and stay at a port out of the course when within the usage of the trade; Bulkley v. Ins. Co., 2 Pai. 82, Fed. Cas. No. 2,118; Bentaloe v. Pratt, Wall. C. C. 58, Fed. Cas. No. 1,330.

Necessity alone will sanction a deviation, and the latter must be strictly commensurate with the power compelling; Maryland Ins. Co. v. Le Roy, 7 Cra. (U. S.) 26, 3 L. Ed. 257; the smallest deviation without necessity discharges the underwriters, though the loss be not the immediate consequence of the deviation; Martin v. Ins. Co., 2 Wash. C. C. 254, Fed. Cas. No. 9,161. The same doctrine is applicable in the case of a bill of lading. Shipowners are held to be deprived of the exemptions contained therein, even where the deviation was not the cause of the damage; 23 T. L. R. 89.

See article in 15 Am. L. Rev. 108.

The effect of a deviation in all kinds of insurance is to discharge the underwriters, whether the risk is thereby enhanced or not; the doctrine applies to lake and river navigation as well as ocean; 1 Phill. Ins. § 987. See INSURANCE; DEPARTURE; HARTER ACT.

In the law of railways, a lateral alteration of the line of a railway. The railways clauses act in England authorizes a company which is subject to its provisions to deviate on the line marked on the deposited plans within the limits delineated thereon. Hodg. Railw. 341.

In Contracts. A change made in the progress of a work from the original plan agreed upon.

When the contract is to build a house according to the original plan, and a deviation takes place, the contract must be traced as far as possible, and the additions, if any have been made, must be paid for according to the usual rate of charging; 3 B. & Ald. 47. And see 14 Ves. 413; McFerran v. Taylor, 3 Cra. (U. S.) 270, 2 L. Ed. 436; Munroe v. Perkins, 9 Pick. (Mass.) 298, 20 Am. Dec. 475; Chit. Contr. 168.

DEVICE. That which is devised or formed by design, a contrivance, an invention. Henderson v. State, 59 Ala. 91; Armour Packing Co. v. U. S., 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681, where the word as used in the Elkins Act was construed and the above definition adopted. The court held that the act sought to reach all means by which unlawful preferences might be given or received; that it was not the intention of congress to limit the obtaining of such preferences to fraudulent schemes, and that the term "device" includes anything which is a plan or contrivance. See PATENT.

DEVILLING. A term used in London of a barrister recently admitted to the bar, who assists a junior barrister in his professional work, without compensation and without appearing in any way in the matter.

DEVISAVIT VEL NON. The name of an issue sent out of a court of chancery, or one which exercises chancery or probate jurisdiction, to a court of law, to try the validity of a paper asserted and denied to be a will, to ascertain whether or not the testator did devise, or whether or not that paper was his will; 7 Bro. P. C. 437; 2 Atk. 424; Asay v. Hoover, 5 Pa. 21, 45 Am. Dec. 713.

An application for an issue *devisarit vel non* is properly denied where the decided weight of evidence is in favor of the testamentary capacity of testatrix, and it appears that the two sons in whose favor the will was made cared for their mother and her estate, while the two who had been disinherited, attempted to have her declared insane; In re Pensyl's Estate, 157 Pa. 465, 27 Atl. 669.

DEVISE. A gift of real property by a last will and testament.

The term devise, properly and technically, applies only to real estate; 1 Hill, Abr. c. 36, 62, Dickerman v. Abrahams, 21 Barb. (N. Y.) 561. But it is also sometimes improperly applied to a bequest or legacy. See 4 Kent 489, 8 Viner, Abr. 41, Com. Dig. *Estates by Devise*, Rountree v. Pursell, 11 Ind. App. 522, 39 N. E. 747. The terms "bequest" and "devise" are used indifferently, and legatees may take under a devise of lands, if the context of the will shows that such was the testator's intention. Ladd v. Harvey, 21 N. H. 515; In re Fetrow's Estate, 58 Pa. 427.

A general devise of lands will pass a reversion in fee, even though the testator has other lands which will satisfy the words of the devise, and although it be highly improbable that he had in mind such reversion; 3 P. Wms. 56; 3 Bro. P. C. 408; 4 Bro. C. C. 338; Steel v. Cook, 1 Metc. (Mass.) 281; 8 Ves. 256.

A general devise will pass leases for years, if the testator have no other real estate upon which the will may operate; but if he have both lands in fee and lands for years, a devise of all his lands and tenements will commonly pass only the lands in fee-simple; Cro. Car. 293; Bowen v. Idley, 1 Ed. Ch. (N. Y.) 151; 6 Sim. 99. But if a contrary intention appear from the will, it will prevail; 5 Ves. 540; 9 East 448.

Testator "gave, devised and bequeathed all his furniture, goods, chattels and effects, whatsoever the same may be and wheresoever situate." It was held that giving ex-

pression to the word "devise," in connection with the other terms of the will, that the gift passed all the property of the testator, whether real or personal; [1891] 3 Ch. 389.

A devise in a will can never be regarded as the execution of a power, unless that intention is manifest: as, where the will would otherwise have nothing upon which it could operate. But the devise to have that operation need not necessarily refer to the power in express terms. But where there is an *interest* upon which it can operate, it shall be referred to that, unless some other intention is obvious; 6 Co. 17b; 6 Madd. 190; 4 Kent 334; 1 Jarm. Wills 628.

The devise of all one's lands will not generally carry the interest of a mortgagee, in premises, unless that intent is apparent: 2 Vern. 621; 3 P. Wms. 61; 1 Jarm. Wills, 633. The fact that the mortgagee is in possession is sometimes of importance in determining the purpose of the devise. But many cases hold that the interest of a mortgagee or trustee will pass by a general devise of all one's land, unless a contrary intent be shown. Jackson v. De Lancy, 13 Johns. (N. Y.) 537, 7 Am. Dec. 403; 8 Ves. 407; 1 J. & W. 494. But see 9 B. & C. 267. This is indeed the result of the modern decisions, 4 Kent 539; 1 Jarm. Wills 678. It seems clear that a devise of one's mortgages will pass the beneficial title of the mortgagee; 4 Kent 539.

Devises may be contingent or vested, after the death of the testator. They are contingent when the vesting of any estate in the devisee is made to depend upon some future event, in which case, if the event never occur, or until it does occur, no estate vests under the devise. But when the future event is referred to merely to determine the time at which the devisee shall come into the use of the estate, this does not hinder the vesting of the estate at the death of the testator; 1 Jarm. Wills, c. xxvi., and numerous cases cited. The law favors that construction of the will which will vest the estate; Olney v. Hull, 21 Pick. (Mass.) 311; King v. King, 1 W. & S. (Pa.) 205, 37 Am. Dec. 459. But this construction must not be carried to such an extent as to defeat the manifest intent of the testator; Olney v. Hull, 21 Pick. (Mass.) 311; Richardson v. Wheatland, 7 Metc. (Mass.) 171. Where the estate is given absolutely, but only the time of possession is deferred, the devisee or legatee acquires a transmissible interest although he never arrive at the age to take possession; 1 Ves. Sen. 44, 59, 118; Bowers v. Porter, 4 Pick. (Mass.) 198; Richardson v. Wheatland, 7 Metc. (Mass.) 173. See LAPSED DEVISE; WILL; LEGACY; CHARGE.

DEVISEE. A person to whom a devise has been made.

All persons who are *in rerum natura*, and even embryos, may be devisees, unless excepted by some positive law. But the devisee must be in existence, except in case of devises to charitable uses; 2 Washb. R. P. 688; Philadelphia Baptist Ass'n v. Hart, 4 Wheat. (U. S.) 33, 49, 4 L. Ed. 499. See CHARITABLE USES. In general, he who can acquire property by his labor and industry may receive a devise; Cam. & N. 353. *Femes covert*, infants, aliens, and persons of nonsane memory may be devisees; 4 Kent 506; 2 Wms. Ex. 269, n.; Doe v. Roe, 1 Harr. (Del.) 524. Corporations in England and in some of the states can be devisees only to a limited extent; 2 Washb. R. P. 687.

A devisee may mean a legatee; People v. Petrie, 191 Ill. 497, 61 N. E. 499, 85 Am. St. Rep. 268.

DEVISOR. A testator. One who devises real estate.

Any person who can sell an estate may, in general, devise it; and there are some disabilities as to a sale which are not such as to a devise.

DEVOIR. Duty. It is used in the statute of 2 Ric. II. c. 3, in the sense of duties or customs.

DEVOLUTION. In Ecclesiastical Law. The transfer, by forfeiture, of a right and power which a person has to another, on account of some act or negligence of the person who is vested with such right or power; for example, when a person has the right of presentation and he does not present within the time prescribed, the right devolves on his next immediate superior. Ayliffe, Parerg. 331. See 3 App. Cas. 520.

DEVOLVE. To pass from a person dying to a person living. 1 Mylne & K. 618. See DELEGATION.

DI COLONA. The contract which takes place between the owner of a ship, the captain, and the mariners, who agree that the voyage shall be for the benefit of all. The term is used in the Italian law. Targa, cc. 36, 37; Emerigon, Mar. Loans, s. 5. The New England whalers owned and navigated were under this species of contract. The captain and his mariners were all interested in the profits of the voyage in certain proportion, in the same manner as the captain and crew of a privateer, according to the agreement between them. Such agreements were very common in former times. It is necessary to know this in order to understand many of the provisions of the laws of Oleron and of Wisbuy, the Consolato del Mare, and other ancient codes of maritime and commercial law. Hall, Mar. Loans 42.

DICTATE. To pronounce, word by word, what is meant to be written by another. It is thus defined in the Louisiana code, which provides that the testator may dictate his will; Hamilton v. Hamilton, 6 Mart. N. S. (La.) 143. The presentation, by testator, of an instrument which he has caused to be written, declaring it to be his will, may some-

times supply the want of dictation; Prendergast v. Prendergast, 16 La. Ann. 219, 79 Am. Dec. 575.

DICTATOR. In Roman Law. A magistrate at Rome invested with absolute power. His office continued but for six months. Hist. de la Jur. Dig. 1. 2. 18, 1. 1. 1.

DICTORES. Arbitrators.

DICTUM (also, *Obiter Dictum*). An opinion expressed by a court upon some question of law which is not necessary to the decision of the case before it.

It frequently happens that, in assigning its opinion upon a question before it, the court discusses collateral questions and expresses a decided opinion upon them. Such opinions, however, are frequently given without much reflection or without previous argument at the bar, and as, moreover, they do not enter into the adjudication of the point at issue they have only that authority which may be accorded to the opinion, more or less deliberate, of the individual judge who announces it. Chase, Bla. Com. 36, n. It may be observed that in recent times, particularly in those jurisdictions where appeals are largely favored, the ancient practice of courts in this respect is much modified. Formerly, judges aimed to confine their opinion to the precise point involved, and were glad to make that point as narrow as it might justly be. Where appeals are frequent, however, a strong tendency may be seen to fortify the judgment given with every principle that can be invoked in its behalf,—those that are merely collateral, as well as those that are necessarily involved. In some courts of last resort, also, when there are many judges, it is not unfrequently the case that, while the court come to one and the same conclusion, the different judges may be led to that conclusion by different views of the law, so that it becomes difficult to determine what is to be regarded as the principle upon which the case was decided and what shall be deemed mere *dicta*.

It is not easy to define the term with such precision as to afford an exact criterion by which to decide when the language of a court or judge is entitled to be considered as a precedent and followed as an authority. Judicial references to the subject indicate that expressions which would be included under the term *dicta* are nevertheless afterwards treated by other courts with respect if not with the binding force of adjudicated cases. Possibly no better definition can be found than that of Folger, J., in Rohrbach v. Ins. Co., 62 N. Y. 58, 20 Am. Rep. 451: "*Dicta* are the opinions of a judge which do not embody the resolution or determination of the court, and, made without argument or full consideration of the point, are not the professed, deliberate determinations of the judge himself; *obiter dicta* are such opinions uttered by the way, not upon the point or question pending, as if turning aside for the time from the main topic of the case to collateral subjects."

The general rule, broadly stated by the United States supreme court, is that to make an opinion a decision "there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties, . . . and, therefore, this court has never held itself bound by any part of an opinion which was not needful to the ascertainment of the question between the parties." Per Curtis, J., in Carroll v. Carroll, 16 How. 287, 14 L. Ed. 936. And in Cohens v. Virginia, when the case of Marbury v. Madison, 1 Cra. 137, 2 L. Ed. 60, was very earnestly pressed upon the attention of the court, Marshall, C. J., said: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent case when the very point is presented;" 6 Wheat. 399, 5 L. Ed. 257. In In re City Bank, 3 How. 292, 11 L. Ed. 603, Catron, J., dissenting, strongly criticised the majority of the court for a long discussion of the power of a court as to which they decided that they had no authority to review its decisions. In a later case the same court said, in reference to an allusion to the opinion in a case previously decided, "This was the only question before the court and the decision is authority only to the extent of the case before it; . . . if more was intended by the judge who delivered the opinion it was purely *obiter*;" U. S. v. County of Clark, 96 U. S. 211, 24 L. Ed. 628. The great powers and peculiar functions included in the constitutional powers of that court, as well as the conclusiveness of its judgments as declarations of constitutional construction, make it not only proper but essential that its decisions should be confined to the points necessarily involved in the case and embraced in the argument. And the same reasons not only warrant but require a rigid exclusion of mere *dicta* from the category of authorities. The reason for the enforcement of the rule, as against expressions of opinion upon points not fairly raised by the case, is stated by the supreme court of Pennsylvania: "What I have said or written outside of the case trying, or shall say or write in such circumstances, may be taken as my opinion at the time, without argument or full consideration, but I will not consider myself bound by it when the point is fairly trying and fully argued and considered." Per Huston, J., Frantz v. Brown, 17 S. & R. 287.

According to the more rigid rule, any expression of opinion however deliberate upon a question however fully argued, if not essential to the disposition that was made of the case, may be regarded as a *dictum;* but it is, on the other hand, said that it is difficult to see why, in a philosophical point of view, the opinion of the court is not so persuasive on all the points which were so involved in the cause that it was the duty of counsel to argue them, and which were deliberately passed over by the court, as if the decision had hung upon but one point; 1 Abbott, N. Y. Dig. pref. iv. And a text writer has said that "the line must not be too sharply drawn"; Wells, Res. Adj. & Sta. Dec.

§ 581. The fact that a decision might have been rested upon a different ground, and even a more satisfactory one, does not place the actual decision, on a ground arising, in the category of a *dictum;* Clark v. Thomas, 4 Heisk. (Tenn.) 419.

But even when the point ruled was not directly and necessarily in issue, there are distinctions drawn as to the relative authority of judicial expressions of opinion comprehended under the general term *dicta,* as used in its broadest sense. An expression of opinion upon a point involved in a case, argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the case, if a *dictum,* should be considered as a judicial *dictum* as distinguished from a mere *obiter dictum,* i. e. an expression originating alone with the judge writing the opinion, as an argument or illustration; Buchner v. Ry. Co., 60 Wis. 264, 19 N. W. 56. What was, in strictness, a *dictum* of Mr. Justice McLean has been extensively commented on, treated, and in several cases followed, as an authority. The suit was on a bond of a United States officer, and the question was as to when a resignation took effect, it being claimed that for default after resignation the surety was not liable. The court held the resignation to be a conditional one, and went on to discuss the right of resignation and the necessity of acceptance or power of rejection, reaching the conclusion that an unqualified resignation required no acceptance and would have discharged the surety; U. S. v. Wright, 1 McLean, 509, Fed. Cas. No. 16,775. This case having been cited to that point it was contended that it was a mere *dictum.* After defining *dictum* the supreme court of Nevada held "that while technically such, it was not liable to the objections usually urged,—it was the expression of opinion on a point argued, and entitled to far more weight than an ordinary *dictum* on a point not discussed and remotely connected with the case." State v. Clarke, 3 Nev. 566. The same case was followed in People v. Porter, 6 Cal. 28; State v. Fitts, 19 Ala. 402; and is commented on and treated as an authority without being characterized as a *dictum* in Edwards v. U. S., 103 U. S. 471, 26 L. Ed. 314 and Reeves v. Ferguson, 31 N. J. L. 107.

So also it has been held, with respect to a court of last resort, that all that is needed to render its decision authoritative is that there was an application of the judicial mind to the precise question adjudged; and that the point was investigated with care and considered in its fullest extent; Alexander v. Worthington, 5 Md. 488; and that when a question of general interest is involved, and is fully discussed and submitted by counsel, and the court decides the question with a view to settle the law, the decision cannot be considered a *dictum; id.*

When a question is involved in the case, though not in the particular phase of it, at the time before the court, the language of the court is not a mere *dictum.* When a will was offered for probate the question of its validity, so far as regarded charitable uses, was involved, and what was said as to that was not *obiter;* Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401; although a point may not have been exhaustively argued a decision upon it cannot be said to be *obiter dictum* when it was upon a question raised by a demurrer upon which the court distinctly expressed an opinion; Michael v. Morey, 26 Md. 239, 90 Am. Dec. 106.

"Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere *dictum.*" Union Pac. R. Co. v. Railroad Co., 199 U. S. 160, 166, 26 Sup. Ct. 19, 50 L. Ed. 134; Florida C. R. Co. v. Schutte, 103 U. S. 118, 26 L. Ed. 327; New York Cent. & H. R. R. Co. v. Price, 159 Fed. 330, 332, 86 C. C. A. 502, 16 L. R. A. (N. S.) 1103.

The expressions of courts and judges which fall within the general designation of *dicta* are accorded more or less weight as they agree with, or run counter to, the current of authority, and, like the adjudications of courts in other jurisdictions, not direct authorities, they are always considered with reference to the judicial reputation and experience of their authors. Referring to a case cited in a *dictum* Lord Mansfield said, "This *dictum* of Lord Holt's is no formed decisive resolution, no adjudication; no professed or deliberate determination . . ."; then after citing cases *contra* he continued, "therefore this mere *obiter dictum* ought not to weigh against the settled direct authority of the cases which have been deliberately and upon argument determined the other way." 2 Burr. 2054. "*Dicta* of judges upon matters not argued or directly before them, have had more importance attached to them than, in my opinion, they ought to have had; but such expressions, falling from such a man as Lord Hardwicke, may be safely relied upon to show that, at that time, the idea of a larger legacy being adeemed by a smaller portion was not familiar to his mind. It is the more important to keep this *dictum* of Lord Hardwicke in mind because another *dictum* of that very eminent judge . . . is relied upon in support of the supposed rule." *Id.* Ch. Cottenham, in 1 Russ. 27. The doctrine of the courts of France on this subject is stated in 11 Toullier 177, n. 133.

See PRECEDENT.

In French Law. The report of a judgment made by one of the judges who has given it. Pothier, Proc. Civ. pl. 1, c. 5, art. 2.

DIEM CLAUSIT EXTREMUM (Lat. he has closed his last day,—died). A writ

which formerly lay on the death of a tenant *in capite*, to ascertain the lands of which he died seised, and reclaim them into the king's hands. It was directed to the king's escheators. Fitzh. N. B. 251, K; 2 Reeve, Hist. Eng. Law 327.

A writ of the same name, issuing out of the exchequer after the death of a debtor of the king, to levy the debt of the lands or goods of the heir, executor, or administrator. *Termes de la Ley.* This writ is still in force in England. 3 Steph. Com. 667.

DIES (Lat.). A day; days. Days for appearance in court. Provisions or maintenance for a day. The king's rents were anciently reserved by so many days' provisions. Spelman, Gloss.; Cowell; Blount.

DIES AMORIS (Lat.). A day of favor. If obtained after a default by the defendant, it amounted to a waiver of the default. Co Litt. 135 *a;* 2 Reeve, Hist. Eng. Law 60. The appearance day of the term, or *quarto die post*, was also so called.

DIES COMMUNES IN BANCO (Lat.). Regular days for appearance in court; called, also, common return-days. 2 Reeve, Hist. Eng. Law 57.

DIES DATUS (Lat. a day given). A day or time given to a defendant in a suit, which is in fact a continuance of the cause. It is so called when given before a declaration. When it is allowed afterwards, it assumes the name of imparlance, which see.

Dies datus in banco, a day in bank. Co. Litt. 135. *Dies datus partibus*, a continuance; *dies datus prece partium*, a day given on prayer of the parties.

DIES DOMINICUS. The Lord's day; Sunday.

DIES FASTI (Lat.). **In Roman Law.** Days on which courts might be held and judicial and other business legally transacted. Calvinus, Lex.; Anthon, Rom. Ant. 3 Bla. Com. 275, 424.

DIES GRATIÆ (Lat.). **In Old English Law.** Days of grace. Co. Litt. 134 *b*.

DIES NEFASTI (Lat.). **In Roman Law.** Days on which it was unlawful to transact judicial affairs, and on which the courts were closed. Anthon, Rom. Ant.; 1 Kaufm. Mackeld. 24; 3 Bla. Com. 275.

DIES NON (Lat.). An abbreviation of the phrase *dies non juridicus*, universally used to denote non judicial days. Days during which courts do not transact any business; as, Sunday, or the legal holidays. 3 Chitty, Gen. Pr. 104; W. Jones 156. Sunday was the original *dies non*, but in many states days declared by statute to be legal holidays are also such, but the decisions on this subject depend largely upon the terms and scope of the statutes, many of which apply solely to the presentment and payment of commercial paper, and others include a prohibition of judicial business and provide for the closing of public offices.

A distinction was made in 9 Co. 66 between judicial and ministerial acts performed on a *dies non;* this was overruled in 1 Stra. 387; but the distinction now obtains; 5 Cent. L. J. 26. And under a statute forbidding the transaction of any judicial business on Sunday or a legal holiday, the issuing on such a day of an attachment by a county judge for a claim not due was held to be "judicial" business and void; Merchants' Nat. Bank of Omaha v. Jaffray, 36 Neb. 218, 54 N. W. 258, 19 L. R. A. 316; but an attachment for a claim past due was held to be valid, as a ministerial, and not a judicial act; Whipple v. Hill, 36 Neb. 720, 55 N. W. 227, 20 L. R. A. 313, 38 Am. St. Rep. 742.

It has usually been held that a verdict may be received on a *dies non;* Huidekoper v. Cotton, 3 Watts (Pa.) 56; McCorkle v. State, 14 Ind. 39; Powers v. State, 23 Tex. App. 42, 5 S. W. 153; Brown v. State, 32 Tex. Cr. R. 119, 22 S. W. 596; but a judgment entered on such verdict on the same day is void; Baxter v. People, 3 Gilman (Ill.) 368, Hoghtaling v. Osborn, 15 Johns. (N. Y.) 119. See Webber v. Merrill, 34 N. H. 202; Johnson v. Day, 17 Pick. (Mass.) 106. State v. Ricketts, 74 N. C. 187; Elrod v. Lumber Co., 92 Tenn. 476, 22 S. W. 2; Merchants' Nat. Bank of Omaha v. Jaffray, 36 Neb. 218, 54 N. W. 258, 19 L. R. A. 316. A judgment by confession entered upon December 25, a legal holiday, is not void; Bradley v. Claudon, 45 Ill. App. 326. In Kentucky although Thanksgiving day is a legal holiday, it is not treated as Sunday, except as to commercial paper, and where money becomes due on such a day, the debtor is in default if he fails to pay on that day; National Mut. Ben. Ass'n v. Miller, 85 Ky. 88, 2 S. W. 900. A bill of exceptions signed on Sunday is void; Roberts v. Bank, 137 Ind. 697, 36 N. E. 1091. Warrants for treason, felony, and breach of the peace may be executed on Sunday; State v. Ricketts, 74 N. C. 187. Where public policy or the prevention of irremediable wrong requires it, the courts may sit on Sunday and issue process; Langabier v. Fairbury, P. & N. W. R. R. Co., 64 Ill. 243, 16 Am. Rep. 550. It is no longer uncommon for courts to sit on legal holidays in some jurisdictions. See a full article on this title in 7 So. L. Rev. N. S. 697; SUNDAY; HOLIDAYS.

DIES NON JURIDICUS (Lat.). Non-judicial days. See DIES NON.

DIES PACIS (Lat. day of peace). The year was formerly divided into the days of the peace of the church and the days of the peace of the king,—including in the two divisions all the days of the year. Crabb, Hist. Eng. Law 35.

DIES A QUO (Lat.). **In Civil Law.** The

day from which a transaction begins. Calvinus, Lex.; 1 Kaufm. Mackeld. Civ. Law 168.

DIES UTILES (Lat.). Useful or available days. Days in which an heir might apply to the judge for an inheritance. Cooper, Inst.; Calvinus, Lex.; Du Cange.

DIET. A general assembly is sometimes so called on the continent of Europe. 1 Bla. Com. 147.

DIETA (Lat.). A day's journey; a day's work; a day's expenses. A reasonable day's journey is said to be twenty miles, by an old computation. Cowell; Spelman, Gloss.; Bracton 235 *b*; 3 Bla. Com. 218.

DIFFERENCE. A contention over a question of truth, or fact, or law, as distinguished from a non-agreement over a question of valuation. 28 L. J. Ch. 184.

DIGEST. A compilation arranged in an orderly manner.

The name is given to a great variety of topical compilations, abridgments, and analytical indices of reports, statutes, etc. When reference is made to *the Digest*, the Pandects of Justinian are intended, they being the authoritative compilation of the civil law. As to this Digest and the mode of citing it, see PANDECTS Other digests are referred to by their distinctive names. For some account of digests of the civil and canon law, and those of Indian law, see CIVIL LAW, CODE, and CANON LAW

The digests of English and American law are for the most part deemed not authorities, but simply manuals of reference, by which the reader may find his way to the original cases which are authorities 1 Burr. 364, 2 Wils. 1, 2. Some of them, however, which have been the careful work of scholarly lawyers, possess an independent value as original repositories of the law. Bacon's Abridgment, which has long been deservedly popular in this country, and Comyns's Digest, also often cited, are examples of these. The earlier English digests are those of Statham (Hen VI.), Fitzherbert, 1516, Brooke, 1573, Rolle, Danvers, Nelson, Viner, and Peter-dorf. Of these Rolle and Viner are still not infrequently cited, and some others rarely. The several digests by Coventry & Hughes, Harrison, Fisher, Jacobs, and Chitty, together with the subsequent annual digests of Emden and of Mews, afford a convenient index for the American reader to the English reports. In most of the United States one or more digests of the state reports have been published, and in some of them digests or topical arrangements of the statutes. There are also digests of the federal statutes. The American Digest, Century Edition, covers the reports of the federal and state courts from 1658 to 1896, inclusive, brought down to cover 1906 by the Decennial Edition, and brought down to date by the American Digest, Key-Number Series The Federal Reporter Digest digests the series of Federal Reporters to vol 200 and the United States Supreme Court decisions from vols 106 to 225 U. S., comprised in vols. 21-32 Supreme Court Reporter. The latter, to 225 U. S., are also digested in the Digest of United States Supreme Court Reports. Dane's Abridgment of American Law has been commended by high authority (Story's article in N. Am Rev. July, 1826), but it has not maintained a position as a work of general use. There are also numerous digests of cases on particular titles of the law.

DIGNITARY. An ecclesiastic who holds a dignity or benefice which gives him some pre-eminence over mere priests and canons, such as a bishop, archbishop, prebendary, etc. Burn, Law Dict.

DIGNITIES. In English Law. Titles of honor.

They are considered as incorporeal hereditaments. The character of our government forbids their admission into the republic.

DILACION. In Spanish Law. The time granted by law or by the judge to parties litigant for the purpose of answering a demand or proving some disputed fact.

DILAPIDATION. A species of ecclesiastical waste which occurs whenever the incumbent suffers any edifices of his ecclesiastical living to go to ruin or decay. It is either voluntary, by pulling down or permissive, by suffering the church, parsonage-houses, and other buildings thereunto belonging, to decay. And the remedy for either lies either in the spiritual court, where the canon law prevails, or in the courts of common law. It is also held to be good cause of deprivation if the bishop, parson, or other ecclesiastical person dilapidates buildings or cuts down timber growing on the patrimony of the church, unless for necessary repairs; and that a writ of prohibition will also lie against him in the common-law courts. 3 Bla. Com. 91.

DILATORY DEFENCE. In Chancery Practice. One the object of which is to dismiss, suspend, or obstruct the suit, without touching the merits, until the impediment or obstacle insisted on shall be removed.

DILATORY PLEA. One which goes to defeat the particular action brought, merely, and which does not answer as to the general right of the plaintiff. See PLEA.

DILIGENCE. The degree of care and attention which the law exacts from a person in a particular situation or a given relation to another person. The word finds its most frequent application in the law of Bailments and of Negligence. Indeed it may be termed the correlative of negligence.

DIME (Lat. *decem*, ten). A silver coin of the United States, of the value of ten cents, or one-tenth of the dollar.

DIMINUTION OF THE RECORD. Incompleteness of the record of a case sent up from an inferior to a superior court.

When this exists, the parties may suggest a diminution of the record, and pray a writ of *certiorari* to the court below to certify the whole record; Bassler v. Niesly, 1 S. & R. (Pa.) 472; Co. Entr. 232; 8 Viner, Abr. 552; Cro. Jac. 597; Cro. Car. 91; Den v. Carr. 15 N. C. 575; State v. Reid, 18 N. C. 382, 28 Am. Dec. 572; Hooper v. Royster, 1 Munf. (Va.) 119. See ALLEGING DIMINUTION; CERTIORARI.

DINING CARS. While in the act of making its interstate journey, such car is under the control of congress, and equally it is so when waiting for the train to be made up for the next trip; Johnson v. Southern Pac. Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363.

See INTERSTATE COMMERCE COMMISSION; COMMON CARRIER; MASTER AND SERVANT; EMPLOYER'S LIABILITY.

DIOCESE. The territorial extent of a bishop's jurisdiction. The circuit of every bishop's jurisdiction. Co. Litt. 94; 1 Bla. Com. 111; 2 Burn, Eccl. Law 158.

Dioceses were divided into archdioceses and those into rural deaneries, which were divided into parishes.

DIOCESAN COURTS. See CONSISTORY COURTS; CHURCH OF ENGLAND.

DIONYSIUS. The *Collectio Dionysiana* was a collection and translation of the canons of Eastern councils by a monk named Dionysius Exiguus, living in Rome, but Scythian by birth, about 500 A. D. It helped to spread the notion that the popes can declare, even if they cannot make the law for the universal church, and thus to contract the sphere of secular jurisprudence. 14 L. Q. R. 20.

DIPLOMA. An instrument of writing, executed by a corporation or society, certifying that a certain person therein named is entitled to a certain distinction therein mentioned. It is usually granted by learned institutions to their members or to persons who have studied in them.

Proof of the seal of a medical institution and of the signatures of its officers thereto affixed, by comparison with the seal and signatures attached to a diploma received by the witness from the same institution, has been held to be competent evidence of the genuineness of the instrument, although the witness never saw the officers write their names. Finch v. Gridley's Ex'rs, 25 Wend. (N. Y.) 469.

A diploma is evidence that a physician received a degree from a medical institution; Holmes v. Halde, 74 Me. 28, 43 Am. Rep. 567.

This word, which is also written duploma, in the civil law signifies letters issued by a prince. They are so called it is supposed, *a duplicatis tabellis*, to which Ovid is thought to allude, 1 Amor. 12, 2, 27, when he says, *Tunc ego vos duplices vobis pro nomine scrisi*. Sueton in Augustum, c. 26. Brissonius p. 367. Seals also were called Diplomata. Vicat, *Diploma*. See COLLEGE.

DIPLOMACY. The science which deals with the means and methods by which the intercourse between states is carried on. See DIPLOMATIC AGENTS.

DIPLOMATIC AGENTS. Public officers who have been commissioned according to law to superintend and transact the affairs of the government which has employed them, in a foreign country. Vattel, liv. 4, c. 5.

The agents were formerly regarded as divided into two general classes or orders. Those of the first order were almost the perfect representatives of the government by which they were commissioned: such were legates, nuncios, internuncios, ambassadors, ministers, plenipotentiaries. Those of the second order did not so fully represent their government: they were envoys, residents, ministers, *chargés d'affaires*, and consuls. The classification of these agents, now so far sanctioned as to be considered a rule of international law, was agreed upon at the Congress of Vienna in 1815 and modified by that of Aix-la-Chapelle in 1818. Under this classification diplomatic agents rank as follows: (1) Ambassadors, ordinary and extraordinary, legates, and nuncios; (2) envoys, ministers, or others accredited to sovereigns; (3) ministers resident, accredited to sovereigns; (4) *chargés d'affaires*, and other diplomatic agents accredited to ministers of foreign affairs (whether bearing the title of minister or not), and consuls charged with diplomatic duties. See the several titles and Davis, Int. Law ch. vii.

DIPLOMATICS. The art of judging of ancient charters, public documents, or diplomas, and discriminating the true from the false. Encyc. Lond.

DIPSOMANIA. In Medical Jurisprudence. A mental disease characterized by an uncontrollable desire for intoxicating drinks. An irresistible impulse to indulge in intoxication, either by alcohol or other drugs. Ballard v. State, 19 Neb. 614, 28 N. W. 271. As to how far the law will hold a party responsible for acts committed while the mind is overwhelmed by the effects of liquor, see DRUNKENNESS.

DIRECT. Straightforward; not collateral. The Onrust, 6 Blatchf. 533, Fed. Cas. No. 10,540. The direct line of descent is formed by a series of relationships between persons who descend successively one from the other.

Evidence is termed *direct* which applies immediately to the fact to be proved, without any intervening process as distinguished from *circumstantial*, which applies immediately to collateral facts supposed to have a connection, near or remote, with the fact in controversy.

The examination in chief of a witness is called the direct examination.

DIRECT TAX. In Pollock v. Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759, it was said that in order to determine whether a tax be direct within the meaning of the constitution it must be ascertained whether the one upon whom, by law, the burden of paying it is first cast, can thereafter shift it to another person. If he cannot, the tax would then be direct, and hence, however obvious in other respects it might be a duty, impost or excise, it cannot be levied by the rule of uniformity and must be apportioned. This was said in Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969, to be a disputable theory. It is said direct taxes within the constitution are only capitation taxes, as ex-

pressed in that instrument, and taxes on real estate; Springer v. U. S., 102 U. S. 586, 26 L. Ed. 253; but the inclusion of rentals from real estate was held to make it direct to that extent; Pollock v. Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759, where it is said, although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words duties, imposts and excises, such a tax for more than a hundred years has as yet remained undiscovered.

Direct taxes include those assessed upon property, person, business, income, etc., of those who pay them; while indirect taxes are levied upon commodities before they reach the consumer, and are paid by those upon whom they ultimately fall, not as taxes, but as part of the market price of the commodity. Under the second head may be classed the duties upon imports, and the excise and stamp duties levied upon manufactures; Cooley, Taxation 10.

See TAX; EXCISE.

DIRECTING A VERDICT. See VERDICT; JURY.

DIRECTION. The order and government of an institution; the persons who compose the board of directors are jointly called the direction.

Direction, in another sense, is nearly synonymous with instruction (*q. v.*).

In Practice. The instruction of a jury by a judge on a point of law, so that they may apply it to the facts before them. See CHARGE.

That part of a bill in chancery which contains the address of the bill to the court: this must, of course, contain the appropriate and technical description of the court. See BILL.

DIRECTOR OF THE MINT. An officer appointed by the president of the United States, by and with the advice and consent of the senate. He is the chief officer of the bureau of the mint and is under the general direction of the secretary of the treasury. R. S. § 343.

DIRECTORS. Persons appointed or elected according to law to manage and direct the affairs of a corporation or company. The directors collectively form the board of directors.

They are generally invested with certain powers by the charter of the corporation, and it is believed that there is no instance of a corporation created by statute without provision for such a board of control, whether under the name of directors, or, as they are sometimes termed, managers or trustees,—the latter designation being more frequent in religious or charitable corporations. A comprehensive work on corporations states that the author has likewise found no instance in which these officers were wanting; 3 Thomp. Corp. § 3850. The power to elect directors has been held to be inherent and not dependent upon statute; Hurlbut v. Marshall, 62 Wis. 590, 22 N. W. 852.

As to the nature of the office and its powers very different views have been held, and each is sustained by high authority. They have been held to be the corporation itself "to all purposes of dealing with others" and not to "exercise a delegated authority in the sense which applies to agents or attorneys;" Shaw, C. J., in Burrill v. Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395. Another view, and probably the one which is the best settled conclusion of judicial opinion in this country, is that they are general agents; Simons v. Min. Co., 61 Pa. 202, 100 Am. Dec. 628; State v. Smith, 48 Vt. 266; Chetlain v. Ins. Co., 86 Ill. 220; President, etc., of Mechanics' Bank v. R. Co., 13 N. Y. 599; Goodwin v. Ins. Co., 24 Conn. 591. The question is of importance with respect to the power of directors to act outside of the home state of the corporation, in order to do which, they must act as agents; Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. Ed. 274; Wright v. Bundy, 11 Ind. 398; McCall v. Mfg. Co., 6 Conn. 428. They are undoubtedly, in a certain sense, agents, but they are agents of the corporation, not of the stockholders, they derive their powers from the charter. They alone have the management of the affairs of the corporation, free from direct interference on the part of the stockholders; Dana v. Bank, 5 W. & S. (Pa.) 246; Bank of U. S. v. Dandridge, 12 Wheat. (U. S.) 113, 6 L. Ed. 552; Dayton & C. R. Co. v. Hatch, 1 Disn. (Ohio) 84. The stockholders cannot perform any acts connected with the ordinary affairs of the corporation; Como v. Iron Co., 12 Barb. (N. Y.) 27, 63; the delegation of powers to the directors excludes control by the stockholders; Union Gold Min. Co. v. Nat. Bank, 2 Colo. 565. See Fleckner v. Bank, 8 Wheat. (U. S.) 357, 5 L. Ed. 631; Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607.

In England it is held that the directors of a company are in the position of managing partners, and their mandate is the mandate of the whole body of shareholders, not of the majority only. A simple majority of the shareholders cannot alter the mandate and override the discretion of the directors; [1906] 2 Ch. 34. The ultimate determination of the management rests with the stockholders, when by the charter the powers of the corporation are vested in them, or when it is silent on that question and does not commit the exclusive control to the directors; Union Pac. R. Co. v. R. Co., 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265. In this case the stockholders had adopted a by-law providing that the board should have the whole management of the property of the company, and that they might delegate power to the executive committee. The latter authorized

the president to execute a contract and the stockholders approved it and the action of the committee, but the board never formally acted; it was held that, as they had full knowledge of it, they would be presumed to have ratified it.

It has been said that directors are special agents of the corporation, and not general agents; Adriance v. Roome, 52 Barb. (N. Y.) 399; and this is the view which it is said that in England "the ingenuity of the bench has been taxed to demonstrate;" 3 Thomp. Corp. § 3969; Lindl. Partn. (4th ed.) 249. Among the cases relied on as supporting this view are, 6 Exch 796; 8 C. B. 849; 6 H. L. Cas. 401; L. R. 5 Eq. 316; but the distinction has been said not to be very satisfactory; per Comstock, J., in President, Directors & Co. of Mechanics' Bank v. R. Co., 13 N. Y. 599. See Green's Brice, *Ultra Vires* 470, n. Although the weight of authority is as stated, it is nevertheless important to keep in view the different theories held, in order to weigh accurately the authorities upon the powers of directors, and to distinguish between them when they are to be applied to a particular case. Directors have no common-law powers; 3 Thomp Corp. § 3978; but only granted ones, although in dealing with corporations courts sometimes ascribe to the directors certain powers, termed implied powers, which, however, in fact amount to no more than a recognition by the courts of the usages of business and acts done in the course of business; *id.* But they have no power to make changes in the fundamental law of the corporation, their relation to it being analogous to that of a legislature to the constitution of the state; *id.* § 3979. Accordingly, their power to make such changes must be derived from the charter. They may not change the membership or capital of the corporation by increasing either; Chicago City R. Co. v. Allerton, 18 Wall. (U. S.) 233, 21 L. Ed. 902; Com. v. Gill, 3 Whart. (Pa.) 228; Gill v. Balis, 72 Mo. 424; or reducing the capital; Percy v. Millaudon, 3 La. 568; Hartridge v. Rockwell, R. M. Charlt. 260; nor make by-laws unless specially authorized; Watson v. Printing Co., 56 Mo. App. 145; nor request or accept amendments to the charter; Stark v. Burke, 9 La. Ann. 341; State v. Adams, 44 Mo. 570; Zabriskie v. R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617; Marlborough Mfg. Co. v. Smith, 2 Conn. 579 (but see *contra*, Dayton & C. R Co. v. Hatch, 1 Disney (Ohio) 84, which is doubted, 3 Thomp. Corp. § 3980, n. 7). They may alien property in the course of business; 3 Thomp. Corp. § 3984 (and see note on this subject; Garrett v. Plow Co., 59 Am. Rep. 466); or mortgage corporate property; Sargent v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; Miller v. R. Co., 36 Vt. 452; Augusta Bank v. Hamblet, 35 Me. 491; Hendee v. Pinkerton, 14 Allen (Mass.) 381; Hoyt v. Thompson's Ex'r, 19 N. Y. 207; or make an assignment for the benefit of creditors; Merrick v. Trustees of Bank, 8 Gill (Md.) 59; and see Thomp. Corp. chs. 145, 146, which discuss this subject and the validity of preferential assignments by directors in favor of others and of themselves. They cannot give away corporate property; Bedford R. Co. v. Bowser, 48 Pa. 29; Frankfort Bank v. Johnson, 24 Me. 490; nor sell the stock at less than par; Sturges v. Stetson, 1 Biss. 246, Fed. Cas. No. 13,568; in money or money's worth; Chouteau, Harrison & Valle v. Dean, 7 Mo. App. 210 (but see Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; 2 Thomp. Corp. § 1665; STOCK); nor, as a general rule, become surety, accommodation indorser, or guarantor; 3 Thomp. Corp. § 3990; but under urgent necessity their assumption of a debt of another to secure from the common creditors an extension for themselves has been held justified; Leach v. Blakely, 34 Vt. 134. See Zabriskie v. R. Co., 23 How. (U. S.) 381, 16 L. Ed. 488. In the usual course of business they have a general power to borrow money; Fleckner v. Bank, 8 Wheat. (U. S.) 338, 5 L. Ed. 631; Ridgway v. Bank, 12 S & R. (Pa.) 256, 14 Am. Dec. 681; and secure it by assigning securities owned by the corporation; North Hudson Mut. Bldg & Loan Ass'n v. Bank, 79 Wis. 31, 47 N. W. 300, 11 L. R. A. 845; and one so dealing with them is not affected with knowledge of a breach of trust by them; Borland v. Haven, 37 Fed. 394 They may make, accept, or indorse negotiable paper; Stevens v. Hill, 29 Me. 133; but a single director is not authorized to make corporate notes; Lawrence v. Gebhard, 41 Barb. (N. Y.) 575. They may determine the salaries of officers of the corporation; Waite v. Min Co., 37 Vt. 608. Under the English decisions the powers of corporations with respect to borrowing money and making notes are now restricted; 3 Thomp. Corp. § 3989, n. 3.

While directors are not strictly trustees, yet they occupy a fiduciary position; Jackson v. Ludeling, 21 Wall. (U. S.) 616, 22 L. Ed. 492; European & N. A. Ry. Co. v. Poor, 59 Me. 277; Hoyle v. R. Co., 54 N. Y. 314, 13 Am. Rep. 595; Koehler v. Iron Co., 2 Black (U. S.) 715, 17 L. Ed. 339; Corbett v. Woodward, 5 Sawy. 403, Fed. Cas. No. 3,223; Deaderick v. Wilson, 8 Baxt. (Tenn.) 108; Scott v. Depeyster, 1 Edw. Ch. (N. Y.) 513; Covington & L. R. Co. v. Bowler's Heirs, 9 Bush (Ky.) 468; Hale v. Bridge Co., 8 Kan. 466; Black v. Canal Co., 24 N. J. Eq. 463; Sweeny v. Refining Co., 30 W. Va. 443, 4 S. E. 431, 8 Am. St. Rep. 88; Moraw. Priv. Corp. 516; and by some leading authorities they are termed trustees; Walworth, Ch., in Robinson v. Smith, 3 Paige (N. Y.) 222, 24 Am. Dec. 212; Hardwicke, Ld. Ch., in 2 Atk. 400; Bent v. Priest, 86 Mo. 475.

Directors, in buying shares from other stockholders, when there is a possibility of reselling at a profit, are not bound to discover all the facts; their fiduciary character does not extend that far; [1902] 2 Ch. 421. But a director upon whose action the value of shares depends cannot avail of the knowledge of what his own action will be to acquire shares from those whom he intentionally keeps in ignorance of his expected action and the resulting value of the shares. This rule was applied in view of the special circumstances: That the director owned three-fourths of the stock, was at the time of his purchase administrator general of the company, with large powers, and engaged in negotiations which finally led to a sale of the company's land to the government at a price which greatly enhanced the value of the stock; Strong v. Repide, 213 U. S. 419, 29 Sup. Ct. 521, 53 L. Ed. 853, citing Stewart v. Harris, 69 Kan. 498, 77 Pac. 277, 66 L. R. A. 261, 105 Am. St. Rep 178, 2 Ann. Cas. 873, and Oliver v. Oliver, 118 Ga. 362, 45 S. E. 232, and not deciding as to whether the rule applied to the bare relationship between director and shareholder.

They are charged with trustees' duties and bound to care for corporation property and manage its affairs in good faith; and for violation of that duty, resulting in waste of its assets, injury to its property, or unlawful gain to themselves, they are liable to account in equity the same as ordinary trustees; Bosworth v. Allen, 168 N. Y. 157, 61 N. E. 163, 55 L. R. A. 751, 85 Am. St. Rep. 667, where the directors conspired to wreck the corporation. They are held not trustees in the strict and technical sense; Booth v. Robinson, 55 Md. 419; Wallace v. Savings Bank, 89 Tenn. 649, 15 S. W. 448, 24 Am. St. Rep. 625; at most directors of a bank can only be considered implied trustees; Emerson v. Gaither, 103 Md. 564, 64 Atl. 26, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114; Landis v. Saxton, 105 Mo. 486, 16 S. W. 912, 24 Am. St. Rep. 403; Appeal of Spering, 71 Pa. 11, 10 Am. Rep 684; the liability of a bank director is held to be that of a mandatary or gratuitous bailee, who undertakes without compensation to do something for another, and he is therefore held only to that degree of care which prudent men in like circumstances ordinarily give to the same duties. In Swentzel v. Bank, 147 Pa. 140, 23 Atl. 405, 415, 15 L. R. A. 305, 30 Am. St. Rep. 718, the position of Judge Sharswood in the earlier case is approved and the court said: "The ordinary care of a business man in his own affairs means one thing; the ordinary care of a gratuitous mandatary is quite another matter. The one implies an oversight and knowledge of every detail of his business; the other suggests such care only as a man can give in a short space of time to the business of other persons, for which he receives no compensation." The customs and methods of a community in which a banking business is done are, for such community, a standard of prudence and diligence by which the responsibility of bank officers and directors are to be tested; Wheeler v. Bank, 75 Fed. 781. The degree of care, skill and judgment depends upon the subject to which it is to be applied, the particular circumstances of the case, and the usages of the business; North Hudson Mut. Bldg. & Loan Ass'n v. Childs, 82 Wis. 460, 52 N. W. 600, 33 Am. St. Rep. 57; Killen v. Barnes, 106 Wis. 546, 82 N. W. 536; Savings Bank of Louisville's Assignee v Caperton, 87 Ky. 306, 8 S. W 885, 12 Am. St. Rep. 488; Warren v. Robison, 19 Utah, 289, 57 Pac. 287, 75 Am. St. Rep. 731. The question of negligence is ultimately a question of fact under all the circumstances; Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct 924, 35 L. Ed. 662.

Knowledge of all the affairs of a bank cannot be imputed to the directors to charge them with liability; Mason v. Moore, 73 Ohio St. 275, 76 N. E. 932, 4 L. R. A. (N. S.) 597, 4 Ann. Cas. 240. They cannot be held civilly liable to one deceived to his injury by false representations as to the bank's financial condition, contained in the official report to the comptroller of the currency, made and published under U. S. R. S. § 5211, where they merely negligently participated in or assented to such representations, since the exclusive test of their liability is furnished by U. S. R. S. § 5239, which makes a knowing violation of the provisions of the title relating to national banks a prerequisite to such liability; Yates v. Bank, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002.

In many other cases the degree of care required is held to be that which a prudent man exercises about his own affairs; Wallace v. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Marshall v. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am St. Rep. 84; Union Nat. Bank v. Hill, 148 Mo. 380, 49 S. W. 1012, 71 Am. St. Rep 615; Ackerman v. Halsey, 37 N. J. Eq. 356; Horn Silver Min. Co. v. Ryan, 42 Minn. 196, 44 N. W. 56. It is said they are not merely required to be honest, but they must also bring to the discharge of the duties they undertake ordinary competency. They cannot excuse imprudence or indifference by showing honesty of intention coupled with gross ignorance and inexperience, or coupled with an absorption of their time and attention in their private affairs; Warner v. Penoyer, 91 Fed. 587, 33 C. C. A. 222, 44 L. R. A. 761; Williams v. McKay, 46 N. J. Eq. 25, 18 Atl. 824. The ordinary care and prudence required of bank directors is held to include something more than officiating as figureheads. They may commit the business as defined to duly authorized officers, but this does not absolve them from the duty of reasonable supervision; Martin v. Webb, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49; nor ought they to be per-

mitted to be shielded from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention; Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662.

It is the duty of the directors of a national bank to maintain a supervision of its affairs; to have a general knowledge of the manner in which its business is conducted and of the character of that business, and to have at least such a degree of intimacy with its affairs as to know to whom and upon what security its large lines of credit are given, and generally to know of and give directions as to the important and general affairs of the bank, of which the cashier executes the details; Gibbons v. Anderson, 80 Fed. 345; they cannot shift such duties upon the executive officers; Warren v. Robison, 19 Utah 289, 57 Pac. 287, 75 Am. St. Rep. 734. They will be presumed to have known what they ought to have known; Marshall v Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 81; Martin v Webb, 110 U. S. 7, 3 Sup Ct. 428, 28 L Ed 49

Directors also occupy a fiduciary relation to creditors, for whom they have been said to be *quasi* trustees, and when the corporation becomes insolvent, they become trustees for the creditors and stockholders; Bradley v. Farwell, 1 Holmes 433, Fed. Cas. No. 1,779; Clark v. San Francisco, 53 Cal. 306; Good v. Sherman, 37 Tex 660. Where directors of an insolvent corporation confessed a judgment against it in favor of one of themselves to give him an advantage by priority of lien over another creditor, about to obtain judgment, the two judgments were placed upon the same footing; Coons v. Tome, 9 Fed 532. See Thomp Liab. of Dir. 397; Goodin v. Canal Co., 18 Ohio St. 169, 98 Am. Dec. 95. Directors are held personally responsible for acts of misfeasance or gross negligence, or for fraud and breach of trust; L. R 5 H. L. 480; Lewis v. Steel Works, 50 Vt. 477; Appeal of Spering, 71 Pa. 11, 10 Am Rep. 684; 68 Law T. 380; Mutual Bldg. Fund & Dollar Sav. Bank v. Bosseiux, 3 Fed. 817. An action to enforce this responsibility must be brought on behalf of all the stockholders, and not by a single one; Craig v. Gregg, 83 Pa. 19; and cannot be brought by a creditor; Zinn v. Mendel, 9 W. Va. 580; *contra*, Tate v. Bates, 118 N. C. 287, 24 S. E. 482, 54 Am St. Rep. 719, where it is held that an action will lie against them for any injury to the corporation or a creditor by their fraud, deceit, neglect, or other misconduct. It is held to be the duty of bank directors to see that the directions of the banking laws are complied with and that depositors may, in the absence of a statute to the contrary, maintain an action to recover losses resulting from a breach of such duty; Boyd v. Schneider, 131 Fed. 223, 65 C. C. A. 209, reversing 124 Fed. 239. In Brinckerhoff v. Bostwick, 88 N. Y. 52, it was said the liability of directors for violations of their duty, and the jurisdiction of equity to afford redress to the corporation and its shareholders, exist independently of statute. This was a proceeding by a shareholder; and in Dykman v. Keeney, 154 N. Y. 483, 48 N. E. 894, it was referred to to show that an action in equity will lie by a shareholder, and it was said: There is a wide and vital difference between such a case and one where the action is by the corporation against its delinquent directors.

A director is an agent of the corporation, and accounts primarily with the corporation, which holds the legal title to the assets; but there is no privity at law between a stockholder and the directors, and hence equity is generally the proper tribunal in which to enforce his rights, which are equitable and not legal; Emerson v. Gaither, 103 Md 564, 64 Atl 26, 8 L. R. A. (N S.) 738, 7 Ann Cas. 1114, where it was held that a receiver may proceed in equity to hold bank directors liable for losses caused by their permitting illegal loans and declaring improper dividends. See also North Hudson Mut. Building & Loan Ass'n v. Childs, 82 Wis. 460, 52 N. W. 600, 33 Am. St. Rep. 57; Robinson v. Hall, 63 Fed. 222, 12 C. C. A. 674; Hodges v. Screw Co., 1 R. I. 312, 53 Am. Dec 624; Williams v. McKay, 40 N. J. Eq. 189, 53 Am. Rep 775; Cockrill v. Cooper, 86 Fed 7, 29 C C. A. 529. In the last case it was said the office of a director is so much akin to those of a trustee that in many cases no substantial reason can be given for exempting directors from that degree of control by a court of chancery which such courts ordinarily exercise over trustees; and to the same effect Bosworth v. Allen, 168 N. Y. 157, 61 N. E 163, 55 L. R. A. 751, 85 Am. St Rep 667, where the charge against the directors was waste of corporate assets and unlawful gain to themselves. Other New York cases restricted the right of a receiver to bring an action against directors in equity where the charge against them was negligent and wasteful conduct and a violation of the banking laws in many respects, and held that an action at law was the proper remedy; Dykman v Keeney, 154 N. Y 483, 48 N. E. 894, following O'Brien v. Fitzgerald, 143 N. Y. 377, 38 N. E. 371; Stephens v. Overstolz, 43 Fed. 771. In a case in which it did not appear that an accounting was necessary, it was held that the remedy of a receiver was at law; Thompson v. Greeley, 107 Mo 577, 17 S. W. 962.

Directors are not liable for the fraud of agents employed by them; 26 W. R. 147; Thomp. Liab. of Dir. 355. Directors of a national bank are not insurers of the fidelity of its agents, and are not responsible for losses resulting from the wrongful act or omission of other directors or agents, un-

less the loss is a consequence of their own neglect of duty; Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662.

It is their duty to use their best efforts to promote the interests of the stockholders, and they cannot acquire any adverse interests; Wardell v. R. Co., 4 Dill. 330, Fed. Cas. No. 17,164; Farmers' & Merchants' Bank of Los Angeles v. Downey, 53 Cal. 466, 31 Am. Rep. 62; European & N. A. Ry. Co. v. Poor, 59 Me. 277; Ryan v. R. Co., 21 Kan. 365. A director may become a creditor of a corporation, where his action is not tainted with fraud or other improper act; Borland v. Haven, 37 Fed. 394. It is said to be the rule that contracts made by a director with his company are voidable; L. R. 6 H. L. 189; Wardell v. R. Co., 4 Dill. 330, Fed. Cas. No. 17,164; Appeal of Rice, 79 Pa. 168; Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; President & Trustees of City of San Diego v. R. Co., 44 Cal. 106. In many instances the courts have held them absolutely void. In a leading English case it was held that the directors were agents of the corporation and could not be permitted to enter into engagements or have any personal interest which might possibly conflict with the interests of the corporation, and that no question could be raised as to the fairness of such a contract; 1 McQ. H. L. (Sc.) 461; and in several American cases taking this view it is considered that directors were subject to the rule applying to all persons standing in relations of trust and involving duties inconsistent with their dealing with the trust property as their own; Gardner v. Ogden, 22 N. Y. 327, 78 Am. Dec. 192; Port v. Russell, 36 Ind. 60, 10 Am. Rep. 5; Haywood v. Lincoln Lumber Co., 64 Wis. 639, 26 N. W. 184. A high authority says, "there is no sound principle of law or equity which prohibits" such contracts, if entered into in good faith, and where there is a quorum of directors on the other side of the contract present, so that the adoption of the measure does not depend on the vote of the interested director, and even in the latter case the contract is good at law. Because, however, he is on both sides of it, equity will closely scrutinize it and set it aside if it violates the good faith which the circumstances require; 3 Thomp. Corp. § 4059; but in many cases contracts of a corporation with directors, fairly made, have been upheld; Josup v. R. Co., 43 Fed. 483; Barr v. Glass Co., 51 Fed. 33; Illinois Pneumatic Gas Co. v. Berry, 113 U. S. 322, 5 Sup. Ct. 525, 28 L. Ed. 1003; Barnes v. Brown, 80 N. Y. 527; Smith v. Skeary, 47 Conn. 47. The true rule to be ascertained from the cases is probably, that as to such contract there is a presumption of invalidity which casts upon the party claiming under such contracts the burden of showing that no undue advantage was taken or resulted from the relation, and the evidence must clearly show such fairness and good faith; Skinner v. Smith, 134 N. Y. 240, 31 N. E. 911; Wardell v. R. Co., 103 U. S. 651, 26 L. Ed. 509. Accordingly, the more reasonable view is that first stated, and it is supported by the weight of American authority; 3 Thomp. Corp. § 4061; but courts holding the extreme view that such contracts are void will not enforce the fairest contract if the corporation exercises the option to set it aside; *id.*

Some courts take the view that in all cases of such contracts their nature and terms and the circumstances under which they were made must be taken into consideration, and that after having been subjected to careful scrutiny they will be enforced if for the benefit of the corporation; Stewart v. R. Co., 41 Fed. 736; Appeal of Hammond, 123 Pa. 503, 16 Atl. 419. A corporation acting in good faith and with the sole object of continuing a business which promises to be successful, may give a mortgage to directors who have lent their credit to it, in order to induce a continuance of that credit, and to obtain renewals of maturing paper at a time when it is in fact a going business and expects to continue in business, although its assets may not in fact equal its indebtedness; Sandford Fork & Tool Co. v. Howe, Browne & Co., 157 U. S. 312, 15 Sup. Ct. 621, 39 L. Ed. 713. See, generally, 3 Thomp. Corp. §§ 4059 to 4075; note by J. C. Harper; Cook v. Sherman, 20 Fed. 175, and one by Dr. Francis Wharton; Meeker v. Iron Co., 17 Fed. 53. This rule extends even to cases where a majority of directors in one corporation contract with another corporation in which they are directors; Green's Brice, *Ultra Vires* 479, n; Attaway v. Bank, 93 Mo. 485, 5 S. W. 16. A railroad company desired to purchase the entire property of a canal company, both companies having the same president, who by a purchase of a majority of the stock of the canal company at nominal rates obtained the election of directors favorable to the railroad company. Through collusive legal proceedings the railroad company purchased the canal property at a price which was grossly inadequate. The sale was set aside as a sale by a trustee to himself, neither in good faith nor for an adequate consideration; Goodin v. Canal Co., 18 Ohio St. 169, 98 Am. Dec. 95. The same principles are supported by many authorities; Koehler v. Iron Co., 2 Black (U. S.) 715, 17 L. Ed. 339; Cook v. Mill Co., 43 Wis. 433; Stewart v. R. Co., 38 N. J. L. 505; Rice's Appeal, 79 Pa. 168.

In some cases the question has arisen as to the effect of a minority only of the directors being interested in both companies. A contract made between two corporations through their respective boards of directors is not voidable at the suit of one of the parties thereto from the mere circumstance that

a minority of its board of directors are also directors of the other company; U. S. Rolling Stock Co. v. R. R., 34 Ohio St. 450, 32 Am. Rep. 380, where the court said it had found no case holding such a contract invalid from the mere fact that a minority of the directors of one company are also directors of the other company, and, "in our judgment, where a majority of the board are not adversely interested and have no adverse employment, the right to avoid the contract or transaction does not exist without proof of fraud or unfairness;" *id.;* Flagg v. Ry. Co., 10 Fed. 413; Harts v. Brown, 77 Ill. 226. This rule is criticised by Mr. Harper in a note to Cook v. Sherman, 20 Fed. 180, upon the ground that the corporation is entitled to a full board of disinterested directors. In another case it was said: "A director whose personal interests are adverse to those of the corporation has no right to be or act as a director. As soon as he finds that he has personal interests in conflict with those of the company he ought to resign." Goodin v. Canal Co., 18 Ohio St. 183, 98 Am. Dec. 95. In considering the same subject McCrary, J., said: "Besides, where shall we draw the line? If the presence of two interested directors in the board at the time of the ratification does not vitiate the act, would the presence of a larger number of such directors have that effect, and, if so, what number." Thomas v. R. Co., 2 Fed. 879. On appeal his judgment was affirmed and the supreme court per Miller, J., said, "We concur with the circuit judge that no such contract as this can be enforced in a court of equity where it is resisted and its immorality is brought to light. . . . Such contracts are not absolutely void, but are voidable at the election of the parties affected by the fraud. It may often occur that, notwithstanding the vice of the transaction, namely, the directors or trustees, or a majority of them, being interested in opposition to the interest of those whom they represent, and in reality parties to both sides of the contract, that it may be one which those whose confidence is abused may prefer to ratify or submit to. It is, therefore, at the option of these latter to avoid it, and, until some act of theirs indicates such a purpose, it is not a nullity." Thomas v. R. Co., 109 U. S. 524, 3 Sup. Ct. 315, 27 L. Ed. 1018.

Arrangements made by directors of a railroad company to secure from it unusual advantages through the medium of a new company in which they are to be stockholders, and which is to receive valuable contracts from the railroad company, are not to be enforced by the courts; Wardell v. R. Co., 103 U. S. 651, 26 L. Ed. 509, affirming Wardell v. R. Co., 4 Dill. 330, Fed. Cas. No. 17,164; such contracts cannot be made or ratified by a board of directors including members of the construction company and are void; Thomas v. R. Co., 109 U. S. 522, 3 Sup. Ct. 315, 27 L. Ed. 1018; but a recovery may be had on such a contract for work actually benefiting the railroad company, on a *quantum meruit; id.*

Third parties, without notice, are not bound to know of limitations placed upon directors by by-laws or otherwise; Brice, *Ultra Vires* 474; L. R. 5 Ch. 288; Fay v. Noble, 12 Cush. (Mass.) 1; but see Risley v. R. Co., 62 N. Y. 240; Salem Bank v. Bank, 17 Mass. 1, 9 Am. Dec. 111. When convened as a board, the directors are held to possess all the corporate powers; Hoyt v. Thompson's Ex'r, 19 N. Y. 207; Burrill v. Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395. As principals they can delegate the performance of acts which they themselves can perform; Jones v. Williams, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682, 61 Am. St. Rep. 436, where it is held that without statutory authority directors have the power to delegate to agents, officers or executive committees the power to transact, not only ordinary business, but business requiring the highest degree of judgment. These agents or managing officers have incidental power to employ all assistants and to do all acts necessary properly to conduct the business over which they have charge. Formal action of the board of directors is not necessary in order to confer the authority. The power expressly given by statute to appoint such subordinate officers and agents as the business of the company may require does not limit nor diminish the common-law power to delegate authority.

Where the charter does not otherwise provide, it is held that a banking corporation may be represented by its cashier in transactions outside of his ordinary duties, without his authority to do so being in writing or appearing upon the record of the proceedings of the directors. His authority may be by parol and inferred from circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed to conduct its affairs. It may be implied from the conduct or acquiescence of the directors; Martin v. Webb, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49; Putnam v. U. S., 162 U. S. 713, 16 Sup. Ct. 923, 40 L. Ed. 1118. Statutes requiring a corporation to be managed by directors, but authorizing them to appoint such subordinate officers and agents as the business may require, do not prevent the directors from entrusting the entire management of the business to a president, as this is not a delegation of corporate powers, but a mere authorization to perform the business for and in the name of the corporation; Jones v. Williams, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682, 61 Am. St. Rep. 436.

This may be done either by express resolution or by acquiescence in a course of dealing. A person dealing with the president of a corporation in the usual manner, and within the powers which the president has been accustomed to exercise without the dissent of the directors, would be entitled to assume that the president had actually been invested with those powers; Morawetz, Priv. Corp. § 538; Jones v. Williams, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682, 61 Am. St. Rep. 436.

It has, however, been contended that, as the directors are agents, they cannot delegate their authority; Gillis v Bailey, 21 N. H. 149; Charlestown Boot & Shoe Co. v. Dunsmore, 60 N. H. 85; and see Canada-Atlantic & Plant S. S. Co. v. Flanders, 115 Fed. 875, 76 C. C. A. 1 *(dictum);* 20 Harv. L. Rev. 225, where it is said there is curiously little authority on this point.

The powers of directors of eleemosynary corporations are much greater than those of moneyed corporations; State v. Adams, 44 Mo. 570. Unless the charter provides otherwise, directors need not be chosen from among the stockholders; L. R. 5 Ch. Div. 306; State v. McDaniel, 22 Ohio St. 354.

Directors *de facto* are, presumably, directors *de jure,* and their acts bind the company; L. R. 7 Ch. 587. A director who is permitted to act as such after he has sold all his stock, is a director *de facto;* Wile & Brickner Co. v. Land Co., 4 Misc. 570, 25 N. Y. Supp. 794. See DE FACTO.

Their liability for acts expressly prohibited by the company's charter is not created by force of statutory prohibition. The performance of acts which are illegal or prohibited by law may subject the corporation to a forfeiture of its franchises and the directors to criminal liability; but this would not render them civilly liable for damages. Their liability to the corporation for damages caused by unauthorized acts rests upon the common-law rule, which renders every agent liable who violates his authority, to the damage of his principal. A statutory prohibition is material under these circumstances merely as indicating an express restriction placed upon the powers delegated to the directors when the corporation was formed; Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662; Hicks v. Steel, 142 Mich. 292, 105 N. W. 767, 4 L. R. A. (N. S.) 279, where the liability of a bank director for inducing the bank to extend credit to an individual beyond the statutory limit was denied, though he made false representations as to notes offered for discount, on proof that he acted at the time as agent for the borrower, and not as a director.

Directors of a national bank, who merely negligently participated in or assented to false representations as to the bank's condition contained in its official report to the comptroller of the currency, under R. S. § 5211, cannot be held civilly liable to one deceived by such report, since the exclusive test of such liability is under R. S. § 5239, which makes a knowing violation of the national bank act a prerequisite to such liability; Yates v. Bank, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002, where it was held that this excludes common-law liability, and that a *scienter* must be proved in order to sustain an action, *id.;* to the same effect, State v. Allison, 155 Mo. 332, 56 S. W. 467; Cowley v. Smyth, 46 N. J. L. 380, 50 Am. Rep. 432. It has been held that a director is an insurer of the truth of his report; Gerner v. Mosher, 58 Neb. 135, 78 N. W. 384, 46 L. R. A. 244. In Houston v. Thornton, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699, bank directors were held liable to one who purchased bank stock relying upon a published statement of the condition of the bank which was false.

The publication of an advertisement in a newspaper by savings bank directors that directors and stockholders are personally responsible for its debts does not constitute a contract with the depositors, but, if intentionally false, affords the basis of an action for deceit; Westervelt v. Demarest, 46 N. J. L. 37, 50 Am. Rep. 400.

Directors of a corporation, who falsely represent its condition to a stockholder, knowing that he seeks information to guide his decision as to selling his stock, are liable for the damages sustained by him on account of their misrepresentations, although they were not made for the purpose of inducing a sale; Rothmiller v. Stein, 143 N. Y. 581, 38 N. E. 718, 26 L. R. A. 148. An action for deceit will lie against a director of a corporation, banking or otherwise (there is no difference), who has made false and fraudulent representations as to its condition, whereby others have been misled and damaged. Such representations need not be personally made, but may consist of voluntary reports or prospectuses which are false and are fraudulently published; Jones v. Williams, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682, 61 Am. St. Rep. 436. Morawetz, Priv. Corp. (2d ed.) § 573.

Where a bank certified under oath to the insurance commissioner that an insurance company seeking a license had a certain deposit, which was false, it was held that one who bought shares in such company in reliance upon such certificate, could not recover against the bank; Hindman v. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; nor will an action for deceit lie upon a statement made for the mere purpose of obtaining a charter; Webb v. Rockefeller, 195 Mo. 57, 93 S. W. 778, 6 L. R. A. (N. S.) 872.

Mere matters of opinion as to the prospect of future profits cannot be misrepresentations; Robertson v. Parks, 76 Md. 118, 24 Atl. 411; and where an officer of a corporation purchases stock from another officer by

inducing the latter to believe the value of the shares would decrease, he cannot be held liable for deceit when the stock in fact was resold at a profit; Boulden v. Stilwell, 100 Md. 513, 60 Atl. 609, 1 L. R. A. (N. S.) 258. Where an officer of a corporation procured a transfer of stock to himself by stating that it was worthless, when it was in fact valuable, it was held not a breach of any fiduciary relation and not a ground for avoiding a sale; Krumbhaar v. Griffiths, 151 Pa. 223, 25 Atl. 64, denying the existence of any confidential or fiduciary relation between an officer of a corporation and a person from whom such officer purchases stock *Caveat vendor* is as sound a rule of law, as *caveat emptor*, though less frequently invoked. Boulden v. Stilwell, 100 Md 513, 60 Atl. 609, 1 L. R. A. (N. S.) 258; and where a director bought stock from a stockholder without disclosing facts known to him as director which, if known, would enhance its market value, it was held that the sale would not be set aside; O'Neile v. Ternes, 32 Wash. 528, 73 Pac. 692; see *supra*.

A director may purchase unmatured obligations of the corporation at a discount, and enforce them at par, if the corporation has not a sinking fund for the same purpose; Glenwood Mfg. Co. v. Syme, 109 Wis. 355, 85 N. W. 432; St. Louis, Ft. S. & W. R. Co. v. Chenault, 36 Kan. 51, 12 Pac. 303; Marshall v. Carson, 38 N. J. Eq. 250, 48 Am. Rep. 319. When he forecloses a mortgage on corporate property, he has a right to purchase; Lucas v. Friant, 111 Mich. 426, 69 N. W. 735; and it is held he may buy corporate property at an execution sale on a judgment held by him; Marr v. Marr, 72 N. J. Eq. 797, 66 Atl. 182; but see Sebring v. Association, 2 Pa. Dist. Rep. 629, where it is held the director of a corporation cannot buy corporate property at a judicial sale. He may bid on the foreclosure sale of corporate property; McKittrick v. Ry. Co., 152 U. S. 473, 14 Sup. Ct. 661, 38 L. Ed. 518.

The president and general manager of a corporation were held personally liable for damages caused to a riparian proprietor from the long continued discharge of muddy water into a stream from ore washers operated by the company with their sanction, they having had knowledge of the damage caused thereby; Nunnelly v. Iron Co., 94 Tenn. 397, 29 S. W. 361, 28 L. R. A. 421. The president of a corporation, who was also a director, was held personally liable for the wrongful use by his company of a toll bridge, which diverted business from another bridge; Chenango Bridge Co. v. Paige, 83 N. Y. 178, 38 Am. Rep. 407. The president of an irrigation company was held liable for damage to land caused by ditches, which he, as president, had ordered to be dug across another's land; Bates v. Van Pelt, 1 Tex. Civ. App. 185, 20 S. W. 949. In some cases an action has been sustained against officers of a company, together with the corporation itself, for infringement of a patent; see National Car-Brake Shoe Co. v. Mfg. Co., 19 Fed. 514; and an injunction against infringement of a patent; Goodyear v. Phelps, 3 Blatchf. 91, Fed. Cas. No. 5,581; Iowa Barb Steel Wire Co. v. Barbed-Wire Co., 30 Fed. 123; Cahoone Barnet Manuf'g Co. v. Harness Co., 45 Fed. 582, but the later cases usually hold otherwise.

In the absence of a provision of the charter or of a special contract, a director is not entitled to compensation; Ogden v. Murray, 39 N. Y. 202; Gridley v. Ry Co., 71 Ill. 200; Citizens' Nat. Bank v. Elliott, 55 Ia. 104, 7 N. W. 470, 39 Am. Rep. 167; and he cannot recover therefor even where a resolution to compensate him has been passed after the services were rendered; Accommodation Loan & Saving Fund Ass'n v. Stonemetz, 29 Pa. 534; Kilpatrick v. Bridge Co., 49 Pa 118, 88 Am. Dec. 497; Manx Ferry Gravel Road Co. v. Branegan, 40 Ind. 361; New York & N. H R. Co. v. Ketchum, 27 Conn. 170; unless the services were outside of the line of his duty as an officer, as obtaining a right of way, soliciting subscriptions, etc.; Lafayette, B. & M. Ry Co. v. Cheeney, 87 Ill. 447; Sargent v. Granite Co., 3 Misc. 325, 23 N. Y. Supp. 886; Ten Eyck v. R. Co., 74 Mich. 226, 41 N W. 905, 3 L. R. A. 378, 16 Am. St. Rep. 633. But it has been held that, when no salary is prescribed, one appointed to an executive office, like that of cashier, is entitled to reasonable compensation for his services, and that the directors have power to fix the salary after the expiration of the term of office, and this, though such appointee is also a director, and continues to be such while holding the independent office; 20 Fed. 183, note.

There is no implied promise to pay such an officer either for regular or extra services; to subject the corporation to liability, it must be shown that the services were rendered under such circumstances as to raise a fair presumption that the parties intended and understood they were to be paid for; Pew v. Bank, 130 Mass. 391, followed in Fitzgerald & M Const. Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608.

See Pierce, Railr. 31, with cases

To constitute a legal board of directors, they must meet at a time when and a place where every other director has the opportunity of attending; and there must be a quorum; Percy v. Millaudon, 3 La. 574. See President, etc., of Northampton Bank v. Pepoon, 11 Mass. 288, Hughes v. Bank, 5 Litt. (Ky.) 45; Ridgway v. Bank, 12 S. & R. (Pa.) 256, 14 Am. Dec 681; Minor v. Bank, 1 Pet. (U. S.) 46, 7 L. Ed. 47. The fact that notice of a special meeting of the board was not given as provided by the by-laws of a corporation is immaterial, if all the members of the board were in fact present and participated in the proceedings; Minneapolis

Times Co. v. Nimocks, 53 Minn. 381, 55 N. W. 546. See Taylor County Court v. R. Co., 35 Fed. 161.

They cannot separately make a contract which will bind the corporation; Liner v. Traders Co, 44 W. Va. 175, 28 S. E. 730; Peirce v. Building Co., 94 Me. 406, 47 Atl. 914.

Action of directors in the corporate name, in bad faith, and detrimental to its interest, is, with respect to them, the act of the corporation in name only; Pennsylvania Sugar Refining Co. v. Refining Co., 166 Fed. 254, 92 C. C. A. 318.

The directors of a company which declares dividends, thereby impairing its capital, are liable therefor to the company, though ignorant of its condition as to which they are bound to inform themselves; Cornell v. Seddinger, 237 Pa. 389, 85 Atl. 446.

A director is entitled to access to all the corporate books; Lawton v. Bedell (N. J.) 71 Atl. 490.

Where directors are required to be stockholders, "qualification" shares may be transferred for that purpose; this suffices if the director holds them during his term, but not if he returns them to the owner with a power of attorney for transfer: In re Ringler & Co., 204 N. Y. 30, 97 N. E. 593, Ann. Cas. 1913C, 1036.

DIRECTORY STATUTE. See STATUTE.

DIRIMANT IMPEDIMENTS. Those bars which annul a consummated marriage

DISABILITY. The want of legal capacity "Incapacity to do a legal act." It would include the resignation of a judge before signing a bill of exceptions; McIntyre v. Modern Woodmen of America, 200 Fed. 1, 121 C. C. A. 1. See ABATEMENT; DIVISE, DEED; INFANCY; INSANITY; LIMITATION; MARRIAGE; PARTIES.

DISABLING STATUTES (also called the *Restraining Statutes*). The acts of 1 Eliz. c. 19, 13 Eliz. c. 10, 14 Eliz. cc. 11, 14, 18 Eliz. c. 11, and 43 Eliz. c. 29, by which the power of ecclesiastical or eleemosynary corporations to lease their lands was restricted. 2 Bla. Com. 319, 321; Co. Litt. 44 *a*; 2 Steph. Com. 735.

DISAFFIRMANCE. The act by which a person who has entered into a voidable contract, as, for example, an infant, disagrees to such contract and declares he will not abide by it.

Disaffirmance is expressed or implied:—the former, when the declaration that the party will not abide by the contract is made in terms; the latter, when he does an act which plainly manifests his determination not to abide by it: as, where an infant made a deed for his land, and on coming of age he made a deed for the same land to another; 2 D. & B. 320; Tucker v. Moreland, 10 Pet. (U. S.) 58, 9 L. Ed. 345; Inhabitants of Worcester v. Eaton, 13 Mass. 371, 375, 7 Am. Dec. 155.

DISAFFOREST. To restore to their former condition lands which have been turned into forests. To remove from the operation of the forest laws. 2 Bla. Com. 416.

DISAVOW. To deny the authority by which an agent pretends to have acted, as when he has exceeded the bounds of his authority.

It is the duty of the principal to fulfil the contracts which have been entered into by his authorized agent; and when an agent has exceeded his authority he ought promptly to disavow such act, so that the other party may have his remedy against the agent. See AGENT; PRINCIPAL.

DISBAR. In England, to expel a barrister from the bar. Wharton. This is in England a colloquial term. The particular Inn of Court, in a case requiring its action, "vacates the call" to their own Inn. The judges give and take away the "right of audience." See COUNCIL OF THE BAR, GENERAL; and BARRISTER, as to disbarring barristers; LAW SOCIETY, as to the practice of striking solicitors from the rolls in England.

In the United States, to deprive a person of the right to practise as an attorney at law.

Courts have jurisdiction and power upon their own motion without formal complaint or petition, in a proper case, to strike the name of an attorney from the roll, provided he has had reasonable notice and an opportunity to be heard; Ex parte Steinman, 95 Pa. 220, 40 Am. Rep. 637; In re Orton, 54 Wis. 379, 11 N. W. 584; In re Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552.

A lawyer may be disbarred only for misdemeanor in his professional capacity, or affecting his professional character, but not for a criminal offence without formal indictment, trial and conviction. His office as attorney is property of which he cannot be deprived except by judgment of his peers and by the law of the land; Ex parte Steinman, 95 Pa. 220, 40 Am. Rep. 637. But while this is true as a general rule, it is not an inflexible one, and there may be cases where it is proper for the court to proceed without such previous conviction; In re Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552. In this case the proof was clear, there was a failure to offer any counter proof, and an evasive denial of the charge which was that the attorney was engaged in a tumultuous and riotous gathering for the purpose of lynching.

Courts have no inherent power to disbar an attorney for conviction of crime in a foreign jurisdiction, where the legislature has expressly provided what convictions shall result in disbarment and has not included those in foreign jurisdictions; In re Ebbs

150 N. C. 44, 63 S. E. 190, 19 L. R. A. (N. S.) 892, 17 Ann. Cas. 592. In the absence of restrictive legislation, courts have an inherent power to strike from their rolls names of attorneys who are found, by reason of their conduct, unfit and unworthy; State v. Kirke, 12 Fla. 278, 95 Am. Dec. 314.

A judgment of disbarment by a divided court in another state, no order of disbarment being made, pending on appeal to a higher court, is insufficient as a ground for a revocation of an attorney's license; In re Baum, 10 Mont. 223, 25 Pac. 99.

An attorney may be disbarred for charging a judge with corrupt practices; Matter of Murray, 58 Hun 604, 11 N. Y. Supp. 336; In re Robinson, 48 Wash. 153, 92 Pac. 929, 15 L. R. A. (N. S.) 525, 15 Ann. Cas. 415 (notwithstanding the withdrawal of the charge and an apology, but in view of that the attorney was merely suspended for six months); discussing a court's decision in a disrespectful way; In re Breen, 30 Nev. 164, 93 Pac. 1004; State Board of Law Examiners v. Hart, 104 Minn. 88, 116 N. W. 212, 17 L. R. A. (N. S.) 585, 15 Ann. Cas. 197; embodying in his brief in the appellate court "contemptuous, unbearable and unwarranted language" designed to influence a decision of the court by base appeals to the supposed timidity of the justices; In re Philbrook, 105 Cal. 471, 38 Pac. 511, 884, 45 Am. St. Rep. 59 (where the attorney was suspended for three years); libelous charges against a judge; U. S. v. Green, 85 Fed. 857; unwarrantably charging a judge and another attorney with bribery and unprofessional conduct; People v. Green, 9 Colo. 506, 13 Pac. 514; In re Maines, 121 Mich. 603, 80 N. W. 714; or on conviction and fine in the United States court for unlawful use of the mails; People v. Weeber, 26 Colo. 229, 57 Pac. 1079; or on conviction of felony or misdemeanor involving moral turpitude; In re Kirby, 10 S. D. 414, 73 N. W. 908; or for fighting a duel and killing his antagonist, and being indicted for murder in another state; Smith v. State, 1 Yerg. (Tenn.) 228; or for procuring admission or license to practice law fraudulently; People v. Gilmore, 214 Ill. 569, 73 N. E. 737, 69 L. R. A. 701; People v. Campbell, 26 Cal. 481, 58 Pac. 591; State Board of Law Examiners v. Williams, 116 Tenn. 51, 92 S. W. 521; for gross disrespect to the court; Sharon v. Hill, 24 Fed. 726; or for any breach of fidelity to the court; In re Eldridge, 82 N. Y. 161, 37 Am. Rep. 558; Strout v. Proctor, 71 Me. 288; perjury or subornation of perjury; 10 M. & W. 28; violation of the confidence of a client; Strout v. Proctor, 71 Me. 288. So also for an advertisement as a divorce lawyer, signed or unsigned; People v. Goodrich, 79 Ill. 148; Smith v. People, 32 Colo. 251, 75 Pac. 914; People v. Smith, 200 Ill. 442, 66 N. E. 27, 93 Am. St. Rep. 206; employing runners to hunt up cases and charging fictitious expenses; Appeal of Maires, 189 Pa. 99, 41 Atl. 988; being bookmaker at races in England; 40 Am. L. Rev. 104, cited from 40 L. Jour. 856; appearing for both parties in actions involving the same issue, using legal process in an abusive and oppressive manner, and aiding and counseling bribery of a city officer; In re O'Connell, 174 Mass. 253, 53 N. E. 1001, 54 N. E. 558; receiving money from a woman to secure pardon for her husband under promise to return half of it if he did not succeed, and after failure appropriating it to his own use; In re O'Sullivan, 122 App. Div. 527, 107 N. Y. Supp. 462; bringing a divorce suit without authority and acting in fraudulent collusion with the husband to procure the divorce without knowledge of the wife; Dillon v. State, 6 Tex. 55. For any unprofessional conduct disbarment or suspension may be inflicted; In re Smith, 73 Kan. 743, 85 Pac. 581; State Board of Examiners in Law v. Reynolds, 98 Minn. 44, 107 N. W. 144; State v. Harber, 129 Mo. 271, 31 S. W. 889.

The complaint must affect the official character of the attorney; Wooldridge v. Gage, 68 Ill. 157; Ex parte Steinman, 95 Pa. 220, 40 Am. Rep. 637. The offence need not be an indictable one; but its character must be such as to show the attorney unfit to be trusted with the powers of the profession; 30 L. J. (Q. B.) 32; Baker v. Com., 10 Bush (Ky.) 592; U. S. v. Porter, 2 Cra. C. C. 60, Fed. Cas. No. 16,072; In re Austin, 5 Rawle (Pa.) 191, 28 Am. Dec. 657. But ignorance of the law is not a cause for disbarment: Bryant's Case, 24 N. H. 149.

On being convicted of felony an attorney loses his right to practise in court without an order removing him; In re Niles, 5 Daly (N. Y.) 465. Neither pardon for felony nor a satisfactory settlement with the injured party affects the court's power to disbar; Sanborn v. Kimball, 64 Me. 140; In re Davies, 93 Pa. 116, 39 Am. Rep. 729; Weeks, Attys § 83.

Disbarment is not by way of punishment, but in the exercise by the court of its discretion to determine whether one admitted as an attorney is a proper person to be continued on the roll; In re Adriaans, 17 App. D. C. 39; In re Palmer, 15 Ohio Cir. Ct. 94; or for the protection of the court, the proper administration of justice, the public good and the protection of clients; Ex parte Finn, 32 Or. 519, 52 Pac. 756, 67 Am. St. Rep. 550; it leaves to the attorney his full rights of citizenship; In re Thatcher, 83 Ohio St. 246, 93 N. E. 895, Ann. Cas. 1912A, 810.

The enumeration in a statute of causes of disbarment or suspension does not limit the common-law power of the court in that respect and the penalty may be inflicted for other than statutory grounds; In re Smith, 73 Kan. 743, 85 Pac. 584; Bar Ass'n of Boston v. Greenhood, 168 Mass. 169, 46 N. E.

568; State v. Gebhardt, 87 Mo. App. 542; *contra*, In re Collins, 147 Cal. 8, 81 Pac. 220. The power to disbar is not arbitrary and despotic, to be exercised at the pleasure of the court or from passion, prejudice, or personal hostility, but in a sound judicial discretion; State v. Stiles, 48 W. Va. 425, 37 S. E. 620. The manner of proceeding is said to be largely in the discretion of the court, so long as it is exercised without oppression and injustice, and to be used reasonably with moderation and caution; it is judicial in its character, but the inquiry is not the trial of an action or suit, but an investigation by the court into the conduct of one of its own officers in the exercise of the disciplinary jurisdiction which it has over them; In re Durant, 80 Conn. 140, 67 Atl. 497, 10 Ann. Cas. 539.

A proceeding for disbarment of an attorney is civil in its character and not criminal; Keithley v. Stevens, 238 Ill. 199, 87 N. E. 375, 128 Am. St. Rep. 120; State v. Fourchy, 106 La. 743, 31 South. 325; In re Burnette, 73 Kan. 609, 85 Pac. 575; In re Crum, 7 N. D. 316, 75 N. W. 257; In re Ebbs, 150 N. C. 44, 63 S. E. 190, 19 L. R. A. (N. S.) 892, 17 Ann. Cas. 592; Garfield v. U. S., 32 App. D. C. 109; In re Biggers, 24 Okl. 842, 104 Pac. 1083, 25 L. R. A. (N. S.) 622; In re Spencer, 137 App. Div. 330, 122 N. Y. Supp. 190; Wernimont v. State, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156, but in one case it was said that such a proceeding, while not strictly criminal, is *quasi* criminal; State v. Quarles, 158 Ala. 54, 48 South. 499.

Proceedings at common law for disbarment or suspension should be in the name of the state, but under a statute directing suspension for not paying over money collected, no method of proceeding being prescribed, the client for whom the money was collected is the proper party; Wilson v. Popham, 91 Ky. 327, 15 S. W. 859.

A disbarred attorney's election as attorney-general is void; Danforth v. Egan, 23 S. D. 43, 119 N. W. 1021, 139 Am. St. Rep. 1030, 20 Ann. Cas. 418.

See ATTORNEY.

DISBURSEMENT. Money paid out by an executor, guardian, or trustee, on account of the fund in his hands. The necessary expenditures incurred in an action, and which, under the codes of procedure of some of the states, are included in the costs, are also so called. But see Wright's Adm'rs v. Wilkerson, 41 Ala. 267; Case v. Price, 9 Abb. Pr. (N. Y.) 111.

DISCEPTATIO CAUSÆ (Lat.). **In Roman Law.** The argument of a cause by the counsel on both sides. Calvinus, Lex.

DISCHARGE. The act by which a person in confinement under some legal process, or held on an accusation of some crime or misdemeanor, is set at liberty; the writing containing the order for his being so set at liberty is also called a discharge.

The discharge of a defendant, in prison under a *ca. sa.*, when made by the plaintiff, has the operation of satisfying the debt, the plaintiff having no other remedy; 4 Term 526.

But when the discharge is in consequence of the insolvent laws, or the defendant dies in prison, the debt is not satisfied. In the first case the plaintiff has a remedy against the property of the defendant acquired after his discharge, and in the last case against the executors or administrators of the debtor. Bacon, Abr. *Execution*, D; Bingham, *Execution* 266.

The word has still other uses. Thus, we speak of the discharge of a surety, whereby he is released from his liability; of a debt; of a contract; of lands, or money in the funds, from an incumbrance; of an order of a court of justice, when such order is vacated; 2 Steph. Com. 107, 161. We also speak of a discharge in bankruptcy; Boynton v. Ball, 121 U. S. 457, 7 Sup. Ct. 981, 30 L. Ed. 985; Scott v. Ellery, 142 U. S. 381, 12 Sup. Ct. 233, 35 L. Ed. 1050; Fowle v. Park, 48 Fed. 789.

DISCHARGE OF CONTRACT. A contract may be discharged in the following ways: Performance according to its terms; a breach of such a nature as to justify the innocent party in treating the contract as rescinded or as giving rise to a right of action for breach of the entire contract; rescission of a voidable contract, at the will of one party, as for fraud, mistake, duress; release; rescission by parol agreement; accord and satisfaction; cancellation and surrender; alteration (of a written contract); merger (in judgment); arbitration and award; impossibility; bankruptcy; statutes of limitation, though the latter generally only bars the remedy. A *right of action* on a contract may be discharged in any of these ways except where a breach justifies the innocent party in treating the contract as rescinded, or as giving rise to a right of action, or in the case of impossibility. Williston's Wald's Pollock on Contracts. An executed contract cannot be discharged except by release under seal or by performance, except that a promissory note or a bill of exchange stands on a different footing; 6 Exch. 851, per Parke, B.; but only, in the United States, when the note or bill has been surrendered; Bragg v. Danielson, 141 Mass. 195, 4 N. E. 622; it is said here to have become extinguished; Slade v. Mutrie, 156 Mass. 19, 30 N. E. 168.

Discharge may be by payment under the contract, or, after breach, by an agreement which is effectual as an accord and satisfaction (*q. v.*). Tender of performance, such as by delivery of goods, discharges the party;

but tender of a sum of money due under the contract does not work a discharge; the party must stand ready and willing to pay the debt, and, if sued, must pay the money into court. A substantial performance will suffice; Crouch v. Gutmann, 134 N. Y. 45, 31 N. E. 271, 30 Am. St. Rep. 608, but if the deviation is not slight, or is willful, it is otherwise; Elliott v. Caldwell, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52; and one to whom a sum of money is tendered must not be called upon to make change; Anson, Contr. 349.

Discharge may be by breach, though a breach, while it always gives a right of action, does not always discharge the contract, for it may be broken in whole or in part, and if the latter, the breach may not be important enough to work a discharge, or the other party may not regard it as a breach but may continue to carry out the contract. See BREACH.

Where a contract between A and X is discharged by default of X, A may (1) consider himself exonerated from any further performance and successfully defend an action brought for non performance; (2) sue at once upon the contract for such damages as he has sustained by the breach without being obliged to show that such performance has been done or tendered by him; (3) if he has done all or a portion of that which he promised, so as to have a claim to a money payment for such performance, he may treat such a claim as due upon a new contract arising upon the promise which is understood from the acceptance of an executed consideration; Anson, Contr. 352 Prof. Huffcut in his edition of Anson's Contr points out that the first two propositions are illustrated in Davison v. Von Lingen, 113 U. S. 40, 5 Sup. Ct. 316, 28 L. Ed. 885; and that the second is discussed in Lake Shore & M. S. Ry. Co. v. Richards, 152 Ill 59, 38 N. E. 773, 30 L. R. A. 33; also that A may elect and keep the contract for both parties, thus giving X a period for repentance; Kadish v. Young, 108 Ill. 170, 43 Am. Rep. 548; but he cannot thereby increase the damages; Dillon v. Anderson, 43 N. Y. 231.

A party may break a contract by renouncing his liabilities under it, or by making it impossible that he should fulfill them, or by failing totally or partially to perform what he has promised. As to anticipatory breaches, see BREACH.

Where one party has, before performance is due, created an impossibility of performance, this is equivalent to a renunciation of the contract; Anson, Contr. 356; U. S. v. Peck, 102 U. S. 64, 26 L. Ed. 46. So where, during performance, one party has made it impossible for the other to perform; Western Union Telegraph Co. v. Semmes, 73 Md. 9, 20 Atl. 127; Woodberry v. Warner, 53 Ark. 488, 14 S. W. 67; Bing. 14; [1895] 2 Q. B. 70.

As to breaches of contracts containing conditional and independent promises, see BREACH.

A contract may contain the elements of its own discharge, which may be by non-fulfilment of a condition precedent, by the occurrence of a condition subsequent, or by the exercise of an option to determine the contract reserved to one of the parties by its terms; Anson, Contr. 338 Of the first, a case in L. R. 7 Exch. 7, is in point, where a horse was warranted to have been hunted with the Bicester hounds and if it did not answer to its description, the buyer might return it. It did not answer to its description and had never been so hunted. Held, that the buyer might return it, though injured without his fault; the sale vested the property in the buyer subject to a right of rescission in a particular event; the depreciation in value must fall upon the person in whom the property revested. In such case the buyer may refuse to receive the article if he discovers that the term is not fulfilled; Ganson v. Madigan, 13 Wis. 67; or on discovery he may return it; but not, it was held, if injured while in his possession; Ray v. Thompson, 12 Cush. (Mass.) 281, 59 Am. Dec 187. Instances of conditions subsequent are bonds defeasible upon a condition expressed therein and the "excepted risks" of charter parties.

If a statute requires the contract to be in writing, there is authority for saying that a discharge may be by word of mouth; 5 B. & A. 66; Anson, Contr. 343; Wulschner v. Ward, 115 Ind 219, 17 N. E. 273. "But if the discharge be not a simple rescission, but such an implied discharge as arises from the making of a new agreement inconsistent with the old one, then there must be writing in accordance with the requirements of the statute;" Anson, Contr. 343; Hill v. Blake, 97 N. Y. 216; Burns v. Real Estate Co., 52 Minn. 31, 53 N. W. 1017; *contra*, Stearns v. Hall, 9 Cush. (Mass.) 31.

See ESTOPPEL.

DISCHARGE OF A JURY. See JURY.

DISCLAIMER. A disavowal; a renunciation; as, for example, the act by which a patentee renounces part of his title of invention.

Of Estates. The act by which a party refuses to accept an estate which has been conveyed to him. Thus, a trustee is said to disclaim who releases to his fellow-trustees his estate, and relieves himself of the trust; 1 Hill, R. P. 351; Watson v. Watson, 13 Conn. 83; Jackson v. Richards, 6 Cow. (N. Y.) 617.

Of Tenancy. The act of a person in possession, who denies holding the estate of the person who claims to be the owner. 2 Nev.

& M. 672. An affirmation, by pleading or otherwise, in a court of record, that the reversion is in a stranger. It works a forfeiture of the lease at common law; Co. Litt. 251; 1 Cruise, Dig. 109; but not, it is said, in the United States; 1 Washb. R. P. 93. Equity will not aid a tenant in denyin his landlord's title; Peyton v. Stith, 5 Pet. (U. S.) 486, 8 L. Ed. 200.

In Patent Law. A declaration in writing, filed under the patent laws, by an inventor whose claim as filed covers more than that of which he was the original inventor, renouncing such parts as he does not claim to hold. See PATENT.

In Pleading. A renunciation by the defendant of all claim to the subject of the demand made by the plaintiff.

IN EQUITY. It must, in general be accompanied by an answer; Ellsworth v. Curtis, 10 Paige, Ch. (N. Y.) 105; 2 Russ. 458; 2 Y. & C. 546; Worthington v. Lee, 2 Bland, Ch (Md.) 678; and always when the defendant has so connected himself with the matter that justice cannot be done otherwise; 9 Sim. 102. It must renounce all claim in any capacity and to any extent; Bentley v. Cowman, 6 G. & J. (Md.) 152. It may be to part of a bill only, but it must be clearly a separate and distinct part of the bill; Story, Eq. Pl. § 839. A disclaimer may, in general, be abandoned, and a claim put in upon subsequent discovery of a right; Cooper, Eq. Pl. 310.

AT LAW. *In real actions*, a disclaimer of tenancy or estate is frequently added to the plea of non-tenure; Littleton § 391; Porter v. Rummery, 10 Mass. 64. The plea may be either in abatement or in bar; Prescott v. Hutchinson, 13 Mass 439; Olney v. Adams, 7 Pick. (Mass.) 31; as to the whole or any part of the demanded premises; Stearns, Real Act. 193.

At common law it is not pleaded as a bar to the action, nor is it strictly a plea in abatement, as it does not give the plaintiff a better writ. It contains no prayer for judgment, and is not concluded with a verification. It is in effect an offer by the plaintiff to yield to the claim of the demandant and admit his title to the land; Stearns, Real Act. 193. It cannot, in general, be made by a person incapable of conveying the land. It is equivalent to a judgment in favor of the demandant, except when costs are demanded; Prescott v. Hutchinson, 13 Mass. 439; in which case there must be a replication by the demandant; Favour v. Sargent, 6 Pick. (Mass.) 5; no formal replication is requisite; Bratton v. Mitchell, 5 Watts (Pa.) 70. See 1 Washb. R. P. 93.

DISCONTINUANCE. In Pleading. The chasm or interruption which occurs when no answer is given to some material matter in the preceding pleading, and the opposite party neglects to take advantage of such omission. See Com. Dig. *Pleader*, W.; Bac. Abr. *Pleas*, P. It is distinguished from insufficient pleading by the fact that the pleading does not profess to answer all the preceding pleading in a case of discontinuance; 1 Wms. Saund. 28, n. It constitutes error, but may be cured after verdict, by 32 Hen. VIII. c. 80, and after judgment by *nil dicit*, confession, or *non sum informatus* under 4 Anne, c. 16. See, generally, 1 Saund. 28; 4 Rep. 62 *a*; Taft v. Transp. Co., 56 N. H. 414.

In Practice. The chasm or interruption in proceedings occasioned by the failure of the plaintiff to continue the suit regularly from time to time, as he ought; 3 Bla. Com. 296; Germania Fire Ins. Co. v. Francis, 52 Miss. 467, 24 Am. Rep. 674; Taft v. Transp. Co., 56 N. H. 416. The entry upon record of a discontinuance has the same effect. The plaintiff cannot discontinue after demurrer joined and entered, or after verdict or writ of inquiry, without leave of court; Cro. Jac. 35; 1 Lilly, Abr. 473; 8 C. C. App. 437; but see Lowman v. West, 7 Wash. 407, 35 Pac. 130; although he can notwithstanding the interposition of a counterclaim; Felix v. Vanslooten, 17 N. Y. Sup. 844; and is generally liable for costs when he discontinues, though not in all cases. Leave to discontinue will be refused when proofs had been taken and closed at large expense to defendant, when no other ground is shown except a desire to relitigate in a new suit the questions involved; American Steel & Wire Co. v. Mayer & Englund Co., 121 Fed. 127. See Hart v. Storey, 1 Johns. (N. Y.) 143; Ludlow v. Hackett, 18 Johns. (N. Y.) 252; Lackey v. McDonald, 1 Cal. (N. Y.) 116; Thurman v. James, 48 Mo. 235; Etheridge v. Osborn, 12 Wend. (N. Y.) 402; Com Dig. *Pleader* (W 5); Bac. Abr. *Plea* (5 P).

DISCONTINUANCE OF ESTATES. An alienation made or suffered by the tenant in tail, or other tenant seised in *autre droit*, by which the issue in tail, or heir, or successor, or those in reversion or remainder, are driven to their action, and cannot enter.

The term discontinuance is used to distinguish those cases where the party whose freehold is ousted can restore it only by action, from those in which he may restore it by entry; Co. Litt. 325 *a*; 3 Bla. Com. 171; Ad. Ej. 35; Bac. Abr.; Viner, Abr.

It was a survival of the old law which rigidly protected seizure even against the true owner. 2 Holdsw. Hist. E. L. 496.

Discontinuances of estates, prior to their express abolition, had long become obsolete, and they are now abolished by 3 & 4 Will. IV. c. 27, and 8 & 9 Vict. c. 106; Moz. & W. Dic.; 1 Steph. Com. 510, n.

DISCONTINUOUS SERVITUDE. An easement made up of repeated acts instead of

one continuous act, such as right of way, drawing water, etc. See EASEMENT.

DISCOUNT. Interest reserved from the amount loaned at the time of making a loan. An allowance sometimes made for prompt payment. As a verb, it is used to denote the act of giving money for a bill of exchange or promissory note, deducting the interest. Dunkle v. Renick, 6 Ohio St. 527; Niagara County Bank v. Baker, 15 Ohio St. 87; Philadelphia Loan Co. v. Towner, 13 Conn. 249; State v. Savings Institution, 48 Mo. 189; Fleckner v. Bank, 8 Wheat. (U. S.) 338, 5 L. Ed. 631; Saltmarsh v. Bank, 14 Ala. 677; Weckler v. Bank, 42 Md. 592, 20 Am. Rep. 95.

Discounting means to take interest in advance; McLean v. Bank, 3 McLean 597, Fed Cas. No. 8,888. It is a mode of loaning money; New York Firemen Ins. Co. v. Ely, 2 Cow. (N. Y.) 678; Weckler v. Bank, 42 Md. 592, 20 Am. Rep. 95. As to whether discounting includes buying and selling, the cases are not uniform It is held to be another name for buying at a discount; Tracy v. Talmage, 18 Barb. (N. Y.) 456; Fleckner v. Bank, 8 Wheat. (U. S.) 338, 5 L Ed. 631; Pape v. Bank, 20 Kan. 450, 27 Am. Rep. 183; *contra*, First Nat. Bank of Rochester v. Pierson, 24 Minn. 141, 31 Am. Rep. 341; Niagara County Bank v. Baker, 15 Ohio St. 87. See 16 L. R. A. 223, note.

In an ordinary commercial document, discount means rebate of interest and not "true" or mathematical discount; [1896] 2 Ch. 320.

A discount by a bank means *ex vi termini* a deduction or drawback made upon its advances or loans of money upon negotiable paper or other evidences of debt, payable at a future day, which are transferred to the bank. It is the difference between the price and the amount of the debt, the evidence of which is transferred; National Bank v. Johnson, 104 U. S. 276, 26 L. Ed 742; Fleckner v. Bank, 8 Wheat. (U. S.) 338, 350, 5 L. Ed. 631.

The taking of legal interest in advance is not usurious; but it is only allowed for the benefit of trade and where the bill or note discounted is meant for circulation and is for a short term; New York Firemen Ins Co. v. Ely, 2 Cow. (N. Y.) 678; President, etc, of Bank of Utica v. Wager, 2 Cow. (N. Y.) 712; Bank of Utica v. Phillips, 3 Wend. (N. Y.) 408.

There is a difference between *buying* a bill and *discounting* it. The former word is used when the seller does not indorse the bill and is not accountable for its payment; McElwee v. Collins, 20 N. C. 350; but the discount of negotiable paper at more than a lawful rate of interest includes purchase of such paper as well as loans; Danforth v. Bank, 48 Fed. 271, 1 C. C. A. 62, 17 L. R. A. 622.

The *bona fide* sale of a note, made in good faith for full value in its inception, is valid and not usurious, but if in its origin it was only a nominal negotiation, it is invalidated by a subsequent usurious transaction; Nichols v. Fearson, 7 Pet. (U. S.) 103, 8 L. Ed. 623; Junction R. Co. v. Bank, 12 Wall. (U. S.) 226, 20 L. Ed. 385.

The discount of a note at more than legal interest, for an indorser who was neither maker nor payee, is not usurious; Gaul v. Willis, 26 Pa. 259; Moore v. Baird, 30 Pa. 138; Cram v. Hendricks, 7 Wend. (N. Y.) 569 (but it must be a *bona fide* sale and not a device to cover usury and it may be indorsed by the transferor; French v. Grindle, 15 Me. 163; Roark v. Turner, 29 Ga. 455; National Bank of Michigan v. Green, 33 In. 140); but this rule only applies to business paper, since the sale of accommodation paper at a discount of more than legal interest is usurious, Belden v. Lamb, 17 Conn. 441; in some cases it is held that if the vendor indorses or guarantees or otherwise becomes liable for the payment of the bill or note, the transaction is usurious; National Bank v. Johnson, 104 U. S. 271, 26 L. Ed. 742; Cowles v. McVickar, 3 Wis. 725, where, however, it was also held that the indorsement was valid to pass a good title to the holder as against the maker though usurious as against the indorser; the note, being valid in its inception, was not vitiated by the subsequent transaction except as against the indorser. The last ruling, however, was said to be *obiter dictum*, but, the question arising for adjudication, the view was approved and the subsequent case so decided; Armstrong v. Gibson, 31 Wis. 61, 11 Am. Rep. 599.

The discounting of negotiable paper under the national bank act is synonymous with loans; National Bank v. Johnson, 104 U. S 271, 26 L. Ed. 742, citing Niagara County Bank v. Baker, 15 Ohio St. 68, to the effect that to discount paper is "only a mode of loaning money with the right to take the interest allowed by law in advance." See NATIONAL BANKS.

Where in an act of incorporation the exercise of banking powers was prohibited, it was held that thereby the discounting of notes was forbidden; United German Bank v. Katz, 57 Md. 128, 139; Sewell, Banking.

The true discount for a given sum, for a given time, is such a sum as will in that time amount to the interest of the sum to be discounted. Wharton.

In Practice. A set-off or defalcation in an action. Viner, Abr. *Discount*. But see Trabue's Ex'r v. Harris, 1 Metc. (Ky.) 597.

In common-law actions there was a plea of discount, but it is little used. In Delaware, where the common-law pleading is closely adhered to and short pleas are frequently used, it was said that there was

never any definite idea connected with the plea of discount in the Delaware practice; that they could not "give it the force or meaning of a plea of set-off." Glazier v. McCallister, 5 Harring. (Del.) 41. Hence that plea is rather intended for use when matter which constitutes a deduction or defalcation of or from the plaintiff's claim is introduced to reduce it.

DISCOVERT. Not covert; unmarried. The term is applied to a woman unmarried, or widow,—one not within the bonds of matrimony.

DISCOVERY. The act of finding an unknown country.

The nations of Europe adopted the principle that the discovery of any part of America gave title to the government by whose subjects or by whose authority it was made, as against all European governments. This title was to be consummated by possession; Johnson v. McIntosh, 8 Wheat. (U. S.) 543, 5 L. Ed 681; Martin v. Waddell, 16 Pet. (U. S.) 367, 10 L. Ed. 997; 2 Washb. R. P. 518.

By the law of nations, dominion of new territory may be acquired by discovery and occupation as well as by cession or conquest; Jones v. U. S., 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691.

An invention or improvement. See PATENT. Also used of the disclosure by a bankrupt of his property for the benefit of creditors.

In Practice. The disclosure of facts resting in the knowledge of the defendant, or the production of deeds, writings, or things in his possession or power, in order to maintain the right or title of the party asking it, in some other suit or proceeding.

It was originally an equitable form of procedure, and a bill of discovery, strictly so called, was brought to assist parties to suits in other courts. Every bill in equity is in some sense a bill of discovery, since it seeks a disclosure from the defendant, on his oath of the truth of the circumstances constituting the plaintiff's case as propounded in his bill; Story, Eq. Jur. § 1483, but the term is technically applied as defined above. See De Wolf v. De Wolf, 4 R. I. 450. Many important questions have arisen out of the exercise of this power by equity; but these are of comparatively little practical importance in England and many of the states, where parties may be made witnesses and compelled to produce books and papers in courts of law.

Such bills are greatly favored in equity, and are sustained in all cases where some well-founded objection does not exist against the exercise of the jurisdiction; Story, Eq. Jur. § 1488; Skinner v. Judson, 8 Conn. 528, 21 Am. Dec. 691; Wolf v. Wolf's Ex'r, 2 H. & G. (Md.) 382, 18 Am. Dec. 313. Some of the more important of the objections are,—*first*, that the subject is not cognizable in any municipal court of justice; Story, Eq. Jur. § 1489; *second*, that the court will not lend its aid to obtain a discovery for the particular court for which it is wanted, where the court can itself compel a discovery; 2 Ves. 451; Fitzhugh v. Everingham, 2 Edw. Ch. (N. Y.) 605; Wheeler v. Wadleigh, 37 N. H. 55; *third*, that the plaintiff is not entitled by reason of personal disability; *fourth*, that the plaintiff has no title to the character in which he sues; Lansing v. Pine, 4 Paige, Ch. (N. Y.) 639; *fifth*, that the value of the suit is beneath the dignity of the court, *sixth*, that the plaintiff has no interest in the subject-matter or title to the discovery required; 2 Bro. C. C. 321; Coombs v. Warren, 17 Me. 404; Marion Nat. Bank v. Abell's Adm'x, 88 Ky. 428, 11 S. W. 300, 10 Ky. L. Rep. 980; or that an action for which it is wanted will not lie; 3 Bro. C. C. 155; 1 Bligh, N. S. 120; 3 Y. & C. 255; *seventh*, that the defendant is not answerable to the plaintiff, but that some other person has a right to call for the discovery; *eighth*, that the policy of the law exempts the defendant from the discovery, as on account of the peculiar relations of the parties; 2 Y. & C. 107; City Bank v. Bangs, 3 Paige, Ch. (N. Y.) 36; in case of arbitrators; 2 Vern. 380; 3 Atk. 529; *ninth*, that the defendant is not bound to discover his own title; Bisph. Eq. 561; 1 Vern. 105; Mange v. Gnenat, 6 Whart. (Pa.) 141; see Downie v. Nettleton, 61 Conn. 593, 24 Atl. 977; or that he is a *bona fide* purchaser without notice of the plaintiff's claim; 8 Sim. 153; McNeil v. Hill, 5 Mas. 269, Fed. Cas. No. 8,915; Wood v. Mann, 1 Sumn. 506, Fed. Cas. No. 17,951; Vattier v. Hinde, 7 Pet. (U. S.) 252, 8 L. Ed. 675; Varick v. Briggs, 6 Paige, Ch. (N. Y.) 323; and see Hart v. Bank, 33 Vt. 252; Howell v. Ashmore, 9 N. J. Eq. 82, 57 Am. Dec. 371; *tenth*, that the discovery is not material in the suit; 2 Ves. 491; Gelston v. Hoyt, 1 Johns. Ch. (N. Y.) 548; *eleventh*, that the defendant is a mere witness; 2 Bro. C. C. 332; Geer v. Kissom, 3 Edw. Ch. (N. Y.) 129; but see 2 Ves. 451; 1 Sch. & L. 227; 11 Sim. 305; Vermilyea v. Bank, 1 Paige, Ch. (N. Y.) 37; *twelfth*, that the discovery called for would criminate the defendant; Noyes v. Thorpe, 73 N. H. 481, 62 Atl. 787, 12 L. R. A. (N. S.) 636, where a demurrer to a bill in aid of an action for libel was sustained upon that ground, the discovery sought being the name of the author of the article complained of. In L. R. 24 Q. B. D. 445, note, the English court of appeal refused to compel the same discovery on the ground that it was a "fishing" interrogatory.

The suit must be of a purely civil nature, and may not be a criminal prosecution; Loft 1; 19 How. St. Tr. 1154; Broadbent v. State, 7 Md. 416; a penal action; 1 Keen 329; Atwill v. Ferrett, 2 Blatchf. 39, Fed. Cas. No. 640; a suit partaking of this character; U. S. v. Bank, 1 Pet. (U. S.) 100, 7 L. Ed. 69; Northrop v. Hatch, 6 Conn. 361; Higdon v. Heard, 14 Ga. 255; or a case involving moral turpitude. See 1 Bligh, N. S. 96; 2 E. L. & Eq. 117; 5 Madd. 229; 11 Beav. 380; 1 Sim. 404; Pleasants v. Glasscock, 1 S. & M. Ch. (Miss.) 17. In a civil action for conspiracy a discovery of material documents cannot be refused merely because they tend to crim-

inate one or to involve him in a criminal charge; [1906] A. C. 434; and in a suit against a newspaper proprietor for both libel and conspiracy the discovery cannot be avoided on the ground either of privilege or self-crimination; [1899] 2 Ir. Rep. Q. B. 199.

Workmen pledged to secrecy and employed in a factory in which the business is conducted in private, to secure secrecy as to the method of manufacture, will not be compelled, in a suit against their employer, to disclose such secrets; Dobson v. Graham, 49 Fed. 17.

A corporation not a party to a suit will not be compelled to open its records which it is claimed will disclose something of importance to the litigation; Henry v. Ins. Co., 35 Fed. 15; nor is an adverse examination of a defendant before trial allowable for the purpose of discovering a cause of action; Britton v. MacDonald, 3 Misc. 514, 23 N. Y. Supp. 350; Nathan v. Whitehill, 67 Hun 398, 22 N. Y. Supp. 63.

An infant party to an action cannot be compelled to make discovery of documents; [1892] 2 Q. B. 178

The court has power to allow a party to an action to take photographs of documents in the possession of the other party; [1893] 2 Q. B. 191.

It seems to be settled that a bill will lie against a corporation and its officers to compel a discovery from the officers, to aid a plaintiff or a defendant in maintaining or defending a suit brought against or by the corporation alone; McComb v. R. Co., 7 Fed. 426, 19 Blatchf. 69; 1 Ch. D. 71; Post v. R. Co., 144 Mass. 347, 11 N. E. 540, 59 Am. Rep. 86. Since it answers under its seal and not upon oath, there can be no discovery by a corporation unless its officers or agents who know the facts are made parties; Manchester Fire Assur. Co. v. Agricultural Works, 38 Fed. 378; Vaughn v. R. Co., 1 Flip. 621, Fed. Cas. No. 16,898; but an officer of a corporation cannot be joined as defendant in a bill of discovery where he did not derive the desired information in his official capacity; McComb v. R. Co., 7 Fed. 426.

In the sense in which the word is used with respect to equity suits generally, there was, until a comparatively recent period, a failure to recognize the distinction between the two functions of an answer in chancery, viz.: discovery and defence. These two were in the civil law entirely separated, while in chancery they were indiscriminately commingled. The distinction is very clearly put in Langdell's Equity Pleadings, 2d ed. § 68, where the author attributes to Wigram (Disc., 2d ed. § 17) and Hare (Disc. 223) the simultaneous notice of what he terms "the unnatural union." The distinction is important because, when it is borne in mind, the "rule for determining what discovery the defendant must give in his answer becomes simple and uniform. He must answer categorically every material allegation and charge in the bill, unless he has some objection which would be good in the mouth of a witness." In a note to his second edition, Professor Langdell characterizes this rule as too narrow, and sets forth cases in which a defendant may object to answer as to matters which as a witness he could not. Among these are the cases of a defendant against whom no case is made and no relief prayed; one joined because he has a conflicting claim against another defendant, which must be set up by cross-bill; or where a defendant may refuse to answer parts of the bill relating wholly to other defendants. With respect to particular cases the rule must be deduced from the decisions most nearly applicable, and the cases will be found to be collected and examined with discrimination in the work cited. See also Ad. Eq. b. 1, ch. 1.

A bill in equity which waives an oath to the answer is demurrable; Starkweather v. Williams, 21 R. I. 55, 41 Atl. 1003; and the complainant cannot have discovery upon such a bill; Tillinghast v. Chace, 121 Fed. 435 (where the cases are collected and those *contra* criticised); Huntington v. Saunders, 120 U. S. 78, 7 Sup. Ct. 356, 30 L. Ed. 580; Ward v. Peck, 114 Mass. 121; Torrent v. Rodgers, 39 Mich. 85; Stettauer v. Dwight, 54 Ill. App. 194; otherwise if the bill prays both discovery and relief; Manley v. Mickle, 55 N. J. Eq. 563, 37 Atl. 738. Where the oath is waived in a bill of discovery, the defendant may decline to answer, but if he undertakes to answer, he must state whether he had knowledge or information, but not his belief; Victor G. Bloede Co. v. Carter, 148 Fed. 127. A bill of discovery will not lie against a mere witness; Post v. Boardman, 10 Paige Ch. (N. Y.) 580; as a general rule; Howell v. Ashmore, 9 N. J. Eq. 82, 57 Am. Dec. 371. Nor is there equitable jurisdiction in a suit where discovery and relief are sought, but the only ground for equitable relief is discovery of evidence to be used in enforcing a purely legal demand; Safford v. Mfg. Co., 120 Fed. 480, 56 C. C. A. 630. A simple bill of discovery will now hardly be resorted to in the United States courts because unnecessary when state statutes available in those courts furnish the remedies formerly sought only in equity; In re Boyd, 105 U. S. 647, 26 L. Ed. 1200; Scott v. Neely, 140 U. S. 109, 11 Sup. Ct. 712, 35 L. Ed. 358; or the relief sought is available under U. S. R. S. § 724, providing for production of books, etc., in suits at law.

Statutory provisions enlarging the jurisdiction of courts of law, such as to provide for discovery at law, have been held to be merely cumulative and not to abridge the jurisdiction of equity to compel a discovery (unless otherwise specifically provided by statute), even though, by enlargement of their jurisdiction, the courts of law could afford

similar relief; Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14; Kurtz v. Brown, 152 Fed. 372, 81 C. C. A. 498, 11 Ann. Cas. 576; 3 K. & J. 433; Union Passenger Ry. Co. v. Mayor, etc., 71 Md. 238, 17 Atl. 933; Reynolds v. Fibre Co., 71 N. H. 332, 51 Atl. 1075, 57 L. R. A. 949, 93 Am. St. Rep. 535; Miller v. Casualty Co., 61 N. J. Eq. 110, 47 Atl. 509; Clark v. Locomotive Works, 24 R. I. 307, 53 Atl. 47; Nixon v. Lumber Co., 150 Ala. 602, 43 South. 805, 9 L. R. A. (N. S.) 1255. But in other jurisdictions (where possibly the distinctive systems of law and equity are less closely adhered to) it is held otherwise; Turnbull v. Crick, 63 Minn. 91, 65 N. W. 135; Baylis v. Mfg. Co., 59 App. Div. 576, 69 N. Y. Supp. 693; Bond v. Worley, 26 Mo. 253; Warren v. Baker, 43 Me. 570; Chapman v. Lee, 45 Ohio St. 356, 13 N. E. 736; Riopelle v. Doellner, 26 Mich. 102; Cleveland v. Burnham, 60 Wis. 16, 17 N. W. 126, 18 N. W. 190; Hall v. Joiner, 1 S. C. 186 (where the decision is put upon the ground that, in that state, the jurisdiction of equity for want of an adequate remedy at law, rests on a statute); though probably, where separate courts of law and equity are maintained, it is generally held that the equitable remedy is not abridged; 1 Pom. Eq. Jur. § 193.

Courts of equity which have once obtained jurisdiction for purposes of discovery will dispose of a cause finally, if proper for the consideration of equity, though the remedy at law is fully adequate; 1 Story, Eq. Jur. 64 *k*; Chichester's Ex'r v. Vass' Adm'r, 1 Munf. (Va.) 98, 4 Am. Dec. 531; Traip v. Gould, 15 Me. 82; Wood v. Hudson, 96 Ala 169, 11 South. 530.

DISCREDIT. To deprive one of credit or confidence.

In general, a party may discredit a witness called by the opposite party, who testifies against him, by proving that his character is such as not to entitle him to credit or confidence, or any other fact which shows he is not entitled to belief. It is clearly settled, also, that the party voluntarily calling a witness cannot afterwards impeach his character for truth and veracity; 3 B. & C. 746; Chism v. State, 70 Miss. 742, 12 South. 852; Erwin v. State, 32 Tex. Cr. R. 519, 24 S. W. 904. If a party call a witness who turns out unfavorable, he may call another to prove the same point; 2 Campb. 556; 4 B. & A. 193; Meyer Bros. Drug Co. v. McMahan, 50 Mo. App. 18. The rule that a party cannot discredit his own witness is not violated by proving facts contrary to the testimony of such witness; Chester v. Wilhelm, 111 N. C. 314, 16 S. E. 229.

Where the evidence of a witness is a surprise to the party calling him, the trial judge, in the exercise of discretion, may permit him to be cross-examined by such party to show that his previous statements and conduct were at variance with his testimony; Selover v. Bryant, 54 Minn. 434, 56 N. W. 58, 21 L. R. A. 418, 40 Am. St. Rep. 3. Proof of contradictory statements by one's own witness, voluntarily called and not a party, is in general not admissible, although the party calling him may have been surprised by them; but he may show that the facts were not as stated, although these may tend incidentally to discredit the witness; Hickory v. U. S., 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170.

DISCREPANCY. A difference between one thing and another, between one writing and another; a variance.

A material discrepancy exists when there is such a difference between a thing alleged and a thing offered in evidence as to show they are not substantially the same as, when the plaintiff in his declaration for a malicious arrest averred that "the plaintiff, in that action, did not prosecute his said suit, but therein made default," and the record was that he obtained a rule to discontinue.

An immaterial discrepancy is one which does not materially affect the cause: as, where a declaration stated that a deed bore date in a certain year of our Lord, and the deed was simply dated "March 30, 1701." 2 Salk. 658; Henry v. Brown, 19 Johns. (N. Y.) 49; Wade v. Grimes, 7 How. (Miss) 428; Drake v. Fisher, 2 McLean, 69, Fed. Cas. No. 4,061; 2 B. & Ald. 301.

DISCRETION. That part of the judicial function which decides questions arising in the trial of a cause, according to the particular circumstances of each case, and as to which the judgment of the court is uncontrolled by fixed rules of law.

The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.

"Discretion when applied to a court of justice means sound discretion guided by law." 4 Burr. 529. Judicial discretion is a mere legal discretion—a discretion in discerning the course presented by law; and what that has discerned it is the duty of the court to follow. Osborn v. Bank, 9 Wheat. 738, 6 L. Ed. 204. "The discretion is not wilful or arbitrary, but legal [to set aside a judicial sale], and though its exercise be not purely a matter of law, yet it involves a matter of law or legal inference." Lovinier v. Pearce, 70 N. C. 167. "A legal discretion is one that is regulated by well known and established principles of law." Detroit Tug & Wrecking Co. v. Circuit Judge, 75 Mich. 360, 42 N. W. 968.

Bishop on Mar. & Div. § 830, defines it as "denoting a sort of individual liberty, a sort of liberty in the collective judges and an adherence to legal principles blended in such a way as shall constitute an established

course of justice bending to the circumstances of the case instead of requiring the cases to bend to it."

"But if the word discretion in this connection [injunction] is used in its secondary sense, and by it is meant that the chancellor has the liberty and power of acting, in finally settling property rights, at his discretion, without the restraint of the legal and equitable rules governing those rights, then I deny such power;" Hennessy v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374.

It would tend to clearness and exactness if discretion were used only with reference to those matters where the action of the trial judge is final; Jenkins v. Brown, 21 Wend. (N. Y.) 454.

Whether or not a particular question is one of discretion is in almost every case a matter of settled law, and the individual court or judge has no power to place it within or without that category. It is only when a question arises which, according to precedent, is treated as such that the judicial discretion is invoked and its exercise cannot be reviewed.

The discretion of a judge is said by Lord Camden to be the law of tyrants: it is always unknown, it is different in different men; it is casual, and depends upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable. *Optima lex quæ minimum relinquit arbitrio judicis: optimus judex qui minimum sibi.* Bacon, Aph.; 2 Bell, Suppl. to Ves. 391; Toullier, liv 3, n. 338; 1 Lilly, Abr. 447. But the prevailing opinion is that discretion must not be arbitrary, fanciful, and capricious; it must be legal and regular, governed by rule, not by humor; 4 Burr. 25; Judges of Oneida Common Pleas v. People, 18 Wend. (N. Y.) 99.

Many matters relating to the trial such as the order of giving evidence, etc., are properly left mainly or entirely to the discretion of the judge; Utsey v. R. Co., 38 S. C. 339, 17 S. E. 141; Winklemeir v. Daiber, 92 Mich. 621, 52 N. W. 1036; Coffin v. Hydraulic Co., 136 N. Y. 655, 32 N. E. 1076; Northern Pac. R. Co. v. Charless, 51 Fed. 562, 2 C. C. A. 380; Estis v. Jackson, 111 N. C. 145, 16 S. E. 7, 32 Am. St. Rep. 784.

Decisions upon matters within the absolute discretion of a court are not reviewable in courts of appeal; Harrington v. Ry. Co., 157 Mass. 579, 32 N. E. 955; Perry v. Shedd, 159 Mass. 200, 34 N. E. 174; Pittsburgh, C. & St. L. R. Co. v. Heck, 102 U. S. 120, 26 L. Ed. 58; but the discretion in granting or refusing a writ of mandamus must be exercised under legal rules, and is reviewable in an appellate court; People v. Common Council of Syracuse, 78 N. Y. 56. Such a writ will not be granted to regulate the exercise of discretion on the part of an official; State v. Van Ness, 15 Fla. 317; Ex parte Harris, 52 Ala. 87, 23 Am. Rep. 559.

A testator may leave it to his executor to construe the provisions of his will, and to decide doubtful questions concerning his intentions; American Board of Com'rs of Foreign Missions v. Ferry, 15 Fed. 696; and the donor of a power may leave its execution to the discretion of the donee; 4 D. J. & S. 614.

In Criminal Law. The ability to know and distinguish between good and evil,—between what is lawful and what is unlawful.

In most modern criminal statutes the amount of punishment is usually left to the discretion of the court. See INDETERMINATE SENTENCES.

As to the age at which children are said to arrive at discretion, see AGE; DOLI CAPAX.

DISCRETIONARY TRUSTS. Those which cannot be duly administered without the application of a certain degree of prudence and judgment: as, when a fund is given to trustees to be distributed in certain charities to be selected by the trustees.

DISCRIMINATION. This word is now generally applied in law to a breach of the statutory or common-law duty of a carrier to treat all customers alike. It is applied to inequality in both rates of fare and rates of freight, and may also be practised by inequality in the facilities afforded to different consignors. See FACILITIES; INTERSTATE COMMERCE COMMISSION; RATES; REBATE; RAILROADS.

As to discrimination in the distribution of cars to shippers, see RAILROADS.

DISCUSSION. In Civil Law. A proceeding on the part of a surety by which the property of the principal debtor is made liable before resort can be had to the sureties. this is called the *benefit of discussion.* This is the law in Louisiana. See Domat, 3, 4, 1-4; Burge, Suretyship 329, 343, 348; 5 Toullier 544; 7 *id.* 93.

DISENTAILING ASSURANCE. A deed executed under stat. 3 & 4 Will. 4, c. 74, whereby the tenant in tail is enabled to alienate the land for an estate in fee-simple or any less estate, and thus destroy the entail. The deed must be duly enrolled in the court of chancery within six months of its execution; 1 Steph. Com. 250, 575.

DISFRANCHISEMENT. The act of depriving a member of a corporation of his right as such, by expulsion.

It differs from amotion (*q. v.*), which is applicable to the removal of an officer from office, leaving him his rights as a member; Willc. Corp. n. 708; Ang. & A. Corp. 237; 10 H. L. Cas. 401; State v. Adams, 44 Mo. 570; White v. Brownell, 2 Daly (N. Y.) 329.

The power of disfranchisement extends only to societies not owning property or organiz-

ed for gain; unless the power be given by the charter: Evans v. Philadelphia Club, 50 Pa. 107; Green's Brice, *Ultra Vires* 45; 41 L. T. N. S. 490; People v. Board of Trade of Chicago, 80 Ill. 134; People v. New York Cotton Exchange, 8 Hun (N. Y.) 216; Ang. & A. Corp. § 410. It extends to the expulsion of members who have proved guilty of the more heinous crimes, as to which there must first be a conviction by a jury; Com. v. Benevolent Society, 2 Binn. (Pa.) 448, 4 Am. Dec. 4; Society for Visitation of Sick v. Com., 52 Pa. 125, 91 Am. Dec. 139. It is said that the power exists where members do not observe certain duties to the corporation, especially where the breach tends directly or indirectly to the forfeiture of the corporate rights, and franchises, and the destruction of the corporation: Green's Brice, *Ultra Vires* 45; People v. Board of Trade of Chicago, 45 Ill. 112; Hussey v. Gallagher, 61 Ga. 86; Sale v. Baptist Church, 62 Ia. 26, 17 N. W. 143, 49 Am. Rep. 136. A member is entitled to notice of the charges against him, and to an opportunity to be heard; Evans v. Philadelphia Club, 50 Pa. 107; People v. Sailors' Snug Harbor, 54 Barb. (N. Y.) 532; State v. Board of Management, 40 N. J. L. 295; People v. Benevolent Society, 24 How. Pr. (N. Y.) 216; State v. Adams, 44 Mo 570; Gregg v. Medical Society, 111 Mass. 185, 15 Am. Rep. 24. See ASSOCIATION; EXPULSION.

Except in cases authorized by constitutional provisions, a citizen entitled to vote cannot be disfranchised, or deprived of his right by any action of the public authorities, and a law having such effect is void; Cooley, Const. Lim. 776; as an act creating a new county and leaving part of its territory unorganized so that the voters of that portion could not participate in the election; People v. Maynard, 15 Mich. 471. A citizen who has been convicted of bribery at an election and has undergone the punishment is qualified to vote, without a pardon; Osborne v. County Court, 68 W. Va. 189, 69 S. E. 470, 32 L. R. A. (N. S.) 418.

The present use of the word in England is the depriving an individual of his right of voting, or a constituency of their right of returning a member to parliament. May's Parl. Pr.

DISGRACE. Ignominy; shame; dishonor. No witness is required to disgrace himself. 13 How. St. Tr. 17, 334; 16 *id.* 161. See CRIMINATE.

DISGUISE.

A person lying in ambush is not in disguise within the meaning of a statute declaring a county liable in damages to the next of kin of any one murdered by persons in disguise; Dale County v. Gunter, 46 Ala. 118, 142.

DISHERISON. Disinheritance; depriving one of an inheritance. Obsolete. See DISINHERISON.

DISHERITOR. One who disinherits, or puts another out of his freehold. Obsolete.

DISHONOR. A term applied to the non-fulfillment of commercial engagements. To dishonor a bill of exchange, or a promissory note, is to refuse or neglect to pay it at maturity.

The holder is bound to give notice to the parties to such instruments of its dishonor; and his laches will discharge the indorsers; Chit. Bills 256, 394; 1 Pars. N. & B. 506, 520.

DISINHERISON. In Civil Law. The act of depriving a forced heir of the inheritance which the law gives him.

In Louisiana, forced heirs may be deprived of their legitime, or legal portion, and of the seisin granted them by law, for just cause. The disinherison must be made in proper form, by name and expressly, and for a just cause; otherwise it is null. See FORCED HEIRS; LEGITIME.

DISINHERITANCE. The act by which a person deprives his heir of an inheritance, who, without such act, would inherit.

By the common law (since the statute of wills) any one may give his estate to a stranger, and thereby disinherit his heir apparent. Cooper, Justin. 495; 7 East 106.

An heir cannot be disinherited by mere words of exclusion, but the entire property of the testator must be given to some one else by express words or by necessary implication; Phillips v. Phillips, 93 Ky. 498, 20 S. W. 541; Chamberlain v. Taylor, 105 N. Y. 185, 11 N. E. 625; Gallagher v. Crooks, 132 N. Y. 338, 30 N. E. 746; Hancock's Appeal, 112 Pa. 532, 5 Atl. 56; and where a will provides that a gift therein is to be the entire share of an heir, he is not excluded from a share of property not disposed of by the will; Sutherland v. Sydnor, 84 Va. 880, 6 S. E. 480, even though the will shows that the testator believed he was disposing of all his property; *id.* A testamentary writing which revokes all other wills, and excludes a son from any share of the estate, for reasons given, but does not dispose of the property, does not affect the rights of such son; Coffman v. Coffman, 85 Va. 459, 8 S. E. 672, 2 L. R. A. 848, 17 Am. St. Rep. 69.

In a case of doubt the law leans to a distribution of the estate of a deceased person as nearly conforming to the rules of inheritance as possible.

DISINTERESTED WITNESS. One who has no interest in the cause or matter in issue, and who is lawfully competent to testify.

DISINTERMENT. See DEAD BODY.

DISJUNCTIVE ALLEGATIONS. Allegations which charge a party disjunctively, so as to leave it uncertain what is relied on as the accusation against him.

An indictment, information, or complaint which charges the defendant with one or other of two offences, in the disjunctive, as

that he murdered *or* caused to be murdered, forged *or* caused to be forged, wrote and published *or* caused to be written and published, is bad for uncertainty; 1 Salk. 342, 371; 2 Stra. 900; 5 B. & C. 251; 1 C. & K. 243; 1 Y. & J. 22 An indictment which averred that S. made a forcible entry into two closes of meadow *or* pasture was held to be bad; 2 Rolle, Abr. 81. A complaint which alleges an unlawful sale of "spirituous *or* intoxicating liquor" is bad for uncertainty; Com. v. Grey, 2 Gray (Mass.) 501, 61 Am. Dec. 476. So is an information which alleges that N. sold beer *or* ale without an excise license; 6 Dowl. & R. 143. And the same rule applies if the defendant is charged in two different characters in the disjunctive: as, *quod* A *existens servus sive deputatus*, took, etc.; 2 Rolle, Abr. 263.

DISJUNCTIVE TERM. One which is placed between two contraries, by the affirming of one of which the other is taken away: it is usually expressed by the word *or*. See 3 Ves. 450; 1 P. Wms. 433; 2 Cox, Ch. 213; 2 Atk. 643; 2 Ves. Sen. 67; Cro. Eliz. 525; 1 Bingh. 500; Ayliffe, Pand. 56.

In the civil law, when a legacy is given to Caius *or* Titius, the word *or* is considered *and*, and both Caius and Titius are entitled to the legacy in equal parts. 6 Toullier, n. 704. See COPULATIVE TERM; CONSTRUCTION.

DISME. Dime, which see.

DISMISS. To remove. To send out of court. Formerly used in chancery of the removal of a cause out of court without any farther hearing. The term is now used in courts of law also.

It signifies a final ending of a suit, not a final judgment on the controversy, but an end of that proceeding; Taft v. Transp Co, 56 N. H. 417; Conner v. Drake, 1 Ohio St. 170. It is well settled that the judgment of a court dismissing a suit for want of jurisdiction does not conclude the plaintiff's right of action; Smith v. McNeal, 109 U. S. 429, 3 Sup. Ct. 319, 27 L. Ed. 986.

After a decree, whether final or interlocutory, has been made by which the rights of a party defendant have been adjudicated, or such proceedings have been taken as entitle the defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of the defendant; Chicago & A. R. R. Co. v. Mill Co., 109 U. S. 713, 3 Sup. Ct. 594, 27 L. Ed. 1081.

The effect of dismissals under the codes of some of the United States, has been much discussed Thus in New York, "a final judgment dismissing the complaint, either before or after a trial, rendered in an action hereafter commenced," does not prevent a new action for the same cause of action, unless it expressly declares that it is rendered upon the merits.

DISMISSED. A judgment of "Dismissed," without qualifying words indicating a right to take further proceedings, is presumed to be dismissed on the merits; Durant v. Essex Co., 7 Wall. (U. S.) 107, 19 L. Ed. 154. But a bill "dismissed" on motion of complainant does not bar a second suit; Ex parte Loung June, 160 Fed 259.

A judgment of dismissal because plaintiff fails to observe a rule of court does not become *res judicata;* Ryan v. R. Co., 89 Fed. 397; so of a dismissal by consent of the parties; Rincon Water & Power Co. v. Water Co., 115 Fed. 543. But circumstances obviously might lead to a different rule.

DISORDERLY HOUSE. A house the inmates of which behave so badly as to become a nuisance to the neighborhood. State v. Grosofski, 89 Minn. 343, 94 N. W. 1077; Hawkins v. Lutton, 95 Wis. 493, 70 N. W. 483, 60 Am. St. Rep. 131. It has a wide meaning, and includes bawdy houses, common gaming houses, and places of a like character; 1 Bish. Cr. L. § 1106; U. S. v. Gray, 2 Cra. C. C. 675, Fed. Cas. No. 15,251; Com. v. Cobb, 120 Mass. 356. Any place of public resort in which illegal practices are carried on, involving moral turpitude or not; State v. Martin, 77 N. J. L. 652, 73 Atl 548, 24 L. R. A. (N. S.) 507, 134 Am. St. Rep 814, 18 Ann. Cas. 986, where a person making usurious loans was convicted of keeping a disorderly house. In order to constitute it such it is not necessary that there be acts violative of the peace of the neighborhood, or boisterous disturbance and open acts of lewdness; Beard v. State, 71 Md. 275, 17 Atl. 1044, 4 L. R. A. 675, 17 Am. St. Rep. 536; but a single act of lewdness of a man and woman in a house, does not constitute the offence of keeping a house of prostitution; People v. Gastro, 75 Mich. 127, 42 N. W. 937. And receiving unmarried people who present themselves as husband and wife at a hotel is not sufficient to convict the proprietor of keeping a disorderly house without proof of *scienter;* People v. Drum, 127 App. Div. 241, 110 N. Y. Supp. 1096.

The keeper of such house may be indicted for keeping a public nuisance; Hardr. 344; People v. Clark, 1 Wheel. Cr. Cas. (N. Y.) 290; Com. v. Stewart, 1 S. & R. (Pa.) 342; Bacon, Abr. *Nuisances*, A; 4 Sharsw. Bla. Com. 167, 168, note; King v. People, 83 N. Y. 587; Ex parte Birchfield, 52 Ala. 377. The husband must be joined with the wife in an indictment to suppress a disorderly house; 1 Show. 146.

See Words and Phrases, vol. 3, pp. 2108-2110.

DISORDERLY PERSONS. A class of offenders described in the statutes which punish them. See 4 Bla. Com. 169.

DISPARAGEMENT. In Old English Law. An injury by union or comparison with some person or thing of inferior rank or excellence.

Marriage without *disparagement* was marriage to one of suitable rank and character.

2 Bla. Com. 70; Co. Litt. 82 *b*. The guardian in chivalry had the right of disposing of his infant ward in matrimony; and provided he tendered a marriage without *disparagement* or inequality, if the infant refused, he was obliged to pay a *valor maritagii* to the guardian.

Disparagare, to connect in an unequal marriage. Spelman, Gloss. *Disparagatio*, disparagement. Used in Magna Carta (9 Hen. III.), c. 6. *Disparagation*, disparagement. Kelham. *Disparage*, to marry unequally. Used of a marriage proposed by a guardian between those of unequal rank and injurious to the ward.

DISPAUPER. In English Law. To deprive a person of the privilege of suing *in forma pauperis*.

When a person has been admitted to sue *in forma pauperis*, and before the suit is ended it appears that the party has become the owner of a sufficient estate real, or personal, or has been guilty of some wrong, he may be *dispaupered*.

DISPENSARY LAW. See LIQUOR.

DISPENSATION. A relaxation of law for the benefit or advantage of an individual. In the United States, no power exists, except in the legislature, to dispense with law; and then it is not so much a dispensation as a change of the law.

DISPLACE. Used in shipping articles, and, when applied to an officer, meaning properly to disrate, not to discharge. Potter v. Smith, 103 Mass. 68.

DISPOSE. To alienate or direct the ownership of property, as, disposition by will. Elston v. Schilling, 42 N. Y. 79, see Flug v. Goodall, 40 N. H. 219; Phelps v. Harris, 101 U. S. 380, 25 L. Ed. 855. Used also of the determination of suits: In re Russell, 13 Wall. (U. S.) 664, 20 L. Ed. 632. Called a word of large extent; Freem. 177.

DISPOSSESSION. Ouster; a wrong that carries with it the amotion of possession. An act whereby the wrong-doer gets the actual occupation of the land or hereditament. It includes abatement, intrusion, disseisin, discontinuance, deforcement. 3 Bla. Com. 167.

DISPUTATIO FORI (Lat.). Argument in court. Du Cange.

DISPUTE. A fact is properly said to be in dispute when it is alleged by one party and denied by the other, and by both with some show of reason. Appeal of Knight, 19 Pa. 494.

DISQUALIFY. To incapacitate, to disable, to divest or deprive of qualifications. Matter of Maguire, 57 Cal. 606, 40 Am. Rep. 125.

DISRATIONARE. To clear oneself from accusation; to make good a legal claim; to prove. Martin, Record Interpreter.

DISSAISINA. A disseisin or dispossession; an ejectment. Skene.

DISSECTION. The act of cutting into pieces an animal or vegetable for the purpose of ascertaining the structure and use of its parts; anatomy; the act of separating into constituent parts for the purpose of critical examination. Webster. See DEAD BODY; AUTOPSY; DEATH.

DISSEISEE. One who is wrongfully put out of possession of his lands; one who is disseised.

DISSEISIN. A privation of seisin. A usurpation of the right of seisin and possession, and an exercise of such powers and privileges of ownership as to keep out or displace him to whom these rightfully belong. 2 Washb. R. P. 283; Mitch. R. P. 259.

It takes the seisin or estate from one man and places it in another. It is an ouster of the rightful owner from the seisin or estate in the land, and the commencement of a new estate in the wrong-doer. It may be by abatement, intrusion, discontinuance, or deforcement, as well as by disseisin properly so called. Every dispossession is not a disseisin. A disseisin, properly so called, requires an ouster of the freehold. A disseisin at election is not a disseisin in fact; 2 Pres. Abstr. Titles 279; but by admission only of the injured party, for the purpose of trying his right in a real action; Co. Litt. 277; Little v. Libby, 2 Greenl. (Me.) 242, 11 Am. Dec. 68; Doe v. Thompson, 5 Cow. (N. Y.) 371; Jackson v. Huntington, 5 Pet. (U. S.) 402, 8 L. Ed. 170; Poignard v. Smith, 6 Pick. (Mass.) 172.

Disseisin may be effected either in corporeal inheritances, or incorporeal. Disseisin of things corporeal, as of houses, lands, etc., must be by entry and actual dispossession of the freehold: as if a man enters, by force or fraud, into the house of another, and turns, or, at least, keeps, him or his servants out of possession. Disseisin of incorporeal hereditaments cannot be an actual dispossession; for the subject itself is neither capable of actual bodily possession or dispossession; 3 Bla. Com. 169, 170. See Poignard v. Smith, 6 Pick. (Mass.) 172; Smith v. Burtis, 6 Johns. (N. Y.) 197, 5 Am. Dec. 218; Ellicott v. Pearl, 10 Pet. (U. S.) 414, 9 L. Ed. 475; Stetson v. Veazie, 11 Me. 408.

In the early law every disseisin was a breach of the peace; if perpetrated with violence it was a serious breach. The disseisor was amerced never less than the amount of the damage; if it were by force of arms he was sent to prison and fined. Besides he gave the sheriff an ox,—"the disseisin ox,"—or five shillings. If he disseised one who has already recovered possession from him by the assize, this was a still graver offence, for which he was imprisoned by statute. The

offender was a redisseisor; 2 Poll. & Maitl. Hist. of Eng. Law 45.

See BUYING TITLES.

DISSEISITUS. One who has been disseised.

DISSEISOR. One who puts another out of the possession of his lands wrongfully.

DISSENT. A disagreement to something which has been done. It is express or implied.

The law presumes that every person to whom a conveyance has been made has given his assent to it, because it is supposed to be for his benefit. To rebut the presumption, his dissent must be expressed. See Brooks v. Marbury, 11 Wheat. (U. S.) 78, 6 L. Ed. 423; Wilt v. Franklin, 1 Binn (Pa.) 502, 2 Am. Dec. 474; Bowman v. Griffith, 35 Neb. 361, 53 N. W. 140; Crain v. Wright, 114 N. Y. 307, 21 N. E. 401. ASSENT.

In Ecclesiastical Law. A refusal to conform to the rites and ceremonies of the established church. 2 Burn, Eccl. Law 165.

DISSENTER. One who refuses to conform to the rites and ceremonies of the established church; a non-conformist. 2 Burn, Eccl. Law 165.

DISSENTIENTE (Lat. dissenting). Used with the name or names of one or more judges, it indicates a dissenting opinion in a case. *Nemine dissentiente.* No one dissenting; unanimous.

DISSENTING OPINIONS. See PRECEDENT.

DISSOLUTION. The dissolution of a contract is the annulling its effects between the contracting parties.

The dissolution of a partnership is the putting an end to the partnership. Its dissolution does not affect contracts made between the partnership and others; so that it is entitled to all its rights, and liable on its obligations, as if it had not been dissolved. See PARTNERSHIP.

Of Corporations. Dissolution of corporations takes place by act of legislature (but in America only by consent of the corporation, or where the power to dissolve has been reserved by the legislature); by the loss of all the members, or an integral part of them; by a surrender of the charter; by the expiration of the period for which it was chartered, by proceedings for the winding up of the company under the law; or by a forfeiture of the franchises, for abuse of its powers. Where a method of procedure for dissolution has been prescribed by statute, as is now usual, such method is exclusive; Kohl v. Lilienthal, 81 Cal. 378, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520.

The loss of members will not work a dissolution, so long as enough members remain to fill vacancies; State v. Trustees, 5 Ind. 77; McGinty v. Reservoir Co., 155 Mass. 183, 29 N. E. 510; nor does a failure to elect officers; Com. v. Cullen, 13 Pa. 133, 53 Am. Dec. 450; Evarts v. Mfg. Co., 20 Conn. 447; United States Electric Lighting Co. v. Leiter, 19 D. C. 575; Rose v. Turnpike Co., 3 Watts (Pa.) 46; or trustees; Speer v. Colbert, 200 U. S. 131, 26 Sup. Ct. 201, 50 L. Ed. 403; so of an eleemosynary corporation; Vincennes University v. Indiana, 14 How. (U. S.) 268, 14 L. Ed. 416; nor does the resignation of all the officers of a corporation work a dissolution; Muscatine Turn Verein v. Funck, 18 Ia. 469; but it is said that a municipal or charitable corporation may be dissolved by the loss of all its members, although this mode of dissolution cannot take place in the case of business corporations which have a transferable joint stock, because the corporate shares, being personal property, must always belong to some person, and such person must of necessity be a member of the corporation; 5 Thomp. Corp. § 6652; Boston Glass Manufactory v. Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292. And even where all the shares of stock pass into the hands of less than the prescribed number of stockholders, there is no dissolution, even though they may have passed into the hands of *two* members; Russell v. McLellan, 14 Pick (Mass.) 63; or of a *single* person, Newton Mfg Co. v. White, 42 Ga. 148; and such person could carry on the corporate business; *id.* See STOCKHOLDERS.

Ordinarily, a corporation may by a majority vote surrender its franchises; McCurdy v Myers, 44 Pa. 535; Black v. Canal Co., 22 N. J. Eq 404; Treadwell v. Mfg Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; State v. Woolen Mills Co., 115 Tenn. 266, 89 S. W. 741, 2 L. R. A. (N. S.) 493, 112 Am. St. Rep. 825; Hitch v. Hawley, 132 N. Y. 221, 30 N. E. 401; but such a surrender must be accepted by the state; Wilson v. Proprietors of Central Bridge, 9 R. I. 590; excepting where the stockholders are liable for the debts; La Grange & M. R. Co. v. Rainey, 7 Cold. (Tenn.) 420. A corporation is not dissolved or its franchises forfeited by its insolvency and assignment of its assets for the benefit of its creditors, where the state brings no proceedings to have the charter forfeited, and there is no surrender thereof by act of the shareholders; State v. Butler, 86 Tenn. 614, 8 S. W. 586; Breene v. Bank, 11 Colo. 97, 17 Pac. 280; Adams v. Milling Co., 35 Fed. 433.

A non-user of corporate powers does not of itself work a dissolution, even though it be for twenty years; Raritan Water Power Co. v. Veghte, 21 N. J. Eq. 463; but see Strickland v. Prichard, 37 Vt. 324, where there had been no corporate acts performed for 23 years and it was held there was a dissolution. The question is one of fact and intent; 5 Thomp. Corp. § 6659. The fact that a corporation has ceased to do business and has made an assignment of all its prop-

erty for the payment of its debts and for several years held no annual meetings or elected directors, does not work a dissolution to the extent of preventing its maintaining an action for a debt due it; *id.* § 6660. The sale of the property and franchises of a corporation in foreclosure proceedings does not, *ipso facto*, work a dissolution. It will pass the franchise of the company to operate or enjoy the particular property foreclosed, but not its primary franchise to be a corporation; 5 Thomp. Corp. § 6662 (but that the corporation is extinguished by such a sale, see 37 Mo. 131). The insolvency of a corporation or the appointment of a receiver therefor does not work a dissolution; Boston Glass Manufactory v. Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292.

As to dissolution by consolidation, see MERGER.

The forfeiture of a charter by misuser or nonuser is complete only upon a final adjudication thereof in a competent court, upon proper proceedings at the suit of the government which created the corporation, and in the courts of such government; Moraw. Priv. Corp. 959, 1015; the existence of the charter cannot be attacked collaterally, or by an individual; Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 7 Pick. (Mass.) 344; Chesapeake & O. Canal Co. v. R. Co., 4 G. & J. (Md.) 1. But when the legislature has reserved the right to revoke a charter for abuse of its privileges or failure to perform a condition, it may enact the repeal at the proper time; Crease v. Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61; Erie & N. E. R. Co. v. Casey, 26 Pa. 287; and such repealing act will be held constitutional unless the company can show by plain and satisfactory evidence that the privileges granted under the charter were not misused or abused; *id.* The courts will not presume that the power of repeal has been improperly exercised; 5 Thomp. Corp. § 6579. Where the legislature reserves the unqualified right of repeal upon the happening of a certain condition, it is exclusively within its power to determine whether the condition has happened, and a previous judicial determination of that fact is not necessary; *id.*; Erie & N. E. R. Co. v. Casey, 26 Pa. 287; Crease v. Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61; Myrick v. Brawley, 33 Minn. 377, 23 N. W. 549. And so where there is a right of repeal in the legislature in case the corporation misuses its franchises; Erie & N. E. R. Co. v. Casey, 26 Pa. 287. Such misuse or abuse of corporate privileges consists in any positive act in violation of the charter and in derogation of public right, wilfully done or caused to be done by those appointed to manage the general concerns of the corporation; *id.* Where a franchise is granted with a provision that if not exercised in a specified time it shall be void, upon the expiration of the time without the performance of the condition, the charter falls without any action on the part of the state to declare its forfeiture; Com. v. Water Co., 110 Pa. 391, 2 Atl. 63; Elizabethtown Gas Light Co. v. Green, 46 N. J. Eq. 118, 18 Atl. 844; In re Brooklyn, W. & N. Ry. Co., 81 N. Y. 69. But other cases hold that the charter is not forfeited until action by the state either legislative or judicial; Hovelman v. R. Co., 79 Mo. 632; Davis v. Gray, 16 Wall. (U. S.) 203, 21 L. Ed. 447; Chicago City Ry. Co. v. People, 73 Ill. 541. The former view is strongly maintained in 5 Thomp. Corp. § 6586. If the charter or the statute under which it is granted names a definite period for the life of the corporation, the corporation is dissolved *ipso facto*, upon the expiration of that period without any action either on the part of the state or of the members of the corporation; People v. R. Co., 76 Cal. 190, 18 Pac. 308; Scanlan v. Crawshaw, 5 Mo. App. 337. "The incapacity to revive or resuscitate the powers of a corporation may arise from three causes: 1. The absence of the necessary officers who are required to be present when the deficiency is supplied, or their incapacity or neglect to do some act which is requisite to the validity of the appointment; 2. The want of the necessary corporators who are required to unite in the appointment; 3. The want of the proper persons from whom the appointment is to be made." 5 Thomp. Corp. § 6658.

Upon a dissolution, the assets of all kinds are a trust fund for the payment of debts, and afterwards for distribution among the stockholders; Lathrop v. Stedman, 13 Blatch. 134, Fed. Cas. No. 8,519; Blake v. R. Co., 39 N. H. 435; Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135, 3 L. R. A. (N. S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400; Late Corporation of Church of Jesus Christ of Latter-Day Saints v. U. S., 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 478; Temperance Mut. Ben. Ass'n v. Society, 187 Pa. 38, 40 Atl. 1100; 15 Harv. L. Rev. 743; 15 L. Q. Rev. 115.

The ancient rule of the common law was supposed to be that upon the termination of a corporation its real estate reverted to the grantor and its personalty to the sovereign; Titcomb v. Ins. Co., 79 Me. 315, 9 Atl. 732; Kent (13th ed.) 307. See Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135, 3 L. R. A. (N. S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400. This rule has long been obsolete, if it ever was the law, except as regards public or religious corporations; Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. U. S., 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 478. It has been repudiated in the United States as to business corporations; Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 3 L. R. A. (N. S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400; Baldwin v.

Johnson, 95 Tex. 85, 65 S. W. 171; Morawetz, Priv. Corp. § 1032; Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. U. S., 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 478; Bacon v. Robertson, 18 How. (U. S.) 480, 15 L. Ed. 499.

In England it is said there is no instance on record that the doctrine was ever applied by any English court; [1899] 1 Q. B. 325. But it is said that the doctrine that at dissolution the lands of a corporation revert to the donor was almost universally accepted in the English cases before 1800. Prof. Williston, in Business Corp. before 1800, 3 Sel. Essays, Anglo-Amer. Leg. Hist. 233.

As to a public or charitable corporation the ancient rule still prevails that upon dissolution its personal property, like that of a man dying without heirs, ceases to be the subject of private ownership and becomes subject to the disposal of the sovereign authority, while the real estate reverts to the grantor or donor unless it is otherwise provided by statute; Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. U. S., 136 U. S. 1, 47, 10 Sup. Ct. 792, 34 L. Ed. 478, where it was held that the property of the Mormon church became vested in the United States.

On the dissolution of a Louisiana corporation owning land in Texas, it was held that the stockholders became tenants in common of such land; Baldwin v. Johnson, 95 Tex. 85, 65 S. W. 171. The title to the land of an eleemosynary corporation reverts on its dissolution to the original owner without any act on his part; Mott v. Danville Seminary, 129 Ill. 403, 21 N. E. 927. But it is held that, upon the dissolution of a charitable corporation, the property must be appropriated by the court to the purposes most nearly akin to the intent of the donors; it does not revert to the donors; Centennial & Memorial Ass'n of Valley Forge, 235 Pa. 206, 83 Atl. 683.

Actions at law brought against a private corporation abate upon its dissolution; Life Ass'n v. Goode, 71 Tex. 90, 8 S. W. 639; *contra*, Greenbrier Lumber Co. v. Ward, 30 W. Va. 43, 3 S. E. 227; Breene v. Bank, 11 Colo. 97, 17 Pac. 280. Dissolution puts an end to all existing contracts. It works a breach of the contract; Green's Brice, *Ultra Vires* 803. See State Bank v. State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 239; Schleider v. Dielman, 44 La. Ann. 462, 10 South. 934.

Since the dissolution of a corporation, either by its own limitation or by the decree of a court of competent jurisdiction, puts an end to its legal existence, it can thereafter neither prosecute nor defend an action. Accordingly, in the absence of statutory reservations (which, however, generally exist), upon the dissolution of a corporation all actions pending against it abate; Mumma v. Potomac Co., 8 Pet. (U. S.) 281, 8 L. Ed. 945; First Nat. Bank v. Colby, 21 Wall. (U. S.) 609, 22 L. Ed. 687; City Ins. Co. v. Bank, 68 Ill. 348; Merrill v. Bank, 31 Me. 57, 50 Am. Dec. 649; Thornton v. R. Co., 123 Mass. 32; McCulloch v. Norwood, 58 N. Y. 562; Life Ass'n v. Goode, 71 Tex. 90, 8 S. W. 639; and if the suit has been commenced by attachment, the dissolution will destroy the attachment lien; Wilcox v. Ins. Co., 56 Conn. 468, 16 Atl. 244; Farmers' & Mechanics' Bank v. Little, 8 W. & S. (Pa.) 207, 42 Am. Dec. 293; unless ripened into a judgment at the time of the dissolution, and this, whether the attachment is original or is sued out in aid of a pending action.

Under the statutes providing for the keeping alive of actions which would otherwise abate on the dissolution of a corporation, it is not quite settled whether the same principles apply as those which apply to the survival of actions on the death of a natural person; but the weight of authority is in favor of the affirmative; Hepworth v. Ferry Co., 62 Hun 257, 16 N. Y. Supp. 692; Milwaukee Mut. Fire Ins. Co. v. Sentinel Co., 81 Wis. 207, 51 N. W. 440, 15 L. R. A. 627.

See FORFEITURE OF CHARTER; FRANCHISE.

In Practice. The act of rendering a legal proceeding null, or changing its character; as where an attachment is dissolved so far as it is a lien on property by entering bail or security to the action; or as injunctions are dissolved by the court.

DISSUADE. To dissuade a witness from giving evidence against a person indicted is an indictable offence at common law; Hawk. Pl. Cr. b. 1, c. 21, s. 15. The mere attempt to stifle evidence is also criminal although the persuasion should not succeed, on the general principle that an incitement to commit a crime is in itself criminal; 2 East 5, 21; 6 *id.* 454; 2 Stra. 904; 2 Leach 925.

DISTANCE. The rule is that the distance between given points should be measured in a straight line; 5 E. & B. 92; 6 *id.* 350; 8 L. R. Exch. 32. But in a rule of court as to service the distance has been taken by the usual road; Smith v. Ingraham, 7 Cow. (N. Y.) 119.

DISTILLERY. A place or building where alcoholic liquors are distilled or manufactured. See U. S. v. Tenbroek, Pet. C. C. 180, Fed. Cas. No. 16,446; Act July 13, 1866, 14 Stat. L. 117; Atlantic Dock Co. v. Libby, 45 N. Y. 499; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, 13 Am. Rep. 556.

DISTRACTED PERSON. A term used in the statutes of Illinois, Rev. Laws 1833, p. 332, and New Hampshire, Dig. Laws 1830, p. 339, to express a state of insanity.

DISTRACTIO. In Civil Law. The sale of a pledge by a debtor. The appropriation of the property of a ward by a guardian. Calvinus, Lex.

DISTRAHERE. To withdraw; to sell. *Distrahere controversias*, to diminish and settle quarrels; *distrahere matrimoniam*, to dissolve marriage; to divorce. Calvinus, Lex.

DISTRAIN. To take as a pledge property of another, and keep the same until he performs his obligation or until the property is replevied by the sheriff. It was used to secure an appearance in court, payment of rent, performance of services, etc. 3 Bla. Com. 231; Fitzh. N. B. 32 (B) (C), 223; Boyd v. Howden, 3 Daly (N. Y.) 455. See DISTRESS.

DISTRESS (Fr. *distraindre*, to draw away from; Lat. *districtio*). The taking of a personal chattel out of the possession of a wrong-doer into the custody of the party injured, to procure satisfaction for the wrong done. 3 Bla. Com. 6; Hard v. Nearing, 44 Barb. (N. Y.) 488. It is generally resorted to for the purpose of enforcing the payment of rent, taxes, or other duties, as well as to exact compensation for such damages as result from the trespasses of cattle. Correctly speaking, one distrains a man by *(per)* a thing. 2 Poll. & Maitl. 576.

This remedy is of great antiquity, and is said by Spelman to have prevailed among the Gothic nations of Europe from the breaking up of the Roman Empire. But in a recent work the opinion is expressed that distress before judicial proceedings had been taken is not very old 1 Poll. & Maitl Hist. Engl Law 334. Distress was not a means whereby the distrainor could satisfy the debt due him; *ibid.* After distress the lord might not sell the goods; they were not in his possession, but were *in custodia legis*, and he must be ready to give them up if the tenant tendered arrears or offered gage and pledge that he would contest the claim in a court of law The lord could not take what he liked best among the chattels that he found; 2 *id.* 574. The English statutes since the days of Magna Charta have, from time to time, extended and modified its features to meet the exigencies of the times. Our state legislatures have generally, and with some alterations, adopted the English provisions, recognizing the old remedy as a salutary and necessary one, equally conducive to the security of the landlord and to the welfare of society. As a means of collecting rent, however, it has become unpopular in some states as giving an undue advantage to landlords over other creditors in the collection of debts. See Woglam v Cowperthwaite, 2 Dall. (U. S.) 68, 1 L. Ed. 292, Hartshorne v Kierman, 7 N. J. L. 29; Garrett v. Hughlett, 1 Harr. & J (Md) 3; Charleston v Price, 1 McCord (S. C) 299; Owens v. Conner, 1 Bibb (Ky) 607; Mayo v. Winfree, 2 Leigh (Va) 370; Burket v. Boude, 3 Dana (Ky.) 209.

In the New England states the law of attachment on *mesne process* has superseded the law of distress; Potter v. Hall, 3 Pick. (Mass) 368, 15 Am Dec. 226; 4 Dane, Abr. 126 New York has expressly abolished it by statute. Acts of 1846, ch. 274. This statute was held constitutional and valid as against a lease of prior date which provided for the remedy; Van Rensselaer v. Snyder, 13 N. Y 299; Conkey v. Hart, 14 N. Y. 22, it being held a mere change of remedy; but such a statute would not apply when the goods had been seized; Dutcher v. Culver, 24 Minn. 584. The courts of North Carolina hold it to be inconsistent with the spirit of her laws and government, and declare that the common process of distress does not exist in that state; Youngblood v. Lowry, 2 McCord (S. C) 39, 13 Am. Dec. 698; Dalgleish v. Grandy, 1 N. C. 249; to the same effect are the laws of Missouri; Crocker v. Mann, 3 Mo. 472, 26 Am. Dec. 684. In Ohio, Tennessee, and Alabama there are no statutory provisions on the subject, except in the former state to secure to the landlord a share of the crops in preference to an execution creditor, and one in the latter, confining the remedy to the city of Mobile; McLeod v. McDonnel, 6 Ala. 239. Mississippi has abolished it by statute; but property cannot be taken in execution on the premises unless a year's rent, if it be due, is first tendered to the landlord, who has also a lien on the growing crop; Arbuckle v. Nelms, 50 Miss. 556; to the same effect are the statutes of Wisconsin; Wis. Laws 1866, p. 77. In Colorado a landlord cannot distrain unless in pursuance of an express agreement; Herr v. Johnson, 11 Colo. 393, 18 Pac. 342.

To authorize a distress there must be a fixed rent in money, produce or services; it may be by parol and, if not certain, it must be capable of being reduced to a certainty; Co. Litt. 96 *a*; Miles v. Stevens, 3 Pa. 31, 45 Am. Dec. 621; Jacks v. Smith, 1 Bay (S. C.) 315; and hence it will not lie on an agreement to pay no rent, but make repairs of uncertain value; Grier v. Cowan, Add. (Pa.) 347; a distress for a rent of a certain quantity of grain, may name the value in case of tender of arrears or sale of the property; Warren v. Forney, 13 S. & R. (Pa.) 52. See Jones v. Gundrim, 3 W. & S. (Pa.) 531.

A distress can only be taken for rent in arrear, and not until the day after it is due (which may be in advance); Russell v. Doty, 4 Cow. (N. Y.) 576; Williams v. Howard, 3 Munf. (Va.) 277; First Nat. Bank of Joliet v. Adam, 138 Ill. 483, 28 N. E. 955. But no previous demand is necessary, except where the lease requires it; Almand v. Scott, 83 Ga. 402, 11 S. E. 653. Nor will the right be extinguished either by an unsatisfied judgment for the rent or by taking a promissory note therefor, unless such note has been accepted in absolute payment of the rent; Bates v. Nellis, 5 Hill (N. Y.) 651.

It may be taken for any kind of rent, the detention of which beyond the day of payment is injurious to him who is entitled to receive it.

At common law, the distrainer must have possessed a reversionary interest in the premises out of which the distress issued, unless he had expressly reserved a power to distrain when he parted with the reversion; Cornell v. Lamb, 2 Cow. (N. Y.) 652; 1 Term 441; Co. Litt. 143 *b* But the English statute of 4 Geo II. c. 28, substantially abolished all distinctions between rents, and gave the remedy in all cases where rent is reserved upon a lease. The effect of the statute was to separate the right of distress from the reversion to which it had before been incident, and to place every species of rent upon the same footing as if the power of distress had been expressly reserved in each case.

A distress may be made by each one of several joint tenants for the whole rent or they may all join together; 4 Bingh. 562; 2 Ball & B. 465; by tenants in common, each for his separate share; 1 McCl. & Y. 107; Cro. Jac. 611; unless the rent be entire, as of a house, in which case they must all join; Co. Litt. 197 *a*; 5 Term 246; a husband as

tenant by the curtesy for rent due to his wife, although due to her as executrix or administratrix; 2 Saund. 195; a widow after dower has been admeasured for her third of the rent; Co. Litt. 32 *a*; an heir at law, or devisee, for that which becomes due to them respectively, after the death of the ancestor, in respect to their reversionary estate; Wright v. Williams, 5 Cow. (N. Y.) 501; 1 Saund. 287; and guardians, trustees, or agents who make leases in their own names, as well as the assignee of the reversion which is subject to a lease; Slocum v. Clark, 2 Hill (N. Y.) 475; 5 C. & P. 379. Payment of rent is sufficient attornment to enable the party to whom the payment is made to make a distress; Walker v. McDonald, 28 Ill. App. 643.

Generally all goods found upon the premises, whether of tenant, under-tenant, or stranger, may be distrained for rent in arrear; Spencer v. McGowen, 13 Wend. (N. Y.) 256; Kessler v. McConachy, 1 Rawle (Pa.) 435; Howard v. Ransay, 7 H. & J. (Md.) 120; Davis v. Payne's Adm'r, 4 Rand. (Va.) 334; Reeves v. McKenzie, 1 Bail. (S. C.) 497; Com. Dig. *Distress* (B 1). Thus, a gentleman's chariot in a coach-house of a livery-stable keeper was distrainable by the landlord of the livery-stable keeper; 3 Burr. 1498; cattle put on the tenant's land by consent of the owners of the beasts, are distrainable by the landlord immediately after for rent in arrear; 3 Bla. Com. 8; and furniture leased to a tenant, and used by him on the demised premises, is subject to the landlord's right of distress for rent; Myers v. Esery, 134 Pa. 177, 19 Atl. 488. The necessity of this rule is justified by the consideration that the rights of the landlord would be liable to be defeated by a great variety of frauds and collusions, if his remedy should be restricted to such goods only as he could prove to be the property of the tenant.

Goods of a person who has some interest in the land jointly with the distrainor, as those of a joint tenant, although found upon the land, cannot be distrained; nor goods of executors and administrators, or of the assignee of an insolvent regularly discharged according to law, in Pennsylvania, for more than one year's rent. Nor can the goods of a former tenant, rightfully on the land, be distrained for another's rent, as emblements, or growing crops of a tenant at will quitting on notice, even after they are reaped, if they remain on the land for the purpose of husbandry; Willes 131; or in the hands of a vendee they cannot be distrained although the purchaser allow them to remain uncut after they have come to maturity; 2 Ball & B. 362; 5 J. B. Moo. 97. If a tenant seek to remove from the premises any portion of the crops before the rent is due, he is subject to distraint immediately; Daniel v. Harris, 84 Ga. 479, 10 S. E. 1013.

As a distress is only of the property of the tenant, things wherein he can have no absolute property, as cats, dogs, rabbits, and animals *ferœ naturæ*, cannot be distrained; yet deer, which are of a wild nature, kept in a private enclosure for sale or profit, may be distrained for rent; 3 Bla. Com. 7. There can be no distress of such things as cannot be restored to the owner in the same plight as when taken, as milk, fruit, and the like; 3 Bla. Com. 9; or things affixed or annexed to the freehold, as furnaces, windows, doors, and the like; Co. Litt 47 *b*; or essentially part of the freehold although for a time removed therefrom, as a millstone removed to be picked; or an anvil fixed in a smith's shop; 6 Price 3; 1 Q. B. 895; 3 *id.* 961.

Goods are also privileged in cases where the proprietor is either compelled from *necessity* to place his goods upon the land, or where he does so for *commercial* purposes; Brown v. Sims, 17 S. & R. (Pa.) 139; Hoskins v. Paul, 9 N. J. L. 110, 17 Am. Dec. 455; Himely v. Wyatt, 1 Bay (S. C.) 102; Phaelon v. McBride, 1 Bay (S. C.) 170; Youngblood v. Lowry, 2 McCord (S. C.) 39, 13 Am. Dec. 698; 3 Ball & B. 75; 6 J. B. Moo. 243; 2 C. & P. 353. In the first case, the goods are exempt because the owner has no option: as goods of a traveller in an inn; 7 Hen. VII. M. 1, p. 1; 1 W. Bla. 483; 3 Burr. 1408. In the other, the interests of the community require that commerce should be encouraged; and adventurers will not engage in speculations if the property embarked is to be made liable for the payment of debts they never contracted. Hence goods landed at a wharf, or deposited in a warehouse on storage; Brown v. Sims, 17 S. & R. (Pa.) 138; Richardson v. Merrill, 21 Me. 47; Connah v. Hale, 23 Wend. (N. Y.) 462; goods of a third person consigned to an agent to be sold on commission (and if the landlord knows that the goods are so owned and has them sold under distress, he is liable to the owner in trespass; Brown v. Stackhouse, 155 Pa. 582, 26 Atl. 669, 35 Am. St. Rep. 908); a horse standing in a smith's shop to be shod, or in a common inn, or cloth at a tailor's house to be made into a coat, or corn sent to a mill to be ground; 3 Bla. Com. 8; cannot be distrained; neither can goods of a boarder, for rent due by the keeper of a boarding-house; Riddle v. Welden, 5 Whart. (Pa.) 9; unless used by the tenant with the boarder's consent and without that of the landlord; Matthews v. Stone, 1 Hill (N. Y.) 565.

In this country whether the tenant conducts a regular trade or business seems to have been considered immaterial with respect to exemption of things on the premises in the way of trade; Howe Sewing Mach. Co. v. Sloan, 87 Pa. 438, 30 Am. Rep. 376; McCreery v. Clafflin, 37 Md. 435, 11 Am. Rep. 542. See list of exemptions allowed under this rule; 2 Tiffany, Landl. & Ten. 2007.

At common law, goods delivered to a common carrier, or other person, to be conveyed for hire, or goods on the premises of an auctioneer, for the purpose of sale are privileged; 1 Cr. & M. 380.

Goods taken in execution cannot be distrained. The law in some states gives the landlord the right to claim payment out of the proceeds of an execution for rent not exceeding one year, and he is entitled to payment up to the day of seizure, though it be in the middle of a quarter; Binns v. Hudson, 5 Binn. (Pa.) 505; but he is not entitled to the day of sale. See Trappan v. Morie, 18 Johns. (N. Y.) 1. The usual practice is to give notice to the sheriff that there is a certain sum due to the landlord as arrears of rent,—which notice ought to be given to the sheriff, or person who takes the goods in execution upon the premises; for the sheriff is not bound to find out whether rent is due, nor is he liable to an action unless there has been a demand of rent before the removal; Com. Dig. *Rent* (D 8); Alexander v. Mahon, 11 Johns. (N. Y.) 185. This notice can be given by the immediate landlord only. A ground-landlord is not entitled to his rent out of the goods of the under-tenant taken in execution; 2 Stra. 787. And where there are two executions, the landlord is not entitled to a year's rent on each. See 2 Stra. 1024. Goods distrained and replevied may be distrained by another landlord for subsequent rent; Woglam v. Cowperthwaite, 2 Dall. (U. S.) 68, 1 L. Ed. 292. Where a tenant makes an assignment in the usual form, for the benefit of creditors, the assigned property is no longer his in his own right, and it cannot be seized under a distress warrant for rent; Ex parte Knobelbloch, 26 S. C. 333, 2 S. E. 612; Bischoff v. Trenholm, 36 S. C. 75, 15 S. E. 346.

By statute in some states tools of a man's trade, some designated household furniture, school-books, and the like, are exempted from distress, execution, or sale. In Pennsylvania, property to the value of $300, exclusive of all wearing apparel of the defendant and his family, and all Bibles and school-books in use in the family, are exempted from distress for rent. Also sewing-machines in private families.

There are also goods conditionally privileged, as beasts of the plough, which are exempt if there be a sufficient distress besides on the land whence the rent issues; Co Litt. 47 *a*; implements of trade, as a loom in actual use, where there is a sufficient distress besides; 4 Term 565; other things in actual use, as a horse whereon a person is riding, an axe in the hands of a person cutting wood, and the like; Co. Litt. 47 *a*.

The leading case upon exemptions from distress, Simpson v. Hartopp, Willes 512, 1 Sm. L. Cas. (9th Am. ed.) 721, has been the subject of critical review in England after the lapse of 150 years with respect to a curious application of one of its exceptions to the rule subjecting to distress all property on the premises, including that of third persons. The exception declared by Willes, J., of "things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ," was the subject of construction in [1908] 1 Ch. 49, where pictures sent to an art club for exhibition were held not to be within it, because the owner could not show that the pictures were delivered to the club "for the purposes of trade, his trade being a public trade." In this judgment, Neville, J., says that it seems extraordinary that in the year 1907 "it should be possible in a country which boasts of civilization, which purports to protect the property of the law-abiding citizen, to raise such question. But so it is. The rule that the landlord is entitled to distrain on the property of third persons upon the premises, subject to certain exceptions, has up to the present day escaped the zeal of the legal reformer and therefore I have to deal with the law as I find it." He then proceeds to find "it impossible," as is remarked by an annotator, "to extend an irrational exception, formulated towards the middle of the eighteenth century, from a still less reasonable rule which has been a part of the law of landlord and tenant ever since leasehold interests have been known to the law;" 24 L. Q. Rev. 49 The Court of Appeal affirmed the decision, but on the ground that the exception was laid down by Willes, J., in 1744 "with great accuracy" and must be adhered to as a definition, and the word "managed" used by him was equivalent to "disposed of," which would not apply to the case. Thus, though reaching the same result, they differed from Neville, J., who put the case on the ground that "public trade" meant that which was open to all buyers and not to those only of the club.

At common law a distress could not be made after the expiration of the lease. This evil was corrected by statute in Pennsylvania in 1772. Similar legislative enactments exist in most of the other states. In Philadelphia, the landlord may, under certain circumstances, apportion his rent, and distrain before it becomes due.

A distress may be made either upon or off the land. It generally follows the rent, and is, consequently, confined to the land out of which it issues; Woodf. Landl. & T. 456. If two pieces of land, therefore, are let by two separate demises, although both be contained in one lease, a joint distress cannot be made for them; for this would be to make the rent of one issue out of the other; Rep. t. Hardw. 245; 2 Stra. 1040. But where lands lying in different counties are let together by one demise at one entire rent, and it does not appear that the lands are separate from each other, one distress may be

made for the whole rent; 1 Ld. Raym. 55; 12 Mod. 76. And where rent is charged upon land which is afterwards held by several tenants, the grantee or landlord may distrain for the whole upon the land of any of them; because the whole rent is deemed to issue out of every part of the land; Rolle, Abr. 671. If there be a house on the land, the distress may be made in the house. If the outer door or window be open, a distress may be taken out of it; Rolle, Abr. 671. If an outer door be open, an inner door may be broken for the purpose of taking a distress, but not otherwise; Cas. t. Hard. 168. In levying a distress for rent entrance was obtained into the courtyard through a gate, and being there, the bailiff broke open the main door of the warehouse and distrained therein; the court held the distress illegal, for the reason that the door that was broken was the outer door; 68 Law T. 742. A distress was held lawful where a party climbed over the wall surrounding the yard of a house and entered the house by an open window; [1894] 1 Q. B. 119. Barges on a river, attached to the leased premises (a wharf) by ropes, cannot be distrained; 6 Bingh. 150.

By an act of 1772 in Pennsylvania copied from the act of 11 Geo. II. c. 19, where a tenant fraudulently removes his goods from the premises to prevent a distress, the landlord may distrain on them within 30 days after removal, but not on goods previously sold *bona fide* and for a valuable consideration to one not privy to the fraud. To bring a case within the act, the removal must take place *after* the rent becomes due, and must be *secret*, not made in open day; for such removal cannot be said to be clandestine within the meaning of the act; Grace v. Shively, 12 S. & R. (Pa.) 217; 7 Bingh. 423; 1 Mood. & M. 535. This English statute has been re-enacted in many of the states, but the period during which the goods may be followed varies in different states. In Louisiana the landlord may follow goods removed from his premises for fifteen days after removal, provided they continue to be the property of the tenant; La. Civ. Code 2675; Tayl. Landl. & T. § 538. It has been made a question whether goods are protected that were fraudulently removed on the night before the rent had become due; 4 Campb. 135. The goods of a stranger cannot be pursued; they can be distrained only while they are on the premises; Adams v. La Comb. 1 Dall. (U. S.) 440, 1 L. Ed. 214.

A distress for rent may be made either by the person to whom it is due, or, which is the preferable mode, by a constable or bailiff, or other officer properly authorized by him. If made by a constable or bailiff, he must be properly authorized to make it; for which purpose the landlord should give him a written authority, usually called a warrant of distress; but a subsequent assent and recognition given by the party for whose use the distress has been made is sufficient; Hamm. N. P. 382.

Being thus provided with the requisite authority to make a distress, he seizes the tenant's goods, or some of them in the name of the whole, and declares that he takes them as a distress for the sum expressed in the warrant to be due by the tenant to the landlord, and that he takes them by virtue of the said warrant; which warrant he ought, if required, to show; 1 Leon. 50. When making the distress, it ought to be made for the whole rent; but if goods cannot be found at the time sufficient to satisfy the whole, or the party mistake the value of the thing distrained, he may make a second distress, Bradb. Distr. 129, 130. It must be taken in the daytime after sunrise and before sunset; except for damage feasant, which may be in the night; Co. Litt. 142 *a*.

As soon as a distress is made, an inventory of the goods should be made, and a copy of it delivered to the tenant, together with a notice of taking such distress, with the cause of taking it, and an opportunity thus afforded the owner to replevy or redeem the goods. This notice of taking a distress is not required by the statute to be in writing; and, therefore, parol or verbal notice may be given either to the tenant on the premises, or to the owner of the goods distrained; 12 Mod. 76. And although notice is directed by the act to specify the cause of taking, it is not material whether it accurately state the period of the rent's becoming due; Dougl. 279; or even whether the true cause of taking the goods be expressed therein; 7 Term 654. If the notice be not personally given, it should be left in writing at the tenant's house, or, according to the directions of the act, at the mansion-house, or other most notorious place on the premises charged with the rent distrained for.

The distrainor may leave or impound the distress on the premises for the five days mentioned in the act, but becomes a trespasser after that time; Woglam v. Cowperthwaite, 2 Dall. (U. S.) 69, 1 L. Ed. 292. As in many cases it is desirable, for the sake of the tenant, that the goods should not be sold as soon as the law permits, it is usual for him to sign an agreement or consent to their remaining on the premises for a longer time, in the custody of the distrainor, or of a person by him appointed for that purpose. While in his possession, the distrainor cannot use or work cattle distrained, unless it be for the owner's benefit, as to milk a cow, or the like; 5 Dane, Abr. 34. Goods distrained for rent may be replevied by a claimant thereof before sale; Lardner v. Ins. Co., 32 W. N. C. (Pa.) 62.

Before the goods are sold, they must be appraised by two reputable freeholders, who shall take an oath or affirmation, to be ad-

ministered by the sheriff, under-sheriff, or coroner, in the words mentioned in the act. The next requisite is to give public notice of the time and place of sale of the things distrained; see Whitton v. Milligan, 153 Pa. 376, 26 Atl 22; after which, if they have not been replevied, they may be sold by the proper officer, who may apply the proceeds to the payment and satisfaction of the rent, and the expenses of the distress, appraisement, and sale; Woodf. Landl. & T. 1322. The overplus, if any, is to be paid to the tenant. A distrainor has always been held strictly accountable for any irregularity he might commit, although accidental, as well as for the taking of anything more than was reasonably required to satisfy the demand; Bradb. Dist.; Gilbert, Rent.

At common law a landlord who had distrained could not sell the goods; Davis v. Davis, 128 Pa. 108, 18 Atl. 514.

DISTRESS INFINITE. In English Practice. A process commanding the sheriff to distrain a person from time to time, and continually afterwards, by taking his goods by way of pledge to enforce the performance of something due from the party distrained upon. In this case no distress can be immoderate, because, whatever its value may be, it cannot be sold, but is to be immediately restored on satisfaction being made; 3 Bla. Com. 231. It was the means anciently resorted to to compel an appearance. See ATTACHMENT; ARREST.

DISTRIBUTEES. The persons who are entitled under the statute of distribution to the personal estate of one who has died intestate Henry v. Henry, 31 N. C. 279.

DISTRIBUTION. See EXECUTORS AND ADMINISTRATORS.

DISTRICT. A certain portion of the country, separated from the rest for some special purpose.

The United States is divided into judicial districts, in each of which is established a district court; they are also divided into election districts, collection districts, etc.

It may be construed to mean territory; Com. v. Dumbauld, 97 Pa. 305; and in the revenue laws the words "district" and "port" are often used in the same sense; Ayer v. Thacher, 3 Mas. 155, Fed. Cas. No. 684.

DISTRICT ATTORNEY. District attorneys of the United States are appointed for a term of four years in each judicial district, whose duty it is to prosecute, in such district, all delinquents, for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except in the supreme court, in the district in which the court shall be holden. R. S. § 767. He must appear upon the record for the United States as plaintiff, in order that the United States should be recognized as such on the record; U. S. v. Doughty, 7 Blatch. 424, Fed. Cas. No. 14,986; U. S. v. Blaisdell, 3 Ben. 132, Fed. Cas. No. 14,608; U. S. v. McAvoy, 4 Blatch. 418, Fed. Cas. No. 15,654. They are under the direction of the attorney-general and must report to him.

The officer who represents the state in criminal proceedings within a particular county is also, in some of the states, called district attorney. As a prosecuting attorney he is a *quasi* judicial officer and stands indifferent between the accused and any private interest; People v. Bemis, 51 Mich. 422, 16 N. W. 794.

See PROSECUTION; PROSECUTOR.

DISTRICT COURTS. See UNITED STATES COURTS.

DISTRICT MESSENGER SERVICE. The service is not that of a common carrier, but the furnishing of messengers to be used by the employer in any way in which they could be properly employed, in the course of which the messenger becomes for the time the servant of the employer and the company is not liable for his dishonesty in the ordinary course of his employment unless there was failure to use proper care in his selection; Haskell v. Messenger Co., 190 Mass. 189, 76 N. E. 215, 2 L. R. A. (N. S.) 1091, 112 Am. St. Rep. 324, 5 Ann. Cas. 796.

DISTRICT OF COLUMBIA. A portion of the country, originally ten miles square, which was ceded to the United States by the states of Virginia and Maryland, over which the national government has exclusive jurisdiction.

Under the constitution, congress is authorized to "exercise exclusive jurisdiction in all cases whatsoever, over such district, not exceeding ten miles square, as may, by cession of particular states and the acceptance of congress, become the seat of government of the United States." In pursuance of this authority, the states of Maryland and Virginia ceded to the United States a small territory on the banks of the Potomac, and congress, by the act of July 16, 1790, accepted the same, for the permanent seat of the government of the United States

By the act of July 11, 1846, congress ceded back the county of Alexandria, part of the District of Columbia, to the state of Virginia.

The seat of government was removed from Philadelphia to the District in December, 1800 As it exists at present, it constitutes but one county, called the county of Washington

By act of Congress of Feb. 21, 1871, a territorial government was created for the District; 16 Stat. L 419, which was not a mere municipality in its restricted sense, but was held to be placed upon the same footing with that of the states or territories within the limits of the act; Grant v. Cooke, 7 D. C. 165 This government was, however, abolished by act of June 20, 1874, and a temporary government by commissioners was thereby created, which existed until by act of June 11, 1878, provision was made for the continuance of the District "as a municipal corporation" and its control by the federal government through these commissioners, two of whom are appointed by the president and confirmed by the senate, and the other is an engineer officer of the army to be detailed for that service by the president. It is a municipal corporation having a right to sue and be sued, and is subject to the ordinary rules that govern the law of procedure between pri-

vate persons. The sovereign power is lodged in the government of the United States, and not in the corporation of the District; Metropolitan R. Co. v. District of Columbia, 132 U. S. 1, 10 Sup. Ct. 19, 33 L. Ed. 231. Congress is its local legislature; Gibbons v. District of Columbia, 116 U. S. 404, 6 Sup. Ct. 427, 29 L. Ed. 680; and exercises over it full and entire jurisdiction both of a political and municipal nature; Shoemaker v. U. S., 147 U. S. 282, 300, 13 Sup Ct. 361, 37 L. Ed 170; Parsons v. District of Columbia, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943; and it may legislate with respect to people and property therein as may the legislature of a state over any of its municipalities, Mattingly v. District of Columbia, 97 U S. 687, 690, 24 L Ed. 1098

The District differs from a territory in that the latter is the fountain from which rights ordinarily flow, though congress may intervene, while in the former the body of private rights is created and controlled by congress and not by a legislature of the District; Kawananakoa v. Polyblank, 205 U. S. 349, 354, 27 Sup. Ct. 526, 51 L. Ed. 834.

The District of Columbia and the territorial districts of the United States are not states within the meaning of the constitution and of the Judiciary Act, so as to enable a citizen thereof to sue a citizen of one of the states in the federal courts; Hepburn v. Ellzey, 2 Cra. (U S.) 445, 2 L Ed 332, New Orleans v. Winter, 1 Wheat (U. S) 91, 4 L Ed 41, Seton v. Hanham, R. M T. Charlt. (Ga.) 371 Kent says: "However extraordinary it might seem to be, that the courts of the United States, which were open to aliens, and to the citizens of every state, should be closed upon the inhabitants of those districts (territories and the District of Columbia), on the construction that they were not citizens of a state, yet as the court observed, this was a subject for legislative, and not for judicial consideration" 1 Com. 319. It might be suggested as a consideration not here adverted to, that the theory on which this right of suing in federal courts is based is possible prejudice to the rights of a citizen of another state or an alien in the state court. In the District of Columbia and territories this would not apply, as their courts are created by the federal government

For the judiciary, see UNITED STATES COURTS

DISTRICTIO. A distraint, or distress. Cowell.

DISTRINGAS. A writ directed to the sheriff, commanding him to distrain a person of his goods and chattels to enforce a compliance with what is required of him.

It is used to compel an appearance where the party cannot be found, and in equity may be availed of to compel the appearance of a corporation aggregate. 4 Bouvier, Inst. n 4191; Comyns, Dig *Process* (D 7); Chitty, Pr.; Sellon, Pr

A form of execution in the actions of detinue and assize of nuisance. Brooke, Abr. pl. 26; Barnet v. Ihrie, 1 Rawle (Pa.) 44.

DISTRINGAS JURATORES (Lat. that you distrain jurors). A writ commanding the sheriff to have the bodies of the jurors, or to *distrain* them by their lands and goods, that they may appear upon the day appointed. 3 Bla. Com. 354. It issues at the same time with the *venire*, though in theory afterwards, founded on the supposed neglect of the juror to attend. 3 Steph. Com. 590.

DISTRINGAS NUPER VICE COMITEM (Lat. that you distrain the late sheriff). A writ to distrain the goods of a sheriff who is out of office, to compel him to bring in the body of a defendant, or to sell goods attached under a *fi. fa.*, which he ought to have done while in office, but has failed to do. 1 Tidd, Pr. 313.

It can only issue after a return of seizure of goods to the value, etc.; Kline v. Church, 16 Pa. Dist. R. 559, where the practice was considered, although the writ has long fallen into disuse, and cases in 6 Mod. 295, and Zane v. Cowperthwaite, 1 Dall. (U. S.) 312, 1 L. Ed. 152, were cited.

DISTURBANCE. A wrong done to an incorporeal hereditament by hindering or disquieting the owner in the enjoyment of it. 3 Bla Com. 235; Downing v. Baldwin, 1 S. & R. (Pa.) 298; Files v. Magoon, 41 Me. 104. The remedy for a disturbance is an action on the case, or, in some instances in equity, by an injunction.

DISTURBANCE OF COMMON. Any act done by which the right of another to his common is incommoded or hindered. The remedy is by distress (where beasts are put on his common) or by an action on the case, provided the damages are large enough to admit of his laying an action with a *per quod*. Cro. Jac. 195; Co Litt. 122; 3 Bla. Com. 237; 1 Saund. 346; 4 Term 71.

DISTURBANCE OF FRANCHISE. Any acts done whereby the owner of a franchise has his property damnified or the profits arising thence diminished. The remedy for such disturbance is a special action on the case; Cro Eliz. 558; 2 Saund. 113 *b*; 3 Sharsw. Bla. Com. 236; Bassett v. Mfg. Co., 28 N. H. 438.

Equity will grant an injunction against disturbance of a franchise in certain cases; Mohawk Bridge Co. v R. Co., 6 Paige Ch. (N. Y.) 554; Georgetown v. Canal Co., 12 Pet. (U. S.) 91, 9 L. Ed. 1012; President, etc., of Delaware & M. R. Co. v. Stump, 8 G. & J. (Md.) 479, 29 Am. Dec. 561.

DISTURBANCE OF PATRONAGE. The hindrance or obstruction of the patron to present his clerk to a benefice. 3 Bla. Com. 242. The principal remedy was a writ of right of advowson; and there were also writs of *darrein presentment* and of *quare impedit*. Co. 2d Inst. 355; Fitzh. N. B. 31.

DISTURBANCE OF PUBLIC WORSHIP. The interference with the good order of religious assemblies has been described as disturbance, and in some of the states statutes have been passed to meet the offence; State v. Oskins, 28 Ind. 364; Wall v. Lee, 34 N. Y. 141; Cockreham v. State, 7 Humph. (Tenn.) 11; Owen v. Henman, 1 W. & S. (Pa.) 548, 37 Am. Dec. 481; Taffe v. State, 90 Ga. 459, 16 S. E. 204; State v. Karnes, 51 Mo. App. 293; Williams v. State, 83 Ala. 68, 3 South. 743; Ball v. State, 67 Miss. 358, 7 South. 353.

It is not necessary to constitute the offence that the congregation shall be actually

engaged in acts of religious worship at the time of the disturbance, but it is sufficient if they are assembled for the purpose of worship; State v. Ramsay, 78 N. C. 448; State v. Lusk, 68 Ind 264.

To support a conviction for disturbing public worship, the evidence must show a wilful disturbance; Prucell v. State, (Tex.) 19 S. W. 605; Richardson v. State, 5 Tex. App. 470; Lancaster v. State, 53 Ala. 398, 25 Am. Rep. 625; State v. Lusk, 68 Ind. 264; State v. Bryson, 82 N. C. 576

A Christmas festival is not a religious assembly; Layne v. State, 4 Lea (Tenn.) 199; nor is a church business meeting; Wood v. State, 11 Tex. App. 318. A Sunday school is not divine service; Appeal of Gass, 73 Pa. 39, 13 Am. Rep. 726.

DISTURBANCE OF TENURE. Breaking the connection which subsists between lord and tenant. 3 Bla. Com. 242; 2 Steph. Com. 513.

DISTURBANCE OF WAYS. This happens where a person who hath a right of way over another's ground by grant or prescription is obstructed by enclosures or other obstacles, or by ploughing across it, by which means he cannot enjoy his right of way, or at least in so commodious a manner as he might have done; 3 Bla. Com. 242; Pope v. Devereaux, 5 Gray (Mass.) 409; McTavish v. Carroll, 7 Md. 352, 61 Am. Dec. 353; Shroder v. Brenneman, 23 Pa. 348; Okeson v. Patterson, 29 Pa. 22.

DITCH. The words "ditch" and "drain" have no technical or exact meaning. They both may mean a hollow place in the ground, natural or artificial, where water is collected or passes off. Goldthwait v. Inhabitants of East Bridgewater, 5 Gray (Mass) 64. See EASEMENT; DRAIN.

DIVERSION. A turning aside or altering the natural course of a thing. The term is chiefly applied to the unauthorized changing the course of a water-course to the prejudice of a lower proprietor. Rap. & Lawr. L. Dict. See Parker v. Griswold, 17 Conn. 299, 42 Am. Dec. 739; 6 Price 1.

One who has a natural gas well on his place may explode nitroglycerine therein for the purpose of increasing the flow, though it has the effect of drawing the gas from the land of another; Greenfield Gas. Co. v. Gas Co., 131 Ind. 599, 31 N. E. 61.

The owner of land through which flows a stream of water, may recover damages from one who diverts the water, for any actual injury suffered therefrom in the enjoyment of his land; Clark v. R. Co., 145 Pa. 438, 22 Atl. 989, 27 Am. St. Rep. 710; Case v. Hoffman, 84 Wis. 438, 54 N. W. 793, 20 L. R. A. 40, 36 Am. St. Rep. 937. The fact that one diverts water maliciously is of no importance in determining whether a legal right of plaintiff has been violated; Paine v. Chandler, 134 N. Y. 385, 32 N. E. 18, 19 L. R. A. 99. See RIPARIAN PROPRIETORS; WATER-COURSE; GAS; OIL.

DIVERSITY OF PERSON. The plea of a prisoner in bar of execution that he is not the person convicted. 4 Steph. Com. 368; Moz. & W. Law Dict.

DIVERSO INTUITU. From a different view or point of view; with a different view, design, or purpose; by a different course or process. 1 W. Bla. 89; 9 East 311; D'Wolf v. Rabaud, 1 Pet. (U. S.) 500, 7 L. Ed. 227; 4 Kent, Com. 211 (b).

DIVEST. See DEVEST.

DIVIDED COURT. See PRECEDENT.

DIVIDEND. A portion of the principal or profits divided among several owners of a thing Williston v. R. Co., 13 Allen (Mass.) 400; Taft v. R. Co., 8 R. I. 310, 5 Am. Rep. 575; Attorney General v. Bank, 21 N. C. 545; Cary v. Sav. Union, 22 Wall. (U. S.) 38, 22 L. Ed 779. See Rose v. Barclay, 191 Pa. 594, 43 Atl. 385, 45 L. R. A. 392.

As confined to corporations it is "that portion of the profits and surplus funds of the corporation which has been actually set apart by a valid resolution of the board of directors, or by the shareholders at a corporate meeting, for distribution among the shareholders according to their respective interests, in such a sense as to become segregated from the property of the corporation, and to become the property of the shareholders distributively." 2 Thomp. Corp. § 2126; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 14 Sup. Ct. 968, 38 L Ed 793.

In the commonest use of the term dividends are a sum which a corporation sets apart from its profits to be divided among its members. Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; which, for the purpose of declaring a dividend, consist of the excess of its cash and other property on hand over its liabilities; Hubbard v. Weare, 79 Ia. 678, 44 N. W. 915.

Dividends cannot usually be paid out of the capital but only from the profits. The former is a trust fund for the stockholders; 2 Thomp. Corp. § 2152; which each of them is entitled to have preserved intact; Slayden v. Coal Co., 25 Mo. App. 439; but this principle does not apply when the capital from its nature is liable to waste and depreciation, as in case of companies to work a mine or a patent; 41 Ch. Div. 1.

Where dividends are *required* to be declared out of *profits merely* of a railroad company, the rule for ascertaining the profits is to exclude from consideration all debts other than what are commonly understood by the term funded debts, but to treat as deductions debts incurred and due for engines, rails, and the like, which should and would have been paid at the time if the funds had been in hand and are necessary

deductions from the property; 29 Beav. 272; and as to what are net earnings in the sense of surplus profits and therefore susceptible of definition, see Union Pac. R. Co. v. U. S., 99 U. S. 420, 25 L. Ed. 274; 99 Am. Dec. 762, note; Excelsior Water & Mining Co. v. Pierce, 90 Cal. 131, 27 Pac. 44.

In England it was held that dividends must be payable in money; L. R. 14 Eq. 517; and it has been said there that the whole of the profits of a corporation must be divided periodically; L. R. 4 Ch. 494; but this is perhaps too broadly stated; Green's Brice, *Ultra Vires* 201. Neither of the above rules obtains in America: here stock and scrip dividends are very common; Leland v. Hayden, 102 Mass. 542; Lord v. Brooks, 52 N. H. 72; Howell v. Ry. Co., 51 Barb. (N. Y.) 378; State v. R. Co., 6 Gill (Md.) 363; Moraw. Priv. Corp. 448; and in the absence of statutory restriction are lawful; Williams v. Telegraph Co., 93 N. Y. 162; Rand v. Hubbell, 115 Mass. 471, 15 Am. Rep. 121; Com. v. Ry. Co., 74 Pa. 83; and bonds may be issued to the stockholders of a railroad corporation in place of cash, as the dividends representing earnings appropriated to the construction account, and these dividends, having been duly earned, may be declared for four years at once instead of each year; Wood v. Lary, 47 Hun (N. Y.) 550.

The declaration of dividends is within the implied scope of the authority of the directors, and unless controlled by the action of the corporation itself they have authority, in their sole discretion, to declare dividends and to fix the time and place of payment within the limits of reason and good faith with the stockholders; State v. Bank, 6 La. 745; Union Pac. Ry. Co. v. U. S., 99 U. S. 420, 25 L. Ed. 274; Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705; Park v. Locomotive Works, 40 N. J. Eq. 114, 3 Atl. 762; Excelsior Water & Mining Co. v. Pierce, 90 Cal. 131, 27 Pac. 44; Williams v. Telegraph Co., 93 N. Y. 162; and as to time and place: King v. R. Co., 29 N. J. L. 82. See Belfast & M. L. R. Co. v. City of Belfast, 77 Me. 445, 1 Atl. 362; New York, L. E. & W. R. Co. v. Nickals, 119 U. S. 296, 7 Sup. Ct. 209, 30 L. Ed. 363.

Where stockholders, including directors, met and agreed to a division of profits, but without formally declaring a dividend, their action was equivalent to such declaration; Spencer v. Lowe, 198 Fed. 961, 117 C. C. A. 497. Generally courts will not interfere in behalf of a common stockholder to compel the declaration of a dividend except in case of fraud or abuse of discretion; Howell v. R. Co., 51 Barb. (N. Y.) 378; Pratt v. Pratt, Read & Co., 33 Conn. 446; Smith v. Mfg. Co., 29 Ala. 503; Hunter v. Roberts, Throp & Co., 83 Mich. 63, 47 N. W. 131; nor will equity restrain the declaration of a dividend where the propriety of declaring one is fairly within the discretion of the directors; 41 Ch. Div. 1. Dividends may be applied by the corporation to debts due by the stockholder where the right of set-off would exist with respect to other creditors; Ex parte Winsor, 3 Sto. 411, Fed. Cas. No. 17,884; but this right exists only where the dividend has been declared and therefore a stockholder cannot refuse to pay interest due to the corporation in anticipation that a dividend will be declared; Ely v. Sprague, 1 Clarke, Ch. (N. Y.) 351. It has been held that unpaid dividends are assets of the corporation available for creditors in case of its insolvency; Curry v. Woodward, 44 Ala. 305; but this view is disapproved and declared unsound; 2 Thomp. Corp. § 2134. Dividends improperly declared may be recalled; *id.* § 2135; and even if paid, it has been held that they may be reclaimed; Lexington Life, Fire & Marine Ins. Co. v. Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; but this decision is doubted; 2 Thomp. Corp. § 2135; although approved in a case which did not require the court to go so far but only to hold that the dividend, not having been paid, was not collectible; Slayden v. Coal Co., 25 Mo. App. 439.

But where the directors, in fraud of a stockholder, set aside all the earnings for working capital, equity required the directors to declare a dividend out of the net earnings not needed for the corporate business; Lawton v. Bedell (N. J.) 71 Atl. 490. Equity will order a surplus of earnings of a life insurance company to be distributed to stockholders, if not needed for its business and the directors have arbitrarily or unreasonably withheld them; Blanchard v. Ins. Co., 78 N. J. Eq. 471, 79 Atl. 533.

When the fact that a dividend has been voted by the directors is not made public or communicated to the stockholders, and no fund is set apart for payment, the vote may be rescinded; Ford v. Thread Co., 158 Mass. 84, 32 N. E. 1036, 20 L. R. A. 65, 35 Am. St. Rep. 462. There can be no discrimination among stockholders of the same class in respect to dividends, but if one stockholder is discriminated against, he cannot recover his share ratably from the others, until at least he has established his right as a creditor of the company and pursued his remedy against it; Peckham v. Van Wagenen, 83 N. Y. 40, 38 Am. Rep. 392.

A stockholder cannot recover the profits made by a corporation until a dividend has been declared; Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705; Lockhart v. Van Alstyne, 31 Mich. 78, 18 Am. Rep. 156; Appeal of Moss, 83 Pa. 269, 24 Am. Rep. 164; Goodwin v. Hardy, 57 Me. 143, 99 Am. Dec. 758; Beveridge v. R. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648; but after a dividend has been declared, and a *demand made therefor* by a stockholder, he may sue in assumpsit for the amount due him; Jones v. R. Co., 57 N. Y. 196; Brown v. Nav. Co., 49 Pa. 270; and

a stockholder has been allowed to follow the amount of his dividend into the hands of the receiver of the company; In re Le Blanc, 14 Hun 8; Beers v. Spring Co., 42 Conn. 17; the declaration of the dividend is an admission of indebtedness in money; Ehle v. Bank, 24 N. Y. 548; and it is no defence to show that the earnings were received in other property; *id.* The earnings of the corporation are part of the corporate property, and, until separated from the general mass, the interest of the stockholders therein passes with the transfer of the stock; and this is irrespective of the time during which earnings have accrued. By the declaration of a dividend, however, the earnings, to the extent declared, are separated from the general mass and are appropriated to the then stockholders, who become creditors of the corporation for the amount of the dividend. The earnings represented by the dividend, although the fruit of the general property of the company, are no longer represented by the stock, but become a debt of the company to the individual who, at the time of the declaration of the dividend, was the owner of the stock. That the dividend is payable at a future date makes no distinction in the right. The debt exists from the time of the declaration of the dividend, though payment be postponed. This right could of course be transferred, by special agreement, with the stock, but not otherwise. The dividend would not pass as an incident of the stock; Wheeler v. Sleigh Co., 39 Fed. 347; Clark v. Campbell, 23 Utah 569, 65 Pac. 496, 54 L. R. A. 508, 90 Am. St. Rep. 716.

Mandamus will not lie to compel the payment of dividends declared by a private corporation; Van Norman v. Mfg. Co., 41 Mich. 166, 49 N. W. 925.

Dividends must be so declared as to give each stockholder his proportional share of profits; Jones v. R. R. Co., 57 N. Y. 196; Ryder v. R. Co., 13 Ill. 516; L. R. 3 Ch. 262; Atlantic & O. Telegraph Co. v. Com., 3 Brewst. (Pa.) 366; and if one person is excepted, he may sue for his dividends, for the reason that such exception is void; Hill v. Coal & Min. Co. (Mo.) 21 S. W. 508. They can properly be declared only out of profits actually earned; and when improperly declared and paid, they may be recovered back; Comstock v. Drohan, 71 N. Y. 9.

It is said that in Great Britain it is well settled that where a corporation, whether authorized or unauthorized by law to increase its capital stock, accumulates and invests part of its earnings, and afterwards apportions them among its shareholders as capital, the amount so apportioned must be deemed an accretion to the capital of each share, the income of which only is payable to a tenant for life; Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525. Where a company, by a majority of the votes, has decided not to divide the money, but to turn it all into capital, it must be held capital from that time; L. R. 29 Ch. Div. 635; L. R. 12 App. Cas. 385. The same principle was established in Massachusetts before the last cited English case had come before the courts of England; Atkins v. Albree, 12 Allen (Mass.) 359; Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705; Daland v. Williams, 101 Mass. 571; Leland v. Hayden, 102 Mass. 542; Rand v. Hubbell, 115 Mass. 461, 15 Am. Rep. 121. And in Connecticut, Rhode Island and Maine a dividend of new shares representing accumulated earnings is held to be capital and not income; Brinley v. Grou, 50 Conn. 66, 47 Am. Rep. 618; Boardman v. Mansfield, 79 Conn. 634, 66 Atl. 169, 12 L. R. A. (N. S.) 793, 118 Am. St. Rep. 178; In re Brown, 14 R. I. 371, 51 Am. Rep. 397; Richardson v. Richardson, 75 Me. 570, 46 Am. Rep. 428. A stock dividend is held not to distribute property; Kalbach v. Clark, 133 Ia. 215, 110 N. W. 599, 12 L. R. A. (N. S.) 801, 12 Ann. Cas. 647; but simply dilutes the shares as they existed before; Williams v. Telegraph Co., 93 N. Y. 189. In In re Kernochan, 104 N. Y. 618, 11 N. E. 149, the court applied the same rules as between the remainderman and the person entitled for life to the income of shares bequeathed in trust, rejected the test of determining what part of a cash dividend should be deemed principal and what part income, by ascertaining how much was earned before and how much after the death of the testator, approved the English doctrine above cited, and said that from the shares in question no income could accrue, no profit arise to the holder until declared by the company, and that act should be deemed to have been in the mind of the testator, and not the earnings or profits as ascertained by a third person, or a court upon an investigation of the business of the company.

Where the votes of the corporation left the stockholders at liberty to take the cash dividend or to take new stock and treat the dividend as payment for it, it cannot be said to be a stock dividend; Davis v. Jackson, 152 Mass. 58, 25 N. E. 21, 23 Am. St. Rep. 801. In Lord v. Brooks, 52 N. H. 72, it was held that the surplus earnings of a corporation that were not divided at the date of a trust deed belonged to the corpus of the trust as a part of the capital of the trust fund, and that dividends declared out of surplus earnings accrued since the date of the trust deed were income for the life tenant.

Stock which a corporation has acquired from its stockholder in payment of a debt, and which it distributes among its remaining stockholders as surplus earnings, goes to the life tenant, and not to the remainder-

man; Green v. Bissell, 79 Conn. 547, 65 Atl. 1056, 8 L. R. A. (N. S.) 1011, 118 Am. St. Rep. 156, 9 Ann. Cas. 287.

In Holbrook v. Holbrook, 74 N. H. 201, 66 Atl. 124, 12 L. R. A. (N. S.) 768, it is said the method to be pursued is to inquire into the actual nature and source of the dividend. If it is found to represent surplus earnings accrued since the creation of the trust, it is income and goes to the life tenant. If it is found to represent earnings accrued prior to the creation of the trust, it is capital and goes to the corpus of the trust. And if it is found in whole or in part to represent the increase in value of the corporate plant and business, whether it took place before or after the trust was created, it is also to that extent capital, citing Jones v. Railroad, 67 N. H. 234, 30 Atl. 614, 68 Am. St. Rep. 650; Van Blarcom v. Dager, 31 N. J. Eq. 783; Hite's Devisees v. Hite's Ex'r, 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189. As the court in making the inquiry concerns itself with the substance of the transaction, and not the form in which the corporation has seen fit to clothe it, the fact that a dividend is distributed in cash or stock is of little, if of any, importance in determining whether it is capital or income. The inquiry is largely one of fact, and the dividend is capital or income as the fact discloses into which of the above enumerated classes it falls. That it is said is the logic of the decision of the case in Lord v. Brooks, 52 N. H. 72, *supra*, and to be supported by the great weight of authority in this country; McLouth v. Hunt, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230; Ashhurst v. Field's Adm'r, 26 N. J. Eq. 1; Appeal of Earp, 28 Pa. 368; Smith's Estate, 140 Pa. 344, 21 Atl. 438, 23 Am. St. Rep. 237; Thomas v. Gregg, 78 Md. 545, 28 Atl. 565, 44 Am. St. Rep. 310; Hite's Devisees v. Hite's Ex'r, 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189; Pritchitt v. Trust Co., 96 Tenn. 472, 36 S. W. 1064, 33 L. R. A. 856.

In Pennsylvania it is held that when stock is bequeathed in trust for the use of one for life with remainder over, surplus profits accumulated during the testator's life, but not divided until after his death, belong to the corpus of his estate; while dividends of earnings made after his death, whether in cash, stock, or scrip, go to the tenant for life; Smith's Estate, 140 Pa. 344, 21 Atl. 438, 23 Am. St. Rep. 237. In Appeal of Earp, 28 Pa. 368, the earnings from which a stock dividend was declared had accumulated partly before and partly after the death of the testator, and the court held that such dividend should be apportioned between the corpus and income in the proportion that the value of the stock at the testator's death bore to the value of the stock, including the new shares, after the dividend. The principle of apportionment of extraordinary dividends, earned partly before and partly after the inception of the life estate, has also been recognized and applied; Thomas v. Gregg, 78 Ind. 545, 28 Atl. 565, 44 Am St. Rep. 310; Van Doren v. Olden, 19 N. J. Eq. 176, 97 Am. Dec. 650; Pratt v. Douglas, 38 N. J. Eq. 541. In Hawaii, the court, after discussing the various rules, adopted the doctrine which treats stock and cash dividends alike, holding that only so much of the new stock allotted to the trustee as was of the par value of the stock so allotted should be apportioned to the life tenant, and the rest should be held as part of the corpus; 12 Haw. 309.

The value of a right to subscribe to additional stock, which depends on the earnings of the corporation since the creation of a trust for the benefit of a life tenant and remainderman, is income; Holbrook v. Holbrook, 74 N. H. 201, 66 Atl. 124, 12 L. R. A. (N. S.) 768.

In England it was at first held that all extra dividends belonged to the remainderman; 10 Ves. 185; 4 Ves. 800; but the House of Lords finally determined that stock dividends should pass to the remainderman and cash dividends to the life tenant, except in the case of companies which could not legally increase their capital stock, and extra dividends should go to the remainderman; 12 App. Cas. 385.

When arising under a will, the testator's intention must be ascertained, and this is ordinarily that the life tenant shall have the income and bonuses declared by the company; [1893] 3 Ch. 337 (C. A.), following 12 App. Cas. 385, where, upon an examination of many authorities, it was held that a reserved fund set apart out of profits and afterwards distributed as a bonus dividend, to be applied by stockholders in part payment of a new allotment of shares partly paid up, was held capital. Bramwell, L. J., said he could deduce no principle from the authorities.

A note in 26 Harv. L. Rev. 77, classifies the cases as follows: In Massachusetts and a number of cases following the rule of that state, it was held that stock dividends pass to the remaindermen and cash dividends from earnings to the life tenant; Lyman v. Pratt, 183 Mass. 58, 66 N. E. 423; Boardman v. Mansfield, 79 Conn. 634, 66 Atl. 169; De Koven v. Alsop, 205 Ill. 309, 68 N. E. 930, 63 L. R. A. 587; Millen v. Guerrard, 67 Ga. 284, 44 Am. Rep. 720; Bryan v. Aikin (Del.) 82 Atl. 817. In Pennsylvania and states following the same rule, the courts have distinguished between the life tenant and remainderman with respect to dividends representing earnings before or since the creation of the trust fund; Earp's Appeal, 28 Pa. 368; Van Doren v. Olden, 19 N. J. Eq. 176, 97 Am. Dec. 650; Thomas v. Gregg, 78 Md. 545, 28 Atl. 565, 44 Am. St. Rep. 310; Soehnlein v. Soehnlein, 146 Wis. 330, 131 N. W. 739; Miller v. Payne, 150 Wis. 354, 136 N.

W. 811; Pritchitt v. Trust Co., 96 Tenn. 472, 36 S. W. 1064, 33 L. R. A. 856.

Another rule adopted in New York and Kentucky gives the dividends to the life tenant, whether they be of stock or cash representing accumulated earnings; McLouth v. Hunt, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230; Hite's Devisees v. Hite's Ex'rs, 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189. Other cases follow so much of the Massachusetts rule as treats stock dividends as part of the principal; Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525; In re Brown, 14 R. I. 371, 51 Am. Rep. 397; Kaufman v. Woolen Mills Co., 93 Va. 673, 25 S. E. 1003. The conclusion is reached by the writer (26 Harv. L. Rev. 77) that while all the rules stated are open to objections, that of the Massachusetts courts is the most workable.

See 42 Amer. L. Rev. 25, for a discussion of the subject.

As used in the United States Corporation Tax Act (August 5, 1909), the so-called dividends of a mutual life insurance company doing business on the level premium plan, consisting merely of the portion of the loading of a premium charged in excess of the cost of insurance and returned annually after the first year to the policy holders to reduce their subsequent premiums, are not income and therefore not taxable under that act; Mutual Benefit Life Ins. Co. v. Herold, 198 Fed. 199 (an instructive case on the practice of life insurance companies in this respect); to the same effect, Mutual Benefit Life Ins. Co. v. Com., 128 Ky. 171, 107 S. W. 802; Fuller v. Ins. Co., 70 Conn. 647, 41 Atl. 4; L. R. 14 App. Cas. 381.

In another sense, according to some old authorities, dividend signifies one part of an indenture.

DIVINE RIGHT OF KINGS. This theory "was in its origin directed, not against popular liberty, but against papal and ecclesiastical claims to supremacy in temporal as well as spiritual affairs." Figgis, "The Theory of the Divine Right of Kings."

DIVINE SERVICE. The name of a feudal tenure, by which the tenants were obliged to do some special divine services in certain, as to sing so many masses, etc. 2 Bla. Com. 102; Mozl. & W. Dict.

In its modern use the term does not include Sunday schools, Appeal of Gass, 73 Pa. 39, 13 Am. Rep. 726.

DIVISA. In Old English. A device, award, or decree; also a devise; bounds or limits of division of a parish or farm. Also a court held on the boundary, in order to settle disputes of the tenants. Wharton.

DIVISIBLE. That which is susceptible of being divided.

A contract cannot, in general, be divided in such a manner that an action may be brought, or a right accrue, on a part of it; Shaw v. Turnpike Co., 2 Pen. & W. (Pa.) 454. But some contracts are susceptible of division: as, when a reversioner sells a part of the reversion to one man and a part to another, each shall have an action for his share of the rent which may accrue on a contract to pay a particular rent to the reversioner; Thomas v. Smith, 3 Whart. (Pa.) 404. See APPORTIONMENT. But when it is to do several things at several times, an action will lie upon every default; Badger v. Titcomb, 15 Pick. (Mass.) 409, 26 Am. Dec. 611. See Aldrich v. Fox, 1 Greenl. (Me.) 316; Symmes v. Frazier, 6 Mass. 344, 4 Am. Dec. 142; PERFORMANCE.

DIVISION. In English Law. A particular and ascertained part of a county. In Lincolnshire division means what riding does in Yorkshire.

DIVISION OF OPINION. Disagreement among those called upon to decide a matter.

When, in a company or society, the parties having a right to vote are so divided that there is not a plurality of the whole in favor of any particular proposition, or when the voters are equally divided, it is said there is division of opinion. The term is especially applied to a disagreement among the judges of a court such that no decision can be rendered upon the matter referred to them.

When the judges of a court are divided into three classes, each holding a different opinion, that class which has the greatest number shall give the judgment: for example, on a *habeas corpus*, when a court is composed of four judges, and one is for remanding the prisoner, another is for discharging him on his own recognizance, and the two others are for discharging him absolutely, the judgment will be that he be discharged; Rudyard's Case; Bacon, Abr. *Habeas Corpus* (B 10), *Court*, 5.

A certificate under the act of 1891 should contain a proper statement of the facts on which the question of law arises; the entire record should not be transmitted; Emsheimer v. New Orleans, 186 U. S. 33, 22 Sup. Ct. 770, 46 L. Ed. 1042.

DIVISUM IMPERIUM. A divided jurisdiction. Applied *e. g.* to the jurisdiction of courts of common law and equity over the same subject. 1 Kent 366.

DIVORCE. The dissolution or partial suspension, by law, of the marriage relation.

The dissolution is termed divorce from the bond of matrimony, or, in the Latin form of the expression, *a vinculo matrimonii*; the suspension, divorce from bed and board, *a mensa et thoro*. The former divorce puts an end to the marriage; the later leaves it in full force. The term divorce is sometimes also applied to a sentence of nullity, which establishes that a supposed or pretended marriage either never existed at all, or at least was voidable at the election of one or both of the parties.

The more correct modern usage, however, confines the signification of divorce to the *dissolution*

of a *valid* marriage. What has been known as a divorce *a mensa et thoro* may more properly be termed a legal separation. So also a sentence or decree which renders a marriage void *ab initio*, and bastardizes the issue, should be distinguished from one which is entirely prospective in its operation, and for that purpose the former may be termed a sentence of nullity The present article will accordingly be confined to divorce in the strict acceptation of the term. For the other branches of the subject, see SEPARATION A MENSA ET THORO; NULLITY OF MARRIAGE.

Marriage, being a legal relation, and not (as sometimes supposed) a mere contract, can only be dissolved by legal authority.

The relation originates in the consent of the parties, but, once entered into, it must continue until the death of either husband or wife, unless sooner put an end to by the sovereign power. In Maynard v. Hill, 125 U. S. 210, 8 Sup. Ct. 723, 31 L. Ed. 654, it is said that whilst marriage is often termed by text writers and in decisions of courts a civil contract, it is something more. When the contract to marry is executed by the marriage, a relation between the parties is created which cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties, but not so with marriage The relation once formed, the law steps in and holds the parties to various obligations and liabilities. The supreme court then approves the views laid down in Adams v. Palmer, 51 Me. 183, where it is said that when the contracting parties have entered into the marriage state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the state, statutory or common; they are of law, not of contract. It was of contract that the relation should be established, but being established the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the sovereign as evidenced by the law. They can neither be modified nor changed by any agreement of the parties. It is a relation for life and the parties cannot terminate it at any shorter period by virtue of any contract they may make. "Marriage has been said to be something more than a mere contract, religious or civil; to be an institution"; L. R. 1 P. & D. 130. In England, until the middle of the last century no authority existed in any of the judicial courts to grant a divorce in the strict sense of the term. The subject of marriage and divorce generally belonged exclusively to the various ecclesiastical courts; and they were in the constant habit of granting what were termed divorces *a mensa et thoro*, for various causes, and of pronouncing sentences of nullity; but they had no power to dissolve a marriage, valid and binding in its origin for causes arising subsequent to its solemnization. For that purpose recourse must be had to parliament; 2 Burn, Eccl. Law 202; Macq. Parl. Pr. 470 (after having first obtained an ecclesiastical decree *a mensa et thoro* and recovered damages against the adulterer in an action of *crim. con.* This practice began about 1669). But in 1857 a court was created, "The Court for Divorce and Matrimonial Causes," upon which was conferred exclusively all jurisdiction over matrimonial matters then vested in the various ecclesiastical courts, and also the jurisdiction theretofore exercised by parliament in granting divorces. At present divorce causes are heard, in the first instance, in the Probate, Divorce and Admiralty Division of the High Court of Justice, whence an appeal lies to the Court of Appeal

In Ireland there is no divorce *a vinculo*, except by act of parliament.

In this country the usage has been various. Formerly it was common for the various state legislatures, like the English parliament, to grant divorces by special act. This practice is now much less common. In many states it has been expressly prohibited by state constitutions; 1 Bish. Mar. & D. § 1471. Such an act is constitutional; Wright v. Wright's Lessee, 2 Md. 429, 56 Am. Dec. 723; Berthelemy v. Johnson, 3 B. Monr. (Ky.) 90, 38 Am Dec 179, and does not offend against the constitutional provision which forbids laws impairing the obligation of contracts, even though there was no valid ground for divorce and the wife was not notified; Maynard v Hill, 125 U. S. 190, 8 Sup Ct. 723, 31 L. Ed. 654, where the husband was a resident of the territory. See also State v. Duket, 90 Wis. 272, 63 N. W. 83, 31 L. R. A. 515, 48 Am. St. Rep. 928. Generally, at the present time, the jurisdiction to grant divorces is conferred by statute upon courts of equity, or courts possessing equity powers, to be exercised in accordance with the general principles of equity practice, subject to such modifications as the statute may direct. The action is statutory only; there is no common-law jurisdiction over the subject of divorce; Ackerman v. Ackerman, 200 N. Y. 73, 93 N. E. 192. The practice of the English ecclesiastical courts, which is also the foundation of the practice of the new court for divorce and matrimonial causes in England, has never been adopted to any considerable extent in this country; but it is said that in some jurisdictions the principles and practice of the ecclesiastical courts are followed so far as they are applicable to our altered conditions and in accord with the spirit of our laws; 2 Bish. Mar. & Div. 460. See Le Barron v. Le Barron, 35 Vt. 365; J. G. v. H. G., 33 Md. 401, 3 Am. Rep. 183.

Numerous and difficult questions are constantly arising in regard to the validity in one state of divorces granted by the courts or legislature of another state. The subject is treated in 2 Bish. Mar. Div. and Sep. § 128. The learned author there states the

following propositions, which he elaborates with great care: *First*, the tribunals of a country have no jurisdiction over a cause of divorce, wherever the offence may have occurred, if neither of the parties has an actual *bona fide* domicil within its territory; *secondly*, to entitle the court to take jurisdiction, it is sufficient for one of the parties to be domiciled in the country; both need not be, neither need the citation, when the domiciled party is plaintiff, be served personally on the defendant, if such personal service cannot be made, but there should be reasonable constructive notice, at least; *thirdly*, the place where the offence was committed, whether in the country in which the suit is brought or a foreign country, is immaterial; *fourthly*, the domicil of the parties at the time of the offence committed is of no consequence, the jurisdiction depending on their domicil when the proceeding is instituted and the judgment is rendered; *fifthly*, it is immaterial to this question of jurisdiction in what country or under what system of divorce laws the marriage was celebrated; *sixthly*, without a citation within the reach of process, or an appearance, the jurisdiction extends only to the status and what depends directly thereon, and not to collateral rights.

The doctrine of the first proposition is said not to have been thoroughly established in England; 2 Bish. Mar. D. & Sep. § 43; but it is fully established in America; Davis v. Com., 13 Bush (Ky.) 318; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21; State v. Armington, 25 Minn. 29; People v. Smith, 13 Hun (N. Y.) 414; Cast v. Cast, 1 Utah, 112; Smith v. Smith, 43 La. Ann. 1140, 10 South. 248; Morgan v. Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154; De Meli v. De Meli, 120 N. Y. 485, 24 N. E. 996, 17 Am. St. Rep. 652; Watkins v. Watkins, 135 Mass. 83; Arrington v. Arrington, 102 N. C. 491, 9 S. E. 200; Appeal of Platt, 80 Pa. 501; Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366; Bell v. Bell, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. Ed. 804; Streitwolf v. Streitwolf, 181 U. S. 179, 21 Sup. Ct. 553, 45 L. Ed. 807. Mr. Bishop maintains the second proposition as fully supported on principle and authority; see especially Ditson v. Ditson, 4 R. I. 87; Thompson v. State, 28 Ala. 12; Wakefield v. Ives, 35 Ia. 238; Cheever v. Wilson, 9 Wall. (U. S.) 108, 19 L. Ed. 604; Richards v. Richards, 19 D. C. 431; but see People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274; Story, Confl. Laws, Redf. ed. As to the third proposition, which is said by the same author to be universal, see Hanberry v. Hanberry, 29 Ala. 719; Clark v. Clark, 8 N. H. 21; Holmes v. Holmes, 37 Barb. (N. Y.) 305; Pawling v. Willson, 13 Johns. (N. Y.) 192. The fifth proposition is universally recognized; see Dorsey v. Dorsey, 7 Watts (Pa.) 349, 32 Am. Dec. 767; Harteau v. Harteau, 14 Pick. (Mass.) 181, 25 Am. Dec. 372; Thompson v. State, 28 Ala. 12; Standridge v. Standridge, 31 Ga. 223. See, however, 2 Cl. & F. 568.

When both husband and wife are domiciled in the state where the divorce is granted, the decree of divorce is without doubt valid everywhere; Leith v. Leith, 39 N. H. 38; Harding v. Alden, 9 Greenl. (Me.) 140, 23 Am. Dec. 549; Hanover v. Turner, 14 Mass. 227, 7 Am. Dec. 203; Garner v. Garner, 56 Md. 128; Hunt v. Hunt, 72 N. Y. 237, 28 Am. Rep. 129; Jones v. Jones, 108 N. Y. 415, 15 N. E. 707, 2 Am. St. Rep. 447; Arrington v. Arrington, 102 N. C. 491, 9 S. E. 200; Hubbell v. Hubbell, 3 Wis. 664, 62 Am. Dec. 702; Cheely v. Clayton, 110 U. S. 701, 4 Sup. Ct. 328, 28 L. Ed. 298; Barrett v. Failing, 111 U. S. 524, 4 Sup. Ct. 598, 28 L. Ed. 505; Roth v. Roth, 104 Ill. 35, 44 Am. Rep. 81. See L. R. 6 P. D. 35.

If the court making the decree had jurisdiction, it will be held conclusive in other states; In re James' Estate, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60; People v. Allen, 40 Hun (N. Y.) 611; Hawkins v. Ragsdale, 80 Ky. 353, 44 Am. Rep. 483; Shaw v. Shaw, 98 Mass. 158; and jurisdiction will be presumed; Knowlton v. Knowlton, 155 Ill. 158, 39 N. E. 595; unless want of it appears upon the record; Werner v. Werner, 30 Ill App. 159; Collins v. Collins, 80 N. Y. 1; Morey v. Morey, 27 Minn. 265, 6 N. W. 783; or it may be shown as against the record; Reed v. Reed, 52 Mich. 117, 17 N. W. 720, 50 Am. Rep. 247; Adams v. Adams, 154 Mass. 290, 28 N. E. 260, 13 L. R. A. 275.

As to the right of the wife to acquire a different domicil from that of the husband for the purpose of jurisdiction in a suit for divorce, see DOMICIL.

There has been much difference of opinion as to the extra-territorial effect of constructive service by publication as between states. If both parties are domiciled within the state the decree is of force in other states; Hood v. Hood, 11 Allen (Mass.) 196, 87 Am. Dec. 709; Burlen v. Shannon, 115 Mass. 438; Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; but if only one, the decree determines his or her status; Pennoyer v. Neff, 95 U. S. 714, 734, 24 L. Ed. 565; Shafer v. Bushnell, 24 Wis. 372; Adams v. Adams, 154 Mass. 290, 28 N. E. 260, 13 L. R. A. 275. Where the custody of children is involved it is held that constructive service of summons cannot give jurisdiction where the defendant and the children are out of the state and do not appear, even if their domicil is within the state; De la Montanya v. De la Montanya, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165.

The view cited from Bishop concerning the extra-territorial operation of the decree under the constitution is held in Harding v. Alden, 9 Greenl. (Me.) 140, 23 Am. Dec. 549; Anthony v. Rice, 110 Mo. 233, 19 S. W. 423; Chapman v. Chapman, 48 Kan. 636, 29 Pac. 1071; Thompson v. Thompson, 91 Ala. 591, 8

South. 419, 11 L. R. A. 443; the contrary view is taken in Van Inwagen v. Van Inwagen, 86 Mich. 333, 49 N. W. 154; Cook v. Cook, 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706; Flower v. Flower, 42 N. J. Eq. 152, 7 Atl. 669; Doerr v. Forsythe, 50 Ohio St. 726, 35 N. E. 1055, 40 Am. St. Rep. 703; Com. v. Steiger, 12 Pa. Co. Ct. 334; [1893] Prob. 89.

Where the husband removed to Minnesota and there secured a divorce on constructive service of notice on the wife, who did not appear, it was held in a subsequent suit for divorce by the wife in New York that the Minnesota decree was invalid; Williams v. Williams, 130 N. Y. 193, 29 N. E. 98, 14 L. R. A. 220, 27 Am. St. Rep. 517; and to the same effect are O'Dea v. O'Dea, 101 N. Y. 23, 4 N. E. 110; People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274. The ground of these cases is that the court rendering the decree under such circumstances, though having jurisdiction to establish the status of the parties in the state where the divorce is granted, yet has no jurisdiction over their status in New York; People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274; Williams v. Williams, 130 N. Y. 193, 29 N. E. 98, 14 L. R. A. 220, 27 Am. St. Rep. 517; Lynde v. Lynde, 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679, 76 Am. St. Rep. 332; Atherton v. Atherton, 155 N. Y. 129, 49 N. E. 933, 40 L. R. A. 291, 63 Am. St. Rep. 650, which case was reversed in Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794, where it was held that actual notice need not be given to a non-resident defendant to bind her by a decree of divorce, if reasonable efforts to give her actual notice as required by the statutes of the state granting the decree are made. The decision in this case was expressly placed on the ground that the suit was brought in the state of the matrimonial domicil. A later case in the supreme court held that the mere domicil within the state of one party to the marriage does not give the courts of that state jurisdiction to render a decree of divorce enforceable in all the other states by virtue of the full faith and credit clause of the federal constitution, against a non-resident who did not appear and was only constructively served with notice of the action; Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1. The court in this case made the following classification: (a) States where the power to decree a divorce is recognized, based upon the mere domicil of the plaintiff, although the decree when rendered will be but operative within the borders of the state, wholly irrespective of any force which may be given such decree in other states. Under this heading all of the states are embraced with the possible exception of Rhode Island. (b) States which decline, even upon principles of comity, to recognize and enforce as to their own citizens, within their own borders, decrees of divorce rendered in other states, when the court rendering the same had jurisdiction over only one of the parties. Under this heading is embraced Massachusetts, New Jersey (with the qualification made by the decision in Felt v. Felt, 59 N. J. Eq. 606, 45 Atl. 105, 49 Atl. 1071, 47 L. R. A. 546, 83 Am. St. Rep. 612), and New York. (c) States which, whilst giving some effect to decrees of divorce rendered against its citizens, in other states where the court had jurisdiction of the plaintiff alone, either place the effect given to such decrees upon the principle of state comity alone, or make such limitations upon the effect given to such decree as indubitably establishes that the recognition given is a result merely of state comity. As the greater includes the less, this class of course embraces the cases under the previous heading. It also includes Alabama, Maine, Ohio, and Wisconsin. (d) Cases which, although not actually so deciding, yet lend themselves to the view that *ex parte* decrees of divorce rendered in other states would receive recognition by virtue of the due faith and credit clause. And this class embraces Missouri and Rhode Island.

This analysis and classification, the court said, serves conclusively to demonstrate that the limited recognition which is given in most of the states to such *ex parte* decrees of divorce rendered in other states is wholly inconsistent with the theory that such limited recognition is based upon the operation of the full faith and credit clause of the constitution, and on the contrary is consistent only with the conception that such limited recognition as is given is based upon state comity. In Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1, it was held that a decree of divorce rendered in Connecticut, where the husband had his domicil, against a non-resident defendant who had never been domiciled in that state, was not, by virtue of the full faith and credit clause, enforceable in all the other states.

This decision was by a divided court. In 19 Harv. L. Rev. 586, it is elaborately criticised, but the supreme court of Utah (*infra*), in deciding whether it was justified in granting a divorce, or whether it had jurisdiction, where the husband had abandoned his matrimonial domicil in that state, was constructively served with notice, and failed to appear, followed the Haddock Case and in a careful analysis of it, to determine if under its ruling the decision of the Utah court would be entitled to full faith and credit, held that it would; that a man cannot change the matrimonial domicil by abandoning his wife and going into another state to reside, and laid down the following propositions deduced from it:

Divorces may be granted by state courts, upon constructive service, where statutory cause and residence co-exist, which become binding upon the parties, the courts of all states, and upon all persons: (1) In cases

where the parties are residents of the state at the time of the marriage and thus established a domicil of matrimony in that state and the complaining party continues this domicil up to the time of the action. (2). In all cases where the parties are married out of the state, but come to reside in the state afterwards and recognize the marriage relation within the state and thus establish a domicil of matrimony therein, and the party bringing the action continues this marital domicil up to the time of bringing the action. (3) In all cases where a statutory cause and residence co-exist where personal service is had; State v. Morse, 31 Utah 213, 87 Pac. 705, 7 L. R. A. (N. S.) 1127.

Where the full faith and credit clause of the constitution is invoked to compel the enforcement in one state of a decree rendered in another, the question of the jurisdiction of the court by which the decree was rendered is open to inquiry, and if there was no jurisdiction either of the subject-matter or of the person of the defendant, the courts of another state are not required, by virtue of the full faith and credit clause, to enforce such decree; Haddock v. Haddock, 201 *id.* 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1.

Where substituted service was made upon a non-resident defendant in accordance with the laws of the state granting the divorce, it has been held in New York that the decree of divorce was entitled to full extra-territorial validity under the full faith and credit clause of the federal constitution; North v. North, 47 Misc. 180, 93 N. Y. Supp. 512; but the deserted spouse had acquired a *bona fide* domicil in the state granting the decree. It is said that this case marks an important development in this branch of the New York law (19 Harv. L. Rev. 61), rendered necessary by the decision of the supreme court in the Atherton Case, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794, reversing 155 N. Y. 129, 49 N. E. 933, 40 L. R. A. 291, 63 Am. St. Rep. 650, which, following the New York rule that divorce is a proceeding *in personam*, required that the defendant should be personally served with process within the jurisdiction of the divorce court.

A provision in the Georgia Code of 1895, § 5237, that records and judicial proceedings, properly authenticated, shall have such faith and credit given them in every court within the United States as they have by law or usage in the court from which they were taken, was held not to apply to a decree of divorce granted in Kansas based on constructive and not actual service of process on a wife who remained in Georgia; but, it not appearing that any fraud or concealment was practiced by the husband, the Georgia courts, recognized the validity of the decree on the ground of comity; Joyner v. Joyner, 131 Ga. 217, 62 S. E. 182, 18 L. R. A. (N. S.) 647, 127 Am. St. Rep. 220.

A decree of a state court, having jurisdiction of the parties, that a divorce granted in another state is valid, is held binding in a third state in an attack there upon such decree; Bidwell v. Bidwell, 139 N. C. 402, 52 S. E. 55, 2 L. R. A. (N. S.) 324, 111 Am. St. Rep. 797, where a North Dakota decree was assailed for lack of jurisdiction and for duress and fraud by the husband in obtaining it. The Massachusetts court, in which the wife sued for divorce, held the Dakota decree valid, as did the court in North Carolina, where after six years she again sued for divorce and it was held that the validity of the North Dakota divorce was established by the Massachusetts court and the plaintiff was estopped by the Massachusetts decree from further questions concerning the one in Dakota.

In New Jersey it was held that a court of chancery, on a bill filed by a wife, had jurisdiction to enjoin the husband from prosecuting a suit for divorce in another state, the jurisdiction of which he had invoked on a false and fraudulent allegation of his residence in that state; Kempson v. Kempson, 58 N. J. Eq. 94, 43 Atl. 97; Kempson v. Kempson, 63 N. J. Eq. 783, 52 Atl. 360, 625, 58 L. R. A. 484, 92 Am. St. Rep. 682. The defendant in this suit had disregarded the injunction and obtained a final decree of divorce. He returned to New Jersey with a new wife, and was committed for contempt. The Vice Chancellor reported a decree that the defendant should be fined and be imprisoned until he should have the decree of the North Dakota court set aside. On appeal, the order of the Vice Chancellor was so far modified as to require the defendant to present the truth to the court in North Dakota and in good faith to urge that its decree be set aside, as only that court could vacate its decree, and the defendant clearly had no power to insure the result. And see Kittle v. Kittle, 8 Daly (N. Y.) 72, where a defendant in a divorce suit was enjoined from prosecuting a subsequent suit in another state for a divorce which he intended to press to judgment, before the former was terminated, where all the witnesses were in the former state, and the wife was pecuniarily unable to defend a suit in the other state.

In several states divorces are by statute inoperative when a person goes out of the state and obtains elsewhere a divorce for a cause not valid in the state from which he goes. And in Massachusetts the courts have held invalid decrees, for causes not cognizable in that state, granted in another state, for a divorce when the party went there to procure it; Sewall v. Sewall, 122 Mass. 156, 23 Am. Rep. 299; or to annul a marriage; Loker v. Gerald, 157 Mass. 42, 31 N. E. 709, 16 L. R. A. 497, 34 Am. St. Rep. 252; and such a decree does not violate the full faith and credit clause of the United States con-

stitution; Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366; and such a divorce was held invalid as against public policy, in Wisconsin, where the marriage in another state was considered as having been entered into for the purpose of evading the statute; Lanham v. Lanham, 136 Wis. 360, 117 N. W. 787, 17 L. R. A. (N. S.) 804, 128 Am. St. Rep. 1085; but where it was not shown that the party went to the other state for that purpose and the wife had executed a release to the husband, she was not permitted to impeach the decree; Loud v. Loud, 129 Mass. 14; and so where an appearance was entered in the other state; Elliott v. Wohlfrom, 55 Cal. 384; or where there has been obtained a *bona fide* domicil elsewhere; Gregory v. Gregory, 76 Me. 535.

The supreme court of the United States has no jurisdiction to re-examine the judgment of a state court, recognizing as valid the decree of a court of a foreign country annulling a marriage; Roth v. Ehman, 107 U. S. 319, 2 Sup. Ct. 312, 27 L. Ed. 490. See Whart. Confl. Laws.

It was never the practice of the English parliament to grant a divorce for any other cause than adultery; and it was the general rule to grant it for simple adultery only when committed by the wife, and upon the application of the husband. To entitle the wife, other circumstances must ordinarily concur, simple adultery committed by the husband not being sufficient; Macq. Parl. Pr. 473. The English statute of 20 & 21 Vict. c. 85, before referred to, prescribes substantially the same rule,—it being provided, § 27, that the husband may apply to have his marriage dissolved "on the ground that his wife has, since the celebration thereof, been guilty of adultery," and the wife, "on the ground that, since the celebration thereof, her husband has been guilty of incestuous bigamy, or of bigamy with adultery, or of rape, or of sodomy, or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards."

In this country the question depends upon the statutes of the several states, the provisions of which are far from uniform. In some of the states, also, the matter is left wholly or in part to the discretion of the court. See Bish. Mar. D. & Sep.; Weber v. Weber, 16 Or. 163, 17 Pac. 866. For more specific information, recourse must be had to the statutes of the several states.

Some of the more important grounds for divorce are: *desertion;* for a statutory period; Whitfield v. Whitfield, 89 Ga. 471, 15 S. E. 543; Millowitsch v. Millowitsch, 44 Ill. App. 357; Hemenway v. Hemenway, 65 Vt. 623, 27 Atl. 609 (see DESERTION); *abandonment;* McLean v. Janin, 45 La. Ann. 664, 12 South. 747; *adultery;* Carter v. Carter, 37 Ill. App. 219; McGrail v. McGrail, 48 N. J. Eq. 532, 22 Atl. 582; *cruelty;* De Zwaan v. De Zwaan, 91 Mich. 279, 51 N. W. 998; Day v. Day, 84 Ia. 221, 50 N. W. 979; Mayhew v. Mayhew, 61 Conn. 233, 23 Atl. 966, 29 Am. St. Rep. 195; 69 Law T. 152; Glass v. Wynn, 76 Ga. 319; Myers v. Myers, 83 Va. 806, 6 S. E. 630 (see LEGAL CRUELTY); *habitual drunkenness;* McBee v. McBee, 22 Or. 329, 29 Pac. 887, 29 Am. St. Rep. 613, De Lesdernier v. De Lesdernier, 45 La. Ann. 1361, 14 South. 191; Page v. Page, 43 Wash. 293, 86 Pac. 582, 6 L. R. A. (N. S.) 914, 117 Am. St. Rep. 1054; *conviction of crime,* in most states; *incurable insanity,* in some states; *failure to support;* and *impotence, relationship, incapacity* to enter into the contract, *fraud, duress,* etc.

Fraud in the contract is an offence or wrong done by one spouse to another, so affecting the essential conditions of the marriage status as practically to destroy that relation, and render the continuance of the bond an injury to the state as well as to the parties. The wrong becomes complete on the completion of the marriage contract. It may consist in false statements as to existing facts which affect one or more of the essential purposes of the status. The injured spouse may however condone the injury and accept the relation or, upon discovery of the wrong, may apply for a divorce; Gould v. Gould, 78 Conn. 242, 61 Atl. 604, 2 L. R. A. (N. S.) 531.

Concealment of epilepsy is a fraud within the meaning of a statute allowing divorce for fraud in the contract of marriage, where the statute forbids an epileptic to marry under penalty of imprisonment. Such statute is valid and a marriage in disregard of it is voidable, not void; *id.*

Where a statute gave a court of chancery sole cognizance to decree a marriage null and void where either of the parties was at the time insane, drunkenness was held not insanity for which a divorce could be granted; Elzey v. Elzey, 1 Houst. (Del.) 308; nor was an excessive indulgence in morphine considered a ground for divorce under a statute permitting divorce for habitual drunkenness; Youngs v. Youngs, 130 Ill. 230, 22 N. E. 806, 6 L. R. A. 548, 17 Am. St. Rep. 313; Dawson v. Dawson, 23 Mo. App. 169. It is said there must be an involuntary tendency to become intoxicated as often as the temptation is presented, which comes from a fixed habit acquired from frequent and excessive indulgence; McBee v. McBee, 22 Or. 329, 29 Pac. 887, 29 Am. St. Rep. 613; Burns v. Burns, 13 Fla. 369. As an independent ground, drunkenness is held in Maryland to furnish no cause for divorce; Shutt v. Shutt, 71 Md. 193, 17 Atl. 1024, 17 Am. St. Rep. 519; Mason v. Mason, 131 Pa. 161, 18 Atl. 1021. Where the statute coupled habitual intemperance with intolerable cruelty as a cause for divorce, it was said the habitual use of intoxi-

cating liquor, though producing excitement, will not justify a divorce. The habit must be so gross as to produce suffering or want in the family to a degree which cannot be reasonably borne. The term cannot well be defined, but must be applied to cases as they arise by inclusion or exclusion, and the existence of the condition in question decided as a matter of fact; Dennis v. Dennis, 68 Conn. 186, 36 Atl. 34, 34 L. R. A. 449, 57 Am. St. Rep. 95, where it is said: "While there may be, on the one hand, such a clear case of intemperate habits as to justify the court in saying that such and such facts constitute a condition of habitual intemperance, or, on the other hand, such an entire absence of proof, beyond an occasional indulgence in the use of ardent spirits, as to warrant the opposite conclusion, yet the main field of inquiry and the determination of the question must be submitted to the jury, and the questions on this submission must be decided by them."

If at the time of the marriage the wife was with child by another man, it may be ground for divorce; Baker v. Baker, 13 Cal. 87; or the marriage may be declared null and void *ab initio;* Reynolds v. Reynolds, 3 Allen (Mass.) 605; Carris v. Carris, 24 N. J. Eq. 516; *contra,* [1897] P. D. 263; but where the wife concealed the fact that she had been previously married and divorced and had a child, it was not such fraud as to entitle the husband to a sentence of nullity; Donnelly v. Strong, 175 Mass. 157, 55 N. E. 892.

The existence of venereal disease at the time of marriage is held ground for annulment; Ryder v. Ryder, 66 Vt. 158, 28 Atl. 1029, 44 Am. St. Rep. 833; Smith v. Smith, 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 Am. St. Rep. 440 (where there was refusal to consummate and the court confined its decision to that case, considering it the stronger because of the prompt action); and it is also, during marriage, cause for divorce, being put upon the ground that the communication of such disease to the other spouse is extreme cruelty; Cook v. Cook, 32 N. J. Eq. 475; 28 E. L. & Eq. 603, 29 L. J. Mat. 57; L. R. 1 P. & D. 702, Curt. 678; McMahen v. McMahen, 186 Pa. 485, 40 Atl. 795, 41 L. R. A. 802; Morehouse v. Morehouse, 70 Conn. 420, 39 Atl. 516; Holthoefer v. Holthoefer, 47 Mich. 260, 643, 11 N. W. 150 (where the doctrine is sustained, though the divorce was refused in a case termed by Cooley, J., as "quite peculiar," the wife being found diseased, with no suspicion against her chastity, and the husband found on examination to have no signs of it); and having the disease has been held sufficient cause without communicating it; 1 Hagg. Eccl. 765; Canfield v. Canfield, 34 Mich. 519; Hanna v. Hanna, 3 Tex. Civ. App. 51, 21 S. W. 720; where the court was not prepared to say that it would not entitle the wife to a divorce, if the husband were diseased, without proof that he had communicated it to her; a reasonable apprehension of injury is sufficient; 1 Hagg. Con. 35. The libellant must have been ignorant as to the existence and nature of the disease, otherwise there may be waiver and condonation; Rehart v. Rehart (Or.) 25 Pac. 775; but if she was ignorant, the divorce will be granted; Wilson v. Wilson, 16 R. I. 122, 13 Atl. 102.

Charges held not to be grounds of divorce are that the wife entered into love-making, secret correspondence and meetings with young men and the like, which the court characterized as "flirting"; Hancock v. Hancock, 55 Fla. 680, 45 South. 1020, 15 L. R. A. (N. S.) 670; the refusal of a man to permit his wife actively to control his business, though it result in the inability to live harmoniously together; Root v. Root, 164 Mich. 638, 130 N. W. 194, 32 L. R. A. (N. S.) 837, Ann. Cas. 1912B, 740. The practice of Christian Science as a doctor by a wife may give her husband ground for divorce under a statute authorizing divorce for treatment seriously injuring health or endangering reason, even though such alleged injury is due to the husband's abnormal sensitiveness; Robinson v. Robinson, 66 N. H. 600, 23 Atl. 362, 15 L. R. A. 121, 49 Am. St. Rep. 632.

In the Philippine Islands adultery of the husband must be accompanied by public scandal and disgrace to entitle the wife to a divorce; De La Rama v. De La Rama, 201 U. S. 303, 26 Sup. Ct. 485, 50 L. Ed. 765.

The Uniform Divorce Act has been passed in Delaware, New Jersey, and Wisconsin.

See ABANDONMENT; ADULTERY; LEGAL CRUELTY; HABITUAL DRUNKARD; INSANITY; IMPOTENCE. As to divorce laws in all countries, see 3 Burge, Colonial Law, by Renton & Phillimore.

Some of the principal defences in suits for divorce are: *Connivance,* or the corrupt consent of a party to the conduct of the other party, whereof he afterwards complains. This bars the right of divorce, because no injury was received; for what a man has consented to he cannot say was an injury; 2 Bish. Mar. & D. § 204. See Brown v. Grove, 116 Ind. 84, 18 N. E. 387, 9 Am. St. Rep. 823; Pettee v. Pettee, 77 Hun 595, 28 N. Y. Supp. 1067. And this may be passive as well as active; 3 Hagg. Eccl. 87. See Morrison v. Morrison, 136 Mass. 310. See CONNIVANCE. *Collusion,* which is an agreement between husband and wife for one of them to commit, or appear to commit, a breach of matrimonial duty, for the purpose of enabling the other to obtain the legal remedy of divorce, as for a real injury. Where the act has not been done, collusion is a real or attempted fraud upon the court; where it has, it is also a species of connivance; in either case it is a bar to any claim for divorce; 2 Bish. Mar. & D. § 251. See COLLUSION. *Condonation,* or the conditional forgiveness or remis-

sion by the husband or wife of a matrimonial offence which the other has committed. While the condition remains unbroken, condonation, on whatever motive it proceeded, is an absolute bar to the remedy for the particular injury condoned; 2 Bish. Mar. & D. § 268; Farmer v. Farmer, 86 Ala. 322, 5 South. 434; 60 Law J. Prob. 73; O'Connor v. O'Connor, 109 N. C. 139, 13 S. E. 887; Nullmeyer v. Nullmeyer, 49 Ill. App. 573. For the nature of the condition, and other matters, see CONDONATION. *Recrimination*, which is a defence arising from the complainant's being in like guilt with the one of whom he complains. It is incompetent for one of the parties to a marriage to come into court and complain of the other's violation of matrimonial duties, if the party complaining is guilty likewise; Redington v. Redington, 2 Colo. App. 8, 29 Pac. 811. When the defendant sets up such violation in answer to the plaintiff's suit, this is called, in the matrimonial law, recrimination; 2 Bish. Mar. & D. § 340. See RECRIMINATION.

The foregoing defences, though available in all divorce causes, are more frequently applicable where a divorce is sought on the ground of adultery.

The consequences of divorce are such as flow from the sentence by operation of law, or flow from either the sentence or the proceeding by reason of their being directly ordered by the court and set down of record. In regard to the former, they are chiefly such as result immediately and necessarily from the definition and nature of a divorce. Being a dissolution of the marriage relation, the parties have no longer any of the rights, nor are subject to any of the duties, pertaining to that relation. They are henceforth single persons to all intents and purposes. It is true that the statutes of some of the states contain provisions disabling the guilty party from marrying again; but these are in the nature of penal regulations, collateral to the divorce, and which leave the latter in full force.

In regard to rights of property as between husband and wife, a sentence of divorce leaves them as it finds them. Consequently, all transfers of property which were actually executed, either in law or fact, continue undisturbed; for example, the personal estate of the wife, reduced to possession by the husband, remains his after the divorce the same as before. On the termination of a tenancy by the entirety, created by a conveyance to husband and wife, by an absolute divorce, they afterward hold the land as tenants in common without survivorship; Stelz v. Shreck, 128 N. Y. 263, 28 N. E. 510, 13 L. R. A. 325, 26 Am. St. Rep. 475. See Hopson v. Fowlkes, 92 Tenn. 697, 23 S. W. 55, 23 L. R. A. 805, 36 Am. St. Rep. 120. But it puts an end to all rights depending upon the marriage and not actually vested; as, dower in a wife, all rights of the husband in the real estate of the wife, and his right to reduce to possession her choses in action; Lawson v. Shotwell, 27 Miss. 630; Gould v. Crow, 57 Mo. 200; Whitsell v. Mills, 6 Ind. 229, Clark v. Clark, 6 W. & S. (Pa.) 85; Townsend v. Griffin, 4 Harr. (Del.) 440; Starr v. Pease, 8 Conn. 541; Legg v. Legg, 8 Mass. 99; Renwick v. Renwick, 10 Paige, Ch. (N. Y.) 420; Doe v. Brown, 5 Blackf. (Ind.) 309; Oldham v. Henderson, 5 Dana (Ky.) 254; Arrington v. Arrington, 102 N. C. 491, 9 S. E. 4; American Legion of Honor v. Smith, 45 N. J. Eq. 466, 17 Atl. 770; Maynard v. Hill, 125 U. S. 216, 8 Sup. Ct. 723, 31 L. Ed. 654; Barrett v. Failing, 111 U. S. 525, 4 Sup. Ct. 598, 28 L. Ed. 505; Lamkin v. Knapp, 20 Ohio St. 454. In respect to dower, however, it should be observed that a contrary doctrine has been settled in New York, it being there held that immediately upon the marriage being solemnized the wife's right to dower becomes perfect, provided only she survives her husband; Wait v. Wait, 4 N. Y. 95; Forrest v. Forrest, 6 Duer (N. Y.) 102.

Courts will annul or vacate decrees of divorce on sufficient showing after the death of one or both of the parties thereto, where property rights are involved; Johnson v. Coleman, 23 Wis. 452, 99 Am. Dec. 193; Lawrence v. Nelson, 113 Ia. 277, 85 N. W. 84, 57 L. R. A. 583; Wood v. Wood, 136 Ia. 128, 113 N. W. 492, 12 L. R. A. (N. S.) 891, 125 Am. St. Rep. 223, Shafer v. Shafer, 30 Mich. 163; or where it is shown that the divorce was fraudulently obtained; Appeal of Fidelity Ins. Co., 93 Pa. 242 (where the rule to vacate it was not filed until thirteen years after the decree was obtained and after the death of the party obtaining it); Brown v Grove, 116 Ind. 84, 18 N. E. 387, 9 Am. St Rep. 823 (twenty years after the date of the decree and long after the death of the party obtaining it); or where lack of jurisdiction to grant the decree is shown; Rine v. Hodgson, 9 Ohio Dec. Reprint 275; Willman v. Willman, 57 Ind. 500.

One against whom a divorce is obtained who accepts the benefit of the decree, and acts in a way which would be illegal but for the divorce so granted, cannot, after a long lapse of time and after the death of the other party, deny its validity, or assert that it was obtained without due notice; In re Richardson's Estate, 132 Pa. 292, 19 Atl. 82; Mohler v. Shank's Estate, 93 Ia. 273, 61 N. W. 981, 34 L. R. A. 161, 57 Am. St. Rep. 274; nor can one who invokes the jurisdiction of a state and submits himself thereto be heard to question such jurisdiction; Matter of Morrisson, 52 Hun 102, 5 N. Y. Supp. 90, affirmed in 117 N. Y. 638, 22 N. E. 1130; and his representatives can occupy no better position than he would have, if living; *id.* If the defendant in a divorce decree cannot attack it because it was obtained by his own fraud,

his administrator cannot attack it because of such fraud; Dow v. Blake, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156. In Kirschner v. Dietrich, 110 Cal. 502, 42 Pac. 1064, where no property rights were involved, it was held that, by the death of a party, a suit for a divorce was absolutely abated, and that the purpose of the action being to change the personal *status* of the plaintiff in her relations to her husband after her death, there was none which could be changed by judgment; and in Barney v. Barney, 14 Ia. 189, there being no property in which the husband, except for the divorce, would have had an interest at the death of the wife, and no fraud being alleged, it was held that the suit abated. Where in an action for dower in Ohio the defence was set up that the deceased had previously obtained a divorce in an Indiana court, of which it was proved that the wife had no knowledge until after the death of the husband, and the record did not show the ground upon which the decree was based, it was held that the decree acted only on the marital relations, and having been rendered without jurisdiction of the person of the wife, her property rights in Ohio were unaffected; Doerr v. Forsythe, 50 Ohio St. 726, 35 N. E. 1055, 40 Am. St. Rep. 703.

The death of the complainant in a divorce suit, before a writ of error, was held not to destroy the subject-matter of the suit, as respects the jurisdiction of the court of review; although the record fails to show that any property right was involved; Chatterton v. Chatterton, 231 Ill. 449, 83 N. E. 161, 121 Am. St. Rep. 339, where the court approved of decisions denying that, by the death of a party in such suit, the marriage *status* was forever destroyed and that there was no subject matter of which a court of review could assume jurisdiction; Danforth v. Danforth, 111 Ill. 236, where the writ of error was taken before the death of the party and a motion to amend the record, so as to give effect to the judgment as of a prior term, was allowed; Wren v. Moss, 2 Gilman (Ill.) 72, where it was held that a writ of error might be prosecuted after the death of the other party, to reverse the decree; Wren v. Moss, 1 Gilman (Ill.) 560, where a motion to abate the suit as to alimony and to make the executor a party for a writ of error was allowed.

A decree of divorce may be reviewed after the death of a party, either on a writ of error; Israel v. Arthur, 6 Colo. 85; or appeal; Shafer v. Shafer, 30 Mich. 163. Such a decree was properly vacated and annulled by the court, after the death of the husband who had obtained it, there being evidence of fraud and imposition on the part of the libellant; Appeal of Boyd, 38 Pa. 241. A case constantly cited to the effect that a divorce obtained by fraud may be set aside after the death of a party has been properly characterized as merely a *dictum*, since the decision was upon other grounds and that question was not involved; 57 L. R. A. 583, 589, note, where the cases to that date upon the right to contest the validity of a divorce decree, after the death of a party, are collected and reviewed with discrimination. But where a divorce had been obtained by the plaintiff who subsequently died, a motion to set aside the judgment for fraud was properly denied and it was suggested that the proper course was an action in the nature of a bill of revivor bringing before the court all the heirs at law and others interested in the property left by decedent; Watson v. Watson, 1 Hun (N. Y.) 267; and to the same effect is Groh v. Groh, 35 Misc. 354, 71 N. Y. Supp. 985. These cases having been in New York, where the writ of error was abolished, the method of review suggested was doubtless the only one available. In Michigan, where the practice, it is believed, is very similar to that of New York, there is a similar case; Zoellner v. Zoellner, 46 Mich. 511, 9 N. W. 831; and a precisely similar case citing and relying upon the Michigan case is Roberts v. Roberts, 19 R. I. 349, 33 Atl. 872; and in a later Michigan case it was held that in simple divorce proceedings aimed at no independent relief after the death of one party, no decree could be made relating back to his lifetime; Wilson v. Wilson, 73 Mich. 620, 41 N. W. 817. Where the plaintiff in a suit for divorce dies pending the trial, before submission to the jury, if the issues are found in his favor, judgment of divorce will be entered as of the first day of the term while he was alive; Webber v. Webber, 83 N. C. 280. Cases which hold that the action is of a personal nature and abates with the death of the party bringing it are Hunt v. Hunt, 75 Misc. 209, 135 N. Y. Supp. 39; Dwyer v. Nolan, 40 Wash. 459, 82 Pac. 746, 1 L. R. A. (N. S.) 551, 111 Am. St. Rep. 919, 5 Ann. Cas. 890 (where it was held that the decree could not be set aside for want of jurisdiction); Wood v. Wood, 1 Boyce (Del.) 134, 74 Atl. 560 (where the court refused to make absolute a decree *nisi* and set it aside on the petition and affidavit of the defendant suggesting the death of the plaintiff); In re Crandall, 196 N. Y. 127, 89 N. E. 578, 134 Am. St. Rep. 830, 17 Ann. Cas. 874; Strickland v. Strickland, 80 Ark. 451, 97 S. W. 659; Hite v. Trust Co., 156 Cal. 765, 106 Pac. 102; but where the plaintiff died, after the entry of a interlocutory judgment by default, the court had power to render its final decree in accordance therewith after the death of the party; John v. Superior Court, 5 Cal. App. 262, 90 Pac. 53 (this being exactly the reverse of the Delaware case cited).

Of those consequences which result from the direction or order of the court, the most important are: ***Alimony***, or the allowance

which a husband, by order of court, pays to his wife, living separate from him, for her maintenance. The allowance may be for her use either during the pendency of a suit,—in which case it is called alimony *pendente lite*,—or after its termination, called permanent alimony. As will be seen from the foregoing definition, alimony, especially permanent alimony, pertains rather to a separation from bed and board than to a divorce from the bond of matrimony. Indeed, it is generally allowed in the latter case only in pursuance of statutory provisions.

A court has no authority to grant a decree of divorce in favor of a libellant after he has moved the court that no decree be entered; Milliman v. Milliman, 45 Colo. 291, 101 Pac. 58, 22 L. R. A. (N. S.) 999, 132 Am. St. Rep. 181; see, also, Adams v. Adams, 57 Misc. 150, 106 N. Y. Supp. 1064, where it appeared that the defendant had denied the marriage and the court refused to dismiss the suit on libellant's motion; Winans v. Winans, 124 N. Y. 140, 26 N. E. 293. See Milliman v. Milliman, 45 Colo. 291, 101 Pac. 58, 22 L. R. A. (N. S.) 999, 132 Am. St. Rep. 181.

As a general rule of practice, the uncorroborated evidence of a co-respondent is held not sufficient to grant a divorce; Delaney v. Delaney, 71 N. J. Eq. 246, 65 Atl. 217, reversing 69 N. J. Eq. 602, 61 Atl. 266; Herrick v. Herrick, 31 Mich. 298; Evans v. Evans, 93 Ky. 512, 20 S. W. 605; but the court may act upon it, if satisfied that the story told is true and that there is no collusion; 21 T. L. R. 676; (1907) P. 334. The denial of the adultery by defendant and the co-respondent is competent and, although of little weight against clear proof, in the absence of it, was held sufficient; Mayer v. Mayer, 21 N. J. Eq. 246.

As to the Effect on a Will. It has been held that a divorce alone does not revoke a previously executed will; In re Brown's Estate, 139 Ia 219, 117 N. W. 260; Baacke v. Baacke, 50 Neb. 21, 69 N. W. 303; Charlton v. Miller, 27 Ohio St. 298, 22 Am. Rep. 307; Card v. Alexander, 48 Conn. 492, 40 Am. Rep. 187; L. R. 22 Ch. Div. 597; L. R. 25 Ch. Div. 685. It is said that it is probable that a divorce granted at the suit of the wife with alimony expressly decreed to be in lieu of all her rights in the property of her husband, testamentary and otherwise, would by implication of law revoke the will of her husband in so far as it made provision for her; 1 Underhill, Wills 265. In a Michigan case it is held that when at the time a decree of divorce is granted, the parties to the action settle and adjust their property rights by mutual agreement, without mentioning wills theretofore made by them, the decree of divorce and settlement constituted an implied revocation of the will so theretofore made. The court said that by the decree of divorce and the property settlement the parties became strangers to each other, neither thereafter owing to the other either legal or moral obligations or duties, and that there was therefore a complete change in their relations, within the rule of implied revocation of wills; Lansing v. Haynes, 95 Mich. 16, 54 N. W. 699, 35 Am. St. Rep. 545, followed in Donaldson v. Hall, 106 Minn. 502, 119 N. W. 219, 20 L. R. A. (N. S.) 1073, 130 Am. St. Rep. 621, 16 Ann. Cas. 511. In Baacke v. Baacke, 50 Neb. 18, 69 N. W. 303, however, it was held that the doctrine of revocation by implication of law was based upon a presumed alteration of intention, arising from the changed condition and circumstances of the testator, or on the presumption that the will would have been different had it been executed under altered circumstances, and that a settlement of a woman's property rights upon obtaining a divorce from her husband does not work a revocation of a will previously executed by the husband.

As to questions arising from divorce relating to the custody of children, see PARENT AND CHILD.

By the civil law, the child of parents divorced is to be brought up by the innocent party at the expense of the guilty party. Ridley's View, pt. 1, c. 3, § 9, citing 8th Collation.

DO UT DES. I give that you may give. See CONSIDERATION.

DO UT FACIAS. I give that you may do. See CONSIDERATION.

DOCK. The enclosed space occupied by prisoners in a criminal court.

The space between two wharves. See City of Boston v. Lecraw, 17 How. (U. S.) 434, 15 L. Ed. 118. The owner of a dock is liable to a person who, by his invitation, and in the exercise of due care, places a vessel in the dock, for injury to the vessel caused by a defect thereon which the owner negligently allows to exist; Nickerson v. Tirrell, 127 Mass. 236.

DOCK WARRANT. A negotiable instrument, in use in England, given by the dock-owners to the owner of goods imported and warehoused in the docks, as a recognition of his title to the goods, upon the production of the bills of lading, etc. Pulling on the Customs of London.

DOCKAGE. The sum charged for the use of a dock. In the case of a dry dock, it has been held in the nature of rent. Ives v. The Buckeye State, 1 Newb. 69, Fed. Cas. No. 7117. See WHARFAGE.

DOCKET. A formal record of judicial proceedings; a brief writing. A small piece of paper or parchment having the effect of a larger. Blount. An abstract. Cowell.

To docket is said to be by Blackstone to abstract and enter into a book; 3 Bla. Com. 397. The essential idea of a modern docket, then, is an entry in brief in a proper book of all the important acts done

in court in the conduct of each case from its commencement to its conclusion. See Colby, Pr. 154.

In common use, it is the name given to the book containing these abstracts. The name of trial-docket is given to the book containing the cases which are liable to be tried at a specified term of court, called also calendar, or list.

The docket should contain the names of the parties and a minute of every proceeding in the case. It is kept by the clerk or prothonotary of the court. The docket entries form the record until the technical record is made up in proper form; State v. Carroll, 38 Conn. 449, 9 Am. Rep 409; McGrath v. Seagrave, 2 Allen (Mass.) 443, 79 Am. Dec. 797; Leathers v. Cooley, 49 Me. 337; Tracy v. Maloney, 105 Mass. 90, and this is true of the entries in the docket of a justice of the peace; Davidson v. Slocomb, 18 Pick. (Mass) 464; Ellsworth v. Learned, 21 Vt. 535. A sheriff's docket is not a record; Thomas v. Wright, 9 S & R. (Pa.) 91; Stevenson v. Weisser, 1 Bradf. (N. Y) 343.

DOCKMASTERS. Officers appointed to direct the mooring of ships, so as to prevent the obstruction of dock entrances.

DOCTOR. Means commonly a practitioner of medicine, of whatever system or school. Corsi v. Maretzek, 4 E. D. Smith (N. Y.) 1. See PHYSICIANS.

DOCTORS COMMONS. An institution near St. Paul's Cathedral in London, where the ecclesiastical and admiralty courts were held until the year 1857. 3 Steph. Com. 306, n.

In 1768 a royal charter was obtained by virtue of which the members of the society and their successors were incorporated under the name and title of "The College of Doctors of Laws exercent in the Ecclesiastical and Admiralty Courts." The College consists of a president (the dean of the arches for the time-being) and of those doctors of laws who, having regularly taken that degree in either of the universities of Oxford and Cambridge, and having been admitted advocates in pursuance of the rescript of the archbishop of Canterbury, shall have been elected fellows of the college in the manner prescribed by the charter.

DOCUMENT OF TITLE. By the Factors' Act 56, Vict. c. 39, § 4, it is stated to mean any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate warrant, or order for the delivery of goods, or any other document used in the ordinary course of business, as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented. Benj. Sales 788.

DOCUMENTS. The deeds, agreements, title-papers, letters, receipts, and other written instruments used to prove a fact. See Hazard v. Durant, 12 R. I. 99.

If a document is lost, secondary evidence of its contents may be given, after laying a proper foundation therefor by proving its former existence, and its due execution, and satisfactorily accounting for the failure to produce it. The burden of proving all these facts rests on the party who seeks to introduce secondary evidence of the document claimed to have been lost; Earley v. Euwer, 102 Pa. 338; Elwell v. Cunningham, 74 Me. 127. See American Life Insurance & Trust Co. v. Roseuagle, 77 Pa. 507. See LOST INSTRUMENT.

In Civil Law. Evidence delivered in the forms established by law, of whatever nature such evidence may be. The term is, however, applied principally to the testimony of witnesses. Savigny, Dr. Rom. § 165. See EVIDENCE.

DOE, JOHN. The name of the fictitious plaintiff in the action of ejectment. 3 Steph. Com. 618.

DOG. See ANIMAL; EXPEDITATION.

In almost all languages this word is used as a term or name of contumely or reproach See 3 Bulstr 226; 2 Mod. 260; 1 Leon. 148; and the title *Action on the Case for Defamation* in the Digests.

A tax on dogs is constitutional, and so is a provision that in case of refusal to pay the tax, the dog may be killed; Blair v. Forehand, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94; Mowery v. Town of Salisbury, 82 N. C. 175; *contra*, Archer v. Baertschi, 8 Ohio Cir. Ct. R. 12; Jenkins v. Ballantyne, 8 Utah 245, 30 Pac. 760, 16 L. R. A. 689. A proceeding of the most stringent character for the destruction of dogs kept contrary to municipal regulations is constitutional; Julienne v. City of Jackson, 69 Miss. 34, 10 South. 43, 30 Am. St. Rep. 526.

DOGMA. **In Civil Law.** The word is used in the first chapter, first section, of the second Novel, and signifies an ordinance of the senate. See, also, Dig. 27. 1. 6.

DOING BUSINESS. See FOREIGN CORPORATION.

DOLE. A part or portion. *Dole-meadow*, that which is shared by several. Spelman, Gloss.; Cowell.

DOLÉANCE. A peculiar appeal in the Channel Islands. It is a personal charge against a judicial officer, either of misconduct or of negligence. L. R. 6 P. C. 155. It still exists in a modified form. L. R. 5 A. C. 348. See 48 L. Jour. 281.

DOLI CAPAX. Capable of mischief; having knowledge of right and wrong. 4 Bla. Com. 22, 23; 1 Hale, Pl. Cr. 26, 27.

DOLI INCAPAX (Lat.). Incapable of distinguishing good from evil. A child under seven is absolutely presumed to be *doli incapax;* between seven and fourteen is, *prima facie, incapax doli*, but may be shown to be *capax doli.* 4 Bla. Com. 23; Broom, Max. 310; Williams v. State, 14 Ohio 222, 45 Am. Dec. 536; People v. Randolph, 2 Park. Cr. R. (N. Y.) 174. See DISCRETION; AGE.

DOLLAR (Germ. *Thaler*). The money unit of the United States.

It was established under the confederation by resolution of congress, July 6, 1785. This was originally represented by a silver piece only; the coinage of which was authorized by the act of congress of Aug. 8, 1786. The same act also established a decimal system of coinage and accounts. But the coinage was not effected until after the passage of the act

of April 2, 1792, establishing a mint, 1 U. S. Stat. L. 246; and the first coinage of dollars commenced in 1794 The law last cited provided for the coinage of "dollars or units, each to be of the value of a Spanish milled dollar, as the same was then current, and to contain three hundred and seventy-one grains and four-sixteenth parts of a grain of pure silver, or four hundred and sixteen grains of standard silver."

The Spanish dollar known to our legislation was the dollar coined in Spanish America, North and South, which was abundant in our currency, in contradistinction to the dollar coined in Spain, which was rarely seen in the United States. The intrinsic value of the two coins was the same; but, as a general (not invariable) distinction, the American coinage bore *pillars*, and the Spanish an escutcheon or shield; all kinds bore the royal effigy.

The *milled dollar*, so called, is in contradistinction to the irregular, misshapen coinage nicknamed *cob*, which a century ago was executed in the Spanish-American provinces,—chiefly Mexican. By the use of a milling machine the pieces were figured on the edge, and assumed a true circular form. The pillar dollar and the milled dollar were in effect the same in value, and, in general terms, the same coin; though there are pillar dollars ("cobs") which are not milled, and there are milled dollars (of Spain proper) which have no pillars.

The weight and fineness of the Spanish milled and pillar dollars is eight and one-half pieces to a Castilian mark, or four hundred and seventeen and fifteen-seventeenths grains Troy. The limitation of four hundred and fifteen grains in our law of 1806, April 10, 2 U. S. Stat L. 374, was to meet the loss by wear. The legal fineness of these dollars was ten dineros, twenty granos, equal to nine hundred and two and seven-ninths thousandths: the actual fineness was somewhat variable, and always below. The Spanish dollar and all other foreign coins are ruled out by the act of congress of Feb. 21, 1857, 13 U S. Stat. 1856-57, 163, they being no longer a legal tender But the statements herein given are useful for the sake of comparison. moreover, many contracts still in existence provide for payment (of ground-rents, for example) in Spanish milled or pillar dollars The following terms, or their equivalent, are frequently used in agreements made about the close of the last and the beginning of the present century: "silver milled dollars, each dollar weighing seventeen pennyweights and six grains at least." This was equal to four hundred and fourteen grains. The standard fineness of United States silver coin from 1792 to 1836 was fourteen hundred and eighty-five parts fine silver in sixteen hundred and sixty-four. Consequently, a piece of coin of four hundred and fourteen grains should contain three hundred and sixty-nine and forty-six hundredths grains pure silver.

By the act of Jan. 18, 1837, § 8, 5 U. S. Stat. 137, the standard weight and fineness of the dollar of the United States was fixed as follows: "of one thousand parts by weight, nine hundred shall be of pure metal and one hundred of alloy," the alloy to consist of copper, and it was further provided that the weight of the silver dollar should be four hundred and twelve and one-half grains (412 1-2).

The weight of the silver dollar has not been changed by subsequent legislation, but the proportionate weight of the lower denomination of silver coins has been diminished by the act of Feb. 21, 1853, 11 U. S. Stat. L. 160. By this act the half-dollar (and the lower coins in proportion) is reduced in weight fourteen and one-quarter grains below the previous coinage: so that the silver *dollar* which was embraced in this act weighs twenty-eight and one-half grains more than *two* half-dollars The silver dollar then, consequently, ceased to be current in the United States; but it continued to be coined to supply the demands of the West India trade and a local demand for cabinets, etc.

But the act of Feb. 28, 1878, 20 U. S Stat. L. c. 20, restored the standard silver dollar of the act of Jan. 18, 1837, as a legal tender for all debts except where otherwise stipulated in the contract, and required the monthly purchase of not less than two million and not more than four million dollars worth of silver bullion and the coinage of the same into standard silver dollars, but this latter clause was repealed by act of July 14, 1890. The act of Feb. 12, 1873, introduced the *trade-dollar*, of the weight of four hundred and twenty grains Troy, intended chiefly, if not wholly, to supplant the Mexican dollar in trade with China and the East. It has found its way, however, all over the United States, and, as it has been declared by a joint resolution of congress of July 22, 1876, 19 Stat L. p. 215, not to be a legal tender, has led to great inconvenience. The coinage of the *trade-dollar* was terminated and its redemption and recoinage in standard dollars was directed by the act of March 3, 1887, 24 Stat. L. 643. See also U. S. R. S. 1 Supp 563, 774.

By the act of November 1, 1893, it is declared to be the policy of the United States to continue the use of both gold and silver as standard money, and to coin both gold and silver into money of equal intrinsic and exchangeable value, such equality to be secured through international agreement, or by such safeguards of legislation as will insure the maintenance of the parity in value of the coins of the two metals, and the equal power of every dollar at all times in the markets and in the payment of debts. It is further declared that the efforts of the Government should be steadily directed to the establishment of such a safe system of bimetallism as will maintain at all times the equal power of every dollar coined or issued by the United States, in the markets and in the payment of debts.

By the act of March 3, 1849, a *gold* dollar was authorized to be coined at the mint of the United States and the several branches thereof, conformably in all respects to the standard of gold coins now established by law, except that on the reverse of the piece the figure of the eagle shall be omitted. It is of the weight of 25 8 grains, and of the fineness of nine hundred thousandths This dollar was made the unit of value by act of congress Feb. 12, 1873, and it was further provided that such dollar, when worn by natural abrasion, and so reduced in weight after twenty years of circulation (as evidenced by date on the face of such coin), will be redeemed by the United States Treasury or its offices, subject to such regulations as the Secretary of the Treasury may prescribe for the protection of the Government against fraudulent abrasions and other practices; U. S. Rev Stat. §§ 3505, 3511. Its coinage was discontinued by act of September 26, 1890.

A charge of one-fifth per centum was formerly made for converting gold bullion into coin, but by act of Jan 14, 1875, this law was repealed.

The one dollar and the three dollar gold pieces are no longer coined. See 26 Stat. L. 485.

When the word dollars is used in a bequest or in any instrument for the payment of money, the amount is payable in whatever the United States declares to be legal tender, whether coin or paper money, but not in real or personal property in which money has been invested; Halsted v. Meeker's Ex'rs, 18 N J Eq 136; Lanning v Sisters of St. Francis, 35 N J Eq 396; Bank of State v. Burton, 27 Ind. 426; Miller v. Lacy, 33 Tex. 351; Hart v. Flyn's Ex'rs, 8 Dana (Ky.) 190; Morris v. Bancroft, 1 U. N. C. (Pa) 223.

DOLO. The Spanish form of *dolus*.

DOLUS (Lat.). **In Civil Law.** A fraudulent address or trick used to deceive some one; a fraud. Dig. 4. 3. 1. Any subtle contrivance by words or acts with a design to circumvent. 2 Kent 560; Code 2. 21.

Dolus differs from *culpa* in this, that the latter proceeds from an error of the understanding, while to constitute the former there must be a will or intention to do wrong Wolffius, Inst. § 17.

As opposed to *dolus*, *culpa* imports negligence, heedlessness, or temerity, as well as indirect intention (*i. e.* of consequence intended but not desired). G. Campbell, Analysis of Austin 78. See CULPA. It seems doubtful, however, whether the general use of the word *dolus* in the civil law is not rather

that of very great negligence, than of fraud, as used in the common law. A distinction was also made between *dolus* and *fraus*, the essence of the former being the intention to deceive, while that of the latter was actual damage resulting from the deceit.

Such acts or omissions as operate as a deception upon the other party, or violate the just confidence reposed by him, whether there be a deceitful intent (*malus animus*) or not. Pothier, *Traité de Dépôt*, nn. 23, 27; Story, Bailm. § 20 *a;* Webb's Poll. Torts 18; 2 Kent 506, n.

DOLUS MALUS (Lat.). Fraud. Deceit with an evil intention. Distinguished from *dolus bonus*, justifiable or allowable deceit. Calvinus, Lex.; Broom, Max. 349; 1 Kaufmann, Mackeld. Civ. Law 165. Misconduct. *Magna negligentia culpa est, magna culpa dolus est* (great negligence is a fault, a great fault is fraud). 2 Kent 560, n.

DOM. PROC. An abbreviation of *Domus Procerum*, the House of Lords.

DOMAIN. Dominion; territory governed. Possession; estate. Land about the mansion-house of a lord. The right to dispose at our pleasure of what belongs to us.

A distinction has been made between property and domain. The former is said to be that quality which is conceived to be in the thing itself, considered as belonging to such or such person, exclusively of all others. By the latter is understood that right which the owner has of disposing of the thing Hence domain and property are said to be correlative terms, the one is the active right to dispose of, the other a passive quality which follows the thing and places it at the disposition of the owner. 3 Toullier, n. 83. But this distinction is too subtle for practical use. Puffendorff, *Droit de la Nat.* l 4 c. 4, 106 § 2. See 1 Bla. Com. 105; *Clef des Lois Rom.*, Domat; 1 Hill, Abr. 24; 2 *id.* 237, EMINENT DOMAIN.

DOMBOC (spelled, also, often *dombec*. Sax.). The name of codes of laws among the Saxons. Of these King Alfred's was the most famous. 1 Bla. Com. 46; 4 *id.* 411.

The *domboc* of king Alfred is not to be confounded with the domesday-book of William the Conqueror.

DOME (Sax.). Doom; sentence; judgment. An oath. The homager's oath in the black book of Hereford. See DOOM.

DOMESDAY-BOOK. The record of the survey of England instituted by William the Conquerer and effected by inquests of local jurors. It was begun in 1085 and completed in 1086.

It was primarily a fiscal survey—the liability for paying "gild" in the past and the liability for paying "geld" in the future were the chief points to be ascertained. It has been called "a great rate book." Incidentally it gives a marvelously detailed picture of the legal, social, and economic state of England, but a picture which, in some respects, is not easily interpreted; Maitl. 2 Sel. Essays, Anglo-Amer. L. H. 76. It is preserved in two manuscript volumes; the second deals with the counties of Essex, Norfolk, and Suffolk; the first with the rest of England. The first is a folio of 382 leaves; the second is a quarto volume of 450 leaves. It is probable that the second was compiled first; Round, Feud. Engl. 140. It was printed by royal command in 1783. A third volume, containing a general introduction and indexes, and a fourth, containing various documents supposed to be connected with the survey, were published in 1816.

It early acquired the name of "Domesday." The *Dialogus de Scaccario* ascribes the name to the fact that the people were reminded by it of the Day of Judgment. Hales' theory (Domesday of St. Paul's XI) is that the name was derived from the fact that the inquisitions on which it was based were held on the "Domes-days," or law-days, of the various hundreds.

"If English history is to be understood, the law of Domesday Book must be mastered We have here an absolutely unique account of feudalism in two different stages of its growth, the more trustworthy, though the more puzzling, because it gives us particulars and not generalities." Maitland, Domesday and Beyond 3. It is not a collection of laws; nor a register of title; it is a "geld" book, *id.* For a partial bibliography, see 2 Sel. Essays, Anglo-Amer. L. H. 77. See Round, Feudal England; 11 Engl. Hist. Rev. 209 (Pollock), Ellis, General Introd. to Domesday, Ballard, Domesday Boroughs; Ballard, Domesday Inquest; 2 Holdsworth, Hist. E. L. 118; 1 Soc Engl 236, Domesday Studies (papers read at the Domesday Commemoration, 1886); Maitland, Domesday Book and Beyond.

DOMESMEN (Sax.). An inferior kind of judges. Men appointed to doom (judge) in matters in controversy. Cowell. Suitors in a court of a manor in ancient demesne, who are judges there. Blount; Whishaw; *Termes de la Ley.* See JURY.

DOMESTIC ATTACHMENT. See ATTACHMENT.

DOMESTIC MANUFACTURES. This term in a state statute is used, generally, of manufactures within its jurisdiction. Com. v. Gilfinan, 64 Pa. 100.

DOMESTIC PORT. See HOME PORT.

DOMESTICS. Those who reside in the same house with the master they serve. The term does not extend to workmen or laborers employed out-of-doors. Ex parte Meason, 5 Binn. (Pa.) 167; Cook v. Dodge, 6 La. Ann. 276; Richardson v. State, 43 Tex. 456; Merlin, *Répert.* The act of congress of April 30, 1790, s. 25, used the word domestic in this sense. This term does not extend to a servant whose employment is out of doors and not in the house; Wakefield v. State, 41 Tex. 556.

Formerly this word was used to designate those who resided in the house of another, however exalted their station, who performed services for him. Voltaire, in writing to the French queen, in 1748, says, "Deign to consider, madam, that I am one of the domestics of the king, and consequently yours, my companions, the gentlemen of the king," etc.; but librarians, secretaries, and persons in such honorable employments would not probably be considered domestics, although they might reside in the houses of their respective employers.

Pothier, to point out the distinction between a

domestic and a servant, gives the following example:—A literary man who lives and lodges with you, solely to be your companion, that you may profit by his conversation and learning, is your domestic; for all who live in the same house and eat at the same table with the owner of the house are his domestics, but they are not *servants*. On the contrary, your valet-de-chambre, to whom you pay wages, and who sleeps out of your house, is not, properly speaking, your domestic, but your servant Pothier, Proc. Cr. sect. 2, art. 5, § 5; Pothier, Obl 710, 828; 9 Toullier, n 314; H. de Pansey, *Des Justices de Paix*, c. 30, n. 1.

DOMICIL. That place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. White v. Crawford, 10 Mass. 188; Tanner v. King, 11 La. 175; Crawford v. Wilson, 4 Barb. (N. Y.) 505; White v. Brown, Wall. Jr. 217, Fed. Cas. No. 17,538; Horne v. Horne, 31 N. C. 99; Holliman's Heirs v. Peebles, 1 Tex. 673; Hairston v. Hairston, 27 Miss. 704, 61 Am. Dec. 530; Chaine v. Wilson, 1 Bosw. (N. Y.) 673; Hayes v. Hayes, 74 Ill. 312.

The domicil of a person is that place or country in which his habitation is fixed, without any present intention of removing therefrom. [1892] 3 Ch. 180; Story, Confl. L. § 43.

Dicey defines domicil as, in general, the place or country which is in fact his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law; Dicey, Dom. 42; and again as "that place or country either (1) in which he in fact resides with the intention of residence (*animus manendi*); or (2) in which, having so resided, he continues actually to reside, though no longer retaining the intention of residence; or (3) with regard to which, having so resided there, he retains the intention of residence, though he, in fact, no longer resides there;" *id.* 44. The same definition substantially is given in Dicey, Confl. Laws (Moore's ed.) 727. It is there said not to include cases of domicil created by operation of law.

Domicil is "a habitation fixed in some place with the intention of remaining there alway." Vattel, *Droit des Gens*, liv. i, c. xix, s. 218, *Du Domicile*.

"The place where a person has established the principal seat of his residence and of his business." Pothier, *Introd. Gen. Cout. d'Orleans*, ch. 1, s. 1, art. 8.

"That place is to be regarded as a man's domicil which he has freely chosen for his permanent abode [and thus for the centre at once of his legal relations and his business]." Savigny, S. 353.

"A residence at a particular place, accompanied with [positive or presumptive proof of] an intention to remain there for an unlimited time." Phillimore, Int. Law 49.

"That place is properly the domicil of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or uncertain) shall occur to induce him to adopt some other permanent home." 28 L. J. Ch. 361, 366, per Kindersley, V. C. It is said to be a relation between an individual and a particular locality or country. 22 Harv. L. Rev. 220; In re Reed's Will, 48 Or. 500, 87 Pac. 763.

It has been said that there is no precise definition of the word; 25 L. J. Ch. 730; but Dicey (Domicil, App. and in his Confl. Laws 731) dissents from this statement. In the latter work the learned writer says that "the attempts which have been made to define domicil, and of the criticisms upon such attempts, lead to results which may be summed up as follows:

"First. Domicil, being a complex term, must, from the nature of things, be capable of definition. In other words, it is a term which has a meaning, and that meaning can be explained by analyzing it into its elements.

"Secondly. All the best definitions agree in making the elements of domicil 'residence' and '*animus manendi*.'

"Thirdly. Several of these definitions—such, for example, as Story's Phillimore's, or Vice-Chancellor Kindersley's—have succeeded in giving an explanation of the meaning of domicil, which, even if not expressed in the most precise language, is substantially accurate.

"Fourthly. The reason why English courts have been inclined to hold that no definition of domicil is satisfactory is, that they have found it impossible to reconcile any definition with three sets of judicial decisions or dicta (an officer in the service of the East India Company; an Englishman acquiring a domicil in another country; and a person residing in another country for his health). When, however, these sets are examined, it is found that two of them consist of cases embodying views of domicil now admitted to be erroneous, whilst the third set can be reconciled with all the best definitions of domicil." Dicey, Confl. Laws 735.

A person must have a domicil for purposes of taxation; Thorndike v. City of Boston, 1 Metc. (Mass.) 242; Borland v. City of Boston, 132 Mass. 89, 42 Am. Rep. 424; Church v. Rowell, 49 Me. 367; for jurisdiction; Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366; Bell v. Bell, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. Ed. 804; Streitwolf v. Streitwolf, 181 U. S. 179, 21 Sup. Ct. 553, 45 L. Ed. 807; Ayer v. Weeks, 65 N. H. 248, 18 Atl. 1108, 6 L. R. A. 716, 23 Am. St. Rep. 37; for succession; Gilman v. Gilman, 52 Me. 165, 83 Am. Dec. 502; Merrill's Heirs v. Morrissett, 76 Ala. 433; Dupuy v. Wurtz, 53 N. Y. 556; for adminis-

tration; Hindman's Appeal, 85 Pa. 466; for pauper settlement; Abington v. North Bridgewater, 23 Pick. (Mass.) 177; for loyal character; Desmare v. U. S., 93 U. S. 605, 23 L. Ed. 959; for homestead exemption; Shepherd v. Cassiday, 20 Tex. 24, 70 Am. Dec. 372; for attachment; Morgan v. Nunes, 54 Miss. 308; Hicks v. Skinner, 72 N. C. 1. A person can, however, have but one domicil at a time; Desmare v. U. S., 93 U. S. 605, 23 L. Ed. 959; Shaw v. Shaw, 98 Mass. 158; Evans v. Payne, 30 La. Ann. 502; Dupuy v. Wurtz, 53 N. Y. 556; Abington v. North Bridgewater, 23 Pick. (Mass.) 170; but Cockburn (Nationality) says that it is quite possible for a person to have two domicils. See Morse, Citizenship 100. And it is said that a person may have both a civil and a commercial domicil; Dicey, Confl. Laws 740.

A bachelor cannot claim the place where he takes his meals as his residence for voting purposes, when he keeps a business office and sleeping apartments in connection therewith in another place, where he spends most of his time; State v. Savre, 129 Ia. 122, 105 N. W. 387, 3 L. R. A. (N. S.) 455, 113 Am. St. Rep. 452; Behrensmeyer v. Kreitz, 135 Ill. 591, 26 N. E. 704 (where an engineer had a room in one state and took his meals in another); Carter v. Putnam, 141 Ill. 138, 30 N. E. 681 (where an unmarried man was in business in one town and took the greater number of his meals with his father, who lived in another, keeping part of his clothing in each place); Longhammer v. Munter, 80 Md. 518, 31 Atl. 300, 27 L. R. A. 330.

Where a house was located on the line between two towns, it was said by Shaw, C. J., that if it could be ascertained where the occupant usually slept, this would be a preponderating circumstance, and, in the absence of other proof, decisive; Inhabitants of Abington v. Inhabitants of North Bridgewater, 23 Pick. (Mass.) 170.

Domicil may be either national or domestic. In deciding the question of national domicil, the point to be determined will be in which of two or more distinct nationalities a man has his domicil. In deciding the matter of domestic domicil, the question is in which subdivision of the nation does the person have his domicil. Thus, whether a person is domiciled in England or France would be a question of national domicil, whether in Norfolk or Suffolk county, a question of domestic domicil. The distinction is to be kept in mind, since the rules for determining the two domicils, though frequently, are not necessarily, the same; see 2 Kent 449; Story, Confl. Laws § 39; Westl. Priv. Int. Law 15; Wheat. Int. Law 123.

The Romanists and civilians seem to attach about equal importance to the place of business and of residence as fixing the place of domicil; Pothier, Introd. *Gen. Cout. d'Orleans*, c. 1, art. 1, § 8; Story, Confl. Laws § 42. This may go far towards reconciling the discrepancies of the common law and civil law as to what law is to govern in regard to contracts.

Legal residence, inhabitancy, and domicil are generally used as synonymous; Isham v. Gibbons, 1 Bradf. Surr. (N. Y.) 70; Del Hoyo v. Brundred, 20 N. J. L. 328; Bartlett v. Brisbane, 2 Rich. (S. C.) 489; Moore v. Wilkins, 10 N. H. 452; Cooper v. Galbraith, 3 Wash. C. C. 555, Fed. Cas. No. 3,193; Crawford v. Wilson, 4 Barb. (N. Y.) 505; Holmes v. Greene, 7 Gray (Mass.) 299; Church v. Crossman, 49 Ia. 447; but much depends on the connection and purpose; In re Thompson, 1 Wend. (N. Y.) 43; Lyman v. Fiske, 17 Pick. (Mass.) 231, 28 Am. Dec. 293; Inhabitants of Exeter v. Inhabitants of Brighton, 15 Me. 58; "residence" has a more restricted meaning than "domicil;" Charlton County v. Moberly, 59 Mo. 238; Foster v. Hall, 4 Humph. (Tenn.) 346; Borland v. Boston, 132 Mass. 89, 42 Am. Rep. 424. So also in insolvency statutes; Cobb v. Rice, 130 Mass. 231; those relating to administration and distribution; White v. Tennant, 31 W. Va. 790, 8 S. E. 596, 13 Am. St. Rep. 896; testamentary matters; In re Zerega's Will, 20 N. Y. Supp. 417; eligibility for public office; People v. Platt, 50 Hun 454, 3 N. Y. Supp. 367; attachment statutes; Labe v. Brauss, 12 Pa. Co. Ct. Rep. 255; and matters of jurisdiction; De Meli v. De Meli, 120 N. Y. 485, 24 N. E. 996, 17 Am. St. Rep. 652; Bradley v. Fraser, 54 Ia. 289, 6 N. W. 293; Penfield v. R. Co., 29 Fed. 494. Within divorce statutes, residence has been construed as equivalent to domicil; Graham v. Graham, 9 N. D. 88, 81 N. W. 44; Downs v. Downs, 23 App. D. C. 381; Hinds v. Hinds, 1 Ia. 36; but it must be an actual residence; Hamill v. Talbott, 81 Mo. App. 210. Besides mere bodily presence within the state, there must be the present bona fide purpose of abiding there indefinitely as a home; Graham v. Graham, 9 N. D. 88, 81 N. W. 44; mere length of time during which a person has lived in a particular locality is not controlling; and if he remain there longer than the period of time required to give him a legal residence, but without any intention of making it his permanent place of residence, he does not become a resident thereof; Sylvester v. Sylvester, 109 Ia. 401, 80 N. W. 547.

The term citizenship ordinarily conveys a distinct idea from that of domicil; State v. Adams, 45 Ia. 99, 24 Am. Rep. 760; but it is often construed in the sense of domicil; Morris v. Gilmer, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690; Comitis v. Parkerson, 56 Fed. 556, 22 L. R. A. 148.

Two things must concur to establish domicil,—the fact of residence and the intention of remaining. These two must exist or must have existed in combination; State v. Hallett, 8 Ala. 159; Crawford v. Wilson, 4 Barb

(N. Y.) 504; Shelton v. Tiffin, 6 How. (U. S.) 163, 12 L. Ed. 387; Lyman v. Fiske, 17 Pick. (Mass.) 231, 28 Am. Dec. 293; Hairston v. Hairston, 27 Miss. 704, 61 Am. Dec. 530; Leach v. Pillsbury, 15 N. H. 137; City of Hartford v. Champion, 58 Conn. 268, 20 Atl. 471. There must have been an actual residence; Roosevelt v. Kellogg, 20 Johns. (N. Y.) 208; Hennen v. Hennen, 12 La. 190; Desesbats v. Berquier, 1 Binn. (Pa.) 349, 2 Am. Dec. 448. The character of the residence is of no importance; Inhabitants of Waterborough v. Inhabitants of Newfield, 8 Greenl. (Me.) 203; Bradley v. Lowry, Speers, Eq. (S. C.) 3, 39 Am. Dec. 142, 5 E. L. & Eq. 52; Verret v. Bonvillain, 33 La. Ann. 1304; and if it has once existed, mere temporary absence will not destroy it, however long continued; 7 Cl. & F. 842; Sherwood v. Judd, 3 Bradf. Surr. (N. Y.) 267; Boyd v. Beck, 29 Ala. 703; McIntyre v. Chappell, 4 Tex. 187; Inhabitants of Knox v. Inhabitants of Waldoborough, 3 Greenl. (Me.) 455; Shattuck v. Maynard, 3 N. H. 123; Fain v. Crawford, 91 Ga. 30, 16 S. E. 106; Charlton County v. Moberly, 59 Mo. 238; Ross v. Ross, 103 Mass. 576; as in the case of a soldier in the army; Inhabitants of Brewer v. Inhabitants of Linneus, 36 Me. 428; Crawford v. Wilson, 4 Barb. (N. Y.) 522. And the law favors the presumption of a continuance of domicil; 5 Ves. 750; President, etc., of Harvard College v. Gore, 5 Pick. (Mass.) 370; White v. Brown, 1 Wall. Jr. 217, Fed. Cas. No. 17,538; Chaine v. Wilson, 1 Bosw. (N. Y.) 673; Hood's Estate, 21 Pa. 106; Ferguson v. Wright, 113 N. C. 537, 18 S. E. 691. The original domicil continues till it is fairly changed for another; 5 Madd. 232, 370; Jennison v. Hapgood, 10 Pick. (Mass.) 77; State v. Hallett, 8 Ala. 159; Layne v. Pardee, 2 Swan (Tenn.) 232; Holliman's Heirs v. Peebles, 1 Tex. 673; Burnham v. Rangeley, 1 Woodb. & M. 8, Fed. Cas. No. 2,176; Inhabitants of Exeter v. Inhabitants of Brighton, 15 Me. 58, Baird v. Byrne, 3 Wall. Jr. 11, Fed. Cas. No. 757; and revives on an intention to return; 1 Curt. Eccl. 856; Frost v. Brisbin, 19 Wend. (N. Y.) 11, 32 Am. Dec. 423; The Venus, 8 Cra. (U. S.) 278, 3 L. Ed. 553; 3 C. Rob. 12; The Friendschaft, 3 Wheat. (U. S.) 14, 4 L. Ed. 322; State v. Hallett, 8 Ala. 159; Miller's Estate, 3 Rawle (Pa.) 312, 24 Am. Dec. 345; The Ann Green, 1 Gall. 275, Fed. Cas. No. 414; Catlin v. Gladding, 4 Mas. 308, Fed. Cas. No. 2,520; L. R. 1 H. L. Sc. 44; In re Wrigley, 8 Wend. (N. Y.) 134. This principle of revival, however, is said not to apply where both domicils are domestic; 5 Madd. 379; Am. Lead. Cas. 714. Where a young man left the state of his original domicil to go to another state to fill a definite engagement for a year and for his health, and at the end of such engagement, returned to the domicil of his origin, it was held that if he had ever renounced his domicil of origin, he had regained it by reverter, it not appearing that he had a domicil elsewhere; Mayo v. Society, 71 Miss. 590, 15 South. 791.

Mere taking up residence is not sufficient, unless there be an intention to abandon a former domicil; Bradley v. Lowry, Speers Eq. (S. C.) 1, 39 Am. Dec. 142; 6 M. & W. 511; Inhabitants of Wayne v. Inhabitants of Greene, 21 Me. 357; Putnam v. Johnson, 10 Mass. 488; 1 Curt. Eccl. 856; People v. Peralta, 4 Cal. 175; Bartlett v. City of New York, 5 Sandf. (N. Y.) 44; Price v. Price, 156 Pa. 617, 27 Atl. 291; State v. Dayton, 77 Mo. 678; nor is it even *prima facie* evidence of domicil when the nature of the residence either is inconsistent with, or rebuts the presumption of the existence of an *animus manendi;* Dicey, Dom. Rule 19; 34 L. J. Ch. 212. Nor is intention of constituting domicil alone, unless accompanied by some acts in furtherance of such intention; Chaine v. Wilson, 1 Bosw. (N. Y.) 673; Ringgold v. Barley, 5 Md. 186, 59 Am. Dec. 107; Wright v. Boston, 126 Mass. 161; Carey's Appeal, 75 Pa. 201; Morris v. Gilmer, 129 U. S. 328, 9 Sup. Ct. 289, 32 L. Ed. 690. A subsequent intent may be grafted on a temporary residence; 2 C. Rob. 322. Removal to a place with an intention of remaining there for an indefinite period and as a place of fixed present domicil, constitutes domicil, though there be a floating intention to return; 2 B. & P. 228; 3 Hagg. Eccl. 374. Both inhabitancy and intention are to a great extent matters of fact, and may be gathered from slight indications; Pearce v. State, 1 Sneed (Tenn.) 63, 60 Am. Dec. 135; Berry v. Hull, 6 N. M. 643, 30 Pac. 936. A statute as to acquiring a residence will be strictly construed, and where a person spends part of his time in one state and the other part at his home in another, and where he has no business in the former but appears to be gaining a residence for the purpose of divorce only, he is not a *bona fide* resident; Albee v. Albee, 43 Ill. App. 370. The place where a person lives is presumed to be the place of domicil until facts establish the contrary; 2 B. & P. 228, n.; 2 Kent 532; Shepard v. Wright, 113 N. Y. 582, 21 N. E. 721. A decedent is presumed to have been domiciled at the place where he died; King v. U. S., 27 Ct. Cl. 529; see 5 Ves. Jr. 750; but where he was a non-resident of the state for many years and until within two months prior to his death, the presumption is that he was a non-resident at the time of his death; Price v. Price, 156 Pa. 617, 27 Atl. 291.

Proof of domicil does not depend upon any particular fact, but upon whether all the facts and circumstances taken together tend to establish the fact; Inhabitants of Abington v. Inhabitants of North Bridgewater, 23 Pick. (Mass.) 170; Appeal of Hindman, 85 Pa. 466. Engaging in business and voting in a particular place are evidence of domicil there; Myr. Prob. Cal. 237; voting

in a place is evidence, though not conclusive; Hayes v. Hayes, 74 Ill. 312; Inhabitants of East Livermore v. Inhabitants of Farmington, 74 Me. 154; Easterly v. Goodwin, 35 Conn. 279, 95 Am. Dec. 237; Smith v. Croom, 7 Fla. 81; Hewes v. Baxter, 48 La. Ann. 1303, 20 South. 701, 36 L. R. A. 531. That it will be given decisive weight, see Wolf v. McGavock, 23 Wis. 518; that it will turn the scale in a case where a man has two places of residence at different times of the year, see Hairston v. Hairston, 27 Miss. 704, 61 Am. Dec. 530; Chariton County v. Moberly, 59 Mo. 238. The mere act of registration as a voter is not conclusive as to change of residence; Mallard v. Bank, 40 Nebr. 784, 59 N W. 511; but see Fulham v. Howe, 60 Vt. 351, 14 Atl. 652, apparently *contra;* is a circumstance to be considered with others; Lyman v. Fiske, 17 Pick. (Mass.) 231, 38 Am Dec. 293; so of a poll tax; Chase v. Chase, 66 N. H. 588, 29 Atl. 553; payment of taxes; so is the execution of one's will in accordance with the laws of a particular place; Dupuy v. Wurtz, 53 N. Y. 556; attending a particular church; Fulham v. Howe, 62 Vt. 386, 20 Atl. 101. But the ownership of real estate in a place not coupled with residence therein is of no value; Price v. Price, 156 Pa. 617, 27 Atl. 291; Holliman's Heirs v. Peebles, 1 Tex. 673. Declaring an intent to become a citizen is not sufficient to prove an intention to adopt a domicil in the place where the declaration is made; Bremme's Estate, 13 Pa. C. C. R. 177. Declarations made at the time of change of residence are evidence of a permanent change of domicil, but a person cannot, by his own declarations, make out a case for himself; Doyle v. Clark, 1 Flipp. 536, Fed. Cas. No. 4,053; Viles v. City of Waltham, 157 Mass. 542, 32 N. E. 901, 34 Am. St. Rep. 311; Ayer v. Weeks, 65 N. H. 248, 18 Atl. 1108, 6 L. R. A. 716, 23 Am. St. Rep. 37; but see as to the latter, L. R. 2 P. & M. 435. Declarations of the party are admissible to prove domicil; Gundlin v. Packet Co., 6 Misc. 620, 26 N. Y. Supp. 73; Hulett v. Hulett, 37 Vt. 586; Reeder v. Holcomb, 105 Mass. 94; Rucker v. Bolles, 80 Fed. 504, 25 C. C. A. 600; Kemna v. Brockhaus, 5 Fed. 762, 10 Biss. 128; but acts are said to be more important than words; Firth v. Firth, 50 N. J. Eq. 137, 24 Atl. 916.

A finding that a person intended to fix his domicil in the city wherein he was taxed for personal property was sustained on evidence that he had actually resided there for four years and had built an expensive house with the evident intention of making it his permanent home; and this against his own testimony as to his intention; Beecher v. Common Council of Detroit, 114 Mich. 228, 72 N. W. 206.

Domicil is said to be of three kinds,—domicil of origin, or by birth, domicil by choice, and domicil by operation of law. The place of birth is the *domicil by birth* if at that time it is the domicil of the parents; 2 Hagg. Eccl. 405; Hardy v. De Leon, 5 Tex. 211. See Sasportas v. De La Motta, 10 Rich. Eq. (S. C.) 38. If the parents are on a journey, the actual domicil of the parents will generally be the place of domicil; 5 Ves. 750; Westl. Priv. Int. Law 17. Children of ambassadors; 14 Beav. 441; 31 L. J. 24, 391; and consuls; L. R. 1 Sc. App. 441; 4 P. D. 1; and children born on seas, take the domicil of their parents; Story, Confl. Laws § 48.

The domicil of an illegitimate child is that of the mother; 23 L. J. Ch. 724; Inhabitants of Houlton v. Inhabitants of Lubec, 35 Me. 411; Inhabitants of Blackstone v. Inhabitants of Seekonk, 8 Cush. (Mass.) 75; but it has been thought better to "regard the father who acknowledges his illegitimate children, or who is adjudged to be such by the law, as imparting his domicil to such children;" Whart. Confl. L. 37; L. R. 1 Sc. App. 441; see Westl. Priv. Int. Law 272, where it is said that the place of birth of a child whose parents are unknown, is its domicil; if that is unknown, the place where it is found. The domicil of a legitimate child is that of its father; L. R. 1 P. & D. 611; Inhabitants of Freetown v. Inhabitants of Taunton, 16 Mass. 52; Lacy v. Williams, 27 Mo. 280; Kennedy v. Ryall, 67 N. Y. 379; Dresser v. Illuminating Co, 49 Fed. 257; Kelly v. Garrett, 67 Ala. 304; 2 Hagg. Eccl. 405; Blumenthal v. Tannenholz, 31 N. J. Eq. 194; Desesbats v. Berquier, 1 Binn. (Pa) 349, 2 Am. Dec. 448; 5 Ves. 786; see De Jarnett v. Harper, 45 Mo. App. 415. Westlake (Int. Law) maintains that a posthumous child takes its mother's domicil; but see Whart. Confl. Laws § 35. The domicil by birth of a minor continues to be his domicil till changed; Overseers of Paterson Tp. v. Overseers of Byram Tp., 23 N. J. L. 394; Hiestand v. Kuns, 8 Blackf. (Ind.) 345, 46 Am. Dec. 481. See Dresser v. Illuminating Co., 49 Fed. 257. It changes with that of the father; Allgood v. Williams, 92 Ala. 551, 8 South. 722; Lamar v. Micou, 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751; even though there was an agreement between the parents upon their separation that the mother should have the control of the child; Lanning v. Gregory, 100 Tex. 310, 99 S. W. 542, 10 L. R. A. (N. S.) 690, 123 Am. St. Rep. 809.

A student does not change his domicil by residence at college; Granby v. Amherst, 7 Mass. 1; Fry's Election Case, 71 Pa. 302, 10 Am. Rep. 698; Sanders v. Getchell, 76 Me. 158, 49 Am. Rep. 606; Hart v. Lindsey, 17 N. H. 235, 43 Am. Dec. 597; and a prisoner removed from his domicil for temporary imprisonment does not acquire a new domicil; Barton v. Barton, 74 Ga. 761; Young v. Pollak, 85 Ala. 439, 5 South. 279; Topsham v. Lewiston, 74 Me. 237, 43 Am. Rep. 584; or a convict for a long term; Topsham v. Lewiston, 74 Me. 237, 43 Am. Rep. 584; or a

fugitive from justice though intending never to return; Cobb v. Rice, 130 Mass. 231; but see Young v. Pollak, 85 Ala. 439, 5 South. 279. A change of residence for purposes of health does not generally establish a new domicil; Ex parte Blumer, 27 Tex. 734; Still v. Woodville, 38 Miss. 646. Absence in the service of the government does not necessarily affect the domicil; Hannon v. Grizzard, 89 N. C. 115; Dennis v. State, 17 Fla. 389; In re Town of Highlands, 22 N. Y. Supp. 137; depending, of course, on the intention of the party; Darragh v. Bird, 3 Or. 229; Wood v. Fitzgerald, *id.* 568; Mooar v. Harvey, 128 Mass. 219. A diplomatic representative residing abroad does not change his domicil; Com. v. Jones, 12 Pa. 365; or a consul; Wooldridge v. Wilkins, 3 How. (Miss.) 360; or one in the military or naval service; Brewer v. Linnaeus, 36 Me. 428; Mooar v. Harvey, 128 Mass. 219; nor a sailor absent on duty; Hallet v. Bassett, 100 Mass. 167.

It was held, however, in Tennessee, on a suit for divorce, that the acquisition of an actual home in Washington, by the petitioner, with the intention of remaining there for an indefinite time, countervailed declarations of intention to return to Tennessee upon the happening of an uncertain future event; Sparks v. Sparks, 114 Tenn. 666, 88 S. W. 173; so one who left a state for the purpose of teaching school (the question arising as to the statute of limitations); Dignam v. Shaff, 51 Wash. 412, 98 Pac. 1113, 22 L. R. A. (N. S.) 996; Redfearn v. Hines, 123 Ga. 391, 51 S. E. 407.

The domicil of origin always remains in abeyance, as it were, to be resorted to the moment the domicil of choice is given up. If one leaves a domicil of choice, with the intention of acquiring a new one, his domicil of origin attaches the moment he leaves the former, and persists until he acquires the latter; L. R. 1 Sc. App. 441; Marks v. Marks, 75 Fed. 321; Dicey, Dom. 92. This, however, can only be true of national, as distinguished from local domicil; when a local domicil of choice is acquired, it certainly persists until a new one is adopted.

Domicil by choice is that domicil which a person of capacity of his free will selects to be such.

Domicil is conferred in many cases by *operation of law*, either expressly or consequentially. The domicil of the husband is that of the wife; Hanberry v. Hanberry, 29 Ala. 719; McAfee v. University, 7 Bush (Ky.) 135; Wingfield v. Rhea, 77 Ga. 84; Babbitt v. Babbitt, 69 Ill. 277; Mason v. Homer, 105 Mass. 116; Baldwin v. Flagg, 43 N. J. L. 495; 7 H. L. C. 390; Anderson v. Watt, 138 U. S. 694, 11 Sup. Ct. 449, 34 L. Ed. 1078. A woman on marriage takes the domicil of her husband, and a husband, if entitled to a divorce, may obtain it though the wife be actually resident in a foreign state; 2 Cl. & F. 488; Parrett v. Palmer, 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479; Turner v. Turner, 44 Ala. 437; Sewall v. Sewall, 122 Mass. 162, 23 Am. Rep. 299; Cook v. Cook, 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706. But, where it is necessary for her to do so, the wife may acquire a separate domicil, which may be in the same jurisdiction; Cheever v. Wilson, 9 Wall. (U. S.) 108, 19 L. Ed. 604; Dutcher v. Dutcher, 39 Wis. 659; Gould v. Crow, 57 Mo. 204; Chapman v. Chapman, 129 Ill. 386, 21 N. E. 806; Barber v. Barber, 21 How. (U. S.) 582, 16 L. Ed. 226; *contra*, 2 Cl. & F. 488; Dicey, Dom. 104. She may rest on her husband's domicil for the purpose of obtaining a divorce; Masten v. Masten, 15 N. H. 159; Williamson v. Parisien, 1 Johns. Ch. (N. Y.) 389; Fickle v. Fickle, 5 Yerg. (Tenn.) 203; Person v. Person, 6 Humphr. (Tenn.) 148; McDermott's Appeal, 8 W. & S. (Pa.) 251. See Wood v. Wood, 54 Ark. 172, 15 S. W. 459; 30 Am. L. Rev. 604; DIVORCE.

A wife divorced *a mensa et thoro* may acquire a separate domicil so as to sue her husband in the United States courts; Barber v. Barber, 21 How. (U. S.) 582, 16 L. Ed. 226; so where the wife is deserted; Moffatt v. Moffatt, 5 Cal. 280; 2 E. L. & Eq. 52; 2 Kent 573; but the right to do so springs from the necessity for its exercise; Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Atherton v. Atherton, 155 N. Y. 129, 49 N. E. 933, 40 L. R. A. 291, 63 Am. St. Rep. 650; Cheever v. Wilson, 9 Wall. (U. S.) 123, 19 L. Ed. 604; Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1. The wife of an insane person may change her domicil; McKnight v. Dudley, 148 Fed. 204, 78 C. C. A. 162.

Where a husband and wife had an established permanent residence in Minnesota, and the wife was compelled by her husband's threats to remove to Massachusetts, compliance with his commands was held not to constitute an abandonment of her domicil in Minnesota, though she remained in Massachusetts several years; Bechtel v. Bechtel, 101 Minn. 511, 112 N. W. 883, 12 L. R. A. (N. S.) 1100; so a wife's absence from the city, after being deserted by her husband, without the intention of making her home elsewhere, was held not sufficient to change her domicil in a suit for divorce; Humphrey v. Humphrey, 115 Mo. App. 361, 91 S. W. 405. Where the domicil of matrimony was in a particular state, and the husband abandoned his wife and went into another state to avoid his marital obligations, such other state did not become a new domicil of matrimony, and therefore was not to be treated as the actual or constructive domicil of the wife; Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1.

A British subject born in England had resided in France under such circumstances that the English law would deem him domi-

ciled there, although he did not acquire a domicil which the French law would recognize. He died leaving a will disposing of movables in England; held that the will should be governed by the English law; 22 T. L. R. 711, following [1903] 1 Ch. 821. Under somewhat similar circumstances, the personal property of a decedent was held to be subject to the law of France, which recognizes a conjugal domicil analogous to what is known in our law as a matrimonial domicil, and is distinguished from that domicil which is required for the purpose of contracting a lawful marriage; Harral v. Harral, 39 N. J. Eq. 279, 51 Am. Rep. 17, where it was held that the government authorization required by the French code to establish a domicil in France is not necessary to establish a conjugal domicil, citing Le Breton v. Nouchet, 3 Mart. O. S. (La.) 60, 5 Am. Dec. 736; Kneeland v. Ensley, Meigs (Tenn.) 620, 33 Am. Dec. 168; Glenn v. Glenn, 47 Ala. 204; Mason v. Homer, 105 Mass. 116, to the point that with respect to the property rights of husband or wife in the personal property of the other, derived from the marriage relation, the place where the marriage was celebrated is not decisive; these rights depend on the matrimonial domicil. An English case held that where the matrimonial domicil was English, the English courts had jurisdiction to entertain a suit for judicial separation, though the domicil of the parties was German; 23 T. L. R. 539. So in suits for nullity, residence and not domicil is the test of jurisdiction; 48 L. J. P. 1; 71 *id.* 74; [1902] P. 143.

Divorce is regulated by the law of the domicil of the parties; [1895] A. C. 517. A domicil for this purpose requires both the animus and the factum; L. R. 1 H. L. Sc. 307; and the intention is itself a question of fact, to be determined by evidence, the declarations of the party not being conclusive; [1892] 3 Ch. 180.

The domicil of a widow remains that of her deceased husband until she makes a change; Story, Confl. Laws § 46; Mifflin Tp. v. Elizabeth Tp., 18 Pa. 17.

Commercial domicil. There may be a commercial domicil acquired by maintenance of a commercial establishment in a country, in relation to transactions connected with such establishments; 1 Kent 82; Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340; U. S. v. Chin Quong Look, 52 Fed. 203. See Dicey, Dom. 341; The Dos Hermanos, 2 Wheat. (U. S.) 76, 4 L. Ed. 189.

This is such a residence in a country for purposes of trade as makes a person's trade or business contribute to or form part of the resources of such country. The question is whether he is or is not residing in such country with the purpose of continuing to trade there; Dicey, Confl. Laws 737. The intention of remaining in the commercial domicil is the intention to continue to reside and trade there for the present; *id.* 738. Commercial domicil is not forfeited by temporary absence at the domicil of origin; Lau Ow Bew v. U. S., 144 U. S. 63, 12 Sup. Ct. 517, 36 L. Ed. 340; but if a person go into a foreign country and engage in trade there, he is, by the law of nations, to be considered a merchant of that country, and subject for all civil purposes, whether that country be hostile or neutral; 3 B. & P. 113; 3 C. Rob. 12; 1 Hagg. 103, 104; U. S. v. Gillies, 1 Pet. C. C. 159, Fed. Cas. No. 15,206; Murray v. The Charming Betsy, 2 Cra. (U. S.) 64, 2 L. Ed. 208; and this whether the effect be to render him hostile or neutral in respect to his *bona fide* trade; 1 Kent 75; 3 B. & P. 113; 1 C. Rob. 249.

Corporations. If the term domicil can apply to corporations, they have their domicil wherever they are created; L. R. 1 Ex. 428; 5 H. L. 416; City of St. Louis v. Ferry Co., 40 Mo. 580; see North & South Rolling Stock Co. v. People, 147 Ill. 234, 35 N. E. 608, 24 L. R. A. 462; irrespective of the residence of the officers or the place where the business is transacted; Merrick v. Van Santvoord, 34 N. Y. 208. If the charter does not fix the domicil, and the directors hold their meetings in several places, the domicil for taxing purposes will be where the by-laws require the stockholders to hold their meetings; Grundy County v. Coal Co., 94 Tenn. 295, 29 S. W. 116. The New York rule is that it is to be where the principal place of business is situated; Austen v. Telephone Co., 73 Hun 96, 25 N. Y. Supp. 916. The place where the business is done and where its personal property is situated is the situs of such property for taxation; Atlantic & P. R. Co. v. Lesueur, 2 Ariz. 428, 19 Pac. 157, 1 L. R. A. 244, 2 Interst. Com. Rep. 189.

A permanent foreign agency of an insurance company may create an independent domicil in the place of the agency, for the purpose of enforcing legal obligation; Martine v. Life Ins. Soc., 53 N. Y. 339, 13 Am. Rep. 529. See Ohio & M. R. Co. v. Wheeler, 1 Black (U. S.) 286, 17 L. Ed. 130. See FOREIGN CORPORATION; CITIZEN.

Change of domicil. Any person, *sui juris*, may make any *bona fide* change of domicil at any time; 5 Madd. 379; President, etc., of Harvard College v. Gore, 5 Pick. (Mass.) 370; 35 E. L. & Eq. 532. And the object of the change does not affect the right, if it be a genuine change with real intention of permanent residence; Cooper v. Galbraith, 3 Wash. C. C. 546, Fed. Cas. No. 3,193; Case v. Clarke, 5 Mas. 70, Fed. Cas. No. 2,490; Catlett v. Ins. Co., 1 Paine 594, Fed. Cas. No. 2,517; Young v. Pollak, 85 Ala. 439, 5 South. 279. Domicil is not lost by going to another state to seek a home, but continues until the home is obtained; Labe v. Brauss, 12 Pa. Co. Ct. R. 255. Where the parties had abandoned

their domicil and were on their way to their future home, the former domicil was not lost before their arrival at the place of the new domicil; Shaw v. Shaw, 98 Mass. 158. Until a new domicil is obtained, the old one is not lost; Desmare v. U. S., 93 U. S. 605, 23 L. Ed. 959; Inhabitants of Monson v. Inhabitants of Fairfield, 55 Me. 117; but is presumed to continue until shown to have been changed; Anderson v. Watt, 138 U. S. 694, 11 Sup. Ct. 449, 34 L. Ed. 1078; Desmare v. U. S., 93 U. S. 605, 23 L. Ed. 959.

To constitute a change of domicil three things are essential: (1) Residence in another place; (2) an intention to abandon the old domicil; and (3) an intention of acquiring a new one; or as some writers express it there must be an *animus non revertendi* and an *animus manendi*, or *animus et factum;* Berry v. Wilcox, 44 Neb. 82, 62 N. W. 249, 48 Am. St. Rep. 706; Hayes v. Hayes, 74 Ill. 312; 34 L. J. Ch. N. S. 212; 10 H. L. Cas. 272; In re Reed's Will, 48 Or. 500, 87 Pac. 763.

The *factum* is the transfer of the bodily presence, and the *animus* is the intention of residing permanently or for an indefinite period. A wife's removal into another state for the benefit of her husband's health and a residence there for twelve years will not change the original domicil; In re Reed's Will, 48 Or. 500, 87 Pac. 763; Ensor v. Graff, 43 Md. 291; Cruger v. Phelps, 21 Misc. 252, 47 N. Y. Supp. 61; Still v. Corp. of Woodville, 38 Miss. 646; 10 Cl. & F. 42; Isham v. Gibbons, 1 Bradf. (N. Y.) 69. In 73 L. J. K. B. N. S. 613, reversing 85 L. T. N. S. 508, 65 J. P. 819, the House of Lords held that the burden of proving that one whose domicil of origin was in the United States had changed his domicil was not overcome by proof that he originally came to England on account of his health, and lived there for twenty-seven years, describing himself as an American citizen, purchasing property in the United States in the hope of finally making his home there, etc. The Lord Chancellor said that if the decedent intended to make England his permanent home, that country would become his domicil, notwithstanding that such intention was formed on account of the condition of his health, but that he could not bring himself to a conclusion from the facts whether the decedent entertained that intention or not, and expressly rested his opinion against a change of domicil upon the fact that the burden was upon the party asserting a change of domicil to establish it.

In the acquisition of a new domicil, more is required than a mere change of residence; there must be a fixed intention to renounce birthright in the place of original domicil and to adopt the political and municipal status involved by permanent residence of choice elsewhere; [1906] A. C. 56; 94 L. T. 33 (an Englishman who lived the greater part of each year for thirty years in Scotland); and a case in 23 Ch. Div. 532, denies the acquisition of a domicil of choice by a British subject in any part of China, on account of differences of religion, customs, etc. See 24 L. Q. R. 440, where the case of British diplomatic agents, etc., residing in India is discussed, and the view taken that their home domicil is not lost. But it is held in Mather v. Cunningham, 105 Me. 326, 74 Atl. 809, 29 L. R. A. (N. S.) 761, 18 Ann. Cas. 692, that the usual law of domicil applies to an American as to acquiring a domicil in Shanghai.

A native of the United States, who had lived twenty-seven years in England, but always described himself as an American citizen, and had bought property in Baltimore in the hope of finally making his home there, though from the state of his health a voyage across the Atlantic was impracticable, was held not to have abandoned his domicil of origin; [1904] A. C. 287. But a Scotchman who for thirty years had lived in Ceylon, where he was engaged in business, and who never spoke of any intention of taking up his residence in Great Britain, but frequently expressed his dislike for the Scottish climate and people, was held to have, *animo et facto*, abandoned his domicil of origin in Scotland and acquired a domicil of choice in Ceylon; [1907] Sc. 333, Ct. of Sess.

There are limitations to the power to change a minor child's domicil in the case of alien parents; 5 East 221; People v. Mercein, 8 Paige Ch. (N. Y.) 47; 2 Kent 226; and of the mother, if a widow; Burge 38; Carlisle v. Tuttle, 30 Ala. 613; see Brown v. Lynch, 2 Bradf. Surr. (N. Y.) 214; De Jarnett v. Harper, 45 Mo. App. 415; however, if she acquires a new domicil by remarriage, the child's domicil does not change; Ryall v. Kennedy, 40 N. Y. Sup. Ct. 347; Brown v. Lynch, 2 Bradf. Surr. (N. Y.) 214; Inhabitants of Walpole v. Inhabitants of Marblehead, 8 Cush. (Mass.) 528; Allen v. Thomason, 11 Humphr. (Tenn.) 536, 54 Am. Dec. 55. See [1893] 3 Ch. 490; Lamar v. Micou, 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751; Johnson v. Copeland's Adm'r, 35 Ala. 521. If a father abandons his children, who are cared for and live with their grandmother for several years, and he subsequently removes them against her will, the residence of the children is not changed; Guardianship of Vance, 92 Cal. 195, 28 Pac. 229; Dresser v. Illuminating Co., 49 Fed. 257.

The guardian is said to have the same power over his ward that a parent has over his child; Holyoke v. Haskins, 5 Pick. (Mass.) 20, 16 Am. Dec. 372; Wheeler v. Hollis, 33 Tex. 512; Pedan v. Robb's Adm'r, 8 Ohio 227; 1 Binn. 349, n.; 2 Kent 237. But see *contra*, Hiestand v. Kuns, 8 Blackf. (Ind.) 345, 46 Am. Dec. 481. The point is not settled in England; Dicey, Dom. 133. See 3 Mer. 67; Appeal of Taney, 9 W. N. C. (Pa.)

564. "It has been generally held that a guardian can change the ward's domicil from one county to another in the same state; Anderson v. Anderson's Estate, 42 Vt. 350, 1 Am. Rep. 334; L. R. 5 Q. B. 325. It is doubtful, to say the least, whether the guardian can remove the ward's domicil out of the state in which he was appointed; L. R. 12 Eq. 617; Daniel v. Hill, 52 Ala. 430. A guardian appointed in a state where the ward is temporarily residing cannot change the ward's domicil from one state to another;" Lamar v. Micou, 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751. But see Woodward v. Woodward, 87 Tenn. 644, 11 S. W. 892. The mere appointment of a guardian will not prevent the ward from changing his domicil where he has sufficient mental capacity to do so; Mowry v. Latham, 17 R. I. 480, 23 Atl. 13; Talbot v. Chamberlain, 149 Mass. 57, 20 N. E. 305, 3 L. R. A. 254. It may be considered questionable whether the guardian can change the national domicil of his ward; 2 Kent 226; Story, Confl. Laws § 506.

The domicil of a lunatic may be changed by the direction or with the assent of his guardian; Holyoke v. Haskins, 5 Pick. (Mass.) 20, 16 Am. Dec. 372; Anderson v. Anderson's Estate, 42 Vt. 350, 1 Am. Rep. 334; In re Kingsley, 160 Fed. 275; *contra*, Inhabitants of Pittsfield v. Inhabitants of Detroit, 53 Me. 442. See L. R. 1 P. & M. 611; 3 Ves. Jr. 198; 9 W. R. 764. If the incompetent has enough mind left to form an *animus manendi*, the assent of the guardian to a change of domicil has been held immaterial; Appeal of Culver, 48 Conn. 165; Talbot v. Chamberlain, 149 Mass. 57, 20 N. E. 305, 3 L. R. A. 254; see 22 Harv. L. R. 220.

The husband may not change his domicil after committing an offence which entitles the wife to a divorce, so as to deprive her of her remedy; Harteau v. Harteau, 14 Pick. (Mass.) 181, 25 Am. Dec. 372; Republic of Texas v. Skidmore, 2 Tex. 261. And it is said the wife may not in the like case acquire a new domicil; Frary v. Frary, 10 N. H. 61, 32 Am. Dec. 395; Harding v. Alden, 9 Greenl. (Me.) 140, 23 Am. Dec. 549; Sawtell v. Sawtell, 17 Conn. 284; Fickle v. Fickle, 5 Yerg. (Tenn.) 203; Richardson v. Richardson, 2 Mass. 153; Tolen v. Tolen, 2 Blackf. (Ind.) 407, 21 Am. Dec. 742.

The law of the place of domicil governs as to all acts of the parties, when not controlled by the *lex loci contractus* or *lex rei sitæ*. Personal property of the woman follows the law of the domicil upon marriage. It passes to the husband, if at all, in such cases as a legal assignment by operation of the law of domicil, but one which is recognized extra-territorially; 2 Rose 97; Holmes v. Remsen, 20 Johns. (N. Y.) 267, 11 Am. Dec. 269; Story, Confl. Laws § 423.

The state and condition of the person according to the law of his domicil will generally, though not universally, be regarded in other countries as to acts done, rights acquired, or contracts made in the place of his native domicil; but as to acts, rights, and contracts done, acquired, or made out of his domicil, the *lex loci* will generally govern in respect to his capacity and condition; 2 Kent 234. See LEX LOCI.

The disposition of, succession to, or distribution of the personal property of a decedent, wherever situated, is to be made in accordance with the law of his actual domicil at the time of his death; 8 Sim. 310; Grattan v. Appleton, 3 Sto. 755, Fed. Cas. No. 5,707; Rankin v. Holloway, 3 Smedes & M. (Miss.) 617; Bradley v. Lowry, Speers, Eq. (S. C.) 3, 39 Am. Dec. 142; Graham v. Public Adm'r, 4 Bradf. Surr. (N. Y.) 127; Leach v. Pillsbury, 15 N. H. 137.

The principle applies equally to cases of voluntary transfer, of intestacy, and of testaments; 5 B. & C. 451; Grattan v. Appleton, 3 Sto. 755, Fed. Cas. No. 5,707; 3 Hagg. 273; Harrison v. Nixon, 9 Pet. (U. S.) 503, 9 L. Ed. 201, De Sobry v. De Laistre, 2 Harr. & J. (Md.) 191, 3 Am. Dec. 535; Blake v. Williams, 6 Pick. (Mass.) 286, 17 Am. Dec. 372; French v. Hall, 9 N. H. 137, 32 Am. Dec. 341; In re Roberts' Will, 8 Paige, Ch. (N. Y.) 519; Harvey v. Richards, 1 Mas. 381, Fed. Cas. No. 6,184; Thomas v. Tanner, 6 T. B. Monr. (Ky.) 52.

Wills are to be governed by the law of the domicil as to the capacity of parties; 1 Jarm. Wills 3; and as to their validity and effect in relation to personal property; Irving v. McLean, 4 Blackf. (Ind.) 53; Conover v. Chapman, 2 Bail. (S. C.) 436; Smith v. Bank, 5 Pet. (U. S.) 519, 8 L. Ed. 212; Barnes' Adm'r v. Brashear, 2 B. Monr. (Ky.) 382; 3 Curt. Eccl. 468; Goodall v. Marshall, 11 N. H. 88, 35 Am. Dec. 472; Hunter v. Bryson, 5 Gill & J. (Md.) 483, 25 Am. Dec. 313; Dupuy v. Wurtz, 53 N. Y. 556; Johnson v. Copeland's Adm'r, 35 Ala. 521; Gilman v. Gilman, 52 Me. 165, 83 Am. Dec. 502; Appeal of Carey, 75 Pa. 201; but by the *lex rei sitæ* as to the transfer of real property; Calloway v. Doe, 1 Blackf. (Ind.) 372; Robertson v. Barbour, 6 T. B. Monr. (Ky.) 527; Potter v. Titcomb, 22 Me. 303; Bailey v. Bailey, 8 Ohio 239; U. S. v. Crosby, 7 Cra. (U. S.) 115, 3 L. Ed. 287; Applegate v. Smith, 31 Mo. 166; Holman v. Hopkins, 27 Tex. 38; 14 Ves. 541; Appeal of Carey, 75 Pa. 201. See LEX REI SITÆ.

The forms and solemnities of the place of domicil must be observed; 4 M. & C. 76; De Sobry v. De Laistre, 2 H. & J. (Md.) 191, 3 Am. Dec. 535; Desesbats v. Berquier, 1 Binn. (Pa.) 336, 2 Am. Dec. 448; Holmes v. Remsen, 4 Johns. Ch. (N. Y.) 460, 8 Am. Dec. 581; Harvey v. Richards, 1 Mas. 381, Fed. Cas. No. 6,184; Armstrong v. Lear, 12 Wheat. (U. S.) 169, 6 L. Ed. 589; Gilman v. Gilman, 52 Me. 165, 83 Am. Dec. 502; Johnson v. Copeland's Adm'r, 35 Ala. 521.

The local law is to determine the character

of property; Chapman v. Robertson, 6 Paige, Ch. (N. Y.) 630, 31 Am. Dec. 264; Story, Confl. Laws § 447; Erskine, Inst. b. 3, tit. 9, § 4. And it is held that a state may regulate the succession to personal as well as real property within its limits, without regard to the *lex domicilii;* Jones v. Marable, 6 Humphr. (Tenn.) 116.

The interpretation of a will of movables is to be according to the law of the place of the last domicil of the testator; L. R. 3 H. L. 55; Appeal of Freeman, 68 Pa. 151; 4 Bligh 502; Harrison v. Nixon, 9 Pet. (U. S.) 483, 9 L. Ed. 201. But so far as its validity is concerned, it does not matter that after the will was made in one domicil the testator obtained a new domicil, where he died; Whart. Confl. Laws § 592; Story, Confl. Laws § 479 *g*. See Dupuy v. Wurtz, 53 N. Y. 556. But it must be valid under the law of the new domicil.

In England, by statute, a will does not become invalid nor is its construction altered by reason of the testator's change of domicil after making it; Dicey, Dom. 308. It has been said that the rules as to construction of wills apply whether they be of real or personal property, unless in case of real property it may be clearly gathered from the terms of the will that the testator had in view the *lex rei sitæ;* Story, Confl. Laws § 479 *h;* 2 Bligh 60; 4 M. & C. 76. But see, *contra,* Whart. Confl. Laws § 597. See CONFLICT OF LAWS; LEX REI SITÆ; WILL.

Uniform acts have been passed in some states providing that a will executed outside a state is good in a state if valid in the state of its execution (Colorado, Kansas, Louisiana, Massachusetts, Michigan, Rhode Island, Washington, Wisconsin, Alaska).

Distribution of the personal property of an intestate is governed exclusively by the law of his actual domicil at the time of his death; 5 B. & C. 438; Dannelli v. Dannelli's Adm'r, 4 Bush (Ky.) 51; Ennis v. Smith, 14 How. (U. S.) 400, 14 L. Ed. 472; De Sobry v. De Laistre, 2 H. & J. (Md.) 193, 3 Am. Dec. 535; Holmes v. Remsen, 4 Johns. Ch. (N. Y.) 460, 8 Am. Dec. 581; Harvey v. Richards, 1 Mas. 418, Fed. Cas. No. 6,184; Leach v. Pillsbury, 15 N. H. 137. This includes the ascertainment of the person who is to take; Story, Confl. Laws § 481; 2 Ves. 35; 2 Keen 293. The *descent* of real estate depends upon the law of the place of the real estate; 8 L. R. Ch. 842; Harvey v. Ball, 32 Ind. 99; Kerr v. Moon, 9 Wheat. (U. S.) 565, 6 L. Ed. 161; 14 Ves. 541; Grimball v. Patton, 70 Ala. 626; Pratt v. Douglas, 38 N. J. Eq. 516; Keegan v. Geraghty, 101 Ill. 26. The question whether debts are to be paid by the administrator from the personalty or realty is to be decided by the law of his domicil; 9 Mod. 66; 2 Keen 293.

Insolvents and bankrupts. An assignment of property for the benefit of creditors valid by the law of the domicil is generally recognized as valid everywhere; Bish. Insolv. Debt. 385; Holmes v. Remsen, 4 Johns. Ch. (N. Y.) 471, 8 Am. Dec. 581; 2 Rose 97; 1 Cr. M. & R. 296; Train v. Kendall, 137 Mass. 366; Ackerman v. Cross, 40 Barb. (N. Y.) 465; Appeal of Smith, 104 Pa. 381; Van Winkle v. Armstrong, 41 N. J. Eq. 402, 5 Atl. 449; in the absence of positive statute to the contrary; Blake v. Williams, 6 Pick. (Mass.) 286, 17 Am. Dec. 372; Oliver v. Townes, 2 Mart. N. S. (La.) 93, 100; Milne v. Moreton, 6 Binn. (Pa.) 353, 6 Am. Dec. 466; but not to the injury of citizens of the foreign state in which property is situated; 5 East 131; Saul v. His Creditors, 5 Mart. N. S. (La.) 596, 16 Am. Dec. 212; Milne v. Moreton, 6 Binn. (Pa.) 360, 6 Am. Dec. 466; Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. Ed. 606; Johnson v. Parker, 4 Bush (Ky.) 149; Kidder v. Tufts, 48 N. H. 125; Burk v. McClain, 1 H. & McH. (Md.) 236; Moore v. Willett, 35 Barb. (N. Y.) 663. But a compulsory assignment by force of statute is not of extra-territorial operation; Holmes v. Remsen, 20 Johns. (N. Y.) 229, 11 Am. Dec. 269; Milne v. Moreton, 6 Binn. (Pa.) 353, 6 Am. Dec. 466; Blake v. Williams, 6 Pick. (Mass.) 286, 17 Am. Dec. 372; Wood v. Parsons, 27 Mich. 159. Distribution of the effects of insolvent or bankrupt debtors is to be made according to the law of the domicil, subject to the same qualifications; Story, Confl. Laws § 323, 423 *a*. See, generally, 13 Am. L. Rev. 261; Whart. Confl. Laws; Morse, Citizenship; Tiffany; Schouler, Domestic Relations; CONFLICT OF LAWS; BANKRUPT; FOREIGN CORPORATION; INSOLVENCY.

DOMINANT. That to which a servitude or easement is due, or for the benefit of which it exists. Distinguished from *servient,* that from which it is due.

DOMINICUM (Lat. domain; demain; demesne). A lordship. That of which one has the lordship or ownership. That which remains under the lord's immediate charge and control.

In this sense it is equivalent to the Saxon *bord-lands.* Spelman, Gloss.; Blount. In regard to lands for which the lord received services and homage merely, the *dominicum* was in the tenant

In Domesday Book it meant the home farm as distinguished from the holdings of the tenants. Vinogradoff, Engl. Soc. in Eleventh Century 353.

Property; domain; anything pertaining to a lord. Cowell.

In Ecclesiastical Law. A church, or any other building consecrated to God. Du Cange.

DOMINION. Ownership or right to property. 2 Bla. Com. 1. "The holder has dominion of the bill." 8 East 579.

Sovereignty or lordship, as the dominion of the seas. Black, L. Dict. See DOMINIUM.

DOMINIUM (Lat.). Perfect and complete property or ownership in a thing.

Plenum in re dominium,—plena in re potestas. This right is composed of three principal elements: The right to use, the right to enjoy, and the right to dispose of the thing, to the exclusion of every other person. To use a thing, *jus utendi tantum*, consists in employing it for the purposes for which it is fit, without destroying it, and which employment can therefore be repeated; to enjoy a thing, *jus fruendi tantum*, consists in receiving the fruits which it yields, *quidquid ex re nascitur;* to dispose of a thing, *jus abutendi*, is to destroy it, or to transfer it to another. Thus, he who has the use of a horse may ride him, or put him in the plow to cultivate his own soil; but he has no right to hire the horse to another and receive the fruits which he may produce in that way.

On the other hand, he who has the enjoyment of a thing is entitled to receive all the profits or revenues which may be derived from it.

And, lastly, he who has the right of disposing of a thing, *jus abutendi*, may sell it, or give it away, etc., subject, however, to the rights of the usuary or usufructuary, as the case may be.

These three elements, *usus, fructus, abusus*, when united in the same person, constitute the *dominium;* but they may be, and frequently are, separated, so that the right of disposing of a thing may belong to *Primus*, and the rights of using and enjoying to *Secundus*, or the right of enjoying alone may belong to *Secundus*, and the right of using to *Tertius*. In that case, *Primus* is always the owner of the thing, but he is the naked owner, inasmuch as for a certain time he is actually deprived of all the principal advantages that can be derived from it. *Secundus*, if he has the use and enjoyment, *jus utendi et fruendi simul*, is called the usufructuary, *ususfructuarius;* if he has the enjoyment only *jus fruendi tantum*, he is the *fructuarius;* and *Tertius*, who has the right of use, *jus utendi tantum*, is called the usuary,—*usuarius*. But this dismemberment of the elements of the *dominium* is essentially temporary; if no shorter period has been fixed for its duration, it terminates with the life of the usuary, fructuary, or usufructuary; for which reason the rights of use and usufruct are called personal servitudes. Besides the separation of the elements of the *dominium* among different persons, there may also be a *jus in re*, or dismemberment, so far as real estates are concerned, in favor of other estates. Thus, a right of way over my land may exist in favor of your house; this right is so completely attached to the house that it can never be separated from it, except by its entire extinction. This class of *jura in re* is called predial or real servitudes. To constitute this servitude, there must be two estates, belonging to different owners; these estates are viewed in some measure as juridical persons, capable of acquiring rights and incurring obligations. The estate in favor of which the servitude exists is the creditor-estate; and the estate by which the servitude is due, the debtor-estate. See Hunter, Roman Law 231; EMINENT DOMAIN.

DOMINIUM DIRECTUM (Lat.). Legal ownership. Ownership as distinguished from enjoyment.

DOMINIUM DIRECTUM ET UTILE (Lat.). Full ownership and possession united in one person.

DOMINIUM UTILE (Lat.). The beneficial ownership. The use of the property.

DOMINUS (Lat.). The lord or master; the owner. Ainsworth, Lat. Lex. The owner or proprietor of a thing, as distinguished from him who uses it merely. Calvinus, Lex. A master or principal, as distinguished from an agent or attorney. Story, Ag. § 3; Ferriere, Dict.

In Civil Law. A husband. A family. Vicat, Voc. Jur.

DOMINUS LITIS (Lat.). The master of suit. The client, as distinguished from an attorney.

And yet it is said that, although he who has appointed an attorney is properly called *dominus litis*, the attorney himself, when the cause has been tried, becomes the *dominus litis*. Vicat.

DOMINUS NAVIS. **In Civil Law.** The absolute owner of a ship. Wharton.

DOMITÆ (Lat.). Tame; subdued; not wild.

Applied to domestic animals, in which a man may have an absolute property. 2 Bla. Com. 391.

DONATARIUS (L. Lat.). One to whom something is given. A donee.

DONATIO (Lat.). A gift. A transfer of the title to property to one who receives it without paying for it. Vicat. The act by which the owner of a thing voluntarily transfers the title and possession of it from himself to another person, without any consideration. See Indiana N. & S. R. W. Co. v. City of Attica, 56 Ind. 476; Georgia Penitentiary Co. No. 2 v. Nelms, 65 Ga. 499, 38 Am. Rep. 793.

A donation is never perfected until it has been accepted; for an acceptance is requisite to make the donation complete. See ASSENT; Ayl. Pand. tit. 9; *Clef des Lois Rom.;* 2 Kent 438; Penfield v. Thayer, 2 E. D. Sm. (N. Y.) 305; Ivey's Adm'r v. Owens, 28 Ala. N. S. 641. In old English law and in the modern law, in several phrases, the word retains the extended sense it has in the civil law.

Its literal translation, gift, has acquired in real property law a more limited meaning, being applied to the conveyance of estates tail. 2 Bla. Com. 316; Littleton § 59; West, Symb. § 254; 4 Cruise, Dig. 51. There are several kinds of *donatio:* as, *donatio simplex et pura* (simple and pure gift without compulsion or consideration); *donatio absoluta et larga* (an absolute gift); *donatio conditionalis* (a conditional gift); *donatio stricta et coarctura* (a restricted gift, as, an estate tail).

DONATIO INTER VIVOS (Lat. a gift between living persons). A contract which takes place by the mutual consent of the giver, who divests himself of the thing given in order to transmit the title of it to the donee, gratuitously, and the donee who accepts and acquires the legal title to it. See GIFT; DONATIO MORTIS CAUSA.

DONATIO MORTIS CAUSA (Lat. a gift in prospect of death). A gift made by a person in sickness, or other immediate peril, who, apprehending his death as near, delivers, or

causes to be delivered, to another, the possession of any personal goods, to keep as his own in case of donor's decease. 2 Bla. Com. 514; Gourley v. Linsenbigler, 51 Pa. 345.

The civil law defines it to be a gift under apprehension of death: as, when anything is given upon condition that if the donor die the donee shall possess it absolutely, or return it if the donor should survive or sould repent of having made the gift, or if the donee should die before the donor. Adams v. Nicholas, 1 Miles (Pa.) 109

It differs from a legacy, inasmuch as it does not require proof in the court of probate, 2 Stra. 777; see 1 Bligh, N. S. 531; and no assent is required from the executor to perfect the donee's title; 2 Ves. 120; 1 S. & S. 245. It differs from a gift *inter vivos* because it is ambulatory and revocable during the donor's life because it may be made to the wife of the donor, and because it is liable for his debts, and it requires actual delivery; Poullain v. Poullain, 79 Ga 11, 4 S E. 81. This division of gifts is taken from the Roman law, as are also the rules by which they are governed. 2 Kent 439. See also as to these distinctions Brett, L. Cas. Mod. Eq. 33.

The donor need not be *in extremis;* Larrabee v. Hascall, 88 Me. 511, 34 Atl. 408, 51 Am. St. Rep. 440. It has been considered essential to the validity of the gift that the donor should die of the very malady from which death was apprehended at the time of making the gift; Williams v. Chamberlain, 165 Ill. 210, 46 N. E. 250; Conser v. Snowden, 54 Md. 175, 39 Am. Rep. 368; but the better opinion is that while it is not a requisite that he should die from the very disease or peril from which he apprehended death, yet there must be no intervening recovery, and it is essential that his death ensue as a result of some disease or peril existing or impending at the time the gift was made; Peck v. Scofield, 186 Mass. 108, 71 N. E. 109; Ridden v. Thrall, 125 N. Y. 572, 26 N. E. 627, 11 L. R. A. 684, 21 Am. St. Rep. 758. A soldier ordered to the seat of war is not in such imminent peril as will justify his making a gift *causa mortis;* Linsenbigler v. Gourley, 56 Pa. 166, 94 Am. Dec. 51; but such gifts have been held valid where the donor never returned alive, but fell in battle or died in camp; Virgin v. Gaither, 42 Ill. 39; Gass v. Simpson, 4 Coldw. (Tenn.) 288. A gift made in contemplation of suicide is utterly void as against public policy; Duryea v. Harvey, 183 Mass. 429, 67 N. E. 351.

A delivery of more than was intended to be given cannot overrule the donor's intention, and the donee can take only as much as was intended to be given; Crippen v. Adams, 132 Mich. 31, 92 N. W. 496. The delivery need not be made to the donee personally, but may be made to another as his agent or trustee, and that without his knowledge at the time of making the gift; Sheedy v. Roach, 124 Mass. 472, 26 Am. Rep. 680; Williams v. Guile, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366. Where actual manual tradition cannot be made, either from their nature or their situation at the time, in such cases the delivery may be constructive, although in all cases it must be as nearly perfect and complete as the nature of the property and attendant circumstances and conditions will permit; Newman v. Bost, 122 N. C. 524, 29 S. E. 848. Technically, there must be an acceptance by the donee as well as a delivery by the donor; Yancy v. Field, 85 Va. 756, 8 S. E. 721; Ammon v. Martin, 59 Ark. 191, 26 S. W. 826; but this is a matter of slight practical importance, for where the gift is beneficial to the donee an acceptance will be presumed; Devol v. Dye, 123 Ind. 321, 24 N. E. 246, 7 L. R. A. 439; Blazo v. Cochrane, 71 N. H. 585, 53 Atl. 1026.

To constitute a good *donatio mortis causa: first,* the thing given must be personal property; Wells v. Tucker, 3 Binn. (Pa.) 370; a bond; Wells v. Tucker, 3 Binn. (Pa.) 370; 2 Ves. Sen. 431; 3 Madd. 184; bank notes; Michener v. Dale, 23 Pa. 59; 2 Bro. C. C. 612; White v. Wager, 32 Barb. (N. Y.) 250; 3 P. Wms. 356; certificates of stock; Walsh v. Sexton, 55 Barb. (N. Y.) 251; a policy of life insurance; 1 B. & S. 109; Gourley v. Linsenbigler, 51 Pa. 345; and a check offered for payment during the life of the donor; 4 Bro. C. C. 286; will be so considered; but a check not so presented, which had not passed into the hands of a *bona fide* holder, is revoked by the death of the decedent; L. R. 6 Eq. 198; Burke v. Bishop, 27 La. Ann. 465, 21 Am. Rep. 567; Simmons v. Society, 31 Ohio St. 457, 27 Am. Rep. 521; Matter of Smither, 30 Hun (N. Y.) 632; Beals v. Crowley, 59 Cal. 665; *aliter,* as to a check given abroad; L. R. 5 Ch. Div. 730. See Taylor's Estate, 154 Pa. 183, 25 Atl. 1061, 18 L. R. A. 855. A check to a wife expressing that it was to enable her to buy mourning, was held under peculiar circumstances a valid *donatio mortis causa;* 1 P. Wms. 441. A note not negotiable, or if negotiable, not indorsed, but delivered, passes by such a donation; 1 Dan. Neg. Inst. § 24; Tiedm. Com. Pap. 252; Chase v. Redding, 13 Gray (Mass.) 418; but in Bradley v. Hunt, 5 Gill & J. (Md.) 54, 23 Am. Dec. 597, this is limited to bank notes and notes payable to bearer. A certificate of deposit which is delivered to a person for the use of a third party, though not indorsed, is a valid gift; Conner v. Root, 11 Colo. 183, 17 Pac. 773; Reed v. Barnum, 36 Ill. App. 525; *contra,* Dunn v. Bank, 109 Mo. 90, 18 S. W. 1139; see Daniel v. Smith, 64 Cal. 346, 30 Pac. 575. A check cannot be the subject of a *donatio mortis causa,* unless paid in the donor's lifetime; death revokes the bank's authority to pay; 4 Bro. C. C. 286; Burke v. Bishop, 27 La. Ann. 465, 21 Am. Rep. 567; Second Nat. Bank of Detroit v. Williams, 13 Mich. 282. But in such case a check has been considered as of a testamentary character; 3 Curt. Eccl. 650; and see 1 P. Wms. 441 (*supra*). Where a man made a gift of his check to his son to be collected after his death, and the bank, knowing the drawer was dead, paid the check, it must pay the amount of the check to the personal

representatives; Pullen v. Bank, 138 Cal. 169, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19. A check or note or other negotiable instrument of a person other than the donor may be the subject of such gift; L. R. 15 Ch. D. 651; L. R. 6 Eq. 198; Burke v. Bishop, 27 La. Ann. 465, 21 Am. Rep. 567. Though unaccepted by the bank, a check for the entire amount of the drawer's balance delivered to a person as a gift of the money, operates as an assignment of the fund and is valid as a gift *mortis causa;* Varley v. Sims, 100 Minn. 331, 111 N. W. 269, 8 L. R. A. (N. S.) 828, 117 Am. St Rep. 694, 10 Ann. Cas. 473. There must be a parting with the dominion over the subject matter of the gift, with a present design that the title shall pass out of the donor and to the donee; Liebe v. Battmann, 33 Or. 241, 54 Pac. 179, 72 Am. St. Rep. 705.

A husband cannot gratuitously dispose of his personalty in this way to defeat the widow's statutory rights therein; Hatcher v. Buford, 60 Ark. 169, 29 S. W. 611, 27 L. R. A. 507, and the same is true as to the wife; Baker v. Smith, 66 N H 422, 23 Atl. 82

Title to the property passes to the donee upon its delivery to him, but remains subject to defeasance while the donor lives, Chase v Redding, 13 Gray (Mass) 418, Nicholas v. Adams, 2 Whart. (Pa) 17, Basket v. Hassell, 107 U. S., 602, 2 Sup Ct. 415, 27 L. Ed. 500 A gift of this nature cannot avail against creditors and the donee takes subject to the right of personal representative to reclaim it if necessary for the payment of deceased's debts; Dunn v. Bank, 109 Mo 90, 18 S. W 1139.

The delivery of a savings-bank book passes the money in bank; Hill v. Stevenson, 63 Me. 364, 18 Am. Rep. 231; Sheedy v. Roach, 124 Mass. 412, 26 Am. Rep. 680; Pierce v. Bank, 129 Mass. 425, 37 Am. Rep. 371; Camp's Appeal, 36 Conn. 88, 4 Am. Rep. 39; Tillinghast v. Wheaton, 8 R. I. 536, 5 Am. Rep. 621, 94 Am. Dec. 126; *contra,* Walsh's Appeal, 122 Pa. 177, 15 Atl. 470, 9 Am. St. Rep. 83, 1 L. R. A. 535; see Thomas' Adm'r v. Lewis, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848. A banker's deposit note is a good subject of gift; 44 Ch. Div. 76; but where the bank book is already in the hands of the donee, a statement by the donor that his wife may have it is not sufficient; Drew v. Hagerty, 81 Me. 231, 17 Atl. 63, 3 L. R. A. 230, 10 Am. St. Rep. 255. See 36 Cent. Law J. 354; 31 Am. Law Reg. 681; 34 *id.* 85, for discussions and annotations on this subject. A mortgage is a good gift; 5 Madd. 351; 1 Bligh, N. S. 497; a policy of insurance; 1 Best & Sm. 109; 33 Beav. 619; a receipt for money; 4 De G. & Sm. 517; bonds; 3 Atk. 214; 1 Bligh, N. S. 497; bank notes; 2 Eden 125; Sel. Ch. Cas. 14; 3 P. Wms. 356; 2 Bro. C. C. 612.

A promissory note of the sick man made in his last illness is not a valid donation; 5 B. & C. 501; Parish v. Stone, 14 Pick. (Mass.) 204, 25 Am. Dec. 378; Craig v. Craig, 3 Barb. Ch. (N. Y.) 76; Smith v. Kittridge, 21 Vt. 238; Helfenstein's Estate, 77 Pa. 328, 18 Am. Rep. 449. See Flint v. Pattee, 33 N. H. 520, 66 Am. Dec. 742; Brown v. Brown, 18 Conn. 410, 46 Am. Dec. 328; Waring Adm'r v. Edmonds, 11 Md. 424; Sessions v. Moseley, 4 Cush. (Mass.) 87; Graves v. Safford, 41 Ill. App. 659; 6 Harv. L. Rev. 36. In England, bills delivered on a deathbed but without consideration, are valid donations; 27 Beav. 303; but a gift of the donor's own cheque, if not payable until after his death, is not valid; 27 Ch. D. 631. See also 5 Ch. D. 730; 4 D. M. & G. 249. As to a gift of money, see Corle v. Monkhouse, 50 N. J. Eq. 537, 25 Atl. 157.

Second, the gift must be made by the donor in peril of death, and to take effect only in case the giver dies; Bisph. Eq. 70; Wells v. Tucker, 3 Binn. (Pa.) 370; 1 Bligh, N. S. 530; Blanchard v. Sheldon, 43 Vt. 513; Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313; Kirk v. McCusker, 3 Misc. 277, 22 N. Y. Supp. 780; a gift made in apprehension of death from a surgical operation is valid; Ridden v. Thrall, 125 N. Y. 572. There is quite a conflict of authority as to whether a gift by a soldier about to join the army is a valid *donatio causa mortis,* with the weight of authority against sustaining them. They have been upheld, it may possibly be considered, in Virgin v. Gaither, 12 Ill. 39; but this case is explained in Travis on Sales as a gift *inter viros* on condition; a case cited as upholding them, Baker v. Williams, 34 Ind. 547, is overruled if it does so hold; Smith v. Dorsey, 38 Ind. 451, 10 Am. Rep. 118; which holds them invalid, as do also Gourley v. Linsenbigler, 51 Pa. 345; Irish v. Nutting, 47 Barb (N Y.) 370; Dexheimer v. Gautier, 5 Rob. (N. Y.) 216 (Barbour, J., dissenting). See Gass v. Simpson, 4 Cold (Tenn.) 288.

Such a gift is only good when made in relation to the death of the person by illness affecting him at the time; 2 Ves. Jr. 121; but if it appear that the donation was made when the donor was ill and only a few days or weeks before his death, it will be presumed that it was made in the last illness and in contemplation of death; 1 Wms. Ex. 845; Dole v. Lincoln, 31 Me. 422.

When a gift was made in contemplation of death, but the donor so far recovered as to be able to attend to his business, and then died of the same disease, *held* not a good *donatio;* Weston v. Hight, 17 Me. 287, 35 Am. Dec. 250. That the donor lived fourteen days; Nicholas v. Adams, 2 Whart. (Pa.) 17; three days; Wells v. Tucker, 3 Binn. (Pa.) 370; Goulding v. Horbury, 85 Me. 227, 27 Atl. 127, 35 Am. St. Rep. 357; six hours; Michener v. Dale, 23 Pa. 63; after making the gift, does not invalidate it. There seems to be no rule limiting the time within which the gift must be made before death; Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313.

Third, there must be an actual delivery of the subject to or for the donee, in cases where such delivery can be made; Pennington v. Gittings, 2 Gill & J. (Md.) 208; Mil-

ler v. Jeffress, 4 Gratt. (Va.) 472; Dole v. Lincoln, 31 Me. 422; Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313; Cutting v. Gilman, 41 N. H. 147; Daniel v. Smith, 75 Cal. 548, 17 Pac. 683; L. R. 6 Eq. 474; Emery v. Clough, 63 N. H. 552, 4 Atl. 796, 56 Am. Rep. 543; McCord's Adm'r v. McCord, 77 Mo. 166, 46 Am. Rep. 9; Kiff v. Weaver, 94 N. C. 274, 55 Am. Rep. 601. The delivery must be as complete as the nature of the property will admit of; Hatch v. Atkinson, 56 Me. 324, 96 Am. Dec. 464, where taking the key of a trunk, putting goods into the trunk and returning the key to its place at the request of the owner, who expressed a desire, in his last illness, to make the trunk and its contents a *donatio mortis causa*, was held not to be a sufficient delivery.

Where one about to commit suicide indorsed a promissory note and placed it in an envelope directed to a friend in the same house and then shot himself, held no delivery; Liebe v. Battmann, 33 Or. 241, 54 Pac. 179, 72 Am. St. Rep. 705. The gift of the keys of a box deposited in a vault of a bank containing bonds, etc., is a sufficient constructive delivery of the contents of the box; Thomas' Adm'r v. Lewis, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848; 2 Ves. Sen. 431; Prec. Ch. 300; [1891] W. N. 201 (where donor delivered the keys of a trunk to donee, and said the trunk and its contents were donee's); Debinson v. Emmons, 158 Mass. 592, 33 N. E. 706; but see Goulding v. Horbury, 85 Me. 227, 27 Atl. 127, 35 Am. St. Rep. 357. An intention to give is sufficiently manifested from the fact that a person *in extremis* hands a package of bonds to another saying, "These bonds are for you;" Vandor v. Roach, 73 Cal. 614, 15 Pac. 354. Delivery can be made to a third person for the use of a donee; Wells v. Tucker, 3 Binn. (Pa.) 370; Bloomer v. Bloomer, 2 Bradf. Surr. (N. Y.) 340; Southerland v. Southerland's Adm'r, 5 Bush (Ky.) 591; but not if the third party is the agent of the giver; 2 Coll. 356. The acceptance is presumed, unless the contrary appear; In re Dunlap's Estate, 94 Mich. 11, 53 N. W. 788.

To make such a gift valid there must be a renunciation by the donor and an acquisition by the donee, of all interest and title to the property intended to be given; Wetmore v. Brooks, 18 N. Y. Supp. 852.

To constitute such a gift, the subject must be delivered either to the donee or to some person for his use and benefit, and the donor must part with all dominion over the property, and the title must vest in the donee, subject to the right of the donor at any time to revoke the gift; Daniel v. Smith, 75 Cal. 548, 17 Pac. 683.

It is an unsettled question whether such kind of gift appearing in writing, without delivery of the subject, can be supported; 2 Ves. 120; Smith v. Downey, 38 N. C. 268; but Lord Hardwicke expressed the opinion that it could be; 2 Ves. Sen. 440; 1 *id.* 314; *contra*, 1 Wms. Ex. 855. And see Thompson v. Thompson, 12 Tex. 327. By the Roman and civil law, a gift *mortis causa* might be made in writing; Dig. lib. 39, t. 6, l. 28; 2 Ves. Sen. 440; 1 *id.* 314.

Upon the recovery of the donor and his consequent ability to comply with the statute, the dispensation from its requirements ceases and the gift *mortis causa*, though valid when made, becomes of no further force. No expression to this effect is necessary; Robson v. Jones, 3 Del. Ch. 63; Thomas' Adm'r v. Lewis, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848.

The essentials are also thus stated: 1. It must be in view of donor's death. 2. With express or implied intention that it shall only take effect by reason of existing disorder. 3. Delivery by the donor to the donee or some one on his behalf; Brett, L. Cas. Mod. Eq. 33; but this is not so satisfactory as the well-settled enumeration above given.

A *donatio mortis causa* does not require the executor's assent; 2 Ves. Jr. 120; is revocable by the donor during his life; Bloomer v. Bloomer, 2 Bradf. Surr. (N. Y.) 339; Parker v. Marston, 27 Me. 196; Lee v. Luther, 3 Woodb. & M. 519, Fed. Cas. No. 8,196; Jones v. Brown, 34 N. H. 439; Doran v. Doran, 99 Cal. 311, 33 Pac. 929; by recovery; 3 Macn. & G. 664; Wms. Ex. 651; or resumption of possession; 2 Ves. Sen. 433; but not by a subsequent will; Prec. Chanc. 300; *contra*, Jayne v. Murphy, 31 Ill. App. 28; but may be satisfied by a subsequent legacy; 1 Ves. Sen. 314. And see Shirley v. Whitehead, 36 N. C. 130. It may be of any amount of property; Meach v. Meach, 24 Vt. 591. It is liable for the testator's debts; Dunn v. Bank, 109 Mo. 90, 18 S. W. 1139; Emery v. Clough, 63 N. H. 552, 4 Atl. 796, 56 Am. Rep. 543; Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500; a gift providing for the payment of certain bills and a division of the remaining property is valid, Loucks v. Johnson, 70 Hun 565, 24 N. Y. Supp. 267.

A gift *mortis causa* is none the less valid because it embraces the entire personal estate of the donor, and the testimony of one credible witness is sufficient to establish such a gift; Thomas' Adm'r v. Lewis, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848; Meach v. Meach, 24 Vt. 591; but see Headley v. Kirby, 18 Pa. 326; Marshall v. Berry, 13 Allen (Mass.) 43; and a gift accompanied by the condition that part thereof is to be applied to the payment of the donor's debts is good; Wetmore v. Brooks, 18 N. Y. Sup. 852.

For a thorough discussion of this subject, see Robson v. Jones, 3 Del. Ch. 51; 36 Am. L. Reg. 247, 289; note to Ward v. Turner, Wh. & T. L. C. Eq.; 36 Cent. Law J. 354; 32 *id.* 27.

DONATIO PROPTER NUPTIAS (Lat. gift on account of marriage). In Roman

Law. A gift made by the husband as a security for the marriage portion. The effect of the act of making such a gift was different according to the relation of the parties at the time. Vicat, Voc. Jur. Called, also, a mutual gift.

The name was originally applied to a gift made before marriage, and was then called a *donatio ante nuptias;* but in process of time it was allowed to be made after marriage as well, and was then called a *donatio propter nuptias.*

DONATION. See DONATIO.

DONATIVE. See ADVOWSON.

DONEE. One to whom a gift is made or a bequest given; one who is invested with a power of appointment: he is sometimes called an appointee. 4 Kent 316.

DONIS, STATUTE DE. See DE DONIS, THE STATUTE.

DONOR. One who makes a gift. One who gives lands in tail. *Termes de la Ley.*

DONUM (Lat.). A gift.

The difference between *donum* and *munus* is said to be that *donum* is more general, while *munus* is specific. *Munus* is *said* to mean *donum* with a cause for the giving (though not a legal consideration), as on account of marriage, etc. *Donum* is said to be that which is given from no necessity of law or duty, but from free will, "from the absence of which, if they are not given, no blame arises, but if they are given, praise is due." Vicat, Voc. Jur.; Calvinus, Lex.

DOOM. Judgment.

DOOM OF THE ASSESSOR. See ASSESSMENT.

DOOR. The place of usual entrance into a house, or into a room in the house.

To authorize the breach of an outer door in order to serve process, the process must be of a criminal nature; and even then a demand of admittance must first have been refused; 5 Co. 94; State v. Smith, 1 N. H. 346; Bell v. Clapp, 10 Johns. (N. Y.) 263, 6 Am. Dec. 339; Kelsy v. Wright, 1 Root (Conn.) 83; State v. Shaw, 1 Root (Conn.) 134; Banks v. Farwell, 21 Pick. (Mass.) 156; Com. v. Reynolds, 120 Mass. 190, 21 Am. Rep. 510; Cahill v. People, 106 Ill. 621; Hawkins v. Com., 14 B. Monr. (Ky.) 395, 61 Am. Dec. 147. The outer door may also be broken open for the purpose of executing a writ of *habere facias;* 5 Co. 93; Bac. Abr. *Sheriff* (N 3).

An outer door cannot, in general, be broken for the purpose of serving civil process; Oystead v. Shed, 13 Mass. 520, 7 Am. Dec. 172; Snydacker v. Brosse, 51 Ill. 357, 99 Am. Dec. 551; Hooker v. Smith, 19 Vt. 151, 47 Am. Dec. 679; 1 M. & W. 336; Curtis v. Hubbard, 4 Hill (N. Y.) 437, 40 Am. Dec. 292; but after the defendant has been arrested, and he takes refuge in his own house, the officer may justify breaking an outer door to take him; Fost. 320; 1 Rolle, 138; Cro. Jac. 555; Allen v. Martin, 10 Wend. (N. Y.) 300, 25 Am. Dec. 564. When once an officer is in the house, he may break open an inner door to make an arrest; Fitch v. Loveland, Kirb. (Conn.) 386; Hubbard v. Mace, 17 Johns. (N. Y.) 127; 13 M. & W. 52; Prettyman v. Dean, 2 Harr. (Del.) 494. See 1 Toullier, n. 214, p. 88; L. R. 2 Q. B. 593; or break the outer door to get out; 7 A. & E. 826.

DORMANT. Sleeping; silent; not known; not acting. One whose name and transactions as a partner are professedly concealed from the world; Mitchell v. Dall, 2 H. & G. (Md.) 159; Kelley v. Hurlburt, 5 Cow. (N. Y.) 534; Pitts v. Waugh, 4 Mass. 424; National Bank of Salem v. Thomas, 47 N. Y. 15. Coll. Partn. § 4. The term is applied, also, to titles, rights, judgments, and executions. As to the latter, see Storm v. Woods, 11 Johns. (N. Y.) 110; Kimball v. Munger, 2 Hill (N. Y.) 364.

DORMANT JUDGMENT. One that has become inoperative so far as the right to issue execution thereon is concerned. General Electric Co. v. Hurd, 171 Fed. 984. See JUDGMENT.

DOS (Lat.). **In Roman Law.** That which is received by or promised to the husband from the wife, or any one else by her influence, for sustaining the burdens of matrimony. There are three classes of *dos. Dos profectitia* is that which is given by the father or any male relative from his property or by his act; *dos adventitia* is that which is given by any other person or from the property of the wife herself; *dos receptitia* is where there is a stipulation connected with the gift relating to the death of the wife. Vicat; Calvinus, Lex.; Du Cange; 1 Washb. R. P. 147.

In English Law. The portion bestowed upon a wife at her marriage by her husband. 1 Washb. R. P. 147; 1 Cruise, Dig. 152.

Dower generally. The portion which a widow has in the estate of her husband after his death. Park, Dower.

This use of the word in the English law, though, as Spelman shows, not strictly correct, has still the authority of Tacitus (*de Mor. Germ* 18) for its use. And if the general meaning of marriage portion is given to it, it is strictly as applicable to a gift from the husband to the wife as to one from the wife to the husband It occurs often, in the phrase *dos de dote peti non debet* (dower should not be sought of dower). 1 Washb. R. P. 209.

DOS RATIONABILIS (Lat.). A reasonable marriage portion. A reasonable part of her husband's estate, to which every widow is entitled, of lands of which her husband may have endowed her on the day of marriage. Co. Litt. 336. Dower, at common law. 2 Bla. Com. 134.

DOSSIER (Fr.). A brief; a bundle of papers.

DOT (a French word adopted in Louisiana). The fortune, portion, or dowry which a woman brings to her husband by the mar-

riage. Buisson v. Thompson, 7 Mart. La. (N. S.) 460.

DOTAGE. That feebleness of the mental faculties which proceeds from old age. A diminution or decay of that intellectual power which was once possessed. 1 Bland, Ch. 389. See DEMENTIA.

DOTAL PROPERTY. By the civil law in Louisiana, by this term is understood that property which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment. Extradotal property, otherwise called paraphernal property, is that which forms no part of the dowry. La. Civ. Code, art. 2335.

The effect of marriage under the civil law as found in the digest was that the wife brought her *dos* and the husband his antidos into the marriage. In all other property belonging to them they each retained the rights of owners in their separate capacities uncontrolled by their relation of husband and wife; Ballinger, Community Property § 2. See COMMUNITY.

DOTATION. In French Law. The act by which the founder of a hospital, or other charity, endows it with property to fulfil its destination.

DOTE. In Spanish Law. The property and effects which a woman brings to her husband for the purpose of aiding him with the rents and revenues thereof to support the expenses of the marriage. Las Partidas, 4. 11. 1. "*Dos*," says Cujas, "*est pecunia marito, nuptiarum causa, data vel promissa.*" The dower of the wife is inalienable, except in certain specified cases, for which see Escriche, Dic. Raz. *Dote*.

As an English verb it has been defined to be delirious, silly or insane. Gates v. Meredith, 7 Ind. 441.

DOTE ASSIGNANDA. In English Law. A writ which lay in favor of a widow, when it was found by office that the king's tenant was seized of tenements in fee or fee-tail at the time of his death, and that he held of the king in chief. Such widows were called king's widows.

DOTE UNDE NIHIL HABET. A writ which lies for a widow to whom no dower has been assigned. 3 Bla. Com. 182. By 23 and 24 Vict. c. 126, an ordinary action commenced by writ of summons has taken its place; but it remains in force in the United States, and under the designation of dower *unde nihil habet*, is the form in common use for the recovery of dower at law; 1 Washb. R. P. 290; 4 Kent 63.

DOUBLE AVAIL OF MARRIAGE. See DUPLEX VALOR MARITAGII.

DOUBLE COMPLAINT. See DUPLEX QUERELA.

DOUBLE COSTS. See COSTS.

DOUBLE EAGLE. A gold coin of the United States, of the value of twenty dollars or units.

It is so called because it is twice the value of the eagle, and, consequently, weighs five hundred and sixteen grains of standard fineness, namely, nine hundred thousandths fine. It is a legal tender for twenty dollars to any amount. Act of March 3 1849, 6 Stat. L. 397. U. S. Rev. Stat. §§ 3511, 3514. The double eagle is in value the largest coin issued in the United States. The first issue was made in 1849. See act of Feb. 12, 1873, 17 Stat. L. p. 426; EAGLE.

DOUBLE INSURANCE. Where divers insurances are made upon the same interest in the same subject against the same risks in favor of the same assured, in proportions exceeding the value. 1 Phill. Ins. §§ 359, 366.

See INSURANCE, sub-title, *Double Insurance.*

A like excess in one policy is over-insurance. If the valuation of the whole interest in one policy is double that in another, and half of the value is insured in each policy according to the valuation in that policy, it is not a double insurance; its being so or not depends on the aggregate of the proportions, one-quarter, one-half, etc., insured by each policy, not upon the aggregate of the amounts.

Where the insurance is on the interests of different persons, though on the same goods, it is not double insurance; Wells v. Ins. Co., 9 S. & R. (Pa.) 107, nor is it where carrier and shipper each insure, Royster v. Roanoke N. & B. S. B. Co., 26 Fed. 492.

In case of double insurance, the assured may sue upon all the policies and is entitled to judgment upon all, *but he is entitled to but one satisfaction;* therefore, if during the pendency of suits on several policies concerning the same risk and interest, the loss is paid in full by one company, the actions against the others must fail, and the insurer paying the loss has a remedy against the other insurers for a proportionate share of the loss. If there be any doubt as to whether the policies cover the same property or interest, evidence is admissible to show the fact, Wiggin v. Ins. Co., 18 Pick. (Mass.) 145, 29 Am. Dec. 576; Ætna Fire Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; Vose v. Ins. Co., 39 Barb. (N. Y.) 302; Peoria Marine & Fire Ins. Co. v. Lewis, 18 Ill. 553; Sloat v. Ins. Co., 49 Pa. 14, 88 Am. Dec. 477; Merrick v. Ins. Co., 54 Pa. 277; May, Ins. § 13.

The question of double insurance does not generally arise in life insurance, as there is no fixed value to the life, and the person in each case is to pay a fixed sum without regard to other insurance. But where the insurable interest has an ascertainable value the question may arise, as where two policies are taken out in different offices, by a creditor, on the life of a debtor, and for the same debt. Then only the value of the interest can be recovered and the amount recovered on the first policy is to be deducted from the amount payable on the second; May, Ins. § 440. See INSURANCE.

DOUBLE PLEA. The alleging, for one single purpose, two or more distinct grounds of defence, when one of them would be as effectual in law as both or all. See DUPLICITY.

By the statute 4 Anne, c. 16, in England, and by similar statutes in most if not all of the states, any defendant in any suit, and

any plaintiff in replevin in any court of record, may plead as many several matters as may be necessary for a defence, with leave of court. This statute allows double pleading; but each plea must be single, as at common law; Lawes, Pl. 131; 1 Chit. Pl. 512; Andr. Steph. Pl. 320; and the statute does not extend to the subsequent pleadings; Com. Dig. *Pleader* (E 2); Story, Pl. § 72; Gould, Pl. c. 8; *Doctrina Plac.* 222. In criminal cases a defendant cannot plead a special plea in addition to the general issue; 7 Cox, Cr. Cas. 85.

DOUBLE POSSIBILITY. A possibility upon a possibility. 2 Bla. Com. 170. See CONTINGENT REMAINDER.

DOUBLE RENT. **In English Law.** Rent payable by a tenant who continues in possession after the time for which he has given notice to quit, until the time of his quitting possession. Stat. 11 Geo. II. c. 19, Fawcett, L. & T. 304. The provisions of this statute have been re-enacted in New York, and some other states, though not generally adopted in this country.

DOUBLE TAX. See TAX.

DOUBLE OR TREBLE DAMAGES. See MEASURE OF DAMAGES.

DOUBLE USE. A term used in patent law to indicate that a later device is merely a new application of an older device, not involving the exercise of the inventive faculty.

In construing letters patent for new applications of old devices, if the new use be so nearly analogous to the former one that it would occur to a person of ordinary mechanical skill, it is only a case of double use; but if the relations between them are remote, and especially if the use of the old device produce a new result, it *may* involve an exercise of the inventive faculty—much depending upon the nature of the changes required to adapt the device to its new use; Potts v. Creager, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275. See PATENT.

DOUBLE VOUCHER. A voucher which occurs when the person first vouched to warranty comes in and vouches over a third person. See a precedent, 2 Bla. Com. App. V. p. xvii.; VOUCHER.

The necessity for double voucher arises when the tenant in tail is not the tenant in the writ, but is tenant by warranty; that is, where he is vouched, and comes in and confesses the warranty. Generally speaking, to accomplish this result a previous conveyance is necessary, by the tenant in tail, to a third person, in order to make such third person tenant to a writ of entry. Pres. Conv. 125, 126.

DOUBLE WASTE. When a tenant bound to repair suffers a house to be wasted, and then unlawfully fells timber to repair it, he is said to commit double waste. Co. Litt. 53. See WASTE.

DOUBT. The uncertainty which exists in relation to a fact, a proposition, or other thing; an equipoise of the mind arising from an equality of contrary reasons. Ayliffe, Pand. 121.

Some rules, not always infallible, have been adopted in doubtful cases, in order to arrive at the truth. 1. In civil cases, the doubt ought to operate against him who, having it in his power to prove facts to remove the doubt, has neglected to do so. In cases of fraud, when there is a doubt, the presumption of innocence ought usually to remove it. 2. In criminal cases, whenever a reasonable doubt exists as to the guilt of the accused, that doubt ought to operate in his favor. In such cases, particularly when the liberty, honor, or life of an individual is at stake, the evidence to convict ought to be clear and devoid of all reasonable doubt.

The term reasonable doubt is often used, but not easily defined. Failure to explain reasonable doubt in a charge is not error; Thigpen v. State, 11 Ga. App. 846, 76 S. E. 596. The words require no definition; Buchanan v. State, 11 Ga. App. 756, 76 S. E. 73. It is a better practice not to define it; Holmes v. State (Tex.) 150 S. W. 926; State v. Reed, 62 Me. 129. "It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in such a condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether." Per Shaw, C. J., in Com. v. Webster, 5 Cush. (Mass.) 320, 52 Am. Dec. 711; Schmidt v. Ins. Co., 1 Gray (Mass.) 534; Bethell v. Moore, 19 N. C. 311; State v. Goldsborough,

Houst. Cr. Rep. (Del.) 316. In approving the opinion of Shaw, C. J., the court in People v. Wreden, 59 Cal. 395, says: "There can be no 'reasonable doubt' of a fact after it has been clearly established by satisfactory proof." No man should be deprived of life under the form of law unless the jury can say upon their conscience that the evidence is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged; Davis v. U. S., 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499.

Reasonable doubt is the result of the proof, not the proof itself; whereas the presumption of innocence is one of the instruments of proof going to bring about the proof from which reasonable doubt arises; thus one is a cause and the other an effect. To say that one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusions upon the proof actually before them; Coffin v. U. S., 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481. It must be an actual, substantial doubt, arising from the evidence or want of evidence in the case; Langford v. State, 32 Neb. 782, 49 N. W. 766.

If the evidence produced in a criminal action be of such a convincing character that the jurors would unhesitatingly be governed by it in the weighty and important matters of life, they may be said to have no *reasonable doubt* respecting the guilt or innocence of the accused, notwithstanding the uncertainty which attends all human evidence. Therefore, a charge to the jury that if after an impartial comparison and consideration of all the evidence, they can truthfully say that they have an abiding conviction of the defendant's guilt, such as they would be willing to act upon in the more weighty and important matters relating to their own affairs, they have no reasonable doubt, is not erroneous; Hopt v. Utah, 120 U. S. 431, 7 Sup. Ct. 614, 30 L. Ed. 708.

Proof "beyond a reasonable doubt" is not beyond all possible or imaginary doubt, but such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof "to a moral certainty," as distinguished from an absolute certainty. As applied to a judicial trial for crime, the two phrases are synonymous and equivalent; and each signifies such proof as satisfies the judgment and consciences of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible; Com. v. Costley, 118 Mass. 24. It must be founded on a consideration of all the circumstances and evidence, and not on mere conjecture or speculation; Kennedy v. State, 107 Ind. 144, 6 N. E. 305, 57 Am. Rep. 99; and must not be a mere mistaking of the imagination or misplaced sympathy; State v. Murphy, 6 Ala. 845; but natural and substantial, not forced or fanciful; State v. Bodekee, 34 Ia. 520; such an honest uncertainty existing in the minds of a candid, impartial and diligent jury as fairly strikes the conscientious mind and clouds the judgment; Com. v. Drum, 58 Pa. 9. It must not be a mere fanciful, vague, speculative or possible doubt, but a reasonable, substantial doubt, remaining after the consideration of all the evidence; State v. Uzzo, 6 Pennew. (Del.) 212, 65 Atl. 775. The subject is discussed in an address by J. S. Burger, before the State Bar Association of Kansas; 11 Am. Lawy. 440; and the history of the doctrine is stated, as well as the difficulty and danger of trying to define it, though the doctrine itself is strongly urged "as the shield of innocence and the champion of liberty." It is said to have been first used in the treason trials in Dublin in 1798.

A much quoted and much criticized definition is that of Dillon, J., in State v. Ostrander, 18 Ia. 437, approved in Polin v. State, 14 Neb. 540, 16 N. W. 898. Other attempts to define reasonable doubt are State v. Hayden, 45 Ia. 17; State v. Nelson, 11 Nev. 334; 4 F. & Fin. 383; U. S. v. Jackson, 29 Fed. 503; State v. Kearley, 26 Kan. 77, per Brewer, J.; People v. Finley, 38 Mich. 482; Lane v. State, 41 Tex. Cr. R. 560, 55 S. W. 831; State v. Swain, 68 Mo. 605. The difficulty of a satisfactory definition is discussed in 57 Am. L. Reg. 419, where C. J. Shaw's definition is criticized and that in Com. v. Costley, 118 Mass. 1, *supra*, is suggested as better. And in Hopt v. Utah, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708, it was approved as contrasted with C. J. Shaw's definition. The whole subject was there considered and the necessity was stated of allowing the trial judge considerable latitude in the way of explanation.

In the Tichborne Case Lord Cockburn charged the jury: "It is the business of the prosecution to bring home guilt to the accused to the satisfaction of the jury. But the doubt of which the accused is entitled to the benefit must be the doubt that a rational —that a sensible—man may fairly entertain, not the doubt of a vacillating mind that has not the moral courage to decide, but shelters itself in vain scepticism." 14 Harv. L. Rev. 87.

An instruction that "reasonable doubt is a doubt you can give a reason for" is erroneous; Abbott v. Territory, 20 Okl. 119, 94 Pac. 179, 16 L. R. A. (N. S.) 260, 129 Am. St. Rep. 818; Pettine v. New Mexico, 201 Fed. 489, 119 C. C. A. 581. It is said that to require an affirmative reason for a reasonable doubt of guilt places upon the defendant the burden of furnishing to every juror a reason why he is not satisfied as to guilt, with

the certainty which the law requires; also, that such an instruction casts on the defendant the burden of furnishing reasons for not finding him guilty, whereas it is on the prosecution to make out a case excluding all reasonable doubt; State v. Cohen, 108 Ia. 208, 78 N. W. 857, 75 Am. St. Rep. 213. So in Carr v. State, 23 Neb. 749, 37 N. W. 630; Darden v. State, 73 Ark. 315, 84 S. W. 507. In State v. Sauer, 38 Minn. 438, 38 N. W. 355, it was said that there is a serious objection to requiring a juror to be able to express in words the ground of his doubt, because he might well have a reasonable doubt and yet find it difficult to give a reason for it.

But a contrary view is held in Butler v. State, 102 Wis. 364, 78 N. W. 590: "A doubt cannot be reasonable unless there is a reason for it, and if such reason exists, it can be given." To the same effect: People v. Guidici, 100 N. Y. 503, 3 N. E. 493; State v. Rounds, 76 Me. 123. In State v. Jefferson, 43 La. Ann. 995, 10 South. 199, it was held to be a "serious, sensible doubt such as you could give a good reason for." The doubt ought not to be a capricious one, but a substantial doubt, which the jury could give a reason for; Marshall v. U. S., 197 Fed. 511, 117 C. C. A. 65.

In Alabama there are numerous and conflicting cases.

There are also cases which, though criticizing the rule that requires the jury to have a reason for a doubt, have held that its application in a charge is not a reversible error, if it be part of a charge defining the difference between a reasonable and a vague doubt; Thibert v. Supreme Lodge, 78 Minn. 450, 81 N. W. 220, 47 L. R. A. 136, 79 Am. St. Rep. 412; Klyce v. State, 78 Miss. 450, 28 South. 827; People v. Stubenvoll, 62 Mich. 329, 28 N. W. 883.

The cases are collected in 16 L. R. A. (N. S.) 260, note.

DOVE. See ANIMAL.

DOWAGER. A widow endowed; one who has a jointure.

In England, this is a title or addition given to the widow of a prince, duke, earl, or other nobleman, to distinguish her from the wife of the heir, who has the right to bear the title; 1 Bla. Com. 224.

DOWER (from Fr. *douer*, to endow). The provision which the law makes for a widow out of the lands or tenements of her husband, for her support and the nurture of her children. Co. Litt. 30 *a*; 2 Bla. Com. 130; 4 Kent 35; Washb. R. P. 146.

There were five species of dower in England (Littleton § 51):

1. *Dower ad ostium ecclesiæ*, where a man of full age, on coming to the church-door to be married, endowed his wife of a certain portion of his lands.

2. *Dower ex assensu patris*, which differed from dower *ad ostium ecclesiæ* only in being made out of the lands of the husband's father and with his consent.

3. *Dower by common law*, where the widow was entitled during her life to a third part of all the lands and tenements of which her husband was seised in law or in fact of an inheritable estate, at any time during the coverture, and which any issue she might have had might by possibility have inherited.

4. *Dower by custom*, where a widow became entitled to a specified portion of her husband's lands in consequence of some local or particular custom.

5. *Dower de la plus belle* (*de la plus beale*), where the widow on suing the guardian in chivalry for dower, was required by him to endow herself of the fairest portion of any lands she might hold as guardian in socage, and thus release from dower the lands of her husband held in chivalry. This was abolished along with the military tenures, of which it was a consequence; 2 Bla. Com. 132, n.

Of these, the first and second were created by the act of the parties, the third and fourth by the law. The two classes represent the old order and the new. 3 Holdsw. Hist. E. L. 157. In later days the former class was superseded by the latter class or by jointures.

By the Dower Act in England (1833) the widow is entitled to dower out of equitable estates as well as legal, but only out of those estates to which the husband is beneficially entitled at his death.

Dower in the United States, although regulated by statutes differing from each other in many respects, conforms substantially to that at the common law; 1 Washb. R. P. 149; see Schoul. Hus. & W. 455.

Where a statute provided that no estate in dower be allotted to the wife on the death of her husband, it took away a wife's inchoate right of dower in lands previously alienated by her husband without joining her in the deed; Richards v. Land Co., 47 Fed. 854; the inchoate right of the wife is not such a vested right or interest as cannot be taken away by legislative action; Richards v. Land Co., 54 Fed. 209, 4 C. C. A. 290.

Of what estates the wife is dowable. Her right to dower is always determined by the laws of the place where the property is situate; Duncan v. Dick, Walker (Miss.) 281; O'Ferrall v. Simplot, 4 Ia. 381; Lamar v. Scott, 3 Strobh. (S. C.) 562.

She is entitled to one-third of all lands, tenements, or hereditaments, corporeal and incorporeal, of which her husband may have been seized during the coverture, in fee or in tail; 2 Bla. Com. 131; Gorham v. Daniels, 23 Vt. 611.

She was not dowable of a term for years, however long; Park. Dow. 47; Spangler v. Stanler, 1 Md. Ch. Dec. 36.

The inheritance must be an entire one,

and one of which the husband may have corporeal seisin or the right of immediate corporeal seisin; Plowd. 506; Caruthers v. Wilson, 1 Sm. & M. (Miss.) 527.

Dower does not attach in an estate held in joint tenancy; but the widow of the survivor has dower; Co. Litt. § 45; Mayburry v. Brien, 15 Pet. (U. S.) 21, 10 L. Ed. 646. But where the principle of survivorship is abolished, this disability does not exist; Davis v. Logan, 9 Dana (Ky.) 185; Reed v. Kennedy, 2 Strobh. (S. C.) 67.

An estate in common is subject to dower; Wilkinson v. Parish, 3 Paige, Ch. (N. Y.) 653; Totten v. Stuyvesant, 3 Edw. Ch. (N. Y.) 500; Pynchon v. Lester, 6 Gray (Mass.) 314; Clift v. Clift, 87 Tenn. 17, 9 S. W. 198, 360; Parrish v. Parrish, 88 Va. 529, 14 S. E. 325; Chew v. Chew, 1 Md. 172. But the dower in land owned by the husband in common with others is divested by partition thereof in a suit to which the husband is a party, though the wife is not joined; Holley v. Glover, 36 S. C. 404, 15 S. E. 605, 16 L. R. A. 776, 31 Am. St. Rep. 883. See 2 Can. L. T. 15.

In the case of an exchange of lands, the widow may claim dower in either, but not in both; Co. Litt. 31 *b*; if the interests are unequal, then in both; Wilcox v. Randall, 7 Barb. (N. Y.) 633; Mosher v. Mosher, 32 Me. 412; Cass v. Thompson, 1 N. H. 65, 8 Am. Dec. 36.

She is entitled to dower in mines belonging to her husband, if opened by him in his lifetime on his own or another's land; 1 Taunt. 402; Coates v. Cheever, 1 Cow. (N. Y.) 460; Lenfers v. Henke, 73 Ill. 405, 24 Am. Rep. 263; Moore v. Rollins, 45 Me. 493. See In re Seager's Estate, 92 Mich. 186, 52 N. W. 299, where she was held to be entitled whether the mines were opened before or after her husband's death; Black v. Min. Co., 49 Fed. 549; *id.* 52 Fed. 859, 3 C. C. A. 312. See also Seager v. McCabe, 92 Mich. 186, 52 N. W. 299, 16 L. R. A. 247. But in Marshall v. Mellon, 179 Pa. 371, 36 Atl. 201, 35 L. R. A. 816, 57 Am. St. Rep. 601 she was held to have no right to operate for oil or gas, where such operations had not commenced during the lifetime of her husband. Where a statute gave the surviving husband or wife a one-third interest in the real estate of the other, the life tenant is entitled only to the income upon one-third of the oil produced; Swayne v. Oil Co., 98 Tex. 597, 86 S. W. 740, 69 L. R. A. 986, 8 Ann. Cas. 1117.

She had the right of dower in various species of incorporeal hereditaments: as, rights of fishing, and rents; Co. Litt. 32 *a*; 2 Bla. Com. 132; Chase's Case, 1 Bland, Ch. (Md.) 227, 17 Am. Dec. 277; but the rents should be estates of inheritance; 2 Cruise, Dig. 291.

In most of the states she is dowable of wild lands; Chapman v. Schroeder, 10 Ga. 321; Macaulay's Ex'r v. Land Co., 2 Rob. (Va.) 507; Hickman v. Irvine's Heirs, 3 Dana (Ky.) 121; Allen v. McCoy, 8 Ohio, 418; Pike v. Underhill's Adm'r, 24 Ark. 124; Brown v. Richards, 17 N. J. Eq. 32; Joyner v. Speed, 68 N. C. 236, *contra*, Kuhn v. Kaler, 14 Me. 409; Johnson v. Perley, 2 N. H. 56, 9 Am. Dec. 35.

She has no right of dower in a pre-emption claim; Well's Guardian v. Moore, 16 Mo. 478; Davenport v. Farrar, 1 Scam. (Ill.) 314.

At law there was nothing to prevent her from having dower in lands which her husband held as trustee. But, as she would take it subject to the trust, courts of equity were in the habit of restraining her from claiming her dower in lands which she would be compelled to hold entirely to another's use, till it was finally established, both in England and the United States, that she is not entitled in such case to dower; Firestone v. Firestone, 2 Ohio St. 415; Bartlett v. Gouge, 5 B. Mon. (Ky.) 152; Park, Dow. 105.

At common law she was not dowable of the estate of a *cestui que trust;* 2 Sch. & L. 387; 4 Kent 43; Lenox v. Notrebe, Hempst. 251, Fed. Cas. No. 8,246c. See Watson's Estate, 139 Pa. 461, 22 Atl. 638. But by the Dower Act this restriction was removed in England; 3 & 4 Will. IV. c. 105; 1 Spence, Eq. Jur. 501. The common-law rule that a widow could only have dower in the legal estates of the husband has been either expressly or impliedly changed by statute in the majority of states, and she now has a right of dower in his equitable estates as well, but only in those of which he died seised; In re Ransom, 17 Fed. 233; Morse v. Thorsell, 78 Ill. 604; and if the husband has aliened an equitable estate, although his wife may not have consented, the dower is defeated; Taylor v. Kearn, 68 Ill. 341; Miller v. Stump, 3 Gill (Md.) 304. In Delaware a widow is not dowable out of an equitable estate of her deceased husband, except in intestate lands; Cornog v. Cornog, 3 Del. Ch. 407, but the law upon this subject is not uniform; Stelle v. Carroll, 12 Pet. (U. S.) 201, 9 L. Ed. 1056; Hamlin v. Hamlin, 19 Me. 141; Shoemaker v. Walker, 2 S. & R. (Pa.) 554; Rowton v. Rowton, 1 Hen. & M. (Va.) 92. In some states, dower in equitable estates is given by statutes; while in others the severe common-law rule has not been strictly followed by the courts; Hawley v. James, 5 Paige, Ch. (N. Y.) 318; Lawson v. Morton, 6 Dana (Ky.) 471; Lewis v. James, 8 Humphr. (Tenn.) 537; Thompson v. Thompson, 46 N. C. 430; Miller v. Stump, 3 Gill (Md.) 304.

A mortgagee's wife, although her husband has the technical seisin, had no dowable interest till the estate becomes irredeemable; 4 Dane, Abr. 671; 4 Kent 42; Foster v.

Dwinel, 49 Me. 53, 2 Ves. Jr. 631; Waller v. Waller's Adm'r, 33 Gratt. (Va.) 83.

A widow was not dowable of an equity of redemption under the common law; In re Ransom, 17 Fed. 331; L. R. 6 Ch. D. 218; Cox v. Garst, 105 Ill. 342; Glenn v. Clark, 53 Md. 607; Pickett v. Buckner, 45 Miss. 243; Hopkinson v. Dumas, 42 N. H. 296; Eddy v. Moulton, 13 R. I. 105; nor did the English courts admit the doctrine until the statute of 1833; Ld. Ch. Redesdale in 2 S. & L. 388; but, as was said by Chancellor Bates in Cornog v. Cornog, 3 Del. Ch. 407, the American courts, being free to carry the equitable view of mortgaged estates to its logical results, have uniformly allowed dower in an equity of redemption; Mayburry v. Brien, 15 Pet. (U. S.) 38, 10 L. Ed. 646; Simonton v. Gray, 34 Me. 50; Newton v. Cook, 4 Gray (Mass.) 46; Titus v. Neilson, 5 Johns. Ch. (N. Y.) 452; Taylor v McCrackin, 2 Blackf. (Ind.) 262; Heth v. Cocke, 1 Rand. (Va.) 344; Fish v. Fish, 1 Conn. 559; Hastings v. Stevens, 29 N. H. 564; Hinchman v. Stiles, 9 N. J. Eq. 361; but after the surplus proceeds of sale have been applied by the sheriff to a judgment against the husband, it is too late to assert the widow's claim to equitable dower; Gemmill v. Richardson, 4 Del. Ch. 599. See on this subject 11 Can. L. T. 281.

In reference to her husband's contracts for the purchase of lands, the rule seems to be, in those states where dower is allowed in equitable estates, that her right attaches to her husband's interest in the contract, if at his death he was in a condition to enforce specific performance; Hawley v. James, 5 Paige, Ch. (N. Y.) 318; Smith v. Addleman, 5 Blackf. (Ind.) 406; Rowton v. Rowton, 1 Hen. & M. (Va.) 92; Robinson v. Miller, 1 B. Monr. (Ky.) 93; Reed v. Whitney, 7 Gray (Mass.) 533; Owen v. Robbins, 19 Ill. 545; Thompson v. Thompson, 46 N. C. 430. If his interest has been assigned before his death, or forfeited, or taken on execution, her dower-right is defeated; Pritts v. Ritchey, 29 Pa. 71; Secrest v. McKenna, 6 Rich. Eq. (S. C.) 72; Dean's Heirs v. Michell's Heirs, 4 J. J. Marsh. (Ky.) 451; Heed v. Ford, 16 B. Monr. (Ky.) 114; Rowton v. Rowton, 1 Hen. & M. (Va.) 91.

She is entitled to dower in lands actually purchased by her husband and upon which the vendor retains a lien for the unpaid purchase-money, subject to that lien; McClure v. Harris, 12 B. Monr. (Ky.) 261; Crane v. Palmer, 8 Blackf. Ind. 120; Ellicott v. Welch, 2 Bland. Ch. (Md.) 242; Williams v. Woods, 1 Humphr. (Tenn.) 408; or upon which her husband has given a mortgage to secure the purchase-money, subject to that mortgage; Henagan v. Harllee, 10 Rich. Eq. (S. C.) 285. See Seibert v. Todd, 31 S. C. 206, 9 S. E. 822, 4 L. R. A. 606.

She is not entitled to dower in partnership lands purchased by partnership funds and for partnership purposes, until the partnership debts have been paid; Burnside v. Merrick, 4 Metc. (Mass.) 537; Woolridge v. Wilkins, 3 How. (Miss.) 372; Loubat v. Nourse, 5 Fla. 350; Duhring v. Duhring, 20 Mo. 174; Drewry v. Montgomery, 28 Ark. 259; Willet v. Brown, 65 Mo. 148, 27 Am. Rep. 265; Campbell v. Campbell, 30 N. J. Eq. 417. She has been denied dower in land purchased by several for the purposes of sale and speculation; Coster v. Clarke, 3 Edw. Ch. (N. Y.) 428; it has been treated as personalty so far as was necessary to settle the partnership affairs, the right of dower being subject to the debts of the firm; Young v. Thrasher, 115 Mo. 222, 21 S. W. 1104; Mallory v. Russell, 71 Ia. 63, 32 N. W. 102, 60 Am. Rep. 776; Wheatley's Heirs v. Calhoun, 12 Leigh (Va.) 264, 37 Am. Dec. 654.

Sometimes she is allowed dower out of money, the proceeds of real estate sold by order of court, or by the wrongful act of an agent or trustee; Jennison v. Hapgood, 14 Pick. (Mass.) 345; Beavers v. Smith, 11 Ala. 33; Church v. Church, 3 Sandf. Ch. (N. Y.) 434; Willet v. Beatty, 12 B. Monr. (Ky.) 172; Thompson v. Cochran, 7 Humphr. (Tenn.) 72, 46 Am. Dec. 68.

Her claim for dower has been held not subject to mechanics' liens; Shaeffer v. Weed, 3 Gilman (Ill.) 511; Nazareth Literary & Benevolent Inst. v. Lowe, 1 B. Monr. (Ky.) 257.

The principle of equitable contribution applies equally to dower, as to other incumbrances; Eliason v. Eliason, 3 Del. Ch. 260.

She is not entitled to dower in an estate *pur auter vie;* Gillis v. Brown, 5 Cow. (N. Y.) 388; or in a vested remainder; Fisk v. Eastman, 5 N. H. 240; Moore v. Esty, 5 N. H. 479; Blow v. Maynard, 2 Leigh (Va.) 29; Reynolds v. Reynolds, 5 Paige, Ch. (N. Y.) 161; or in reversion of the husband, where he dies before the termination of the life estate; Kellett v. Shepard, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254.

In some states she has dower only in what the husband died seised of; Winstead v. Winstead's Heirs, 2 N. C. 243; 4 Kent 41.

The wife's dower will be protected against the voluntary conveyance of the husband made pending a marriage engagement, under the same circumstances in which the husband is relieved against an ante-nuptial settlement by the wife; Chandler v. Hollingsworth, 3 Del. Ch. 99. This case is considered by Washburn and Bishop as the leading case and is approved by both authors; 3 Washb. R. P. 359; 2 Bish. M. W. § 343, note 2, quoting the greater portion of the opinion of Bates, Ch.

Requisites of. Three things are usually said to be requisite to the consummation of a title to dower, viz.: marriage, seisin of the husband, and his death; 4 Kent 36; 1 Washb. R. P. 169; King v. King, 61 Ala. 481; Wait v. Wait, 4 N. Y. 99.

The marriage must be a legal one; though, if voidable and not void, she will have her dower unless it is dissolved in his lifetime; Smart v. Whaley, 6 Smedes & M. (Miss.) 308; Co. Litt. 33 *a*; 1 Cruise, Dig. 164; Higgins v. Breen, 9 Mo. 501; Jones v. Jones, 28 Ark. 21.

The husband must have been seised in the premises of an estate of inheritance at some time during the coverture. It may not be an actual seisin; a seisin in law with the right of immediate corporeal seisin is sufficient; Eldredge v. Forrestal, 7 Mass. 253; Mann v. Edson, 39 Me. 25; Dunham v. Osborn, 1 Paige, Ch. (N. Y.) 635; Shoemaker v. Walker, 2 S. & R. (Pa.) 554; 1 Cruise, Dig. 166; Young v. Young, 45 N. J. Eq. 27, 16 Atl. 921; Houston v. Smith, 88 N. C. 312. Possession by a widow of the mansion house of her husband, and her unassigned right of dower, do not prevent the heir from being seised thereof so that his widow may acquire dower therein; Null v. Howell, 111 Mo. 273, 20 S. W. 24. It is not necessary that the seisin of the husband should be a rightful one. The widow of a disseisor may have dower against all who have not the rightful seisin; Scribn. Dow. 702. See Toomey v. McLean, 105 Mass. 122.

So, although the estate is a defeasible one, provided it is one of inheritance, she may claim her dower until it is defeated; Co Litt. 241; Doughty v. Doughty, 7 N. J. Eq. 241; 10 Co. 95.

The seisin is not required to remain in the husband any particular length of time. It is sufficient if he is seised but an instant, to his own benefit and use; Young v. Tarbell, 37 Me. 509; 2 Bla Com. 132; Kade v. Lauber, 48 How. Pr. (N. Y.) 382; but a mere instantaneous seisin for some other purpose than proprietorship will not give the wife dower; Stanwood v. Dunning, 14 Me. 290; Wooldridge v. Wilkins, 3 How. (Miss.) 369; Edmondson v. Welsh, 27 Ala. 578; McCauley v. Grimes, 2 G. & J. (Md.) 318, 20 Am. Dec. 434; Emerson v. Harris, 6 Metc. (Mass.) 475.

Where he purchases land and gives a mortgage at the same time to secure the purchase-money, such incumbrance takes precedence of his wife's dower; Stow v. Tifft, 15 Johns. (N. Y.) 458, 8 Am. Dec. 266; Reed v. Morrison, 12 S. & R. (Pa.) 18; Holbrook v Finney, 4 Mass. 566, 3 Am. Dec. 243; Moore v. Esty, 5 N. H. 479; Griggs v. Smith, 12 N. J. L. 22; Bogie v. Rutledge, 1 Bay (S. C.) 312; Smith v. Stanley, 37 Me. 11, 58 Am. Dec. 771.

The death of the husband. 1 Cruise, Dig. 168. What was known as civil death in England did not give the wife right of dower; 2 Crabb. R. P. 130; Wooldridge v. Lucas, 7 B. Monr. (Ky.) 51; Platner v. Sherwood, 6 Johns. Ch. (N. Y.) 129. Imprisonment for life is declared civil death in some of the states.

How dower may be prevented or defeated. At common law, *alienage* on the part of the husband or wife prevented dower from attaching; 2 Bla. Com. 131; Priest v. Cummings, 16 Wend. (N. Y.) 617; Stokes v. O'Fallon, 2 Mo. 32. This disability is partially done away with in England, 7 & 8 Vict. c. 66, and is almost wholly abolished in the United States. See ALIEN.

It is well established that the wife's dower is defeated whenever the seisin of her husband is defeated by a paramount title; Co. Litt. 240 *b*; 4 Kent 48.

The foreclosure of a mortgage given by the husband before marriage, or by the wife and husband after marriage, will defeat her right of dower; Stow v. Tifft, 15 Johns. (N. Y.) 458, 8 Am. Dec. 266; Reed v. Morrison, 12 S. & R. (Pa.) 18; Nottingham v. Calvert, 1 Ind. 527; Bisland v. Hewett, 11 Smedes & M. (Miss.) 164; Wilson v. Davisson, 2 Rob. (Va.) 384; Ingram v Morris, 4 Harr. (Del.) 111; Shope v. Schaffner, 140 Ill. 470, 30 N. E. 872; Boorum v. Tucker, 51 N. J. Eq. 135, 26 Atl. 456. And in Pennsylvania, whether the wife joined or not. Like force would be given to a vendor's lien or mortgage for the purchase-money, or to a judgment lien outstanding at the time of marriage.

Her right to dower in the estate which she has joined with her husband in mortgaging is good against every one but the mortgagee; Whitehead v. Middleton, 2 How. (Miss.) 692; Eaton v. Simonds, 14 Pick. (Mass.) 98; Hastings v. Stevens, 29 N. H. 564; Young v. Tarbell, 37 Me. 509. The same is true in regard to an estate mortgaged by her husband before coverture; Eaton v. Simonds, 14 Pick. (Mass.) 98. In neither case would the husband have the right to cut off her claim for dower by a release to the mortgagee, or an assignment of his equity of redemption; Titus v. Neilson, 5 Johns. Ch. (N. Y.) 452; Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; Eaton v. Simonds, 14 Pick. (Mass.) 98; McIver v. Cherry, 8 Humphr. (Tenn.) 713; Heth v. Cocke, 1 Rand. (Va.) 344; Simonton v. Gray, 34 Me. 50; Harrison v. Eldridge, 7 N. J. L. 392. As to a purchase and mortgage for the purchase-money before marriage, in which the husband releases the equity of redemption after marriage, see Jackson v. Dewitt, 6 Cow. (N. Y.) 316.

An agreement on the part of the husband to convey before dower attaches, if enforced, will extinguish her claim; Adkins v. Holmes, 2 Ind. 197; Bowie v. Berry, 3 Md. Ch. 359.

Dower will not be defeated by the determination of the estate by natural limitation; as, if the tenant in fee die without heirs, or the tenant in tail; 8 Co. 34; 4 Kent 49; Northcut v. Whipp, 12 B. Monr. (Ky.) 73. Whether it will be defeated by a conditional limitation by way of executory devise or shifting use, is not yet fully settled; Co. Litt. 241 *a*, Butler's note 170; Sugd. Pow. 333; 3

B. & P. 652. But it seems that the weight of American authority is in favor of sustaining dower out of such estates; Evans v. Evans, 9 Pa. 190; Milledge v. Lamar, 4 Desaus. (S. C.) 617. See 1 Washb. R. P. 216.

Dower will be defeated by operation of a collateral limitation: as, in the case of an estate to a man and his heirs so long as a tree shall stand, and the tree dies; 3 Prest. Abstr. 373; 4 Kent 49.

In some states it will be defeated by a sale on execution for the debts of the husband; Gardiner v. Miles, 5 Gill (Md.) 94; London v. London, 1 Humphr. (Tenn.) 1; Kennerly v. Ins. Co., 11 Mo. 204; Den v. Frew, 14 N. C. 3, 22 Am. Dec. 708; but see Thomas v. Thomas, 73 Ia. 657, 35 N. W 693. In Missouri it is defeated by a sale in partition; Lee v. Lindell, 22 Mo. 202, 64 Am. Dec. 262. See Jackson v. Edwards, 22 Wend. (N. Y.) 498; Van Gelder v. Post, 2 Edw. Ch. (N. Y.) 577. See 25 Alb. L. J. 387.

It is defeated by a sale for the payment of taxes; Jones v. Devore, 8 Ohio St. 430.

It is also defeated by exercise of the right of eminent domain during the life of the husband. Nor has the widow the right of compensation for such taking. The same is true of land dedicated by her husband to public use; Gwynne v. City of Cincinnati, 3 Ohio 24, 17 Am. Dec. 576.

How dower may be barred. A divorce from the bonds of matrimony was at common law a bar to dower; 2 Bla. Com 130; Wait v. Wait, 4 Barb. (N. Y.) 192; Hinson v. Bush, 84 Ala. 368, 4 South. 410; Pullen v. Pullen, 52 N. J. Eq. 9, 28 Atl. 719; but the woman's right to dower, or something equivalent to it, is reserved by statutes in most of the states, if she be the innocent party; Forrest v. Forrest, 6 Duer (N. Y.) 102. A judgment of divorce in another state, for cause other than adultery, which has the effect to deprive the wife of dower in the state where rendered, will not have such effect in New York; the United States constitution makes a judgment in another state conclusive as to the fact of divorce, but gives no extra-territorial effect on land of the husband; Van Cleaf v. Burns, 133 N. Y. 540, 30 N. E. 661, 15 L. R. A. 542.

By the common law neither adultery alone nor with elopement was a bar to dower; 2 Scrib. Dow. 531; but by the statute of Westminster 2d, a wife who eloped and lived in adultery forfeited her dower-right. This provision has been re-enacted in several of the states and recognized as common law in others; Lecompte v. Wash, 9 Mo. 555; Stegall v. Stegall, 2 Brock. 256, Fed. Cas. No. 13,351; Cogswell v. Tibbetts, 3 N. H. 41; Walters v. Jordan, 35 N. C. 361, 57 Am. Dec. 558; 4 Dane, Abr. 676; Bell v. Nealy, 1 Bailey (S. C.) 312, 19 Am. Dec. 686; *contra*, Schiffer v. Pruden, 64 N. Y. 47; Lakin v. Lakin, 2 Allen (Mass.) 45; Littlefield v. Paul, 69 Me. 527; Bryan v. Batcheller, 6 R. I. 543, 78 Am. Dec. 454. Dower is not barred even if the wife commit adultery, if she be abandoned by her husband and he be profligate and intemperate and an adulterer; Rawlins v. Buttel, 1 Houst. (Del.) 224; nor if she be deserted by her husband, will her subsequent seduction and adultery operate as a bar; Appeal of Nye, 126 Pa. 341, 17 Atl. 618; 6 U. C. C. P. 310; Shaffer v. Richardson's Adm'r, 27 Ind. 122. For an analysis of decisions and reference to state statutes on this subject, see 2 Scrib. Dow. 531.

A widow who had been convicted as accessory before the fact to her husband's murder was held entitled to dower; Owens v. Owens, 100 N. C. 240, 6 S. E. 794.

Dower is barred by an annuity given the wife in a divorce decree, and charged on the husband's real estate, where the wife had taken her maintenance under the decree; Adams v. Storey, 135 Ill. 448, 26 N. E. 582, 11 L. R. A. 790, 25 Am. St. Rep. 392.

The widow of a convicted traitor could not recover dower; 2 Bla. Com. 130; but this principle is not recognized in this country; Wms. R. P. 103, n.

Nor does she in this country, as at common law, forfeit her dower by conveying in fee the estate assigned to her; 4 Kent 82; Wms. R. P. 121, 125, n.; Robinson v. Miller, 1 B. Monr. (Ky.) 88.

The most common mode formerly of barring dower was by jointure; Scrib. Dow. 389; Craig's Heirs v. Walthall, 14 Gratt. (Va.) 518; Stilley v. Folger, 14 Ohio 610; West v. Walker, 77 Wis. 557, 46 N. W. 819. Marriage is a sufficient consideration to support an ante-nuptial contract for release of dower; Shea's Appeal, 121 Pa. 302, 15 Atl. 629, 1 L. R. A. 422; Worrell v. Forsyth, 141 Ill. 22, 30 N. E. 673. Now it is usually done by joining with her husband in conveying the estate. Formerly this was done by levying a fine, or suffering a recovery; 4 Kent 51; 2 Bla. Com. 137; now it is by deed executed with her husband and acknowledged in the form required by statute; Wms. R. P. 189; Coburn v. Herrington, 114 Ill. 104, 29 N. E. 478; Mitch. R. P. 156; which is the mode prevailing in the United States. The husband must usually join in the act; Moore v. Tisdale, 5 B. Monr. (Ky.) 352; Ulp v. Campbell, 19 Pa. 361; Page v. Page, 6 Cush. (Mass.) 196; Shaw v. Russ, 14 Me. 432.

Words of grant will be sufficient although no reference is made in the deed to dower *eo nomine;* Dundas v. Hitchcock, 12 How. (U. S.) 256, 13 L. Ed. 978; Smith v. Handy, 16 Ohio 236.

In most of the states her deed must be acknowledged, and in the form pointed out by statute; Williams v. Robson, 6 Ohio St. 510; Kirk v. Dean, 2 Binn. (Pa.) 341; Scanlan v. Turner, 1 Bail. (S. C.) 421; Clark v. Redman, 1 Blackf. (Ind.) 379; which must appear in the certificate; Elwood v. Klock, 13 Barb. (N. Y.) 50. She should be of age

at the time; Jones v. Todd, 2 J. J. Marsh. (Ky.) 359; Thomas v. Gammel, 6 Leigh (Va.) 9; Cunningham v. Knight, 1 Barb. (N. Y.) 399; Markham v. Merrett, 7 How. (Miss.) 437, 40 Am. Dec. 76. She cannot release her dower by parol; see Wood v. Lee, 5 T. B. Monr. (Ky.) 57; Keeler v. Tatnell, 23 N. J. L. 62. A parol sale of lands in which the husband delivers possession does not exclude dower; Williams v. Dawson, 3 Sneed (Tenn.) 316. But it has been held that she may bar her claim for dower by her own acts operating by way of estoppel; Heth v. Cocke, 1 Rand. (Va.) 344; Dougrey v. Topping, 4 Paige, Ch. (N. Y.) 94; Reed v. Morrison, 12 S. & R. (Pa.) 18; Gardiner v. Miles, 5 Gill (Md.) 94.

A release of dower by a wife direct to her husband will not enable him by his sole deed to convey the land free of dower right, for, if the release is at all effectual, the husband becomes vested with a fee simple and the dower-right immediately reattaches by operation of law; House v. Fowle, 22 Or. 303, 29 Pac. 890; but where the wife has power to release her dower by an attorney in fact, she may constitute her husband attorney for the purpose; Wronkow v. Oakley, 133 N. Y. 505, 31 N. E. 521, 16 L. R. A. 209, 28 Am. St. Rep. 661.

A release of dower has been presumed after a long lapse of time; Barnard v. Edwards, 4 N. H. 321; Evans v. Evans, 3 Yeates (Pa.) 507.

At common law there was no limitation to the claim for dower; 4 Kent 70. As to the statutes in the different states, see *id.* note; 1 Washb. R. P. 217. Adverse possession for seven years with claim and color of title and payment of taxes will bar a claim of dower; Brian v. Melton, 125 Ill. 647, 18 N. E. 318; Null v. Howell, 111 Mo. 275, 20 S. W. 24; but see Boling v. Clark, 83 La. 481, 50 N. W. 57.

The right to dower does not depend on the existence of the family relation at the death of the husband and is not barred by desertion; Nye's Appeal, 126 Pa. 341, 17 Atl. 618, 12 Am. St. Rep. 873.

Upon the doctrine of *dos de dote*, see 1 Washb. R. P. 209.

In some states the wife may elect to take half of the husband's estate in lieu of dower under certain contingencies; Welch v. Anderson, 28 Mo. 293; or she may accept a devise in lieu of dower; Nelson v. Brown, 66 Hun 311, 20 N. Y. Supp. 978; Stone v. Vandermark, 146 Ill. 312, 34 N. E. 150; Bannister v. Bannister, 37 S. C. 529, 16 S. E. 612; Goodrum v. Goodrum, 56 Ark. 532, 20 S. W. 353.

It seems that a contract to marry on condition that the wife should receive no portion of the husband's lands may be valid; Spiva v. Jeter, 9 Rich. Eq. (S. C.) 434.

How and by whom dower may be assigned. Her right to have dower set out to her accrues immediately upon the death of her husband; but until it is assigned she has no right to any specific part of the estate; 2 Bla. Com. 139. She was allowed by Magna Carta to occupy the principal mansion of her husband for forty days after his death, if it were on dowable lands. This right is variously recognized in the states; Stokes v. McAllister, 2 Mo. 163; Doe v. Carrol, 16 Ala. 148; Chaplin v. Simmons' Heirs, 7 T. B. Monr. (Ky.) 337; Stedman v. Fortune, 5 Conn. 462. In some states, she may remain in possession of the principal mansion-house and messuages thereto belonging until dower has been assigned, Grimes v. Wilson, 4 Blackf. (Ind.) 331. This makes her tenant in common with the heir to the extent of her right of dower; and an assignment only works a severance of the tenancy; 4 Kent 62; Stokes v. McAllister, 2 Mo. 163.

There were two modes of assigning dower; one by "common right," where the assignment was by legal process; the other "against common right," which rested upon the widow's assent and agreement.

Dower of "common right" must be assigned by metes and bounds, where this is possible, unless the parties agree to a different form; 2 Penning. 521; 1 Rolle, Abr. 683; Style 276; Perkins 407.

If assigned "against common right," it must be by indenture to which she is a party; Co. Litt. 34 *b*; Jones v. Brewer, 1 Pick. (Mass.) 314.

Where assigned of common right, it must be unconditional and absolute; Co. Litt. 34 *b*, n. 217; 1 Rolle, Abr. 682; and for her life; 1 Bright, Husb. & W. 379.

Where it is assigned not by legal process, it must be by the tenant of the freehold; Co. Litt. 35 *a*. It may be done by an infant; 2 Bla. Com. 136; McCormick v. Taylor, 2 Ind. 336; or by the guardian of the heir; 2 Bla. Com. 136; Young v. Tarbell, 37 Me. 509. Dower may be assigned in partition; Thomas v. Thomas, 73 Ia. 657, 35 N. W. 693.

As between the widow and heir, she takes her dower according to the value of the property at the time of the assignment; Thompson v. Morrow, 5 S. & R. (Pa.) 290, 9 Am. Dec. 358; Wooldridge v. Wilkins, 3 How. (Miss.) 360; Mosher v. Mosher, 15 Me. 371; Green v. Tennant, 2 Harr. (Del.) 336; Summers v. Babb, 13 Ill. 483.

As between the widow and the husband's alienee, she takes her dower according to the value at the time of the alienation; Hale v. James, 6 Johns. Ch. (N. Y.) 258, 10 Am. Dec. 328; Tod v. Baylor, 4 Leigh (Va.) 498. This was the ancient and well-established rule; Humphrey v. Phinney, 2 Johns. (N. Y.) 484; Catlin v. Ware, 9 Mass. 218, 6 Am. Dec. 56. But in this country the rule in respect to the alienee seems now to be that if the land had been enhanced in value by his labor and improvements, the widow shall not share in these; Thompson v. Morrow, 5

S. & R. (Pa.) 289, 9 Am. Dec. 358; Catlin v. Ware, 9 Mass. 218, 6 Am. Dec. 56; Tod v. Baylor, 4 Leigh (Va.) 498; Wilson v. Oatman, 2 Blackf. (Ind.) 223; Barney v. Frowner, 9 Ala. 901; Baden v. McKenny, 7 Mackey (D. C.) 268; Felch v. Finch, 52 Ia. 563, 3 N. W. 570; McGehee v. McGehee, 42 Miss. 747; if it has been enhanced by extraneous circumstances, such as the rise and improvement of property in the neighborhood, she is to have the full benefit of this; Smith v. Addleman, 5 Blackf. (Ind.) 406; Powell v. M'f'g Co, 3 Mas. 375, Fed. Cas. No. 11,356; Johnston v. Vandyke, 6 McLean, 422, Fed. Cas. No. 7,426; Wms. R. P. 191, n.

There seems to be no remedy for her now in either country where the land has deteriorated in value by the waste and mismanagement of the alienee or by extraneous circumstances; McClanahan v. Porter, 10 Mo. 746; see Westcott v. Campbell, 11 R. I. 378; but she must be content to take her dower in the property as it was at the time of her husband's death; 1 Washb. R. P. 239. See Sanders v. McMillian, 98 Ala. 144, 11 South. 750, 18 L. R. A. 425, 39 Am. St. Rep. 19. Where the widow dies without asserting her claim, neither her personal representatives, nor those of her assignee of such dower right, can maintain an action to have dower admeasured or for a gross sum in lieu thereof; Howell v. Newman, 59 Hun 538, 13 N. Y. Supp. 648; Pollitt v. Kerr, 49 N. J. Eq. 66, 22 Atl. 800.

Dower may also be recovered in equity, the jurisdiction of which, as Chancellor Kent says, "has been thoroughly examined, clearly asserted, and definitively established;" 4 Kent 71; and nearly half a century later this language is repeated as correctly expressing the result of the authorities; Bisph. Eq. § 495. The jurisdiction was asserted in the U. S. at an early period; Grayson v. Moncure, 1 Leigh (Va.) 449; Kendall v. Honey, 5 T. B. Monr. (Ky.) 284; Stevens v. Smith, 4 J. J. Marsh. (Ky.) 64, 20 Am. Dec. 205; Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; Badgley v. Bruce, 4 Paige, Ch. (N. Y.) 98; and although in New Jersey in the time of Kent the equitable jurisdiction was denied; 4 Kent 72; Harrison v. Eldridge, 7 N. J. L. 392; it was afterwards asserted and sustained; 1 Green Ch. 349. The jurisdiction is concurrent with that of courts of law, which must settle the legal title when that is in controversy, "but if that be admitted or settled, full and effectual relief can be granted to the widow in equity both as to the assignment of dower and the damages;" 4 Kent 71; and in many respects the remedy in equity possesses great advantages over that at law; Bisph. Eq. § 496. As to the remedies afforded both by law and equity for the enforcement of dower, see 1 Washb. R. P. 226; 4 W. R. 459.

Nature of the estate in dower. Until the death of her husband, the wife's right of dower is not an interest in real estate of which value can be predicated; Moore v. City of New York, 8 N. Y. 110, 59 Am. Dec. 473. And although on the death of her husband this right becomes consummate, it remains a chose in action until assignment; 4 Kent 61; Green v. Putnam, 1 Barb. (N. Y.) 500; Johnson v. Shields, 32 Me. 424; Shield's Heirs v. Batts, 5 J. J. Marsh. (Ky.) 12; McClanahan v. Porter, 10 Mo. 746; Hilleary v. Hilleary's Lessee, 26 Md. 289.

During coverture a wife has such an interest in her husband's lands which have been conveyed by him without her joining in the deed, as will make a release by her a valuable consideration; Howlett v. Dilts, 4 Ind. App. 23, 30 N. E. 313. See Brooks v. McMeekin, 37 S. C. 285, 15 S. E. 1019.

Until assignment, she has no estate which she can convey or which can be taken on execution for her debts; 2 Keen 527; Tompkins v. Fonda, 4 Paige, Ch. (N. Y.) 448; Gooch v. Atkins, 14 Mass. 378; Summers v. Babb, 13 Ill. 483; Rausch v. Moore, 48 Ia. 611, 30 Am. Rep. 412; Webb v. Boyle, 63 N. C. 271; *contra*, Powell v. Powell, 10 Ala. 900.

But where she does sell or assign this right of action, equity will protect the rights of the assignee and sustain an action in the widow's name for his benefit; Lamar v. Scott, 4 Rich. (S. C.) 516; Powell v. Powell, 10 Ala. 900; Potter v. Everitt, 42 N. C. 152; Parton v. Allison, 109 N. C. 674, 14 S. E. 107. She may mortgage her undivided dower interest, which is valid in equity; Herr v. Herr, 90 Ia. 538, 58 N. W. 897.

She can release her claim to one who is in possession of the lands, or to whom she stands in privity of estate; Blain v. Harrison, 11 Ill. 384; Jackson v. Vanderheyden, 17 Johns. (N. Y.) 167, 8 Am. Dec. 378; Johnson v. Shields, 32 Me. 424; Saltmarsh v. Smith, 32 Ala. 404; Saunders v. Blythe, 112 Mo. 1, 20 S. W. 319; 8 L. R. Q. B. D. 31; Weaver v. Sturtevant, 12 R. I. 537.

But as soon as the premises have been set out and assigned to her, and she has entered upon them, the freehold vests in her by virtue of her husband's seisin; Co. Litt. 239 *a*; Inhabitants of Windham v. Inhabitants of Portland, 4 Mass. 384; Norwood v. Marrow, 20 N. C. 578. Her estate is a continuation of her husband's by appointment of the law; Conant v. Little, 1 Pick. (Mass.) 189; Baker v. Baker, 4 Greenl. (Me.) 67; Love v. McClure, 99 N. C. 290, 6 S. E. 247, 250.

The legislature may change the relative rights of husband and wife after marriage, and may substitute for inchoate dower another and larger estate to be carved out of that of the husband after his death; Noel v. Ewing, 9 Ind. 37; but not after the husband's death; Bottorff v. Lewis, 121 Ia. 27, 95 N. W. 262; nor as against one who has contracted for a judgment lien on the husband's property, although such judgment was not entered until after the statute was

passed; Davidson v. Richardson, 50 Or. 323, 91 Pac. 1080, 17 L. R. A. (N. S.) 319, 126 Am. St. Rep. 738. And it is held that a statute enlarging dower by extending it to the husband's equitable estate did not apply to a widow married before the statute was passed; Slingluff v. Hubner, 101 Md. 652, 61 Atl. 320.

See Scribner, Dower; Dembitz, Land Titles; Tudor; Washburn; Cruise; Tiedeman, Real Property; DIVORCE; ELECTION OF RIGHTS; ASSIGNMENT OF DOWER; QUARANTINE.

DOWRESS. A woman entitled to dower. See DOWER.

DOWRY. Formerly applied to mean that which a woman brings to her husband in marriage: this is now called a portion. This word is sometimes confounded with dower. See Co. Litt. 31; La. Civ. Code; Dig. 23. 3. 76; Code 5. 12. 20; Buard v. De Russy, 6 Rob. (La.) 111; Gates v. Legendre, 10 Rob. (La.) 74; De Young v. De Young, 6 La. Ann. 786; Cutter v. Waddingham; 22 Mo. 254.

DRAFT. An order for the payment of money, drawn by one person on another. Wildes v. Savage, 1 Sto. 30, Fed. Cas. No. 17,653. It is said to be a *nomen generalissimum*, and to include all such orders. *ibid.*, per Story, J. It is frequently used in corporations where one agent draws on another; in such case it may be treated either as an accepted bill or a promissory note; 1 Dan. Neg. Inst. 350; Tiedeman, Com. Pap. § 128. Drafts come within a statutory provision respecting "bills and notes for the direct payment of money;" Gilstrap v. R. Co., 50 Mo. 491. They are frequently given for mere convenience in keeping accounts, and providing concurrent vouchers, and it is not necessary to present such a draft to the drawee or to give notice of non-payment before suing the corporation; 1 Dan. Neg. Inst. 350; Dennis v. Water Co., 10 Cal. 369; Mobley v. Clark, 28 Barb. (N. Y.) 391; Shaw v. Stone, 1 Cush. (Mass.) 256. A draft by directors of an assurance company on its cashier was said to contain all that is essential to constitute a promissory note; 9 C. B. 574. Drafts are frequently used between municipal officers, and are not usually negotiable instruments; 1 Dan. Neg. Inst. 352. But it has been held that municipal warrants or orders for the payment of debts, if authorized and drawn in negotiable language, may be sued on by the transferee; *id.* 353; Kelley v. City of Brooklyn, 4 Hill. (N. Y.) 265. They must be presented for payment before suit; Pease v. Inhabitants of Cornish, 19 Me. 193; *contra*, Steel v. Davis County, 2 G. Greene (Ia.) 469.

Draft, in a commercial sense, is an allowance to the merchant where the duty is ascertained by weight, to insure good weight to him; it is a small allowance in weighable goods, made by the king to the importer; it is to compensate for any loss that may occur from the handling of the scales, in the weighing, so that, when weighed the second time, the article will hold out good weight. Napier v. Barney, 5 Blatchf. 192, Fed. Cas. No. 10,009.

Also the rough copy of a legal document before engrossing.

DRAGO DOCTRINE. The principle asserted by Luis Drago, Minister of Foreign Affairs of the Argentine Republic, in a letter to the Argentine Minister at Washington, December 29, 1902, that the forcible intervention of states to secure the payment of public debts due to their citizens from foreign states is unjustifiable and dangerous to the security and peace of the nations of South America. The doctrine was not new, but became associated with the name of Drago, owing to his publication of an elaborate exposition of it shortly before the Second Hague Conference. The subject was brought before the Conference by the United States and a Convention was adopted in which the contracting powers agreed, with some restrictive conditions, not to have recourse to armed force for the recovery of contract debts claimed by their nationals against a foreign state. Higgins, 184–197.

DRAGOMAN. An interpreter employed in the east, and particularly at the Turkish court.

DRAIN. To conduct water from one place to another, for the purpose of drying the former.

The right of draining water through another man's land. This is an easement or servitude acquired by grant or prescription. See 3 Kent 436; 7 M. & G. 354.

In Goldthwait v. Inhabitants of East Bridgwater, 5 Gray (Mass.) 63, it was said that the word drain has no technical or exact meaning. It was considered fully in People v. Parks, 58 Cal. 639.

A state may provide for the construction of canals for draining marshy and malarious districts, and of levees to prevent inundations; Hagar v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569. The expenses of such works may be charged against parties specially benefited and be made a lien upon their property; *id.* The law under which such an assessment is made does not deprive one of property without due process of law; *id.* Taylor v. Crawford, 72 Ohio St. 560, 74 N. E. 1065, 69 L. R. A. 805. See DUE PROCESS OF LAW; EMINENT DOMAIN; TAXATION; LEGISLATIVE POWER; ASSESSMENT.

DRAINAGE DISTRICT. The organization of a drainage district is within the power of the state; Hagar v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; for the exclusive benefit of the territory

within the district; Commissioners of Union Drainage Dist. No. 3 v. Com'rs, 220 Ill. 176, 77 N. E. 71; and the lands within the district may be assessed to pay the entire cost, on the theory that they alone are benefited; Bradbury v. Drainage Dist., 236 Ill. 36, 86 N. E. 163, 19 L. R. A. (N. S.) 991, 15 Ann. Cas. 904. It is correct to say that a drainage district is a quasi-corporation, if the act under which it is organized does not make it a corporation in fact; but it is not created for political purposes or for the administration of civil government. It is not liable for the unauthorized acts of its commissioners, but the district has the power of eminent domain for the purposes of its organization; Bradbury v. Drainage Dist., 236 Ill. 36, 86 N. E. 163, 19 L. R. A. (N. S.) 991, 15 Ann. Cas. 904. They have been classed as municipal corporations; Commissioners of Havana Tp. Drainage Dist. No. 1 v. Kelsey, 120 Ill. 482, 11 N. E. 256.

Where, in the construction of a levee, an upper owner was damaged by having the water thrown back on his lands, and there was no negligence on the part of the district in the performance of the work, he could not recover; Bradbury v. Drainage Dist., 236 Ill. 36, 86 N. E. 163, 19 L. R. A. (N. S.) 991, 15 Ann. Cas. 904; Lamb v. Reclamation Dist., 73 Cal. 125, 14 Pac. 625, 2 Am. St. Rep. 775 (where a lower owner was damaged by overflow, caused by the necessary work of a reclamation district). See POLICE POWER; ASSESSMENT; RIVERS.

DRAM. A liquid containing alcohol; something that can intoxicate. Lacy v. State, 32 Tex. 228. See Wright v. People, 101 Ill. 134.

DRAW. To drag (on a hurdle) to the place of execution. Anciently no hurdle was allowed, but the criminal was actually dragged along the road to the place of execution. A part of the ancient punishment of traitors was to be thus drawn. 4 Bla. Com. 92, 377.

DRAWBACK. An allowance made by the government to merchants on the re-exportation of certain imported goods liable to duties, which in some cases consists of the whole, in others of a part, of the duties which had been paid upon the importation. Goods can thus be sold in a foreign market at their natural cost in the home market. See U. S. R. S. tit. 34, c. 9.

DRAWEE. A person to whom a bill of exchange is addressed, and who is requested to pay the amount of money therein mentioned. See BILL OF EXCHANGE.

DRAWER. The party who makes a bill of exchange.

DRAWING. Every person who applies for a patent for an invention is required to furnish a drawing or drawings illustrative of that invention: provided from the nature of the case the invention can be so illustrated. Drawings are also required on application for a patent for a design. See PATENT.

DRAWLATCHES. Thieves; robbers. Cowell.

DREDGE. Formerly applied to a net or drag for taking oysters; now a machine for cleansing canals and rivers. To dredge is to gather or take with a dredge, to remove sand, mud, and filth from the beds of rivers, harbors, and canals, with a dredging machine. 15 Can. L. T. 268.

DREIT DREIT. Droit droit. Double right. A union of the right of possession and the right of property. 2 Bla. Com. 199.

DRENGAGE. A variety of feudal tenure by *serjeanty (q. v.)*, often occurring in the northern counties of England, involving a kind of general service. Vinogradoff, Engl. Soc. in Eleventh Cent. 62. Little is known of it; 3 Holdsw. Hist. E. L. 132.

DRIFTWAY. A road or way over which cattle are driven. 1 Taunt. 279; Selw. N. P. 1037; Woolr. Ways 1 The term is in use in Rhode Island. 2 Hilliard, Abr. Prop. 33.

DRIP. The right of drip is an easement by which the water which falls on one house is allowed to fall upon the land of another. Unless the owner has acquired the right by grant or prescription, he has no right so to construct his house as to let the water drip over his neighbor's land; 1 Rolle, Abr. 107. See 3 Kent 436; Dig. 43. 23. 4. 6; 11 Ad. & E. 40.

DRIVER. One employed in conducting a coach, carriage, wagon, or other vehicle with horses, mules, or other animals.

The law requires that a driver should possess reasonable skill and be of good habits; if, therefore, he is not acquainted with the road he undertakes to drive; 3 Bing. 314, 321; drives with reins so loose that he cannot govern his horse; 2 Esp. 533; does not give notice of any serious danger on the road; 1 Campb. 67; takes the wrong side of the road; 4 Esp. 273; incautiously comes in collision with another carriage; 1 Stark. 423; 1 Campb. 167; or does not exercise a sound and reasonable discretion in travelling on the road to avoid dangers and difficulties, and any accident happens by which any passenger is injured, both the driver and his employers will be responsible; Barnes v. Hurd, 11 Mass. 57; 6 Term 659; 1 East 106; 4 B. & Ald. 590; Maury v. Talmadge, 2 McLean, 157, Fed. Cas. No. 9,315.

It has been held that the conductor of a street railway is not a driver; Isaacs v. R. Co., 47 N. Y. 122, 7 Am. Rep. 418; and one who drove a wagon loaded with calves and drawn by horses was held not to be "driving or conducting" cattle; L. R. 1 Q. B. 259.

DROF-LAND (*Drift-land*). A yearly pay-

ment made by some to their landlords for driving their cattle through the manor to fairs and markets. Cowell.

DROIT (Fr.). **In French Law.** Law. The whole body of law, written and unwritten.

A right. No law exists without a duty. Toullier, n. 96; Pothier, *Droit.*

In English Law. Right. Co. Litt. 158.

A person was said to have *droit droit, plurimum juris,* and *plurimum possessionis,* when he had the freehold, the fee, and the property in him. Crabb, Hist. E. L. 406.

Recht, Droit, Diritto.—These terms are all closely connected with each other and with the English *right.* The French and Italian words are derivatives of the Latin *directus* and *rectus,* these being cognate with *recht* and *right;* 15 L. Q. R. 369.

DROIT-CLOSE. The name of an ancient writ directed to the lord of ancient demesne, and which lies for those tenants in ancient demesne who hold their lands and tenements by charter in fee-simple, in fee-tail, for life, or in dower. Fitzh. N. B. 23.

DROIT COUTUMIER. **In French Law.** Common law

DROIT D'ACCESSION. **In French Law.** That property which is acquired by making a new form out of the material of another The civil law rule is that if the thing can be reduced to the former matter it belongs to the owner of the matter, *e. g.* a statue made of gold; but if it cannot so be reduced it belongs to the person who made it, *e. g.* a statue made of marble. This subject is treated of in the *Code Civil de Napoléon,* art. 565, 577; Merlin, *Répert. Accession;* Malleville's Discussion, art. 565. See ACCESSION

DROIT D'AUBAINE. A rule by which all the property of a deceased foreigner, whether movable or immovable, was confiscated to the use of the state, to the exclusion of his heirs, whether claiming *ab intestato* or under a will of the deceased. Finally abolished in 1819. Boyd's Wheat. Int. Laws § 82.

The word *aubaine* signifies *hospes loci, peregrinus advena,* a stranger It is derived, according to some, from *alibi,* elsewhere, *natus,* born, from which the word *albinus* is said to be formed. Others, as Cujas, derive the word directly from *advena,* by which word aubains or strangers are designated in the capitularies of Charlemagne. See Du Cange, Trévoux, Dict.

DROIT DE NAUFRAGE. **In French Law.** The right of a seignieur, who owns the seashore, or the king, when a vessel is wrecked, to take possession of the wreckage and to kill the crew or sell them as slaves. 14 Yale L. Jour. 129.

DROIT NATUREL (Fr.). The law of nature. See JURISPRUDENCE.

DROITS OF ADMIRALTY. Rights claimed by the government over the property of an enemy. In England, it has been usual in maritime wars for the government to seize and condemn, as droits of admiralty, the property of an enemy found in her ports at the breaking out of hostilities. 1 C. Rob. 196; 13 Ves. 71; 1 Edw. 60; 3 Bos. & P. 191. The power to exercise such a right has not been delegated to, nor has it ever been claimed by, the United States government; Benedict, Adm. § 33; Brown v. U. S., 8 Cra. 110, 3 L. Ed. 504.

The droits formerly attaching to the office of Lord High Admiral consisted of flotsam, jetsam, ligan, treasure, deodands, derelicts, all goods picked up at sea, fines, etc., sturgeons and all such large fish, all ships and goods of an enemy coming into any port, creek or road, all ships seized at sea, salvage, and a share of prizes. 2 Sel. Essays in Anglo-Amer. Leg. Hist. 318. The Droit Book of the High Court, 1618–1737, is extant. See 15 L. Q. R. 359; Marsden, Admiralty, Droits and Salvage.

For a case of the condemnation to the Crown of goods taken from convicted pirates, see 1 W. Rob. 423.

DROITS CIVILS. **In French Law.**

Private rights, the exercise of which is independent of the status (*qualité*) of citizen Foreigners enjoy them, and the extent of that enjoyment is determined by the principle of reciprocity. Conversely, foreigners, although not resident in France, may be sued on contracts made by them in France, and (unless possessed of sufficient real property in France) are obliged to give security; 12 C. B. 801, Brown, Law Dict.

DROITURAL. What belongs of right; relating to right: as, real actions are either droitural or possessory,—*droitural* when the plaintiff seeks to recover the property. Finch, Law 257. See WRIT OF RIGHT.

DRUGGIST. One who deals in medicinal substances, vegetable, animal, or mineral, uncompounded. State v. Holmes, 28 La. Ann. 765, 26 Am. Rep. 110.

In America the term druggist is used synonymously with apothecary, although, strictly speaking, a druggist is one who deals in medicinal substances, vegetable, animal, or mineral, before being compounded, while composition and combination are really the business of the apothecary. The term is here used in its double sense, and throughout this article is to be read as if druggist *or* apothecary In England an apothecary was formerly a subphysician, or privileged practitioner. He was the ordinary medical man, or family medical attendant, in that country

Druggists are subject to the general rule of law that persons who hold themselves out to the world as possessing skill and qualification for a particular trade or profession are bound to reasonable skill and diligence in the performance of their duties. Accordingly the law implies an undertaking on the part of apothecaries that they shall use a reasonable degree of care and skill in the treatment of their customers; Chit. Contr. 553; Gwynn v. Duffield, 66 Ia. 708, 24 N. W. 523, 55 Am. Rep. 286; Walton v. Booth, 34 La. Ann. 913; Beckwith v. Oatman, 43 Hun (N. Y.) 265. This rule is probably more strict here than in England; Webb's

Poll. Torts 26, note. A druggist, whether under a license or not, holds himself out as competent for that business, but not to prescribe as a physician; and for any lack of capacity or for negligence, he is answerable in damages to the person injured, the same principles of law applying to him as to a medical practitioner; Bish. Non-Contr. L. § 716. In dispensing poisons, he is required to exercise the highest degree of care for the safety of his customers; Sutton's Adm'r v. Wood, 120 Ky. 23, 85 S. W. 201, 8 Ann Cas. 894.

Where a customer asked for a preparation for a specified purpose (corrosive sublimate for external application to kill lice) and the druggist made the solution so strong (85 per cent.) as to cause severe injury, he was held liable, though it was labelled "Poison Carbolic Acid"; it was the druggist's duty to give proper instructions; Goldberg v. Hegeman & Co., 60 Misc. 107, 111 N. Y. Supp. 679. Where a solution was called for to cleanse a wound, plaintiff had a right to assume that that which was furnished would be at least harmless, if not efficient, and could be applied without further injury; Horst v. Walter, 53 Misc. 591, 103 N. Y. Supp. 750.

A druggist is required to know the properties of the medicines he sells and to employ capable assistants; Smith v. Hays, 23 Ill. App. 244; it is no defence that he used ordinary care; Fleet v. Hollenkemp, 13 B Mon. (Ky.) 219, 56 Am. Dec. 563; or that the clerk who negligently put up the prescription was a competent pharmacist; Burgess v. Drug Co., 114 Ia. 275, 86 N. W. 307, 54 L. R. A. 364, 89 Am. St. Rep. 359. The highest degree of skill is not to be expected nor can it reasonably be required of all; Simonds v. Henry, 39 Me. 156, 63 Am. Dec. 611.

Perhaps a higher degree of skill than is the usual rule was required in Fleet v. Hollenkemp, 13 B. Monr. (Ky.) 219; where it was held that any mistake made by the druggist, if the result of ignorance or carelessness, renders him liable to the injured party; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455. Where one, whether an apothecary or not, negligently gave a customer poison and the customer swallowed it and was injured, he who negligently gave the poison was guilty of a tort, and liable for the injury to the customer unless the latter was also guilty of negligence which contributed to the injury; Gwynn v. Duffield, 61 Ia. 64, 15 N. W. 594, 47 Am. Rep. 802. If a druggist negligently sells a deadly poison as a harmless medicine to A, who administers it to B and B takes it as a medicine and dies in a few hours by reason thereof, a right of action against the druggist survives to B's administrator; Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298. The sale of an article in itself harmless, which becomes dangerous only by being used in combination with some other article, without any knowledge on the part of the vendor that it was to be used in such combination, does not render him liable to an action by one who purchased the article from the original vendee and is injured while using it in a dangerous combination, although by mistake the article sold was different from that which was intended to be sold; Davidson v. Nichols, 11 Allen (Mass.) 514.

A druggist who sells to one person for the use of another a hair wash made by himself and represented not to be injurious, is liable to the person for whom it was purchased when used as directed, for injuries arising from such use, the intended use by the third person being known to the vendor; L. R. 5 Ex. 1. The maker of a proprietary medicine recommended for the cure of a certain disease, the bottle having on it directions for use, who sells the medicine, so put up, to a druggist, is liable to one who buys it from the druggist and is injured by its use according to the directions on the bottle; Blood Balm Co. v. Cooper, 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. Rep. 324.

Where a druggist selling a poisonous medicine, fully and clearly warned the person of its nature and gave him accurate directions as to the quantity which he could safely take, and the person was injured or killed by taking an overdose in disregard of the directions, the druggist is not liable for negligence simply because he failed to put a label marked "Poison" on the package as directed by statute. The customer disregarding the warning and direction of the vendor was guilty of negligence; Wohlfahrt v. Beckert, 92 N. Y. 490, 44 Am. Rep. 406.

An unlicensed druggist who conducts a drug store cannot escape the penalty of the law for the unlawful sale of intoxicating liquors by showing that the sales were made for medicinal purposes by his clerk, who was a licensed pharmacist; State v. Norton, 67 Ia. 641, 25 N. W. 842. A druggist is not liable if he compounds carefully another's prescription; Ray v. Burbank, 61 Ga. 505, 34 Am. Rep. 103. But if he sell one medicine for another and an injury result therefrom, it is no defence for him to show that the case was negligently treated; Brown v. Marshall, 47 Mich. 576, 11 N. W. 392, 41 Am. Rep. 728. An apothecary, if guilty of criminal negligence, and fatal results follow, may be convicted of manslaughter; 1 Lew. Cr. Cas. 169. See PHYSICIAN.

DRUGS. Substances used in the composition of medicines or in dyeing and in chemical operations. Webst. Dict.

"Drugs and Medicines," when used in insurance policies, include saltpetre; Collins v. Ins. Co., 79 N. C. 279, 28 Am. Rep. 322. It is a question of fact whether benzine is a drug; Carrigan v. Ins. Co., 53 Vt. 418, 38 Am. Rep. 687.

Where a druggist was charged with selling peppermint lozenges on Sunday, it appeared that the statute permitted the selling of "drugs and medicines" on that day. They were held *prima facie* within the statute; 33 U. C. Q. B. 543. So a mixture of rosewater and prussic acid to be used as a lotion is within the same terms; L. R. 4 Q. B. 296.

For pure food and drug law, see FOOD AND DRUGS.

DRUMMER. A travelling salesman. One who solicits custom. Thomas v. City of Hot Springs, 34 Ark. 553, 36 Am Rep. 34. "Commercial agents who are travelling for wholesale merchants and supplying the retail trade with goods, or rather, taking orders for goods to be shipped to the retail merchant." Singleton v. Fritsch, 4 Lea (Tenn.) 93. See COMMERCIAL TRAVELLER; COMMERCE.

DRUNKENNESS. In Medical Jurisprudence. The condition of a man whose mind is affected by the immediate use of intoxicating drinks.

This condition presents various degrees of intensity, ranging from a simple exhilaration to a state of utter unconsciousness and insensibility In the popular phrase, the term drunkenness is applied only to those degrees of it in which the mind is manifestly disturbed in its operations In the earlier stages it frequently happens that the mind is not only not disturbed, but acts with extraordinary clearness, promptitude, and vigor In the latter the thoughts obviously succeed one another without much relevance or coherence, the perceptive faculties are active, but the impressions are misconceived, as if they passed through a distorting medium, and the reflective powers cease to act with any degree of efficiency Some of the intermediate stages may be easily recognized, but it is not always possible to fix upon the exact moment when they succeed one another. In some persons peculiarly constituted, a fit of intoxication presents few if any of these successive stages, and the mind rapidly loses its self-control, and for the time is actually frenzied, as if in a maniacal paroxysm, though the amount of the drink may be comparatively small The same phenomenon is observed sometimes in persons who have had some injury of the head, who are deprived of their reason by the slightest indulgence.

The habitual abuse of intoxicating drinks is usually followed by a pathological condition of the brain, which is manifested by a degree of intellectual obtuseness, and some insensibility to moral distinctions once readily discerned The mind is more exposed to the force of foreign influences, and more readily induced to regard things in the light to which others have directed them In others it produces a permanent mental derangement, which, if the person continue to indulge, is easily mistaken by common observers for the immediate effects of hard drinking. These two results—the mediate and the immediate effects of drinking—may coexist, but it is no less necessary to distinguish them from each other, because their legal consequences may be very different. Moved by the latter, a person goes into the street and abuses or assaults his neighbors; moved by the former, the same person makes his will, and cuts off with a shilling those who have the strongest claims upon his bounty. In a judicial investigation, one class of witnesses will attribute all his extravagances to drink, while another will see nothing in them but the effect of insanity. The medical jurist should not be misled by either party, but be able to refer each particular act to its proper source.

Drunkenness may be the result of dipsomania. Rather suddenly, and perhaps without much preliminary indulgence, a person manifests an insatiable thirst for strong drink, which no considerations of propriety or prudence can induce him to control. He generally retires to some secluded place, and there, during a period of a few days or weeks, he swallows enormous quantities of liquor, until his stomach refuses to bear any more. Vomiting succeeds, followed by sickness, depression, and disgust for all intoxicating drinks. This affection is often periodical, the paroxysms recurring at periods varying from three months to several years. Sometimes the indulgence is more continuous and limited, sufficient, however, to derange the mind, without producing sickness, and equally beyond control Dipsomania may result from moral causes, such as anxiety, disappointment, grief, sense of responsibility, or physical, consisting chiefly of some anomalous condition of the stomach. Esquirol, Mal Men ii 73, Marc, *de la Folie*, ii 605; Ray, Med Jur 497, Macnish, Anatomy of Drunkenness, chap. 14.

The common law showed but little disposition to afford relief, either in civil or criminal cases, from the immediate effects of drunkenness. It has never considered that mere drunkenness alone as a sufficient reason for invalidating any act. In Crane v. Conklin, 1 N. J. Eq. 346, 22 Am. Dec. 519, it was said that the early cases held that relief could not be granted against a contract made by one who was intoxicated, unless the intoxication was brought about by the other party, but that that rule had been changed; that courts will not interfere to assist a person on the ground of intoxication merely, but will, if any unfair advantage has been taken of his situation. To the same effect, Baird v. Howard, 51 Ohio St. 57, 36 N. E. 732, 22 L. R. A. 846, 46 Am. St. Rep. 550, but such contracts have been held void where it appeared that actual intoxication dethroned the reason or that the party's understanding was so impaired as to render him mentally unsound; Burnham v. Burnham, 119 Wis 509, 97 N. W. 176, 100 Am. St. Rep. 895; Wright v. Fisher, 65 Mich. 275, 32 N. W. 605, 8 Am. St. Rep. 886; that the drunkenness must have been such as to have drowned reason, memory and judgment and to have impaired the mental faculties to such an extent as to render the party non compos mentis for the time being; Martin v. Harsh, 231 Ill. 384, 83 N. E. 164, 13 L. R. A. (N. S.) 1000; that at the time the party did not fully understand the nature of the transaction; 7 Idaho 292; that the party was incapable of knowing or understanding the nature or quality of the act; Benton v. Sikyta, 84 Neb. 808, 122 N. W. 61, 24 L. R. A. (N. S.) 1057; so destitute of reason as not to know the consequences of his contract; Fowler v. Water Co, 208 Pa. 473, 57 Atl. 959; incapable of knowing what he was doing; Cook v. Timber Co., 78 Ark. 47, 94 S. W. 695, 8 Ann. Cas. 251.

It has been held that there must be a degree of drunkenness which may be called excessive, where a party is so far deprived of his reason as to render him incapable of understanding the consequences of his act; J.

I. Case Threshing Mach. Co. v. Meyers, 78 Neb. 685, 111 N. W. 602, 9 L. R. A. (N. S.) 970; Conant v. Jackson, 16 Vt. 335; Johns v. Fritchey, 39 Md. 258; Reynolds v. Dechaums, 24 Tex. 174, 76 Am. Dec. 101; Taylor v. Purcell, 60 Ark. 606, 31 S. W. 567; Kuhlman v. Wieben, 129 Ia. 188, 105 N. W. 445, 2 L. R. A. (N. S.) 666; Drummond v. Hopper, 4 Harr. (Del.) 327; Fowler v. Water Co., 208 Pa. 473; or where it is of such a degree as to make his mind similar to that of an idiot or a lunatic; Harbison v. Lemon, 3 Blackf. (Ind.) 51, 23 Am. Dec. 376; when he is in such a condition as to be unable to understand the nature of the transaction; Ryan v. Schutt, 135 Ill. App. 554; or is deprived entirely of his reason; Bing v. Bank, 5 Ga. App. 578, 63 S. E. 652. It must be so extreme that the party sought to be charged was incapable of assenting; Wade v. Colvert, 2 Mill, Const. (S. C.) 26, 12 Am. Dec. 652; because the very essence of a contract is the assent of the party; *id.;* Longhead v. Commission Co., 64 Mo. App. 559. That one may plead his intoxication in avoidance of a contract is held in Johnson v. Harmon, 94 U. S. 371, 24 L. Ed. 271.

The leading English case is 13 M. & W. 623, which holds that there is a class of contracts from which a party cannot be released, even by proof of complete drunkenness at the time they were entered into This class embraces transactions where the law raises the assent essential to their execution, such as actions for money had and received to the plaintiff's use, or paid by him to the defendant's use. So a tradesman who supplies a drunken man with necessaries may recover the price of them if the party keeps them when he becomes sober, although a count for goods bargained and sold would fail. The contract may be ratified by him when he becomes sober; L. R. 8 Exch. 132, where it was said that the judges in 13 M. & W. 623, used the word *void,* but that they did not mean absolutely void, but only that a drunken man's contract could not be enforced against his will, not that it was incapable of ratification. To the same effect, McClure v. Mausell, 4 Brewst. (Pa.) 119; Birmingham Ry., Light & Power Co. v. Hinton, 158 Ala. 470, 48 South. 546; Eaton's Adm'r v. Perry, 29 Mo. 96; Brockway v. Jewell, 52 Ohio St. 187, 39 N. E. 470 (holding that a drunken man may be bound on an implied contract).

The contract of a drunken man is not void but voidable only; 8 Am. Rep. 251, note. See also 1 Ames, Cas. on Bills and Notes 558; Carpenter v. Rodgers, 61 Mich. 384, 28 N. W. 156, 1 Am. St. Rep. 595; see Rice v. Peet, 15 Johns. (N. Y.) 503; Joest v. Williams, 42 Ind. 565, 13 Am. Rep. 377; Bates v. Ball, 72 Ill. 108. The party must rescind the contract within a reasonable time after recovery; Fowler v. Water Co., 208 Pa. 473, 57 Atl. 959; Shaw v. R. Co., 126 App. Div. 210, 110 N. Y. Supp. 362; Kelly v. R. Co., 154 Ala. 573, 45 South. 906; Case Threshing Mach. Co. v. Meyers, 78 Neb. 685, 111 N. W. 602, 9 L. R. A. (N. S.) 970. If a person when sober agree to sign a contract, he cannot avail himself of intoxication at the time of signature as a defence; Strickland v. Parlin & Orendorf Co., 118 Ga. 213, 44 S. E. 997; Fagan v. Wiley, 49 Or. 480, 90 Pac. 910. When carried so far as to deprive the party of all consciousness, a strong presumption of fraud is raised; and on that ground courts may interfere; 1 Ves. 19; 18 *id.* 12; Thackrah v. Haas, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. Ed. 486; Jones v. McGruder, 87 Va. 360, 12 S. E. 792. In equity it is not so much the drunkenness of one party as the fraud and imposition of the other; Cook v. Bagnell Timber Co., 78 Ark. 47, 94 S. W. 695, 8 Ann. Cas. 251; Calloway v. Witherspoon, 40 N. C. 128. Drunkenness in such a degree as to render the testator unconscious of what he is about, or less capable of resisting the influence of others, avoids a will; Shelf. Lun. 274, 304; Dimond's Estate, 3 Pa. D. R. 554; but not if at the time the testator could comprehend the nature of his act; Bannister v. Jackson, 45 N. J. Eq. 702, 17 Atl. 692.

In actions for torts, drunkenness is not regarded as a reason for mitigating damages; Co. Litt. 247 *a*; Webb, Poll. Torts 59, n. See Hanvey v. State, 68 Ga. 612. Courts of equity, too, have declined to interfere in favor of parties pleading intoxication in the performance of some civil act; but they have not gone the length of enforcing agreements against such parties; 1 Story, Eq. § 232; Youn v. Lamont, 56 Minn. 216, 57 N. W. 478; 18 Ves. Jr. 12; 1 Ves. 19. "A drunkard who is *voluntarius dæmon,*" says Coke, "hath no privilege thereby: Whatever ill or hurt he doth, his drunkenness doth aggravate it." Lawyers have occasionally shown a disposition to distinguish between the guilt of one who commits an offence unconsciously, though in consequence of vicious indulgence, and that of another who is actuated by malice aforethought and acts deliberately, and coolly. In Pennsylvania, as early as 1794, it was remarked that, as drunkenness clouds the understanding and excites passion, it may be evidence of passion only, and of want of malice and design; Add. Pa. 257. See Meyers v. Com., 83 Pa. 144. In 1819, Justice Holroyd decided that the fact of drunkenness might be taken into consideration in determining the question whether the act was premeditated or done only with sudden heat and impulse; Rex v. Grundley, 1 Russ. Cr. 8. This particular decision, however, was, a few years afterwards, pronounced to be not correct law; 7 C. & P. 145. Again, it was held that drunkenness, by rendering the party more excitable under provocation, might be taken into consid-

eration in determining the sufficiency of the provocation; 7 C. & P. 817. In Rex v. Monkhouse, 4 Cox, Cr. Cas. 55, it was declared that there might exist a state of drunkenness which takes away the power of forming any specific intention.

In this country, courts have gone still further in regarding drunkenness as incompatible with some of the elements of crime. It has been held, where murder was defined to be wilful, deliberate, malicious, and premeditated killing, that the existence of these attributes is not compatible with drunkenness; State v. Bullock, 13 Ala. 413; Swan v. State, 4 Humphr. (Tenn.) 136; Haile v. State, 11 Humphr. (Tenn.) 154; State v. McCants, 1 Speers (S. C.) 384; and when a man's intoxication is so great as to render him unable to form a wilful, deliberate, and premeditated design to kill, or of judging of his acts and their legitimate consequences, then it reduces what would otherwise be murder in the first degree to murder in the second degree; People v. Harris, 29 Cal. 678; Com. v. Jones, 1 Leigh (Va.) 612; People v. Robinson, 2 Park C. R. (N. Y.) 235; Ayres v. State (Tex.) 26 S. W. 396; Mooney v. State, 33 Ala. 419; State v. Johnson, 41 Conn. 584; Rafferty v. People, 66 Ill. 118; Jones v. Com., 75 Pa. 403. See Bernhardt v. State, 82 Wis 23, 51 N. W. 1009; State v. Zorn, 22 Or. 591, 30 Pac. 317; People v. Vincent, 95 Cal. 425, 30 Pac. 581. But where one who intends to kill another becomes voluntarily intoxicated for the purpose of carrying out the intention, the intoxication will have no effect upon the act; Garner v. State, 28 Fla. 113, 9 South. 835, 29 Am. St. Rep. 232; Springfield v. State, 96 Ala. 81, 11 South. 250, 38 Am. St. Rep. 85. See People v. Young, 102 Cal. 411; 36 Pac. 770; and if one person gets another drunk and persuades him to commit a crime, he is legally responsible; McCook v. State, 91 Ga. 740, 17 S. E. 1019.

Intoxication does not excuse crime, but may show an absence of malice; Wilkerson v. Com., 88 Ky. 29, 9 S. W. 836, 10 Ky. L. Rep. 656; Engelhardt v. State, 88 Ala. 100, 7 South. 154; and the burden of proof is on the defendant to show intoxication to such an extent as to render him incapable of malice; State v. Hill, 46 La. Ann. 27, 14 South 294, 49 Am. St. Rep. 316.

If one commits robbery while so drunk as not to know what he was doing, he will not be deemed to have taken the property with a felonious intent; Keeton v. Com., 92 Ky. 522, 18 S. W. 359.

It has been already stated that strong drink sometimes, in consequence of injury to the head, or some peculiar constitutional susceptibility, produces a paroxysm of frenzy immediately, under the influence of which the person commits a criminal act. Cases of this kind have been too seldom tried to make it quite certain how they would be regarded in law. It is probable, however, that the plea of insanity would be deprived of its validity by the fact that, sane or insane, the party was confessedly drunk. In a case where injury of the head had been followed by occasional paroxysms of insanity, in one of which the prisoner killed his wife, it appeared that he had just been drinking, and that intoxication had sometimes brought on the paroxysms, though they were not always preceded by drinking. The court ruled that if the mental disturbance were produced by intoxication it was not a valid defence; and accordingly the prisoner was convicted and executed. Trial of M'Donough, Ray, Med. Jur. 514. The principle is that if a person voluntarily deprives himself of reason, he can claim no exemption from the ordinary consequences of crime; 3 Par. & Fonbl. Med. J. 39; and the courts hold that voluntary intoxication is no justification or excuse for crime; State v. O'Neil, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555; People v. Bell, 49 Cal. 485; State v. Bullock, 13 Ala. 413; Estes v. State, 55 Ga. 31; State v. Tatro, 50 Vt. 483; Colbath v. State, 4 Tex. App. 76. Milder views have been advocated by writers of note, and have appeared in judicial decisions. Alison, referring to the class of cases just mentioned, calls it inhuman to visit them with the extreme punishment otherwise suitable. Prin. of Crim. Law of Scotland 654. See, also, 23 Am. Jur. 290. When a defendant sets up the defence of *delirium tremens*, and there is evidence to support the plea, the court in charging the jury is bound to set forth the law applicable to such a defence; 12 Rep. 701. This disease is a species of insanity, and one who labors under it is not responsible for his acts; 1 Wh. & Stillé, Med. Jur. § 202. While drunkenness is no excuse for crime, *mania a potu* is; State v. Potts, 100 N. C. 457, 6 S. E. 657. See People v. Williams, 43 Cal. 344; Fisher v. State, 64 Ind. 435; Lanergan v. People, 50 Barb. (N. Y.) 266. Where dipsomania affects the intellect and not merely the will, it may be a defence; 3 Witth. & Beck. Med. Jur. 506. See Flanigan v. People, 86 N. Y. 559, 40 Am. Rep. 556; People v. Leary, 105 Cal. 486, 39 Pac. 24. Where a person, in regard to a particular act, though knowing right from wrong, has lost his power to discriminate, in consequence of mental disease, he will be exempt from crime; 3 Witth. & Beck. 507. See State v. McDaniel, 115 N. C. 807, 20 S. E 622. Dipsomania would hardly be considered, in the present state of judicial opinion, a valid defence in a capital case, though there have been decisions which have allowed it, holding the question whether there is such a disease, and whether the act was committed under its influence, to be questions of fact for the jury; State v. Pike, 49 N. H. 399, 6 Am. Rep. 533; State v. Johnson, 40 Conn. 136; 1 Bish. Cr. Law § 409.

The law does recognize two kinds of in-

culpable drunkenness, viz.: that which is produced by the "unskilfulness of the physician," and that which is produced by the "contrivance of enemies." Russ. Cr. 8. To these there may perhaps also be added that above described, where the party drinks no more liquor than he has habitually used without being intoxicated, but which exerts an unusually potent effect on the brain, in consequence of certain pathological conditions. See Com. v. Whitney, 5 Gray (Mass.) 86; 1 Benn. & H. Lead. Cr. Cas. 113. See INSANITY; DELIRIUM TREMENS.

DRY EXCHANGE. A term invented for disguising and covering usury,—in which something was pretended to pass on both sides, when in truth nothing passed on one side; whence it was called *dry*. Stat. 3 Hen. VII. c. 5; Wolffius, Ins. Nat. § 657.

DRY RENT. Rent-seck; a rent reserved without a clause of distress.

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

DUBITANTE. Doubting. Affixed in law reports to a judge's name, to signify that he doubts the correctness of a decision.

DUCAT. The name of a foreign coin.

The ducat, or sequin, was originally a gold coin of the middle ages, apparently a descendant from the bezant of the Greek-Roman Empire. For many centuries it constituted the principal international currency, being intended, or supposed, to be made of pure gold, though subsequently settled at a basis a little below. It is now nearly obsolete in every part of the world. Its average value is about $2 26 of our money. It is said they appeared earliest in Venice, and that they bore the following motto: *Sit tibi, Christe, datus, quem tu regis, iste Ducatus* (Let this Duchy which thou rulest be dedicated to thee, O Christ)—whence the name ducat.

The silver ducat was formerly a coin of Naples, weighing three hundred and forty-eight grains, eight hundred and forty-two thousandths fine; consequent value, in our money, about eighty-one cents, but it now exists only as a money of account.

DUCES TECUM LICET LANGUIDUS. A writ directing the sheriff to bring a person whom he returned as so sick that he could not be brought without endangering his life. Cowell. Now obsolete.

DUCKING-STOOL. A stool or chair in which common scolds were formerly tied and plunged into water. The ducking-stool is mentioned in the Domesday Book; it was extensively in use throughout Great Britain from the fifteenth till the beginning of the eighteenth century. Cent. Dict. The last recorded instance in England was in 1899. See CASTIGATORY; PUNISHMENT.

DUE. Just and proper, as due care, due rights. Ryerson v. Boorman, 8 N. J. Eq. 701; Jones v. Inhabitants of Andover, 10 Allen (Mass.) 18; Butterfield v. Western R. Corp., 10 Allen (Mass.) 532, 87 Am. Dec. 678. A due presentment and demand of payment must be made. See Bank of Pennsylvania v. McCalmont, 4 Rawle (Pa.) 307; Collins's Adm'x v. Janey, 3 Leigh (Va.) 389; Simms v. Slacum, 3 Cra. (U. S.) 300, 2 L. Ed. 446.

What ought to be paid; what may be demanded.

It differs from *owing* in this, that sometimes what is owing is not due: a note payable thirty days after date is owing immediately after it is delivered to the payee, but it is not due until the thirty days have elapsed. But see Allen v. Patterson, 7 N. Y. 476, 57 Am. Dec 542; Scudder v. Scudder, 10 N. J. L. 340; U. S. v. Bank of North Carolina, 6 Pet. (U. S.) 36, 8 L. Ed. 308.

The word "due," unlike "arrears," has more than one signification, and expresses two distinct ideas. At times it signifies a simple indebtedness without reference to the time of payment; at others it shows that the day of payment has passed; Wiggin v. Knights of Pythias, 31 Fed. 125; Scudder v. Scudder, 10 N. J. L. 345.

DUE-BILL. An acknowledgment of a debt in writing. This instrument differs from a promissory note in many particulars. it is not payable to order, nor is it assignable by mere indorsement. Byles, Bills *11, n. (t). See I. O. U.; PROMISSORY NOTES.

DUE CARE. Reasonable care adapted to the circumstances of the case. Butterfield v. Western R. Corp., 10 Allen (Mass.) 532; Baltimore & P. R. Co. v. State, 54 Md. 656. See BAILMENT; NEGLIGENCE.

DUE COURSE OF LAW. This phrase is synonymous with "due process of law," or "the law of the land," and means law in its regular course of administration through courts of justice. Kansas Pac. Ry. Co. v. Dunmeyer, 19 Kan. 542. But see DUE PROCESS OF LAW.

DUE PROCESS OF LAW. Law in its regular course of administration through courts of justice. 3 Story, Const. 264, 661; Miller, Const. 664; Wynehamer v. People, 13 N. Y. 378.

This definition embodies the earlier conception; 2 Co. Inst. 51; but it was long ago held too narrow; Murray's Lessee v. Hoboken Land & Improvement Company, 18 How. (U. S.) 272, 15 L. Ed. 372, where a distress warrant to collect a balance due from a collector of customs, under executive authority, prescribed by law, was held due process within the Vth Amendment; and the same ruling is made under the XIVth Amendment; Ballard v. Hunter, 204 U. S. 241, 27 Sup. Ct. 261, 51 L. Ed. 461, where it was said that the phrase, "has never been defined. It does not always mean proceedings in court. Its fundamental requirement is an opportunity for a hearing and defense, but no fixed procedure is demanded," and the ruling in Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616 (*infra*) is approved.

Any legal proceeding enforced by public

authority, whether sanctioned by age or custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice. Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232.

This term is considered by Coke as equivalent to the phrase "law of the land" (used in Magna Carta, c. 29), and is said by him to denote "indictment or presentment of good and lawful men." Co. 2d Inst. 50. Amendment V. of the Constitution of the United States provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." Amendment XIV. prohibits a state from depriving a person of life, liberty, or property, without due process of law. A similar provision exists in all the state constitutions; the phrases "due course of law" and "the law of the land" are sometimes used; but all three of these phrases have the same meaning; and that implies conformity with the ancient and customary laws of the English people or laws indicated by parliament; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616; Cooley, Const. Lim. 437, where the provisions in the various state constitutions are set forth. Miller, J., says, in that case that a general definition of the phrases which would cover every case would be most desirable, but that, apart from the risk of failure to make the definition perspicuous and comprehensive, there is a wisdom in ascertaining the extent and application of the phrase by the judicial process of exclusion and inclusion as the cases arise. In that case, however, he says also, that it must be confessed that the constitutional meaning or value of the phrase remains without that satisfactory precision of definition which judicial decisions have given to nearly all the other guaranties of personal rights found in the constitutions of the several states and of the United States. And in a much later case it was said that the phrase has never been precisely defined; while its fundamental requirement is opportunity for hearing and defense, the procedure may be adapted to the case. Proceedings in court are not always essential; Ballard v. Hunter, 204 U. S. 241, 27 Sup. Ct. 261, 51 L. Ed. 461, where it was held that personal service of liens for taxes and assessments on real estate on resident owners, and constructive service by publication on non-resident owners, may be required by statute, the land being accountable to the state and the owner charged with knowledge of laws affecting it.

The liberty guaranteed is that of natural and not of artificial persons; Western Turf Ass'n v. Greenberg, 204 U. S. 359, 27 Sup. Ct. 384, 51 L. Ed. 520; where it was said "a corporation cannot be deemed a citizen within the meaning of the clause of the Constitution of the United States which protects the privileges and immunities of citizens of the United States against being abridged or impaired by the law of a state"; the same principle was laid down in Northwestern Nat. Life Ins. Co. v. Riggs, 203 U. S. 243, 27 Sup. Ct. 126, 51 L. Ed. 168, 7 Ann. Cas. 1104 and Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650. But corporations are persons as well as with respect to this guaranty as to that of equal protection of the laws, Covington & L. Turnpike Road Co. v. Sandford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed 560, Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970.

The full significance of the clause "law of the land" is said by Ruffin, C. J., to be that statutes which would deprive a citizen of the rights of person or property without a regular trial according to the course and usage of the common law would not be the law of the land; Hoke v. Henderson, 15 N. C. 15, 25 Am. Dec. 677. Mr. Webster's explanation of the meaning of these phrases in the Dartmouth College Case, 4 Wheat. (U. S.) 518, 4 L. Ed. 629, is: "By the law of the land is more clearly intended the general law, a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land."

General Principles. The adoption of the XIVth Amendment completed the circle of protection against violations of the provision of Magna Carta, which guaranteed to the citizen his life, liberty and property against interference except by the "law of the land," which phrase was coupled in the Petition of Right with due process of law. The latter phrase was then used for the first time, but the two are generally treated as meaning the same. This security is provided as against the United States by the XIVth and Vth Amendments and as against the states by the XIVth Amendment; Davidson v. New Orleans, 96 U. S. 97, 101, 24 L. Ed. 616, which declined to attempt its precise definition; Frecland v. Williams, 131 U. S. 405, 418, 9 Sup. Ct. 763, 33 L. Ed. 193; the supreme court has frequently declared in general terms its appreciation of the value of this constitutional guaranty; Bank of Columbia v. Okely, 4 Wheat. (U. S.) 235, 244, 4 L. Ed. 559; Yick Wo v. Hopkins, 118 U. S. 370, 6 Sup. Ct. 1064, 30 L. Ed. 220; Holden v. Hardy, 169 U. S. 366, 389, 18 Sup. Ct. 383, 42 L. Ed. 780. The meaning of the phrase is discussed generally in Kennard v.

Louisiana, 92 U. S. 480, 23 L. Ed. 478; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616; Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552; Hagar v. Reclamation District No. 108, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; Missouri Pac. Ry. Co. v. Humes, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463; Freeland v. Williams, 131 U. S. 405, 9 Sup. Ct. 763, 33 L. Ed. 193; Hallinger v. Davis, 146 U. S. 314, 13 Sup. Ct. 105, 36 L. Ed. 986. It does not refer to any general system of law, but must be construed with reference to the historical developments of the law in each state; Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Kennard v. Louisiana, 92 U. S. 480, 23 L. Ed. 478; and it means according to the system of law in each state and not any general one; Walker v. Sauvinet, 92 U. S. 90, 93, 23 L. Ed. 678; Kennard v. Louisiana, 92 U. S. 480, 23 L. Ed. 478; Missouri v. Lewis, 101 U. S. 22, 25 L. Ed. 989; Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232; In re Converse, 137 U. S. 624, 11 Sup. Ct. 191, 34 L. Ed. 796; Leeper v. Texas, 139 U. S. 462, 11 Sup. Ct. 577, 35 L. Ed. 225; McNulty v. California, 149 U. S. 645, 13 Sup. Ct. 959, 37 L. Ed. 882; but see Wynehamer v. People, 13 N. Y. 378.

The prohibition applies to all instrumentalities of a state; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; it is sufficient if the legislation is general, in its operation and enforceable by usual methods adapted to the case; Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623. What is due process of law in a particular state is regulated by the law of the state; Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; although a state cannot make due process of law of anything which it chooses to declare such by its own legislation; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616.

Due process of law means such acts of government as settled maxims of law and custom sanction and permit; Ex parte Ah Fook, 49 Cal. 402; in the regular course of administration according to the prescribed forms; Rowan v. State, 30 Wis. 129, 11 Am. Rep. 559; according to the law of the land; Walker v. Sauvinet, 92 U. S. 93, 23 L. Ed. 678; Kennard v. Louisiana, 92 U. S. 480, 23 L. Ed. 478; and with respect to taxation, as to which the question is so frequently raised, it has been said that the assessment of taxes is necessarily summary and need not be by judicial proceeding; so a levy by a collector under a state law is valid; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616; Sears v. Cottrell, 5 Mich. 251, where the subject is fully treated; and taxation for railroad aid bonds; Talcott v. Pine Grove, 1 Flipp. 120, Fed. Cas. No. 13,735; the clause has reference to the modes of ascertaining rights, not to the objects and purposes of a statute; *id.*

Legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subject to which it relates and is enforceable by usual methods adapted to the nature of the case; Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623. As was said by Field, J., in Bartemeyer v. Iowa, 18 Wall. (U. S.) 129, 21 L. Ed. 929: "No one has ever pretended, that I am aware of, that the XIVth Amendment interferes in any respect with the police power of the state." In that case it was held that the right to sell liquor, as far as it exists, is not a right growing out of citizenship of the United States.

The Distinction Between the Two Amendments. While the language of the Vth and XIVth Amendments is the same, yet as they were engrafted upon the Constitution at different times and under widely different circumstances, it may be that questions may arise in which different constructions and applications of their provisions may be proper; French v. Pav. Co., 181 U. S. 324, 328, 21 Sup. Ct. 625, 45 L. Ed. 879; citing Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394; then quoting from Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616 as follows: "It is not a little remarkable that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the federal government for nearly a century, and while during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the states, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the XIVth Amendment." The court then stated that it would "proceed in the present case on the assumption that the legal import of the phrase due process of law is the same in both amendments." See Lent v. Tillson, 140 U. S. 316, 11 Sup. Ct. 825, 35 L. Ed. 419; Palmer v. McMahon, 133 U. S. 660, 10 Sup. Ct. 324, 33 L. Ed. 772; Pittsburgh, C., C. & St. L. Ry. Co. v. Backus, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031.

It was not intended by the XIVth Amendment to impose on the states, when exercis-

ing their power of taxation, any more rigid or stricter curb than that imposed on the federal government, in the exercise of a similar power by the Vth Amendment. French v. Paving Co., 181 U. S. 324, 329, 21 Sup. Ct. 625, 45 L. Ed. 879. And in another case the court said: "It by no means follows that a long and consistent construction put upon the Vth Amendment relating to public improvements within the District of Columbia is to be deemed overruled by a decision concerning the operation of the XIVth Amendment as controlling state legislation." Wight v. Davidson, 181 U. S. 371, 384, 21 Sup. Ct. 616, 45 L. Ed. 900.

The privileges and immunities of citizens of the United States, protected by the XIVth Amendment, are those arising out of the nature and essential character of the federal government, and granted or secured by the constitution; and due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government; Duncan v. Missouri, 152 U. S. 382, 14 Sup. Ct. 570, 38 L. Ed. 485; Hurtado v. California, 110 U. S. 535, 4 Sup. Ct. 111, 292, 28 L. Ed. 232; due process of law in the XIVth Amendment refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state exerted within the limits of those fundamental principles of liberty and justice which lie at the basis of all our civil and political institutions; In re Kemmler, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519. It implies conformity with the natural and inherent principles of justice and forbids the taking of one's property without compensation, and requires that no one shall be condemned in person or property without opportunity to be heard; Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; the proceedings need not be in a court of justice, but according to the forms thereof; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616. The proceedings must be appropriate to the case and just to the parties affected, and pursued in the ordinary manner and adapted to the end to be attained, with opportunity to be heard, when necessary, for the just protection of rights; Turpin v. Lemon, 187 U. S. 51, 23 Sup. Ct. 20, 47 L. Ed. 70. See editorial notes on What is Due Process of Law in 24 L. Ed. 436; 42 L. Ed. 865. Appropriate regulation of property is not deprivation of due process of law; Richmond, F. & P. R. Co. v. Richmond, 96 U. S. 521, 24 L. Ed. 734.

In Bank of Columbia v. Okely, 4 Wheat. (U. S.) 235, 4 L. Ed. 559, Johnson, J., says: "As to the words from Magna Carta incorporated in the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this,—that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

"Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights;" Westervelt v. Gregg, 12 N. Y. 209, 62 Am. Dec. 160; but not necessarily judicial proceedings; it may include summary proceedings, if not arbitrary or unequal, as for collection of taxes; McMillen v. Anderson, 95 U. S. 37, 24 L. Ed. 335; nor is the right of appeal essential; where a statute has fixed the time and place of meeting of any board or tribunal, no special notice to parties interested is required; Reetz v. Michigan, 188 U. S. 505, 23 Sup. Ct. 390, 47 L. Ed. 563.

Law in its regular course of administration through courts of justice is due process; and when secured by the law of the state, the constitutional requirement is satisfied; Leeper v. Texas, 139 U. S. 462, 11 Sup. Ct. 577, 35 L. Ed. 225. The phrase as used in the constitution does not "mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the state, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you chose to do it.'" per Bronson, J., in Taylor v. Porter, 4 Hill (N. Y.) 140, 40 Am. Dec. 274. "The meaning of these words is that no man shall be deprived of his property without being heard in his own defence." Kinney v. Beverly, 2 Hen. & M. (Va.) 318, 336.

Cooley (Const. Lim. 441) says: "Due process of law in each particular case means, such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

Taking property under the taxing power is taking it by due process of law; High v. Shoemaker, 22 Cal. 363; Springer v. U. S., 102 U. S. 586, 26 L. Ed. 253. In this connection, it is said in State v. Allen, 2 McCord (S. C.) 56: "We think that any legal process which was originally founded in necessity, has been consecrated by time, and approved and acquiesced in by universal consent, . . . is embraced in the alternative 'law of the land.'" In Brown v. Levee Com'rs, 50 Miss. 479, it is said that these constitutional provisions do not mean the general body of

the law as it was at the time the constitution took effect; but they refer to certain fundamental rights which that system of jurisprudence of which ours is derivative has always recognized; if any of these are disregarded in the proceedings by which a person is condemned to the loss of property, etc., then the deprivation has not been by due process of law. And it has been held that the state cannot deprive a person of his property without due process of law through the medium of a constitutional convention any more than it can through an act of the legislature; Clark v. Mitchell, 69 Mo. 627. Exaction of tolls under a state statute for the use of an improved waterway, is not a deprivation of property within the federal constitution; Sands v. Improv. Co., 123 U. S. 288, 8 Sup. Ct. 113, 31 L. Ed. 149.

It follows necessarily, from the confessed inability of the courts to form a general definition and their settled rule of dealing with each case separately upon its own facts, that in a discussion of the subject it is convenient to illustrate the course of decisions by a selection of them showing different phases of the application of the principle.

Limitations on the Legislation of the States. Acts of a municipal corporation are not wanting in due process of law if such acts, when done or ratified by the state, would not be inconsistent with the Amendment, the latter being not intended to bring under federal control everything done by states illegally under state laws, but only the acts of states or their instrumentalities in violations of rights secured by the Constitution of the United States; Owensboro Waterworks Co v. Owensboro, 200 U. S. 38, 26 Sup. Ct. 249, 50 L. Ed. 361; it does not control mere forms of procedure in state courts or regulate their practice. It only requires that the person condemned has had sufficient notice and an adequate opportunity to defend; Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 20 Sup. Ct. 620, 44 L. Ed. 747. The guaranty is secured within the meaning of the Amendment if the law operates on all alike and does not subject the individual to an arbitrary exercise of the powers of government; Leeper v. Texas, 139 U. S. 462, 11 Sup. Ct. 577, 35 L. Ed. 225; it requires only that a person accused of crime shall be subjected to law in the regular course of the administration in courts of justice; In re Converse, 137 U. S. 624, 11 Sup. Ct. 191, 34 L. Ed. 796; that the accused be present at every stage of the trial, but not in the appellate court, when he has counsel, and when that court is merely deciding as to prejudicial error below; Dowdell v. U. S., 221 U. S. 325, 31 Sup. Ct. 590, 55 L. Ed. 753.

"No right, privilege, or immunity in respect of due process, at any stage in the duty of affording it arises under the XIVth Amendment unless there be denial of the right by the state or its officers;" no immunity is secured against the lawlessness of private individuals who take a prisoner from the custody of the state officers and murder him to prevent his having the benefits of a trial by operation of the state's established course of judicial procedure; U. S. v. Powell, 151 Fed. 648, a very comprehensive opinion by Jones, D. J., in the circuit court of Alabama.

While the XIVth Amendment protects the citizen in his right to engage in any lawful business, it does not prevent legislation intended to regulate useful occupations, which, because of their nature and location, may prove injurious or offensive to the public. It does not prevent a municipality from prohibiting any business which is inherently vicious and harmful; nor does it prevent a state from regulating or prohibiting a nonuseful occupation which may become harmful to the public, and the regulation or prohibition need not be postponed until the evil is flagrant; Murphy v. California, 225 U. S. 623, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153. There is nothing in the XIVth Amendment to prevent a state from requiring individuals to make, on receiving due compensation, such concessions to each other as the public welfare demands, and a statute permitting the exercise of the right of eminent domain for railways, etc., for working mines, was held to be constitutional and to authorize condemnation of the right to cross the land of a private owner by an aërial bucket line, necessary for the working of a mine; Strickley v. Min. Co., 200 U. S. 527, 26 Sup. Ct. 301, 50 L. Ed. 581, 4 Ann. Cas. 1174; Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171.

Acts and Proceedings Held Valid. Statutes or ordinances which have been held valid as not being deprivations of liberty or property without due process of law are: Prohibiting the carrying of dangerous weapons; Miller v. Texas, 153 U. S. 535, 14 Sup. Ct. 874, 38 L. Ed. 812; creating a board of registration for physicians, Reetz v. Michigan, 188 U. S. 505, 23 Sup. Ct. 390, 47 L. Ed. 563 (where it was said that due process of law is not necessarily judicial process and the right of appeal is not essential to it); taxing stocks of railroads in other states (held not unconstitutional because no similar tax was laid upon stock of domestic railroads or foreign railroads doing business in Alabama, the property of the former class of railroads being untaxed and that of the latter two classes being taxed by the state); Kidd v. Alabama, 188 U. S. 730, 23 Sup. Ct. 401, 47 L. Ed. 669; imposing a personal tax on all property in or out of the state; Glidden v. Harrington, 189 U. S. 255, 23 Sup. Ct. 574, 47 L. Ed. 798 (where it was said that what is required by the XIVth Amendment, in the assessment of ordinary annual taxes

on personal property, should be construed liberally, and while notice may be required, it need not be personal, but may be by publication or by posting at polling places, and it was also held in another case that in condemning property for municipal purposes, it is sufficient to give notice by publication, with opportunity for hearing; Wight v. Davidson, 181 U. S. 371, 21 Sup. Ct. 616, 45 L. Ed. 900). So the right is not infringed by imposing liabilities on particular classes, as an act making persons driving herds over a highway liable for damages done to it; Jones v. Brim, 165 U. S. 180, 17 Sup. Ct. 282, 41 L. Ed. 677; or sheep owners for grazing on the public domain; Bacon v. Walker, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. Ed. 499; or making railroads liable to employés for the negligence of fellow employés; Missouri Pac. R. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; or for fires caused by locomotives; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611; or requiring railroads to pay damages for the diminution in value of farms by the company's failure to put up fences and cattle guards; Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. 364, 13 Sup. Ct. 870, 37 L. Ed. 769; requiring log owners to pay fees of state officer for surveying and scaling logs; Lindsay & P. Co. v. Mullen, 176 U. S. 126, 20 Sup. Ct. 325, 44 L. Ed. 400; making mine owners liable for defaults of mine managers and examiners selected by them under a state law; Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 27 Sup. Ct. 412, 51 L. Ed. 708; requiring railroad stockholders to pay their just proportion of bonded debt; Union Pac. R. Co. v. U. S., 99 U. S. 700, 25 L. Ed. 496; the exaction of tolls for the use of an improved water way; Sands v. Imp. Co., 123 U. S. 288, 8 Sup. Ct. 113, 31 L. Ed. 149; subjecting buildings used for gaming to the payment of money lost at play; Marvin v. Trout, 199 U. S. 212, 26 Sup. Ct. 31, 50 L. Ed. 157; authorizing the destruction of nets used in illegal fishing; Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385; subjecting a railroad corporation to a rule of negligence prescribed by a general act under which it is incorporated; Chicago, R. I. & P. R. Co. v. Zernecke, 183 U. S. 582, 22 Sup. Ct. 229, 46 L. Ed. 339; taking private property under state law authorizing the exercise of the right of eminent domain for taking private property; Missouri Pac. R. Co. v. Nebraska, 164 U. S. 403, 17 Sup. Ct. 130, 41 L. Ed. 489; as corporate franchises; Greenwood v. Freight Co., 105 U. S. 13, 26 L. Ed. 961; for flooding lands; Manigault v. Springs, 199 U. S. 473, 26 Sup. Ct. 127, 50 L. Ed. 274; construction of a levee; Eldridge v. Trezevant, 160 U. S. 452, 16 Sup. Ct. 345, 40 L. Ed. 490; condemnation of a right of way across a placer mining claim; Strickley v. Min. Co., 200 U. S. 527, 26 Sup. Ct. 301, 50 L. Ed. 581, 4 Ann. Cas. 1174; constructing a dam in a stream not navigable, paying the damage to owners; Head v. Mfg. Co., 113 U. S. 9, 5 Sup. Ct. 441, 28 L. Ed. 889; condemnation of shares of stock of a railroad for its improvement under a state law; Offield v. R. Co., 203 U. S. 372, 27 Sup. Ct. 72, 51 L. Ed. 231; acts imposing special burdens on public service corporations, as requiring an electric company to pay salaries to commissioners to supervise them; New York v. Squire, 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666; compelling a railroad company to pay for the removal of a grade crossing; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269; requiring the removal of a bridge and culvert; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175; requiring the lowering or removal of a tunnel which had become an obstruction to navigation since its construction; West Chicago St. R. Co. v. Illinois, 201 U. S. 506, 26 Sup. Ct. 518, 50 L. Ed. 845; requiring a railroad company to pay for examiners as to competency of its employés; Nashville, C. & St. L. Ry. v. Alabama, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352; requiring railroad to furnish track connections at intersections; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194; requiring a gas company to change the location of its pipes; New Orleans Gas Light Co. v. Drainage Commission, 197 U. S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831.

So the guaranty is not infringed by compulsory vaccination; Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765; prohibition against sales of options on grain; Booth v. Illinois, 184 U. S. 425; regulating charges of warehousemen; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; the danger that testimony taken in a proceeding under a state law may incriminate the witness in a possible prosecution under the federal anti-trust law; Jack v. Kansas, 199 U. S. 372, 26 Sup. Ct. 73, 50 L. Ed. 234, 4 Ann. Cas. 689; or by the destruction of the value of property by statute forbidding the manufacture or sale of intoxicating liquors; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; or of oleomargarine; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 22 Sup. Ct. 120, 46 L. Ed. 171; or by taxing artificially colored oleomargarine, even if the tax will suppress the manufacture; McCray v. U. S., 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; making water rents a prior lien on land; Provident Inst. for Savings v. Jersey City, 113 U. S. 506, 5 Sup. Ct. 612, 28 L. Ed. 1102; subordinating claims of non-resident mortgagee to those of resident creditors of a foreign corporation; Sully v. Bank, 178 U. S. 289, 20 Sup. Ct. 935, 44 L. Ed. 1072; the appointment of a receiver in a railroad fore-

closure suit; St. Louis, G. & Ft. S. Ry. Co. v. Missouri, 156 U. S. 478, 15 Sup. Ct. 443, 39 L. Ed. 502; precluding defense by life insurance company based on false and fraudulent statement in application unless the matter represented actually contributed to the death of the insured; Northwestern Nat. Life Ins. Co. v. Riggs, 203 U. S. 243, 27 Sup. Ct. 126, 51 L. Ed. 168, 7 Ann. Cas. 1104 (where it was said that liberty means liberty of natural and not artificial persons); assessment for opening streets on the front foot rule, held not void because levied after the work was completed or because, when the work was ordered, the city could under a statute repealed after the work was completed and before assessment, include part of the expenses in general taxes and levy the assessment on a valuation basis under which a smaller amount would have been assessed against these lands; City of Seattle v. Kelleher, 195 U. S. 351, 25 Sup. Ct. 44, 49 L. Ed. 232; the imposition of some duty on transfer of stock; New York v. Reardon, 204 U. S. 152, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736; limiting to eight hours a day the period of work in under-ground mines; Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; a New York tax on a Pennsylvania fire insurance company on premiums received in New York, being the same that was required in Pennsylvania; Fire Ass'n of Philadelphia v. New York, 119 U. S. 110, 7 Sup. Ct. 108, 30 L. Ed. 342 (where it was held a condition precedent to doing business in the state).

The grant by a state to a corporation of the exclusive right or privilege of maintaining slaughter houses, guarded by proper limitation of prices to be charged and imposing the duty of providing ample conveniences, with permission to all owners of stock to land, and to all butchers to slaughter, at those places is valid; Slaughter House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394.

Among the statutes and judicial or administrative proceedings which have been held not to be obnoxious to the XIVth Amendment, as deprivation of property without due process of law, are the following: Providing for the widening of a street; Lent v. Tillson, 140 U. S. 316, 11 Sup. Ct. 825, 35 L. Ed. 419; regulating contests between persons claiming judicial offices; Kennard v. Louisiana, 92 U. S. 480, 23 L. Ed. 478; making water rates a charge on lands prior to liens; Provident Inst. for Savings v. Jersey City, 113 U. S. 506, 5 Sup. Ct. 612, 28 L. Ed. 1102; authorizing any person to erect and maintain a mill dam in a navigable stream, paying to the owners of the lands affected damages assessed in a judicial proceeding; Head v. Mfg. Co., 113 U. S. 9, 5 Sup. Ct. 441, 28 L. Ed. 889; providing for drainage of low lands, damages to be assessed by commissioners after notice and hearing; Wurts v. Hoagland, 114 U. S. 606, 5 Sup. Ct. 1086, 29 L. Ed. 229; a tax law giving notice to the taxable by requiring statement of his property, with public sessions when he has a right to be present and to be heard, with an opportunity in a suit at law to contest the validity of the proceeding; Cincinnati, N. O. & T. P. R. Co. v. Kentucky, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414; for valuation and classification of property with different provisions as to different classes for ascertaining the value and a right of appeal, applying the same means and methods to individuals of each class; Cincinnati, N. O. & T. P. R. Co. v. Kentucky, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414; requiring railroads to erect and maintain cattle guards and in default thereof to be liable for double damages; Missouri Pac. R. Co. v. Humes, 115 U. S 512; 6 Sup. Ct. 110, 29 L. Ed. 463; or to fence a track under penalty of double damages; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585; Spealman v. Ry. Co., 71 Mo. 434; the imposition upon property of a tax or other burden for reclamation of swamp lands; Reclamation Dist. No. 108 v. Hagar, 4 Fed. 366; and see Lent v. Tillson, 140 U. S. 316, 11 Sup. Ct. 825, 35 L. Ed. 419; Walston v. Nevin, 128 U. S. 578, 9 Sup. Ct. 192, 32 L. Ed. 544; Pittsburgh, C., C. & St. L. R. Co. v. Backus, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031; a paving law originating proceedings on petition of two-thirds of the owners of lots bordering on a street, and taxing abutting owners; Schaefer v. Werling, 188 U. S. 516, 23 Sup. Ct. 449, 47 L. Ed. 570; Hibben v. Smith, 191 U. S. 310, 24 Sup. Ct. 88, 48 L. Ed. 195; and as to back-lying property; Voris v. Glass Co., 163 Ind. 599, 70 N. E. 249; Cleveland, C., C. & St. L. R. Co. v. Porter, 210 U. S. 177, 28 Sup. Ct. 647, 52 L. Ed. 1012 (where it was held that the legislature may create back taxing districts of property extending back); assessment for paving, etc., not void because lot is not benefited by the improvements owing to its present use; the land must be considered simply in its general relations and apart from its particular use at the time; Louisville & N. R. Co. v. Paving Co., 197 U. S. 430, 25 Sup. Ct. 466, 49 L. Ed. 819; charging the cost of paving against lots fronting on a street according to the frontage, the XIVth Amendment being held not applicable; French v. Paving Co., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879; providing for the assessment of damages for laying out, etc., streets upon owners of land benefited thereby and determining the amount of tax and also what lands are benefited, with notice to and hearing of each owner at some stage of the proceeding upon the question of his proportion of the tax to be assessed; People v. City of Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; an order of

drainage commissioners requiring a railroad company at its own expense to remove a bridge and culvert over a natural water course and to erect a new one in conformity with the regulations established by the commissioners; C., B. & Q. Ry. v. People, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596; making railroad companies liable for damage to employés caused by the negligence of fellow servants; Missouri Pac. Ry. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; authorizing a city to open and improve streets and assess damages against the owners of adjacent lots; Walston v. Nevin, 128 U. S. 578, 9 Sup. Ct. 192, 32 L. Ed. 544; converting an appearance d. b. e. into a general appearance and submission to jurisdiction; Birmingham v. R. Co., 137 N. Y. 15, 32 N. E. 995, 18 L. R. A. 764; if it does not attempt to restrain the suitor from fully protecting his life, liberty and property against any attempt to enforce a judgment against him without due process of law, Kauffman v. Wooters, 138 U. S. 285, 11 Sup. Ct. 298, 34 L. Ed. 962; a municipal ordinance prohibiting a private market within six squares of any public market under penalty of trial by magistrate; Natal v. Louisiana, 139 U. S. 621, 11 Sup. Ct. 636, 35 L. Ed. 288; an ordinance closing laundries between 10 p. m. and 6 a. m., it being held merely a police regulation and not a violation of the XIVth Amendment; Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; so also a statute forbidding inn-keepers, common carriers, theatres, schools and cemetery associations from excluding any person by reason of race or color; People v. King, 110 N. Y. 418, 18 N. E. 245, 1 L. R. A. 293, 6 Am. St. Rep. 389; a statute requiring an annual license tax from foreign corporations which do not invest and use their capital within the state; Pembina Mining Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; an affirmance on appeal of death sentence in the absence of the accused and his counsel and without notice to either; Schwab v Berggren, 143 U. S. 442, 12 Sup. Ct. 525, 36 L. Ed. 218; punishment of death by electricity; McElvaine v. Brush, 142 U. S. 155, 12 Sup. Ct. 156, 35 L. Ed. 971; trials without a jury if according to the settled course of proceedings; Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Gibson v. Mason, 5 Nev. 283; Janes v. Reynolds' Adm'rs, 2 Tex. 250; whether by motion or action, if sanctioned by state law and with opportunity for hearing; Iowa C. Ry. Co. v. Iowa, 160 U. S. 389, 16 Sup. Ct. 344, 40 L. Ed. 467; and the hearing need not be according to the practice of the courts, but by appropriate judicial proceedings; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L. R. A. 481, 53 Am. St. Rep. 557; the decisions of administrative officers under the immigration acts; Nishimura Ekiu v. U. S., 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146; trial and sentence by a judge *de facto* of a court *de jure*, though appointed by the governor without authority; In re Manning, 139 U. S. 504, 11 Sup. Ct. 624, 35 L. Ed. 264; conviction before a *de facto* officer; In re Ah Lee, 5 Fed. 899, 6 Sawy. 410; altering the mode of fixing water rates in a city; Spring Valley Water-Works v. Bartlett, 16 Fed. 615, 8 Sawy. 555; validating *ultra vires* contracts; Gross v. U. S. Mortgage Co., 108 U. S. 477, 2 Sup. Ct. 910, 27 L. Ed. 795; trebling taxation as a penalty for fraud; State v. Moss, 69 Mo. 495; limiting municipal taxation to prevent payment of a judgment; State v. Mayor of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936; proceeding by information; Rowan v. State, 30 Wis. 129, 11 Am. Rep. 559; Hurtado v. People, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232, as explained and affirmed in Maxwell v. Dow, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. Ed. 597; McNulty v. California, 149 U. S. 645, 13 Sup. Ct. 959, 37 L. Ed. 882; Hodgson v. Vermont, 168 U. S. 262, 18 Sup. Ct. 80, 42 L. Ed. 461; Bolln v. Nebraska, 176 U. S. 83, 20 Sup. Ct. 287, 44 L. Ed. 382; Davis v. Burke, 179 U. S. 399, 21 Sup. Ct. 210, 45 L. Ed. 249; *contra*, Shaw, C. J., in Jones v. Robbins, 8 Gray (Mass.) 329; see also State v Starling, 15 Rich. (S. C.) 120; the trial of cases without a jury; Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; the principle with respect to such details being that the provision against taking property without due process of law does not apply where the party has had a fair trial in a court of justice according to the modes of proceeding applicable to such case; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616; Kennard v. Louisiana, 92 U. S. 480, 23 L. Ed. 478; the fact that the judgment of a commissioner is final does not operate as a deprivation of due process of law; Ex Parte Ah Fook, 49 Cal. 402; nor does the entry of a judgment on forfeited recognizance; People v. Quigg, 59 N. Y. 83; a statute authorizing the immigration commissioner to prevent the landing of lewd women; Ex Parte Ah Fook, 49 Cal. 402; prohibiting any person from making or mending burglars' tools; Ex parte Roberts, 166 Mo. 207, 65 S. W 726; prohibiting saloons from selling liquor in places where women are permitted to enter; Cronin v. Adams, 192 U. S 108, 24 Sup. Ct. 219, 48 L. Ed. 365 (where the court said: "There is no inherent right in a citizen to sell intoxicating liquors by retail; it is not a privilege of a citizen of a state or of a citizen of the United States); a statute making the owner of premises on which liquor is sold with his knowledge liable for all damages resulting from the intoxication of any person purchasing the liquor; Bertholf v. O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323; an ordinance prohibiting the keeping of billiard halls (not unconstitutional

either as depriving the owner of his property without due process of law, or as depriving him of the equal protection of the laws); Murphy v. California, 225 U. S. 623, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153; (and the classification regulating billiard halls based on hotels having twenty-five rooms is reasonable; Murphy v. California, 225 U. S. 623, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153); the discharge of a jury in a murder trial for cause shown before being sworn; Howard v. Kentucky, 200 U. S. 164, 26 Sup. Ct. 189, 50 L. Ed. 421 (where it was held that the amendment was not intended to interfere with the power of the state to protect life, liberty or property of citizens, or with the power of adjudication of its courts, in administering process provided by the state law); regulation by the state of admission of persons to places of amusement, with the provision that persons holding tickets therefor shall be admitted if not under the influence of liquor, boisterous or of immoral character; Western Turf Ass'n v. Greenberg, 204 U. S. 359, 27 Sup. Ct. 384, 51 L. Ed. 520; statutes authorizing the administration on the estates of absentees if the period of absence be fixed and not unreasonably brief, Cummus v. School Dist., 198 U. S. 458, 25 Sup. Ct. 721, 49 L. Ed. 1125, 3 Ann. Cas. 1121, affirming *id.*, 206 Pa. 469, 56 Atl. 16, 98 Am. St. Rep. 790; a municipal ordinance providing for the inspection of good products kept in storage and for the summary seizure and destruction of what is unfit for use; North American Cold Storage Co. v. Chicago, 151 Fed. 120; the restriction of the right of appeal to an intermediate appellate court in lieu of the state supreme court; Missouri v. Lewis, 101 U. S. 22, 25 L. Ed. 989; a review by an appellate court of final judgment in a criminal case not being necessary to constitute due process; McKane v. Durston, 153 U. S. 684, 14 Sup. Ct. 913, 38 L. Ed. 867; the entry of a judgment on a bond which is forfeited is not invalid; Janes v. Reynolds' Adm'rs, 2 Tex. 250; nor the entry of a judgment for money which is void for want of proper service; York v. Texas, 137 U. S. 15, 11 Sup. Ct. 9, 34 L. Ed. 604, authorizing the sale of animals running at large; Campau v. Langley, 39 Mich. 451, 33 Am. Rep. 414; making a garnishee liable to pay a judgment if he fails to render a sworn account; Vaughan v. Furlong, 12 R. I. 127; conviction and sentence to death of a prisoner when after the verdict one of the jurors was insane, the court having upon inquiry found that he was of sufficient mental capacity during the trial to act as a juror; Jordan v. Massachusetts, 225 U. S. 167, 32 Sup. Ct. 651, 56 L. Ed. 1038.

A transfer or succession tax is valid; Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439; Magoun v. Bank, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; it does not violate either the XIVth Amendment or sec. 10 of art. I, of the constitution; Orr v. Gilman, 183 U. S. 278, 22 Sup. Ct. 213, 46 L. Ed. 196 (where it was held that the opinion in Carpenter v. Pennsylvania, 17 How. [U. S.] 456, 15 L. Ed. 127, though prior to the XIVth Amendment, correctly defines the limits of jurisdiction between the state and federal governments in respect of controlling the assets of decedents both before and after that amendment); nor does a state inheritance tax; Campbell v. California, 200 U. S. 87, 26 Sup. Ct. 182, 50 L. Ed. 382 (where it was said that the XIVth Amendment does not deprive the state of the right to regulate and burden the right of inheritance, but at the most can only be held to restrain such an exercise of power as would exclude the conception of judgment and discretion and be so obviously arbitrary and unreasonable as to be beyond the pale of governmental authority); a provision in the California constitution that "all contracts for the sales of shares of capital stock of any corporation or association on margin shall be void and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction," directed against sales on margins; Ottis v. Parker, 187 U. S. 606, 23 Sup. Ct. 168, 47 L. Ed. 323. A tax law which gives a right to be heard, but does not extend a rehearing on appeal to railroad companies, though it does to ordinary taxpayers, is valid; Pittsburgh, C., C. & St. L. R. Co. v. Backus, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031, where Brewer, J., says: "The power of a state to make classifications in judicial or administrative proceedings carries with it the right to make such a classification as will give to parties belonging to one class two hearings and to parties belonging to a different class only a single hearing;" and on this authority a statute making final the decision of an inferior court in a local option election contest was held valid; Saylor v. Duel, 236 Ill. 429, 86 N. E. 119, 19 L. R. A. (N. S.) 377. See EQUAL PROTECTION OF THE LAWS.

An erroneous decision does not deprive the unsuccessful party of liberty without due process of law; Central Land Co. v. Laidley, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91; nor do mere errors in the administration of a state statute not unconstitutional; Lent v. Tillson, 140 U. S. 316, 11 Sup. Ct. 825, 35 L. Ed. 419; nor imprisonment under a valid law, though there was error in the proceedings; In re Ah Lee, 5 Fed. 899; nor error in a charge to a jury in a criminal case; Davis v. Texas, 139 U. S. 651, 11 Sup. Ct. 675, 35 L. Ed. 300. The guaranty is not violated by an order requiring an attorney to defend an accused person gratuitously; Presby v. Klickitat County, 5 Wash. 329, 31 Pac. 876. The XIVth Amendment did not

change the law as held prior to it that regulation of the use, or even of the price of the use, of private property, was not depriving the owner of it without due process of law; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77.

Acts and Proceedings Which Violate the Guaranty of Due Process of Law. Acts of a state held to infringe the guaranty of due process of law are: Taking property by the state for public use without compensation; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443; Cincinnati, N. O. & T. P. R. Co. v. Kentucky, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; Chicago, B. & Q. R. Co. v. Drainage Com'rs, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596; and so also if taken under a judgment of the state court though authorized by statute; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; but if compensation was provided for before a proper tribunal there is due process of law; Backus v. Depot Co., 169 U. S. 557, 18 Sup. Ct. 445, 42 L. Ed. 853; Otis Co. v. Mfg Co., 201 U. S. 140, 26 Sup. Ct. 353, 50 L. Ed. 696. The exclusion of colored men on account of race from the grand jury was held a denial of rights under the XIVth Amendment; Rogers v. Alabama, 192 U. S. 226, 24 Sup. Ct. 257, 48 L. Ed. 417.

Other acts held unconstitutional were: One forbidding the manufacture of cigars in tenement houses; In re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; and a New York statute respecting the sale of oleomargarine; People v. Rosenberg, 138 N. Y. 410, 34 N. E. 285 (on the other hand the constitutionality of the Pennsylvania act on the same subject was affirmed; Powell v. Commonwealth, 114 Pa. 265); a prohibition against laundries except of brick or stone, without the consent of the supervisors, because clearly intended for discrimination against the Chinese; Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; a statute requiring every member of a firm of plumbers to be a registered plumber, whether his duties require him to have knowledge of that trade or not, is an unwarranted interference with liberty and property; Schnaier v. Importation Co., 182 N. Y. 83, 74 N. E. 561, 70 L. R. A. 722, 108 Am. St. Rep. 790; State v. Smith, 42 Wash. 237, 84 Pac. 851, 5 L. R. A. (N. S.) 674, and note, 114 Am. St. Rep. 114, 7 Ann. Cas. 577; so is a statute forbidding women to work in a factory before 6 a. m. or after 9 p. m.; People v. Williams, 189 N. Y. 131, 81 N. E. 778, 12 L. R. A. (N. S.) 1130, 121 Am. St. Rep. 854, 12 Ann. Cas. 798; and one limiting hours of labor for employés of bakers; Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133, reversing People v. Lochner, 177 N. Y. 145, 69 N. E. 373, 101 Am. St. Rep. 773 (the bake shop case); but it was held otherwise as to limiting hours of labor in employments when health is involved, as in underground mines; Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; Ex parte Kair, 28 Nev. 425, 82 Pac. 453, 6 Ann. Cas. 893; State v. Mfg. Co., 34 Mont. 571, 87 Pac. 980, 9 Ann. Cas. 204; State v. Cantwell, 179 Mo. 245, 78 S. W. 569; or for a woman to work in a factory, laundry or mechanical establishment more than ten hours a day; Muller v. State of Oregon, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957, affirming State v. Muller, 48 Or. 252, 85 Pac. 855, 120 Am. St. Rep. 805, 11 Ann. Cas. 88; or limiting hours of work for children under sixteen; State v. Shorey, 48 Or. 396, 86 Pac. 881, 24 L. R. A. (N. S.) 1121; In re Spencer, 149 Cal. 396, 86 Pac. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105.

Denial of due process of law by municipal authorities while acting as a board of equalization amounts to a denial by the state; Raymond v. Traction Co., 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757; the guaranty is denied by imprisonment under a void ordinance; In re Lee Long, 18 Fed. 253; but not under a valid law by reason of error in the proceedings; In re Ah Lee, 5 Fed. 899, 6 Sawy. 410.

Statutes authorizing the destruction of property used for unlawful gaming were held void; Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420; so also the sale of land to satisfy void street assessments which the legislature has unconstitutionally attempted to validate, Brady v. King, 53 Cal. 44; the commitment to the workhouse of an alleged pauper by two overseers *ex parte* and without hearing; City of Portland v. City of Bangor, 65 Me. 120, 20 Am. Rep. 681, reversing earlier cases before the adoption of the XIVth Amendment. A judgment *in personam* without service within the jurisdiction is void; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; see York v. Texas, 137 U. S. 15, 11 Sup. Ct. 9, 34 L. Ed. 604; no judgment of a court is due process of law if rendered without jurisdiction or notice to the party; Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896. A statute providing that the use of an easement shall not be evidence of a right thereto is unconstitutional as to rights acquired prior thereto; Reynolds v. Randall, 12 R. I. 522; and so is an act purporting to make a tax deed conclusive evidence of title; Marx v. Hanthorn, 148 U. S. 172, 13 Sup. Ct. 508, 37 L. Ed. 410 (it may be made *prima facie* evidence); an act fixing absolute liability on a corporation to make compensation for injuries done to property without fault, when no one else would be liable under the general law; Zeigler v. R. Co., 58 Ala. 594; an act authorizing a lien on a tombstone and its sale for non-payment without provision for adjusting the rights of the parties; Brooks v.

Tayntor, 17 Misc. 534, 40 N. Y. Supp. 445; a statute dispensing with personal service in proceedings where it is practicable and usual, the parties being within the jurisdiction; Brown v. Board of Levee Com'rs, 50 Miss. 468; imposing an assessment for local improvement without notice or an opportunity for hearing; it is not enough that the owner may have notice and hearing, the law must provide for it; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Savannah, F. & W. R. Co. v. Savannah, 96 Ga. 680, 23 S. E. 847; Violett v. Alexandria, 92 Va. 561, 23 S. E. 909, 31 L. R. A. 382, 53 Am. St. Rep. 825.

The proceedings of a board of equalization of state taxes, its decision being conclusive, are reviewable in the federal courts at the suit of one claiming that he was deprived thereby of due process of law; Raymond v. Traction Co., 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757, where a tax was held to be an illegal discrimination against property of the same class where it was so great as to cause insolvency.

A state statute requiring that no railroad company shall require a stipulation from its employés waiving damages for injury violates their liberty of contract, and is also void as class legislation in violation of the Ohio constitution; Shaver v. Pennsylvania Co., 71 Fed. 931.

A county ordinance, of which the manifest purpose is to limit the number of any kind of game to be killed or taken by one person in a day, and making it a misdemeanor to use a repeating shotgun or magazine gun, is void; In re Marshall, 102 Fed. 323 (but such prohibition is valid when directed against aliens, and is not in contravention of the treaty between Italy and the United States; Com. v. Patsone, 231 Pa. 46, 79 Atl. 928).

In Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, it was held that taking private property under a rule which excluded any inquiry as to special benefits, the necessary operation of which was to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, was a taking of private property for private use without compensation.

A state statute establishing a board of medical examiners and conditions under which persons will be licensed to practice osteopathy does not deprive one who refuses to apply for a license therein of his property under due process of law or deny him the equal protection of the law; Collins v. Texas, 223 U. S. 288, 32 Sup. Ct. 286, 56 L. Ed. 439; nor does a state statute making entries in public records *prima facie*, but not conclusive, evidence of the validity of the proceedings referred to; Reitler v. Harris, 223 U. S. 437, 32 Sup. Ct. 248, 56 L. Ed. 497.

Contempt of Court. A commitment for contempt of court is not obnoxious to this constitutional provision; State v. Becht, 23 Minn. 411; Eikenberry v. Edwards, 67 Ia. 619, 25 N. W. 832, 56 Am. Rep. 360; In re Clayton, 59 Conn. 510, 21 Atl. 1005, 13 L. R. A. 66, 21 Am. St. Rep. 128; State v. Shepherd, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624; Com. v. Gibbons, 9 Pa. Super. Ct. 527; In re Barnes, 204 N. Y. 108, 97 N. E. 508; Eilenbecker v. District Court, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801; whether under the inherent power of courts or under statutes authorizing summary punishment; In re Barnes, 147 App. Div. 396, 132 N. Y. Supp. 908; Brown v. Powers (Ia.) 134 N. W. 73; nor is a commitment for failure to pay a tax, not resorted to until other means of collection have failed, and then only upon a showing of property possessed, not accessible to levy, but enabling the owner to pay if he chooses; Palmer v. McMahon, 133 U. S. 660, 10 Sup. Ct. 324, 33 L. Ed. 772; but a person summarily adjudged guilty of contempt by a court without a hearing or service upon him of any process, for an act not committed in the presence of the court, and imprisonment for non-payment of the fine imposed, is deprived of his liberty without due process of law; Ex parte Stricker, 109 Fed. 145.

To punish for contempt by striking an answer from the files and condemning as by default is denial of due process of law; but, under the power conferred by statute, the answer of a foreign corporation was stricken from the files and a judgment rendered as by default because of the failure or refusal of the corporation defendant to produce books and papers from outside of the state as required by the statute; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 29 Sup. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645; which decision on this point, was based upon the undoubted right of the legislature to create a presumption in respect to the want of foundation of an asserted defense against a defendant who suppresses, or fails to produce, evidence when legally called upon to produce it.

Where a railroad rate statute was held unconstitutional by a federal court and all the defendants, including the attorney general, were enjoined from enforcing it, and the attorney general refused to comply with the order, and was fined and committed for contempt, the supreme court refused to discharge him on *habeas corpus*, it being considered that he was a state officer charged with the duty of enforcing the statute, if constitutional, and therefore was properly joined as a defendant; Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

Notice. Guarantee by the XIVth Amendment does not require a state to adopt a particular form of procedure, so long as the accused has had sufficient notice and an adequate opportunity to defend himself, and a

state may determine, free from federal interference or control, in what courts crime may be prosecuted and by what courts the prosecution may be reviewed; Rogers v. Peck, 199 U. S. 425, 26 Sup. Ct. 87, 50 L. Ed. 256.

The essential elements of due process of law are notice and opportunity to defend; Simon v. Craft, 182 U. S. 427, 436, 21 Sup. Ct. 836, 45 L. Ed. 1165; "in determining whether such rights were denied we are governed by the substance of things and not by mere form;" *id.*, citing Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 20 Sup. Ct. 620, 44 L. Ed. 747; it is not necessary that the proceedings in a state court should be by particular mode, but only that there shall be a regular course of proceedings in which notice is given of the claim asserted and an opportunity to defend against it"; Simon v. Craft, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165, citing Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 20 Sup. Ct. 620, 44 L. Ed. 747.

While the essential element of due process is opportunity to be heard, a necessary condition of which is notice; Simon v. Craft, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165; personal notice is not always necessary; Jacob v. Roberts, 223 U. S. 261, 32 Sup. Ct. 303, 56 L. Ed. 429.

It is necessary that a tax payer be afforded a hearing, of which he must have notice, and this requirement is not satisfied by the mere right to file objections in writing; Londoner v Denver, 210 U. S. 373, 28 Sup. Ct. 708, 52 L. Ed. 1103, where it was held that the legislature may authorize municipal improvements without any petition of land owners who are to be assessed therefor and the proceedings of the municipality in accordance with the charter and without hearings, do not deny due process of law to land owners who are afforded a hearing on the assessment itself.

Federal courts follow state courts in deciding as to notice and service under a state statute; Ballard v. Hunter, 204 U. S. 241, 27 Sup. Ct. 261, 51 L. Ed. 461.

A statute providing for the taking of private property for a railroad and for the assessment of damages by commissioners, need not, under the Delaware constitution, provide for notice to the owner of the time and place of meeting of the commissioners, nor need it secure to the owner a hearing; the United States constitution and amendments impose no restraint upon the states in the exercise of the right of eminent domain, and the words, "due course of law," in the state constitution do not apply thereto; Wilson v. R. Co., 5 Del. Ch. 524, in which case the authorities are collected and the construction of these words exhaustively considered by Saulsbury, Ch. But as to this and some other cases, holding that notice is not required, see EMINENT DOMAIN, *subtit. Notice and Procedure.*

As to the doctrine of due process before the civil war, see articles by E. S. Corwin in 24 Harv. L. Rev. 366, 460.

See 27 Am. Law Reg. 611, 700; 28 *id.* 129; 31 Am. St. Rep. 104; 48 Am. Dec. 269; Le Grand v. U. S., 12 Fed. 583; San Mateo County v. Southern Pac. R. Co., 13 Fed. 783; 3 L. R. A. 194; 4 L. R. A. 724; 21 L. R. A. 789.

As to assessments for improvements or benefits, see ASSESSMENTS; EMINENT DOMAIN.

DUELLING. The fighting of two persons, one against the other, at an appointed time and place, upon a precedent quarrel. It differs from an affray in this, that the latter occurs on a sudden quarrel, while the former is always the result of design.

When one of the parties is killed, the survivor is guilty of murder; 1 Russ. Cr. 443; Smith v. State, 1 Yerg. (Tenn.) 228; as the deliberate killing of another in a duel is not a killing in a heat of passion which will mitigate the crime, however grievous the provocation may have been; 3 East 581; 8 Carr. & P. 644; but evidence of a mutual willingness to fight upon the part of persons, one of whom killed the other in a fight, has been held to authorize an instruction that the offence was murder in the second degree; Wiley v. State (Tex.) 65 S. W. 190.

Fighting a duel, even where there is no fatal result, is of itself a misdemeanor. See 2 Com. Dig. 252; Clark, Cr. L. 340; Co. 3d Inst. 157; Const. 167; Barker v. People, 20 Johns. (N. Y.) 457; State v. Herriott, 1 McMull. (S. C.) 126. For cases of mutual combat upon a sudden quarrel, see 1 Russ. Cr. 495; 2 Bish. Cr. Law § 311. Under the constitutions of some states, any one directly or indirectly engaged in a duel is forever disqualified from holding public office. See Com. v. Jones, 10 Bush (Ky.) 725; Barker v. People, 20 Johns. (N. Y.) 457; Moody v. Com., 4 Metc. (Ky.) 1; State v. Dupont, 2 McCord (S. C.) 334; Royall v. Thomas, 28 Gratt. (Va.) 130, 26 Am. Rep. 335; CHALLENGE.

DUELLUM. Trial by battle. Judicial combat. Spelman, Gloss. See WAGER OF BATTEL.

DUES. When used of a corporation it includes, in the Kansas constitution, all contractual liabilities, but not, as against a stockholder, an *ultra vires* contract. Ward v. Joslin, 105 Fed. 224, 44 C. C. A. 456.

DUKE. The title given to those who are in the highest rank of nobility in England. First held by the Black Prince, as a superior kind of earldom.

DUKE OF YORK'S LAWS. A body of laws compiled in 1665 for the government of the colony of New York.

DUM SE BENE GESSERIT (Lat. while he shall conduct himself well). These words signify that a judge or other officer shall hold his office during good behavior, and not at the pleasure of the crown nor for a certain limited time.

DUM FUIT IN PRISONA (L. Lat.). A writ which lay for a man who had aliened lands under duress by imprisonment, to restore to him his proper estates. Co. 2d Inst. 482. Abolished by stat. 3 & 4 Will. IV. c. 27.

DUM FUIT INFRA ÆTATEM (Lat.). The name of a writ which lay when an infant had made a feoffment in fee of his lands or for life, or a gift in tail. Abolished by stat. 3 & 4 Will. IV. c. 27.

It could be sued out by him after he came of full age, and not before; but in the meantime he could enter, and his entry remitted him to his ancestor's rights; Fitzh. N. B. 192; Co. Litt. 247, 337.

DUM NON FUIT COMPOS MENTIS (Lat.). The name of a writ which the heirs of a person who was *non compos mentis*, and who aliened his lands, might have sued out to restore him to his rights. Abolished by 3 & 4 Will. IV. c. 27.

DUM SOLA (Lat. while single or unmarried). A phrase to denote that something has been done, or may be done, while a woman is or was unmarried. Thus, when a judgment is rendered against a woman *dum sola*, and afterward she marries, the *scire facias* to revive the judgment must be against both husband and wife.

DUM SOLA ET CASTA (Lat. while unmarried and chaste). Decrees for alimony sometimes provide that it shall be paid only so long as the divorced wife remains unmarried and chaste. See DIVORCE.

DUMB. Unable to speak; mute. See DEAF AND DUMB.

DUMB-BIDDING. In sales at auction, when the amount which the owner of the thing sold is willing to take for the article is written, and placed by the owner under a candlestick, or other thing, and it is agreed that no bidding shall avail unless equal to that, this is called dumb-bidding. Babington, Auct. 44.

DUN. One who duns or urges for payment; a troublesome creditor. A demand for payment, whether oral or written. Stand. Dict.

DUNGEON. A cell under ground; a place in a prison built under ground, dark, or but indifferently lighted.

DUNNAGE. Pieces of wood placed against the sides and bottom of the hold of a vessel, to preserve the cargo from the effect of leakage, according to its nature and quality. Abbott, Shipp. 227.

There is considerable analogy between dunnage and ballast. The latter is used for trimming the ship and bringing it down to a draft of water proper and safe for sailing. Dunnage is placed under the cargo to keep it from being wetted by water getting into the hold, or between the different parcels to keep them from bruising and injuring each other; Great Western Ins. Co. v. Thwing, 13 Wall. (U. S.) 674, 20 L. Ed. 607.

DUODECIMA MANUS (Lat.). Twelve hands. The oaths of twelve men, including himself, by whom the defendant was allowed to make his law. 3 Bla. Com. 343.

DUPLEX QUERELA (Lat.). A complaint in the nature of an appeal from the ordinary to his next immediate superior for delaying or refusing to do justice in some ecclesiastical cause. 3 Bla. Com. 247.

DUPLEX VALOR MARITAGII (Lat. double the value of a marriage). Guardians in chivalry had the privilege of proposing a marriage for their infant wards, provided it were done without disparagement, and if the wards married without the guardian's consent they were liable to forfeit double the value of marriage. Co. Litt. 82 *b*; 2 Sharsw. Bla. Com. 70.

DUPLICATE (Lat. *duplex*, double). The double of anything. A document which is essentially the same as some other instrument. 7 Mann. & G. 93; Benton v. Martin, 40 N. Y. 345,

A duplicate writing has but one effect. Each duplicate is complete evidence of the intention of the parties. When a duplicate is destroyed, for example, in the case of a will, it is presumed both are intended to be destroyed; but this presumption possesses greater or less force, owing to circumstances. When only one of the duplicates is in the possession of the testator, the destruction of that is a strong presumption of any intent to revoke both; but if he possessed both, and destroys but one, it is weaker; when he alters one, and afterwards destroys it, retaining the other entire, it has been held that the intention was to revoke both; 1 P. Wms. 346; 13 Ves. 310. But that seems to be doubted; 3 Hagg. Eccl. 518. See Com. v. Beamish, 81 Pa. 389; 49 E. C. L. 94; 103 *id.* 29; Nelson v. Blakey, 54 Ind. 29. As to the execution of a number of deeds, all to constitute one deed, see DEED.

In English Law. The certificate of discharge given to an insolvent debtor who takes the benefit of the act for the relief of insolvent debtors.

DUPLICATIO (Lat. a doubling). The defendant's second answer; that is, the answer to the plaintiff's replication.

DUPLICATUM JUS (Lat. a twofold or double right). Words which signify the same as *droit droit*, or *droit droit*, and which are applied to a writ of right, patent, and such

other writs of right as are of the same nature, and do as it were flow from it as the writ of right. Booth, Real Act. 87.

DUPLICITY (Lat. *duplex*, twofold; double). The union of more than one cause of action in one count in a writ, or more than one defence in one plea, or more than a single breach in a replication. Jackson v. Rundlet, 1 W. & M. 381, Fed. Cas. No. 7,145.

The union of several facts constituting together but one cause of action, or one defence, or one breach, does not constitute duplicity; Torrey v. Field, 10 Vt. 353; Harker v. Brink, 24 N. J. L. 333; Holland v. Kibbe, 16 Ill. 133; Beckley v. Moore, 1 McCord (S. C.) 464; State v. Bank, 33 Miss. 474; Gulf, C. & S. F. Ry. Co. v. Buford, 2 Tex. Civ. App. 115, 21 S. W. 272; State v. Christmas, 101 N. C. 749, 8 S. E. 361; Merriman v. Mach. Co., 86 Wis. 142, 56 N. W. 743; State v. Warren, 77 Md. 121, 26 Atl. 500, 39 Am. St. Rep. 401; Tracy v. Com., 87 Ky. 578, 9 S. W. 822. Though the joinder of two or more distinct offences in one count of an indictment is faulty, yet where the acts imputed are component parts of the same offence the pleading is not objectionable for duplicity; Farrell v. State, 54 N. J. L. 416, 24 Atl. 723; nor is it where one of the two offences charged is insufficiently set out; State v. Henn, 39 Minn. 476, 40 N. W. 572. It must be of causes on which the party relies, and not merely matter introduced in explanation; Dunning v. Owen, 14 Mass. 157. In trespass it is not duplicity to plead to part and justify or confess as to the residue; Parker v. Parker, 17 Pick. (Mass.) 236. If only one defence be valid, the objection of duplicity is not sustained; Porter v. Brackenridge, 2 Blackf. (Ind.) 385.

It may exist in any part of the pleadings; the declaration; Morse v. Eaton, 23 N. H. 415; Jarman v. Windsor, 2 Harr. (Del.) 162; pleas; Welch v. Jamison, 1 How. (Miss.) 160; replication; Benner v. Elliott, 5 Blackf. (Ind.) 451; Calhoun v. Wright, 3 Scam. (Ill.) 74; Bennett v. Martin, 6 Mo. 460; or subsequent pleadings; Tebbets v. Tilton, 24 N. H. 120; United States v. Gurney, 1 Wash. C. C. 446, Fed. Cas. No. 15,271; and was at common law a fatal defect; Robinson v. Rice, 20 Mo. 229; to be reached on demurrer only; Cunningham v. Smith, 10 Gratt. (Va.) 255, 60 Am. Dec. 333; King v. Howard, 1 Cush. (Mass.) 137; Gardiner v. Miles, 5 Gill (Md.) 94; Benner v. Elliott, 5 Blackf. (Ind.) 451; People v. Clement, 4 Cal. Unrep. 493, 35 Pac. 1022. The rules against duplicity did not extend to dilatory pleas so as to prevent the use of the various classes in their proper order; Co. Litt. 304 *a*; Steph. Pl. App. n. 56.

Owing to the statutory changes in the forms of pleading, duplicity seems to be no longer a defect in many of the states, either in declarations; Blakeney v. Ferguson, 18 Ark. 347; pleas; King v. Howard, 1 Cush. (Mass.) 137; Bryan v. Buford, 7 J. J. Marsh. (Ky.) 335; or replications; Zehnor v. Beard, 8 Ind. 96; though in some cases it is allowed only in the discretion of the court, for the furtherance of justice.

It is too late after verdict to object to duplicity in an information for a misdemeanor; State v. Armstrong, 106 Mo. 395, 16 S. W. 604, 13 L. R. A. 419, 27 Am. St. Rep. 361.

DURANTE ABSENTIA. See EXECUTORS AND ADMINISTRATORS.

DURANTE BENE PLACITO (Lat.). During good pleasure. The ancient tenure of English judges was *durante bene placito*, at the pleasure of the king. See JUDGE. 1 Bla. Com. 267, 342.

DURANTE MINORE ÆTATE (Lat.). During the minority. An infant can enter into no contracts during his minority, except those for his benefit. If he should be appointed an executor, administration of the estate will be granted, *durante minore ætate*, to another person. 2 Bouvier, Inst. n. 1555.

DURANTE VIDUITATE (Lat.). During widowhood.

DURATION. Extent, limit or time. People v. Hill, 7 Cal. 102.

DURBAR. In India, a court, audience, or levee.

DURESS. Personal restraint, or fear of personal injury or imprisonment. Hazelrigg v. Donaldson, 2 Metc. (Ky.) 445.

Duress of imprisonment exists where a man actually loses his liberty. If a man be illegally deprived of his liberty until he sign and seal a bond, or the like, he may allege this duress and avoid the bond; Heaps v. Dunham, 95 Ill. 583; Rollins v. Lashus, 74 Me. 218; Guilleaume v. Rowe, 94 N. Y. 268, 46 Am. Rep. 141. But if a man be legally imprisoned, and, either to procure his discharge, or on any other fair account, seal a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it; Co. 2d Inst. 482; Eddy v. Herrin, 17 Me. 338, 35 Am. Dec. 261; Mascolo v. Montesanto, 61 Conn. 50, 23 Atl. 714, 29 Am. St. Rep. 170. Where the proceedings at law are a mere pretext, the instrument may be avoided; Aleyn 92; 1 Bla. Com. 136.

Duress per minas, which is either for fear of loss of life, or else for fear of mayhem or loss of limb, must be upon a sufficient reason; 1 Bla Com. 131. In this case, a man may avoid his own act. Coke enumerates four instances in which a man may avoid his own act by reason of menaces: For fear of *loss of life; of member; of mayhem; of imprisonment;* Co. 2d Inst. 483; 2 Rolle, Abr. 124; Bac. Abr. *Duress, Murder*, A; 2 Ld. Raym. 1578; Savigny, Dr. Rom. § 114;

Motz v. Mitchell, 91 Pa. 114; Brown v. Pierce, 7 Wall. (U. S.) 205, 19 L. Ed. 134.

It has been held that restraint of goods under circumstances of hardship will avoid a contract; Collins v. Westbury, 2 Bay (S. C.) 211, 1 Am. Dec. 643; Spalds v. Barrett, 57 Ill. 289, 11 Am. Rep. 10; Radich v. Hutchins, 95 U. S. 210, 24 L. Ed. 409; 11 Exch. 878. But see Hazelrigg v. Donaldson, 2 Metc. (Ky.) 445; Maisonnaire v. Keating, 2 Gall. 337, Fed. Cas. No. 8,978; Block v. U. S., 8 Ct. Cl. 461; Lehman v. Shackleford, 50 Ala. 437.

The duress to avoid a deed is that which compels the grantor to do what he would not do voluntarily; Savage v. Savage, 80 Me. 472, 15 Atl. 43; Hackley v. Headley, 45 Mich. 569, 8 N. W. 511; Griffith v. Sitgreaves, 90 Pa. 161. If a contract is made under duress and subsequently ratified, it becomes valid; Ferrari v. Board of Health, 24 Fla. 390, 5 South. 1; Belote v. Henderson, 5 Coldw. (Tenn.) 471, 98 Am. Dec. 432.

The violence or threats must be such as are calculated to operate on a person of ordinary firmness and inspire a just fear of great injury to person, reputation, or fortune. See Seymour v. Prescott, 69 Me. 376; McClair v. Wilson, 18 Colo. 82, 31 Pac. 502; Bosley v. Shanner, 26 Ark. 280; Mollere v. Harp, 36 La. Ann. 471. The resisting power which any man is bound to exercise for his own protection was measured, in the common law, by the standard of a man of courage, as a part of the law itself; Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417. There is no legal standard of resistance which a person acted upon must come up to at his peril of being remediless. The question in each case is: Was the person so acted upon by threats of the person claiming the benefit of the contract, for the purposes of obtaining it, as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby obtained; Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417. The age, sex, state of health, temper, and disposition of the party, and other circumstances calculated to give greater or less effect to the violence of threats, must be taken into consideration; 1 Ky. L. Rep. 137; Parmentier v. Pater, 13 Or. 121, 9 Pac. 59; U. S. v. Huckabee, 16 Wall. (U. S.) 432, 21 L. Ed. 457.

Violence or threats will amount to duress not only where they are exercised on the contracting party, but when the wife, the husband, or children of the party are the object of them; Eadie v. Slimmon, 26 N. Y. 12, 82 Am. Dec. 395; Harris v. Carmody, 131 Mass. 51, 41 Am. Rep. 188. The defence was sustained where a father was coerced into executing a mortgage to secure restitution of his son's defalcation by threats of prosecution; Williamson, Halsell, Frazier Co. v. Ackerman, 77 Kan. 502, 94 Pac. 807, 20 L. R. A. (N. S.) 484; McCormick Harvesting Mach. Co. v. Hamilton, 73 Wis. 486, 41 N. W. 727; Bryant v. Peck & Whipple Co., 154 Mass. 460, 28 N. E. 678; where a father gave a note to avoid prosecution of his son and son-in-law; Folmar v. Siler, 132 Ala. 297, 31 South. 719; National Bank of Oxford v. Kirk, 90 Pa. 49; where a wife gave a note and mortgage to prevent prosecution of her husband, he being already under arrest; Jones v. Dannenberg Co., 112 Ga. 426, 37 N. E. 729, 52 L. R. A. 271 (even though the note was in the hands of a *bona fide* holder, etc.); Harris v. Webb, 101 Ga. 84, 28 S. E. 620; but not, where a son-in-law was threatened with prosecution, the father-in-law, with deliberation, gave his notes and agreed with his daughter that they should constitute an advancement; Loud v. Hamilton (Tenn.) 51 S. W. 140, 45 L. R. A. 400; or where a mortgage was given to stop a threatened prosecution of the mortgagor's husband, but no promise was given not to prosecute; Moyer v. Dodson, 212 Pa. 344, 61 Atl. 937; or where one agreed not to prosecute his agent if he would make restitution of his embezzled funds; Allen v. Dunham, 92 Tenn. 257, 21 S. W. 898.

If the violence used be only a legal constraint, or the threats only of doing that which the party using them had a right to do, they shall not invalidate the contract. A just and legal imprisonment, or threats of any measure authorized by law and the circumstances of the case, are of this description. See Norris, Peake's Ev. 440, and the cases cited; also, Watkins v. Baird, 6 Mass. 506, 4 Am. Dec. 170; Thorn v. Pinkham, 81 Me. 103, 24 Atl. 718, 30 Am. St. Rep. 335; Hilborn v. Bucknam, 78 Me. 482, 7 Atl. 272, 57 Am. Rep. 816. A man lawfully arrested on a warrant for seduction, who, to procure his discharge marries the woman, cannot have the marriage declared void; Marvin v. Marvin, 52 Ark. 425, 12 S. W. 875, 20 Am. St. Rep. 191; Lacoste v. Guidroz, 47 La. Ann. 295, 16 South. 836; Johns v. Johns, 44 Tex. 40; Williams v. State, 44 Ala. 24; Sickles v. Carson, 26 N. J. Eq. 440; Blankenmester v. Blankenmiester, 106 Mo. App. 390, 80 S. W. 706; Griffin v. Griffin, 130 Ga. 527, 61 S. E. 16, 16 L. R. A. (N. S.) 937, 14 Ann. Cas. 866. A marriage between cousins, upon the threat of the man that if the woman would not marry him he would blow out his brains, would not be set aside, where the woman went through the marriage ceremony without any sign of unwillingness, though the marriage was never consummated, and the man admitted that he had only married her for her money, and she was of a weak character; [1891] P. 369. To constitute duress which will be regarded as sufficient to make a payment involuntary there must be some actual or threatened exercise of power possessed or believed to be possessed by the

party exacting the payment over the person or property of another, for which the latter has no other means of immediate relief than by making the payment; Radich v. Hutchins, 95 U. S. 210, 24 L. Ed. 409. There is no ironclad rule which confines an involuntary payment to cases of duress. Money compulsorily paid to prevent an injury to one's property rights comes within the same principle; Buckley v. Mayor, 30 App. Div. 463, 52 N. Y. Supp. 452. One who negotiates a loan to take up an existing mortgage upon which foreclosure proceedings have been begun, and who is required under protest to pay an illegal bonus to secure a discharge of the mortgage, acts under duress in so doing, and can recover the amount paid; Kilpatrick v. Ins. Co., 183 N. Y. 163, 75 N. E. 1124, 2 L. R. A. (N. S.) 574, 110 Am. St. Rep. 722.

As to other contracts it is said that threats of imprisonment, to constitute duress, must be of unlawful imprisonment. But the question is whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener. Imprisonment that is suffered through the execution of a threat which was made for the purpose of forcing a guilty person to enter into a contract may be lawful as against the authorities and the public, but unlawful as against the threatener, when considered in reference to his effort to use for his private benefit processes provided for the protection of the public. One who has overcome the will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which were made for another purpose, and he is in no position to claim the advantage of a formal contract obtained in that way, on the ground that the rights of the parties are to be determined by their language and their overt acts, without reference to the influences which moved them; Morse v. Woodworth, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; Burton v. McMillan, 52 Fla. 469, 42 South. 849, 8 L. R. A. (N. S.) 991, 120 Am. St. Rep. 220, 11 Ann. Cas. 380; Gorringe v. Reed, 23 Utah, 120, 63 Pac. 902, 90 Am. St. Rep. 692; Hargreaves v. Korcek, 44 Neb. 660, 62 N. W. 1086; and to the same effect, Lomerson v. Johnston, 44 N. J. Eq. 93, 13 Atl. 8; Coffman v. Bank, 5 Lea (Tenn.) 232, 40 Am. Rep 31; Bell v. Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505; Heaton v. Bank, 59 Kan. 281, 52 Pac. 876.

In the early common law, duress, strictly so called, was a matter of law. It was pleadable as a defence or as material to a cause of action, by alleging the existence of specific circumstances legally sufficient to constitute duress. Oppression of one person by another, causing such person to surrender something of value to another, not amounting to duress within the rigorous rules of law, regardless of whether the oppression actually deprived the oppressed party of the exercise of his free will, was remediless except by an appeal to equity, where a remedy was obtainable on the ground of unlawful compulsion; Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417, where it is said that the real foundation principle of duress is that it is the condition of mind of the wronged person at the time of the act sought to be avoided, not the means by which such a condition was produced. In its broad sense duress is now said to include all instances where a condition of mind of a person caused by fear of personal injury or loss of limb, or injury to such person's property, wife, child, or husband, is produced by the wrongful conduct of another, rendering such person incompetent to contract with the exercise of his free will power; Williamson v. Ackerman, 77 Kan. 502, 94 Pac. 807, 20 L. R. A. (N. S.) 484, whether formerly relievable at law on the ground of duress or in equity on the ground of wrongful compulsion; Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417.

Threats of unlawful imprisonment are not necessary to constitute duress. It was never contemplated in the law that either the actual use or misuse of criminal process, legal or illegal, should be resorted to for the purpose of compelling the payment of a mere debt, or to coerce the making of contracts. Ample civil remedies are afforded in the law to enforce the payment of debts and the performance of contracts; but the criminal law and the machinery for its enforcement have a wholly different purpose and cannot be employed to interfere with that wise and just policy of the law that all contracts and agreements shall be founded upon the exercise of the free will of the parties, which is the real essence of all contracts; Hartford Fire Ins. Co. v. Kirkpatrick, Dunn & Co., 111 Ala. 456, 20 South. 651; Adams v. Bank, 116 N. Y. 606, 23 N. E. 7, 6 L. R. A. 491, 15 Am. St Rep. 447; Henry v. Bank, 131 Ia 97, 107 N. W. 1034, Williamson, Halsell Frazier Co. v. Ackerman, 77 Kan. 502, 94 Pac. 807, 20 L. R. A. (N. S.) 484; Burton v McMillan, 52 Fla. 228, 42 South. 879, 11 L. R. A. (N. S.) 159.

Excessive charges paid to railroad companies refusing to carry or deliver goods, unless these payments were made voluntarily, have been recovered on the ground of duress; 27 L. J. Ch. 137; 32 *id.* 225; 30 L. J. Exch. 361; 28 *id.* 169. Where the carrier refuses to transport stock until a special contract is signed limiting its liability, it does not bind the shipper; Atchison, T. & S. F. R. Co. v. Dill, 48 Kan. 210, 29 Pac. 148.

Where, in addition to money penalties for delay in payment of a tax, there is forfeiture of the right to do business and risk of having contracts declared illegal for non-payment thereof, payment is made under duress. "Courts sometimes perhaps have been a little too slow to recognize the implied duress under

which payment is made" of taxes; Atchison, T. & S. F. Ry. Co. v. O'Connor, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050; Gaar, Scott & Co. v. Shannon, 223 U. S. 468, 32 Sup. Ct. 236, 56 L. Ed. 510.

The burden of proving duress is on the party alleging it; Horton v. Bloedorn, 37 Neb. 666, 56 N. W. 321.

There is said to be some conflict in the authorities upon the question whether the defence of duress by threats can be successfully urged against a *bona fide* holder for value of negotiable paper, and that the better opinion and weight of authority is that such defence stands upon the same footing as other defences which may be made as between the original parties, but is cut off when the paper reaches the hands of a *bona fide* holder; Fairbanks v. Snow, 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446; Farmers' Bank of Grand Rapids v. Butler, 48 Mich. 192, 12 N. W. 36; Clark v. Pease, 41 N. H. 414; Beals v. Neddo, 2 Fed. 41, 1 McCrary 206. If such a contract be simply a voidable one, then it follows naturally that, when the contract consists of negotiable paper, the defence is cut off by transfer to a *bona fide* purchaser before maturity, in the same manner that other defences upon the ground of fraud are cut off; Mack v. Prang, 104 Wis. 1, 79 N. W. 770, 45 L. R. A. 407, 76 Am. St. Rep. 848. Is a defense to all save the gravest crimes, and one cannot, under compulsion kill another person, even in order to save his own life; 8 C. & P. 616.

DURHAM. See COUNTY PALATINE.

DURSLEY. **In Old English Law.** Blows without wounding or bloodshed; dry blows. Blount.

DUTIES. In its most enlarged sense, this word is nearly equivalent to taxes; State v. Telegraph Co., 73 Me. 518; Blake v. People, 109 Ill. 504; embracing all impositions or charges levied on persons or things; in its more restrained sense, it is often used as equivalent to *customs*, or *imposts*. Story, Const. § 949. In common use, an indirect tax imposed on the importation or consumption of goods. Pollock v. Trust Co., 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108.

DUTY. A human action which is exactly conformable to the laws which require us to obey them.

That which is right or due from one to another. A moral obligation or responsibility.

It differs from a legal obligation, because a duty cannot always be enforced by the law: it is our duty, for example, to be temperate in eating, but we are under no legal obligation to be so, we ought to love our neighbors, but no law obliges us to love them.

DWELLING-HOUSE. A building inhabited by man. A house usually occupied by the person there residing, and his family. The apartment, building, or cluster of buildings in which a man with his family resides. 2 Bish. Cr. Law § 104.

The importance of an exact signification for this word is often felt in criminal cases; and yet it is very difficult to frame an exact definition which will apply to all cases. It is said to be equivalent to mansion-house; Com. v. Pennock, 3 S. & R. (Pa.) 199, State v. Sutcliffe, 4 Strobh. (S. C.) 372; 7 Mann & G. 122. See 14 M. & W. 181; 4 C. B. 105; Com. v. Posey, 4 Call (Va.) 109, 2 Am. Dec. 560.

Judge Cooley, in Stearns v. Vincent, 50 Mich. 219, 15 N. W. 86, 45 Am. Rep. 37, says that in the law of burglary the dwelling-house is deemed to include whatever is within the curtilage, even though not inclosed with the dwelling, if used with it for domestic purposes; People v. Taylor, 2 Mich. 250; Pitcher v. People, 16 Mich. 142.

It must be a permanent structure; 1 Hale, Pl. Cr. 557; 1 Russ. Cr. 798; must be inhabited at the time; 2 Leach 1018, n.; State v. Warren, 33 Me. 30; Ex parte Vincent, 26 Ala. 145, 62 Am. Dec. 714; Com. v. Barney, 10 Cush. (Mass.) 479; People v. Cotteral, 18 Johns (N. Y.) 115; Com. v. Posey, 4 Call (Va.) 109, 2 Am. Dec. 560; Scott v. State, 62 Miss. 782. It is sufficient if a part of the structure only be used for an abode; Russ. & R. 185; Stedman v. Crane, 11 Metc. (Mass.) 295; Cole v. State, 9 Tex. 42; 2 B. & P. 508; Dale v. State, 27 Ala. 31. How far a building may be separate is a difficult question; Com. v. Estabrook, 10 Pick. (Mass.) 293; State v. Langford, 12 N. C. 253; Armour v. State, 3 Humphr. (Tenn.) 379; State v. Ginns, 1 N & McC. (S. C.) 583; Com. v. Sanders, 5 Leigh (Va.) 751; People v. Dupree, 98 Mich. 26, 56 N. W. 1046; Bruce v. Cloutman, 45 N. H. 37, 84 Am. Dec. 111; Chase v. Ins. Co., 20 N. Y. 52; 18 Q. B. 783; 22 Ir. L. T. Rep. 30; State v. Clark, 89 Mo. 430, 1 S. W. 332; Davis v. State, 38 Ohio St. 506; State v. Mordecai, 68 N. C. 207.

A suite of rooms in a college of the University of Cambridge is a dwelling-house; L. R. 4 C. P. 539. Six separate tenants occupied a house of ten rooms, each having exclusive possession of his part of the premises and the owner did not reside there. The outer and street door had no lock or bolt and was always kept open. The entry, stairway, and an ashpit and other conveniences were used in common. Two of the judges held that each of the six tenants occupied a "dwelling-house," and two held otherwise; L. R. 6 C. P. 327.

DWELLING-PLACE. See RESIDENCE; DOMICIL.

DYING DECLARATIONS. Dying declaration of one who did not believe in a Supreme Being are admissible, but are thereby discredited. Gambrell v. State, 92 Miss. 728, 46 South. 138, 17 L. R. A. (N. S.) 291, 131 Am. St. 549, 16 Ann. Cas. 147. See DECLARATION.

DYING WITHOUT ISSUE. Not having issue living at the death of the decedent.

Van Vechten v. Pearson, 5 Paige, Ch. (N. Y.) 514; Fairchild v. Crane, 13 N. J. Eq. 105. In England this is the signification, by statutes 7 Will. IV.; 1 Vict. c. 26, § 29. But the old English rule, that the words, when applied to real estate, import an indefinite failure of issue, has been generally adhered to in this country; Den v. Allaire, 20 N. J. L. 6; Wilson v. Wilson, 32 Barb. (N. Y.) 328; Wallis v. Woodland, 32 Md. 101. See 2 Washb. R. P. 362; 4 Kent 273.

DYNASTY. A succession of kings in the same line or family.

DYSNOMY. Bad legislation; the enactment of bad laws.

DYSPEPSIA. The group of symptoms resulting from alterations in the process of digestion due either to functional or organic diseases of the stomach.

Dyspepsia is not, in general, considered as a disease which tends to shorten life, so as to make a life uninsurable, unless the complaint has become organic dyspepsia, or was of such a degree at the time of the insurance as by its excess to tend to shorten life; 4 Taunt. 763.

E

E CONVERSO (Lat.). On the other hand; on the contrary. Equivalent to *e contra*.

EAGLE. A gold coin of the United States of the value of ten dollars.

It weighs two hundred and fifty-eight grains of standard fineness; that is to say, of one thousand parts by weight, nine hundred shall be of pure metal and one hundred of alloy, the alloy consisting of silver and copper.

The act of February 12, 1873, Rev. Stat. § 3514, fixes the proportion of silver at in no case more than one-tenth of the whole alloy

For all sums whatever the eagle is a legal tender for ten dollars. U. S. Rev. Stat. § 3585

EALDORMAN (Sax.). A Saxon title of honor. It was a mark of honor very widely applicable, the ealdormen being of various ranks. The chief of them were the rulers almost of provinces. After the Conquest they disappeared and the term earl became a mere title. It is the same as alderman.

See Seebohm, Tribal Customs; 2 Freeman, Norm. Conq. 51.

EARLDORMAN. Said to be a false spelling for *ealdorman*. Cent. Dict. But see 2 Holdsw. Hist. E. L. 29, giving Earldorman.

EAR-MARK. A mark put upon a thing for the purpose of distinction. Money in a bag tied and labelled is said to have an ear-mark. 3 Maule & S. 575.

Also used in equity in respect of property or a fund in the hands of a third party, which is capable of identification as belonging to the claimant out of possession.

The doctrine that money has no ear-mark is no longer law. Property entrusted to a person in a fiduciary capacity may be followed as long as it may be traced, and where a person holding money as trustee or in a fiduciary character mixed it with his own and draws out of the mixed fund for his own purposes, the court presumes that his own drawings are to come out of his own money; 13 Ch. D. 696. And see note to this case citing leading English cases in Brett's Lead. Cas. Mod. Eq. 179.

Where police officers, in arresting bank burglars, took the stolen money from them and claimed to hold it for an assignee of the burglars (their attorney for his services) and for a reward offered, it was held that an indemnity company which had indemnified the bank could recover the specific money from the police officers; Ætna Indemnity Co. v. Malone, 89 Neb. 260, 131 N. W. 200.

EAR-WITNESS. One who attests to things he has heard himself.

EARL. In English Law. A title of nobility next below a marquis and above a viscount.

Earls were anciently called *comites*, because they were wont *comitari regem*, to wait upon the king for counsel and advice. They were also called *shiremen*, because each earl had the civil government of a shire. After the Norman conquest they were called *counts*, whence the shires obtained the names of counties. They have now nothing to do with the government of counties, their duties having devolved on the sheriff, the earl's deputy, or *vice-comes*. 1 Bla. Com. 398.

EARL MARSHAL. An officer who formerly was of great repute in England. He held the court of chivalry alone as a court of honor, and in connection with the lord high constable as a court having criminal jurisdiction. 3 Bla. Com. 68; 4 *id.* 268. The duties of the office now are restricted to the settlement of matters of form merely. It would appear, from similarity of duties and from the derivation of the title, to be a relic of the ancient office of alderman of all England. See COURT OF THE EARL MARSHAL.

EARL'S PENNY. See ARLES.

EARL'S THIRD PENNY. In the county court and in every hundred court the king was entitled to but two-thirds of the proceeds of justice and the earl got the other third, except perhaps in some exceptional cases. Maitl., Domesday and Beyond 95.

EARLDOM. The dignity or jurisdiction of an earl. The dignity only remains now, as the jurisdiction has been given over to the sheriff; 1 Bla. Com. 339.

EARNEST. The payment of a sum of money or delivery of a thing or token, upon the making of a contract for the sale of goods, to bind the bargain, the delivery and acceptance of which marks the final and conclusive assent of both parties to the contract.

The payment of a part of the price of goods sold, or the delivery of part of such goods, for the purpose of binding the contract. Howe v. Hayward, 108 Mass. 54, 11 Am. Rep 306.

It has been stated in a general way that the effect of earnest is to bind the goods sold; and, upon their being paid for without default, the buyer is entitled to them; but, notwithstanding the earnest, the money must be paid upon taking away the goods, because no other time for payment is appointed, earnest only binds the bargain, and gives the buyer a right to demand, but a demand without payment of the money is void; after earnest given, the vendor cannot sell the goods to another without a default in the vendee, and therefore if the latter does not come and pay, and take the goods, the vendor ought to go and request him, and then, if he does not come, pay for the goods, and take them away in convenient time, the agreement is dissolved, and the vendor is at liberty to sell them to any other person; 2 Bla. Com. 447; 2 Kent, Com. 495; 2 H. Bla. 316; 3 Campb. 426; Neil v. Cheves, 1 Bailey (S. C) 537

There is great difference of opinion as to the exact definition of this word. It had a signification at common law sufficiently well understood to warrant its use in the statute of frauds of 29 Car. II. § 17, which makes parol sales of goods, etc., void unless there is a delivery, or the buyer "give something in earnest to bind the bargain, or in part payment"

The Roman law included two kinds of earnest, one being a contract prior to that of sale and independent of it, which was practically the payment of a sum of money for what we should now call an

option to purchase, to be forfeited by the purchaser if he did not buy, while, if the other party was unwilling to sell, he must return the earnest and pay an equal amount as a forfeit. The other kind of earnest was that afterwards found in the common law and might be a *thing*, usually a ring, which either party, generally the buyer, gave to the other as a token. It is important in reading the civil law on this topic to bear in mind these two classes. Benj. Sales § 195. Justinian changed the law on this subject by providing that either party might rescind the sale by forfeiting the amount of the earnest money; Inst. l. 3. 23. 1. At least the text appears to be susceptible of no other meaning, but Pothier maintains that, after earnest, neither party could avoid the obligation; in this he is not followed by the later civilians. The same controversy has arisen upon a similar provision of the French code. The conclusion above stated is that of Benjamin, who cites the authorities; Sales, §§ 198-200.

In Scotland the word arles is used for earnest, and is usually applied to a small sum given to a servant on hiring, as earnest that the wage will be paid.

The word earnest "has been supposed to flow from a Phœnician source, through the ἀρραβών of the Greeks, the *arra* or *arrha* of the Latin, and the *arrhes* of the French. . . . The general rule appears to have been that expressed in the Institutes III. 23: *'Is qui recusat adimplere contractum, si quidem est emptor, perdit quod dedit: si vero venditor, duplum restituere compellitur, licet super arris nihil expressum est.'* Furthermore, the *earnest* did not lose that character, because the same thing might also avail as part payment: *'Datur autem arrha vel simpliciter* (says Vinnius, on Inst III 24) *ut sit argumentum duntaxat et probatio emptionis contractæ, veluti si annulus detur; vel ut simul postea cedat in partem pretii, data certa pecunia.'* From the Roman law the principles relating to the *earnest* appear to have passed to the earlier jurisprudence of England. *'Item cum arrarum nomine* (says Bracton ii. 27) *aliquid datum fuerit ante traditionem, si emptorem emptionis pœnituerit, et a contractu resilire voluerit, perdat quod dedit: si autem venditorem, quod arrarum nomine receperit, emptori restituat duplicatum.'* Though the liability of the vendor to return to the purchaser twice the amount of the deposit has long since departed from our law, the passage in question seems an authority for the proposition that the *earnest* is lost by the party who fails to perform the contract. That earnest and part payment are two distinct things is apparent from the 17th section of the statute of frauds, where they are treated as separate acts, each of which is sufficient to give validity to a parol contract." Fry, L. J., in 53 L. J. Ch 1055, 1061.

Kent says it is *only one mode* of binding the bargain, and giving the buyer a right to the goods on payment; 2 Com. 495; it is a token or pledge passing between the parties by way of evidence or ratification of the sale. . . . It is mentioned in the statute of frauds, and in the French code, as an efficient act; but it has fallen into very general disuse in modern times, and seems rather to be suited to the manners of simple and unlettered ages, before the introduction of writing, than to the more precise and accurate habits of dealing at the present day. It was omitted in the New York Revised Statutes; *id.* (14th ed.) 495, n. *(b)*. That it has fallen into disuse is true as to the giving of earnest in its ancient, strict, and technical sense, and its having fallen into disuse has been attributed the tendency to treat earnest and part payment as meaning the same thing, though the language of the statute of frauds implies that the former is something to bind the bargain while no part payment can be made until the contract has been closed; Benj. Sales § 189.

One definition is: "Specifically, in law, a part of the price of goods or service bargained for, which is paid at the time of the bargain to evidence the fact that the negotiation has ended in an actual contract. Hence it is said to bind the bargain." Cent. Dict. And another is: "Something given by a buyer to a seller by way of token or pledge to bind the bargain; a part or portion of goods delivered into the possession of the buyer at the time of the sale as a pledge or security for the complete fulfillment of the contract; a handsel." Encyc. Dict. And the latter authority illustrates the function of earnest as *evidence* of the conclusion of the contract by the Scotch law which holds a party who resiles, to fulfil the contract as well as to forfeit the earnest paid.

It is sometimes said that the question whether the earnest shall count as part of the price or wage depends on the intention of the parties, which, in the absence of direct evidence, will be inferred from the proportion which it bears to the whole sum. Int. Cyc. "If a shilling be given in the purchase of a ship or of a box of diamonds, it is presumed to be given merely in evidence of the bargain, or, in the common way of speaking, is dead earnest; but if the sum be more considerable it is reckoned up in the price." Ersk. Inst. b. iii. tit. iii. § 5.

Another writer considers "that the original view of earnest in England was, that it was a payment of a small portion of the price or wage, in token of the conclusion of the contract; and as this view seems to have been adhered to, the sum, however small, would probably then be counted as a part payment." Sto. Sales 216.

It has been a mooted question whether at common law either earnest or delivery was necessary to perfect a sale of chattels; in a case where it was objected that because there was neither, there could not be a recovery for the breach of a parol contract of sale, it was said: Earnest paid is not necessary to complete a parol contract of sale; when made, it only prevents the vendor, under any circumstances, from rescinding the contract without the assent of the vendee; and this by common law, and not by any statute; Hurlburt v. Simpson, 25 N. C. 236.

It has been much discussed whether the giving of earnest has any effect to pass the title to the property sold; and in earlier cases of the sale of specific chattels it was so held; Shep. Touchst. 224; 5 Term 409; 7 East 558; Noy, Max. 87-89; 2 Bla. Com. 447; but see the analysis of these authorities; Benj. Sales § 355. It is said by this learned writer on the subject, that there is no case in which this has been held when a complet-

ed bargain, if in writing, would not have altered the property; *id.* § 357; and it is concluded that the true legal effect of earnest is simply to afford conclusive evidence of a bargain actually completed with the mutual intention that it should be binding on both; and whether the property has passed in such cases is to be tested, not by the fact that earnest was given, but by the true nature of the contract concluded by the giving of earnest; *id.* Hence with respect to the remedy of the seller, if the buyer refuse to take the property sold, the law of earnest, properly speaking, is not concerned; but it is to be treated as in the case of contracts otherwise legally evidenced. See 2 Kent, Com. Lacey's ed. 496, note 51; SALES.

To constitute earnest to bind the bargain something must be paid or given. An instance is reported where, the buyer having drawn a shilling across the palm of the seller and returned it to his own pocket, according to a custom alleged to exist in the north of England, it was held that the statute was not satisfied; 7 Taunt. 597. This has been said to be the only reported case; Benj. Sales § 191; but it has been held that money left in the hands of a third person as a forfeiture is not sufficient; Howe v. Hayward, 108 Mass. 54, 11 Am. Rep. 306; much less a deposit of a check; Jennings v. Dunham, 60 Mo. App. 635; Noakes v. Morey, 30 Ind. 103. The three cases last cited are usually referred to in connection with the subject of earnest. In the Massachusetts case, the question was as to the recovery of money deposited as a forfeiture, which it was argued was earnest to bind the bargain in case of a refusal to take the goods, and the court said that earnest, as used in the statute of frauds, was part payment. On the strength of this case a text-writer on the law of that state adopts the statement as a definition of earnest; Usher, Sales Per. Prop. § 113. So an authoritative writer on the statute of frauds uses the terms, earnest and part payment, as interchangeable, and discusses the question of when earnest must be paid mainly upon New York cases, although in that state the exception is confined to part payment, the "giving something in earnest" being omitted; Reed, Stat. Fr. § 226. While, therefore, the clear and philosophical definitions of the nature and effect of earnest cited from Benjamin on Sales unquestionably commend themselves as better satisfying the apparent purpose of the statute to designate two distinct acts, it must be admitted that they are constantly referred to by American courts and writers as alternative expressions of the same thing. Consequently the cases cited in text-books as laying down rules as to earnest are usually found, on examination, to be in fact cases of part payment, and they must be so read. This use of the words, interchangeably, makes unavoidable a reference to the cases just referred to, especially since the word earnest, in addition to what has been indicated as its real signification, has, in this country, certainly, an acquired meaning too general to be disregarded.

In part payment something having value must pass from the buyer to the seller; 16 M. & W. 302; Brand v. Brand, 49 Barb. (N. Y.) 348; an unaccepted tender to the vendor on a call for part payment by him will not suffice to bind him, as when a remittance by mail of a check was returned to the sender; Edgerton v. Hodge, 41 Vt. 676; nor the promissory note of the buyer; Combs v. Bateman, 10 Barb. (N. Y.) 573; Hooker v. Knab, 26 Wis. 511; Krohn v. Bantz, 68 Ind. 278; even if there were an express agreement that the note should be received as part payment, which in this instance there was not; *id.;* in this case it was held that the note was not only ineffectual as part payment, but that it could not be regarded as earnest, sufficient to bind the bargain. After referring to the Massachusetts decision, *supra*, that, as used in the statute of frauds, earnest was regarded as part payment of the price, the court said: "But, conceding that it may be something distinct from payment, it is quite clear that it must have some value. The note has no value whatever, because it had no consideration to support it, and its payment could not, therefore, have been enforced. To say that such a note has value, is but grasping at a shadow, and losing sight of the substance. The contract for the sale of the hogs not being valid, the note given in consideration of the agreement therefor was based upon no valid consideration;" *id.;* Ely v. Ormsby, 12 Barb. (N. Y.) 570. But see 13 M. & W. 58; Byles, Bills *386. But when the contract was partly performed by compliance with a condition, and a note was tendered for the price, it was considered that the statute was satisfied; Gray v. Payne, 16 Barb. (N. Y.) 277. A note of a third person accepted as payment is sufficient; Combs v. Bateman, 10 Barb. (N. Y.) 573; or a check if paid is a payment relating back to the time when given; Hunter v. Wetsell, 17 Hun (N. Y.) 135; a stipulation that borrowed money owing from the seller to the buyer shall be treated as part payment will avail; Mattice v. Allen, 33 Barb. (N. Y.) 543; but not an agreement to credit an account due from the seller and send goods for the balance; Galbraith v. Holmes, 15 Ind. App. 34, 43 N. E. 575; or a promise to pay a part of the purchase money to a creditor of the vendor or credit it in the account against him; Artcher v. Zeh, 5 Hill (N. Y.) 204; but if such debt be actually paid it is good; 21 U. C. Q. B. 340; or if accepting the promise the creditor discharge the vendor; Cotterill v. Stevens, 10 Wis. 425; but the payment must be made at the time of the agreement; Paine v. Fulton, 34 Wis. 83; and if there was no entry in the account stating

that the credit was given on account of the transactions in suit it was insufficient; Teed v. Teed, 44 Barb. (N. Y.) 96. A mere agreement that the price shall go in settlement of an existing account is not sufficient without more; Brabin v. Hyde, 30 Barb. (N. Y.) 265; 16 M. & W. 302; 16 L. J. Ex. 120; nor is an agreement to sell one article and take another in part payment; Chapin v. Potter, 1 Hilt. (N. Y.) 366. Part payment may be by the actual delivery of anything of value, as a chattel; Dow v. Worthen, 37 Vt. 108; but a delivery of goods must be sufficient within the statute of frauds if they were in litigation; Walrath v. Ingles, 64 Barb. (N. Y.) 275.

With respect to the time at which part payment must be made, it is in some states required to be at the time of making the contract; Crosby Hardwood Co. v. Tester, 90 Wis 412, 63 N. W. 1057. It was so held in New York; Sprague v. Blake, 20 Wend. (N. Y.) 63; though in a later case the question was raised and not determined; Hawley v. Keeler, 53 N. Y. 119; the same day is sufficient; Brabin v. Hyde, 30 Barb. (N. Y.) 265; and so was a payment asked and received on the following day, the contract being held to be then made for the first time; Bissell v. Balcom, 39 N. Y. 281. And when a check is given and paid upon presentation it is a payment at the time; Hunter v. Wetsell, 84 N. Y. 549, 38 Am. Rep. 544; so also a check upon a deposit in bank; McLure v. Sherman, 70 Fed 190. In some cases it has been held that payment is not so restricted; 7 U. C. C. P. 133; Thompson v. Alger, 12 Metc. (Mass.) 435; Davis v. Moore, 13 Me. 424; Gault v. Brown, 48 N. H. 189, 2 Am. Rep. 210 It is to be observed that this question of time arises with more frequency under the New York statute which does not provide for earnest *eo nomine*, but only for part payment "*at the time*," as does also the Wisconsin statute.

See Benjamin; Blackburn; Story, Sales; Browne; Reed, Statute of Frauds; FRAUDS, STATUTE OF; SALES; GOD'S PENNY.

EARNINGS. The word has been used to denote a larger class of credits than would be included in the term wages. Jenks v. Dyer, 102 Mass. 235; Somers v Keliher, 115 Mass. 165. See Jason v. Antone, 131 Mass. 534. It also means gains derived from services or labor without the aid of capital. Brown v. Hebard, 20 Wis. 330, 91 Am. Dec. 408.

Surplus earnings is an amount owned by a company, over and above the capital and actual liabilities. People v. Board of Com'rs, 76 N. Y. 74.

Net earnings, generally speaking, are the excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves. Union Pac. R. Co. v. U. S., 99 U. S. 420, 25 L. Ed. 274.

They include "tips"; [1908] 1 K. B. 766. See DIVIDENDS.

EARTH. Clay, gravel, loam and the like, in distinction from the firm rock. The term also includes hard-pan, which is a hard stratum of earth. Dickinson v. City of Poughkeepsie, 75 N. Y. 76.

EASEMENT. A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner. 2 Washb. R. P. 25; Clark v. Glidden, 60 Vt. 702, 15 Atl. 358.

A privilege which the owner of one adjacent tenement hath of another, existing in respect of their several tenements, by which that owner against whose tenement the privilege exists is obliged to suffer or not to do something on or in regard to his own land for the advantage of him in whose land the privilege exists. *Termes de la Ley, Easements;* Downing v. Baldwin, 1 S. & R. (Pa.) 298; 3 B. & C. 339; Lawton v. Rivers, 2 M'Cord (S. C.) 451, 13 Am. Dec 741; Com. v. Low, 3 Pick. (Mass.) 408; Forbes v. Balcuseifer, 74 Ill. 183; Oliver v. Hook, 47 Md. 301; Strong v. Wales, 50 Vt. 361; Howell v. Estes, 71 Tex. 690, 12 S. W. 62; Koenigs v. Jung, 73 Wis. 178, 40 N. W. 801.

Although the terms are sometimes used as if convertible, properly speaking *easement* refers to the right enjoyed by one and *servitude* the burden imposed upon the other.

An interest in land created by grant or agreement, express or implied, which confers a right upon the owner thereof to some profit, benefit, dominion, or lawful use out of or over the estate of another. Huyck v. Andrews, 113 N. Y. 81, 20 N. E. 581, 3 L. R. A. 789, 10 Am. St. Rep. 432.

In the civil law, the land against which the privilege exists is called the servient tenement; its proprietor, the servient owner; he in whose favor it exists, the dominant owner; his land, the dominant tenement And, as these rights are not personal and do not change with the persons who may own the respective estates, it is very common to personify the estates as themselves owning or enjoying the easements; Wolfe v. Frost, 4 Sandf Ch (N. Y.) 72, Hills v. Miller, 3 Paige, Ch. (N. Y.) 254, 24 Am Dec 218; Boston Water Power Co. v. R. Co, 16 Pick. (Mass) 522.

There are said to be in England five different classes of rights which one man may have over the land of another: Easements, profits à prendre, personal licenses, customary rights, and natural rights. Odgers C. L. 561. This classification is apparently observed in the English cases. Of these subdivisions, profits à prendre and licenses are treated under these titles. "Customary rights" are referred to below. They are more common in England than here. "Natural rights" do not depend upon grant or prescription, but are really incident to property in land. Such are the right of lateral

support to land by adjacent land, the right to the flow of water, and the right to air free from noxious smells. These rights, of course, exist without grant. See LATERAL SUPPORT; RIPARIAN PROPRIETORS; NUISANCE.

These distinctions have not always been fully observed in the cases here. The distinction between an ordinary easement and an easement in gross is that in the former there is and in the latter there is not a dominant tenement; Jones, Easements 25. Lord Cairns, L. J., said in Rangeley v. Midland R. Co., L. R. 3 Ch. 311, that there is no such thing in the civil law or in England as an easement in gross—an easement not connected with a dominant tenement. Mr. Jones (Easements 25) states that he uses the term "easement in gross" because it is in general use here by legal writers, judges and the profession, and it is useless to attempt to establish a refinement of definition intended to do away with it.

On the other hand, Sharswood, C. J., said: "That there may be the grant of an easement in gross personal to the grantee is not to be denied." Tinicum Fishing Co. v. Carter, 61 Pa. 21, 38, 100 Am. Dec. 597. To the same effect are 3 Kent 420; Washb. Easem. 8; Fisher v. Fair, 34 S. C. 203, 13 S. E. 470, 14 L. R. A. 333, with note citing other cases, in which the statement that "there is no such thing known to the law" as an easement in gross is characterized as a "refinement attempted to be established" by Gale (Easem. 5) and Goddard (Easem. 6).

The essential qualities of easements, properly so called, may be thus distinguished: 1. Easements are incorporeal. 2. They are imposed upon corporeal property. 3. They confer no right to a participation in the profits arising from it. 4. They must be imposed for the benefit of corporeal or incorporeal hereditaments, and are usually imposed for the benefit of corporeal. 5. There must be two distinct tenements—the dominant, to which the right belongs; and the servient, upon which the obligation is imposed. 6. By the civil law it is also required that the cause must be perpetual. Gale, Easem. (8th ed.) 8.

Easements in gross are personal, are not assignable, and will not pass by a deed of conveyance; Washb. Easem. 12; Tinicum Fishing Co. v. Carter, 61 Pa. 38, 100 Am. Dec. 597; Kuecken v. Voltz, 110 Ill 268. See 14 L. R. A. 333, n. They are not inheritable; Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354; Hall v. Armstrong, 53 Conn. 554, 4 Atl. 113; but in Hankey v. Clark, 110 Mass. 262; Poull v. Mockley, 33 Wis. 482; Lonsdale Co. v. Moles, 21 Law Rep. 658, they are held to be assignable and inheritable. A way is never presumed to be in gross when it can be construed to be appurtenant to the land; French v. Williams, 82 Va. 462, 4 S. E. 591; Cadwalader v. Bailey, 17 R. I. 495, 23 Atl. 20, 14 L. R. A. 300.

Easements are also classified as continuous and discontinuous, the distinction between them being thus stated: "Continuous are those of which the enjoyment is, or may be, continual, without the necessity of any actual interference by man. Discontinuous are those, the enjoyment of which can be had only by the interference of man, as rights of way, or a right to draw water." Lampman v. Milks, 21 N. Y. 505. Of the former the right to light and air would be an example, of the latter, the right to use a pump; Chase's Bla. Com. 232, note, which see as to Easements generally.

There must be two tenements owned by distinct proprietors: the dominant, to which the privilege is attached; the servient, upon which it is imposed. Tudor, Lead. Cas. 108; Grant v. Chase, 17 Mass. 443, 9 Am. Dec. 161; Meek v. Breckenridge, 29 Ohio St. 642.

Easements confer no right to any profits arising from the servient tenement; Waters v. Lilley, 4 Pick. (Mass.) 145, 16 Am. Dec. 333; 30 E. L. & Eq. 189; Pierce v. Keator, 70 N. Y. 419, 26 Am. Rep. 612. They are incorporeal. Like other incorporeal hereditaments they have been held not to pass without a grant; 3 Kent 434; Orleans Nav. Co. v. New Orleans, 2 Mart. La. (O. S.) 214. They are specifically distinguished from other incorporeal hereditaments by the absence of all right to participate in the profits of the soil charged with them; Gale, Easem. (8th ed.) 10.

By the common law, they may be temporary; by the civil law, the cause must be perpetual. They impose no duty on the servient owner, except not to change his tenement to the prejudice or destruction of the privilege; Gale, Easem. (8th ed.) 9; Washb. Easem. 5.

Easements are as various as the exigencies of domestic convenience or the purposes to which buildings and lands may be applied. The following attach to land as incidents or appurtenances, viz.: The right—

Of pasture on other land; of fishing in other waters; of taking game on other land; of way over other land; of receiving air, light, or heat from or over other land; of receiving or discharging water over, or having support to buildings from, other land; 3 E., B. & E. 655; of a right to take ice on a pond; Hong v. Place, 93 Mich. 450, 53 N. W. 617, 18 L. R. A. 39; of going on other land to clear a mill-stream, or repair its banks, or draw water from a spring there, or to do some other act not involving ownership; of carrying on an offensive trade; 2 Bingh. N. C. 134; Dana v. Valentine, 5 Metc. (Mass.) 8; of burying in a church, or a particular vault; 8 H. L. Cas. 362; 11 Q. B. 666; Long v. Weller's Ex'or., 29 Gratt. (Va.) 347; Canny v. Andrews, 123 Mass. 155; Central Wharf & Wet Dock Corp. v. India Wharf, 123 Mass. 562; Onthank v. R. Co., 71 N. Y. 194, 27 Am. Rep. 35. See CEMETERY.

The right to maintain a building or other permanent structure upon the land of another cannot be acquired by custom; Attor-

ney General v. Tarr, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87.

Open visible ditches; Thayer v. Payne, 2 Cush. (Mass.) 327; McElroy v. McSeny, 71 Vt. 396, 45 Atl. 898; Stuyvesant v. Early, 58 App. Div. 242, 68 N. Y. Supp. 752; Sanderlin v. Baxter, 76 Va. 299, 44 Am. Rep. 165; Quinlan v. Noble, 75 Cal. 250, 17 Pac. 69; a furnace flue; Ingals v. Plamondon, 75 Ill. 118; an alley way; Cihak v. Klekr, 117 Ill. 643, 7 N. E. 111; Burns v. Gallagher, 62 Md. 462; a water ditch and water rights; Cave v. Crafts, 53 Cal. 135; rights of way; Ellis v. Bassett, 128 Ind. 118, 27 N. E. 344, 25 Am. St. Rep. 421; McTavish v. Carroll, 7 Md. 352, 61 Am. Dec. 353; stairways in a building; Galloway v. Bonesteel, 65 Wis. 79, 26 N. W. 262, 56 Am. Rep. 616; Geible v. Smith, 146 Pa. 276, 23 Atl. 437, 28 Am. St. Rep. 796; a flow of water forced from the vendor's premises through pipes to the premises of the vendee; Toothe v Bryce, 50 N. J. Eq. 589, 25 Atl 182; a portion of a building projecting upon the land retained by the vendor; N. Y. C. & H. R. R. Co. v. Needham, 29 Misc. 435, 61 N. Y. Supp. 992; have all been held the subject of implied easements. Rights to a several fishery in the adjoining sea enjoyed by grantees of land and their predecessors in title from time immemorial were held to pass under a royal patent, though the *habendum* clause recited that they were to have and to hold "the above granted land," which standing alone might not include a fishing right; Damon v. Hawaii, 194 U. S. 158, 24 Sup. Ct. 617, 48 L. Ed. 916, reversing 14 Hawaiian Rep. 465. The fact that the particular method of exercising this alleged right, while prevailing in Hawaii, differed from those known to the common law, was held to make no difference; Carter v. Hawaii, 200 U. S. 255, 26 Sup. Ct. 248, 50 L. Ed. 470.

A covenant to erect and maintain a fence on a railroad, contained in a grant of a right of way, was held to run with the land, because the covenant gave to the grantee an interest in the nature of an easement in the adjoining land of the grantor; Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335; cited in Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843. An easement may be created by way of exception or reservation; Claflin v. R. Co., 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638; and rights in the nature of an easement may be created by statute; Attorney General v. Williams, 174 Mass. 476, 55 N. E. 77, where an act restricted the height of buildings bordering on a public square under the power of eminent domain and provided compensation to the abutting owners. The court said that the act added to the public park rights in light and air and view over adjacent land which were "in the nature of an easement created by the statute and annexed to the park." It was further said "it would be hard to say that this statute might not have been passed in the exercise of the police power," but that, in providing compensation, it conformed to an exercise of the right of eminent domain. A similar right secured by statute is that of lateral support.

An easement of private way over land must have a particular, definite line; Crosier v. Brown, 66 W. Va. 273, 66 S. E. 326, 25 L. R. A. (N. S.) 174. To establish an easement of a private way by prescription, the use must be continuous and uninterrupted under a *bona fide* claim of right adverse to the owner of the land and with his knowledge and silence. If the use is by his permission or if he denies the right, the title does not accrue; *id.;* verbal protests against the use prevent its accruing; Reid v. Garnett, 101 Va. 47, 43 S. E. 182; but it is held that mere verbal denial by the owner does not tend to prove that the enjoyment of the way was interrupted or had been under the owner's license; Okeson v. Patterson, 29 Pa. 22. See 25 L. R. A. (N. S.) 174, note.

Mere knowledge by a railway company that the public and an adjoining owner are passing over its right of way will not create a right of way, especially when the company erects signs notifying the public that it is railroad property; Andries v. Ry. Co., 105 Mich. 557, 63 N. W. 526.

Forbidding an adjoining owner from using a way over his land and beginning to put up a fence will not in law prevent such adjoining owner from acquiring a right of way, when the latter with threats prevented the erection of a fence and the owner took no proceedings to establish his rights; Connor v. Sullivan, 40 Conn. 26, 16 Am. Rep. 10.

Some of these are affirmative or positive, —*i. e.*, authorizing the commission of acts on the lands of another actually injurious to it; as, a right of way,—or negative, being only consequentially injurious; as, forbidding the owner from building to the obstruction of light to the dominant tenement. Tudor, Lead. Cas. 107; 2 Washb. R. P. 26.

All easements must originate in a grant or agreement, express or implied, of the owner of the servient tenement; Huyck v. Andrews, 113 N. Y. 81, 20 N. E. 581, 3 L. R. A. 789, 10 Am. St. Rep. 432. The evidence of their existence, by the common law, may be by proof of the agreement itself, or by prescription, requiring an uninterrupted enjoyment immemorially, or for upwards of twenty years, to the extent of the easement claimed, from which a grant is implied. A negative easement does not admit of possession; and, by the civil law, it cannot be acquired by prescription, and can only be proved by grant. Use, therefore, is not essential to its existence; Gale, Easem. 23, 81, 128; 2 Bla. Com. 263. An easement can only be created by a conveyance under seal or by long user, from which such conveyance is presumed; Cagle v. Parker, 97 N. C. 271, 2

S. E. 76; see Hammond v. Schiff, 100 N. C. 161, 6 S. E. 753; or by necessity; Butterworth v. Crawford, 46 N. Y. 349, 7 Am. Rep. 352; Cihak v. Klekr, 117 Ill. 643, 7 N. E. 111; and the burden is on one claiming that it was by virtue of a license, to prove that fact; Colburn v. Marsh, 68 Hun 269, 22 N. Y. Supp. 990. As to the creation of easements by deed, see 8 L. R. A. 617, note; and by implication, see O'Brien v. R. Co., 74 Md. 363, 22 Atl. 141, 13 L. R. A. 126.

Where the owner of a tract of land fronting upon a public highway sells a portion thereof which is entirely surrounded by the land of the grantor and of strangers with no outlet, except over the lands of the grantor, the grantee is entitled to a right of way over the grantor's land, unless the situation of the land or the object for which it is used and conveyed shows that no grant of such right was intended; Mead v. Anderson, 40 Kan. 203, 19 Pac. 708 See Kinney v. Hooker, 65 Vt. 333, 26 Atl. 690, 36 Am. St. Rep. 864.

In case of a division of an estate consisting of two or more heritages, the question whether an easement or convenience, which may have been used in favor of one in or over the other by the common owner of both, shall become attached to the one or charged upon the other in the hands of separate owners, by a grant of one or both of those parts, or upon a partition thereof, must depend, where there are no words limiting or defining what is intended to be embraced in the deed or partition, upon whether the easement is necessary for the reasonable enjoyment of the part of the heritage claimed as an appurtenance.

The scope of the doctrine of implication of an easement over one portion of a grantor's lands in favor of the other portion, either granted or reserved upon the sale of either portion, is said to be in much confusion in the United States. The rule in England, as quoted and adopted in perhaps the most cited of the earlier American cases, Lampman v. Milks, 21 N. Y. 505, is, in effect, that where the owner of two tenements sells one of them, the purchaser takes the portion sold, with all the benefits and burdens which appear at the time of the sale to belong to it, as between it and the property which the vendor retains. . . . The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts. The rule has been applied in Dixon v. Schermeier, 110 Cal. 582, 42 Pac. 1091; Fremont, E. & M. V. R. Co. v. Gayton, 67 Neb. 263, 93 N. W. 163; Janes v. Jenkins, 34 Md. 1, 6 Am. Rep. 300; Cihak v. Klekr, 117 Ill. 643, 7 N. E. 111; Dunklee v. R. Co., 24 N. H. 489; Henry v. Koch, 80 Ky. 391, 44 Am. Rep. 484; Cannon v. Boyd, 73 Pa. 179; John Hancock Mut. Life Ins. Co. v. Patterson, 103 Ind. 582, 2 N. E. 188, 53 Am. Rep. 550; Lammott v. Ewers, 106 Ind. 310, 6 N. E. 636, 55 Am. Rep. 746. In the states where the rule has been adopted in terms, its application has been quite limited, and in some of them an early tendency to liberality has been followed by a later strictness of limitation; Griffiths v. Morrison, 106 N. Y. 165, 12 N. E. 580; Whyte v. Builders' League of New York, 164 N. Y. 429, 58 N. E. 517; Keats v. Hugo, 115 Mass 204, 15 Am. Rep. 80.

It is said that this rule has its reason in intended permanence of real estate arrangements supposed to be in the minds of grantor and grantee. But, whatever may be true in older communities, it would be difficult to find justification for any such presumption in a new and developing country, and especially in cities. There, instead of permanence, change is to be expected, and there can be but a slight reason to suppose that, upon a sale of that part of an entire tract on which stands a house, it is intended permanently to subject other parts of the tract to such obsolescent uses, although the owner of the whole had so devoted them; Miller v. Hoeschler, 126 Wis. 263, 105 N. W. 790, 8 L. R. A. (N. S.) 327, where it is said: "The English rule, above quoted, if applied to the full extent of its words, would be against public policy." In Dillman v. Hoffman, 38 Wis. 359, doubt is suggested whether any enlargement of the doctrine of implied easements, beyond rights of way strictly necessary to the use of the dominant estate, is at all wise. Largely on the authority of that case, necessary rights of way have been implied in several cases; Jarstadt v. Smith, 51 Wis. 96, 8 N W. 29; Galloway v. Bonesteel, 65 Wis. 79, 26 N. W. 262, 56 Am. Rep 616; Johnson v. Borson, 77 Wis. 593, 46 N. W 815, 20 Am St. Rep 146; Benedict v. Barling, 79 Wis. 551, 48 N. W. 670; but no other easement than a right of way has been held implied in that state, Miller v. Hoeschler, 126 Wis. 263, 105 N. W 790, 8 L. R. A. (N. S.) 327, where the conclusion is reached that even if, in some extreme cases, there must be any easement other than right of way implied from necessity, that necessity must be so clear and absolute that, without the easement, the grantee cannot, in any reasonable sense, be said to have acquired that which is expressly granted.

In New York the rule of strict necessity is applied to reservations, but not to grants; Paine v. Chandler, 134 N. Y. 385, 32 N. E. 18, 19 L. R. A. 99. The reservation of an easement will not be implied except in cases where it was apparent, continuous, and strictly necessary; Wells v. Garbutt, 132 N. Y. 430, 30 N. E. 978; Whyte v. Builders' League of New York, 164 N. Y. 429, 58 N. E. 517. The former case was approved and followed in Walker v. Clifford, 128 Ala. 67, 29 South. 588, 86 Am. St. Rep. 74. In Stuyve-

sant v. Early, 58 App. Div. 242, 68 N. Y. Supp. 752, a distinction between an implied grant and an implied reservation was recognized. It was there held that a right to drain through the grantor's premises passed by implication, on the ground that the easement was visible and apparent. The court said that, if the owner had conveyed the servient tenement first, no easement would have been implied.

In New Jersey, there is no distinction between an implied grant and an implied reservation; Greer v. Van Meter, 54 N. J. Eq. 270, 33 Atl. 794; so in Seibert v. Levan, 8 Pa. 383, 49 Am. Dec. 525, the distinction between an implied grant and an implied reservation was denied, following the rule in Gale & Whately, Easem. 52: "It is true that, strictly speaking, a man cannot subject one part of his property to another by an easement, for no man can have an easement in his own property; but he obtains the same object by the exercise of another right, the general right of property; but he has, nevertheless, thereby altered the quality of the two parts of his heritage, and if, after the annexation of peculiar qualities, he alien one part of his heritage, it seems but reasonable, if the alterations thus made are palpable and manifest, that a purchaser should take the land, burdened or benefited, as the case may be, by the qualities which the previous owner had undoubtedly the right to attach to it."

In Burns v. Gallagher, 62 Md. 464, the test was said to be that the doctrine of reservation of an easement would be invoked when the necessity is so strict that it would be unreasonable to suppose the parties intended the easement in question should not be used Where the owner of a lot, bounded on one side by a highway and on the other by the ocean, sold that half of the estate which adjoined the highway, without expressly reserving a way across it from the highway to the part he retained, and no access could be had to the unsold portion except by the ocean or by crossing the land of other owners, it was held, following the English rule, that the ocean was a public highway, and, as all communication was not shown to be cut off, the grantor must in future rely on such access as the sea afforded. Hildreth v. Googins, 91 Me 227, 39 Atl. 550.

Where it is not necessary, it requires descriptive words of grant or reservation in the deed to create it; Washb. Easem. 95; 36 Am. Rep. 415. The common-law rule requiring the word "heirs" in the creation of an estate of inheritance by deed is inapplicable in creating a permanent easement; Chappell v. R. Co., 62 Conn. 195, 24 Atl. 997, 17 L. R. A. 420; Lathrop v. Elsner, 93 Mich. 599, 53 N. W. 791. See Claflin v. R. Co., 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638. The use of the word appurtenances is not sufficient to create an easement where none existed before; Bonelli v. Blakemore, 66 Miss. 136, 5 South. 228, 14 Am. St. Rep. 550.

An easement in land held in common cannot be acquired by one of the tenants in common in favor of land held by him in severalty, as a right of flowage over common property by a tenant owning a dam; Great Falls Co. v. Worster, 15 N. H. 412; or a right of way over the common land by the tenant to a lot in the rear owned by him; Boyd v. Hand, 65 Ga. 468.

There are many rights which in their mode of enjoyment partake of the character of easements, such as a custom for the inhabitants of a village to dance upon a particular close at all times of the year; 1 Lev. 176; for the inhabitants of a parish to play at all kinds of lawful games in a close at all seasonable times of the year; 2 H. Bl. 393; for the freemen and citizens of a town on a particular day of the year to enter upon a close and have horse races thereon; 1 H. & C. 729; that every inhabitant of a town shall have a way over certain land either to church or to market; 6 Co. Rep. 59; a right to use a strip of land as a promenade; [1900] 1 Ir. 302; a custom for victuallers to erect booths on the waste of a manor at the time of fairs; 6 A. & E. 745; for the inhabitants of a township to go on a close and take water from a spring; 4 E. & B. 702; to move vessels in a navigable tidal estuary of the Thames; [1897] 2 Q. B. 318; to deposit oysters dredged from oyster fisheries upon the foreshore in another part of the fishery; [1901] 2 K. B. 870; for all the fishermen of a parish to dry their nets on a particular close; [1904] 2 Ch. 534; [1905] 2 Ch. 538; for the inhabitants of a burgh (in Scotland) to use a strip of ground for recreation and for drying clothes; [1904] A. C. 73. As, however, the existence and validity of these rights generally depend on some local custom excluding the operation of the general rules of law *(consuetudo tollit communem legem)* and they are sometimes entirely independent of any express or implied agreement between the parties, they generally stand upon a different footing, and are not in all respects governed by the same principles as those which determine the boundaries of private easements. When claims of this kind are unreasonable, they are disallowed even in cases where they might possibly have formed the subject of a valid grant. When it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence, and not from any right conferred in ancient times on the party setting up the custom; 9 H. L. Cas. 692.

The general public cannot acquire by user a right to visit a monument or other object

of interest on private property (Stonehenge); [1905] 2 Ch. Div. 188. See JUS SPATIANDI.

Easements are extinguished: by release; by merger, when the two tenements in respect of which they exist are united under the same title and to the same person; Parsons v. Johnson, 68 N. Y. 62, 23 Am. Rep. 149; by necessity, or abandonment, as by a license to the servient owner to do some act inconsistent with its existence; Cartwright v. Maplesden, 53 N. Y. 622; by cessation of enjoyment, when acquired by prescription,—the non-user being evidence of a release where the abandonment has continued at least as long as the user from which the right arose. In some cases a shorter time will suffice; 2 Washb. R. P. 56, 82, 453. An easement acquired by grant cannot be lost by mere non-user, though it may be by non-user coupled with an intention of abandonment; Welsh v. Taylor, 134 N. Y. 450, 31 N. E. 896, 18 L. R. A. 535; Edgerton v. McMullan, 55 Kan. 90, 39 Pac. 1021; Tabbutt v. Grant, 94 Me. 371, 47 Atl. 899; Cox v. Forrest, 60 Md. 74. A presumption of a way resting in grant will not be created by the fact that it is not continuously used by the dominant owner; Bombaugh v. Miller, 82 Pa. 203; [1893] A. C. 162; Tyler v. Cooper, 47 Hun (N. Y.) 94. The destruction of an easement of a private right of way for public purposes is a taking of the property of the dominant owner for which he must be compensated; U. S. v. Welch, 217 U. S. 333, 30 Sup. Ct. 527, 54 L. Ed. 787, 28 L. R. A. (N. S.) 385, 19 Ann. Cas. 680.

Prescription does not run against the exercise of a servitude in favor of one who resisted and prevented its exercise; Sarpy v. Hymel, 40 La. Ann. 425, 4 South. 439. Mere non-user must be accompanied by adverse use of the servient estate; Welsh v. Taylor, 134 N. Y. 450, 31 N. E. 896, 18 L. R. A. 535, with note on the effect of non-user generally. One cannot acquire a prescriptive right over his own lands or the lands of another which he occupies as tenant; Vossen v. Dautel, 116 Mo. 379, 22 S. W. 734.

An easement in favor of land held in common will be extinguished by a partition, if nothing is said about it; Livingston v. Ketcham, 1 Barb. (N. Y.) 592. As to the loss or extinguishment of easements, see 1 L. R. A. 214, note.

The remedy at common law for interference with a right of easement is an action of trespass, or where it is for consequential damages and for an act not done on plaintiff's own land, of case; Brenton v. Davis, 8 Blackf. (Ind.) 317, 44 Am. Dec. 769; Ganley v. Looney, 14 Allen (Mass.) 40. Where the act complained of is done in one county, but the injurious consequences thereof are felt in another, the action may be brought in the latter; Thompson v. Crocker, 9 Pick. (Mass.) 59; Worster v. Lake Co., 25 N. H. 525. Redress may also, as a general proposition, be obtained through a court of equity, for the infringement of an easement and an injunction will be granted to prevent the same; Washb. Easem. 747.

As to the distinction between an easement and a license, see LICENSE.

See Washburn, Easements; ABANDONMENT; AIR; ANCIENT LIGHTS; BACKWATER; COMMON; DAM; HIGHWAYS; LATERAL SUPPORT; PARTY-WALL; PROFIT À PRENDRE; SERVITUDE; STREET; SUPPORT; WAY.

EASTER TERM. **In English Law.** Formerly one of the four movable terms of the courts, but afterwards a fixed term, beginning on the 15th of April and ending on the 8th of May in every year, though sometimes prolonged so late as the 13th of May, under stat. 11 Geo. IV. and 1 Will. IV. c. 70. See TERM.

EASTERLY. When this word is used alone it will be construed to mean due east; but this is a rule of necessity, growing out of the indefiniteness of the term and has no application where other words are used for the purpose of qualifying its meaning. Where such is the case it means precisely what the qualifying word makes it mean; Fratt v. Woodward, 32 Cal. 227, 91 Am. Dec. 573.

EAT INDE SINE DIE. Words used on an acquittal, or when a prisoner is to be discharged, *that he may go without day;* that is that he be dismissed. Dane, Abr. Index.

EAVES-DROPPERS. **In Criminal Law.** Such persons as wait under walls or windows or the eaves of a house, to listen to discourses and thereupon to frame mischievous tales.

The common-law punishment for this offence is fine and finding sureties for good behavior; 4 Bla. Com. 167; State v. Williams, 2 Ov. (Tenn.) 108. See Com. v. Lovett, 4 Clark (Pa.) 5; 1 Bish. Cr. L. § 112; State v. Pennington, 3 Head (Tenn.) 299, 75 Am. Dec. 771; 8 Haz. Pa. Reg. 305.

EBB AND FLOW. An expression used formerly in this country to denote the limits of admiralty jurisdiction. As to jurisdiction as founded on ebb and flow of tide, see ADMIRALTY.

EBEREMURDER. See ABEREMURDER.

ECCHYMOSIS. **In Medical Jurisprudence.** Localized discoloration in and under the skin. An extravasation of blood by rupture of capillary vessels, and hence it follows contusion; but it may exist, as in cases of scurvy, asphyxiation and other morbid conditions, without the latter. Ryan Med. Jur. 172. Ecchymoses produced by blows upon a body but a few hours dead cannot be distinguished from those produced during life. 1 Witth. & Beck. Med. Jur. 485; 2 BECK, Med. Jur. 22.

ECCLESIA (Lat.). An assembly. A Christian assembly; a church. A place of religious worship. Spelman, Gloss.

In the civil law this word retains its classical meaning of an assembly of whatever character. Du Cange; Calvinus, Lex.; Vicat. Voc. Jur; Acts xix 39. Ordinarily in the New Testament the word denotes a Christian assembly, and is rendered into English by the word *church*. It occurs twice in the gospels, Matt. xvi 18, xviii. 17, but frequently in the other parts of the New Testament, beginning with Acts ii. 47. *Ecclesia* there never denotes the building, however, as its English equivalent *church* does. In the law, generally, the word is used to denote a place of religious worship, and sometimes a parsonage Spelman, Gloss. See CHURCH.

ECCLESIASTIC. A clergyman; one destined to the divine ministry: as, a bishop, a priest, a deacon.

ECCLESIASTICAL COMMISSIONERS. In English Law. A body appointed to consider the state of the revenues, and the more equal distribution of episcopal duties, in the several dioceses. They were first appointed as royal commissioners in 1835; were incorporated in 1836, and now comprise all the bishops of England and Wales and the Lord Chief Justice, and other persons of distinction. 2 Steph Com. 708.

ECCLESIASTICAL CORPORATIONS. Such corporations as are composed of persons who take a lively interest in the advancement of religion, and who are associated and incorporated for that purpose. Ang. & A. Corp. § 36.

Corporations whose members are spiritual persons are distinguished from *lay* corporations; 1 Bla. Com. 470.

They are generally called *religious corporations* in the United States. 2 Kent 274; Ang. & A. Corp. § 37.

In the earlier times, the church became a large property owner. Before the device of a corporation sole was known to the law, there was the greatest uncertainty as to who the owner of church property really was. Property given to the church was given to the patron saint—the gift was in the first place to God and the saint, and only in the second place to the ecclesiastic in charge of it. But it was managed by a group of persons and they were perpetual because their numbers were always being renewed Gradually the theory that they were *personæ fictæ* was evolved by the Canonists They became persons created by law—distinct from their members, and perpetual The change was gradually accepted by the common-law lawyers and was extended to other groups which had nothing to do with the church. The growing definiteness of the conception of the corporation had reacted upon those ecclesiastical corporations which had originally introduced the idea of *persona ficta* The corporation was a person. Gifts were made to a parson for the benefit of the church and no longer to a saint. The parson became a corporation sole and gradually that theory obtained recognition at the common law; 3 Holdsw. Hist. E. L 367, see 16 L. Q R. 336, where Prof. Maitland suggests that "corporation sole" was first applied to a parson by Brooke, author of the Abridgment, who died in 1558. See, as to corporations sole, CORPORATION.

See ASSOCIATION; RELIGIOUS SOCIETIES; CHURCH.

ECCLESIASTICAL COURTS (called, also, *Courts Christian*). The generic name for certain courts in England having cognizance mainly of spiritual matters.

In 1857 they were deprived of their jurisdiction in probate and divorce cases and they now deal only with clergymen of the Church of England in their professional character. Even over clergymen their power on questions of heresy is very limited. It is not an ecclesiastical offense to deny that the whole of the Scriptures are inspired, or to reject parts thereof as inherently incredible, etc., so long as they do not contradict the Articles or Formularies of the Church of England. Odgers, Com. L. 206.

See COURTS OF ENGLAND; CHURCH OF ENGLAND; COURT OF ARCHES; COURT OF CONVOCATION; COURT OF FACULTIES; COURT OF PECULIARS; CONSISTORY COURTS; ARCHIDEACON'S COURT; PREROGATIVE COURT; PRIVY COUNCIL.

ECCLESIASTICAL LAW. The law of the church.

The existence in England of a separate order of ecclesiastical courts, and a separate system of law by them administered, may be traced back to the time of William the Conqueror, who separated the civil and the ecclesiastical jurisdictions, and forbade tribunals of either class from assuming cognizance of cases pertaining to the other. The elements of the English ecclesiastical law are the canon law, the civil law, the common law of England, and the statutes of the realm The jurisdiction of the ecclesiastical tribunals extended to matters concerning the order of clergy and their discipline, and also to such affairs of the laity as "concern the health of the soul;" and under this latter theory it grasped also cases of marriage and divorce, and testamentary causes But in more recent times, 1830-1858, these latter subjects have been taken from these courts, and they are now substantially confined to administering the judicial authority and discipline incident to a national ecclesiastical establishment See CANON LAW; ECCLESIASTICAL COURTS; ASSOCIATION; CHURCH, RELIGIOUS SOCIETY.

ECHOUEMENT. In French Marine Law. Stranding.

ECLAMPSIA PARTURIENTIUM. In Medical Jurisprudence. Puerperal convulsions. Convulsive movements, loss of consciousness, and coma occurring during pregnancy, parturition or the puerperium. The attack closely resembles the convulsions of epilepsy. The disease is often fatal, causing the death of the patient in about one-fourth of all the cases, and fœtal death in about one-half. Mental defects may result from eclampsia, and are occasionally permanent. American Text-book of Obstetrics.

The word eclampsia is of Greek origin *Significat splendorem, fulgorem, effulgentiam, et emicationem quales ex oculis aliquando prodeunt. Metaphorice sumitur de emicatione flammæ vitalis in pubertate et ætatis vigore* Castelli, Lex Medic.

There can be but little doubt that many of the tragical cases of infanticide proceed from this cause. The criminal judge and lawyer cannot inquire with too much care into the symptoms of this disease, in order to discover the guilt of the mother, where it exists, and to ascertain her innocence, where it does not. See two well-reported cases of this kind in the Boston Medical Journal, vol. 27, no. 10, p 161.

EDICT (Lat. *edictum*). A law ordained by the sovereign, by which he forbids or

commands something: it extends either to the whole country or only to some particular provinces.

Edicts are somewhat similar to public proclamations. Their difference consists in this,—that the former have authority and form of law in themselves, whereas the latter are, at most, declarations of a law before enacted.

Among the Romans this word sometimes signified a citation to appear before a judge. The edicts of the emperors, also called *constitutiones principum*, were new laws which they made of their own motion, either to decide cases which they had foreseen, or to abolish or change some ancient laws. They were different from rescripts or decrees, which were answers given in deciding questions brought before them. These edicts contributed to the formation of the Georgian, Hermogenian, Theodosian, and Justinian codes. See Dig. 1. 4. 1. 1; Inst. 1. 2. 7; Code 1. 1, Nov. 139.

A special edict was a judgment in a case; a general edict was in effect a statute. The prætor, at the commencement of his year of office, published a body of rules as to the remedies he would grant. In the reign of Hadrian (A. D. 131) a codified edict was published, made by Salvius Julianus, and called the *Edictum Salvianum* or *Perpetuum*.

EDICTS OF JUSTINIAN. Thirteen constitutions or laws of this prince, found in most editions of the *Corpus Juris Civilis* after the Novels. Being confined to matters of police in the provinces of the empire, they are of little use.

EDICTUM PERPETUUM. See EDICT.

EDITION. The term applies to every quantity of books put forth to the bookselling trade at one time by the publisher; 4 K. & J. 656. A new edition is published whenever, having in his warehouse a certain number of copies, the publisher issues a fresh batch of them to the public. This, according to the practice of the trade is done, as is well known, periodically, and if, after printing 20,000 copies, a publisher should think it expedient for the purpose of keeping up the price of the work, to issue them in batches of a thousand at a time, keeping the rest under lock and key, each successive issue would be a new edition in every sense of the word; 4 K. & J. 667; Short, Literature.

EDITOR. The term is held to include not only the person who writes or selects the articles for publication, but he who publishes a paper and puts it in circulation. Pennoyer v. Neff, 95 U. S. 721, 24 L. Ed. 565; Bunce v. Reed, 16 Barb. (N. Y.) 350.

EDITUS. In Old English Law. Put forth or promulgated when speaking of the passage of a statute; and brought forth or born, when speaking of the birth of a child. Black, L. Dict.

EDMUNDS ACT. An act of congress of March 22, 1882, punishing polygamy, which see.

EDUCATE. Includes proper moral, as well as intellectual and physical, instruction. Ruohs v. Backer, 6 Heisk. (Tenn.) 395, 19 Am. Rep. 598. See Williams v. MacDougall, 39 Cal. 80; Merrill v. Emery, 10 Pick. (Mass.) 507; Peck v. Claflin, 105 Mass. 420; De Camp v. Dobbins, 29 N. J. Eq. 36.

EDUCATION. It may be directed particularly to either the mental, moral, or physical powers and faculties, but in its broadest and best sense it refers to them all. Mt. Hermon Boys' School v. Gill, 145 Mass. 146, 13 N. E. 354.

Legal Education. This subject has been for many years receiving earnest and extended attention in England and the United States. It has been elaborately treated at various times by committees of the American Bar Association, in which a report was made in 1879 by Carleton Hunt, chairman, and subsequent reports in 1881, 1890, 1891, and 1892. See the annual reports of those years. In 1893 the association formed a section of legal education, which has held yearly conferences for the reading of papers and discussion on the subject, which has been ably and elaborately treated. Its work in 1894 was published by the United States in the reports of the Commissioner of Education.

In 1901, an Association of American Law Schools was organized in connection with that Association, which has also held annual meetings.

The subject has also been much discussed by various State Bar Associations, as will appear by reference to their published reports.

An interesting address by Lord Russell, Lord Chief Justice of England, was delivered before the Benchers of Lincoln's Inn, October, 1895. See also a paper by Austen G. Fox on the work of the New York State Board of Examiners (Am. Bar Ass'n Report, 1896, p. 543, and 10 Harv. L. Rev. 199). The following is a partial list of books and papers on the subject:

Legal Education, by Gerald B. Finch, London, 1885; 1 Jurid. Soc. Papers 385; Hoffman's Course of Legal Studies; Warren's Introd. to Law Studies; Jones, Legal Educ. in France; Parliamentary Reports on Inns of Court, 1855, and on Legal Educ., 1846; Sir R. Palmer's Address before the Legal Educ. Association, 1871; Reports of Incorporated Law Society, 1893, 1894, 1895, 1896; Bar Examinations in Canada, 18 Legal News (Can.) 275; 3 Amer. Lawy. 55, 283, 288; 33 Am. Law Reg. 689; N. Y. State Bar Association Report, 1894; 7 Harv. Law Rev. 203; Sir F. Pollock's Advice to Students, 95 Law Times 552; Existing Questions, by Austin Abbott, 26 Chi. Leg. News 72; Methods of Study, by J. N. Field, 48 Alb. L. J. 264; 34 *id.* 84; 24 Am. L. Rev. 211, 1027; Address by Lawrence Maxwell, Jr., 30 Weekly L. Bull. 41; 48 Alb. L. J. 81-88; 47 *id.* 496; 28 Can. L. J. 605; 9 Scot. L. Rev. 122; 9 Harv. L. Rev. 169; Case System, 27 Am.

L. Reg. 416; 23 Am. L. Rev. 1; 25 *id.* 234; 22 *id.* 756; In Germany, 8 Am. L. Rec. 200; In Japan, 5 G. B. 17, 18; Inns of Court, 1 *id.* 68. See numerous other references in Jones's Index of Legal Periodicals.

EFFECT. The operation of a law, of an agreement, or an act, is called its effect. Maize v. State, 4 Ind. 342.

By the laws of the United States, a patent cannot be granted for an effect only, but it may be for a new mode or application of machinery to produce effects; Whittemore v. Cutter, 1 Gall. 478, Fed. Cas. No. 17,601. See Gray v. James, 1 Pet. C. C. 394, Fed. Cas. No. 5,718.

EFFECTS. Property, or worldly substance. As thus used, it denotes property in a more extensive sense than goods. 2 Bla. Com. 284. See The Alpena, 7 Fed. 361. Indeed the word may be used to embrace every kind of property, real and personal, including things in action; as, a ship at sea; Welsh v. Parish, 1 Hill (S. C.) 155; a bond; Banning v. Sibley, 3 Minn. 389 (Gil. 282); 16 East 222; shares of capital stock; Union Nat. Bank v. Byram, 131 Ill. 92, 22 N. E. 842.

In a will, "effects" may carry the whole personal estate; 5 Madd. 72; 15 Ves. 507; but not real estate; Andrews v. Applegate, 223 Ill. 535, 79 N. E. 176, 12 L. R. A. (N. S.) 661, 7 Ann. Cas 126, Appeal of Price, 169 Pa. 294, 32 Atl. 455; unless the word "real" be added; 15 M. & W. 450; Foxall v. McKenney, 3 Cranch C. C. 206, Fed. Cas. No. 5,016; Schouler, Wills § 509. "Effects either real or personal," in the residuary clause of a will, have been held to embrace real estate; 22 L. J. Ch N. S. 236; Page v. Foust, 89 N. C. 447. When preceded or followed in a will by words of narrower import, if the bequest is not residuary, it will be confined to species of property of the same kind *(ejusdem generis)* with those previously described; 13 Ves. 39; Rop. Leg. 210. See 2 Sharsw. Bla. Com. 384, n. Generally speaking the word "effects" in a will, is equivalent to "property" or "worldly substance"; but the interpretation may be restricted to articles *ejusdem generis* with those previously enumerated or specified; 1 Ves Jr. 143; 15 Ves. 500.

When "the effects" passes realty, and when personalty, in a will, see 1 Jarm. Wills 585, 590; Ennis v. Smith, 14 How. (U. S.) 400, 420, 14 L. Ed. 472; 1 Cowp. 307; L. R. 8 Ch. Div. 561; WILL.

In a treaty between the United States and the Netherlands, "effects" was held to include real estate; Dowd v. Seawell, 14 N. C. 188; and in a treaty between Sweden and the United States *"fonds et biens"* (translated goods and effects) was held to embrace all kinds of property; Adams v. Akerlund, 168 Ill. 632, 48 N. E. 454. But these words in this treaty were held to apply to personalty only in Meier v. Lee, 106 Ia. 303, 76 N. W. 712.

EFFIGY. The figure or representation of a person.

To make the effigy of a person with an intent to make him the object of ridicule, is libel *(q. v.)*. Hawk. Pl. Cr. b. 1, c. 73, s. 2; 14 East 227; 2 Chitty, Cr. Law 866.

In France an execution by effigy or in effigy was adopted in the case of a criminal who has fled from justice. By the public exposure or exhibition of a picture or representation of him on a scaffold, on which his name and the decree condemning him are written, he is deemed to undergo the punishment to which he has been sentenced. Since the adoption of the Code Civil, the practice has been to affix the names, qualities, or addition, and the residence, of the condemned person, together with an extract from the sentence of condemnation, to a post set upright in the ground, instead of exhibiting a portrait of him on the scaffold. Répert. *de Villargues*, Biret, Vocab.

EFFRACTOR. One who breaks through; one who commits a burglary.

EGO. I, myself. This term is used in forming genealogical tables, to represent the person who is the object of inquiry.

EGYPT. As to courts established by the Christian Powers in Egypt, see MIXED TRIBUNALS.

EIGHT HOUR LAWS. Statutes making eight hours a day's labor for workmen, laborers, and mechanics.

Acts regulating the hours of labor for women and children are generally upheld; Com. v. Mfg. Co., 120 Mass. 383; Com. v. Beatty, 15 Pa. Super. Ct. 5; State v. Buchanan, 29 Wash. 602, 70 Pac. 52, 59 L. R. A. 342, 92 Am. St. Rep. 930; but *contra*, Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315, where the Massachusetts case was expressly disapproved. See Atkin v. Kansas, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148; LIBERTY OF CONTRACT. Such statutes have been upheld in three classes of cases: (1) Occupations injurious to the health of employés; (2) occupations in which women and children are employed; (3) occupations involving the public safety and welfare. Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. Ed. 780.

An act providing that in contracting for municipal work the contractor should bind himself not to accept more than eight hours as a day's work to be performed within nine consecutive hours or, except in case of necessity, not to employ any one for more than eight hours in twenty-four consecutive hours, was held not to violate either the federal or the New York constitution; People v. Warren, 77 Hun 120, 28 N. Y. Supp. 303; People v. Beck, 10 Misc. 77, 30 N. Y. Supp. 473, reversed on other grounds in People v. Beck, 144 N. Y. 225, 39 N. E. 80.

Other courts have held that statutes limiting a day's work for all classes of mechan-

ics, servants and laborers (except farm and domestic workers) to eight hours are invalid as interfering with the constitutional right to contract; Low v. Printing Co., 41 Neb. 127, 59 N. W. 362, 24 L. R. A. 702, 43 Am. St. Rep. 670; In re Bill Providing That Eight Hours Shall Constitute a Day's Labor, 21 Colo. 29, 39 Pac. 328; City of Cleveland v. Const. Co., 67 Ohio St. 197, 65 N. E. 885, 59 L. R. A. 775, 93 Am. St. Rep. 670; Fiske v. People, 188 Ill. 206, 58 N. E. 985, 52 L. R. A. 291; State v. McNally, 48 La. Ann. 1450, 21 South. 27, 36 L. R. A. 533. And a similar municipal ordinance was held invalid; Ex parte Kuback, 85 Cal. 274, 24 Pac. 737, 9 L. R. A. 482, 20 Am. St. Rep. 226; City of Seattle v. Smyth, 22 Wash. 327, 60 Pac. 1120, 79 Am. St. Rep. 939.

By act of congress of August 1, 1892, the employment of all laborers and mechanics employed by the United States, the District of Columbia or by any contractor upon any of the public works of the United States or the District of Columbia is limited to eight hours in any one calendar day, except in cases of extraordinary emergency. A violation of this act is made punishable by fine and imprisonment or both. The act was upheld; Ellis v. U. S., 206 U. S. 246, 27 Sup. Ct. 600, 51 L. Ed. 1047, 11 Ann. Cas. 589. A statute somewhat similar was passed June 19, 1912. A similar statute of Kansas was held not to infringe the freedom to contract, nor deny the equal protection of the laws; Atkin v. Kansas, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148, affirming State v. Atkin, 64 Kan. 174, 67 Pac. 519, 97 Am. St. Rep. 343. A statute limiting to eight hours a day's work for men in underground mines, or in the smelting, refining or reduction of metals, is constitutional; Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, affirming State v. Holden, 14 Utah 71, 46 Pac. 756, 37 L. R. A. 103; *contra*, In re Bill Providing that Eight Hours shall Constitute a Day's Labor, 21 Colo. 29, 39 Pac. 328.

The emergency which permits days of more than eight hours' work is something more than contemplated emergencies necessarily inhering in the work; U. S. v. Garbish, 222 U. S. 257, 32 Sup. Ct. 77, 56 L. Ed. 190. See LABOR LAWS.

EIGNE. A corruption of the French word *ainé*. Eldest or first-born.

It is frequently used in our old law-books; *bastard eigne* signifies an elder bastard when spoken of two children, one of whom was born before the marriage of his parents and the other after; the latter is called *mulier puisne*. Littleton, sect. 399.

EINETIUS. In English Law. The oldest; the first-born. Spelman, Gloss.

EIRE, or EYRE. In English Law. A journey. See EYRE.

EISNE. The senior; the oldest son. Spelled, also, *eigne, einsne, aisne, eign. Termes de la Ley;* 1 Kelham.

EISNETIA, EINETIA (Lat.). The share of the oldest son. The portion acquired by primogeniture. *Termes de la Ley;* Co. Litt. 166 *b*; Cowell.

EITHER. May be used in the sense of each. Chidester v. Ry. Co., 59 Ill. 87.

EJECTION. Turning out of possession. 3 Bla. Com. 199. See EJECTMENT.

EJECTIONE CUSTODIÆ (Lat.). A writ of which lay for a guardian to recover the land or person of his ward, or both, where he had been deprived of the possession of them. Fitzh. N. B. 139, L.; Co. Litt. 199.

EJECTIONE FIRMÆ (Lat. ejectment from a farm). This writ lay where lands or tenements were let for a term of years, and afterwards the lessor, reversioner, remainderman, or a stranger ejected or ousted the lessee of his term. The plaintiff, if he prevailed, recovered the term with damages. Hence Blackstone calls this *a mixed* action, somewhat between real and personal; for therein are two things recovered, as well restitution of the "term of years," as damages for the ouster or wrong. This writ is the original foundation of the action of ejectment. 3 Sharsw. Bla. Com. 199; Fitzh. N. B. 220, F, G; Gibson, Eject. 3; Stearn, Real Act. 53, 400.

EJECTMENT (Lat. *e*, out of, *jacere*, to throw, cast). A form of action by which possessory titles to corporeal hereditaments may be tried and possession obtained.

A form of action which lies to regain the possession of real property, with damages for the unlawful detention.

In its origin, during the reign of Edw. III, this action was an action of trespass which lay for a tenant for years, to recover damages against a person who had ousted him of his possession without right. To the judgment for damages the courts soon added a judgment for possession, upon which the plaintiff became entitled to a writ of possession. The action of *de ejectione firmæ* (*q. v.*), was framed to meet the case of the termor, and just at the close of the middle ages it was held that under it he could recover his term. As to its history see 2 Poll. & Maitl 105. As the disadvantages of real actions as a means of recovering land for the benefit of the real owner from the possession of one who held them without title became a serious obstacle to their use, this form of action was taken advantage of by Ch J. Rolle to accomplish the same result.

In the original action, the plaintiff had been obliged to prove a *lease* from the person shown to have *title*, an *entry* under the *lease*, and an *ouster* by some third person. The modified action as sanctioned by Rolle was brought by a fictitious person as lessee against another fictitious person (the casual ejector) alleged to have committed the ouster. Service was made upon the tenant in possession, with a notice annexed from the casual ejector to appear and defend. If the tenant failed to do this, judgment was given by default and the claimant put in possession. If he did appear, he was allowed to defend only by entering into the *consent rule*, by which he confessed the fictitious *lease, entry*, and *ouster* to have been made, leaving only the *title* in

question. The tenant by a subsequent statute was obliged, under heavy penalties, to give notice to his lessor of the pendency of the action.

The action has been superseded in England under the Common Law Procedure Act (1852 §§ 170-220) by a writ, in a prescribed form, addressed, on the claimant's part, to the person or persons in possession, by name, and generally "to all persons entitled to defend the possession" of the premises therein described; commanding such of them as deny the claimant's title to appear in court and defend the possession of the property. Not only the person to whom the writ is directed, but any other person (on filing an affidavit that he or his tenant is in possession, and obtaining the leave of the court or a judge), is allowed to appear and defend.

In England, since the Judicature Act, ejectment has given place to a new action for the recovery of land.

Ejectment has been materially modified in many of the states, though still retaining the name, but is retained in its original form in others, and in the United States courts for those states in which it existed when the circuit courts were organized In some of the states it has never been in use. See 3 Bla. Com. 198.

The action lies for the recovery of corporeal hereditaments only; Carmalt v. Platt, 7 Watts (Pa.) 318; People v. Maurian, 5 Denio (N. Y.) 389; including a room in a house; White v. White, 16 N. J. L. 202, 31 Am. Dec. 232; upon which there may have been an entry and of which the sheriff can deliver possession to the plaintiff; Jackson v. Buel, 9 Johns. (N. Y.) 298; Nichols v. Lewis, 15 Conn. 137; and not for incorporeal hereditaments; Den v. Craig, 15 N. J. L. 191; Parker v. Packing Co., 17 Or. 510, 21 Pac. 822, 5 L. R. A. 61; or rights of dower; Jackson v. Vanderheyden, 17 Johns (N. Y.) 167, 8 Am Dec. 378; Jones v. Hollopeter, 10 S. & R. (Pa.) 326; or a right of way; Taylor v. Gladwin, 40 Mich. 232; or a rent reserved; Van Rensselaer v. Hayes, 5 Denio (N. Y.) 477; or for an easement to use land for a public park; Canton Co. of Baltimore v. City of Baltimore, 106 Md. 69, 66 Atl. 679, 67 Atl. 274, 11 L. R. A. (N. S.) 129; or to put the public in possession of land appropriated for streets; Bay County v. Bradley, 39 Mich. 163, 33 Am. Rep. 367; City of Racine v. Crotsenberg, 61 Wis. 481, 21 N. W. 520, 50 Am Rep. 149; or of an ocean beach; Trustees of the Freeholders and Commonalty of Southampton v. Betts, 163 N. Y. 454, 57 N. E. 762. Ejectment may be maintained for the possession of a street dedicated to the public use; City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. 928, 23 Pac. 1085; City and County of San Francisco v. Grote, 120 Cal. 59, 52 Pac. 127, 41 L. R. A. 335, 65 Am. St. Rep. 155. So in Village of Lee v. Harris, 206 Ill. 428, 69 N E. 230, 99 Am. St. Rep. 176; French v. Robb, 67 N. J. L. 260, 51 Atl. 509, 57 L. R. A. 956, 91 Am. St. Rep. 433; City of Winona v. Huff, 11 Minn. 119 (Gil. 24). It is said that the right to the possession, use and control of highways is primarily in the state, and that the state, having by express grants vested in the cities and villages of the state the possession, use and control of their streets and alleys, the right of possession, use and control is regarded as a legal and not a mere equitable right, and that in that view, no reason exists why the action of ejectment may not be maintained, though the city or village had not the legal title; Village of Lee v. Harris, 206 Ill. 428, 69 N. E. 230, 99 Am. St. Rep. 176; and see City of Cleveland v. R. Co., 93 Fed. 113 (reversed on other grounds in City of Cleveland v. R. Co., 147 Fed. 171, 77 C. C. A. 467, holding that ejectment will lie by a city for the recovery of possession of its streets, though the effect of the dedication was to give the city only an easement.

One is liable in ejectment for the projection of his roof over another's land; Murphy v. Bolger, 60 Vt. 723, 15 Atl. 365, 1 L. R. A. 309; *contra*, Rasch v. Noth, 99 Wis. 285, 74 N. W. 820, 40 L. R. A. 577, 67 Am. St. Rep. 858; or for the encroachment of the foundations of a building on the land of another, though entirely below the surface; Wachstein v. Christopher, 128 Ga. 229, 57 S. E. 511, 11 L. R. A. (N. S.) 917, 119 Am. St. Rep. 381; or to secure the removal of wires strung through the air over one's property, though the supports are on adjoining land; Butler v. Tel. Co., 186 N. Y. 486, 79 N. E. 716, 11 L. R. A. (N. S) 920, 116 Am. St. Rep. 563, 9 Ann. Cas. 858.

It may be brought upon a right to an estate in fee-simple, fee-tail, for life, or for years, if only there be a right of entry and possession in the plaintiff; McMillan's Lessee v. Robbins, 5 Ohio, 28; Matthews v Ward, 10 Gill & J. (Md.) 443; Miller v. Shackleford, 3 Dana (Ky.) 289; Middleton v. Johns, 4 Gratt. (Va.) 129; Batterton v. Yoakum, 17 Ill 288; Sears v. Taylor, 4 Cal 38; but the title must be a legal one; Wright v. Douglass, 3 Barb. (N. Y.) 554; Botts v. Shield's Heirs, 3 Litt. (Ky.) 32; Thompson v. Wheatley, 5 Smedes & M. (Miss.) 499; Middleton v. Johns, 4 Gratt. (Va.) 129, Foster v. Mora, 98 U. S. 425, 25 L. Ed. 191; Hollingsworth v. Walker, 98 Ala. 543, 13 South 6; Collins v. Ballow, 72 Tex. 330, 10 S. W. 248; Anson v. Townsend, 73 Cal. 415, 15 Pac. 49; Johnson v. Christian, 128 U. S. 374, 9 Sup. Ct. 87, 32 L. Ed. 412 (but in Pennsylvania a valid equitable title will sustain ejectment, on the ground, as has been said, that there is no court of chancery in that state; Peebles v. Reading, 8 S. & R. [Pa.] 484; Chase v. Irvin, 87 Pa. 286); which existed at the commencement of the suit; Carroll v. Norwood's Heirs, 5 Harr. & J. (Md.) 155; McCulloch v. Cowher, 5 W. & S. (Pa.) 427; Pitkin v. Yaw, 13 Ill. 251; Laurissini v. Doe, 25 Miss. 177, 57 Am. Dec. 200; Layman v. Whiting, 20 Barb. (N. Y.) 559; Collins v. Ballow, 72 Tex. 330, 10 S. W. 248; Green v. Jordan, 83 Ala. 220, 3 South. 513, 3 Am. St. Rep. 711; Buxton v. Carter, 11 Mo.

481 (but he cannot recover if the title is terminated pending the action; Brunson v. Morgan, 86 Ala. 318, 5 South. 495); at the date of the demise; Anderson v. Turner, 3 A. K. Marsh. (Ky.) 131; Hargrove v. Powell, 19 N. C. 97; Wood v. Morton, 11 Ill. 547; Scisson v. McLaws, 12 Ga. 166; Fenn v. Holme, 21 How. (U. S.) 481, 16 L. Ed. 198; and at the time of trial; Ratcliff v. Trimble, 12 B. Monr. (Ky.) 32; Beach v. Beach, 20 Vt. 83; Cresap's Lessees v. Hutson, 9 Gill (Md.) 269; and it must be against the person having actual possession; Den v. Stephens, 18 N. C. 5; Den v. Oliver, 10 N. C. 479; McDowell v. King, 4 Dana (Ky.) 67; McDaniel v. Reed, 17 Vt. 674; Huff v. Lake, 9 Humphr. (Tenn.) 137; Hyde v. Folger, 4 McLean 255, Fed. Cas. No. 6,971; Lucas v. Johnson, 8 Barb. (N. Y.) 244; Losee v. McFarland, 86 Pa. 33. A railroad company which has condemned lands for railroad purposes has a sufficient title to sustain an action; Pittsburgh, Ft. W. & C. Ry. Co. v. Peet, 152 Pa. 488, 25 Atl. 612, 19 L. R. A. 467.

Plaintiff in ejectment may recover as against a mere trespasser, on proof of his former possession only, without regard to his title; Green v. Jordan, 83 Ala. 220, 3 South. 513, 3 Am. St. Rep. 711; Wilson v. Fine, 38 Fed. 789; Nolan v. Pelham, 77 Ga. 262, 2 S. E. 639; Ratcliff v. Iron Works Co., 87 Ky. 559, 10 S. W. 365; Parker v. Ry. Co., 71 Tex. 132, 8 S. W. 541; Bradshaw v. Ashley, 180 U. S. 59, 21 Sup. Ct. 297, 45 L. Ed. 423.

The real plaintiff must recover on the strength of his own title; King v. Mullins, 171 U. S. 404, 18 Sup. Ct. 925, 43 L. Ed. 214; and cannot rely on the weakness of the defendant's; 1 East 246; Lane v. Reynard, 2 S. & R. (Pa.) 65; Boardman v. Bartlett, 6 Vt. 631; Den v. Sinnickson, 9 N. J. L. 149; Winton v. Rodger's Lessee, 2 Ov. (Tenn.) 183; Hall v. Gittings' Lessee, 2 H. & J. (Md.) 112; Doe v. Ingersoll, 11 Smedes & M. (Miss.) 249, 49 Am. Dec. 57; Clarke v. Diggs, 28 N. C. 159, 44 Am. Dec. 73; Woodworth v. Fulton, 1 Cal. 295; Garrett v. Lyle, 27 Ala. 586; Jones v. Lofton, 16 Fla. 189; Holly River Coal Co. v. Howell, 36 W. Va. 489, 15 S. E. 214; Dunbar v. Green, 198 U. S. 166, 25 Sup. Ct. 620, 49 L. Ed. 998; and must show an injury which amounts in law to an ouster or dispossession; Cooley v. Penfield, 1 Vt. 244; Moore v. Gilliam, 5 Munf. (Va.) 346; Edwards v. Bishop, 4 N. Y. 61; Lykens v. Whelan, 15 Pa. 483; an entry under a contract which the defendant has not fulfilled being equivalent; Jackson v. Moncrief, 5 Wend. (N. Y.) 26; Marlin v. Willink, 7 S. & R. (Pa.) 297; Harle v. McCoy, 7 J. J. Marsh. (Ky.) 318, 23 Am. Dec. 407; Dennis v. Warder, 3 B. Monr. (Ky.) 173; Den v. Westbrook, 15 N. J. L. 371, 29 Am. Dec. 692; Baker v. Gittings' Lessee, 16 Ohio 485; Prentice v. Wilson, 14 Ill. 91.

It may be maintained by one joint tenant or tenants in common against another who has dispossessed him; White's Lessee v. Sayre, 2 Ohio 110; Barnitz v. Casey, 7 Cra. (U. S.) 456, 3 L. Ed. 403; Clark v. Vaughan, 3 Conn. 191; Den v. Bordine, 20 N. J. L. 394; Edwards v. Bishop, 4 N. Y. 61; Peterson v. Laik, 24 Mo. 541, 69 Am. Dec. 444; Avery v. Hall, 50 Vt. 11. Co-tenants need not join as against a mere disseisor; Smith v. Starkweather, 5 Day (Conn.) 207; Chesrouud v. Cunningham, 3 Blackf. (Ind.) 82; Craig v. Taylor, 6 B. Monr. (Ky.) 457; but mere tenants in common may; Hicks v. Rogers, 4 Cra. (U. S.) 165, 2 L. Ed. 583; Innis v. Crawford, 4 Bibb (Ky.) 241; Camp v. Homesley, 35 N. C. 211. It may be maintained by the wife against the husband to recover her separate real estate; Crater v. Crater, 118 Ind 521, 21 N. E. 290, 10 Am. St. Rep. 161.

A court of law will not uphold or enforce an equitable title to land as a defence to an action of ejectment; Johnson v. Christian, 128 U. S. 374, 9 Sup. Ct. 87, 32 L. Ed. 412; Doe v. Aiken, 31 Fed. 393; *contra*, Brolaskey v. McClain, 61 Pa. 146; but see, Brame v. Swain, 111 N. C. 542, 15 S. E. 938; Hamilton v. Williford, 90 Ga. 210, 15 S. E. 753. In Pennsylvania, ejectment lies on an equitable title and is the full equivalent of a bill in equity; Winpenny v. Winpenny, 92 Pa. 440.

Where a defendant has entered a disclaimer of title and possession, he cannot defend his possession as agent of his wife without first showing a title in her; Duncan v. Sherman, 121 Pa. 520, 15 Atl. 565.

Where a defendant in ejectment repudiates a tenancy and claims a title in fee, he dispenses with the necessity of notice to quit; McGinnis v. Fernandes, 126 Ill. 228, 19 N. E. 44; Simpson v. Applegate, 75 Cal 342, 17 Pac. 237.

Plaintiff in ejectment in proving title need not go further back than the common source of title, where the defendant claims under the same person; Johnson v. Cobb, 29 S. C. 372, 7 S. E. 601; Luen v. Wilson, 85 Ky. 503, 3 S. W. 911; Laidley v. Land Co., 30 W. Va. 505, 4 S. E. 705; Blalock v. Newhill, 78 Ga. 245, 1 S. E. 383; Drake v. Happ, 92 Mich. 580, 52 N. W. 1023.

In case title is denied, it cannot be proved by merely producing a deed, but when such a deed is produced from a grantor who was in possession, or where possession was taken and held under such deed, and the premises in the deed are clearly identified, then a *prima facie* title is shown; Hartley v. Ferrell, 9 Fla. 374; McFarlane v. Ray, 14 Mich. 465; Hall v. Kellogg, 16 Mich. 135; Cottrell v. Pickering, 32 Utah 62, 88 Pac. 696, 10 L. R. A. (N. S.) 404.

The plea of not guilty raises the general issue; Zeigler v. Fisher's Heirs, 3 Pa. 365; King v. Kent's Heirs, 29 Ala. 542.

The judgment is that the plaintiff recover his term and damages; Battin v. Bigelow, Pet. C. C. 452, Fed. Cas. No. 1,108; Congrega-

tional Soc. in Newport v. Walker, 18 Vt. 600; Livingston v. Tanner, 12 Barb. (N. Y.) 481; Carroll v. Carroll, 16 How. (U. S.) 275, 14 L. Ed. 936; or damages merely where the the term expires during suit; Jackson v. Davenport, 18 Johns. (N. Y.) 295.

Where the fictitious form is abolished, however, the possession of the land generally is recovered, and the recovery may be of part of what the demandant claims; Treon's Lessee v. Emerick, 6 Ohio 391; Thornton's Lessee v. Edwards, 1 H. & McH. (Md.) 158; Vrooman v. Weed, 2 Barb. (N. Y.) 330; Lenoir v. South, 32 N. C. 237; Little v. Bishop, 9 B. Monr. (Ky.) 240; Loard v. Philips, 4 Sneed (Tenn.) 566; Messick v. Thomas, 84 Va. 891, 6 S. E. 482.

The damages are, regularly, nominal merely; and in such case an action of trespass for mesne profits lies to recover the actual damages; Baron v. Abeel, 3 Johns (N. Y.) 481, 3 Am. Dec. 515; Shipley v. Alexander, 3 Harr. & J. (Md.) 81, 5 Am. Dec. 421; Miller v. Melchor, 35 N. C. 439; Davis v. Doe, 25 Miss. 445; Saunders v. Lee, 101 N. C. 3, 7 S. E. 590; Gooch v. Botts, 110 Mo. 419, 20 S. W. 192; Roach v. Hefferman, 65 Vt. 485, 27 Atl. 71. See TRESPASS FOR MESNE PROFITS; ADVERSE POSSESSION.

In some states, however, full damages may be assessed by the jury in the original action; Congregational Soc in Newport v. Walker, 18 Vt. 600; Livingston v. Tanner, 12 Barb. (N. Y.) 481; Jenkins v. Means, 59 Ga. 55; Emrich v. Ireland, 55 Miss. 390; Whissenhunt v. Jones, 78 N. C. 361; and the verdict is conclusive as to the damages; Mills v. Fletcher, 100 Cal. 142, 34 Pac 637.

For the history of ejectment, see 3 Sel Essays in Anglo-Amer. L. Hist. 611.

EJECTUM. That which is thrown up by the sea. Warder v. La Belle Creole, 1 Pet. Adm. Dec. 43, Fed. Cas. No. 17,165. See JETSAM.

EJERCITORIA. In Spanish Law. The action which lies against the owner of a vessel for debts contracted by the master, or contracts entered into by him, for the purpose of repairing, rigging, and victualling the same.

EJUSDEM GENERIS (Lat.). Of the same kind.

In the construction of laws, wills, and other instruments, general words following an enumeration of specific things are usually restricted to things of the same kind (*ejusdem generis*) as those specifically enumerated

So, in the construction of wills, when certain articles are enumerated, the term *goods* is to be restricted to those *ejusdem generis* Bacon, Abr. *Legacies*, B; Minor's Ex'x v. Dabney, 3 Rand. (Va.) 191; 2 Atk. 113; 3 *id* 61 See INTERPRETATION; ET CÆTERA.

ELDER BRETHREN. A distinguished body of men, elected as masters of Trinity House, an institution incorporated in the reign of Henry VIII., charged with numerous important duties relating to the marine, such as the superintendence of lighthouses. Mozl & W. Dict.; 2 Steph. Com. 502. The full title of the corporation is Elder Brethren of the Holy and Undivided Trinity. It consists of a master, deputy master, a certain number of acting elder brethren, and of honorary elder brethren, with an unlimited number of younger brethren, the master and honorary elder brethren being chosen on account of eminent social position, and are elected by the court of elder brethren. The deputy master and elder brethren are chosen from such of the younger brethren as have been commanders in the navy four years previously, or have served as master in the merchant service on foreign voyages for at least four years. The younger brethren are chosen from officers of the navy or the merchant shipping service who possess certain qualifications. Their action is subject to an appeal to the Board of Trade. Two of the elder brethren assist the court of admiralty at the hearing of every suit for collision, and occasionally in suits for salvage. Their duty is to guide the court by advice only; though influential, their opinion is not legally binding on the judges.

ELDEST. He or she who has the greatest age

The eldest son of a man is his first-born, the *primo-genitus;* L. R 2 App Cas 698; L. R. 12 Ch. Div. 171. See PRIMOGENITURE.

ELECTED. In its ordinary signification this word carries with it the idea of a vote, generally popular, sometimes more restricted, and cannot be held the synonym of any other mode of filling a position. State v. Irwin, 5 Nev. 121; Magruder v. Swann, 25 Md 214.

ELECTION. Choice; selection. The selection of one person from a specified class to discharge certain duties in a state, corporation, or society.

The word, in its ordinary signification, carries the idea of a vote, and cannot be held the synonym of any other mode of filling a position, State v Irwin, 5 Nev 111 See People v. Molitor, 23 Mich 341, APPOINTMENT. Election has often been construed to mean the act of casting and receiving the ballots,—the actual time of voting, not the date of the certificate of election. State v. Tucker, 51 Ala. 205.

Both houses of congress, and parliamentary bodies in general, claim to be the sole judges of the election of their own members This right seems to be derived from the declaration of rights, delivered by the commons to the king in 1604. Brown, Law Dict

In the United States this power is vested in congress and the state legislatures by the federal and state constitutions, and chancellor Kent considers that "there is no other body known to the constitution to which such power might safely be trusted It is requisite to preserve a pure and genuine representation, and to control the evils of irregular, corrupt, and tumultuous elections; and as each house acts in these cases in a judicial character, its decisions, like the decisions of any other court of justice, ought to be regulated by known principles of law, and strictly adhered to for the sake of uniformity and certainty;" 1 Com. 235. On the other hand, experience of the temptation to defeated mem-

bers, which makes contests, in reliance (unfortunately too often well-founded) upon the irresponsibility of party majorities, leads Mr. Justice Miller to remark that. "This provision . . . seems, from the experience of the past, to have been one of those principles adopted from the English house of commons which has not worked well with our institutions, and which the house of commons itself has been obliged to abandon. Contested elections are now, by the law of England, tried before the judiciary, and the judgment of the court is conclusive upon the subject. It is conceded on all hands that justice is in this way more nearly administered with accuracy than it was under the former system. Both in that country and in this, under the former method, the result of a contested election has been very generally forecast by a knowledge of the relations of the parties contesting to the political majority or minority of the house in which the contest is carried on As this is a constitutional provision, however, there exists no power in the legislature, without an amendment of that instrument, to refer these contested cases to the judiciary. The increasing number of contested election cases arising out of frauds supposed to be perpetrated at the elections themselves, the investigation of which is always difficult, and the uncertainty of a fair and impartial decision . . . render it doubtful whether the entire provision on this subject is of any value." Miller, Const. 193

Much may be said in support of the views of each of these learned commentators, and there is a possible middle ground practicable under existing constitutional conditions, which might be suggested That would be to provide for a judicial determination of the contest in the first instance, reserving to the legislative body the final decision only on exception or appeal under such limitations as would preserve and emphasize the judicial character of the proceeding This would, on the one hand, preserve the absolute independence of the legislature as one of three co-ordinate branches of the government,—a basic principle, it may be remarked, of American and not of English governmental policy,—and at the same time add to the difficulty and probably lessen the frequency of partisan decisions, contrived in the comparative secrecy of committee rooms and consummated by the mere brute force of a majority.

Election of Public Officers. The right to vote is not a natural one but is derived from constitutions and statutes; it is not a privilege protected by the Fourteenth Amendment; Minor v. Happersett, 21 Wall. 163, 22 L. Ed. 627. Each state determines for itself the qualifications of its voters, and the United States adopts the state law upon the subject as the rule in federal elections in accordance with Section 2, article 1 of the Constitution of the United States, which provides that "the house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications required for electors of the most numerous branch of the state legislature."

The power of the state governments, however, to prescribe the qualifications of electors is limited by the Fifteenth Amendment of the Constitution which provides "that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state, on account of race, color, or previous condition of servitude." This provision renders void all provisions of a state constitution or a state law which come in conflict with it or with any act of congress passed to enforce it; McCrary, Elections 2; Ex parte Yarbrough, 110 U. S. 663, 4 Sup. Ct. 152, 28 L. Ed. 274. In the territories the right to vote is regulated by congress.

The right to vote, if once given by a state constitution, cannot be impaired or taken away by legislation. But the legislature can regulate the right to vote in a reasonable way by prescribing questions to be propounded to voters to test their qualifications; State v. Lean, 9 Wis. 279; or by requiring them to swear to support the Constitution of the United States, or by requiring registration. But regulations must not in any way impair the right to vote, and hence it has been held that an act prohibiting from voting those who, having been drafted into the military service and duly notified, had failed to report for duty, was void; McCafferty v. Guyer, 59 Pa. 109. An act requiring the voter to declare under oath that he is not guilty of any crime and has not voluntarily borne arms against the United States has also been held void; Rison v. Farr, 24 Ark. 161, 87 Am. Dec. 52. But see Randolph v Good, 3 W. Va. 551. The right to vote can, however, be limited to male citizens or extended to females, but only upon the same terms and conditions as are applied to males; U. S. v. Anthony, 11 Blatch. 200, Fed. Cas No. 14,459; Minor v. Happersett, 53 Mo. 58; Wheeler v. Brady, 15 Kan. 26; Lyman v. Martin, 2 Utah, 136. Different qualifications for persons to vote upon the question of licensing the sale of intoxicating liquors, from those prescribed in a state constitution for electors of public officers, may be prescribed by a legislative act; Willis v. Kalmbach, 109 Va. 475, 64 S. E. 342, 21 L. R. A. (N. S.) 1009; but the legislature may not prescribe additional qualifications for voters to those fixed in the constitution; Johnson v. Grand Forks County, 16 N. D. 363, 113 N. W. 1071, 125 Am. St. Rep. 662.

The qualifications of voters in the different states are usually citizenship, residence for a given period, age (21 years), sometimes payment of taxes, ownership of land, and education, and mental capacity. See GRANDFATHER CLAUSE.

As to woman suffrage, see that title.

See CITIZEN; RESIDENCE; NATURALIZATION; DOMICIL.

Elections must be held at the time and place required by law. Legislative or constitutional provisions on this question are mandatory; Chase v. Miller, 41 Pa. 403; Opinion of the Judges, 30 Conn. 591; and votes cast by soldiers in the field, outside of the state, under a statute permitting it, are not valid, when the constitution requires a citizen to vote at his place of residence. In the absence of any constitutional provision

a statute providing that soldiers in service may vote is valid; Morrison v. Springer, 15 Ia. 304.

A soldier making his permanent residence at a soldiers' home does not thereby acquire a right to vote in the precinct where the institution is situated; Powell v. Spackman, 7 Idaho 692, 65 Pac. 503, 54 L. R. A. 378.

If polls are moved to a place not authorized, the election becomes void; Melvin's Case, 68 Pa. 333; if the polls are not kept open as required by law, the election will be set aside, if enough votes were thereby excluded to change or render doubtful the result; Knowles v. Yates, 31 Cal. 82; Melvin's Case, 68 Pa. 333; but see State v. Smith, 4 Wash. 661, 30 Pac. 1064; but it is doubtful whether a few minutes' delay in opening the polls will avoid an election; 5 Eng. El. Cas 387; 4 *id.* 378 Closing polls too soon; Cleland v. Porter, 74 Ill. 76, 24 Am. Rep. 273; or during the dinner hour will not vitiate the election: Fry v. Booth, 19 Ohio St. 25. But the casting of enough votes after the proper hour for closing to change the result will; Contested Election of Locust Ward, 4 Pa. L. J. 341. See 3 Cong. El. Cas 564.

Generally speaking, notice is essential to the validity of an election; McCrary, Elect. 87; and all qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, even though only a minority of those entitled to vote really do vote: Walker v. Oswald, 68 Md. 146, 11 Atl. 711; but formalities or even the absence of notice may be dispensed with, where there has been an actual election by the people; Dishon v. Smith, 10 Ia. 212. See Seymour v. Tacoma, 6 Wash. 427, 33 Pac. 1059; Woodward v. Sanitary Dist., 99 Cal. 554, 34 Pac. 239; but it would seem that, if by a default of notice, enough voters were deprived of a chance to vote, to change the result, the election would be void; McCrary, Elect. 88. The fact that an order providing for an election of the board of education was passed by less than a quorum of the board, does not affect the validity of the election, where it is held at the time provided by statute and there is no statute provision requiring the order to be made; Ackerman v. Haenck, 147 Ill 514, 35 N. E. 381. In California, in a much considered case, it was held that voters must take notice of general elections prescribed by law, and in such cases provisions of the laws as to notice are merely directory; but that in elections to fill vacancies, the requirements as to notice must be fully complied with; People v. Weller, 11 Cal. 49, 70 Am. Dec. 754. In this case it was further held that, without statutory regulations, no election can be held. See also People v. Martin, 12 Cal. 409; Com. v. Smith, 132 Mass. 289; City of Lafayette v. State, 69 Ind. 218; Jones v. Gridley, 20 Kan. 584; Bolton v. Good, 41 N. J. L. 296; People v. Crissey, 91 N. Y. 616. An election to fill a vacancy cannot be held where such vacancy did not occur long enough before the election to enable due notice to be given, Beal v. Ray, 17 Ind. 554; People v. Martin, 12 Cal. 409. A failure to give more than three days' notice may not be fatal to the election, if there was full knowledge thereof and a full vote; State v. Carroll, 17 R. I. 591, 24 Atl. 835.

Slight irregularities in the manner of conducting elections, if not fraudulent, will not avoid an election; Paine, Elect. 502. For instance, the presence of one of the candidates in the room where the election was held, and the fact that he intermeddled with the ballots, was held not to vitiate the poll, there not appearing to have been any actual fraud, Bright. Elect. Cas. 268. Irregularities which do not tend to affect results, will not defeat the will of the majority; Juker v. Com., 20 Pa. 493. Where a special election was not called by legal authority, the fact that the people voted for the several candidates, will not render the election valid; People v Palmer, 91 Mich. 283, 51 N. W. 999.

A majority of voters is necessary to pass a constitutional amendment, by a popular vote, but it will be presumed that the number of those who voted is the number of the qualified voters; 22 Alb. L. J. 147; see as to the latter point, St. Joseph Township v. Rogers, 16 Wall. (U. S.) 644, 21 L. Ed. 328. But there may be a constitutional or statutory method prescribed for ascertaining a majority, in which case the presumption stated does not apply. Thus, in Delaware, a majority to determine whether a constitutional convention shall be called is to be ascertained by the highest vote cast at any one of the last three preceding elections; Const. 1831.

As to whether, when the person receiving the highest number of votes is ineligible, the person receiving the next highest number of votes is thereby elected: In England it is held that the second highest is elected only when it is affirmatively shown that the voters for the candidate highest in votes had such actual knowledge of his ineligibility that they must be taken to have thrown away their votes wilfully; L. R. 3 Q. B. 629; so in People v. Clute, 50 N. Y. 451, 10 Am. Rep. 508. But in other cases this distinction has not been regarded, and it has been held that the election is void; Saunders v. Haynes, 13 Cal. 145; Sublett v. Bedwell, 47 Miss. 266, 12 Am. Rep. 338; People v. Molitor, 23 Mich. 341; State v. Bell, 169 Ind. 61, 82 N. E. 69, 13 L. R. A. (N. S.) 1013, 124 Am. St. Rep. 203. The better opinion is stated by Cooley (Const. Lim.) and Dillon (Mun. Corp.) to be in accordance with this view. This rule was followed in Rhode Island in the presidential election of 1876; In re Corliss, 16 Am. L. Reg. 15, with a note by Judge Mitchell. It was therein also held that the ineligibility at the time of election cannot be removed by

a subsequent resignation of the office which constituted the ineligibility.

Where a candidate who receives the highest number of votes dies on election day, that candidate for the same office who receives the next highest number of votes is not elected; State v. Speidel, 62 Ohio St. 156, 56 N. E. 871.

Where there is a tie vote and one of the candidates refuses to participate in the drawing prescribed by statute, the office cannot thereby be declared vacant, and an appointment to fill such alleged vacancy is invalid; Com. v. Meanor, 167 Pa. 292, 31 Atl. 552.

The legislative precedents as to the effect of ineligibility are not uniform. See Sublett v. Bedwell, 47 Miss. 266, 12 Am. Rep. 338; People v. Clute, 50 N. Y. 451, 10 Am. Rep. 508.

An act providing for the registration of voters, either local or general in its operation, is within the legislative power and constitutional; Cowan v. Prowse, 93 Ky. 156, 19 S. W. 407.

The election laws of the United States of 1870 and 1871, for supervising the election of representatives, now repealed, were constitutional; Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717.

A wager upon the result of an election, being contrary to public policy, is void; Bunn v. Riker, 4 Johns. (N Y) 426, 4 Am. Dec. 292; Johnston v. Russell, 37 Cal. 670; Reynolds v. McKinney, 4 Kan. 94, 89 Am. Dec. 602. All contracts tending to corrupt elections are also void; Nichols v. Mudgett, 32 Vt. 546. In Pennsylvania and other states one betting on the result of an election is disfranchised as a voter thereat.

See CORRUPT PRACTICES.

Election Officers. Canvassing officers and return judges are ministerial officers only; they exercise no judicial or discretionary function; Cooley, Const. Lim. 783; State v. Steers, 44 Mo. 223; Morgan v. Quackenbush, 22 Barb. (N. Y.) 72; Clark v. Board of Examiners of Hampden County, 126 Mass. 282. It is said they may judge whether the returns are in due form; People v. Head, 25 Ill. 328. The acts of such officer, within the scope of his authority, are presumed to be correct; Littell v. Robbins, 1 Bartl. 138. In some states, canvassing officers have the power to revise the returns, hear testimony, and reject illegal votes; it is so in Texas, Alabama, Louisiana, and Florida; McCrary, Elect. 67. Where election officers have enforced an erroneous view as to the qualifications of voters, whereby legal voters are not permitted to vote, an election may be set aside, especially if it appear that such votes would have changed or rendered doubtful the result of the election; Bright. Elect. Cas. 455; McCrary, Elect. 68. A canvassing board which has counted a vote and declared the result, is *functus officio*. It cannot make a recount; Bowen v. Hixon, 45 Mo. 340; Hadley v. City of Albany, 33 N. Y. 603, 88 Am. Dec. 412; State v. Donnewirth, 21 Ohio St. 216.

It is a general rule that the errors of a returning officer shall not prejudice the rights of innocent voters; Cl. & H. 329; (see Behrensmeyer v. Kreitz, 135 Ill. 591, 26 N. E. 704; Ackerman v. Haeuck, 147 Ill. 514, 35 N. E. 381); as where it was the duty of the officer to return the votes sealed and he returned them unsealed, it was held that in the absence of any suspicion of fraud the return was good. Also where a state prescribed a certain form of certificate to be executed by the election officer, it is sufficient if the certificate is substantially in that form, and if an election officer insert by accident the wrong name in his return of the persons voted for, the mistake may be corrected; Cl. & H. Elect. Cas 229, 369.

But it has also been held that where a statute requires the election officer to place on each ballot the number corresponding with the number of the voter, the failure so to number will deprive the voter of his rights, Ledbetter v. Hall, 62 Mo 422; West v. Ross, 53 Mo. 350. All regulations intended to secure the purity of elections are of vital importance and must be enforced to the letter; Jones v. State, 1 Kan 273, 279; Gilleland v. Schuyler, 9 Kan. 569. Regulations which affect the time and place of the election and the legal qualifications of the voters are usually matters of substance, while those relating to the recording and return of the votes received and the mode and manner of conducting the details of the election are directory.

A statute requiring an official act, for public purposes, to be done by a given day, is directory only; People v. Allen, 6 Wend. (N. Y.) 486. A representative in the legislature cannot be deprived of his seat by the failure of mere election officers to make the return required by law to the secretary of state; see opinion of the judges in Maine; Me. Laws, 1880, p. 225, where many election questions are considered fully. Mere irregularity on the part of election officers, or their omission to observe some merely directory provision of the law, will not vitiate the poll; Anderson v. Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307; nor is an election invalid because the election officers *de facto* were disqualified; Quinn v. Markoe, 37 Minn. 439, 35 N. W. 263; State v. Goowin, 69 Tex. 55, 5 S. W. 678; so also irregularities which do not tend to affect results are not allowed to defeat the will of the majority, which must be respected, even when irregularly expressed; Lane v. Cary, 19 Barb. (N. Y.) 540; Juker v. Com., 20 Pa. 493; Morris v. Vanlaningham, 11 Kan. 269; Ranney v. Brooks, 20 Mo. 107; People v. Bates, 11 Mich. 362,

83 Am. Dec. 745; McKinney v. O'Connor, 26 Tex. 5; Keller v. Chapman, 34 Cal. 635; Bright Elect. Cas. 448, 449, 450.

By the laws of some states separate boxes are kept at the voting polls for the reception of ballots for different officers, and the question has arisen whether a ballot dropped into the wrong box can be counted. There is some conflict of authority on this point, but it has been held by the supreme court of Michigan that a voter cannot be deprived of his vote by the mistake or fraud of an officer in depositing it in the wrong box, if the intention of a voter can be ascertained with reasonable certainty; and for the same reason a ballot should not be rejected because put in the wrong box by the honest mistake of the voter himself; People v. Bates, 11 Mich. 362, 83 Am. Dec. 745.

An election officer who wilfully and corruptly refuses to any qualified citizen the right to vote or to register is liable in damages to the person injured; Ashby v. White, 1 Sm. L. Cas. (7th ed.) 455; 2 Ld. Raym. 958; Bernier v. Russell, 89 Ill. 60. Equity will not interpose to protect the right to vote, it being a mere political right; Shoemaker v. City of Des Moines, 129 Ia. 244, 105 N. W. 520, 3 L. R. A. (N. S.) 382. In England and in most of the states proof of a malicious or a corrupt purpose on the part of the officer is necessary; Weckerly v. Geyer, 11 S. & R. (Pa.) 35; but in Massachusetts it is not necessary to show malice, and this rule has been followed in Ohio and Wisconsin. But even in Massachusetts the officer is not liable if he acted under a mistake into which he was led by the conduct of the plaintiff; Lincoln v. Hapgood, 11 Mass. 350; Gillespie v. Palmer, 20 Wis. 544. See Jenkins v. Waldron, 11 Johns. (N. Y.) 114, 6 Am. Dec. 359; State v. Smith, 18 N. H. 91; State v. Robb, 17 Ind. 536.

Exemplary damages may be recovered if the refusal was wilful, corrupt, and fraudulent; Elbin v. Wilson, 33 Md. 135. Equity may upon the relation of the Attorney General, the Governor and the state committee chairman, restrain by injunction election officials from committing illegal and fraudulent acts, though the acts charged, if committed, constitute criminal offences; People v. Tool, 35 Colo. 225, 86 Pac. 224, 229, 231, 6 L. R. A. (N. S.) 822, 117 Am. St. Rep. 198.

The jurisdiction to hear and determine election cases, though by common law in courts having ordinary common-law jurisdiction, is generally regulated by special statutes in most of the states.

Where a court can reach a conclusion as to the actual legal vote cast at a precinct, on a contest of an election, it can give effect to it notwithstanding the election officers may have been guilty of misconduct; Lucky v. Police Jury, 46 La. Ann. 679, 15 South. 89.

Ballots. Voting by ballots is by a ticket or ball and secrecy is an essential part of this manner of voting; State v. Shaw, 9 S. C. 94; Brisbin v. Cleary, 26 Minn. 107, 1 N. W. 825; L. R. 10 C. P. 753; therefore a statute which provides for numbering ballots is repugnant to a constitutional provision that elections shall be by ballot; Williams v. Stein, 38 Ind. 89, 10 Am. Rep. 97; *contra*, State, v. Connor, 86 Tex. 133, 23 S. W. 1103; People v. Bidelman, 69 Hun 596, 23 N. Y. Supp. 954; Ex parte Owens, 148 Ala. 402, 42 South. 676, 8 L. R. A. (N. S.) 888, 121 Am. St. Rep. 67; unnumbered ballots are not void although the omission to number them is a misdemeanor; Montgomery v. Henry, 144 Ala. 629, 39 South. 507, 1 L. R. A. (N. S.) 656, 6 Ann. Cas. 965.

Ballots are frequently deposited which do not clearly indicate the voter's intention; for instance, by misspelling the name of a candidate, etc. The rule in such cases is thus stated in Cooley, Const. Lim. 611: "We think evidence of such facts as may be called the circumstances surrounding the election,—such as, who were the candidates brought forward by the nominating conventions; whether other persons of the same name resided in the district from which the officer was to be chosen; and if so, whether they were eligible or had been named for the office; if the ballot was printed imperfectly, how it came to be so printed, and the like,—is admissible for the purpose of showing that an imperfect ballot was intended for a particular candidate, unless the name is so different that to thus apply it would be to contradict the ballot itself, or unless the ballot is so defective that it fails to show any intention whatever, in which case it is inadmissible." See on this point, Attorney-General v. Ely, 4 Wis. 430; People v. Pease, 27 N. Y. 64, 84 Am. Dec. 242. The case in People v. Tisdale, 1 Dougl. (Mich.) 65, which is *contra*, was overruled in People v. Cicott, 16 Mich. 283, 97 Am. Dec. 141, and the rule above laid down by Judge Cooley approved and followed. Thus votes for "E. M. Braxton," "Elliot Braxton," and "Braxton" have been counted for Elliot M. Braxton in the 42d Congress. See McCrary, Elect. 296. Ballots cast for "D. M. Carpenter," "M. D. Carpenter," "M. I. Carpenter," and "Carpenter" were counted for Mathew H. Carpenter; Attorney-General v. Ely, 4 Wis. 430. Ballots for "Judge Ferguson" were counted for Fenner Ferguson; 1 Bartl. 267. Ballots cast for "E. Clark" and "Clark" were counted for E. E. Clark; those cast for "W. E. Robso," "Robertson," "Robers," and "Robin—" were counted for W. E. Robinson. Where the only candidates for an office were Caleb Gumm and Joel D. Hubbard, votes for "J. D. Huba," "J. D. Hubba," "J. D. Hub," and also one for "Huber," and one for "D. Huber," are properly counted for Hubbard; Gumm v. Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St.

Rep. 312. See opinion of judges of supreme court of Maine, printed in Maine Laws, 1880, App. p. 225.

A ballot containing the names of two candidates for the same office is bad as to both, but is not thereby vitiated as to other names of candidates on the same ballot; Attorney-General v. Ely, 4 Wis. 420; State v. Foxworthy, 29 Neb. 341, 45 N. W. 632; where a ballot contains the names of three persons for the same office, and there is only one vacancy to be filled, it should be rejected; Montgomery v. O'Dell, 67 Hun 169, 22 N. Y. Supp. 412.

Where there are statutory provisions as to the marking of ballots, the paper on which they are printed, etc., a ballot not complying with the law should not be received; the direction is mandatory; Com. v. Woelper, 3 S. & R. (Pa.) 29, 8 Am. Dec. 628; Parvin v. Wimberg, 130 Ind. 561, 30 N. E. 790, 15 L. R. A. 775, 30 Am. St. Rep. 254; but see People v. Kilduff, 15 Ill. 492, 60 Am. Dec. 769, where the law required white paper without any marks, and blue-tinted paper, ruled, was used, and the ballot declared legal; and where the law required the marking of the ballots with ink, if otherwise regular and marked with a pencil, they were counted; State v. Russell, 34 Neb. 116, 51 N. W. 465, 15 L. R. A. 740, 33 Am St. Rep. 625. In Kirk v. Rhoads, 46 Cal. 398, the court held, in this connection, that as to those things over which the voter has control, provisions as to the appearance of ballots are mandatory; and as to those things that are not under his control, such provisions are directory. Ballots on which a printed name is erased and another name written in its place are valid; People v. Saxton, 22 N. Y. 309, 78 Am. Dec. 191; Fenton v. Scott, 17 Or. 189, 20 Pac. 95, 11 Am. St. Rep. 801, but see State v. McElroy, 44 La. Ann. 796, 11 South. 133, 16 L. R. A. 278, 32 Am. St. Rep. 355.

Where a law provides that the voter may insert in the blank space provided therefor any name not already on the ballot, it was held that such insertion might be made by the use of a "sticker" as well as by writing the name of the candidate; De Walt v. Bartley, 146 Pa. 529, 24 Atl. 185, 15 L. R. A. 771, 28 Am. St. Rep. 814.

The fact that some of the ballots cast at an election were marked, and thereby rendered void by the election law, does not invalidate the ballots that were regular; People v. Bidelman, 69 Hun 596, 23 N. Y. Supp. 954.

Australian Ballot. This system, the leading features of which have now been adopted in many of the states, is the first important gift to civilization from the continent of Australasia. It revives the secret ballot in the time of Cicero, under the Gabinian Law. It originated in South Australia soon after the beginning of the present century as the result of the efforts of Mr. Francis S. Dutton, and thence passed from state to state in Australasia, then to the mother country in Europe, afterward to Canada, and eastward to continental countries, and finally westward again to the United States. It has been said that a somewhat similar system had been in vogue in England in Maryport for many years before the modern system was introduced in Australasia. But the Australasian system seems to have been purely indigenous, and was developed without any copying or even knowledge of the system at Maryport.

The cardinal features of the system, as everywhere adopted, are an arrangement for polling by which compulsory secrecy of voting is secured and an official ballot printed and distributed by government authority containing the names of all candidates. The details of the system include methods by which candidates may be nominated, prescribing the number of persons necessary to nominate a candidate, forms in which the various party nominations and information for the voters shall be printed on the ballots, arrangements for small closets or rooms into which the voter can retire and mark his ballot in secret, regulations for allowing him to take into the closet with him when he so desires a person to assist him in marking his ballot, and regulations for the numbering and counting of the ballots. See Wigmore, Australian Ballot System.

The system now generally in vogue in the United States is in most cases not the Australian ballot pure and simple. One feature of that system is the enumeration of candidates for a particular office alphabetically and without designation of party name or emblem. This was adopted in Massachusetts. But in most states the plan, better adapted for the American states, is to use an official ballot, but, when many officers are voted for on a single ballot, to have the column of each party indicated by name or sign or both, and permit the voter to vote a "straight" ticket by a single mark for all officers voted for. This, in various forms, may be termed the American modification of the Australian ballot.

The novel features of this system of voting have given rise to much litigation, and a considerable body of law has already accumulated, which involves not so much new principles as the application of old ones to new conditions. It is, nevertheless, desirable to consider these decisions separately from those under the old system, as thereby a clearer impression is received, both of the system and the method of its enforcement, which is necessarily committed very largely to the courts, and, like cases of railroad receiverships, devolves upon the courts the

exercise of functions often to some extent administrative as well as judicial.

It may be said without reserve that the courts have, as a rule, been true to the fundamental doctrines of the law of elections: to give effect to the intention of the voter, where it can be done without defeating the purpose of the legislation,—to enforce party rules with respect to nominations and test the integrity and fairness of those made by petition,—to disregard mere technical irregularities and hold valid elections carried on in good faith rather than to permit them to be defeated by the carelessness, ignorance, or fraud of officials,—to enforce rigidly the safeguards against bribery and intimidation, and the provisions to secure the secrecy of the ballot which lie at the foundation of the system.

For an extended discussion of the Australian ballot laws of England and some of the American states, see Bowers v. Smith, 111 Mo. 45, 20 S. W. 101, 16 L. R. A. 754, 33 Am. St. Rep. 491, in which it is held that the system should be construed in subordination to the constitution and laws of the state wherein it is adopted.

Such laws have been held constitutional: Bowers v. Smith, 111 Mo. 45, 20 S. W. 101, 16 L. R. A. 754, 33 Am. St. Rep. 491; De Walt v. Bartley, 146 Pa. 529, 24 Atl. 185, 15 L. R. A. 771, 28 Am. St. Rep. 814; Attorney-General v. May, 99 Mich. 538, 58 N. W. 483, 25 L. R. A. 325; Ransom v. Black, 54 N. J. L. 446, 24 Atl 489, 1021, 16 L. R A. 769; Miner v. Olin, 159 Mass. 487, 34 N. E. 721; Slaymaker v. Phillips, 5 Wyo. 453, 40 Pac. 971, 42 Pac. 1049, 47 L. R. A. 842; Pearson v. Board of Sup'rs, 91 Va. 322, 21 S. E. 483. The objections taken will be found to include general ones and also features of particular statutes. The statute forbidding the counting of a ballot not officially stamped and marked with the initials of a judge of election is in conflict with the constitutional provision that all persons duly qualified are entitled to vote and that all elections shall be by ballot; Moyer v. Van De Vanter, 12 Wash. St. 377, 41 Pac. 60, 29 L. R. A. 670; 50 Am. St. Rep. 900. In Illinois the new ballot law was held to have repealed all other laws respecting voting on municipal affairs and ballots; Union County v. Ussery, 147 Ill. 204, 35 N. E. 618; but it is held to apply only to the election of officers and not to special elections to determine other matters, in Wisconsin; State v. City of Janesville, 90 Wis. 157, 62 N. W. 933; and Pennsylvania; Evans v. Willistown Township, 3 Pa. Dist. Rep. 395. A statutory provision that a local option election shall be conducted according to the rules provided for general elections requires that it shall be by ballot, where the constitution requires general elections to be so conducted; State v. Board of Canvassers, 78 S. C. 461, 59 S. E. 145, 14 L. R. A. (N. S.) 850, 13 Ann. Cas. 1133.

Questions as to the regularity of nomination papers under the Australian ballot system are usually settled by the courts either under express statutory provisions or under their general jurisdiction when applicable. A number of such questions decided in reference to the then pending election are reported in Tilbrook's and Semmen's Nominations, 5 Pa. Dist. Rep. 660; Hendley v. Reeder, 5 Pa. Dist. Rep. 677.

Where conflicting nominations have each certain claims to superiority, if technical rules only are applied, the court will give weight to the fact that one candidate carried the district by a decisive majority. The desire of the court in such cases is to reach what is substantial; Tilbrook's and Semmen's Nominations, 5 Pa. Dist. Rep. 660. If, under the rules of the party, the county committee has power to fill vacancies and did not act, but only certain members of it residing within the representative district, such action is a clear violation of the party rules and the nomination by such irregular body is void; Stucker's Nomination, 5 Pa. Dist. Rep. 660. Where congressional conferees from one county of a congressional district were appointed in violation of the party rules, the conference in which they took part was not a regular body, and the nomination made by it was void; Klugh's Nomination, 5 Pa. Dist. Rep. 661. Nominations attended by fraud and the exercise of arbitrary power will not be upheld by the courts. A minority of delegates cannot nominate, and a faction may not arbitrarily select their meeting-place in defiance of a clear majority of the ward executive committee; Saunders' and Roberts' Nominations, 5 Pa. Dist. Rep. 661. Where persons who are not delegates are permitted upon the floor of a convention and the evidence justifies the conclusion that their presence was not harmless, the nomination is invalid; Boger's and Sterr's, Laubach's and Hessler's Nominations, 5 Pa. Dist. Rep. 662. A nomination paper which attempts to name presidential electors, representatives at large in congress, and other state officers, as well as candidates for separate congressional, senatorial, and representative districts, by a single paper is bad; Crow Anti-Combine Party Nomination Paper, 5 Pa. Dist. Rep. 665. A court will, not, however, in the exercise of its equitable powers, enjoin the printing of a certain column on the official ballot on a mere allegation that the nomination papers are defective, false, and fraudulent. Proof of such allegation must be made before the court will find it so as a fact; Hendley v. Reeder, 5 Pa. Dist. Rep. 677. Where an adequate remedy exists and a sufficient opportunity has been given to present to the court objections to a nomination paper, the court will not intervene by injunction in relief of a complainant who has failed to avail himself

of such a remedy; Cassin v. Reeder, 5 Pa. Dist. Rep. 681.

Whenever an official ballot is provided for by statute the secretary of state will not decide which of two rival conventions of the same organization is the regular one, but all such nominations should be certified and left to the voters for their decision; State v. Allen, 43 Neb. 651, 62 N. W. 35; People v. District Court, 18 Colo. 26, 31 Pac. 339; Shields v. Jacob, 88 Mich. 164, 50 N. W. 105, 13 L. R. A. 760; Matter of Redmond, 5 Misc 369, 25 N. Y. Supp. 381; nominations by a bolting convention are invalid; In re Nomination of Gibbons, 5 Pa Dist. Rep 194, in case of a tie vote in a nominating convention neither the candidates nor the election officers can determine the result by lot; Beck v. Board of Election Com'rs, 103 Mich. 192, 61 N. W. 346. Where the People's Independent party had been generally known as the "Populist Party," that name could not be adopted by a new political organization; Porter v. Flick, 60 Neb. 773, 84 N. W. 262.

The offence of falsely making or signing a nomination certificate must be charged in the words of the statute, being unknown at common law, and the want of criminal intent is no defence, and the voter must sign in person, or be present, and request it to be done; Com. v. Connelly, 163 Mass. 539, 40 N. E. 862.

As to defects in statement of names of candidates in nomination papers, see L. R 1 C. P. Div. 596; L. R. 15 Q. B. Div. 273; 12 *id.* 257; they are not invalidated by ordinary abbreviations of names; 10 N. S. Wales L. R. 59.

Provisions as to filling vacancies are not always mandatory, and after a fair election, an irregularity will not be permitted to invalidate it; Stackpole v. Hallahan, 16 Mont. 40, 40 Pac. 80, 28 L. R. A. 502.

For the form of ballots prescribed in a number of states, see Talcott v. Philbrick, 59 Conn. 472, 20 Atl. 436, 10 L. R. A. 150. For inserting names under the Australian ballot law in the official ballot, not legally entitled to insertion, see Bowers v. Smith, 35 Cent. L. J. 305.

Courts will not interfere with the discretion of the officer charged with the preparation of the official ballot, as to details; Woods v. State, 44 Neb. 430, 63 N. W. 23.

Prohibiting the printing of the name of a candidate in more than one column is constitutional; Todd v. Election Com'rs, 104 Mich. 474, 480, 62 N. W. 564, 64 N. W. 496, 29 L. R. A. 330; but where the act provides that names shall be grouped by parties, a candidate named by more than one party is entitled to have his name appear in the column of each; Williams v. Dalrymple, 132 Mo. 62, 33 S. W. 447; *contra*, Sawin v. Pease, 6 Wyo. 91, 42 Pac. 750.

A construction which makes the error of a single official disfranchise large bodies of voters must be avoided if the language is susceptible of any other; Bowers v. Smith, 111 Mo. 45, 20 S. W. 101, 16 L. R. A. 754, 33 Am. St. Rep. 491; and where, by the negligence of the officer, the name of a candidate and of the office is omitted from the ballot, the voter may write them, and his vote will be valid; People v. President, etc., of Wappingers Falls, 144 N. Y. 616, 39 N. E. 641.

The provision requiring the voter to make a cross with a stamp *opposite* each name voted for is mandatory; Lay v. Parsons, 104 Cal. 661, 38 Pac. 447; Sego v. Stoddard, 136 Ind. 297, 36 N. E. 204, 22 L. R. A. 468; Curran v. Clayton, 86 Me. 42, 29 Atl. 930; Parvin v. Wimberg, 130 Ind. 561, 30 N. E. 790, 15 L. R. A. 775, 30 Am. St. Rep. 254; but in other states the courts are disposed to be more liberal and permit marking outside of the square if to the right of the name; In re Vote Marks, 17 R. I. 812, 21 Atl. 962; Weidknecht v. Hawk, 13 Pa. Co. Ct. 41; Contested Election for Mayor of City of York, 13 Pa. Co. Ct. 205; Tebbe v. Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673, 49 Am. St. Rep. 68; Lynip v. Buckner, 22 Nev. 426, 41 Pac. 762, 30 L. R. A. 354; Vallier v. Brakke, 7 S. D. 343, 64 N. W. 180, 186; Parker v. Orr, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227; Houston v. Steele, 98 Ky. 596, 34 S W. 6 (in which cases the subject of marks is fully considered). A provision for marking with ink is directory only, and pencil will answer; State v. Russell, 34 Neb. 116, 51 N. W. 465, 15 L. R A. 740, 33 Am. St. Rep. 625; a blanket paster is not legal in Pennsylvania, but a single sticker may be used; Little Beaver Tp. School Directors' Election, 165 Pa. 233, 30 Atl. 955, 27 L. R. A. 234. As to what distinguishing marks on ballots will vitiate them see Parker v. Orr, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227; Zeis v. Passwater, 142 Ind. 375, 41 N. E. 796; Rutledge v. Crawford, 91 Cal. 526, 27 Pac. 779, 13 L. R. A. 761, 25 Am. St. Rep. 212; People v. Board of County Canvassers, 129 N. Y. 395, 29 N. E. 327, 14 L. R. A. 624; Hanscom v. State, 10 Tex. Civ. App. 638, 31 S. W. 547; and where by mistake "spoiled ballots" were counted the result was not thereby ascertained and the returns of the county clerk were *prima facie* evidence which should be considered by the court; Hendee v. Hayden, 42 Neb. 760, 60 N. W. 1034; voters are not confined to the names on the official ballot but may write other names thereon; Sanner v. Patton, 155 Ill. 553, 40 N. E. 290; signing a ballot invalidates it; Parker v. Orr, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227. The failure of a voter to retire to the booth to mark the ballot does not make the marking illegal if not wilful; Hall v. Schoenecke, 128 Mo. 661, 31 S. W. 97. In Michigan the supreme court have with much detail considered this subject and enumerate seven methods of marking which are defective by reason of their

being in effect distinguishing marks; Attorney-General v. Glaser, 102 Mich. 396, 61 N. W. 648, 64 N. W. 828.

The provision that an officer or person designated by law *may assist* a voter physically or educationally unable to vote should be liberally construed; Pearson v. Board of Supervisors, 91 Va. 322, 21 S. E. 483; the voter is the sole judge of his disability; Beaver County Elections, 12 Pa. Co. Ct. 227; *contra*, under the same statute; Election Instructions, 2 Pa. Dist. Rep. 1; the disability must be one contemplated by the statute and not drunkenness or ignorance; *id.*; nor that he left his glasses at home; State v. Gay, 59 Minn. 6, 60 N. W. 676, 50 Am. St. Rep. 389; a ballot is good if the voter asks assistance though he can read; Montgomery v. Oldham, 143 Ind. 34, 42 N. E. 474; where the voter is required to make oath, this is mandatory, and failure to take it invalidates the vote; Attorney-General v. May, 99 Mich. 538, 58 N. W. 483, 25 L. R. A. 325; but if no form of oath is prescribed any sufficient form of words will suffice; State v. Gay, 59 Minn. 6, 60 N. W. 676, 50 Am. St. Rep. 389; if the statute does not restrict the voter's choice of an assistant the election officers cannot do so; Beaver County Elections, 12 Pa. Co. Ct. 227; but when the statute designates a particular officer, it is mandatory; Pearson v. Board of Supervisors, 91 Va. 322, 21 S. E. 483; and irregularities in the services of the voter's assistant, as having one where two were required, or if the assistant had received money from a candidate, will not invalidate the vote; Hanscom v. State, 10 Tex. Civ. App. 638, 31 S. W. 547; if the assistant prepares a ballot contrary to the direction of the voter, if fraudulently done, it will avoid the vote, but if it does not appear whether it was fraud of the assistant or mistake of the voter it will not be rejected; *id.*

When an interpreter was permitted by law but not asked for, the presence of one inside the railing, conversing with voters was held to vitiate the election; Attorney-General v. Stillson, 108 Mich. 419, 66 N. W. 388.

Irregularities in taking the ballot must be gross to defeat the election; L. R. 16 Q. B. Div. 739; 7 Can. S. C. 247. When the statute declares a certain irregularity fatal courts will give effect to it, otherwise they will ignore such innocent irregularities as are free from fraud and have not interfered with a fair expression of the voter's will; Bowers v. Smith, 111 Mo. 45, 20 S. W. 101, 16 L. R. A. 754, 33 Am. St. Rep. 491.

Irregularities which have been held harmless, are: Where there were two voting places in a precinct entitled to one; Wildman v. Anderson, 17 Kan. 347; Bowers v. Smith, 111 Mo. 45, 20 S. W. 101, 16 L. R. A. 754, 33 Am. St. Rep. 491; where ballots were received by officers near a house appointed whose owner refused to permit its use; Preston v. Culbertson, 58 Cal. 198; errors or irregularities in printing; Allen v. Glynn, 17 Colo. 338, 29 Pac. 670, 15 L. R. A. 743, 31 Am. St. Rep. 304; Miller v. Pennoyer, 23 Or. 564, 31 Pac. 830; ballots improperly prepared by the officers and not "marked" ballots may be counted; People v. Wood, 148 N. Y. 142, 42 N. E. 536.

When candidates and voters have participated in an election and *acquiesced* in the result failure to give notice may be disregarded; Adsit v. Board of State Canvassers, 84 Mich. 420, 48 N. W. 31, 11 L. R. A. 534; and other irregularities may be so far acquiesced in by the defeated candidate that he will be disqualified to complain; L. R. 1 Q. B. 423; Allen v. Glynn, 17 Colo. 338, 29 Pac. 670, 15 L. R. A. 743, 31 Am. St. Rep. 304.

Contested Elections. At common law the right to an office was tried by a writ of *quo warranto;* in modern practice, an information in the nature of *quo warranto* is usual in the absence of a statute; McCrary, Elect. 196. See 3 Bla. Com. 263; 2 Jurist N. S. 114. An act for trying contested elections without a jury is not unconstitutional; Ewing v. Filley, 43 Pa. 389. An act providing for the appointment of an election commission with power over contests, by the legislature, is an invasion of the executive power and unconstitutional; Pratt v. Breckinridge, 112 Ky. 1, 65 S. W. 136, 66 S. W. 405. As to whether the declarations not under oath of illegal voters is evidence as to the votes cast by them, is doubtful, see State v. Olin, 23 Wis. 319; 1 Bartl. 19, 230; Gilleland v. Schuyler, 9 Kan. 569; People v. Pease, 27 N. Y. 45, 84 Am. Dec. 242. The ordinary rules of evidence apply to election cases; McCrary, Elect. 231; Paine, Elect. 824. A legal voter may refuse to testify for whom he voted, but he may waive this privilege; Kneass' Case, 2 Pars. (Pa.) 580. It is competent for witnesses to testify that they were under age at the time of voting, and that their votes were cast for the candidate receiving the largest number; Crabb v. Orth, 133 Ind. 11, 32 N. E. 711. A voter who participates in an election which is not secret, although required by statute to be by ballot, does not waive his right to contest the result, as such waiver would be contrary to public policy; State v. Board of Canvassers, 78 S. C. 461, 59 S. E. 145, 14 L. R. A. (N. S.) 850, 13 Ann. Cas. 1133.

In all contested elections, the tribunal will look beyond the certificate of the returning board; People v. Vail, 20 Wend. (N. Y.) 12. See State v. Townsley, 56 Mo. 107.

In purging the poll of illegal votes, unless it be shown for whom the illegal votes were cast, they will be deducted from the total vote; In re Contested Elections of 1868, 2 Brewst. (Pa.) 128.

Where the laws have been entirely disre-

garded by the election officers and the returns are utterly unworthy of credit, the entire poll will be thrown out, but legal votes, having been properly proved, may be counted; Bright. Elect. Cas. 493. "Nothing short of the impossibility of determining for whom the majority of votes were given ought to vacate an election;" Cl. & H. 504.

Where another than the person returned as elected is found to have received the highest number of legal votes given, he is entitled to the office; Varney v. Justice, 86 Ky. 596, 6 S. W. 457.

Primary Elections. After an election, the right of successful candidates to their offices is not affected by the unconstitutionality of the primary act under which they were nominated; People v. Strassheim, 240 Ill. 279, 88 N. E. 821, 22 L. R. A. (N. S.) 1135; such an act may not curtail, subvert or add to the constitutional qualifications of voters; *id.* Primary elections may be provided by statute for political parties which cast at least 10 per cent. of the vote at the last general election, and such statute does not deprive any person of the equal protection of the laws; State v. Felton, 77 Ohio St. 554, 84 N. E. 85, 12 Ann. Cas. 65. They are not within the meaning of a statute permitting the use of voting machines at all state, etc., elections, Line v. Board of Election Canvassers, 154 Mich. 329, 117 N. W. 730, 18 L. R. A. (N. S.) 412, 16 Ann. Cas. 248.

A law requiring the payment of a fee as a condition precedent to having a candidate's name printed on the official primary election ballot, except as may be reasonable for the services of an auditor for filing petition, is unconstitutional; Johnson v. Grand Forks County, 16 N. D. 363, 113 N. W. 1071, 125 Am. St. Rep. 662.

In 1868, jurisdiction over contested elections to the House of Commons was transferred to the Court of Common Pleas and is now vested in the High Court of Justice, the cases being heard by two judges. Their decision is certified to the Speaker of the House.

See BALLOT; ELIGIBILITY; MAJORITY; VOTER; VOTING MACHINE.

ELECTION OF RIGHTS OR REMEDIES.

The obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is clear intention of the person from whom he derives one that he should not enjoy both. 2 Sto. Eq. Jur. § 1075.

A choice shown by an overt act between two inconsistent rights, either of which may be asserted at the will of the chooser alone. Bierce v. Hutchins, 205 U. S. 346, 27 Sup. Ct. 524, 51 L. Ed. 828.

Etymologically, election denotes choice, selection *out of* the number of those choosing. Thus, the election of a governor would be the choice of some individual from the body of the electors to perform the duties of governor. In common use, however, it has come to denote such a selection made by a distinctly defined body—as a board of aldermen, a corporation, or state—conducted in such a manner that each individual of the body choosing shall have an equal voice in the choice, but without regard to the question whether the person to be chosen is a member of the body or not. The word occurs in law frequently in such a sense, especially in governmental law and the law of corporations.

But the term has also acquired a more technical signification, in which it is oftener used as a legal term, which is substantially the choice of one of two rights or things, to each one of which the party choosing has equal right, but both of which he cannot have. This option occurs in fewer instances at law than in equity, and is in the former branch, in general, a question of practice.

At Law. In contracts, when a debtor is obliged in an alternative obligation to do one of two things, as to pay one hundred dollars or deliver one hundred bushels of wheat, he has the choice to do one or the other until the time of payment; he has not the choice, however, to pay a part in each. Pothier, Obl. part 2, c. 3, art. 6, no. 247; Smith v. Sanborn, 11 Johns. (N. Y.) 59. Or, if a man sell or agree to deliver one of two articles, as a horse or an ox, he has the election till the time of delivery,—it being a rule that, "in case an election be given of two several things, always he which is the first agent, and which ought to do the first act, shall have the election;" Co. Litt. 145 *a*; McNitt v. Clark, 7 Johns. (N. Y.) 465; Fleming v. Harrison's Devisees, 2 Bibb (Ky.) 171, 4 Am. Dec. 691. On the failure of the person who has the right to make his election in proper time, the right passes to the opposite party; Co. Litt. 145 *a*; Reid v. Smith, 1 Des. Ch. (S. C.) 460; Overbach v. Heermance, Hopk. Ch. (N. Y.) 337, 14 Am. Dec. 546; Waggoner v. Cox, 40 Ohio St. 539; Corbin v. Fairbanks Co., 56 Vt. 538; Husson v. Oppenheimer, 66 How. Pr. (N. Y.) 306; Marlor v. R. Co., 21 Fed. 383.

When one party renounces a contract the other party may elect to rescind at once, except so far as to sue upon it and recover for the breach, and he may immediately bring an action, without waiting for the time of performance to arrive or elapse (in such case he cannot treat the contract as subsisting for any other purpose); L. R. 7 Exch. 114; L. R. 16 Q. B. 460; Hocking v. Hamilton, 158 Pa. 107, 27 Atl. 836; Lovell v. Ins. Co., 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423; Dingley v. Oler, 11 Fed. 372; *contra*, as to a contract for the sale of land, Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384. See the cases collected, Ans. Cont. (8th ed.) 355, n. 1. It is a maxim of law that, an election once made and pleaded, the party is concluded; *electio semel facta et placitum testatum non patitur regressum;* Co. Litt. 146; Lawrence v. Ins. Co., 11 Johns. (N. Y.) 241.

But an action for enforcing the benefits due under a contract conveying property in consideration of support does not preclude an action to rescind on subsequent breaches;

Gall v. Gall, 126 Wis. 390, 105 N. W. 953, 5 L. R. A. (N. S.) 603.

In many cases of voidable contracts there is a right of election to affirm or disavow them, after the termination of the disability, the existence of which makes this contract voidable. So all contracts of an infant, except for necessaries, may be avoided by him within a reasonable time after he comes of age, but they are voidable only, and he must elect not to be bound by them; Heath v. Stevens, 48 N. H. 251; Philpot v. Mfg. Co., 18 Neb. 54, 24 N. W. 428. See Sims v. Everhardt, 102 U. S. 300, 26 L. Ed. 87. And bringing suit is an election to rescind; Eaton v. Hill, 50 N. H. 235, 9 Am. Rep. 189; Pakas v. Racy, 13 Daly (N. Y.) 227. See INFANT.

Whenever, by law or contract, a party has laid before him a variety of steps, the taking of one of which excludes another, or the rest, he must choose between them. After his choice is made, and by words or acts expressed in a manner suited to the particular case, he cannot reverse it; he is said to have elected the one step, and waived the other; Bish. Cont. § 808.

Other cases in law arise: as in case of a person holding land by two inconsistent titles; 1 Jenk. Cent. Cas. 27; dower in a piece of land and that piece for which it was exchanged; 3 Leon 271. See Sugd. Pow. 498.

In Equity. A choice which a party is compelled to make between the acceptance of a benefit under a written instrument, and the retention of some property already his own, which is attempted to be disposed of, in favor of a third party, by virtue of the same paper. The doctrine of election pre-supposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both, that one should be a substitute for the other; 1 Swanst. 394; 3 Woodd. Lect. 491; 2 Rop. Leg. 480; Snell, Pr. Eq. 237.

The doctrine of election rests upon the principle that he who seeks equity must do equity, and means, as the term is ordinarily used, that where two inconsistent or alternative rights or claims are presented to the choice of a party, by a person who manifests the clear intention that he should not enjoy both, then he must accept or reject one or the other; and so, in other words, that one cannot take a benefit under an instrument and then repudiate it; Peters v. Bain, 133 U. S. 695, 10 Sup. Ct. 354, 33 L. Ed. 696.

Where an express and positive election is required, there is no claim, either at law or in equity, to but one of the objects between which election is to be made; but in many cases there is apparent, from the whole of an instrument, the intention that the party to be benefited shall be benefited on certain conditions. In such cases, equity will require the party to elect; Bisph. Eq. sec. 295.

Where a testator gives money or land to A, and by the same will gives something of A's to B, A must elect either to give effect to the will by allowing B to have the property which the testator intended should go to him, or if he chooses to disregard the will and retain his own property, he must make good the value of the gift to the disappointed beneficiary; Bisph. Eq. sec. 295. This doctrine is principally applied to cases of wills; but it is applicable also to voluntary deeds, to contracts for value resting upon articles, and to contracts completely executed by conveyance and assignment. This is a case of implied election. An express election is where a condition is annexed to a gift, a compliance with which is distinctly made one of the terms by which alone the gift can be enjoyed. In a case of express condition the result of a non-compliance is a forfeiture; whereas in elections growing out of an implied duty, the person who declines to make good the gift does not absolutely lose the benefit which is bestowed upon him, but is compelled only to give up so much of it as will amount to compensation for the disappointed beneficiary; Bisph. Eq. sec. 296.

Where a testator purports to give property to A which in fact belongs to B, and at the same time out of his own property confers benefits on B, the literal construction and application of the will would allow B to keep his property to the disappointment of A and also to take the benefits given him by the will. In such circumstances, however, B is not allowed to take the full benefit given him by the will unless he is prepared to carry into effect the whole of the testator's dispositions; 1 Swan. 359, 394. If he elects to take under the will, he is bound and may be ordered to convey his own property to A; 1 Ves. 514; 1 Swan. 409, 420. If he efects to take against the will and keep his own property, and disappoints A, then he cannot take any benefits under the will without compensating A to the extent of the value of the property as to which A is disappointed; 5 Ch. D. 163; 4 Bro. C. C. 21.

The question whether an election is required occurs most frequently in case of devises; "because deeds being generally matters of contract, the contract is not to be interpreted otherwise than as the consideration which is expressed requires;" L. R. 8 Ch. 578; but it extends to deeds; 1 Swanst. 400; 2 Story, Eq. Jur. § 1075, n.; and it has been held to apply to "voluntary deeds, to cases of contracts for valuable consideration resting in articles, to contracts for value completely executed by conveyance and assignments"; L. R. 8 Ch. 578, where the authorities are collected. The doctrine also applies to powers of appointment; L. R. 9 Eq. 519; 22 Ch. D. 555; 34 *id.* 160.

In the case, not strictly of election, but

often so treated, of two distinct gifts of a testator's own property, one onerous and the other not, it is the general rule that the donee may take one and reject the other, unless it appear that it was the testator's intention that the option should not exist; 22 Ch. D. 573, 577; and where a gift is made by a deed of which the consideration is partly invalid by reason of the disability of the parties, the parts of the deed are read together and the burden is treated as the consideration for the benefit; Brett, L. Cas. Mod. Eq. 263. Where a married woman made a valid appointment by will to her husband under a power, and also bequeathed personal property (not her separate estate) to another person to which the power did not extend, the husband was not put to his election, but took both under the power and *jure mariti*, as to the property ineffectually bequeathed; 9 Ves. 369.

There must be a clear intention by the testator to give that which is not his property; Scott v. Depeyster, 1 Edw. Ch. (N. Y.) 532; L. R. 7 Eq. 291. And if the testator has some interest in the thing disposed, the presumption that he intended to dispose only of his interest must be overruled in order to make a case of election; 6 Dow. 149, 179; 1 Ves. 515; and evidence is not admissible to enlarge the devise so as to include property belonging to another; McDonald v. Shaw, 92 Ark. 15, 121 S. W. 935, 28 L. R. A. (N. S.) 657.

The intention of the testator to put the devisee to his election must appear from the will itself; McDonald v. Shaw, 92 Ark. 15, 121 S. W. 935, 28 L. R. A. (N. S.) 657; but surrounding circumstances may be shown by parol; Fitzhugh v. Hubbard, 41 Ark. 64; 30 Beav. 14. The time in which election may be exercised must be reasonable; 30 Beav. 235; Cooper v. Cooper's Ex'r, 77 Va. 198; 19 Ves. 663; Reaves v. Garrett's Adm'r, 34 Ala. 558; U. S. v. Duncan, 4 McLean 99, Fed. Cas. No. 15,002.

The doctrine applies to every species of property or interest, whether the donor does or does not know of his right to dispose of it; Wats. Comp. Eq. 177; cases of transactions involving property of the wife; 23 Beav. 457; Gregory v. Gates, 30 Gratt. (Va.) 83; satisfaction of dower; Fuller v. Yates, 8 Paige, Ch. (N. Y.) 325; 2 Sch. & L. 452; 14 Sim. 258. The doctrine does not apply to creditors; 12 Ves. 354.

As to the right or duty of election by persons under disability, there is much apparent confusion in the cases both as to theory and practice. Story states the rule generally that married women, infants, and lunatics are not bound by election; 2 Eq. Jur. § 1097. The statement would seem too broad even before the great changes made in all matters affecting the property rights and powers of married women by recent legislation, and before the changes characterized as a "brand new invention of equity not fifty years old, and made exclusively for the benefit of married women under the old law—a breed which is rapidly becoming extinct;" Brett, L. Cas. Mod. Eq. 257. This writer considers the old and true doctrine of election to apply only to the acceptance of gifts under an instrument made by another, while the new doctrine involves the confirmation or repudiation of voidable instruments made by the person electing, who, in the cases referred to, is always a married woman. The rule, so far as there is one, has been stated thus: —Parties competent to make an election must usually be *sui juris*, but election may sometimes be made by a court of equity on behalf of infants and married women; Bisph. Eq. § 304; but this is really no rule and probably none can be exactly defined; the cases must be resorted to, and a large measure of judicial discretion has been exercised in dealing with them as they arose. In some it is held that a married woman may be permitted to elect; 4 Kay & J. 409; Van Steenwyck v. Washburn, 59 Wis. 483, 17 N. W. 289, 48 Am. Rep. 532; Kennedy v. Johnston, 65 Pa. 451, 3 Am. Rep. 650; in others that she cannot; 3 Myl. & Cr. 171; Lord Cairns in L. R. 7 H. L. 67; 9 Ch. D. 363; but it may be referred to a master to inquire what is best for her; 2 Ves. 60; L. R. 7 H. L. 67 (but in this case there were also infants). It was held by Lord Hatherly that she must elect; in 2 J. & H. 344 (which Brett says "led to the new departure"); followed in 28 Ch. D. 124; *contra;* by Sir George Jessel in 18 Ch. D. 531; followed by Chitty, L. J., in 27 Ch. D. 606. The decisions of Lord Hatherly and Sir George Jessel were referred to without disapproval by Lord Selborne, one in L. R. 8 Ch. 578, and the other in 8 App. Cas 420. Finally in 31 Ch. D. 275, (reversing 28 Ch Div. 124,) it was held that the wife would not be compelled to elect, but was entitled to retain both funds, on the ground that the settled fund had a restraint on anticipation. This case reviews the conflicting decisions and considers that they leave the question to be determined on principle. It is treated as deciding that but for the fact on which the case was put it was one for election; Snell, Pr. Eq. 247; and it assumed without discussion that election applied to married women, and thereby as Brett considers "sealed the triumph of the new election"; Lead. Cas. Mod. Eq. 257.

With regard to infants, the practice has varied very much, and the cases are collected in 1 Swanst. 413, note (*c*). The infant has been permitted to elect after coming of age in some cases; cas. *t.* Talbot 176; *id.* 130; 3 Bro. P. C. 173; in others an inquiry has been directed; 2 Sch. & Lef. 266; and this may be considered the usual practice; 1 Bro. P. C. 300; though the court has elected for them without reference; 26 L. J. N. S. Ch. 148; Addison v. Bowie, 2 Bland,

Ch. (Md.) 606; and the same practice is adopted when the persons to elect are unborn; Brett, L. Cas. Mod. Eq. 260. See, generally, on this subject, Serrell, Equit. Doct. Elect. 184.

Persons not under disabilities are bound to elect; Prentice v. Janssen, 79 N. Y. 478. Positive acts of acceptance or renunciation are not indispensable, but the question is to be determined from the circumstances of each case as it arises; 21 Beav. 447; 1 McClel. 541; Tiernan v. Roland, 15 Pa. 429. And the election need not be made till all the circumstances are known; 2 V. & B. 222; 1 McCl. & Y. 569. See, generally, 2 Story, Eq. Jur. § 1075; 1 Swanst. 402, note; 2 Rop. Leg. 480; Bisph. Eq. 295.

A widow has a right, regulated by statute in the several states, to declare her election between the provisions in her favor under the will of her husband and her right of dower. When bound to elect she is entitled to full information and ascertainment of the values of the two interests, and she may file a bill in equity to obtain them; 2 Scribn. Dow. 497, and cases cited at large in note 1. The right must be exercised by the widow herself, being purely personal; Sherman v. Newton, 6 Gray (Mass.) 307; Hinton v. Hinton, 28 N. C. 274; and the rule is not subject to exception even if she is insane; Lewis v. Lewis, 29 N. C. 72; Collins v. Carman, 5 Md. 503. After the widow's death within forty days without election, her representatives could not make a renunciation of the will; Boone's Representatives v. Boone, 3 Har. & McH. (Md.) 95; Millikin v. Welliver, 37 Ohio St 460; Eltzroth v. Binford, 71 Ind. 455; Appeal of Crozier, 90 Pa. 384, 35 Am. Rep. 666; and the right to a legacy in her favor vests in her executor; Flynn v. McDermott, 183 N. Y. 62, 75 N. E. 931, 2 L. R. A. (N. S.) 959, 110 Am. St. Rep. 687, 5 Ann Cas. 81; and attacking a will on the ground of lack of testamentary capacity is not an election by the widow; *id.* For the statutory provisions on the subject see 2 Scribn. Dow. 505, notes.

There must be an intention to elect and knowledge of her rights so as to constitute a deliberate choice; Bradford v. Kent, 43 Pa. 474; and an election made under a mistake does not conclude her; 1 Bro. C. C. 445; 12 Ves. Jr. 136; Snelgrove v. Snelgrove, 4 Dessaus. (S. C.) 274; but if she is acquainted with the material facts the election will bind her even though she do not understand her legal rights; Light v. Light, 21 Pa. 407. But see McDaniel v. Douglas, 6 Humph. (Tenn.) 220; Davis v. Davis, 11 Ohio St. 386. Nor is she concluded by an election procured by fraud; Smart v. Waterhouse, 10 Yerg. (Tenn.) 94; Morrison v. Morrison's Widow, 2 Dana (Ky.) 13. In some cases an election is implied, but so much difficulty is found to exist with respect to what constitutes an implied election that it will generally remain to be determined by the circumstances of each case. See 1 Lead. Cas. in Eq. 537, 570, and cases cited; Blunt v. Gee, 5 Call (Va.) 481; Upshaw v. Upshaw, 2 Hen. & Mun. (Va.) 381, 3 Am. Dec. 632; Reed v. Dickerman, 12 Pick. (Mass.) 146; Bradford v. Kent, 43 Pa. 474; Thompson's Lessee v. Hoop, 6 Ohio St. 480; Craig's Heirs v. Walthall, 14 Gratt. (Va.) 518. A widow's administrator cannot sell land originally belonging to her, where her husband by his will dealt with it as his, and she for nine years had elected to take under his will; Hoggard v. Jordan, 140 N. C. 610, 53 S. E. 220, 4 L. R. A. (N. S.) 1065, 6 Ann. Cas. 332.

In many states, if deprived of the provision given in lieu of dower, the widow is entitled to demand her dower; 2 Scribn. Dow. 525; Thompson v. Egbert, 17 N. J. L. 459; if the deprivation be substantial though not total; Hastings v. Clifford, 32 Me. 132; or if a previous application for dower has been refused; Thompson v. McGaw, 1 Metc. (Mass.) 66; or the statutory period for demand has passed before she was advised of the failure of her provision; Hastings v. Clifford, 32 Me. 132; or she had previously elected to take under the will; Hone's Ex'rs v. Van Schaick, 20 Wend. (N. Y.) 564. In taking a testamentary provision in lieu of dower the widow becomes a purchaser for a valuable consideration; 1 Lead Cas. in Eq. 511, 570; 2 Scribn. Dow. 527; Warren v. Morris, 4 Del. Ch. 289.

In cases not covered by statute a widow may be required to elect upon general equitable principles In the case last cited, she being also a legatee of one-third of the estate "according to law," was held to be put to her election, not under the statute but under the general doctrine of equity which is thus stated by Bates, Ch. "This doctrine precludes a party taking a benefit by deed or will from asserting any title or claim clearly inconsistent with the provisions of the instrument under which he takes —putting him to his election between the two. In its application to dower it is nowhere better stated than by our court of appeals in Kinsey v. Woodward, 3 Harr. (Del.) 464 'In regard to dower it seems from all the cases to be an established rule that a court of equity will not compel the widow to make her election, unless it be shown by the express words of the testator, that the devise or bequest was given in lieu or satisfaction of dower; or unless it appears that such was the testator's intention, by clear and manifest implication arising from the fact that the dower is plainly inconsistent with the devise or bequest, and so repugnant to the will as to defeat its provisions. If both claims can stand consistently together, the widow is entitled to both, although the claim under the will may be much greater in value than her dower'" 2 S. & L. 451; 3 Ves. Jr. 249; 1 Drew. 411, Dru. & War 107; 3 Kay & J. 257; Adsit v. Adsit, 2 John. Ch. (N. Y.) 451, 7 Am. Dec. 539.

If a beneficiary elects to take against the will, the amount of compensation to be paid to a disappointed legatee must be ascertained as of the time of testator's death, and not the date of election; [1905] 1 Ch. 16.

Of Remedies. A choice between two or more means of redress for an injury or the punishment of a crime allowed by law.

The selection of one of several forms of action allowed by law.

The choice of remedies is a matter demanding practical judgment of what will, upon the whole, best secure the end to be attained. Thus, a remedy may be furnished by law or equity, and at law, in a variety of actions resembling each other in some particulars. Actually, however, the choice is greatly narrowed by statutory regulations in modern law, in most cases. See 1 Chit. Pl. 207-214.

Where a party has two inconsistent remedies, and brings suit on one with knowledge of the facts and his rights therein, he cannot thereafter sue on the other; A. Klipstein & Co. v. Grant, 141 Fed. 72, 72 C. C. A. 511. But it is held that where a wrong has been inflicted, and the party is doubtful which of two inconsistent remedies is the right one, he may pursue both until he recovers through one; Rankin v. Tygard, 198 Fed. 795. Supreme Court Equity Rule 25 provides that relief in a bill may be sought in alternative forms.

A person may often choose whether he will sue in tort or contract. If his goods are taken from him by fraud he may sue for the price in assumpsit, or bring an action of replevin or trover; Pike v. Bright, 29 Ala. 332; Watson v. Stever, 25 Mich. 386; Hudson v. Gilliland, 25 Ark. 100; Roberts v. Evans, 43 Cal. 380; Phelps v. Conant, 30 Vt. 277; Rogers v. Inhabitants of Greenbush, 57 Me. 441. But where a principal had recovered from a fraudulent agent for money had and received, it was held he could later sue the third party who had bought from the agent, in conversion; [1900] 1 K. B. 54; criticized in 16 L. Q. Rev. 160. And when two actions are pending at law or in equity between the same persons and for the same subject-matter, the plaintiff is usually compelled to elect which one he will maintain; Central R. Co. of New Jersey v. R. Co., 32 N. J. Eq. 67; Hause v. Hause, 29 Minn. 252, 13 N. W. 43; McRae v. Singleton, 35 Ala. 297. But an election is not usually compelled between domestic and foreign suits; In re Bininger, 7 Blatchf. 159, Fed. Cas. No. 1,417; Wood v. Lake, 13 Wis. 94; and a foreclosure of a mortgage and a suit on the bond or note secured by it as well as actions to enforce admiralty liens and at the same time recover on the debt are also exceptions; Morgan v. Sherwood, 53 Ill. 171; Russell v. Alvarez, 5 Cal. 48; The Kalorama, 10 Wall. (U. S.) 204, 19 L. Ed. 941; Ober v. Gallagher, 93 U. S. 199, 23 L. Ed 829.

It may be laid down as a general rule that when a statute prescribes a new remedy the plaintiff has his election either to adopt such remedy or proceed at common law. Such statutory remedy is cumulative, unless the statute expressly or by necessary implication takes away the common-law remedy; Miles v. O'Hara, 1 S. & R. (Pa.) 32; Booker's Ex'rs v. McRoberts, 1 Call (Va.) 243; Bear-Camp-River Co. v. Woodman, 2 Greenl. (Me.) 404; Mayor, etc., of Baltimore v. Howard, 6 Har. & J. (Md.) 383; Coxe v. Robbins, 9 N. J. L. 384.

The commencement and trial of an action on a contract is not such an election of remedies as would estop plaintiff from suing on the notes; Fifield v. Edwards, 39 Mich. 267; Kingsbury v. Kettle, 90 Mich. 476, 51 N. W. 541.

Where a plaintiff has separate and concurrent remedies against a number of parties, he loses no rights by suing some and afterwards discontinuing his action; Bishop v. McGillis, 82 Wis. 120, 51 N. W. 1075. See Russell v. McCall, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. Rep. 807. An unsatisfied judgment on a note will not bar an action on notes taken as collateral security; Black v. Reno, 59 Fed. 917.

By joining his wife in a suit for her legacy, a husband exercises his election to treat it as joint property; Wingate v. Parsons, 4 Del. Ch. 117.

After a suit in replevin has been discontinued before judgment without obtaining any benefit, because plaintiff has paid the value of the goods to satisfy his replevin bond, this suit does not constitute such an election of remedy as to stop him from claiming payment of the purchase price out of the assets of the purchaser's estate; Bolton Mines Co. v. Stokes, 82 Md. 50, 33 Atl. 491, 31 L. R. A. 789. Bringing trover for possession of goods by mistake will not preclude a subsequent action of assumpsit for their purchase price; Clark v. Heath, 101 Me. 530, 64 Atl. 913, 8 L. R. A. (N. S.) 144.

In Criminal Law. The choice or determination by a prosecuting officer, upon which of several charges, or counts, in an indictment he will proceed to trial.

No objection can be raised, either on demurrer or in arrest of judgment, though the defendant or defendants be charged in different counts of an indictment with different offences of the same kind. Indeed, on the face of the record, every count purports to be for a separate offence, and in misdemeanors it is the daily practice to receive evidence of several libels, several assaults, several acts of fraud, and the like, upon the same indictment. In cases of felony, the courts, in the exercise of a sound discretion, are accustomed to quash indictments containing several distinct charges, when it appears, before the defendant has pleaded and the jury are charged, that the inquiry is to include several crimes. When this circumstance is discovered during the progress of the trial, the prosecutor is usually called upon to select one felony, and to confine himself to that, unless the offences, though in law distinct, seem to constitute in fact but parts of one continuous transaction. Thus, if a prisoner is charged with receiving several articles, knowing them to have been stolen, and it is proved that they were received at separate times, the prosecutor may

be put to his election; but if it is possible that all the goods may have been received at one time, he cannot be compelled to abandon any part of his accusation; 1 Mood. 146; 2 Mood. & R. 524. In another case, the defendant was charged in a single count with uttering twenty-two forged receipts, which were severally set out and purported to be signed by different persons, with intent to defraud the king. His counsel contended that the prosecutor ought to elect upon which of these receipts he would proceed, as amidst such a variety it would be almost impossible for the prisoner to conduct his defence. As, however, the indictment alleged that they were all uttered at one and the same time, and the proof corresponded with this allegation, the court refused to interfere; and all the judges subsequently held that a proper discretion had been exercised; 2 Leach 877; 2 East, Pl. Cr. 934. See 11 Cl. & F. 155; Harman v. Com., 12 S. & R. (Pa.) 69; Burk v. State, 2 Har. & J. (Md.) 426; People v. Rynders, 12 Wend. (N. Y.) 426; Com. v. Bennett, 118 Mass. 443; Van Sickle v. People, 29 Mich. 61; State v. Mallon, 75 Mo. 355.

The state need not elect on which count of an indictment it will proceed to trial, where the several counts relate to the same transaction; State v. Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686.

The artificial distinction between felonies and misdemeanors is, in most jurisdictions, obsolete, and in most states several distinct offences to which a similar punishment is attached may be joined It usually rests with the court whether it will compel a prosecuting officer to elect which count to proceed on, State v. Hood, 51 Me 363, Com v Sullivan, 104 Mass 552; Beasley v People, 89 Ill 571, State v. Green, 66 Mo. 632; Whart Crim Pl & Pr § 293 The election should be made before opening the case of the defence; Gilbert v State, 65 Ga. 449

ELECTION DISTRICT. A subdivision of territory, whether of state, county, or city, the boundaries of which are fixed by law, for convenience in local or general elections Chase v. Miller, 41 Pa. 403.

ELECTIONS IN CORPORATIONS. The power of election by corporations may apply either to corporate officers generally, or to the selection of new members to fill vacancies in those corporations, whose nature and composition require them to consist of members and not of holders of capital stock, as eleemosynary corporations. The election of members of a corporation of the former class is, in general, regulated by the charter, or other constituent law of the corporation, or by its by-laws, and their provisions must be strictly followed. In the absence of express regulations it is a general principle that the power of election of new members, or when the number is limited, of supplying vacancies, is an inherent power necessarily implied in every corporation aggregate. It is said to result from the principle of self-preservation; 2 Kent 293; 1 Rolle, Abr. 513; 8 East 272.

If the right and power of election is not adequately prescribed by the charter, a corporation has power to make by-laws consistent with the charter, and not contrary to law, regulating the time and manner of elections and the qualifications of electors, and manner of proving the same; 3 Term 189; Com. v. Woelper, 3 S. & R. (Pa.) 29, 8 Am. Dec, 628; Com. v. Detwiller, 131 Pa. 614, 18 Atl. 990, 992, 7 L. R. A. 357, 360; and if there be no by-law established usage will be resorted to; Juker v. Com., 20 Pa. 484. In many states there are general statutes on this subject, and in such case they must be strictly followed; 1 Thomp. Corp. § 745.

Unless under express provision as to special meetings, or filling vacancies, elections of officers are held at regular meetings of the corporation. The *time* is nearly, if not always, regulated by statute, charter, or by-laws, and such cases as are found on the subject are not as to any general principle; 1 Thomp. Corp. § 701; the date cannot be changed by directors so as, by postponement of an annual election, to lengthen their terms; Mottu v. Primrose, 23 Md. 482; a business meeting of a benevolent corporation may be held on Sunday; People v. Benev. Society, 65 Barb. (N. Y.) 357; and a charter provision requiring the choice of directors at an annual meeting was held to be directory and not exclusive; Hughes v. Parker, 20 N. H. 58.

The *place* of meeting for elections is also usually regulated by the law of the corporation itself, and if there be none, it should unquestionably be done at its usual and principal place of business, or where it exercises its corporate functions. This is for corporate purposes its domicil, *(q. v.)* and the term residence is also applied to corporations, as the place where its business is done; Bristol v. R. Co., 15 Ill. 436; Chicago, D. & V. R. Co. v. Bank, 82 Ill. 493; while it is a citizen only of the state by which it was created; *id.* In the latter state only may constituent acts be done; Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 588, 10 L. Ed. 274; Galveston, H. & H. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 476, 20 L. Ed. 199; Hilles v. Parrish, 14 N. J. Eq. 380. See also Arms v. Conant, 36 Vt. 750; Ohio & M. R. Co. v. McPherson, 35 Mo. 13, 86 Am. Dec. 128. Accordingly it has been held that votes and similar acts outside of the state creating it are void; Miller v. Ewer, 27 Me. 509. 46 Am. Dec. 619; even under a provision authorizing the calling of a first meeting at such a time or place as they think proper; *id.;* but the appointment in one state of a secretary, by the directors of a manufacturing corporation of another state, has been held valid; McCall v. Mfg. Co., 6 Conn. 428; and a corporation created by a concurrent

legislation of two states may hold meetings for elections in either; Covington & C. Bridge Co. v. Mayer, 31 Ohio St. 317. In some states, as Minnesota, the Dakotas, and Colorado, the holding of such meetings is permitted outside of the state; and in the latter state it is held that the fact that the annual meeting was held outside of the state cannot be raised in a collateral proceeding; Humphreys v. Mooney, 5 Colo. 282. Under an authority to call special meetings on notice of time and place, they may be called by the president at a place other than the regular place of business; Corbett v. Woodward, 5 Sawy. 403, Fed. Cas. No. 3,223; and at such a meeting an election may be held if otherwise legal. Where no place is named in the charter, the directors may designate it, and officers elected at such meeting will be such *de facto;* Com. v. Smith, 45 Pa. 59.

Meetings for the election of officers following the law of the corporation must be *called by* the person or persons designated for that purpose; Congregational Society of Bethany v. Sperry, 10 Conn 200; Reilly v. Oglebay, 25 W. Va. 36; though it has been held that it need not always be by formal action or with strictness of procedure if it is done by their direction; Hardenburgh v. Bank, 3 N. J. Eq. 68; Citizens' Mut. Fire Ins. Co. v. Sortwell, 8 Allen (Mass) 217; *contra;* Reilly v. Oglebay, 25 W. Va. 36; Goulding v. Clark, 34 N. H. 148; Third School District in Stoughton v. Atherton, 12 Metc. (Mass.) 105; they must be duly *assembled;* German Evangelical Congregation v. Pressler, 14 La. Ann. 799; whether of stockholders; Peirce v. Building Co., 9 La. 397, 29 Am. Dec. 448; or directors; Despatch Line of Packets v. Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Elliot v. Abbot, 12 N. H. 549, 37 Am. Dec. 227; Herrington v. District Tp. of Liston, 47 Ia. 11; upon due *notice;* 5 Burr. 2681; in accordance with charter or by-laws; Cogswell v. Bullock, 13 Allen (Mass.) 90; Stow v. Wyse, 7 Conn 214, 18 Am. Dec. 99; Stockholders of Shelby R. Co. v. R. Co., 12 Bush (Ky.) 62; and when there is no provision as to method, personal notice is proper; Stow v. Wyse, 7 Conn. 214, 18 Am. Dec. 99; or according to general statute law, if there be such; In re Long Island R. Co., 19 Wend. (N. Y.) 37, 32 Am. Dec. 429; but, though it is safer and better practice to give notice, in case of stated meetings for regular elections, notice is not required, but the members are charged with notice of them; Sampson v. Mill Corp., 36 Me. 78; 4 B. & C. 441; Atlantic Mut. Fire Ins. Co. v. Sanders, 36 N. H. 252; People v. Peck, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104; while of *special* meetings there must always be notice; 2 H. L. Cas. 789; People v. Batchelor, 22 N. Y. 128; Com. v. Guardians of Poor of Philadelphia, 6 S. & R. (Pa.) 469; and the failure to notify a single member will avoid the proceedings, 5 Burr. 2681; 4 B. & C. 441; 4 A. & E. 538; People v. Batchelor, 22 N. Y. 128; unless notice is waived by *attendance,* as, if all are present, each of them waives the want or irregularity of notice; Jones v. Turnpike Co., 7 Ind. 547; People v. Peck, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104. Such waiver will not operate as against a positive direction of the charter; 1 Dill. Mun. Corp. § 264; and when there is no provision as to notice it must be personal; Savings Bank of New Haven v. Davis, 8 Conn. 191; Wiggin v. First Freewill Baptist Church, 8 Metc. (Mass.) 301; Harding v. Vandewater, 40 Cal. 77.

As to what constitutes a *quorum* at elections, see MEETINGS; QUORUM.

As to all the details of the *conduct* of elections, the provisions of state statutes, charters, or by-laws, must be strictly pursued and will generally be found to cover the subject. Where a statute provided for three *inspectors,* it was held that two could act; In re Excelsior Fire Ins. Co., 16 Abb. Pr. (N. Y.) 8. The method of appointment prescribed must be strictly followed; People v. Peck, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104; though in certain emergencies the corporators may appoint; Matter of Wheeler, 2 Abb. Pr. N. S. (N. Y.) 361; and a candidate has been held not disqualified; Ex parte Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525; but this is so contrary to well settled and judicious legal principles that it cannot be considered desirable. An election otherwise valid will not be avoided because inspectors were not sworn; In re Chenango County Mut. Ins. Co., 19 Wend. (N. Y.) 635; or the oath taken not subscribed by them; Matter of Wheeler, 2 Abb. Pr. N. S. (N. Y.) 361. In the absence of a statute to the contrary, their duties are ministerial, and they cannot act upon the challenge of a vote except to follow the transfer books; In re Long Island R. Co., 19 Wend. (N. Y.) 37, 32 Am. Dec. 429; or put the challenged party on oath; *id.* note; or pass judicially upon proxies regular on their face; In re Election of Directors of St. Lawrence Steamboat Co., 44 N. J. L. 529; because not acknowledged or witnessed; In re Cecil, 36 How. Pr. (N. Y.) 477; but this would be otherwise if, as is often the case, the charter requires witnesses. They may not reject votes once received; Hartt v. Harvey, 10 Abb. Pr. (N. Y.) 321; nor go beyond the ballot to ascertain the intention of the voter; Loubat v. Le Roy, 15 Abb. N. C. (N. Y.) 16. *Ballots* in which only the initials of a candidate were inserted have been held sufficient when it was determined by a verdict who was intended thereby; People v. Seaman, 5 Denio (N. Y.) 409. If the statutes provide that only a certain number are to be chosen, ballots containing more names will not be counted; State v. Thompson, 27 Mo. 365;

2 Burr. 1020; votes for ineligible candidates were formerly held to be "thrown away;" 2 Burr. 1021 note; but it has been held in a later case that such votes will not give the election to a minority candidate unless the voters knew of the ineligibility; In re Election of Directors of St. Lawrence Steamboat Co., 44 N. J. L. 529.

There is no common-law right to vote by *proxy*, except in England in the House of Lords; 1 Bla. Com. 168; Com. v. Detwiller, 131 Pa. 623, 18 Atl. 919, 992, 7 L. R. A. 357, 360; and in public or municipal corporations, voting can only be done in person; 2 Kent 294; in private corporations, the right of voting by proxy is usually conferred by charter and the weight of authority is that, if not so conferred, it may be done by by-law; *id.* 295; Com. v. Detwiller, 131 Pa. 614, 18 Atl. 919, 992, 7 L. R. A. 357, 360; People v. Crossley, 69 Ill. 195; Moraw. Corp. § 486; *contra;* People v. Twaddell, 18 Hun (N. Y.) 427; Taylor v. Griswold, 14 N. J. L. 222, 27 Am. Dec. 33. A proxy may be revoked, even if given for a valuable consideration, if about to be used fraudulently; Reed v. Bank, 6 Paige Ch. (N. Y.) 337; and voting by proxy in fraud or violation of the charter may be restrained by injunction; Campbell v. Poultney, Ellicott & Co., 6 Gill & J. (Md.) 94, 26 Am. Dec. 559. A *certificate* of election is not essential; People v. Peck, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104; but it is, when valid on its face, *prima facie* evidence of election; Hartt v. Harvey, 10 Abb. Pr. (N. Y.) 321; but a court on *quo warranto*, may go behind it; People v. Vail, 20 Wend. (N. Y.) 12.

It is probable that at common law each stockholder is entitled to but one vote without respect to the number of shares held. In public and municipal corporations undoubtedly each member has but one vote, and it is said in connection with the statement of this principle: "This rule has been applied to stockholders in a private corporation, and it has been held that such a shareholder has but one vote; Cook, Stock & Stockholders, § 608. But this writer, after adverting to the almost universal practice of providing by constitution, statute, or charter for a vote to each share of stock adds, "at the present day it is probable that no court, even in the absence of such provision, would uphold a rule which disregards the number of shares which the shareholder holds in the corporation;" *id.* And after a reference to the same common-law rule it is said: "But there are good reasons for holding that this rule has no application to ordinary joint stock business corporations of the present day;" Moraw. Corp. § 476. Where the charter declared that the by-laws may make provision for the conduct of elections, it was held that a corporation might enact a by-law giving to stockholders a vote for each share of stock; Com. v. Detwiller, 131 Pa. 614, 18 Atl. 990, 992, 7 L. R. A. 357, 360.

See MEETINGS; PROXY; QUORUM; CUMULATIVE VOTING.

ELECTOR. One who has the right to make choice of public officers; one who has a right to vote. See Taylor v. Taylor, 10 Minn. 107, (Gil. 81). See PRESIDENTIAL ELECTORS.

One who exercises the right of election in equity. The term is sometimes used in this sense. Brett, L. Cas. Mod. Eq. 257.

In the German Empire the name was given to those great princes who had the right to elect the emperor or king. The office of elector in some instances became hereditary and was connected with territorial possessions as, elector of Saxony.

ELECTORAL COLLEGE. A name given to the presidential electors, when met to vote for president and vice-president of the United States, by analogy to the college of cardinals, which elects the pope, or the body which formerly selected the German emperor. It is, according to the more general usage, applied to the electors chosen by a single state, but is also used to designate those chosen throughout the United States.

This term has no strict legal or technical meaning, and being unknown to the constitution and laws of the United States, its use is purely colloquial. Accordingly the term is not clearly defined, and it is employed by approved writers in both the senses stated, though more frequently when reference is made to the entire body of electors the plural is employed, as, "the expectations of the public . . . (have) been so completely frustrated as in the practical operation of the system, so far as relates to the independence of the electors in the electoral colleges," 2 Sto Const. § 1463, ". . . would be chosen as electors, and would, after mature deliberation in their respective colleges," etc ; 1 Hare, Am. Const. L. 219; "the electoral colleges have sunk so low", *id* 221 So in speaking of the electors the phrase "state colleges" is used by Stevens, Sources of the Constitution of the U. S. 153, note. Following this view is the following definition A name informally given to the electors of a single state when met to vote for president and vice-president of the United States, and sometimes to the whole body of electors. Cent. Dict.

On the other hand, the other use is well sustained by authority, and we find this definition: The body of electors chosen by the people to elect their president. Encyc. Dict. This is supported by Webster and Worcester as well as some authorities on constitutional law. "The presidential electors chosen as therein directed, constitute what is commonly called the 'electoral college';" Black, Const. L 86; and again, "by an electoral college appointed or elected in the several states"; *id.* "In case the electoral college fails to choose a vice-president, the power devolves on the senate to make the selection from the two candidates having the highest number of votes." 1 Calhoun's Works, 175. See PRESIDENTIAL ELECTORS.

ELECTORAL COMMISSION. A commission created by an act of congress of January 29, 1877, to decide certain questions arising out of the presidential election of November, 1876, in which Hayes and Wheeler had been candidates of the republican party

and Tilden and Hendricks of the democratic party. The election was very close, and depended on the electoral votes of South Carolina, Florida, and Louisiana. It was feared that there would be much trouble at the final counting of the votes by the president of the senate according to the plan laid down in the Constitution. The republicans had a majority in the senate and the democrats had a majority in the house of representatives A resolution was adopted by congress for the appointment of a committee of seven members by the speaker to act in conjunction with a similar committee that might be appointed by the senate to prepare a report and plan for the creation of a tribunal to count the electoral votes whose authority no one would question and whose decision all would accept as final. The joint committee thus appointed reported a bill providing for a commission of fifteen members, to be composed of five members from each house appointed *viva voce*, with four associate justices of the supreme court, which latter would select another of the justices of the supreme court, the entire commission to be presided over by the associate justice longest in commission. This body has since been known as the Electoral Commission.

Justices Clifford, Miller, Field, and Strong were named in the act as members, and they chose as the fifth justice Justice Bradley. The other members were Senators Bayard, Edmunds, Frelinghuysen, Morton, and Thurman, and Representatives Abbott, Garfield, Hoar, Hunton, and Payne.

The commission began its sessions February 1, and completed its work March 2, 1877. Various questions came before it in regard to the electoral vote of South Carolina, Florida, and Louisiana, as to which of two state returns was valid, and as to the eligibility of certain of the presidential electors. The most important decision of the commission and the one which has caused most comment and criticism was to the effect that the regular returns from a state must be accepted, and that the commission had no power to go behind these returns; or, as the commission itself expressed it, "that it is not competent under the Constitution and the law as it existed at the date of the passage of said act, to go into evidence *aliunde* the papers opened by the president of the senate in the presence of the two houses, to prove that other persons than those regularly certified to by the governor of the state of Florida in and according to the determination and declaration of their appointment by the Board of State Canvassers of said state prior to the time required for the performance of their duties, had been appointed electors, or by counter-proof to show that they had not, and that all proceedings of the courts or acts of the legislature or of the executive of Florida subsequent to the casting of the votes of the electors on the prescribed day are inadmissible for any such purpose." 2 Curtis, Const. Hist. of U. S., 419.

The result of the controversy over the election of 1876 was the passage, after long and earnest consideration, of the Act of Feb. 3, 1887, to regulate the counting of the electoral votes for president and vice-president. U. S. R. S. 1 Supp. 525. See PRESIDENTIAL ELECTORS; PRESIDENT OF THE UNITED STATES; 38 Am. L. Rev. 1.

ELECTRIC COMPANIES. Such companies, although not public corporations in the sense that the term is applied to municipal corporations; Croswell Elec. § 20; and being unable without statutory authority to claim an exemption of property from the ordinary mechanic's lien; Badger Lumber Co. v. Power Co., 48 Kan. 182, 29 Pac. 476, 15 L. R. A. 652, 30 Am. St. Rep. 301; are held to exercise a public use and are of a public character similar to telegraph and telephone companies; Opinion of Justices, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487; Linn v. Chambersburg Borough, 160 Pa. 511, 28 Atl. 842, 25 L. R. A. 217; Thompson-Houston Electric Co. v. City of Newton, 42 Fed. 723; City of Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214. Poles and wires erected for lighting city streets are a public use and constitute no additional burden; Tuttle v. Illuminating Co., 50 N. Y. Super. Ct. 464; People v. Thompson, 65 How. Pr. (N. Y.) 407, affirmed in 32 Hun (N. Y.) 93; Tiffany & Co. v. Illuminating Co., 51 N. Y. Super. Ct. 286; Johnson v. Electric Co., 54 Hun 469, 7 N. Y. Supp. 716; Gulf Coast Ice & Mfg. Co. v. Bowers, 80 Miss. 570, 32 South. 113; Halsey v. Ry. Co., 47 N. J. Eq. 380, 20 Atl. 859; Loeber v. Electric Co., 16 Mont. 1, 39 Pac. 912, 50 Am. St. Rep. 468; but not where a pole shut off free access to a store; Tiffany & Co. v. Illuminating Co., 51 N. Y. Super. Ct. 280. The same general rule may be applied to rural highways; Palmer v. Electric Co., 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672; *contra*, Haverford Electric Light Co. v. Hart, 13 Pa. Co. Ct. 369. In the case of private lighting, such use entitles the owner to compensation; Callen v. Electric Light Co., 66 Ohio 166, 64 N. E. 141, 58 L. R. A. 782. See, generally, Joyce on Electric Law.

They are held to be manufacturing companies with reference to taxation; People v. Wemple, 129 N. Y. 543, 29 N. E. 808, 14 L. R. A. 708 (reversing People v. Wemple, 15 N. Y. Supp. 718); Beggs v. Illuminating Co., 96 Ala. 295, 11 South. 381, 38 Am. St. Rep. 94; People v. Wemple, 129 N. Y. 664, 29 N. E. 812; *contra*, Evanston Electric Illuminating Co. v. Kochersperger, 175 Ill. 26, 51 N. E. 719; Frederick Electric Light & Power Co. v. Frederick City, 84 Md. 599,

36 Atl. 362, 36 L. R. A. 130; Com. v. Light & Power Co., 145 Pa. 105, 22 Atl. 839, 14 L. R. A. 107; Com. v. Electric Light Co., 145 Pa. 131, 22 Atl. 841, 845, 27 Am. St. Rep. 683; Com. v. Electric Light Co., 145 Pa. 147, 22 Atl. 844. See Globe Mut. Life Ins. Ass'n v. Ahern, 191 Ill. 170, 60 N. E. 806.

Charter authority to such a company to enter upon any public street of a city for the purpose of its business is held to include the right to lay conduits beneath the sidewalks; Allegheny County Light Co. v. Booth, 216 Pa. 564, 66 Atl. 72, 9 L. R. A. (N. S.) 404.

Implied Powers of the Municipality. The right of a municipality to light the streets is generally conceded as a part of the police power and while usually enumerated in the charters, its omission would not deprive the city of such right, whether by electricity or other means; City of Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214; Mauldin v. City Council of Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291; State v. City of Hiawatha, 53 Kan. 477, 36 Pac. 1119; Hamilton Gaslight & Coke Co. v. City of Hamilton, 37 Fed. 832; Hamilton Gas Light & Coke Co. v. Hamilton City, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; and the right of the municipality, not only to own, operate, and control an electric light plant, but to raise money for such purpose by taxation has been upheld; City of Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214; Mauldin v. City Council of Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291; State v. City of Hiawatha, 53 Kan. 477, 36 Pac. 1119; and to issue bonds for that purpose; Rushville Gas Co. v. City of Rushville, 121 Ind. 212, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. Rep. 388; Hequembourg v. City of Dunkirk, 49 Hun 550, 2 N. Y. Supp. 447. The contrary view of such implied powers was taken in Spaulding v. Inhabitants of Peabody, 153 Mass. 129, 26 N. E. 421, 10 L. R. A. 397, where the court decided that the existing statute giving towns the right to maintain street lamps and to raise money by taxation for such purpose did not carry with it the right to maintain the more costly electric light plant, and that to authorize such a purchase an express statute must be passed, thus settling a question raised but not decided in Opinion of Justices, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487. The Massachusetts case was followed in Posey v. Town of North Birmingham, 154 Ala. 511, 45 South. 663, 15 L. R. A. (N. S.) 711.

Commercial Lighting by the Municipality. Where the right of maintaining an electric light plant has been conferred upon towns by statute, it has been usually held to apply as well to private property as to public highways; Thompson-Houston Electric Co. v. City of Newton, 42 Fed. 723; City of Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214; but where it has been only implied from existing statutes the implication will not extend to a commercial use; Mauldin v. City Council of Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291; Rushville Gas Co. v. City of Rushville, 121 Ind. 212, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. Rep. 388. Statutes conferring such rights are constitutional; Opinion of the Justices, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487; Linn v. Chambersburg Borough, 160 Pa. 511, 28 Atl. 842, 25 L. R. A. 217; Hequembourg v. City of Dunkirk, 49 Hun 550, 2 N. Y. Supp. 447; State v. Allen, 178 Mo. 555, 77 S. W. 868; Mitchell v. City of Negaunee, 113 Mich. 359, 71 N. W. 646, 38 L. R. A. 157, 67 Am. St. Rep. 468; Fawcett v. Mt. Airy, 134 N. C. 125, 45 S. E. 1029, 63 L. R. A. 870, 101 Am. St. Rep. 825.

In so far as municipal corporations are engaged in the discharge of the powers and duties imposed upon them by the legislature as governmental agencies of the state, they are not liable for breach of duty by their officers; in that respect the officers are the agents of the state, although selected by the municipality. When acting in their ministerial or corporate character in the management of property used for their own benefit or profit, discharging powers and duties voluntarily assumed for their own advantage, they are liable to an action to persons injured by the negligence of their servants, agents and officers; and it is immaterial whether such servant, agent or officer be a corporation or an individual; City of Owensboro v. Knox's Adm'r, 116 Ky. 451, 76 S. W. 191; Emery v. Philadelphia, 208 Pa. 492, 57 Atl. 977; Twist v. City of Rochester, 165 N. Y. 619, 59 N. E. 1131; City of Emporia v. Burns, 67 Kan. 523, 73 Pac. 94; Moffitt v. Asheville, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810; Fisher v. City of New Bern, 140 N. C. 506, 53 S. E. 342, 5 L. R. A. (N. S.) 542, 111 Am. St. Rep. 857, where a commission was established by the legislature to have charge of the electric light, water and sewer systems of a city. It was held that, though one of the purposes of the company in the construction of the electric light plant was the illumination of the streets (which possibly might be considered a governmental function), yet the selling the power for profit to shops, residences, etc., would place such a corporation upon the same footing as private individuals engaged in the same business. The city was held responsible for the negligence of the commission in leaving a live, broken electric light wire on a pole in a much used street, where one stepped upon it and was killed. And to the same effect that a city is liable in the exercise of its business powers, see Davoust v. City of Alameda, 149 Cal.

69, 84 Pac. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847; Esberg Cigar Co. v. City of Portland, 34 Or. 282, 55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651; City of Henderson v. Young, 119 Ky. 224, 83 S. W. 583, 26 Ky. L. Rep. 1152; Twist v. City of Rochester, 165 N. Y. 619, 59 N. E. 1131; Bullmaster v. City of St. Joseph, 70 Mo. App. 60.

It has been held that the duty of a city to see that its highways are in a safe condition does not extend to the inspection of the insulation of wires owned by a private corporation, and that recovery cannot be had from the city for a death caused by a hanging wire charged by the defective insulation of a wire belonging to an electric company; Fox v. Village of Manchester, 183 N. Y. 141, 75 N. E. 1116, 2 L. R. A. (N. S.) 474. But see, to the contrary, Gladdon v. Borough of Duncannon, 23 Pa. Co. Ct. R. 81, where a borough, manufacturing electricity for the use of its inhabitants, was held not to become thereby an electric light company, so as to be liable under an act providing for the recovery of damage to trees by such companies.

As to Rights and Privileges. A municipality may grant a franchise to an electric light company to use its streets without making such right an exclusive one, Crowder v. Town of Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; Hanson v. Electric Light Co., 86 Ia. 722, 48 N. W. 1005, 53 N. W. 84; but it must have legislative authority to grant such franchise, Brush Electric Light Co. v. Electric Light Co., 5 Ohio Cir. Ct. 340; Grand Rapids E. L. & P. Co. v. Gas Co., 33 Fed. 659, and in Iowa it must be submitted to a vote of qualified electors; Hanson v. Electric Light Co., 86 Ia. 722, 48 N. W. 1005, 53 N. W. 84; City of Keokuk v. Electric Co., 90 Ia. 67, 57 N. W. 689. It may confer the right on one company to use poles erected by another company; Citizens' Electric Light & Power Co. v. Sands, 95 Mich. 551, 55 N. W. 452, 20 L. R. A. 411; and may fix the compensation to the latter for their use; Toledo Electric St. Ry. Co. v. Power Co., 10 Ohio Cir. Ct. 531; but unless the limit of such use is fixed and the manner of stringing the wires prescribed such a permission is unreasonable and void; Citizens' Electric Light & Power Co. v. Sands, 95 Mich. 551, 55 N. W. 452, 20 L. R. A. 411; and a company will be enjoined from use of another's poles without permission from the city, the court, or the other company; Hauss Electric Lighting Power Co. v. Electric Co., 23 Wkly. Law Bul. 137. A contract with a gas company to light the streets with gas was held not to deprive the city of the power to contract with another company to furnish electric lights for the same purpose; Parkersburg Gas Co. v. Parkersburg, 30 W. Va. 435, 4 S. E. 650; Saginaw Gas-Light Co. v. City of Saginaw, 28 Fed. 529. The right of the city to grant franchises for electric lighting carries with it the right to purchase or operate a plant even if there be an existing organized corporation and the city violates no contract by so doing; Thompson-Houston Electric Co. v. City of Newton, 42 Fed. 723. As a rule, however, the statutes provide for the purchase of an existing plant by the municipality and for arbitration in case of disagreement as to the price. In Massachusetts an existing company is not compelled to sell its property to the town, Citizens' Gas Light Co. v. Wakefield, 161 Mass. 432, 37 N. E. 444, 31 L. R. A. 457.

Conflicting Electrical Companies. Where a telegraph and an electric light company had each obtained a franchise for the use of the same street, it was held that the company which first obtained the franchise was entitled to priority, and the other company must so adjust its wires as to prevent danger from juxtaposition or interference with the business of the first company; Western Union Tel. Co. v. Light Co., 46 Mo. App. 120, and that where the street was already occupied by the telegraph company the electric light company would be enjoined from placing its wires so near as to interfere with the transmission of messages, *id.* In the case of a telephone and an electric light company, both having valid franchises, the telephone company was refused an injunction against the latter company on the ground that they had first occupied the streets, but on streets not occupied by either company, the electric light company was enjoined from using the same side of the street for lights and from stringing wires within such a distance as to injure the service of the telephone company; Nebraska Telephone Co. v. Gas & Electric Light Co., 27 Neb. 284, 43 N. W. 126; 12 Ont. 571; Paris Electric Light & Ry. Co. v. Telegraph & Telephone Co. (Tex.) 27 S. W. 902. If two electric light companies have the use of the same street, the first to occupy them has the prior right, and the second company will be restrained from stringing its wires so near as to interfere with the business of the first company or cause danger to the public; Consolidated Electric Light Co. v. Electric Light & Gas Co., 94 Ala. 372, 10 South. 440 (where the decision was based rather on the ground that such juxtaposition of the wires was dangerous to public safety). An electric light corporation, contracting to light a building, must exercise the highest degree of care in the installation of its wires and fixtures, and is liable for injuries sustained by a person handling in the usual way an ordinary incandescent light bulb; Alexander v. Light Co., 209 Pa. 571, 58 Atl. 1068, 67 L. R. A. 475; to the same effect, Gilbert v. Electric Co., 93 Minn. 99, 100 N. W. 653, 106 Am. St. Rep. 430; Memphis Consol. Gas & Electric Co. v. Letson, 135 Fed. 969, 68 C.

C. A. 453; Southern Telegraph & Telephone Co. v. Evans, 54 Tex. Civ. App. 63, 116 S. W. 418; such a company must use reasonable care to prevent a secondary current from being charged with a high voltage current; Witmer v. Electric Light & Power Co., 187 N. Y. 572, 80 N. E. 1122; and is bound to see that its fixtures are securely attached; Fish v. Electric Light & Power Co., 189 N. Y. 336, 82 N. E. 150, 13 L. R. A. (N. S.) 226; and to keep the wires properly insulated; Griffin v. Light Co., 164 Mass. 192, 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477. The test of the liability of a company is whether injury to persons might reasonably be anticipated; Guinn v. Telephone Co., 72 N. J. L. 276, 62 Atl. 412, 3 L. R. A. (N. S.) 988, 111 Am. St. Rep. 668. Where the apparatus is installed by other parties, the company has been held bound to make a reasonable inspection of it before furnishing current; Hoboken Land & Imp. Co. v. Electric Co., 71 N. J. L. 430, 58 Atl. 1082; but they are held not liable for defective apparatus where other persons did the work of wiring; Harter v. Power Co, 124 Ia. 500, 100 N. W. 508; Brunelle v. Light Corp., 188 Mass. 493, 74 N. E. 676; National Fire Ins. Co. v. Electric Co., 16 Colo. App. 86, 63 Pac. 949; Minneapolis General Electric Co. v. Cronon, 166 Fed. 651, 92 C. C. A. 345, 20 L. R. A. (N. S.) 816. A city ordinance requiring all splices or joints on electric wires to be perfectly insulated is a contract with every inhabitant fixing a standard of duty, failure to observe which will constitute negligence; Clements v. Light Co., 44 Ia. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348.

The liability extends to trespassers; Nelson v. Lighting & Water Co, 75 Conn 548, 54 Atl. 303; Newark Electric Light & Power Co. v. Garden, 78 Fed. 74, 23 C. C. A. 649, 37 L. R. A. 725; Lynchburg Telephone Co. v. Booker, 103 Va. 595, 50 S. E. 148; *contra*, Augusta Ry. Co. v. Andrews, 89 Ga. 653, 16 S. E. 203; McCaughna v. Electric Co., 129 Mich. 407, 89 N. W. 73, 95 Am. St. Rep. 441; Stark v. Traction & Lighting Co., 141 Mich. 575, 104 N. W. 1100, 1 L. R. A. (N. S.) 822; Cumberland Telegraph & Telephone Co. v. Martin's Adm'r, 116 Ky. 554, 76 S. W. 394, 77 S. W. 718, 63 L. R. A. 469, 105 Am. St. Rep. 229; Minneapolis General Electric Co. v. Cronon, 166 Fed. 651, 92 C. C. A. 345, 20 L. R. A. (N. S.) 816.

Equity, at the suit of a state, will enjoin an electric railway company from permitting the escape of electricity into the ground, injuring municipal water pipes; Dayton v. Ry. Co., 26 Ohio Cir. Ct. R. 736. One who discharges electricity into the earth is liable for damages caused by the current just as if he had discharged a stream of water. Where a railway company did so under order of the Board of Trade and used the best known system, it was not responsible for the injury; [1893] 2 Ch. 186.

Equity cannot prescribe by injunction a particular system of circuit or negative return of the electric current to be used by an electric railway company, although it is shown that the system in use results in continuous injury to the water pipes of a water company; but it will act by injunction upon the continuance of the injury, leaving it to the discretion of the company to prevent it. In this case it appeared that the railway company's system could not entirely prevent electrolysis, but that it was suggesting other means which would practically prevent serious injury. The court enjoined the continuance of the injury, but left the defendant free to adopt the proper system within a reasonable time; Peoria Waterworks Co. v. R. Co., 181 Fed. 990 (C. C. Ill.), per Sanborn, C. J.

See generally CAUSA PROXIMA; Joyce, Electric Law; EMINENT DOMAIN; HIGHWAYS, IMPAIRING OBLIGATION OF CONTRACTS; STREETS; TELEGRAPH; TELEPHONE.

ELECTROCUTION. A method of punishment of death inflicted by causing to pass through the body of the convicted person a current of electricity of sufficient force and continuance to cause death. See 1 Witth. & Beck. Med. Jur. 663.

It was enacted in New York in 1888, in Ohio in 1896, and in Pennsylvania in 1913, and in one or two other states.

Punishment by electrocution is not within the meaning of the Constitution of the United States, which prohibits the infliction of unusual and cruel punishments; and while the infliction of the death penalty by a new agency is unusual, the adoption of such an agency which is not a certainly prolonged or extreme procedure is not violative of this constitutional provision; People v. Durston, 119 N. Y. 569, 24 N. E. 6, 7 L. R. A. 715, 16 Am. St. Rep. 859.

This act of New York is not repugnant to the Constitution of the United States when applied to a convict who committed the crime after the act took effect; In re Kemmler, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519. See Ex parte Mirzan, 119 U. S. 584, 7 Sup. Ct. 341, 30 L. Ed. 513.

ELECTROLYSIS. See ELECTRICAL COMPANIES.

ELEEMOSYNARIUS (Lat.). An almoner. There was formerly a lord almoner to the kings of England, whose duties are described in Fleta, lib. 2, cap. 23. A chief officer who received the eleemosynary rents and gifts, and in due method distributed them to pious and charitable uses. Cowell.

ELEEMOSYNARY CORPORATIONS. Such private corporations as are instituted for purposes of charity, their object being the distribution of the bounty of the founder of

them to such persons as he directed. Of this kind are hospitals for the relief of the impotent, indigent, sick, and deaf or dumb; Ang. & A. Corp. § 39; American Asylum at Hartford v. Bank, 4 Conn. 172, 10 Am. Dec. 112; McKim v. Odom, 3 Bland (Md.) 407; 1 Ld. Raym. 5; 2 Term 346. The nature of eleemosynary corporations is discussed in the Dartmouth College case. They are in no sense ecclesiastical corporations as understood in the classification of Blackstone. Marshall, C. J., said, in distinguishing the college from a public corporation employed for the purposes of government, that it was in fact a private eleemosynary institution endowed with capacity to take property for objects unconnected with government, whose funds were bestowed by individuals on the faith of the charter—none the less so because for public education; Dartmouth College v. Woodward, 4 Wheat. 518, 630, 4 L. Ed. 629. And in the same case, Story, J., discussed at length the nature of these corporations, defining them as "such as are constituted for the perpetual distribution of the free alms and bounty of the founder in such manner as he has directed"; and then, after pointing out the division of corporations into public and private, he goes on to explain that eleemosynary corporations are private corporations although dedicated to general charity, and that the argument that because the charity is public, the corporation is public, "manifestly confounds the popular with the strictly legal sense of the terms." He also calls attention to the fact that "to all eleemosynary corporations a visitorial power attaches as a necessary incident." See VISITATION.

In the same opinion it is said that a private eleemosynary corporation, when created by the charter of the crown, is subject to no other control of the crown unless power be reserved for that purpose, and this he characterizes as "one of the most stubborn and well-settled doctrines of the common law"; but nevertheless such corporations, like all others, are subject to the general law of the land. See, also, Society for Propagation of Gospel v. New Haven, 8 Wheat. (U. S.) 464, 5 L. Ed. 662; 1 Bla. Com. 471.

"In the English law corporations are divided into *ecclesiastical* and *lay;* and lay corportions are again divided into eleemosynary and civil. It is doubtful how far clear conceptions of the law are promoted by keeping in mind these divisions. They seem, for us at least, to have an historical, rather than a practical, value. In a country where the church is totally disassociated from the state, there is little room for a division of corporations into ecclesiastical and lay; and while charitable corporations have many features which distinguish them from other private corporations, as will hereafter appear, it is very seldom that the word 'civil' is used in our American books of reports in order to distinguish corporations other than charitable."

ELEGIT (Lat. *eligere*, to choose). A writ of execution directed to the sheriff, commanding him to make delivery of a moiety of the party's land and all his goods, beasts of the plough only excepted.

The sheriff, on the receipt of the writ, holds an inquest to ascertain the value of the lands and goods he has seized, and then they are delivered to the plaintiff, who retains them until the whole debt and damages have been paid and satisfied. During that term he is called tenant by eligit; Co. Litt. 289. See Pow. Mort.; Wats. Sheriff 206; 1 C. B. N. S. 568; 3 Holdsw. Hist. E. L. 113; 2 Poll. & Maitl. 122.

The name was given because the plaintiff has his choice to accept either this writ or a *fi. fa.*

By statute, in England, the sheriff is to deliver the whole estate instead of the half; see 3 Bla. Com. 418; and by act of 1883 it no longer extends to goods. The writ is still in use in the United States, to some extent, and with somewhat different modifications in the various states adopting it; 4 Kent 431, 436; McCance v. Taylor, 10 Gratt. (Va.) 580; Morris v. Ellis, 3 Ala. 560.

ELEMENTS. A term popularly applied to fire, air, earth and water, anciently supposed to be the four simple bodies of which the world was composed. Encyc. Dict. Often applied in a particular sense to wind and water, as "the fury of the elements." Cent. Dict. It has been said that "damages by the elements," and "damages by the act of God," are convertible expressions; Polack v. Pioche, 35 Cal. 416, 95 Am. Dec. 115.

ELEVATED RAILWAYS. See RAILROADS.

ELEVATOR. A building containing one or more mechanical elevators, especially a warehouse for the storage of grain; a hoisting apparatus; a lift; a car or cage for lifting and lowering passengers or freight in a hoistway. Cent. Dict.

A landlord who runs an elevator for the use of his tenants and their visitors thereby becomes a common carrier; Goodsell v. Taylor, 41 Minn. 207, 42 N. W. 873, 4 L. R. A. 673, 16 Am. St. Rep. 700; Morgan v. Saks, 143 Ala. 139, 38 South. 848; Mitchell v. Marker, 62 Fed. 139, 10 C. C. A. 306, 25 L. R. A. 33; Edwards v. Burke, 36 Wash. 107, 78 Pac. 610; Lee v. Knapp & Co., 155 Mo. 610, 56 S. W. 458; Fox v. Philadelphia, 208 Pa. 127, 57 Atl. 356, 65 L. R. A. 214; Oberfelder v. Doran, 26 Neb. 118, 41 N. W. 1094, 18 Am. St. Rep. 771; Walsh v. Cullen, 235 Ill. 91, 85 N. E. 223, 18 L. R. A. (N. S.) 911. He is charged with the highest degree of care which human foresight can suggest, both as to the machinery and the conduct of his servants; Marker v. Mitchell, 54 Fed. 637; Treadwell v. Whittier, 80 Cal. 595, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. That such a carrier of passengers is not an insurer, but is required to exercise the highest degree of care; Mitchell v. Marker, 62 Fed. 139, 10 C. C. A. 306, 25 L. R. A. 33;

Tousey v. Roberts, 114 N. Y. 312, 21 N. E. 399, 11 Am. St. Rep. 655; Edwards v. Burke, 36 Wash. 107, 78 Pac. 610. Other cases do not subject him to the same responsibility as common carriers; Edwards v. Building Co., 27 R. I. 248, 61 Atl. 646, 2 L. R. A. (N. S.) 744, 114 Am. St. Rep. 37, 8 Ann. Cas. 974; Griffen v. Manice, 166 N. Y. 197, 59 N. E. 925, 52 L. R. A 922, 82 Am. St. Rep. 630; Seaver v. Bradley, 179 Mass. 329, 60 N. E. 795, 88 Am. St. Rep. 384.

Where the owner is in the habit of permitting a person to accompany freight on an elevator, he owes him the duty of a carrier; Orcutt v. Building Co., 201 Mo. 424, 99 S. W. 1062, 8 L. R. A. (N. S.) 929. Where a municipal ordinance imposed upon owners of elevators the duty to employ competent persons, the owner of an apartment house was held liable for injuries to the child of his tenant, who, finding the elevator unguarded, attempted to run it; Shellaberger v. Fisher, 143 Fed. 937, 75 C. C. A. 9, 5 L. R. A. (N. S.) 250. A hotel-keeper owes the same duty to persons visiting his guests, and, in general, to all persons lawfully in the hotel and in the elevator, as to his guests; McCracken v. Meyers, 75 N. J. L. 935, 68 Atl. 805, 16 L. R. A. (N. S.) 290, citing Siggins v. McGill, 72 N. J. L. 263, 62 Atl. 411, 3 L. R. A. (N. S.) 316, 111 Am. St. Rep. 666.

The right of any person to ride on an elevator is held to be based on the implied invitation which the owner is deemed to have extended to all who have business on his premises; such owner must see that the premises are in a reasonable, safe, condition; the measure of duty is reasonable care and prudence; Griffen v. Manice, 166 N. Y. 197, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630; Burgess v. Stowe, 134 Mich. 204, 96 N. W. 29.

A hotel-keeper is not bound to the same degree of care with respect to his employés as to his guests in operating his elevator. His duty as to them is ascertained by the general rules governing the relation of master and servant. In Illinois, where the proprietor of an elevator is held to be a carrier of passengers; Hodges v. Percival, 132 Ill. 53, 23 N. E. 423; Springer v. Ford, 189 Ill. 430, 59 N. E. 953, 52 L. R. A. 930, 82 Am. St. Rep. 464; Beidler v. Branshaw, 200 Ill. 425, 65 N. E. 1086; Masonic Fraternity Temple Ass'n v. Collins, 210 Ill. 482, 71 N. E. 396; yet where a waitress was injured on a hotel elevator, the proprietor was held not to owe her the duty of a common carrier; Walsh v. Cullen, 235 Ill. 91, 85 N. E. 223, 18 L. R. A. (N. S.) 911. To the same effect, Sievers v. Lumber Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399; McDonough v. Lanpher, 55 Minn. 501, 57 N. W. 152, 43 Am. St. Rep. 541.

The owner of an office building has been held not to owe the duty of keeping closed the doors to the elevator wells in respect to one who enters the building seeking information about one not a tenant of or employed in it, since he is a mere licensee; Stanwood v. Clancey, 106 Me. 72, 75 Atl. 293; Plummer v. Dill, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463; as such he goes into the building at his own risk and is bound to take the premises as he finds them; Beehler v. Daniels, 18 R. I. 563, 29 Atl. 6, 27 L. R. A. 512, 49 Am. St. Rep. 790; Faurot v. Grocery Co., 21 Okl. 104, 95 Pac. 463, 17 L. R. A. (N. S.) 136; Faris v. Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261. This rule was applied where a policeman, in the exercise of his duty to protect the property of an express company from strikers, was killed from falling down an elevator shaft; Casey v. Adams, 234 Ill. 350, 84 N. E. 933, 17 L. R. A. (N. S.) 776, 123 Am. St. Rep. 105; and also where a fireman entered a building for the purpose of protecting property therein from fire and was injured while using an elevator in such building; Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182, 17 L. R. A. 588, 36 Am. St. Rep. 376; and where the wife of the janitor of a building used the elevator for the purpose of showing a tenant therein the roof; Billows v. Moors, 162 Mass. 42, 37 N. E. 750.

As to licensees by invitation or affirmative consent, it is held that the owner of an elevator owes the duty of exercising ordinary care; Muench v. Heinemann, 119 Wis. 441, 96 N. W. 800. Thus a child, who with the knowledge or implied consent of an elevator operator, rides on the top of the car, is held not a trespasser; Davis' Adm'r v. Trust Co., 127 Ky. 800, 106 S. W. 843, 15 L. R. A. (N. S.) 402. As to licensees by permission or on mere sufferance, the owner owes no duty except to refrain from acts of actual negligence; Muench v. Heinemann, 119 Wis. 441, 96 N. W. 800; Faris v. Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261; Amerine v. Porteous, 105 Mich. 347, 63 N. W. 300; McCarvell v. Sawyer, 173 Mass. 540, 54 N. E. 259, 73 Am. St. Rep. 318; McManus v. Thing, 194 Mass. 362, 80 N. E. 487; Leavitt v. Shoe Co., 69 N. H. 597, 45 Atl. 558. Where one has been forbidden to use the elevator and sustains an injury, he cannot recover; Ferguson v. Truax, 132 Wis. 478, 110 N. W. 395, 111 N. W. 657, 112 N. W. 513, 14 L. R. A. (N. S.) 350, 13 Ann. Cas. 1092.

An elevator should have constant care and inspection; Bier v. Mfg. Co., 130 Pa. 446, 18 Atl. 637; McGuigan v. Beatty, 186 Pa. 329, 40 Atl. 490; that the machinery was oiled once a week and the elevator looked at by a fellow servant does not fulfil the requirement that it should be inspected regularly; Swenson v. R. Co., 78 App. Div. 379, 80 N. Y. Supp. 281; or where it has been inspected two weeks before an accident, and a defect overlooked; Corn Products Refining Co. v.

King, 168 Fed. 892, 94 C. C. A. 304; or where an accident was caused by the breaking of a shaft, the defective condition of which might have been discovered by inspection; Reinhardt v. Lard Co., 74 N. J. L. 9, 64 Atl. 990. But one is not liable for an accident to an employé if he regularly employs a competent firm to inspect the elevator; Young v. Stable Co., 193 N. Y. 188, 86 N. E. 15, 21 L. R. A. (N. S.) 592, 127 Am. St. Rep. 939. In case of a casualty, it is not enough to show that the elevator is one of a kind in ordinary use; McCormick Harvesting Machine Co. v. Burandt, 136 Ill. 170, 26 N. E. 588. But the absence of safety appliances is said not to be conclusive evidence of negligence; Shattuck v. Rand, 142 Mass. 83, 7 N. E. 43. An elevator is not supposed to be a place of danger, to be approached with great caution; Zieman v. Mfg. Co., 90 Wis. 497, 63 N. W. 1021; but when the door is opened a passenger may enter it without stopping to make a special examination; Tousey v. Roberts, 114 N. Y. 312, 21 N. E. 399, 11 Am. St. Rep. 655.

See 9 L. R. A. 640, note; Mitchell v. Marker, 62 Fed. 139, 10 C. C. A. 306, 25 L. R. A. 33; Webb, Elevators.

The business of handling grain in elevators is of such a nature as to subject it to regulations which would be entirely unjustifiable if applied to a purely private business. Because the business is of a quasi-public nature, even the owner of a country elevator, who buys for himself alone and is his own grader and weighmaster, may be required to secure a license from the state; State v. W. W. Cargill Co., 77 Minn. 223, 79 N. W. 962; W. W. Cargill Co. v. Minnesota, 180 U. S. 402, 21 Sup. Ct. 423, 45 L. Ed. 619. For the same reason the legislature may make a weighmaster's certificate prima facie evidence of what is stated therein; Vega Steamship Co. v. Elevator Co., 75 Minn. 308, 77 N. W. 973, 43 L. R. A. 843, 74 Am. St. Rep. 484.

As to grain in a grain elevator, see CONFUSION OF GOODS.

ELIGIBILITY. The constitution of the United States provides that no person holding any office under the United States shall be a member of either house. The acceptance by a member of congress of a commission as a volunteer in the army vacates his seat; Cl. & H. 122, 395, 637. But by a decision of the second comptroller of the treasury, of Feb. 24, 1894, it was held that there was no incompatibility of office between that of a member of the house of representatives and the military office held by an officer of the United States army on the retired list, and that he was entitled to pay for both offices. A centennial commissioner holds an office of trust or profit under the United States, and is thereby ineligible as a presidential elector; In re Corliss, 11 R. I. 638, 23 Am. Rep. 538. A state cannot by statute provide that certain state officers are ineligible to a federal office; Turney v. Marshall, 1 Bartl. 167; Trumbull's Election, 1 Bartl. 619.

Duelling has been made in some states a disqualification for office; see DUELLING. In Kentucky, it was held that the doing of any of the prohibited acts was a disqualification for office without a previous conviction; Cochrane v. Jones, 14 Am. L. Reg. N. S. 22; but this opinion has been questioned in a note to that case. See McCrary, Elect. 189.

An alien cannot, even in the absence of any provision forbidding it, *hold* an office; State v. Van Beek, 87 Ia. 569, 54 N. W. 525, 19 L. R. A. 622, 43 Am. St. Rep. 397. See Cooley, Const. Lim. 748, n.; but he may be *elected* to an office; State v. Murray, 28 Wis. 96, 9 Am. Rep. 489; State v. Trumpf, 50 Wis. 103, 5 N. W. 876, 6 N. W. 512. And members elect of congress, who were ineligible on account of participation in the rebellion, have been admitted to a seat, their disqualification having been subsequently removed; McCrary, Elect. 193.

The word *eligibility*, used in connection with an office, where there are no explanatory words indicating that it is used with reference to the time of election, refers to the qualification to hold the office rather than to be elected; Bradfield v. Avery, 16 Idaho 769, 102 Pac. 687, 23 L. R. A. (N. S.) 1228; Hoy v. State, 168 Ind. 506, 81 N. E. 509, 11 Ann. Cas. 944.

As to the effect of the ineligibility of the candidate having the highest number of votes, see ELECTION.

ELIGIBLE. This term relates to the capacity of holding as well as that of being elected to an office; Carson v. McPhetridge, 15 Ind. 327. See Searcy v. Grow, 15 Cal. 117; State v. Clarke, 3 Nev. 566; State v. Smith, 14 Wis. 497.

ELISORS. Two persons appointed by the court to return a jury when the sheriff and coroner have been challenged as incompetent, either because they are parties to the suit, or are related to either party. 3 Bla. Com. 354; Allen v. Com., 12 S. W. 582, 11 Ky. L. Rep. 555; or because they are partial; 5 Bac. Abr. 318; 3 East 141; Fortesc. de Laudibus LL. 53; Alc. & Nap. 113; or interested; Tidd, Prac. 723, 780; People v. Fellows, 122 Cal. 233, 54 Pac. 830; State v. Hultz, 106 Mo. 41, 16 S. W. 940; Harriman v. State, 2 G. Greene (Ia.) 270. They return the writ of venire directed to them with a panel of the jurors' names, and their return is final and no challenge is allowed to the array. But a party may have his challenge to the poll; Co. Litt. 158 *a*.

Elisors may be appointed to serve process other than that of returning a jury; Bruner v. Superior Court, 92 Cal. 239, 28 Pac. 341. An attachment may be directed to elisors against the coroners for not attaching a disobedient sheriff who has not brought the

defendant into court; 2 Wm. Bla. 911; 2 *id.* 1218; Tidd, Prac. 314; or for not returning an execution; People v. Palmer, 1 Cow. (N. Y.) 32; but such appointment will be refused where it is a matter of mere service of process; 10 Moore 266.

Authority to appoint elisors need not be given by statute; Wilson v. Roach, 4 Cal. 362; though the legislature may authorize the governor to appoint officers with the powers of sheriff to enforce liquor laws; Gilmore v. Penobscot County, 107 Me. 345, 78 Atl. 454.

Elisors were named by the prothonotary and appointed by the court; Barnes 465; named by plaintiff and approved by prothonotary; 2 Wm. Bla. 911; or named by the master in the King's Bench, or prothonotary in the Common Pleas; Tidd, Prac. 151.

A sheriff is incompetent if he is part of a defendant corporation, in which case elisors will be appointed; 1 Ir. L. Rec. O. S. 281; but where the sheriff and coroner were members of a corporation defending another similar suit against the same plaintiff, elisors were not appointed; Jackson v. Rathbone, 3 Cow (N. Y.) 296.

Elisors are usually two clerks of the court or residents of the county, and are sworn; 3 Bla. Com. 354; Fortesc. de Laud. LL. 53; but a person residing in a county other than that in which the defendant resides may be appointed under peculiar circumstances; Anonymous, 23 Wend. (N. Y.) 102; so may one who has served under the sheriff as bailiff to the petit jury in other causes; State v. Bodly, 7 Blackf. (Ind.) 355; and only one need be appointed to serve a summons; Reed v. Moffatt, 62 Ill. 300; and he need not be sworn; *id.*

Notice of the appointment of elisors must be given to the opposite party; 1 Stra. 235.

The appointment by a judge having competent jurisdiction is presumed to be proper; Turner v. Billagram, 2 Cal. 520; or by a clerk to serve a writ of replevin; Beach v. Schmultz, 20 Ill. 185. If it is irregular, a motion to quash the levy should be made in the court to which the writ is returnable; Turner v. Billagram, 2 Cal. 520. It rests in the discretion of the trial judge and will not be disturbed unless arbitrary and unjust; State v. Hultz, 106 Mo. 41, 16 S. W. 940. A venire for a grand jury was directed to elisors, the sheriff being disqualified, and not to the coroner; held legal; State v. Zeller, 83 N. J. L. 666, 85 Atl. 237.

Absence of the coroner from the parish when the sheriff is a party to the suit will not warrant the appointment of an elisor; Whitehead v. Brigham, 1 La. Ann. 317. A new sheriff will not be awarded process, though he be impartial, if it has already been given to elisors; Co. Litt. 158 *a; contra,* Anonymous, 23 Wend. (N. Y.) 102.

An elisor may be appointed to take charge of a jury retiring to deliberate upon a verdict, when both sheriff and coroner are disqualified or unable to act; People v. Fellows, 122 Cal. 233, 54 Pac. 830; People v. Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269.

By act of parliament elisors have free access to jurors' books in Ireland; Huband, Grand Jury in Ireland 1084.

See Umfreville, Lex Coronatoria 237, 241; Huband, Grand Jury in Ireland 480; Woodward, Coroners in Pennsylvania 140, 233.

ELKINS' ACT. See RATES.

ELL. A measure of length.

In old English the word signifies *arm,* which sense it still retains in the word *elbow.* Nature has no standard of measure. The cubit, the ell, the span, palm, hand, finger (being taken from the individual who uses them), are variable measures. So of the foot, pace, mile, or *mille passuum.* See Report on Weights and Measures, by the secretary of state of the United States, Feb. 22, 1821.

ELLENBOROUGH'S ACT. An English statute (43 Geo. III. c. 58) punishing offenses against the person. See ABORTION.

ELOGIUM (Lat.). **In Civil Law.** A will or testament.

ELOIGNE (Fr. *éloigner,* to remove to a distance). **In Practice.** A return to a writ of replevin, when the chattels have been removed out of the way of the sheriff.

ELONGATA. The return made by the sheriff to a writ of replevin, when the goods have been removed to places unknown to him. See, for the form of this return, Wats. Sheriff, Appx. c. 18, s. 3, p. 454; 3 Bla. Com. 148.

On this return the plaintiff is entitled to a capias in withernam. See WITHERNAM; Wats. Sheriff 300, 301. The word *éloigné* is sometimes used as synonymous with *elongata.*

ELONGATUS. The sheriff's return to a writ *de homine replegiando, q. v.*

ELOPEMENT. The departure of a married woman from her husband and dwelling with an adulterer. Cowell; Tomlin.

To constitute elopement the wife must not only leave the husband, but go beyond his actual control. For if she abandon the husband, and go and live in adultery in a house belonging to him, it is said not to be an elopement; Cogswell v. Tibbetts, 3 N. H. 42; 1 Rolle, Abr. 680.

When a wife elopes the husband is no longer liable for her support, and is not bound to pay debts of her contracting, when the separation is notorious; and whoever gives her credit does so, under these circumstances, at his peril; Hunter v. Boucher, 3 Pick. (Mass.) 289; 6 Term 603; McCutchen v. McGahay, 11 Johns. (N. Y.) 281, 6 Am. Dec. 373; Bull. N. P. 135.

It has been said that the word has no legal sense; 2 W. Bla. 1080; but it is frequently

used, as is here shown, with a precisely defined meaning. An action may be maintained by the husband, against a third person, for enticing away his wife, where nothing in the nature of criminal conversation is alleged. See Schoul. Hus. & W. 64; ALIENATION OF AFFECTION; ENTICE.

ELSEWHERE. In another place.

Where one devises all his land in A, B, and C, three distinct towns, and *elsewhere*, and had lands of much greater value than those in A, B, and C, in another county, the lands in the other county were decreed to pass by the word "elsewhere"; and by Lord Chancellor King, assisted by Raymond, C. J., and other judges, the word "elsewhere" was adjudged to be the same as if the testator had said he devised all his lands in the three towns particularly mentioned, or in any other place whatever. 3 P. Wms. 56. See, also, Chanc. Prec 202; 1 Vern. 4, n.; Cowp. 360, 808; 5 Bro. P. C. 496; 1 East 456.

As to the effect of the word "elsewhere" in the case of lands not purchased at the time of making the will, see 3 Atk. 254, 2 Ventr. 351. The words "or elsewhere" have been held not to include lands in another state, Atkinson v Schillman, 60 Fla 39, 53 South. 844, 56 South 274 As to the construction of the words "or elsewhere" in shipping articles, see Brown v Jones, 2 Gall. 477, Fed. Cas. No. 2,017.

ELUVIONES. Spring-tides.

EMANCIPATION. An act by which a person who was once in the power or under the control of another is rendered free.

This is of importance mainly in relation to the emancipation of minors from the parental control. See 3 Term 355; 8 *id.* 479; Varney v. Young, 11 Vt. 258; Tillotson v. McCrillis, *id.* 477; Haugh, Ketcham & Co. Iron Works v. Duncan, 2 Ind. App. 264, 28 N. E. 334; Trapnell v. Conklyn, 37 W. Va. 242, 16 S. E 570, 38 Am. St. Rep. 30. See Cooper, Justin. 441, 480; Cowperthwaite v. Jones, 2 Dall. (U. S.) 57, 1 L. Ed 287; Ferrière, *Dict. de Jurisp. Emancipation;* MANUMISSION.

An infant husband is entitled to his own wages, so far as necessary for the support of himself and family, even though he married without his father's consent; Com. v. Graham, 157 Mass. 73, 31 N. E. 706, 16 L. R. A. 578, 34 Am. St. Rep. 255. Where children contract for, collect, and use their own earnings, emancipation is to be inferred; Geringer v. Heinlein, 29 Wkly. Law Bul. 339; and so when they become of age, no other facts being shown; Baldwin v. Worcester, 66 Vt. 54, 28 Atl. 633.

The desertion of children by their father emancipates them; Thompson v. Ry. Co., 104 Fed. 845, where, in an action by the father as next of kin for the death of the child, it was held that there could be no recovery as by reason of the emancipation the father had no right to the earnings. See also for other authorities note in Wilson v. McMillan, 62 Ga. 16, 35 Am. Rep. 117; Rodg. Dom. Rel. § 467. This presumption of emancipation from desertion has been termed "the presumption of necessity." Schoul. Dom. Rel. § 267.

EMANCIPATION PROCLAMATION. See BONDAGE.

EMBARGO. A proclamation or order of state, usually issued in time of war or threatened hostilities, prohibiting the departure of ships or goods from some or all the ports of such state, until further order. The William King, 2 Wheat. (U. S.) 148, 4 L. Ed. 206.

A *civil* embargo is the act of a state detaining the ships of its own citizens in port, which amounts to an interdiction of commerce, accompanied, as it usually is, by a closing of its ports to foreign vessels. A *hostile* embargo is a detention, as before mentioned, of foreign vessels and property which may be in the ports of the wronged state. The detention is by way of reprisal *(q. v.)* and is thus distinguished from a detention of foreign vessels upon other grounds. If hostile embargo is followed by war, the vessels detained are confiscated. The term *embargo* is sometimes applied to the detention of foreign merchant vessels after the outbreak of war. It had been customary for belligerents to allow enemy vessels in their ports at the outbreak of hostilities to depart freely, and this custom finds a limited expression in the Convention Relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, adopted at the Hague Convention of 1907, which provides that it is *desirable* that such vessels be allowed to depart freely.

The detention of ships by an embargo is such an injury to the owner as to entitle him to recover on a policy of insurance against "arrests or detainments." And whether the embargo be legally or illegally laid, the injury to the owner is the same, and the insurer is equally liable for the loss occasioned by it. Marsh. Ins b. 1, c. 12, s. 5; 1 Kent 60; 1 Bell, Dict. 517.

An embargo detaining a vessel at the port of departure, or in the course of the voyage, does not of itself work a dissolution of a charter-party, or of the contract with the seamen. It is only a temporary restraint imposed by authority for legitimate political purposes, which suspends for a time the performance of such contracts, and leaves the rights of parties untouched; 1 Bell, Dict. 517.

EMBASSAGE or EMBASSY. The message or commission given by a sovereign or state to a minister called an "ambassador," empowered to treat or communicate with another sovereign or state; also the establishment of an ambassador. Black, L. Dict.

EMBEZZLEMENT. The fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another. Fagnan v. Knox, 40 N. Y. Super. Ct. 41.

The fraudulent appropriation of property by a person to whom it has been intrusted or to whose hands it has lawfully come; it

is distinguished from larceny in the fact that the original taking of the property was lawful or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking. Moore v. U. S., 160 U. S. 268, 16 Sup. Ct. 294, 40 L. Ed. 422. See Grin v. Shine, 187 U. S. 181, 23 Sup. Ct. 98, 47 L. Ed. 130; People v. Tomlinson, 102 Cal. 19, 36 Pac. 506.

The principles of the common law not being found adequate to protect general owners against the fraudulent conversion of property by persons standing in certain fiduciary relations to those who were the subject of their peculations, certain statutes have been enacted, as well in England as in this country, creating new criminal offences and annexing to them their proper punishments. The general object of these statutes doubtless was to define and embrace, as criminal offences punishable by law, certain cases where, although the moral guilt was quite as great as in larceny, yet the technical objection arising from the fact of a possession lawfully acquired by the party screened him from punishment. Com. v. Stearns, 2 Mete. (Mass.) 345; Com. v. Simpson, 9 Mete. (Mass.) 142. See State v. Wolff, 34 La. Ann. 1153.

In order to constitute embezzlement, it must distinctly appear that the party acted with felonious intent, and made an intentionally wrong disposal, indicating a design to cheat and deceive the owner. A mere failure to pay over money intrusted to such party as agent for investment is not sufficient, if this intent is not plainly apparent; People v. Hurst, 62 Mich. 276, 28 N. W. 838. The money *appropriated* need not have been intrusted to the accused by the owner; it is sufficient if it were intrusted to the employer of the accused and appropriated by the latter; Com. v. Clifford, 96 Ky. 4, 27 S. W. 811; and that the money was taken without any attempt at concealment is no defence to the charge of embezzlement; People v. Connelly, 4 Cal. Unrep. Cas. 858, 38 Pac. 42. There must be a relation of special trust in regard to the article appropriated, and it must be by virtue of such trust that the servant has access to, or control or possession of, it; Colip v. State, 153 Ind. 584, 55 N. E. 739, 74 Am St. Rep. 322; followed in State v. Winstandley, 155 Ind. 290, 58 N. E. 71. Whether the lack of authority to receive the money in the first instance will necessarily defeat a prosecution for embezzlement is a subject much discussed. The better view seems to be that if, by virtue of his employment, the money came into his possession, its embezzlement is within the meaning of the statute; Ker v. State, 110 Ill. 629, 51 Am. Rep. 706; Smith v. State, 53 Tex. Cr. R. 117, 109 S. W. 118, 17 L. R. A. (N. S.) 531, 15 Ann. Cas. 435; McAleer v. State, 46 Neb. 116, 64 N. W. 358; State v. Costin, 89 N. C. 511; State v. Jennings, 98 Mo. 493, 11 S. W. 980; but some cases hold that, if there was no authority to receive the money, its conversion will not constitute embezzlement; Brady v. State, 21 Tex. App. 659, 1 S. W. 462; State v. Johnson, 49 Ia. 141.

Embezzlement being a statutory offence, reference must be had to the statutes of the jurisdiction for the classes of persons and property affected by them. It has been held that there may be embezzlement of bank bills; Com. v. King, 9 Cush. (Mass.) 284; municipal bonds; Bork v. People, 91 N. Y. 5; State v. White, 66 Wis. 343, 28 N. W. 202; grain; State v. Stoller, 38 Ia. 321; an animal; Washington v. State, 72 Ala. 272; commercial securities; State v. Orwig, 24 Ia. 102; [1891] 1 Q. B. 112; and of a mortgage; Com. v. Concannon, 5 Allen (Mass.) 502; and by public officers, placed in a fiduciary relation as such; Com. v. Tuckerman, 10 Gray (Mass.) 173; People v. McKinney, 10 Mich. 54. See Ex parte Hedley, 31 Cal. 108; People v. Dalton, 15 Wend. (N. Y.) 581; Com. v. Morrisey, 86 Pa. 416; State v. Munch, 22 Minn. 67; Lewis v. Kendall, 6 How. Pr. (N. Y.) 59; State v. King, 81 Ia. 587, 47 N. W. 775; State v. Noland, 111 Mo. 473, 19 S. W. 715. Where one withdraws from the money drawer of a cash register money that he had deposited a moment before without registering, he is guilty of embezzlement; Com. v. Ryan, 155 Mass. 523, 30 N. E. 364, 15 L. R. A. 317, 31 Am. St. Rep. 560. Where an attorney collects money for his client, he acts as agent and attorney, and in either case, if he appropriate the money collected to his own use with the intention of depriving the owner of the same, he is guilty of embezzlement; People v. Converse, 74 Mich. 478, 42 N. W. 70, 16 Am. St. Rep. 648. In a prosecution for the embezzlement of money held by defendant as bailee, it is immaterial that it was deposited in a bank for a time, so that the money actually converted was not the identical bills delivered to the bailee; Com. v. Mead, 160 Mass. 319, 35 N. E. 1125.

A taking is requisite to constitute a larceny, and embezzlement is in substance and essentially a larceny, aggravated rather than palliated by the violation of a trust or contract, instead of being, like larceny, a trespass. The administration of the common law has been not a little embarrassed in discriminating between the two offences. But they are so far distinct in their character that, under an indictment charging merely a larceny, evidence of embezzlement is not sufficient to authorize a conviction; and in cases of embezzlement the proper mode is to allege sufficient matter in the indictment to apprise the defendant that the charge is for embezzlement. And it is often no less difficult to distinguish this crime from a mere breach of trust. Although the statutes declare that a party shall be deemed to have committed the crime of simple larceny, yet

it is a larceny of a peculiar character, and must be set forth in its distinctive character; Com. v. Wyman, 8 Metc. (Mass.) 247; Com. v. Simpson, 9 Metc. (Mass.) 138; Com. v. King, 9 Cush. (Mass.) 284; Kribs v. People, 82 Ill. 425; State v. Newton, 26 Ohio St. 265.

The word *embezzle* implies a fraudulent intent, and the addition of the word *fraudulently* is mere surplusage; Reeves v. State, 95 Ala. 31, 11 South. 158; U. S. v. Lancaster, 2 McLean 431, Fed. Cas. No. 15,556; State v. Wolff, 34 La. Ann. 1153; State v. Trolson, 21 Nev. 419, 32 Pac. 930; State v. Combs, 47 Kan. 136, 27 Pac. 818.

When money is embezzled, the owner has a right to settle as for an implied contract, and such settlement is no bar to a criminal prosecution; Fagnan v. Knox, 66 N. Y. 526; State v. Noland, 111 Mo. 473, 19 S. W. 715.

A partner is not guilty of embezzlement in appropriating the funds of the firm to his own use; Gary v. Masonic Aid Ass'n, 87 Ia. 25, 53 N. W. 1086. See Napoleon v. State, 3 Tex. App. 522; 12 Cox, C. C. 96.

When an embezzlement of a part of the cargo takes place on board of a ship, either from the fault, fraud, connivance, or negligence of any of the crew, they are bound to contribute to the reparation of the loss, in proportion to their wages. So too the embezzlement of property saved is a bar to salvage. When the embezzlement is fixed on any individual, he is solely responsible; when it is made by the crew, or some of the crew, but the particular offender is unknown, and, from the circumstances of the case, strong presumptions of guilt apply to the whole crew, all must contribute. The presumption of innocence is always in favor of the crew; and the guilt of the parties must be established beyond all reasonable doubt before they can be required to contribute; Spurr v. Pearson, 1 Mas. 104, Fed. Cas. No. 13,268; 4 B. & P. 347; Lewis v. Davis, 3 Johns. (N. Y.) 17; Dane, Abr. Index; Wesk. Ins. 194; 3 Kent 151. See Pars. Sh. & Adm

A prima facie case of embezzlement is made out, sufficient to warrant the surrender of one in extradition proceedings, when it was shown that a check was delivered to him with instructions to draw the money from the bank and take it to a railway station to be forwarded to another city, and that he subsequently converted the same to his own use; Grin v. Shine, 187 U. S. 181, 23 Sup. Ct. 98, 47 L. Ed. 130.

Stringent provisions are made by several acts of congress against the embezzlement of arms, munitions, and habiliments of war, property stored in public storehouses, letters, precious metals, and coins from the mint.

EMBLEMENTS (Fr. *embler*, or *emblaver*, to sow with corn. The profits of the land sown). The right of a tenant to take and carry away, after his tenancy has ended, such annual products of the land as have resulted from his own care and labor. The term is also applied to the crops themselves. Co. Litt. 55 *b*; 4 H. & J. 139; 3 B. & Ald. 118; Reiff v. Reiff, 64 Pa. 134.

It is a privilege allowed to tenants for life, at will, or from year to year, because of the uncertainty of their estates and to encourage husbandry. If, however, the tenancy is for years, and its duration depends upon no contingency, a tenant when he sows a crop must know whether his term will continue long enough for him to reap it, and is not permitted to re-enter and cut it after his term has ended; 4 Bingh. 202; Whitmarsh v. Cutting, 10 Johns. (N. Y.) 361; Debow v. Colfax, 10 N. J. L. 128; Gossett v. Drydale, 48 Mo. App. 430. Whenever a tenancy, other than at sufferance, is from the first of uncertain duration and is unexpectedly terminated without fault of the tenant, he is entitled to emblements; Gardner v. Lanford, 86 Ala. 508, 5 South. 879.

This privilege extends to cases where a lease has been unexpectedly terminated by *the act of God or the law;* that is, by some unforeseen event which happens without the tenant's agency; as, if a lease is made to husband and wife so long as they continue in that relation, and they are afterwards divorced by a legal sentence, the husband will be entitled to emblements; Oland's case, 5 Co. 116 *b*; or where the lessee of a tenant for life has growing crops unharvested at the time of the latter's death, he is entitled to them; Bradley v. Bailey, 56 Conn. 374, 15 Atl. 746, 1 L. R. A. 427, 7 Am. St. Rep. 316; Edghill v. Mankey, 79 Neb. 347, 112 N. W. 570, 11 L. R. A. (N. S.) 688; Hoagland v. Crum, 113 Ill. 365, 55 Am. Rep. 424 A similar result will follow if the landlord, having the power, terminates the tenancy by notice to quit; Cro. Eliz. 460; but not where, under the terms of the lease, the landlord re-enters and takes possession because the tenant fails to pay rent; Gregg v. Boyd, 69 Hun 588, 23 N. Y. Supp. 918. See other cases of uncertain duration, Stewart v. Doughty, 9 Johns. (N. Y.) 112; 8 Viner, Abr. 364. But it is otherwise if the tenancy is determined by an act of the tenant which works a forfeiture; as if, being a woman, she has a lease for a term of years provided she remains so long single, and she terminates it by marrying; 2 B. & Ald. 470; Lane v. King, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105. A landlord who re-enters for a forfeiture takes the emblements; 7 Bingh. 154. Where a tenant wrongfully retains possession of land after his term has expired, crops planted by him so long as they remain unsevered, belong to the landlord; Kleimann v. Geiselmann, 45 Mo. App. 505. See LANDLORD AND TENANT.

All such crops as in the ordinary course of things return the labor and expense bestowed upon them within the current year

become the subject of emblements,—consisting of grain, peas, beans, hemp, flax, and annual roots, such as parsnips, carrots, turnips, and potatoes as well as the artificial grasses, which are usually renewed like other crops. But such things as are of spontaneous growth, as roots and trees not annual, and the fruit on such trees, although ripe, and grass growing, even if ready to cut, or a second crop of clover, although the first crop taken before the end of the term did not repay the expense of cultivation, do not fall within the description of emblements; Cro. Car. 515; Cro. Eliz. 463; Whitmarsh v. Cutting, 10 Johns. (N. Y.) 361; Co. Litt 55 *b*; Tayl. Landl. & T. § 534; Woodf. Landl. & T. 750.

But although a tenant for years may not be entitled to emblements *as such*, yet by the custom of the country, in particular districts, he may be allowed to enter and reap a crop which he has sown, after his lease has expired; Dougl. 201; 16 East 71; 7 Bingh. 465. The parties to a lease may, of course, regulate all such matters by an express stipulation; but in the absence of such stipulation it is to be understood that every demise is open to explanation by the general usage of the country where the land lies, in respect to all matters about which the lease is silent; and every person is supposed to be cognizant of this custom and to contract in reference to it; Stultz v. Dickey, 5 Binn. (Pa.) 285, 6 Am. Dec. 411. The rights of tenants, therefore, with regard to the *away-going crop*, will differ in different sections of the country; thus, in Pennsylvania and New Jersey a tenant is held to be entitled to the grain sown in the autumn before the expiration of his lease, and coming to maturity in the following summer; Mitch. R. P. 24; Clark v. Harvey, 54 Pa. 142; Hudson v. Porter, 13 Conn. 59; Howell v. Schenck, 24 N. J. L. 89; while in Delaware the same custom is said to prevail with respect to wheat, but not as to oats; Templeman v. Biddle, 1 Harr. (Del.) 522; and trespass will lie against one who interferes with the land to the injury of the outgoing tenant; Clark v. Banks, 6 Houst. (Del.) 584.

Of a similar nature would be the tenant's right to remove the manure made upon the farm during the last year of the tenancy. Good husbandry requires that it should either be used by the tenant on the farm, or left by him for the use of his successor; and such is the general rule on the subject in England as well as in this country; Middlebrook v. Corwin, 15 Wend. (N. Y.) 169; Goodrich v. Jones, 2 Hill (N. Y.) 142. A different rule has been laid down in North Carolina; 2 Ired. 326; but it is clearly at variance with the whole current of American authorities upon this point. See MANURE. Straw, however, is incidental to the crop to which it belongs, and may be removed in all cases where the crop may be; Fobes v. Shattuck, 22 Barb. (N. Y.) 568; Craig v. Dale, 1 W. & S. (Pa.) 509, 37 Am. Dec. 477.

There are sometimes, also, mutual privileges, in the nature of emblements, which are founded on the common usage of the neighborhood where there is no express agreement to the contrary, applicable to both outgoing and incoming tenants. Thus, the outgoing tenant may by custom be entitled to the privilege of retaining possession of the land on which his away-going crops are sown, with the use of the barns and stables for housing and carrying them away; while the incoming tenant has the privilege of entering during the continuance of the old tenancy for the purposes of ploughing and manuring the land. But, independently of any custom, every tenant who is entitled to emblements has a right of ingress, egress, and regress to cut and carry them away, and the same privilege will belong to his vendee,—neither of them, however, having any exclusive right of possession. See Wintermute v. Light, 46 Barb. (N. Y.) 278; Tayl. Landl. & T. § 543; Woodf. Landl. & T. 754; LANDLORD AND TENANT; AWAY-GOING CROP; GROWING CROPS.

EMBRACEOR. He who, when a matter is on trial between party and party, comes to the bar with one of the parties, and, having received some reward so to do, speaks in the case or privily labors the jury, or stands there to survey or overlook them, thereby to put them in fear and doubt of the matter. But persons learned in the law may speak in a cause for their clients. Co. Litt. 369; *Termes de la Ley.*

EMBRACERY. An attempt to corrupt or influence a jury, or any way incline them to be more favorable to one side than to the other, by money, promises, threats, or persuasions, whether the juror on whom such attempt is made give any verdict or not, or whether the verdict be true or false. Hawk. Pl. Cr. 259; Co. Litt. 157 *b*, 369 *a*; 11 Mod. 111, 118; Gibbs v. Dewey, 5 Cow. (N. Y.) 503; 2 Bish. Cr. L. § 389; State v. Sales, 2 Nev. 268; Grannis v. Branden, 5 Day (Conn.) 260, 5 Am. Dec. 143; State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450.

Such an attempt is a misdemeanor at common law; Cl. Cr. L. 326.

See JURY.

EMENDA (Lat.) Amends. That which is given in reparation or satisfaction for a trespass committed; or, among the Saxons, a compensation for a crime. Spelman, Gloss.

EMENDALS. In English Law. This ancient word is said to be used in the accounts of the Inner Temple, where so much in emendals at the foot of an account signifies so much in bank, or stock, for the supply of emergencies. Cunningham, Law Dict. But

spelman says it is what is contributed for the reparation of losses. Cowell.

EMENDATIO PANIS ET CERVISIÆ. The power of supervising and correcting the weights and measures of bread and ale. Cowell.

EMERGENCY. An unforeseen occurrence or condition. See ACCIDENT.

EMIGRANT. One who quits his country for any lawful reason, with a design to settle elsewhere, and who takes his family and property, if he has any, with him. Vattel, b. 1, c. 19, § 224. See McIlvaine v. Coxe, 2 Cra. (U. S.) 302, 2 L. Ed. 279.

EMIGRANT AGENT. As used in a Georgia statute taxing emigrant agents, a person engaged in hiring laborers in a state to be employed beyond its limits. Williams v. Fears, 179 U. S. 270, 21 Sup. Ct 128, 45 L. Ed. 186, affirming 110 Ga. 584, 35 S. E. 699, 50 L. R. A. 685. See EMPLOYMENT AGENCIES.

EMIGRATION. The act of removing from one place to another.

It is sometimes used in the same sense as expatriation; but there is some difference in the signification. Expatriation is the act of abandoning one's country; while emigration is, perhaps not strictly, applied to the act of removing from one part of the country to another. See 2 Kent 34, 44; EXPATRIATION.

EMINENCE. A title of honor given to cardinals.

EMINENT DOMAIN. The superior right of property subsisting in a sovereignty, by which private property may in certain cases be taken or its use controlled for the public benefit, without regard to the wishes of the owner.

The power to take private property for public use. West River Bridge Co. v. Dix, 6 How. (U. S.) 536, 12 L. Ed. 535.

The right of every government to appropriate otherwise than by taxation and its police authority (which are distinct powers), private property for public use. Dill. Mun. Corp. § 584.

History and Nature of the Power. The phrase "eminent domain" appears to have originated with Grotius, who carefully describes its nature; Lewis, Em. Dom. § 3, n.; Mills, Em. Dom. § 5; 1 Thayer, Cas. Const. L. 945. The power is a universal one and as old as political society, and the American constitutions do not change its scope or nature but simply embody it, as described by Grotius, in positive, fundamental law.

The language of Grotius is: "We have elsewhere said, that the property of subjects is under the eminent domain of the state; so that the state, or he who acts for it, may use, and even alienate and destroy such property; not only in case of extreme necessity, in which even private persons have a right over the property of others; but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added, that when this is done, the state is bound to make good the loss to those who lose their property; and to this public purpose, among others, he who has suffered the loss must, if need be, contribute." Grotius, *Ecl. ac Pac.* lib iii. c 20. In the last clause quoted there seems to be an expression thus early of the doctrine which commonly forms a part of later legislation in the exercise of the right of eminent domain of the assessment of benefits on the person whose property is taken.

The term used by Grotius has been objected to by other writers, as, for example Bynkershoek, who prefers the terms *imperium eminens* rather than *dominium eminens*, considering the former as more accurately expressing the idea of *supreme* power. At the same time that he advocates the use of a terminology to give more emphatic expression to the sovereign nature and character of the power, this writer discusses the question whether it may be exercised only for necessity as he conceives Puffendorf to urge, or also on the ground of convenience or, to use the exact phrase of Grotius, utility. Bynkershoek considers either ground sufficient, but he also lays down the principle of requiring compensation not merely for a taking, but for "every loss which private persons bear for the common necessity or utility," thus anticipating the doctrine not recognized by writers of his time, but accepted by modern constitution makers, under the name of consequential damages for injury to, as well the direct loss occasioned by, the taking private property. *Quest Jur. Pub.* lib. ii. c. 15 Puffendorf also criticises the term employed by Grotius He divides the term control (*potestas*) into *dominium* as used in respect to what is one's own, and *imperium*, with respect to what belongs to others. Accordingly he would consider that *imperium eminens* is more accurate than *dominium eminens; De Jure Naturæ et Gentium*, lib. i. c 1. s. 19. So Heinneccius says "We confess that this use of the word is not quite apt, for the conception of *dominium* and that of *imperium* are different things; it is the latter and not the former which belongs to rulers," but he adds, that as there is no doubt about the absolute right, it is useless to condemn the word when once it has been accepted, *Elem. Jur. Nat et Gent* lib. ii c 8, s. 168

All these writers agree that the power is exercised as an attribute of sovereignty, and in this conclusion there is a general concurrence Vattel says, "In political society everything must give way to the common good, and if even the person of the citizens is subject to this rule, their property cannot be excepted. The state cannot live, or continue to administer public affairs in the most advantageous manner, if it have not the power, on occasion, to dispose of every kind of property under its control It should be presumed that when the nation takes possession of a country, property in specific things is given up to individuals only upon this reservation" So it was said by the U S. Supreme Court: "The power to take private property for public use, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and as said in Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed 206, requires no constitutional recognition," Field, J., U. S v Jones, 109 U. S. 513, 518, 3 Sup. Ct. 346, 27 L. Ed. 1015.

Blackstone rests the doctrine upon necessity, and considers the recognized right to compensation as evidence of the great regard of the law for private property, while the good of the individual must yield to that of the community, the legislature alone may interpose to compel the individual to acquiesce, but such interposition is not arbitrary but only upon full indemnification and equivalent for the injury thereby sustained. The nature of the transaction he states thus: "All that the legislature does, is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power which the legislature indulges with

caution, and which nothing but the legislature can perform." 1 Sharsw. Bla. Com. 139, n. 19.

This statement by Blackstone of English law is to be borne in mind hereafter in considering the nature and origin of the right to compensation. Here we have the right defined with the same limitation which, as will be seen, is sometimes claimed to rest solely on express provisions of written constitutions And the force of this statement is strengthened not weakened, by the observation of Buller, J., that there were many cases in which an injury is suffered by individuals for which there is no right of action, as in a case of the destruction of private property in time of war for the public defence; *id.*; 4 Term 794; 3 Wils 461, 6 Taunt. 29.

Notwithstanding this recognition of the nature of the power the subject of eminent domain as understood in the United States is practically eliminated from English law and the title itself is usually not to be found in digests or text books of that country. "That there is no eminent domain in English jurisprudence," says a recent writer on the subject, "is because the power is included, and the obligation to compensate lost, in the absolutism of parliament" "The only technical term approximating to eminent domain, is compulsory power, as used in acts enabling municipal and other corporations to take property for their use. The multiplication of such acts led to the enactment of several general laws, notably the Lands Clauses Consolidation Act (*q. v.*), which is a complete code This act or one of the others of a similar class, as the Railway Clauses Consolidation Act, is incorporated by reference in the various special acts," Rand Em Dom § 7

It follows of necessity that English decisions do not apply to the vast number of constitutional questions constantly arising in this country, though the adherence of English legislation to the same great principle of compensation necessarily results in producing a body of law in England covering most of the questions which are adjudicated in our own country respecting the construction and application of statutes under which the power is exercised.

The subject is treated at length in 6 Halsbury, Laws of England 1, under the title of Compulsory Purchase of Land, where (p. 12) it is pointed out that the earliest act appears to be one for supplying Gloucester with water in 1541-42, called 'The Bill for the Conduyttes at Gloucester", and that there was a similar act in 1543-44 for rebuilding London after the Great Fire

Different theories are advanced as to the precise nature of the power, and it has been defined to be the right retained by the people or government over the estate of individuals, to reclaim the same for public use,—a kind of reserved right or estate remaining in the sovereign as paramount to the individual title. This conception of the right was at one time very generally accepted The result of this view is to consider the right, theoretically at least, as so much of the original proprietorship retained by the sovereign power in granting lands or franchises to individuals or corporations, wherever the common-law theory of original proprietorship prevails. An argument by analogy in support of this view is derived from the able examination and explanation of the origin of the *jus publicum* in Com v Alger, 7 Cush. (Mass.) 90. See, also, remarks of Daniell, J, in West River Bridge Co v. Dix, 6 How. (U. S.) 533, 12 L. Ed 535. Perhaps no better statement of this doctrine is to be found than this: "The highest and most exact idea of property remaining in the government, or in the aggregate body of the people in their sovereign capacity, giving a right to resume the possession of the property in the manner directed by the constitution and the laws of the state whenever the public good requires it." Beekman v. R. Co, 3 Paige, Ch. (N. Y.) 73, 22 Am. Dec. 679; or, "The true theory and principle of the matter is, that the legislature resume dominion over the property, and having resumed it, instead of using it by their agents, to effect the intended public good, and to avoid entanglement in the common business of life, they revest it in other individuals or corporations to be used by them in such manner as to effect, directly or indirectly, or incidentally, as the case may be, the public good intended" Todd v Austin, 34 Conn. 78; see also Harding v. Goodlett, 3 Yerg (Tenn.) 41, 24 Am. Dec. 546, Heyward v. City of New York, 8 Barb. (N. Y.) 486; In re Union El. R. Co., 113 N. Y. 275, 21 N. E. 81; Biddle v. Hussman, 23 Mo. 597.

But this theory of resumption of original proprietorship is disapproved by the most authoritative writers, and with reason, the weight of authority and of argument are both against it. In this country the right is exercised by two governments, each sovereign, operating on the same property; the federal power can, upon no hypothesis, be based upon original grant in the older states, nor perhaps the state power, in the new states; a new sovereignty by acquiring territorial rights succeeds to this right over property, of which the original grant was from the prior one, property may be appropriated a second time after the power has been already exercised and, upon the theory under consideration, necessarily exhausted; personal property is subject to the right, although the doctrine of reserved right cannot apply to it, while the reversion of the state will supply no argument, as it applies equally to personal property in which the state never had any title, and any paramount or reserved right could be granted, but this right never can; Sholl v. Coal Co, 118 Ill. 427, 10 N. E. 199, 59 Am Rep 379; New York, H. & N. R. Co. v. R. Co, 36 Conn. 196 All these considerations are inconsistent with the theory suggested and seem to leave no alternative but to recognize the right as an attribute of sovereignty and in no sense an interest or estate. See Lewis, Em. Dom. § 3, Rand. Em Dom § 3; Noll v. R. Co, 32 Ia. 66, Raleigh & G R Co. v. Davis, 19 N. C 451, Bloodgood v R. Co, 18 Wend (N. Y.) 9, 57, 31 Am. Dec. 313; 2 Redf Railw. 229

It is an inherent power which belongs to the states and was not surrendered to the United States, and it is untouched by any provision of the federal constitution. It extends to tangible and intangible property, to a chose in action, a charter or any kind of contract, as well as to land and movables. It is not limited by the inhibition against impairing the obligation of contracts. The obligation of a contract is not impaired by being taken under eminent domain if compensation be made. Every contract between the state and the individual or between individuals is subject to this law; City of Cincinnati v. R. Co., 223 U. S. 390, 32 Sup. Ct. 267, 56 L. Ed. 481.

One of the inalienable rights of sovereignty; Hollister v. State, 9 Ida S, 71 Pac. 541; Central Branch U. P. R. Co. v. R. Co., 28 Kan. 453; Woodmere Cemetery v. Roulo, 104 Mich. 595, 62 N. W. 1010; Painter v. St. Clair, 98 Va. 85, 34 S. E. 989, and may be exercised for public purposes in the absence of any constitutional restriction; Anderson v. Draining Co., 14 Ind. 199, 77 Am. Dec. 63. It lies dormant in the state until legislative action determines the occasion, mode, conditions, and agencies for its exercise; Allen v. Jones, 47 Ind 438; St. Louis, H. & K. C. R. Co. v. Union Depot Co., 125 Mo. 82, 28 S. W. 483; the legislature may determine the estate or quantity of interest in lands which may be taken; Cleveland, C., C. & I. R. Co. v. R. Co., 91 Ind. 557; the power is recognized but not granted by the constitution; Samish

River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670; by which it is limited; Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 29 N. E. 1062, 15 L. R. A. 505; it is the "offspring of political necessity, and is inseparable from sovereignty unless denied to it by its fundamental law"; Searl v. School Dist. No. 2, 133 U. S. 553, 10 Sup. Ct. 374, 33 L. Ed. 740, cited in Adams v. Henderson, 168 U. S. 574, 18 Sup. Ct. 179, 42 L. Ed. 584.

Distinction between Eminent Domain and Other Powers. The constitutional requirement that compensation be made for property taken for public use does not restrict the inherent power of the state under reasonable regulation to protect the lives and secure the safety of the people; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; instances of taking or destruction of property which have been sustained are: the change of boundaries of municipal corporations, Little Rock v. North Little Rock, 72 Ark. 195, 79 S. W. 785; restriction on a mill site which another one had previously appropriated; Otis Comp. v. Mfg. Co., 201 U. S. 140, 26 Sup. Ct. 353, 50 L. Ed. 696, affirming Otis Co. v. Ludlow Mfg. Co., 186 Mass. 89, 70 N. E. 1009, 104 Am. St. Rep. 563; the construction and operation of a water works plant by a city in competition with a company which had constructed works under a franchise from the city; City of Meridian v. Loan & Trust Co., 143 Fed. 67, 74 C. C. A. 221, 6 Ann. Cas. 599; the destruction of a fruit tree affected with the "yellows"; State v. Main, 69 Conn. 123, 37 Atl. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30; abatement of a public nuisance and the assessment of the benefits of such abatement to the owner; Rude v. St. Marie, 121 Wis. 634, 99 N. W. 460; the restrictions imposed by game laws; Ex parte Fritz, 86 Miss. 210, 38 South. 722, 109 Am. St. Rep. 700; State v. Heger, 194 Mo. 707, 93 S. W. 252; State v. Theriault, 70 Vt. 617, 41 Atl. 1030, 43 L. R. A. 290, 67 Am. St. Rep. 695; reasonable health regulations; State v. Robb, 100 Me. 180, 60 Atl. 874, 4 Ann. Cas. 275.

"Acts done in the exercise of governmental powers and not directly encroaching upon private property, though their consequences may be to impair its use, are universally held not to be a taking" within the fifth amendment; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. Ed. 336; Union Bridge Co. v. U. S., 204 U. S. 390, 27 Sup. Ct. 367, 51 L. Ed. 523. So of the change of location of gas pipes under a municipal regulation enacted for the public safety under the police power; Union Bridge Co. v. U. S., 204 U. S. 395, 27 Sup. Ct. 367, 51 L. Ed. 523; and an ordinance requiring a railroad company to lower its tunnel under the Chicago river to afford increased depth of water for navigation; West Chicago Street Ry. Co. v. Illinois, 201 U. S. 506, 26 Sup. Ct. 518, 50 L. Ed. 845; so of an order of the secretary of war requiring a bridge over a navigable river to be raised in aid of navigation; Union Bridge Co. v. U. S., 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523.

This right is distinguished from public domain, which is property owned absolutely by the state in the same manner as an individual holds his property; 19 (No. 37) Am. Jur. 121; 2 Kent 339; Corporation of Memphis v. Overton, 3 Yerg. (Tenn.) 389; West River Bridge Co. v. Dix, 6 How. (U. S.) 540, 12 L. Ed. 535; termed by Cooley "the ordinary domain of the state"; Const. Lim. 642.

The right of eminent domain is not to be confounded with cases in which there exists a sovereign right to take or destroy private property without making compensation. The familiar case of taxation is readily distinguished. An owner is not entitled to compensation for damage or loss to property taken or destroyed during war. As to the distinction between the war power and eminent domain see 13 Am. L. Reg. 265, 337, 401; Mills, Em. Dom. § 3. So property may be taken under a controlling necessity, or to prevent the spread of a fire; 12 Co. 63; Keller v. City of Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613; McDonald v. City of Red Wing, 13 Minn. 38 (Gil. 25); Mayor, etc., of New York v. Lord, 18 Wend. (N. Y.) 126; Amer. Print Works v. Lawrence, 21 N. J. L. 248.

In trespass for destruction of goods, destroyed by the blowing up a building to prevent the spread of fire in a city, ordered by defendant as Mayor of New York, the common-law plea of necessity is good in justification and it need not be averred that the defendant was a resident of or owner of property, in the city, or that his own property was in danger; American Print Works v. Lawrence, 23 N. J. L. 590, 57 Am. Dec. 420. And similarly are treated proceedings under the police power, to abate a nuisance *(q. v.)*; Com. v. Alger, 7 Cush. (Mass.) 53 (in which Shaw, C. J., draws the distinction between the police power and eminent domain); Bancroft v. Cambridge, 126 Mass. 438; or by restraining the owner of land from making a noxious use of it; Chicago & A. R. Co. v. R. Co., 105 Ill. 388, 44 Am. Rep. 799; or by removing sand, etc., from beaches; Com. v. Tewksbury, 11 Metc. (Mass.) 55; compelling railroads to erect cattle guards; Thorpe v. R. Co., 27 Vt. 140, 62 Am. Dec. 625; or holding them responsible for damages by fire *(q. v.)* from locomotives; Rodemacher v. R. Co., 41 Ia. 297, 20 Am. Rep. 592; compelling riparian owners to keep up a levee; Bouligny v. Dormenon, 2 Mart. N. S. (La.) 455; or changing the course of a river; Green v. Swift, 47 Cal. 536; or as a forfeiture for violation of law; State v. Snow, 3 R. I. 64; People v. Hawley, 3 Mich. 330; Erie & N. E. R. Co. v. Casey, 26 Pa. 287; Guillotte v. New Orleans, 12 La. Ann. 432.

The Right of Compensation. Though not included in the definitions of the power as usually given, the necessity for compensation is recognized by the most authoritative writers as an incident to the right, an original element of its existence, and not a superimposed limitation.

Accordingly eminent domain is said with more precision to be the right of the nation or the state, or of those to whom the power has been lawfully delegated, to condemn private property to public use, and to appropriate the ownership and possession of such property for such use, upon paying to the owner a due compensation, to be ascertained according to law; Black, Const. L. 350.

So far as the federal constitution is concerned, a state may authorize the taking possession of property for a public use, prior to any payment therefor, or even the determination of the amount of compensation, provided adequate provision is made for such compensation; Williams v. Parker, 188 U. S. 491, 23 Sup. Ct. 440, 47 L. Ed. 559.

Nearly if not all of the American constitutions provide for compensation. Professor Thayer states that "now (1895) only three constitutions, New Hampshire, North Carolina, and Virginia are without a clause expressly requiring compensation." The provisions of the several then constitutions are given in Randolph, Em. Dom. 401 to 416, and Lewis, Em. Dom. §§ 14 to 52 (the latter including the prior as well as the last state constitutions). Nichols, Em. Dom. (1909) gives the provisions of twenty-seven state constitutions requiring prepayment; § 267. In one of these states a statute providing that possession might be taken after the money was paid into court and before the amount of the compensation was ascertained was held unconstitutional on the ground that the owner was entitled to hold the land until he received the money; Steinhart v. Superior Court, 137 Cal. 575, 70 Pac. 629, 59 L. R. A. 404, 92 Am. St. Rep. 183.

With respect to compensation, Kent says: "This principle, in American constitutional jurisprudence, is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law;" 2 Com. 339.

It would seem to be the most satisfactory conclusion both upon reason and authority that neither the right of the state to take nor the right of the individual to compensation required a constitutional assertion. The right to take private property for public use does not depend on constitutional provisions, but is an attribute of sovereignty; Sinnickson v. Johnson, 17 N. J. L. 129, 34 Am. Dec. 184; Raleigh & G. R. Co. v. Davis, 19 N. C. 451; it (the right) exists, and the only limitation upon its exercise is that imposed by the state or federal constitution; Wilson v. R. Co., 5 Del. Ch. 524.

So also the ***right to compensation*** is an incident to the exercise of the power, inseparably connected with it; Sinnickson v. Johnson, 17 N. J. L. 129, 34 Am. Dec. 184; "this is an affirmance of a great doctrine established by the common law for the protection of private property;" 2 Story, Const. § 1790; "the obligation attaches to the exercise of the power, though it is not provided for by the state constitution, or that of the United States had not enjoined it;" Bonaparte v. R. Co., Baldw. C. C. 220, Fed. Cas. No. 1,617. "If by the assertion that this right existed at common law independent of the declaration of rights, is meant that compensation in such case is required by a plain dictate of natural justice, it must be conceded. The bill of rights declares a great principle; the particular law prescribes a practical rule by which the remedy for the violation of right is to be sought and afforded;" Shaw, C. J., in Hazen v. Essex Co., 12 Cush. (Mass.) 475. In New Hampshire, although the constitution did not contain an express provision requiring compensation, "yet it has been construed by the courts, in view of the spirit and tenor of the whole instrument, as prohibiting such taking without compensation; and it is understood to be the settled law of the state, that the legislature cannot constitutionally authorize such taking without compensation;" Eaton v. R. R., 51 N. H. 504, 12 Am. Rep. 147. It is a condition precedent to its exercise under a statute that it make reasonable provision for compensation to the owner of the property taken; Sweet v. Rechel, 159 U. S. 380, 16 Sup. Ct. 43, 40 L. Ed. 188; Gardner v. Newburgh, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526.

There are *dicta* which countenance the opinion that compensation is not of the essence of eminent domain, that the usual constitutional clause is restrictive, not declaratory, so that, were it omitted, the state could properly take property without paying for it, Rand. Em. Dom. § 226, citing Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206; U. S. v. Jones, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. Ed. 1015; Clark v. Town of Saybrook, 21 Conn. 313; Wilson v. R. Co., 5 Del. Ch. 524; In re Furman St., 17 Wend. (N. Y.) 649; Orr v. Quimby, 54 N. H. 590, 647. In one of these cases the language used is "the provision found in the federal and state constitutions for just compensation for property taken is no part of the power itself, but merely a limitation upon the use of it, a condition upon which it may be exercised;" U. S. v. Jones, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. Ed. 1015.

One of the text writers on the subject takes this view; Lewis, Em. Dom. § 10; and argues it with great earnestness, treating it as the same question discussed by Sedgwick and Cooley and referred to *supra* under the title Constitutional *(q. v.)*, whether there are limitations of legislative power other than those contained in the constitutions, federal and state. The real question involved in the relation of compensation to eminent domain is a different one. It is not whether the sovereign

powers of government exercised by American state legislatures are subject to undefined limitations not embodied in the written constitution, but what is the sovereign power which we term eminent domain, as recognized and exercised by governments long before written constitutions were known. It is true that some courts in discussing this subject have fallen into the same confusion of ideas, but the distinction none the less exists and should be borne in mind Is it the right to take private property arbitrarily, or only to take it on making compensation? Lewis thinks "the question has lost most of its practical interest from the fact that all states except one (North Carolina), now have an express limitation in their organic law touching the exercise of this power" It is submitted, however, that the precise definition and true limitation of so autocratic a governmental power can never become a matter of indifference. So long as one state constitution is silent on the subject of compensation it remains a practical question in American constitutional law and the existence of a reserved power to amend or abolish any existing constitution, coupled with the prevalent tendency to attack and impair the right to private property, must necessarily keep it such, independently of the theoretical interest in maintaining correct definitions of the inherent rights of sovereignty.

Suggestions in the line of the cases cited by Randolph and the views expressed by Lewis, led to practical results in but few cases —In South Carolina land was taken for roads without compensation; Lindsay v. Street Com'rs, 2 Bay (S. C.) 38, State v. Dawson, 3 Hill (S C.) 100; but in New York, taking wild land without compensation was held unconstitutional, Wallace v. Karlenowefski, 19 Barb. (N Y) 118 In New Jersey and Pennsylvania, the subject rested on a statutory rather than a constitutional basis, because the grants by the proprietors included an extra allowance for roads; Simmons v. City of Passaic, 42 N J L 619, Workman v. Mifflin, 30 Pa 362, and this was held compensation, East Union Tp v. Comrey, 100 Pa. 362 See Wagner v Salzburg Tp, 132 Pa. 636, 19 Atl 294 Under the New Jersey constitution, land might be taken for highways without compensation until otherwise directed by the legislature. In Louisiana land on the Mississippi River can be taken without compensation for the construction of a public levee under the old French law, and this applies to the land of a citizen of another state, provided he receive the same measure of right as citizens of Louisiana in regard to their property similarly situated; Eldridge v. Trezevant, 160 U. S. 452, 16 Sup Ct. 345, 40 L. Ed. 490.

Mr. James B. Thayer (Cases, Const. L. 953) discusses this subject in a very interesting note and reaches the somewhat metaphysical conclusion that the right to compensation is not a component part of the right to take, though it arises at the same time and the latter cannot exist without it, the two being compared to shadow and substance

He argues that the right of the state springs from the necessity of government, while the obligation to reimburse stands upon the natural rights of the individual. "These two, therefore, have not the same origin, they do not come, for instance, from any implied contract between the state and the individual, that the former shall have the property, if it will make compensation; the right is no mere right of pre-emption, and it has no condition of compensation annexed to it, either precedent or subsequent But there is a right to take, and attached to it, as an incident, an obligation to make compensation, this latter, morally speaking, follows the other, indeed, like a shadow, but it is yet distinct from it, and flows from another source." From this he argues that for the taking the citizen cannot complain; if recompense is not made, the duty of the sovereign is violated and the individual "has an eternal claim against the state, which can never be blotted out except only by satisfaction; but this claim is for compensation, and not for his former property," and, "in the absence of constitutional provisions," the loss "must be regarded as *damnum absque injuria.*"

The distinction between this theory and the doctrine that the right to compensation is an inherent attribute rather than a subsequent limitation of the original right would seem to be rather ingenious than practical. The citations in the same note from the civilians show clearly that, in their view, compensation was essential, and even in the states whose organic law was, at the time of the decision, either silent or contained merely a general declaration as to private rights the necessity of compensation has been recognized; Rand. Em. Dom. § 227, citing Bristol v. New Chester, 3 N. H. 524; In re Mt. Washington Road Co., 35 N. H. 134; Harness v. Canal Co., 1 Md. Ch. 248, Bonaparte v. R Co., Baldw. C. C. 205, Fed Cas. No 1,617; Johnston v. Rankin, 70 N. C. 550, Staton v R Co, 111 N C. 278, 16 S E. 181, 17 L. R. A 838, Ex parte Martin, 13 Ark. 198, 58 Am. Dec 321; see also Monongahela Nav. Co. v. U. S., 148 U. S. 312, 13 Sup Ct. 622, 37 L Ed. 463, Hazen v. Essex Co., 12 Cush. (Mass.) 475 The mistaken idea that the fifth amendment of the constitution of the U. S., applied to the states, seems to have contributed to this opinion in some cases; Gardner v. Village of Newburgh, 2 Johns Ch. (N. Y) 162, 7 Am. Dec. 526; Scudder v. Falls Co, 1 N. J Eq 694, 23 Am Dec. 756 "The true doctrine is, in the writer's opinion," says the author last cited, that which requires the payment of compensation whether it be expressly enjoined or not The modern concept of a constitutional state as realized in the United States has no room for spoliation of the individual" The same view is supported in Mills, Em. Dom. § 1.

Whatever view may be taken of the general doctrine of the law on this subject the necessity of compensation is firmly imbedded in American constitutional law.

It may be considered settled that the exercise of the right is not justifiable, where the statute fails to provide compensation; and the courts will, in general, substantially declare such an act unconstitutional; Sweet v. Rechel, 159 U. S. 380, 16 Sup. Ct. 43, 40 L. Ed. 188; Richmond v. Telegraph Co., 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162; U. S. v. Lynah, 188 U. S. 445, 485, 23 Sup. Ct. 349, 47 L. Ed. 539; Barron v. City of Memphis, 113 Tenn. 89, 80 S. W. 832, 106 Am. St. Rep. 810; Clifton v. Town of Weston, 54 W. Va. 250, 46 S. E. 360; Smith v. City of Sedalia, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711; East Shore Land Co. v. Peckham, 33 R. I. 541, 82 Atl. 487; Higginson v. Com'rs, 212 Mass. 583, 99 N. E. 523, 42 L. R. A. (N. S.) 215; Sea Cliff Grove & Metropolitan Camp Ground Ass'n v. Steamboat Co., 70 Misc. 97, 127 N. Y. Supp. 1021; Kent 339, n.; *dicta* in 4 Term 794; Louisville, C. & C. R. R. Co. v. Chappell, Rice (S. C.) 383; Stokes v. Upper Appomatox Co., 3 Leigh (Va.) 337; Eastman v. Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201; Wells v. R. Co., 47 Me. 345; Watkins v. Walker County, 18 Tex. 585, 70 Am. Dec. 298; Watson's Ex'r v. Trustees of Pleasant Tp., 21 Ohio St. 667; Shute v. R. Co., 26 Ill. 436; Georgia M. & G. R. Co. v. Ry. Co., 89 Ga. 205, 15 S. E. 305; Calder v. Police Jury, 44 La. Ann. 173, 10 South. 726; Webster v. Ry. Co., 116 Mo. 114, 22 S. W. 474; Monongahela Nav. Co. v. U. S., 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463; Searl v. School Dist. No.

2, 133 U. S. 553, 10 Sup. Ct. 374, 33 L. Ed. 740. See *contra*, Hart v. Board of Levee Com'rs, 54 Fed. 559. Such statute may be treated by the land owner as void; Boston & L. R. Co. v. R. Co., 2 Gray (Mass.) 1; and he has the same rights against a trespasser under color of such authority as if it did not exist; *id.;* Proprietors of Piscataqua Bridge Co. v. Bridge Co., 7 N. H. 35. Such an act is, however, said not to be so far void as not to warrant the acquisition of the property by purchase; Carbon Coal & Min. Co. v. Drake, 26 Kan. 345. This compensation must be in money; Com. v. Peters, 2 Mass. 125; Vanhorne v. Dorrance, 2 Dall. (U. S.) 304, 1 L. Ed. 391; Murphy v. De Grott, 44 Cal. 51; Chicago, M. & St. P. Ry. Co. v. Melville, 66 Ill. 329; State v. Sewer Com'rs, 39 N. J. L. 665.

In constitutional construction the words "just," "ample," "full," "adequate," "due," etc., prefixed to the word "compensation," has been said to lend no appreciable additional weight; Rand. Em. Dom. § 223; but much stress has often been put upon it by courts. The word "just" in the fifth amendment excludes the taking into account as an element in the compensation any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated and leaves it to stand as a declaration that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner; Monongahela Nav. Co. v. U. S., 148 U. S. 326, 13 Sup. Ct. 622, 37 L. Ed. 463. The word "just" is not used as an antithesis of unjust, but "evidently to intensify the meaning of the word compensation;" Virginia & T. R. Co. v. Henry, 8 Nev. 165; it means recompense "all circumstances considered;" McIntire v. State, 5 Blackf. (Ind.) 384, "to save the owner from suffering in his property or estate . . . as far as compensation in money can go;" Bangor & P. R. Co. v. McComb, 60 Me. 290; "making the owner good by an equivalent in money;" Bigelow v. R. Co., 27 Wis. 478.

The Federal Power. All lands held by private owners everywhere within the geographical limits of the United States are subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it; Cherokee Nation v. R. Co., 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295. The federal government exercises its own right of eminent domain subject to the constitutional limitations requiring compensation; it does not proceed under the right of the state and the measure of compensation in each case may be different; Town of Nahant v. U. S., 136 Fed. 273, 70 C. C. A. 641, 69 L. R. A. 723, modified in U. S. v. Town of Nahant, 153 Fed. 520, 82 C. C. A. 470; Alexander v. U. S., 39 Ct. Cl. 383; Burt v. Ins. Co., 106 Mass. 356, 8 Am. Rep. 339; the consent of the state is not necessary for the condemnation, but only for the transfer of jurisdiction; People v. Humphrey, 23 Mich. 471, 9 Am. Rep. 94. It has the right in territory acquired either by purchase or conquest; People v. Folsom, 5 Cal. 373.

The right of eminent domain is one of the powers of the federal government essential to its independent existence and perpetuity. Among the purposes for which it is exercised are the acquisition of lands for forts, armories, arsenals, navy yards, light-houses, custom-houses, post-offices, court-houses, and other public uses. The right may be exercised within the states without application to them for permission to exercise it; Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449; the fact that the power has not been exercised adversely does not disprove its existence, nor does the fact that in some instances the states have condemned lands for the use of the general government; *id.* It is a right belonging to a sovereignty to take private property for its own public uses but not for those of another; hence the power of the United States must be complete in itself, it can neither be enlarged nor diminished, nor can the manner of its exercise be regulated by the state whose consent is not a condition precedent to its enjoyment; *id.*

Originally the method of proceeding was usually for the state to condemn lands for the United States when needed by the latter; Orr v. Quimby, 54 N. H. 590; U. S. v. Dumplin Island, 1 Barb. (N. Y.) 24; Gilmer v. Lime Point, 18 Cal. 229; Burt v. Ins. Co., 106 Mass. 356, 8 Am. Rep. 339, and the power has been delegated by the state to the United States within a comparatively recent period, In re Certain Land in Lawrence, 119 Fed. 453; but this method is not only unnecessary, but is not based on correct principles, since the absolute and unqualified power belongs to the federal government, and that method has been disapproved; Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449; Reddall v. Bryan, 14 Md. 444, 74 Am. Dec. 550; In re Appointment of U. S. Com'rs, 96 N. Y. 227. When the taking of property is authorized by congress, the proceedings are carried on under federal law; Town of Nahant v. U. S., 136 Fed. 273, 70 C. C. A. 641, 69 L. R. A. 723.

The United States cannot take state property devoted to a public use and the loss of which would interfere with the performance of its duties by the state. It was on this principle that the right to tax a state judicial officer upon his salary was denied to the United States; The Collector v. Day, 11 Wall. (U. S.) 113, 20 L. Ed. 122; but the United States may acquire an easement in the property of a state which does not interfere with its ordinary use, as by the placing of telegraph poles, under a federal authority, upon state roads; City of St. Louis v. Telegraph Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; City of Richmond v. Telegraph

Co., 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162.

It has been said that a necessity of the federal government would override the right of the state to the occupancy of property for public use—that what was devoted to a local public use might be taken for a higher national use; New Orleans v. U. S., 10 Pet. (U. S.) 662, 723, 9 L. Ed 573; and it was said by Bradley, J., that "if it is necessary that the United States government should have an eminent domain still higher than that of the state, in order that it may fully carry out the objects and purposes of the constitution, then it has it"; Stockton v. R. Co., 32 Fed. 9; it has paramount authority in the matter of taking any property within its borders for those public uses which are within the constitutional reservations to the general government; U. S. v. City of Tiffin, 190 Fed. 279; and in the Northern Securities Case it was said that state legislation, even if in the exercise of its unquestioned power, must yield, in case of conflict, to the supremacy of the United States constitution and the acts of congress passed pursuant to it; Northern Securities Co. v. U. S., 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. As to the nature and extent of power of condemnation of the United States, see note, 70 C. C. A. 653.

On the other hand, the state cannot condemn land held by the United States and used for public purposes; U. S. v. Chicago, 7 How. (U. S.) 185, 12 L. Ed. 660; nor can a territory; Pratt v. Brown, 3 Wis. 603 With respect to land not used for public purposes of which the United States is considered as a private proprietor, it has been held that such land might be taken; Hendricks v. Johnson, 6 Port. (Ala.) 472; U. S. v. R. Bridge Co., 6 McLean 517, Fed. Cas. No. 16,114, approved by a dictum in U. S. v. Chicago, 7 How. (U. S.) 185, 12 L. Ed. 660, and apparently disapproved in Van Brocklin v. Tennessee, 117 U. S. 151, 6 Sup. Ct. 670, 29 L. Ed. 845, where Gray, J. suggests that the question, will, when raised, require careful consideration. When the state has ceded land to the federal government it has lost its jurisdiction entirely; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. Ed. 264; U. S. v. Cornell, 2 Mas. 60, Fed. Cas. No. 14,867; People v. Godfrey, 17 Johns. (N. Y.) 225; Mitchell v. Tibbetts, 17 Pick. (Mass.) 298; Sinks v. Reese, 19 Ohio St. 306, 2 Am. Rep. 397; and hence the state cannot condemn land within the ceded district; U. S. v. Ames, 1 Woodb. & M. 76, Fed. Cas. No. 14,441; In re Opinion of the Justices, 1 Metc. (Mass.) 580. But when land has been acquired by the United States without the consent of the state, the state retains its jurisdiction and may act with respect to it, so far as it does not interfere with the use of the property by the United States; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. Ed. 264; but whether in the exercise of this jurisdiction there is included the power of condemnation remains an open question; Nichols, Em. Dom. § 25.

The state may condemn for another public use the land of an interstate railroad chartered by congress if it does not interfere with its operation; Union Pac. Ry. Co. v. R. Co., 3 Fed. 106; Northern Pac. Ry. Co. v. Ry. Co., 3 Fed. 702; Union Pac. Ry. Co. v. R. Co., 29 Fed. 728.

A federal court may require proceedings to condemn a crossing over a railroad, in the hand of a receiver appointed by it, to be brought within its jurisdiction; Buckhannon & N. R. Co. v. Davis, 135 Fed. 707, 68 C. C. A. 345; and when the owner of the land and the party seeking to condemn it are citizens of the same state, the condemnation proceedings may be begun in, or removed to, the federal court; Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206; Madisonville Traction Co. v. Min. Co., 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed 462; Kansas City v. Hennegan, 152 Fed. 249; Deepwater R. Co. v. Lumber Co., 152 Fed. 824; but it must follow the procedure of the state statute; East Tennessee, Va. & Ga. R. Co. v. Telegraph Co., 112 U. S. 306, 5 Sup. Ct. 168, 28 L. Ed. 746; Broadmoor Land Co. v. Curr, 142 Fed. 421, 73 C. C. A. 537.

This right exists in the District of Columbia, the territories, and lands within the United States acquired through cession; Shoemaker v U. S., 147 U. S. 282, 13 Sup Ct. 361, 37 L. Ed 170.

The power of eminent domain in the general government as exercised for local purposes in the District of Columbia is the same as that exercised by a state within its own territory; Shoemaker v. U S., 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170; there and in the territories it exists in all cases in which a similar power could be exercised by the states; First Nat. Bank v. County of Yankton, 101 U. S. 129, 25 L. Ed 1046. It is among the powers derived by the territorial governments immediately from the United States; Swan v. Williams, 2 Mich 427; Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 376; Newcomb v. Smith, 1 Chand. (Wis.) 71.

Within the states the United States has the right of eminent domain for federal purposes; Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449; Cherokee Nation v. Ry. Co., 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295. This power has been exercised to condemn land for military posts; U. S. v. Chicago, 7 How. (U. S.) 185, 12 L. Ed. 660; fortification; Gilmer v. Lime Point, 18 Cal. 229; navigation work; King v. U. S., 59 Fed. 9; lighthouse and coast survey purposes; Orr v. Quimby, 54 N. H. 590; Chappell v. U. S., 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510; the construction of interstate railroads; Cali-

fornia v. R. Co., 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150; water supply; Reddall v. Bryan, 14 Md. 444, 74 Am. Dec. 550; post-office; Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449; Burt v. Ins. Co., 106 Mass. 356, 8 Am. Rep. 339; a national cemetery at Gettysburg; U. S. v. Ry. Co., 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576. The weight of authority is in favor of the exercise of the right by the United States directly when property is required for federal purposes and not through the right of eminent domain of the state; Reddall v. Bryan, 14 Md. 444, 74 Am. Dec. 550; In re Appointment of United States Commissioners, 96 N. Y. 227; though the latter method is upheld in some cases; U. S. v. Dumplin Island, 1 Barb. (N. Y.) 24; Burt v. Ins. Co., 106 Mass. 356, 8 Am. Rep. 339; Orr v. Quimby, 54 N. H. 590; but it is held that the United States may delegate to a tribunal created under the laws of the state the power to fix and determine the amount of compensation to be paid by the federal government for private property taken by it in the exercise of the right of eminent domain; U. S. v. Jones, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. Ed. 1015. The United States circuit court has jurisdiction to entertain proceedings instituted by the United States to appropriate land for a post-office; Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449. In this case there was no act of congress relating to the subject except the appropriation of money, and a direction to the secretary of the treasury to purchase a site, and the jurisdiction was objected to. The supreme court held that the proceedings were a suit at law and cognizable under the general provisions of the judiciary act. As to the federal right, see Chattaroi Ry. Co. v. Kinner, 14 Am. & Eng. R. R. Cas. 30; Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449. The state cannot condemn for the United States and bind the latter as to compensation; People v. Humphrey, 23 Mich. 471, 9 Am. Rep. 94, in which the whole subject of the exercise of this right by state and federal governments was considered by Cooley, J. Proceedings may be in the United States courts, or in state courts, in the name of the United States, and state practice should be followed; In re Appointment of United States Commissioners, 96 N. Y. 227; Jones v. U. S., 48 Wis. 385, 4 N. W. 519; U. S. v. Jones, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. Ed. 1015; or may by act of congress be made to follow some state statute; Darlington v. U. S., 82 Pa. 382, 22 Am. Rep. 766.

Public uses of the federal government have been held to be public uses of the state; Reddall v. Bryan, 14 Md. 444, 74 Am. Dec. 550.

Proceedings under state laws for condemnation of lands, involving the ascertainment by judicial proceedings of the value of property to be paid as compensation, may be removed to the United States court; Searl v. School Dist. No. 2, 124 U. S. 197, 8 Sup. Ct. 460, 31 L. Ed. 415; Sugar Creek, P. B. & P. C. R. Co. v. McKell, 75 Fed. 34; if they take the form of a proceeding before the courts: Mississippi & R. R. Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206; the preliminary proceedings are in the nature of an inquest and not a "suit," but when transferred into the state court by appeal it becomes one; *id.*; Hastings Lumber Co. v. Garland, 115 Fed. 18, 52 C. C. A. 609. As to removal of such proceedings, see 25 Am. L. Reg. 183.

The Power of the States. The right of eminent domain is also an attribute or part of the sovereignty of the states, and is by them exercised for a great and constantly increasing variety of purposes, some of which are for governmental uses either of the state at large or of local municipal bodies, or by private persons or corporations authorized to exercise some function of such public character, technically known as a public use.

It is also true that a state cannot condemn property within its borders for the use of another state; Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449; and a state statute is constitutional which forbids a riparian owner from diverting the water of a river for the use of a city in another state; Hudson County Water Co. v. McCarter, 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560; but a statute of one state authorizing condemnation of a water supply for use in a canal in another state was sustained on the ground that the work was also of great benefit to the former state; In re Townsend, 39 N. Y. 171.

When the right of eminent domain is conferred upon private persons or corporations the right is termed by some writers the delegated power of eminent domain; 4 Thomp. Corp. ch. cxxii.; and such person or corporation is the agent of the state for its exercise.

Delegation of Power. The power may be delegated; Brayton v. City of Fall River, 124 Mass. 95; but it can only be exercised by a private individual or corporation by express legislative authority; Minnesota Canal & Power Co. v. Koochiching Co., 97 Minn. 429, 107 N. W. 405, 5 L. R. A. (N. S.) 638, 7 Ann. Cas. 1182; it may be conferred upon a municipality for laying out and establishing streets; St. Louis & S. F. R. Co. v. Fayetteville, 75 Ark. 534, 87 S. W. 1174 (but it is not implied from a mere grant of authority to establish new streets; Georgia R. & B. Co. v. Mayor, etc., of Union Point, 119 Ga. 809, 47 S. E. 183); constructing drains; Hutchins v. Drainage Dist., 217 Ill. 561, 75 N. E. 354; establishing water works; In re Petition of Board of Water Com'rs of Village of White Plains, 176 N. Y. 239, 68 N. E. 348; Dallas v. Hallock, 44 Or. 246, 75 Pac. 204; laying out parks and parkways; City of Memphis v. Hastings, 113 Tenn. 142, 86 S. W. 609, 69 L. R. A. 750 (but a municipal corporation cannot exercise the right beyond its corporate limit without express legisla-

tive authority; City of Puyallup v. Lacey, 43 Wash. 110, 86 Pac. 215); a railroad company for obtaining gravel and other material; Hopkins v. R. Co., 97 Ga. 107, 25 S. E. 452; for building bridges and approaches thereto; Southern I. & M. Bridge Co. v. Stone, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301; and tunnels; McEwan v. R. Co., 72 N. J. L. 419, 60 Atl. 1130. Railroad companies may acquire a title in fee simple if the legislature authorizes it to do so; Challiss v. R. Co., 16 Kans. 117. A *de facto* railroad corporation may exercise the right inasmuch as its legal existence can only be questioned by the state in a direct proceeding for that purpose; Reisner v. Strong, 24 Kans. 410.

Strictly speaking it is not accurate to say that the state delegates a right of sovereignty, of which it cannot divest itself, hence it is more exact to speak of it as exercising the power through an agent. While corporations are usually selected for such agency, it may be and sometimes is conferred upon *individuals;* Young v. Buckingham, 5 Ohio 485; Ash v. Cummings, 50 N. H. 591; Calking v. Baldwin, 4 Wend. (N. Y.) 667, 21 Am. Dec. 168; Moran v. Ross, 79 Cal. 159, 21 Pac. 833; and where incorporation and a franchise were granted to an individual "and associates" it was held that he need not associate any one with him; Day v. Stetson, 8 Greenl. (Me.) 365. It has also been held that an individual as purchaser of a railroad and franchises at the foreclosure sale acquired the right to condemn lands; Morgan v. Louisiana, 93 U. S. 217, 23 L. Ed. 860. In one case it is said that a statute neither did nor *could* confer this right "upon private persons, but only corporations organized for public purposes can be clothed with such privileges;" Finney v. Somerville, 80 Pa. 59; but this expression, so far as it concerns the power of the legislature, was *obiter;* and a case often cited with this only decides that under a general act, then under construction, the power could not be exercised by individuals, because there was no provision of law for its exercise by individuals; Coe v. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518

The exercise of the power by such agencies is governed in the main by the same principles and limitations as when it is directly exerted by the federal or state government, and the exceptions to this rule readily disclose themselves in the consideration of the natural divisions of the subject. When its exercise by a private corporation is authorized it has been termed not a *franchise* but a means to the enjoyment of corporate franchises; Coe v. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; but the contrary view was expressed by Bradley, J., in California v. R. Co., 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150; "a power conferred upon certain corporations, which is not possessed by the citizens generally, and which is in derogation of their rights, so nearly resembles a franchise as to justify its treatment" under that title; 4 Thomp. Corp. § 5587. The use of the term franchise is not defined, by those who most use it, with sufficient precision to be conclusive against either view. It is as much a franchise, if one at all, if exercised by an individual as a corporation, though the writer quoted seems to overlook the possibility of this. It is, however, a grant of power or privilege from the sovereign to the citizen or subject, to do what would but for the grant be unlawful, and it undoubtedly does come within the usually accepted definition of the word franchise *(q. v.).* As is true with respect to franchises generally, the grant of the power is *never presumed* unless the intent to part with it is clearly expressed; *id.* § 5588; Lewis, Em. Dom. § 240; Appeal of Pennsylvania R. Co., 93 Pa. 150; Butler v. Mayor, etc., of Thomasville, 74 Ga. 570; Schmidt v. Densmore, 42 Mo. 225; Chamberlain v. Steam Cordage Co., 41 N. J. Eq. 43, 2 Atl. 775; and its exercise by the state may determine a preceding contract made by the state without impairing the obligation of such contract, the right itself being always reserved by implication, if not expressly; Tait's Ex'r v. Central Lunatic Asylum, 84 Va. 271, 4 S. E. 697.

It is no objection to a grant of the power to a corporation that the latter is seeking to effect its own *private gain;* 4 Thomp. Corp. § 5589; for that is said to be merely compensation for the risk assumed for the benefit of the public; Concord R. R. v. Greely, 17 N. H. 47. When unrestrained by constitutional provision, the discretion of the legislature in selecting agents through whom the power is to be exercised is absolute. In a state whose constitution prohibits its exercise by *foreign corporations* they cannot of course act unless domesticated in the state; St. Louis & S. F. R. Co. v. Foltz, 52 Fed. 627; but otherwise they may do so; New York, N. H. & H. R. Co. v. Welsh, 143 N. Y. 411, 38 N. E. 378, 43 Am. St. Rep. 731; New York & E. R. Co. v. Young, 33 Pa. 175; Dodge v. City of Council Bluffs, 57 Ia. 560, 10 N. W. 886; but a constitutional incapacity cannot be avoided by acting through a domestic corporation; Koening v. R. Co., 27 Neb. 699, 43 N. W. 423 (see State v. Scott, 22 Neb. 628, 36 N. W. 121); though by consolidating with a domestic corporation it may exercise the power; Toledo, A. A. & G. T. R. Co. v. Dunlap, 47 Mich. 456, 11 N. W. 271; In re St. Paul & N. P. R. Co., 36 Minn. 85, 30 N. W. 432; as thereby the consolidated company becomes a corporation of the state; Trester v. R. Co., 33 Neb. 171, 49 N. W. 1110.

Foreign Corporations. A state cannot confer upon any corporation, public, *quasi* public or private, the power to exercise the right of eminent domain outside of its own limits; St. Louis & S. F. R. Co. v. Telegraph

Co., 121 Fed. 276, 58 C. C. A. 198; Chestatee Pyrites Co. v. Mining Co., 119 Ga. 354, 46 S. E. 422; 100 Am. St. Rep. 174; Helena Power Co. v. Spratt, 35 Mont. 108, 88 Pac. 773, 8 L. R. A. (N. S.) 567, 10 Ann. Cas. 1055; Duke v. Cable Co., 71 S. C. 95, 50 S. E. 675; but the fact that a corporation duly organized under the law of the state is subsidiary to a foreign corporation does not affect its right to exercise such power; Oregon Short Line R. Co. v. Cable Co., 111 Fed. 842, 49 C. C. A. 663. A domesticated foreign corporation may, in the absence of constitutional prohibition, be authorized by statute to exercise the power within a state; Columbus Water Works Co. v. Long, 121 Ala. 245, 25 South. 702; Illinois State Trust Co. v. R. Co., 208 Ill. 419, 70 N. E. 357; Southern Illinois & M. Bridge Co. v. Stone, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301; In re New York & N. H. Co. (In re Marks) 53 Hun 633, 6 N. Y. Supp. 105; Abbott v Railroad, 145 Mass. 450, 15 N. E. 91; New York & Erie R. Co. v. Young, 33 Pa. 175; or the district of Alaska; St. Louis & S. F. R. Co. v. Telephone & Telegraph Co., 121 Fed. 276, 58 C. C. A. 198.

Statutes conferring the power of eminent domain are to be construed strictly; Goddard v. Ry. Co., 202 Ill. 362, 66 N. E. 1066; Chesapeake & O. Ry. Co. v. Walker, 100 Va. 69, 40 S. E. 633, 914; State v. Superior Court for Chelan County, 36 Wash 381, 78 Pac. 1011; City of Puyallup v. Lacey, 43 Wash. 110, 86 Pac. 215; *aliter*, Petersburg School Dist. v. Peterson, 14 N. D. 344, 103 N. W. 756.

The power can only be delegated for a public use; People v. R. Co., 2 McCarty, Civ. Pro. (N. Y.) 345; a statute authorizing a telegraph company to construct, maintain, and operate its lines over and along any military or post road of the United States does not confer authority to condemn a right of way over private property; Western Union Telegraph Co. v. R Co., 195 U. S. 540, 25 Sup Ct. 133, 49 L. Ed 312, 1 Ann. Cas. 517; land may be taken for a private road if it is open to the public; County of Madera v. Granite Co., 139 Cal. 128, 72 Pac. 915; the laying out of private roads may be authorized; Dickinson Township Road, 23 Pa. Super. Ct. 34; *contra*, Beaudrot v. Murphy, 53 S. C. 118, 30 S. E. 825; Varner v. Martin, 21 W. Va. 534.

How the Question of Public Use is Determined. It is well settled that the power exists only in cases where the public exigency demands its exercise. See remarks of Woodbury, J., and cases cited by him in West River Bridge Co. v. Dix, 6 How. (U. S.) 545, 12 L. Ed. 535. But the practice of all the states and of the federal government, since this decision, in condemning land for purposes of public convenience but not necessity, has been so frequent that the legislative control over the necessity and the particular location is almost universally conceded. Mills, Em. Dom. § 11; Nichols, Em. Dom. ch. iii. In a proceeding to condemn land, the term "necessary" does not mean that it is indispensable or imperative, but only that it is convenient and useful; and if an improvement is useful, and a convenience and benefit to the public sufficient to warrant the expense in making it, then it is necessary; Com'rs of Parks and Boulevards of City of Detroit v. Moesta, 91 Mich. 149, 51 N. W. 903; but it is no ground for a right to take land that its resources could be utilized at a much less expense than the land already owned; Spring Valley Water Works v. San Mateo Water Works, 64 Cal. 123, 28 Pac. 447. In 4 Thomp. Corp. § 5593, in concluding a discussion of the various theories as to what uses are public uses, the author says "But it is a sound conclusion that the use must be a public use in the sense that it is open to such members of the public as may choose to use it upon the performance of reasonable or proper conditions; or in the sense of satisfying a great public want or exigency. On the other hand, where the public use is not compulsory, but is optional with the private corporation seeking the condemnation, it is not a public use." In U. S. v. Ry. Co., 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576, it was said: "The constitution provides that private property shall not be taken for public uses without just compensation. These words are a limitation, the same in effect as 'You shall not exercise this power except for public use'"

The legislature cannot so determine that the use is public as to make its determination conclusive on the courts, and the existence of a public use in any class of cases is a question for the courts; Tyler v. Beacher, 44 Vt. 648, 8 Am. Rep. 398; Varner v. Martin, 21 W. Va. 534; McQuillen v. Hatton, 42 Ohio St. 202; New Central Coal Co. v. George's Creek Coal & Iron Co., 37 Md. 537; Consolidated Channel Co. v. R. Co., 51 Cal. 269; Sadler v. Langham, 34 Ala. 311.

The Missouri constitution provides, as do those of Colorado, Mississippi, and Washington, that it shall be a judicial question whether the use contemplated is public, and that question will be determined without the aid of a jury; City of Savannah v. Hancock, 91 Mo. 54, 3 S. W. 215.

The Massachusetts Bill of Rights uses the term "public exigency" and the existence of one was said by Shaw, C. J., to be made by implication a prerequisite; Harback v. City of Boston, 10 Cush. (Mass.) 295. There is a similar provision in Maine, and in both states the rule making the necessity a legislative question is followed as in other states; Lynch v. Forbes, 161 Mass. 302, 37 N. E. 437, 42 Am. St. Rep. 402; Hayford v. City of Bangor, 102 Me. 340, 66 Atl. 731, 11 L. R. A.

(N. S.) 940. The Michigan constitution requires the necessity of all takings, except by the state, to be determined by a jury, and in Wisconsin a similar provision applies to condemnation by municipal corporations.

The presumption is in favor of the public character of a use declared so by the legislature; Appeal of Edgewood R. Co., 79 Pa. 257; Varner v. Martin, 21 W. Va. 534; and unless it is clear that it is not possible for the use to be public, the courts cannot interfere; Mills, Em. Dom. § 10.

In an early case it was said that in general the question whether a particular structure, as a bridge, or a lock, canal, or road, is for the public use, is a question for the legislature, and it may be presumed to have been decided by them, Hazen v. Essex Co., 12 Cush (Mass.) 475, citing Com. v. Breed, 4 Pick. (Mass.) 463, but in a later case when this position was broadly urged, it was held to be obviously untenable, and that, where the power was exercised, it necessarily involved an inquiry into the rightful authority of the legislature under the organic law, and that the legislature had no power to determine finally upon the extent of its authority over private rights; Talbot v. Hudson, 16 Gray (Mass.) 417. In this case what is probably the true doctrine was stated, that it is the duty of the courts to make all reasonable presumptions in favor of the validity of the legislative act. But this is simply the application to *this* particular subject of the general presumption of the constitutionality of legislative acts.

This right of the courts to determine the question of public use was maintained in In re Niagara Falls & W. Ry. Co., 108 N. Y. 375, 15 N. E. 429; but if the court determine the matter in question to be a public use, their power is exhausted and the extent to which property shall be taken for it is wholly in the legislative discretion; Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170. Whether the necessity exists for taking the property is a legislative question; Lynch v. Forbes, 161 Mass. 302, 37 N. E. 437, 42 Am. St. Rep. 402.

The grant of the right is a determination on the part of the legislature that the object is necessary; Central R. Co. of New Jersey v. R. Co., 31 N. J. Eq. 475; and of this it is the judge; Tracy, etc., v. R. Co., 80 Ky. 259; In re Application of Jacobs, 98 N. Y. 109, 50 Am. Rep. 636; North Missouri R. Co. v. Gott, 25 Mo. 540; and parties cannot be heard on the question of necessity; Holt v. City Council of Somerville, 127 Mass. 408. If it is a public use there is no restraint on legislative discretion and the judicial function is gone; Mills, Em. Dom. § 11. If the use is certainly public courts will not interfere; only, when there is an attempt to evade the law and procure condemnation for private uses will courts declare it void; Mills, Em. Dom. § 11; Baltimore & O. R. Co. v. R. Co., 17 W. Va. 812. The fact that a railroad has located its line across certain land, is *prima facie* proof that it is necessary for it to take that land for the use of its road; O'Hare v. R. Co., 139 Ill. 151, 28 N. E. 923. Whether the land is reasonably required is a question of fact to be determined by the court or jury, and the burden of proof is on the plaintiff; Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 28 Pac. 681.

It has been held that when under the constitution a federal question arises, the supreme court will determine the law without reference to state decisions; Ohio Life Ins. & Trust Co. v. Debolt, 16 How. (U. S.) 432, 14 L. Ed. 997. See Olcott v. Fond du Lac County, 16 Wall. (U. S.) 678, 21 L. Ed. 382; People v. Batchellor, 53 N. Y. 128, 13 Am. Rep. 480. But in determining what is a taking of property, the federal courts will accept the definition of the word property by the state court, where it is clearly settled; Pumpelly v. Canal Co., 13 Wall. (U. S.) 166, 20 L. Ed. 557; D. M. Osborne & Co. v. R. Co., 147 U. S. 248, 13 Sup. Ct. 299, 37 L. Ed. 155; Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224; Yates v. Milwaukee, 10 Wall. (U. S.) 497, 19 L. Ed. 984; even following reversals by the latter; Leffingwell v. Warren, 2 Black. (U. S.) 599, 17 L. Ed. 261, Green v. Neal, 6 Pet. (U. S.) 291, 8 L. Ed. 402; Olcott v. Fond du Lac County, 16 Wall. (U. S.) 678, 21 L. Ed. 382.

What is a Public Use. There has not been and probably never will be a satisfactory comprehensive definition of the term "public use." There is a fundamental difficulty in framing one, arising from the double meaning of the word "use." It may be either employment or advantage, and courts have divided in resting their efforts at a definition upon either one or the other of these terms. The subject is discussed at length and the cases examined in Nichols, Em. Dom. §§ 206–211, and the conclusion of this author is that neither view as based upon the words mentioned, is entirely satisfactory or sufficiently broad to justify taking land for all the purposes for which it has been permitted.

Property taken for public use need not be taken by the public as a body into its direct possession, but for public usefulness, utility, or advantage, or purposes productive of general benefit or great advantage to the community; Olmstead v. Camp, 33 Conn. 532, 89 Am. Dec. 221. It is not necessary that the entire community, or any considerable portion of it, should participate in an improvement to constitute a public use; Talbot v. Hudson, 16 Gray (Mass.) 417; County Court of St. Louis County v. Griswold, 58 Mo. 175; it may be limited to the inhabitants of a small locality; but the benefit must be in common, not to particular persons or estates; Gilmer v. Lime Point, 18 Cal. 229. See Mills, Em. Dom. § 12. If a considerable number will be benefited the use is public; Riche v. Water Co., 75 Me. 91; Ross v. Davis, 97 Ind. 79; as a school available for use by a portion of the community taxed to pay

for the property taken; Williams v. School Dist., 33 Vt. 271.

The legislature determines the number of people to be benefited to make the use public; Aldridge v. R. Co., 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 307; but the incidental benefit of additional facilities for business, etc., will not make use public; In re Eureka Basin Warehouse & Mfg. Co. of Long Island, 96 N. Y. 42.

It was formerly considered that a public use must be for material needs, and not mere æsthetic gratification; Nichols, Em. Dom. § 232, citing Bynk. Jur. Pub. lib. ii. c. 15; Boston & R. Mill Dam Corp. v. Newman, 12 Pick. (Mass.) 467, 480, 23 Am. Dec. 662; Town of Woodstock v. Gallup, 28 Vt. 587; but this doctrine has been practically abandoned; Nichols, Em. Dom. § 232; Attorney General v. Williams, 174 Mass. 476, 55 N. E. 77, 47 L. R. A. 314.

It has been judicially decided that the following are public uses: an almshouse; Heyward v. City of New York, 7 N. Y. 314; a public bath; Poillon v. City of Brooklyn, 101 N. Y. 132, 4 N. E. 191; a schoolhouse; Reed v. Inhabitants of Acton, 117 Mass. 384; Williams v. School Dist., 33 Vt. 271; Peckham v. School Dist., 7 R. I. 545; Township Board of Education v. Hackmann, 48 Mo. 243; Long v. Fuller, 68 Pa. 170; a market; In re Cooper, 28 Hun (N. Y.) 515; Henkel v. City of Detroit, 49 Mich. 249, 13 N. W. 611, 43 Am. Rep. 464; telegraph and telephone lines; Lockie v. Telegraph Co., 103 Ill. 401; State v. Telephone Co., 53 N. J. L. 341, 21 Atl. 460, 11 L. R. A. 664; Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7; New Orleans, M. & T. R. Co. v. Telegraph Co., 53 Ala. 211; Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 28 Pac. 681; water-works for a town; Bailey v. Inhabitants of Woburn, 126 Mass. 416; Lake Pleasanton Water Co. v. Water Co., 67 Cal. 659, 8 Pac. 501; water supply for a town; Burden v. Stein, 27 Ala. 104, 62 Am. Dec. 758; Martin v. Gleason, 139 Mass. 183, 29 N. E. 664; Cheyney v. Water Works Co., 55 N. J. L. 235, 26 Atl. 95; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165; City of Chicago v. Smith, 204 Ill. 356, 68 N. E. 395; Denver Power & Irr. Co. v. R. Co., 30 Colo. 204, 69 Pac. 568, 60 L. R. A. 383 (but not where the creation of a water power and plant is for the purpose of supplying power for private enterprises; Berrien Springs Water-Power Co. v. Circuit Judge, 133 Mich. 48, 94 N. W. 379, 103 Am. St. Rep. 438; Minnesota Canal & Power Co. v. Koochiching Co., 97 Minn. 429, 107 N. W. 405, 5 L. R. A. (N. S.) 638, 7 Ann. Cas. 1182; Petty v. Water Supply Co., 214 Pa. 340, 63 Atl. 751); the improvement of the navigation of a river; Hazen v. Essex County, 12 Cush. (Mass.) 475; and the creation of a wholly artificial system of navigation by canals; *Id.*; Chesapeake & O. Canal Co. v. Key, 3 Cra. C. C. 599, Fed. Cas. No. 2,649; Water Works Co. of Indianapolis v. Burkhart, 41 Ind. 364; In re Townsend, 39 N. Y. 171; drainage; Willson v. Marsh Co., 2 Pet. (U. S.) 245, 7 L. Ed. 412; Cleveland, C., C. & St. L. Ry. Co. v. Drainage Dist., 213 Ill. 83, 72 N. E. 684; Sisson v. Board of Sup'rs of Buena Vista County, 128 Ia. 442, 104 N. W. 454, 70 L. R. A. 440; *contra*, Nickey v. Stearns Ranchos Co., 126 Cal. 150, 58 Pac. 459; Henry v. Thomas, 119 Mass. 583; Anderson v. Baker, 98 Ind. 587; sewers; Hildreth v. City of Lowell, 11 Gray (Mass.) 345; wharves; Curran v. City of Louisville, 83 Ky. 628; Kingsland v. City of New York, 110 N. Y. 569, 18 N. E. 435; In re City of New York, 135 N. Y. 253, 31 N. E. 1043, 31 Am. St. Rep. 825; ferries; Day v. Stetson, 8 Greenl. (Me.) 365; Stark v. McGowen, 1 N. & McC. (S. C.) 387; irrigation; Umatilla Irr. Co. v. Barnhart, 22 Or. 389, 30 Pac. 37; Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; Gutierres v. Land & Irr. Co., 188 U. S. 545, 23 Sup. Ct. 338, 47 L. Ed. 588; Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171; Borden v. Irr. Co., 204 U. S. 667, 27 Sup. Ct. 785, 51 L. Ed. 671; Irrigation Co. v. Klein, 63 Kan. 484, 65 Pac. 684; Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. 635; levees; Missouri, K. & T. Ry. Co. v. Cambern, 66 Kan. 365, 71 Pac. 809; forts, armories or arsenals; Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449; U. S. v. Fox, 94 U. S. 315, 24 L. Ed. 192; Gilmer v. Lime Point, 18 Cal. 229; navy yards; In re League Island, 1 Brewst. (Pa.) 524; military camps; Morris v. Comptroller, 54 N. J. L. 268, 23 Atl. 664; turnpikes; In re Mount Washington Road Co., 35 N. H. 134; State v. Maine, 27 Conn. 641, 71 Am. Dec. 89; bridges; Young v. Buckingham, 5 Ohio 485; In re Towanda Bridge Co., 91 Pa. 216; Young v. McKenzie, 3 Ga. 31; Crosby v. Hanover, 36 N. H. 404; Palmer v. State, Wright (Ohio) 364; the criterion being, whether the public may use by right, or only by permission, and not to whom the tolls are paid; Arnold v. Bridge Co., 1 Duv. (Ky.) 372; cemeteries; Edgecumbe v. City of Burlington, 46 Vt. 218; Balch v. County Com'rs, 103 Mass. 106; Edwards v. Cemetery Ass'n, 20 Conn. 466; even if the price of the lots therein differ; Evergreen Cemetery Ass'n of New Haven v. Beecher, 53 Conn. 551, 5 Atl. 353; but not if used exclusively for members of a private corporation; In re Deansville Cemetery Ass'n, 66 N. Y. 569, 23 Am. Rep. 86; a restaurant at a summer resort; Prospect Park & C. I. R. Co. v. Williamson, 91 N. Y. 552; parks; City of Lexington v. Assembly, 114 Ky. 781, 71 S. W. 943; In re Mayor, etc., of City of New York, 99 N. Y. 569, 2 N. E. 642; Kansas City v. Ward, 134 Mo. 172, 35 S. W. 600; Holt v. City Council, 127 Mass.

408; Gilman v. City of Milwaukee, 55 Wis. 328, 13 N. W. 266; Cook v. South Park Com'rs, 61 Ill. 115; Kerr v. South Park, 117 U. S. 379, 6 Sup. Ct 801, 29 L. Ed. 924; Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170; even if paid for by a county, though beneficial only or mainly to a neighboring city; St. Louis County Court v. Griswold, 58 Mo. 175; acquiring private property within 200 feet of city parks and parkways in order to protect the same by resale in fee for private use; Penna. Mut. Life Ins. Co. v. Philadelphia, 22 Pa. Dist. R. 195, per Sulzberger, J.; the erection of a memorial hall or monumental statues, arches, and the like, the publication of town histories, decorations on public buildings, parks designed to provide for fresh air or recreation, educate the public taste, or inspire patriotism; Kingman v. City of Brockton, 153 Mass. 255, 26 N. E. 998, 11 L. R. A. 123. As to playgrounds, or places of public recreation, the law is not fully settled; Nichols, Em. Dom. § 234; it was held not valid for a theatre; Sugar v. City of Monroe, 108 La. 677, 32 South. 961, 59 L. R. A. 723; or a private right of fishing in an island pond to provide for fishing as a pastime; Albright v. Park Commission, 71 N. J. L. 303, 57 Atl. 398, 69 L. R. A. 768, 108 Am. St. Rep. 749, 2 Ann. Cas. 48.

Restrictions on the height of buildings, while valid under the police power; Welch v. Swasey, 193 Mass. 364, 79 N. E. 745, 23 L. R. A. (N. S.) 1160, 118 Am. St. Rep. 523; have been also upheld to prevent disfiguring the surroundings, when compensation is made; Attorney General v. Williams, 174 Mass. 476, 55 N. E. 77, 47 L. R. A. 314, affirmed Williams v. Parker, 188 U. S. 491, 23 Sup. Ct. 440, 47 L. Ed. 559; American Unitarian Ass'n v. Com., 193 Mass. 470, 79 N. E. 878; but not otherwise; Nichols, Em. Dom. § 235, giving cases.

A highway is a public use; Dronberger v. Reed, 11 Ind. 420; Haverhill Bridge Proprietors v. Commissioners, 103 Mass. 120, 4 Am. Rep. 518; but it must connect with another highway; In re Niagara Falls & W. Ry. Co., 108 N. Y. 375, 15 N. E. 429; Moore v. Roberts, 64 Wis. 538, 25 N. W. 564; Appeal of Waddell, 84 Pa. 90; though at one end only; Schatz v. Pfeil, 56 Wis. 429, 14 N. W. 628; Peckham v. Town of Lebanon, 39 Conn. 231; People v. Kingman, 24 N. Y. 559. It may, however, terminate on private property; Atkinson v. Bishop, 39 N. J. L. 226; Sheaff v. People, 87 Ill. 189, 29 Am. Rep. 49; Goodwin v. Town of Wethersfield, 43 Conn. 437; or at a river; Moore v. Auge, 125 Ind. 562, 25 N. E. 816; or at a church; West Pikeland Road, 63 Pa. 471. So the improvement of a harbor is a public use, (but not the extension of harbor lines to prevent the placing of buildings on either side of a bridge); Farist Steel Co. v. City of Bridgeport, 60 Conn. 278, 22 Atl. 561, 13 L. R. A. 590; and the reclamation of flat land; 1 Thayer, Cas. Const. L. 1025, n. citing cases. Gas works; Bloomfield & R. Nat. Gaslight Co. v. Richardson, 63 Barb. (N. Y.) 437; Appeal of Pittsburgh, 123 Pa. 374, 16 Atl. 621; Providence Gas Co. v. Thurber, 2 R. I. 15, 55 Am. Dec. 621; a state military encampment; State v. Heppenheimer, 54 N. J. L. 268, 23 Atl. 664; a public urinal; Badger v. City of Boston, 130 Mass. 170, are public uses. So has been held the production of electric power or light; Story v. Power Co., 166 Ind. 316, 76 N. E. 1057; Minnesota C. & P. Co. v. Koochiching Co., 97 Minn. 429, 107 N. W. 405, 5 L. R. A. (N. S.) 638, 7 Ann. Cas. 1182; In re East Canada Creek Electric L. & P. Co., 49 Misc. 565, 99 N. Y. Supp. 109; In re Niagara, L. & O. Power Co., 111 App. Div. 686, 97 N. Y. Supp. 853; Rockingham County L. & P. Co. v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581; Jones v. Electric Co., 125 Ga. 618, 54 S. E. 85, 6 L. R. A. (N. S.) 122, 5 Ann. Cas. 526; though some courts have doubted whether the transmitting of water power into electricity was such a public use as would warrant the exercise of the right of eminent domain; State v. Power Co., 39 Wash. 648, 82 Pac. 150, 2 L. R. A. (N. S.) 842, and note, 4 Ann Cas 987; Minnesota Canal & P. Co. v. Koochiching Co., 97 Minn. 429, 107 N. W. 405, 5 L. R. A. (N. S.) 638, 7 Ann. Cas. 1182. A department store is not a public use; Townsend v. Epstein, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409, 86 Am. St. Rep 441; and see Hatfield v. Straus, 189 N. Y. 208, 82 N. E. 172.

Other instrumentalities of commerce held to be public uses are, pipe lines for the transportation of oil or natural gas; W. Va. Transp. Co. v. Coal Co., 5 W. Va. 382; City of La Harpe v. Power Co., 69 Kan. 97, 76 Pac. 448; City of Rushville v. Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; Charleston Nat. Gas Co. v. Lowe, 52 W. Va. 662, 44 S. E. 410; dams for booms used in logging; Patterson v. Boom Co., 3 Dill 465, Fed. Cas. No. 10,829; Lawler v. Baring Boom Co., 56 Me. 443; Schoff v. Imp. Co., 57 N. H. 110; Maffet v. Quine, 93 Fed. 347; *contra*, Brewster v. Rogers Co., 169 N. Y. 73, 62 N. E. 164, 58 L. R. A. 495; Matthews v. Mfg. Co., 35 Wash. 662, 77 Pac. 1046; see also Mississippi & R. R. Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206; Weaver v. Boom Co., 28 Minn. 534, 11 N. W. 114; Appeal of Bennett's Branch Imp. Co., 65 Pa. 242; a flume for the transportation of lumber; Dallas Lumbering Co. v. Urquhart, 16 Or. 67, 19 Pac. 78. As to the condemnation of land to facilitate mining operations there is a conflict of decisions. In some of the states the courts have refused to permit it; Amador Queen Min. Co. v. Dewitt, 73 Cal. 482, 15 Pac. 74; Appeal of Waddell, 84 Pa. 90; Woodruff v. Min. Co., 18 Fed. 753; while in others they have considered it justifiable on the

ground of public utility; Hand Gold Min. Co. v. Parker, 59 Ga. 419; Overman Silver Min. Co. v. Corcoran, 15 Nev. 147; and the owner of a mine may have land condemned for a railroad for the transportation of the products of his mine to the nearest thoroughfare by rail or water, provided such a railway shall be free to all who wish to use it; Hays v. Risher, 32 Pa. 169; Hibernia Underground R. Co. v. De Camp, 47 N. J. L. 518, 4 Atl. 318, 54 Am. Rep. 197; New Central Coal Co. v. Coal & Iron Co., 37 Md. 537; Colorado E. R. Co. v. R. Co., 41 Fed. 294; and this latter provision will be implied from the statute authorizing the condemnation; Phillips v. Watson, 63 Ia. 28, 18 N. W. 659; but it has been held that a mine-owner cannot condemn land solely for the transportation of his own products; Appeal of Stewart, 56 Pa. 413; Appeal of McCandless, 70 Pa. 210; Sholl v. Coal Co., 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379; State v. R. Co., 40 Ohio St. 504; or to take water to the mines; Lorenz v Jacob, 63 Cal. 73.

The right to condemn land for mill sites has been frequently granted; Hankins v. Laurence, 8 Blackf. (Ind.) 266; Harding v. Goodlett, 3 Yerg. (Tenn.) 41, 24 Am. Dec. 546; Boston & R. Mill Dam. Corp. v. Newman, 12 Pick. (Mass.) 467, 23 Am. Dec. 622; Inhabitants of Andover v. Sutton, 12 Mete. (Mass.) 182; Tyler v. Beacher, 44 Vt. 648, 8 Am Rep. 398; Olmstead v. Camp, 33 Conn. 532, 89 Am. Dec. 221. In the last case it was urged that it was against public policy to allow such great agencies as streams capable of propelling machinery to go to waste, and that to utilize such power, even for the erection of private mills, promotes the wealth of the state and is of incidental benefit to the people. But although courts have recognized this right to a certain extent; Holyoke Co. v. Lyman, 15 Wall. (U. S.) 500, 21 L. Ed. 133, it has been with reluctance and it will not now probably be sustained; Mills, Em. Dom. § 15; it has been doubted; Powers v. Bears, 12 Wis. 213, 78 Am. Dec. 733; and by some denied; Jordan v. Woodward, 40 Me. 317; Hay v. Cohoes Co., 3 Barb. (N. Y.) 42; Sadler v. Langham, 34 Ala. 311; Ryerson v. Brown, 35 Mich. 333, 24 Am. Rep. 564; in which, after reviewing the authorities, Judge Cooley holds the question not one of necessity but of comparative cost. A general statute, delegating to individuals the power to condemn land and locate mills, was held unconstitutional; Loughbridge v. Harris, 42 Ga. 500. See generally as to the exercise of the power in aid of private enterprises, including mining, mills, etc., including an historical review of the cases, Nichols, Em. Dom. ch. xliv, §§ 236–254.

A railroad is a public use; Cherokee Nation v. Ry. Co., 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295; Whiteman's Ex'x v. R. Co., 2 Harring. (Del.) 514, 33 Am. Dec. 411; Swan v. Williams, 2 Mich. 427; In re Long Island R. Co., 143 N. Y. 67, 37 N. E. 636; even where used for freight only; State v. R. Co., 47 N. J. L. 43; so also are all appurtenances essential to the reasonable, convenient, and proper construction, maintenance, and operation of the road, such as yard-room; Eldridge v. Smith, 34 Vt. 484; and terminals; Spofford v. R. Co., 66 Me. 26; turnouts, engine-houses, depots, shops, turntables; Chicago, B. & Q. R. Co. v. Wilson, 17 Ill. 123; Giesy v. R. Co., 4 Ohio St. 308; and repair shops, stock-yards; Covington Stock-Yards Co. v. Keith, 139 U. S. 128, 11 Sup. Ct. 469, 35 L. Ed. 73; Hannibal & St. J. R. Co. v. Muder, 49 Mo. 165; paint-shop, lumber, and timber sheds; Low v. R. Co., 18 Ill. 324; wharves; In re New York Cent. & H. R. Co., 77 N. Y. 248; a place of deposit for waste earth; Lodge v. R. Co., 8 Phila. (Pa.) 345; but not shops for manufacturing new rolling stock; New York & H. R. Co. v. Kip, 46 N. Y. 546, 7 Am. Rep. 385; or tenement houses for employés; *id.*; State v. Commissioners of Mansfield, Tp., 23 N. J. L. 510, 57 Am. Dec. 409; as to an ordinary warehouse, it was doubted; Cumberland Val. R. Co. v. McLanahan, 59 Pa. 23; but a building for handling freight was not a mere warehouse; In re New York Cent. & H. R. R. Co., 77 N. Y. 248; so land for a track to an elevator could be taken; Clarke v. Blackmar, 47 N. Y. 150; but not for a railroad constructed solely to convey passengers to see the Niagara River and whirlpool for revenue to a private person; In re Niagara Falls & Whirlpool R. Co., 108 N. Y. 375, 15 N. E. 429. See Lewis, Em. Dom. § 170; Rand. Em. Dom. § 45.

Having obtained its franchises and right of way subject to the right of the state to extend public streets and highways across its track, a railway company is not entitled to compensation for interruption of its business, or increased expense or risk involved in the construction of such highway; Boston & M. R. Co. v. County Com'rs, 79 Me. 386, 10 Atl. 113; Lake Shore & M. S. Ry. Co. v. City of Chicago, 148 Ill. 509, 37 N. E. 88. Legislative authority to construct streets and highways across such right of way does not violate the constitutional prohibition against taking private property for public use without compensation; Albany N. R. Co. v. Brownell, 24 N. Y. 345; People v. R. Co., 156 N. Y. 570, 51 N. E. 312; Rochester & H. V. R. Co. v. City of Rochester, 163 N. Y. 608, 57 N. E. 1123. But the company is entitled to compensation under such circumstances and its right is considered property; Hook v. R. Co., 133 Mo. 314, 34 S. W. 549; New York & L. B. R. Co. v. Capner, 49 N. J. L. 555, 9 Atl. 781; Kansas Cent. R. Co. v. Commissioners of Jackson County, 45 Kan. 716, 26 Pac. 394; Illinois Cent. R. Co v. Highway Com'rs of Town of Mattoon, 161 Ill. 247, 43 N. E. 1100; St. Louis S. W. Ry. Co. v. Royall, 75 Ark. 530, 88 S. W. 555; Louisville &

N. R. R. Co. v. City of Louisville, 131 Ky. 108, 114 S. W. 743, 24 L. R. A. (N. S.) 1213.

It is not a public use to provide for fencing a large tract of land subject to floods which carried off the fences; Scuffletown Fence Co. v. McAllister, 12 Bush (Ky.) 312; or to acquire swamp land and build docks, warehouses, factories, etc.; In re Eureka Basin Warehouse & Mfg. Co., 96 N. Y. 42; or to settle private controversies concerning title by transferring the land of one to another; Vanhorne v. Dorrance, 2 Dall. (U. S.) 304, 1 L. Ed. 391; Lessee of Pickering v. Rutty, 1 S. & R. (Pa.) 511. The latter cases arose under legislation to settle titles and adjust controversies in Pennsylvania under the Connecticut grant.

It is settled that the legislature cannot authorize the taking of property for a private use, but the decisions conflict as to the case of private ways, or roads laid out under statutes existing in many states. By many courts they are held unconstitutional as being a private use; Taylor v. Porter, 4 Hill (N. Y.) 140, 40 Am. Dec. 274; Bankhead v. Brown, 25 Ia. 540; Richards v. Wolf, 82 Ia. 358, 47 N. W. 1044, 31 Am. St. Rep. 501; Wild v. Deig, 43 Ind. 455, 13 Am. Rep. 399; Dickey v. Tennison, 27 Mo 373; Crear v. Crossly, 40 Ill. 175; but in others such roads are held to be a public use, and the word private is construed as a word of classification and not technical or describing the use; Sherman v. Buick, 32 Cal. 241, 91 Am. Dec. 577; Monterey County v. Cushing, 83 Cal. 507, 23 Pac. 700; In re Hickman, 4 Harring. (Del.) 580; Sadler v. Langham, 34 Ala. 311; Shaver v. Starrett, 4 Ohio St. 494; Denham v. County Com'rs of Bristol, 108 Mass. 202; Appeal of Waddell, 84 Pa. 90; In re Killbuck Private Road, 77 Pa. 39; Perrine v. Farr, 22 N. J. L. 356.

The doctrine as to taking under this power for the assistance of private enterprise is thus stated: "The power of eminent domain cannot be constitutionally employed to enable individuals to cultivate their land or carry on their business to better advantage even if the prosperity of the community will be enhanced by their success; but when the public welfare depends upon an undertaking which cannot succeed without taking rights in private land, the courts will allow such taking, especially if it is sanctioned by usage contemporary with the adoption of the constitution." Nichols, Em. Dom. 271; People v. Township Board of Salem, 20 Mich. 452, 4 Am Rep. 400; Citizens' Sav. & Loan Ass'n v. Topeka, 20 Wall. (U. S.) 655, 22 L. Ed. 455; Allen v. Inhabitants of Jay, 60 Me. 127, 11 Am. Rep. 185.

"The taking by a state of the private property of one person without the owner's consent for the private use of another is not due process of law and is a violation of the fourteenth article of amendment of the constitution of the United States." An act authorizing a board of transportation to require a railroad corporation to grant to private persons a location on the right of way of a railroad for the purpose of erecting a third elevator is invalid; Missouri Pac. Ry. Co. v. Nebraska, 164 U. S. 403, 17 Sup. Ct. 130, 41 L. Ed. 489. The prohibition is against taking without due process of law. So at the same term the court say: "There is no specific prohibition of the Federal Constitution which acts upon the states with regard to their taking private property for any but a public use;" Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369.

What is a public use, for which private property may be taken by due process of law, depends upon the particular facts and circumstances connected with the particular subject-matter. See notes on this subject in which the cases are collected; 91 Am. Dec. 585.

What may be taken. Every kind of property may be taken under this power. It "is attribute of sovereignty, and whatever exists in any form, whether tangible or intangible, may be subjected to the exercise of its power, and may be seized and appropriated to public uses when necessity demands it." Lewis, Em. Dom. § 262; Metropolitan City Ry. Co. v. Ry. Co., 87 Ill. 317, 324; Alabama & F. R. Co. v. Kenney, 39 Ala. 307; New York, H. & N. R. Co. v. R. Co., 36 Conn 196, Water Works Co. of Indianapolis v. Burkhart, 41 Ind. 364; Eastern R. Co. v. Railroad, 111 Mass. 125, 15 Am. Rep. 13. The general rule to be gathered from all the authorities, considered together, is, that a legislative grant of power to condemn property, expressed in general terms, confers on the grantee power to take all kinds of property except property already devoted to public use and necessary for the exercise of such use; 27 Cent. L. J. 207; it makes no difference whether corporeal property, as land, or incorporeal, as a franchise, is to be affected; Bloodgood v. R. Co., 14 Wend. (N. Y.) 51; Bonaparte v. R. Co., 1 Baldw. C. C. 205, Fed. Cas. No. 1,617; U. S. v. Ry. Co., 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576. see Louisville, C. & C. R. Co. v. Chappell, Rice (S. C.) 383; Backus v. Lebanon, 11 N. H. 19, 35 Am. Dec. 466; Enfield Toll Bridge Co. v. R. Co., 17 Conn. 454, 44 Am. Dec. 556; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 9 L. Ed. 773; State v. Dawson, 3 Hill (S. C.) 109; Lexington & O. R. Co. v. Applegate, 8 Dana (Ky.) 289, 33 Am. Dec. 497; Pocantico Water Works Co. v. Bird, 130 N. Y. 249, 29 N. E. 246; Turner v. Nyc, 154 Mass. 579, 28 N. E. 1018, 14 L. R. A. 487; Louisville, N. O. & T. Ry. Co. v. Telegraph Cable Co., 68 Miss. 806, 10 South. 74; Spring Valley Water Works Co. v. Drinkhouse, 92 Cal. 528, 28 Pac. 681.

The property which may be taken includes: Estates successive in point of time, as remainders and reversions; Alexander v. U.

S., 39 Ct. Cl. 383; Charleston & W. C. Ry. Co. v. Reynolds, 69 S. C. 481, 48 S. E. 476; life-tenancy; Austin v. R. Co., 45 Vt. 215; Chicago, K. & N. Ry. Co. v. Ellis, 52 Kan. 41, 33 Pac. 478; tenancy for years; Chicago & E. R. Co. v. Dresel, 110 Ill. 89; Kearney v. Ry. Co., 129 N. Y. 76, 29 N. E. 70; or at will; Sheehan v. City of Fall River, 187 Mass. 356, 73 N. E. 544; easements, if impaired by the new use; State v. Superior Court of King County, 26 Wash. 278, 66 Pac. 385; even a prescriptive right to pollute a stream; Sprague v. Dorr, 185 Mass 10, 69 N. E. 344; profits à prendre, Carville v. Com, 192 Mass. 570, 78 N. E. 735; mortgages; Bank of Auburn v. Roberts, 44 N. Y. 192; Wooster v. R. Co., 57 Wis. 311, 15 N. W. 401; South Park Com'rs v. Todd, 112 Ill. 379; *contra*, Whiting v. City of New Haven, 45 Conn. 303; Goodrich v. Board, 47 Kan. 355, 27 Pac. 1006, 18 L. R. A. 113, Farnsworth v City of Boston, 126 Mass. 1; (but not general liens; Watson v. R. Co., 47 N. Y. 157, or ground rents; Workman v. Mifflin, 30 Pa. 362;) dower; French v. Lord, 69 Me. 537, Venable v. Ry. Co., 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68; buildings and fixtures; Williams v. Com., 168 Mass. 364, 47 N. E. 115 (but only such fixtures as cannot be removed without injury to the freehold or to the owner; In re City of New York, 192 N. Y. 295, 84 N. E. 1105, 18 L. R. A. [N. S.] 423, 127 Am. St. Rep. 903). As to who are proper parties see *infra;* and as to what is property within the constitutional use of the word, see Nichols, Em. Dom. § 173 *et seq.* An inchoate right of dower is defeated by condemnation for a public use; Moore v. Mayor, etc, 8 N. Y. 110, 59 Am. Dec. 473; Duncan v. City of Terre Haute, 85 Ind 104; Wheeler v Kirtland, 27 N. J. Eq. 534; Chouteau v. Ry. Co., 122 Mo. 375, 22 S. W. 458, 30 S. W. 299; French v. Lord, 69 Me. 537; it is said that the dower right in the land is cut off but transferred to the proceeds; Bonner v. Peterson, 44 Ill. 253, In re Central Park Extension, 16 Abb. Pr. (N. Y) 56; but the statutory purchase of land by a railroad corporation for depots, etc., does not extinguish the inchoate right of dower therein; Nye v. R. Co., 113 Mass. 277.

The power has been held to exist: To build a railroad over basins maintained by a water power company for public purposes, and its franchise is not thereby destroyed; Boston Water Power Co. v. Boston & W. R. Corp., 23 Pick. (Mass.) 360; to take for a public road the property, easement, and franchise of a bridge company; West River Bridge Co. v. Dix, 6 How. (U. S.) 507, 12 L. Ed. 535; to build a railroad over the land of a gas company not then in use but likely to become necessary; New York C. & H. R. R. Co. v. Gas-Light Co., 63 N. Y. 326; over the lands and right of way of a canal company; Tuckahoe Canal Co. v. R. Co, 11 Leigh (Va.) 42, 36 Am. Dec. 374; Board of Trustees of Illinois & M. Canal v. R. Co, 14 Ill. 314; over lands of a state asylum for deaf and dumb; Indiana Cent. Ry. Co. v. State, 3 Ind. 421; over a turnpike which would not be materially injured; White River Turnpike Co. v. R. Co, 21 Vt. 590; but not over lands, not necessary for the railway, owned and used by the state for an institution for the blind; St. Louis, J. & C. R. Co. v. Trustees, 43 Ill. 303. In a proceeding by a railroad company to condemn for terminal warehouses the land of a steamboat company, the test whether the defendant held its land for such use as to exempt it from condemnation was said to be not what the defendant "does or may choose to do, but what under the law it must do, and whether a public trust is impressed upon it. It does not so hold its property impressed with a trust for the public use unless its charter puts that character upon it and so that it cannot be shaken off;" In re New York, L. & W. Ry. Co., 99 N. Y. 12, 1 N. E. 27. Any property belonging to a railway not in actual use or necessary to the proper exercise of the franchise thereof may be taken for the purpose of another railroad under a general power; Baltimore & O. R. Co. v. R. Co., 17 W. Va. 812; Chicago & N. W. Ry. Co. v. R. Co., 112 Ill. 589; In re Poughkeepsie & E. R. Co., 63 Barb. (N. Y.) 151, Providence & W. R. R. Co. v. R. Co., 138 Mass. 277; Pittsburgh Junction R. Co. v. R. Co, 146 Pa 297, 23 Atl. 313; but not where the loss of the property to be taken is necessary to the exercise of the franchise of its owner; Central City Horse Ry. Co. v. Ry. Co, 81 Ill. 523; Oregon Cascade R. Co v. Baily, 3 Or. 164. The same general principles are applied to cases where a municipal corporation attempts to condemn railroad property; if the property is not necessary to the new use and the latter is destructive of the old one it is not permitted to be taken; Baltimore & O. C. R. Co v. North, 103 Ind. 486, 3 N. E. 144, 23 A. & E. R. R. Cas. 36; s. c. Baltimore & O. & C. R. Co. v. North, 103 Ind. 486, 3 N. E. 144; Winona & St. P. Ry. Co. v. City of Watertown, 4 S. D. 323, 56 N. W. 1077; otherwise, if it will leave the franchise unimpaired; New Jersey Southern R. Co. v. Com'rs, 39 N. J. L. 28. A market house has been condemned for a railway terminal station, reached by an elevated railroad, and its approaches; Twelfth-St. Market Co. v. R. Co, 142 Pa. 580, 21 Atl. 902, 989; but one corporation cannot take the franchise of another which is in use unless expressly authorized by the legislature, and then only by regular condemnation, and cannot take it at all, if this will materially affect its use; Fidelity Trust & Safety Vault Co. v. Ry. Co., 53 Fed 687. So a street may be taken; Ottawa, O. C. & C. G. R. Co. v. Larson, 40 Kan. 301, 19 Pac. 661, 2 L. R. A 59; a bridge; 39 Am. & Eng. Corp. Cas. 36, n.; or land in custody of the law; 14 Am. L. Rev. 131.

Where the power in a charter to condemn lands is limited so as to exclude land or property of any other corporation existing under the law of the state, this restriction was not confined to lands of corporations existing at the passage of the act, but applies to those thereafter incorporated; and another corporation which acquired lands after the first corporation had filed a survey thereof according to the requirements of the laws, but before any petition for the appointment of commissioners had been presented, could claim exemption from condemnation under the limitations; In re American Transp. & Nav. Co., 58 N. J. L. 109, 32 Atl. 74.

See review of cases on this general subject, of the taking of a franchise; 27 Cent. L. J. 207, 231; and as to corporate property; 14 Am. & Eng. R. R. Cas. 41, n.

Claims of citizens against a foreign power may be taken by the national government for the purpose of adjusting its relations with such power; Meade v. U. S., 2 Ct. of Cl. 224; and a claim for damages to land by reason of an unlawful entry may be taken and adjusted in a proceeding to take the land itself; Morris Canal & Banking Co. v. Townsend, 24 Barb. (N. Y.) 658

It has been held that money cannot be taken; Field, J., Burnett v. City of Sacramento, 12 Cal. 76, 73 Am. Dec. 518; *contra*, Cary Library v. Bliss, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765; only as to money taken by the state in time of war; Mitchell v. Harmony, 13 How. (U. S.) 115, 14 L. Ed. 75; Wellman v. Wickerman, 44 Mo. 484; and without any such limitation; Sharswood, J., in Hammett v. Philadelphia, 65 Pa. 152, 3 Am. Rep. 615, who says that "the public necessity which gives rise to it prevents its being restrained by any limitations as to either subject or occasion." "Such," the opinion continues, "would be the case of a pressing and immediate necessity, as in the event of invasion by a public enemy, or some great public calamity, as famine or pestilence, contribution could be levied on banks, corporations, or individuals."

Buildings on land condemned are parts of the realty and pass with the land, and the owner must be paid for them in full, and being so paid cannot recover from the company damages for the removal of them; Forney v. R. Co., 23 Neb. 465, 36 N. W. 806; nor can the owner remove them; Finn v. Gas & Water Co., 99 Pa. 640. See, generally, as to structures, 3 Am. R. R. & Corp. Cas. 181, n.

An act for the extinguishment of irredeemable ground rents was held not to be an exercise of the right of eminent domain and therefore unconstitutional; Appeal of Palairet, 67 Pa. 479, 5 Am. Rep. 450. Generally a city may not condemn property beyond its territorial limits; Bank of Augusta v. Earle, 13 Peters (U. S.) 519, 10 L. Ed. 274; Crosby v. Hanover, 36 N. H. 404; or a corporation in a different state from that of its incorporation; Saunders v. Imp. Co., 58 Fed. 133; but there are exceptions to the rule as in case of a city which may condemn property beyond its orders where the necessity exists, as for a park; Thompson v. Moran, 44 Mich. 602, 7 N. W. 180; St. Louis County Court v. Griswold, 58 Mo. 175; a sewer; City of Coldwater v. Tucker, 36 Mich. 474, 24 Am. Rep. 601; Maywood Co. v. Village of Maywood, 140 Ill. 216, 29 N. E. 704; or waterworks; Warner v. Town of Gunnison, 2 Colo. App. 430, 31 Pac. 238; State v. City of Newark, 54 N. J. L. 62, 23 Atl. 129; but in such case the property must be sufficiently near to the municipality to be serviceable for the purpose for which it is condemned; In re City of New York, 99 N. Y. 569, 2 N. E. 642.

Reversion on abandonment and change of public use. Where land is taken for one purpose, it reverts to the owner if that use is abandoned; Miller v. R. Co., 43 Ind. App. 540, 88 N. E. 102; Harris v. Elliott, 10 Pet. (U. S.) 25, 9 L. Ed. 333; Kimball v. City of Kenosha, 4 Wis. 321; Newton v. M'f'g's Ry. Co., 115 Fed. 781, 53 C. C. A. 599; Chicago & E. I. R. Co. v. Clapp, 201 Ill. 418, 66 N. E. 223 (under constitutional provision); Canton Co. of Baltimore v. R. Co., 99 Md. 202, 57 Atl. 637; Neitzel v. Ry. Co., 65 Wash. 100, 117 Pac. 864, 36 L. R. A. (N. S.) 522; and he can restrain the unlawful use of it; Appeal of Lance, 55 Pa. 16, 93 Am. Dec. 722; since the nature of the right exercised subjects the statutes conferring it to a strict construction; Washington Cemetery v. R. Co., 68 N. Y. 591; and unless the statute clearly authorizes greater latitude the power to take is only for the public use indicated; Attorney General v. Aqueduct Corp, 133 Mass. 361. When the public use is discontinued, the land owner holds his title unincumbered as before condemnation; McCombs v. Stewart, 40 Ohio St. 647; Chambers v. Power Co., 100 Minn. 214, 110 N. W. 1128; Gross v. Jones, 85 Neb. 77, 122 N. W. 681, 32 L. R. A. (N. S.) 47; Lyford v. Laconia, 75 N. H. 220, 72 Atl. 1085, 22 L. R. A. (N. S.) 1062, 139 Am. St. Rep. 680; but to constitute abandonment there must be intention to abandon as well as actual relinquishment; Canton Co. of Baltimore v. R. Co., 99 Md. 202, 57 Atl. 637; Corr v. Philadelphia, 212 Pa. 123, 61 Atl. 808; Chicago & E. I. R. Co. v. Clapp, 201 Ill. 418, 66 N. E. 223; and the expression of an intention not to abandon is not conclusive, but is to be considered with other evidence of action and conduct; *id.* It has been held that the legislature may change the use to another of the same nature; Chase v. Mfg. Co., 4 Cush. (Mass.) 152; Eldridge v. City of Binghamton, 120 N. Y. 309, 24 N. E. 462; Malone v. City of Toledo, 28 Ohio St. 643; but it is probably the better opinion that compensation must be given for another or additional burden; State v. Laverack, 34 N.

J. L. 201; Lahr v. Ry. Co., 104 N. Y. 268, 10 N. E. 528; Wagner v. Ry. Co., 104 N. Y. 665, 10 N. E. 535; Wead v. R. Co., 64 Vt. 52, 24 Atl. 361; Lostutter v. City of Aurora, 126 Ind. 436, 26 N. E. 184, 12 L. R. A. 259; Town of Hazlehurst v. Mayes, 84 Miss. 7, 36 South. 33, 64 L. R. A. 805. In some cases payment for the damage caused by the change of use is sufficient; Lucas v. Power Co., 92 Neb. 550, 138 N. W. 761.

Indirect or consequential damages. The principle that a right of compensation exists wherever private property is *taken* for public use does not extend to the case of one whose property is indirectly *damaged* by the lawful use of property already belonging to the public. For example, it was held that an adjoining or abutting owner was not entitled to compensation for damages resulting from the change of a grade of a street; 4 Term 794; Proctor v. Stone, 158 Mass. 564, 33 N. E. 704; Brooks v. Improvement Co., 82 Me. 1, 19 Atl. 87, 7 L. R. A. 460, 17 Am St. Rep. 459; Rauenstein v. R. Co., 136 N. Y. 528, 32 N. E. 1047, 18 L. R. A. 768. Callender v. Marsh, 1 Pick. (Mass.) 418, was the leading American case, and gave rise to a statute to remedy the wrong suggested by it. In Pennsylvania the doctrine of these cases was followed in a case in which Gibson, C. J., expressed regret that such injustice was remediless; O'Connor v. Pittsburgh, 18 Pa. 187 (a case referred to by the same court as of a class intended to be remedied by the constitution of 1874; O'Brien v. Philadelphia, 150 Pa. 589, 24 Atl. 1047, 30 Am St. Rep. 832). These and the other authorities were reviewed by the United States Supreme Court, and the same conclusion reached as being "well settled both in England and in this country:" Smith v. Corporation of Washington, 20 How. (U. S.) 135, 15 L. Ed. 858. Of the law at this period, it was said that the limitation of the term "taking" to an actual physical appropriation or divesting of title was "far too narrow to answer the purpose of justice;" Sedg Const. L. (2d ed.) 456. See 1 Thayer, Cas. Const. L. 1053, 1055; 2 Am. R. & Corp. Cas. 435, n. The law on this specific subject of change of grades became firmly settled, except as changed by constitutional or statutory enactments, but on the general subject of what constitutes a "taking" of property, it has since undergone very great changes, and the narrow rule of physical appropriation has ceased to afford a criterion of decision. An illustration of the tendency to treat this question liberally, rather than technically, is a decision that it is a "taking" of property to prohibit an owner of land on a boulevard from building, beyond a certain limit, on the front part of the lot; City of St. Louis v. Hill, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226; City of Philadelphia v. Linnard, 97 Pa. 242; In re Chestnut Street, 118 Pa. 593, 12 Atl. 585. See Vanderlip v. Grand Rapids, 73 Mich. 522, 41 N. W. 677, 3 L. R. A. 247, 16 Am. St. Rep. 597; Memphis & C. R. Co. v. R. Co., 96 Ala. 571, 11 South. 642, 18 L. R. A. 166. The older cases rested upon a narrow, the later ones upon a liberal, meaning of the word "property" in the constitutions. Of the latter, Eaton v. Railroad Co., 51 N. H. 504, 12 Am. Rep. 147, is the leading case on the subject of the right to compensation where property is injured and not physically taken. Plaintiff's land was overflowed during a freshet as the result of the construction of the defendant's railroad. Damages for the land actually taken for the railroad had been paid as the result of condemnation proceedings. It was held that the right to use the land undisturbed really constituted the property in it, rather than the physical possession of the land itself, and that even if the land itself were the "property," a physical interference with it which abridged the right to use it was in fact a taking of the owner's property to that extent. The opinion of Smith, J., in this case is said to have contributed more than any other towards the change in the law extending the effect of the word *taking;* Lewis, Em. Dom § 58. See also Thompson v Imp. Co., 54 N. H. 545; City of Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128, 8 L. R. A. 808, 20 Am. St. Rep. 123; Weaver v. Boom Co., 28 Minn. 534, 11 N. W. 114; 14 Ch. Div. 58; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. Ed. 336; Earl, J., dissenting in Story v. R. R. Co., 90 N. Y. 122, 43 Am Rep. 146. It is now quite settled that the flowing of lands, against the owner's consent and without compensation, is a taking; Eaton v. R. R., 51 N. H. 504, 12 Am. Rep. 147; Grand Rapids Booming Co. v. Jarvis, 30 Mich. 321. See also, Nevins v. City of Peoria, 41 Ill. 502, 89 Am. Dec. 392; Pettigrew v. Village of Evansville, 25 Wis. 223, 3 Am. Rep. 50; Pumpelly v Canal Co., 13 Wall. (U. S.) 166, 20 L. Ed. 557. In the latter case, Miller, J., after referring to the decisions that there is no remedy for a consequential injury from the improvements of roads, streets, rivers, etc., said: "But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further." This was afterwards said by the court to be a case of "physical invasion of the real estate of the private owner, a practical ouster of his possession";

Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206.

The danger to which the occupants of the remaining land and the stock thereon will be exposed by the operation of a railway upon the land taken cannot be considered in assessing damages; Indianapolis Traction Co. v. Larrabee, 168 Ind. 237, 80 N. E. 413, 10 L. R. A. (N. S.) 1003, and note, 11 Ann. Cas. 695, on the general question of the danger to the owner of the property, or his family, or his live stock, as an element of damages. The conclusion is that the cases disagree too much to form a settled rule and they are collected, dealing with the subject from all points of view.

The interference with the rights of abutting owners by building an elevated railroad on a street was held a taking of private property for public use without compensation, to restrain which the plaintiff was entitled to an injunction; Story v. R. Co., 90 N. Y. 122, 43 Am. Rep. 146. This case was decided by four judges against three dissenting, whose views were expressed by Earl, J., in an opinion much referred to, contending that it was a use of the street properly incident to its purpose as a public highway. An effort to secure a re-examination of the doctrine of this case resulted in its affirmance; Lahr v. Ry. Co., 104 N. Y. 268, 10 N. E. 528. In a subsequent case the New York court of appeals stated the law of that state to be that, although the abutting owner might have an injunction, and in the same proceeding recover full compensation for the permanent injury, he could not, in an action at law, recover permanent damages measured by the diminution in value of the property, but only such temporary damages as he had sustained at the time of commencing the action; Pond v. Ry. Co., 112 N. Y. 190, 19 N. E. 487, 8 Am. St. Rep. 734

In a leading case the construction of an ordinary commercial railroad along a street in front of a lot without impairing ingress and egress, but resulting in the usual injuries to the lot from steam, smoke, dust, smells, interference with light and air, jarring the ground, etc., was held to be an appropriation of the street for what was not a proper street use, for which damages were recoverable, but limited to the injury resulting from the operation of the road in front of the lot, and not including any accruing from operating it on other parts of the street; Adams v. R. Co., 39 Minn. 286, 39 N. W. 629, 1 L. R. A. 493, 12 Am. St. Rep. 644.

The Maryland court of appeals, in reviewing the decisions on the subject, and particularly the New York cases, mentions as the only other cases holding that opinion, Crawford v. Village of Delaware, 7 Ohio St. 460; Adams v. R Co., 39 Minn. 286, 39 N. W. 629, 1 L. R. A. 493, 12 Am. St. Rep. 644; Theobold v. Ry. Co., 66 Miss. 279, 6 South. 230, 4 L. R. A. 735, 14 Am. St. Rep. 564; and considers that its own decision in Mayor, etc., of Cumberland v. Willison, 50 Md. 148, 33 Am. Rep. 304, and O'Brien v. R. Co., 74 Md. 363, 22 Atl. 141, 13 L. R. A. 126, should be adhered to as being in accord with the decided weight of judicial opinion. The conclusion is thus stated: "The New York doctrine involves this inextricable dilemma, viz., if the grading of a street by a municipal corporation cuts off all access to a person's house, albeit his property is thereby destroyed and rendered valueless, it is not taken in the constitutional sense; but if a railroad company in lawfully constructing its road does precisely the same thing that the city did in grading a street, then the abutter's property is taken, though not physically entered upon at all. The structure is therefore a lawful one. But it does not destroy the street as a street, though it may cause the plaintiff greater inconvenience in gaining access to his lots than he encountered before it was built. But this and other injuries complained of are purely incidental and consequential, though the appellant, under the statutes of Maryland, is not without a remedy therefor; Garrett v. Ry. Co., 79 Md. 277, 29 Atl. 830, 24 L. R. A. 396.

The question what constitutes a taking, under the older constitutional provisions, was much considered with respect to the use of streets and highways by many other modern appliances, such as gas and water pipes, steam and electric railroads, and poles for telegraph, telephone, and electric light wires In this class of cases, of which the elevated railroad cases have been used as an illustration, the question has turned on the consideration whether the proposed use was a legitimate incidental use of the street *as such*, and the tendency of the cases is in favor of a very liberal construction of the rights of the public, at least in streets of cities. In some states a distinction is made between city streets and country roads, and the public easement in the latter is much more restricted, and the rights of abutting owners to damages consequently more extended; Bloomfield & Rochester Nat. Gas Light Co. v. Calkins, 62 N. Y. 386; Appeal of Sterling, 111 Pa. 35, 2 Atl. 105, 56 Am. Rep 246; Pennsylvania R. Co. v. Railway, 167 Pa. 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St Rep. 659; Kincaid v. Gas Co., 124 Ind. 577, 24 N. E. 1066, 8 L. R. A. 602, 19 Am. St. Rep. 113. See IMPAIRING THE OBLIGATION OF CONTRACTS.

In a general view of the subject nothing more is practicable than a mere indication or illustration of the tendency of the decisions which must be resorted to and examined for application to a special case. City streets are legitimately used, from necessity, for sewers and drains; Cone v. City of Hartford, 28 Conn. 363; Leeds v. City of Richmond, 102 Ind. 372, 1 N. E. 711; Traphagen v. Mayor, etc., of Jersey City, 29 N. J. Eq.

206; White v. Corporation of Yazoo City, 27 Miss. 357; water pipes; Crooke v. Water-Works Co., 29 Hun (N. Y.) 245; gas pipes, as a practical necessity, in cities, are not questioned but indirectly sanctioned; Story v. R. Co., 90 N. Y. 161, 43 Am. Rep. 146; Tompkins v. Hodgson, 2 Hun (N. Y.) 146. See City of Boston v. Richardson, 13 Allen (Mass.) 146, 160. As to steam railroads, from a great conflict of decisions (difficult if not impossible to reconcile), it would seem to be the best opinion that it is not a legitimate use of the street; see Rand. Em. Dom. § 405; Lewis, Em. Dom. § 111, with notes citing the cases at large; a horse railway is almost universally held to be a proper use of streets; Rand. Em. Dom. § 402; Lewis, Em. Dom. § 124; the only substantial dissent being in New York; Craig v. R. Co., 39 N. Y. 404; unless the fee is in the public; Kellinger v. R. Co., 50 N. Y. 206. See Cincinnati & Spring Grove Ave. St. Ry. Co. v. Village of Cumminsville, 14 Ohio St. 523; Hobart v. R. Co, 27 Wis. 194, 9 Am Rep 461. With respect to electric railways in cities, the doctrine of "the right of the public to use the streets by means of street cars" was said to be "now so thoroughly settled as to be no longer open to debate," and it was extended to the poles and wires of the new system; Halsey v. Ry. Co., 47 N. J. Eq. 380, 20 Atl. 859; and see Detroit City Ry. v. Mills, 85 Mich. 634, 48 N. W. 1007; Koch v. Ry. Co., 45 Md. 222, 23 Atl 463, 15 L R A. 377; Farrell v. R. Co, 61 Conn 127, 23 Atl. 757; Rafferty v. Traction Co., 147 Pa. 579, 23 Atl. 884, 30 Am. St. Rep. 763; but not along a country road; Pennsylvania R. Co. v. Railway, 167 Pa 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. Rep. 659. See Rand. Em. Dom. § 403. Electric light poles are usually treated as proper, on the same basis as the older lamp posts; Johnson v. Electric Co., 54 Hun 469, 7 N. Y. Supp. 716; but not telegraph and telephone poles, according to the weight of authority; Pacific Postal Tel. Cable Co. v. Irvine, 49 Fed. 113; Western Union Tel. Co. v. Williams, 86 Va. 696, 11 S. E 106, 8 L. R. A. 429, 19 Am. St Rep. 908; Taggart v. R. Co., 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205; St. Louis v. Tel. Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; though in some cases it is held otherwise, and of these the leading case considered the subject within the principle of Callender v. Marsh, 1 Pick. (Mass.) 418; the opinion of the court and the dissenting one of two judges present the two views of the question very fully; Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7. See also Julia Bldg. Ass'n v. Tel. Co., 88 Mo. 258, 57 Am. Rep. 398.

In the cases relating to the use of streets and highways a great diversity of decision is occasioned by the distinctions drawn between the rights of an abutting owner who has the fee and one owning merely an easement of access over a street of which the soil belongs to the public. The question is further complicated by the varied application of the doctrine that an owner whose land was taken for a street or highway is presumed to anticipate the future uses to which it may be put both over and under the surface. The confusion of the decisions is well stated by a writer on the subject: "Laying aside constitutional and statutory declarations of liability for consequential injuries we find the following anticipations imputed to one whose land is affected by a street easement In every state except Ohio he anticipates that he may be obliged to enter his house by a second-story window when the grade is raised, or by a ladder when the grade is lowered In New York he does not foresee any improved method of transportation from the horse-car to the electric motor, but in Pennsylvania he anticipates all methods. The Massachusetts man seems to be the only one who has clearly anticipated the telegraph and telephone. Judged by results there is no working rule of general application deducible from a presumed anticipation of future use." Rand. Em. Dom. § 414.

In some states there are constitutional provisions covering this subject, sixteen of them requiring compensation when property is damaged by such proceedings generally, and three others when the delegated power of eminent domain is exercised by corporations. Under these provisions compensation is required for property "damaged" as well as "taken," and the former word is held to include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property; City of Omaha v. Kramer, 25 Neb. 489, 41 N. W. 295, 13 Am. St. Rep. 504; Reardon v. San Francisco, 66 Cal. 492, 6 Pac. 317, 56 Am. Rep. 109; City of Atlanta v. Green, 67 Ga. 386; Chicago & W. I. R. Co. v. Ayres, 106 Ill. 511; Hot Springs R. Co. v. Williamson, 45 Ark. 429.

The treatment by the courts of the subject of consequential damages is illustrated by the course of decisions under two constitutions of Illinois, by the supreme court of that state, which is very elaborately reviewed in a judgment of the supreme court of the United States. The constitution of 1848 prohibited the taking or application to public use of property without just compensation; and the rule adopted by the courts was that any physical injury to private property, by the erection, etc., of a public improvement, in or along a public highway, whereby its use was materially interrupted, was to be regarded as a *taking*, within the meaning of the constitution. The constitution of 1870 provided that private property should not be *taken* or *damaged* without just compensation, and upon this it was held that the property owner was protected against any *substantial damage*, though consequential, and that it did not require a trespass or actual physical invasion; Rigney v. City of Chicago, 102 Ill. 64; City of Chicago v. Bldg. Ass'n, 102 Ill. 379, 40 Am. Rep. 598; Chicago v. Taylor, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638. In the judgment last cited Harlan, J., said: "We concur in that construction" and "we regard that case (Rigney v. City of Chicago, 102 Ill. 64) as conclusive of this question."

This constitution of Illinois was the first in which the word "damaged" was inserted, but in 1894 the supreme court of Colorado enumerated fourteen other states which had then adopted the word; City of Pueblo v. Strait, 20 Colo. 13, 36 Pac. 789, 24 L. R. A. 392, 46 Am. St. Rep. 273.

In awarding damages to one, a part of whose land is sought to be condemned for public use, for injury to his remaining land, injury to tracts not connected with, and held under different titles from, although adjoining, that from which the parts are taken, cannot be considered; Sharpe v. U. S., 112 Fed. 893, 50 C. C. A. 597, 57 L. R. A. 932, where Gray, J., upon careful examination of the question, says that it is right and proper to include the damages, in the shape of deterioration of value, to the residue of the tract, but that, to apply this rule, "regard is had to the integrity of the tract as a unitary holding" and, where the holding from which the part is taken is "of such a character that its integrity as an individual tract shall have been destroyed by the taking, depreciation in the value of the residue . . . may properly be considered allowable damages in adjusting the compensation to be given to the owner for the land taken. It is often difficult, when part of a tract is taken, to determine what is an independent tract, but the character of the holding, and the distinction between the residue of a tract, whose integrity is destroyed by the taking, and what are merely other parcels or holdings of the same owner, must be kept in mind." The case is accompanied in the last citation by a note in which the cases are examined and which concludes that "the general rule is that when property is so situated that it is used as a unit, and each part is dependent upon the other, the damages will not be limited in eminent domain to the particular piece taken, but will extend to the whole." Substantially this rule has been applied in a great variety of cases to both country and city property; Gorgas v. R. Co., 215 Pa. 501, 64 Atl. 680, 114 Am. St. Rep. 974; Jeffery v. Osborne, 145 Wis. 351, 129 N. W. 931; Union Traction Co. v. Pfeil, 39 Ind. App. 51, 78 N. E. 1052; St. Louis, Memphis & S. E. R. Co. v. Realty & Investment Co., 205 Mo. 167, 103 S. W. 977, 120 Am. St. Rep. 724; West Skokie Drainage Dist. v. Dawson, 243 Ill. 175, 90 N. E. 377, 17 Ann. Cas. 776; In re Lehigh Valley R. Co., 78 N. J. L. 699, 76 Atl. 1067; State v. Superior Court of Clarke County, 44 Wash. 108, 87 Pac. 40; Chicago & W. M. Ry. Co. v. Huncheon, 130 Ind. 529, 30 N. E. 636; Union Elevator Co. v. R. Co., 135 Mo. 353, 36 S. W. 1071; Rudolph v. R. Co., 186 Pa. 541, 40 Atl. 1083, 47 L. R. A. 782; and see Bauman v. Ross, 167 U. S. 568, 17 Sup. Ct. 966, 42 L. Ed. 270, where the cases are considered by Gray, J. But this rule did not apply when a man owned one parcel in severalty and he and his wife the other in entirety, even if the two were used for a common purpose; Glendenning v. Stahley, 173 Ind. 674, 91 N. E. 234; and it has been held that the rule does not apply to parcels, not used as a whole for one purpose, when separated by highways; Baker v. R. Co., 236 Pa. 479, 84 Atl. 959; or to such parcels separated by a railroad; Kansas City, M. & O. R. Co. v. Littler, 70 Kan. 556, 79 Pac. 114; or a stream of water; St. Louis, M. & S. E. R. Co. v. Aubuchon, 199 Mo. 352, 97 S. W. 867, 116 Am. St. Rep. 499, 8 Ann. Cas. 822, 9 L. R. A. (N. S.) 426, and note which repeats the conclusion of that above cited, that the right to have the parcels treated as one must depend on unity of use and dependence of each parcel on the other; Baker v. R. Co., 236 Pa. 479, 84 Atl. 959, *supra*.

See, generally, as to land injured; 2 Am. R. & C. Cas. 94; 5 *id.* 201; property damaged; 25 Am. L. Rev. 924; taken or damaged; 27 Am. L. Reg. 391; Harman v. City of Omaha, 21 Cent. L. J. 130.

What estate is acquired. Where the constitution contains no restriction, a fee or any less estate may be taken, in the discretion of the legislature; Dingley v. City of Boston, 100 Mass. 544; Prather v. Telegraph Co., 89 Ind. 501; Malone v. City of Toledo, 34 Ohio St. 541; Patterson v. Boom Co., 3 Dill. 465, Fed. Cas. No. 10,829; Sweet v. Ry. Co., 79 N. Y. 293; Roanoke City v. Berkowitz, 80 Va. 616; Lewis, Em. Dom. § 277; Rand. Em. Dom. § 205; Cooley, Const. Lim. 688.

It is within the power of the legislature to determine the interest to be taken; Fairchild v. City of St. Paul, 46 Minn. 540, 49 N. W. 325; and it may authorize the taking of a fee simple; Wood v. City of Mobile, 107 Fed. 846, 47 C. C. A. 9; In re City of New York, 190 N. Y. 350, 83 N. E. 299, 16 L. R. A. (N. S.) 335; *contra*, Kellogg v. Malin, 50 Mo. 496, 11 Am. Rep. 426; if a fee is taken under the statute, the land may afterwards be devoted to other uses; *id.*; Rand. Em. Dom. § 209. If the state condemn, a fee is presumed; Haldeman v. R. Co., 50 Pa. 425; Craig v. City of Allegheny, 53 Pa. 477; but not when a private corporation does so; Rand. Em. Dom. § 206; when the act authorized a railroad company to take the fee for a *right* of way, it was a qualified estate which would revert; Kellogg v. Malin, 50 Mo. 496, 11 Am. Rep. 426; Kellogg v. Malin, 62 Mo. 429; but a railroad may be authorized to take a fee; Raleigh & G. R. Co. v. Davis, 19 N. C. 451. The purpose is sometimes said to indicate the estate taken; Holt v. City Council of Somerville, 127 Mass. 408; Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; but this is an unsafe criterion of the interest, and the better opinion is that it merely defines the use. See New Orleans Pac. Ry. Co. v. Gay, 31 La. Ann. 430; Commissioners of Parks and Bou-

levards of City of Detroit v. R. Co., 90 Mich. 385, 51 N. W. 447; New York S. & W. R. Co. v. Trimmer, 53 N. J. L. 1, 20 Atl. 761. Under a provision that the title should vest, a city took a fee for sewers; Page v. O'Toole, 144 Mass. 303, 10 N. E. 851; but a turnpike company only an easement; Dunham v. Williams, 36 Barb. (N. Y.) 136. An absolute power of alienation, the ear-mark of untrammelled and unconditional ownership has been supported in land held by a municipal corporation for a park; In re City of Rochester, 137 N. Y. 243, 33 N. E. 320; or an almshouse; Heyward v. City of New York, 7 N. Y. 314; De Varaigne v. Fox, 2 Blatchf. 95, Fed Cas. No. 3,836; when a street which had been taken for a canal was abandoned, the right of the public and the abutters revived in the street; City of Logansport v. Shirk, 88 Ind. 563; and land taken for a canal was afterwards used for a street; Eldridge v. City of Binghamton, 42 Hun (N. Y.) 202; Malone v. City of Toledo, 34 Ohio St. 541. It is said that a municipal corporation can condemn the fee-simple title of land for streets, but only so as to acquire the absolute control for that purpose and not a proprietary right to sell or devote it to a private use; Fairchild v City of St. Paul, 46 Minn. 540, 49 N. W. 325. When the fee is taken and the use ceases, the state may authorize a sale for other uses, but when only an easement, the land reverts; Lewis, Em. Dom. 596, citing cases; and so if there is an abandonment, *id.* 597.

The time when payment must be made varies according to the exact terms of the constitutional provision under which proceedings are taken. In the majority of states where there is no express provision it is held that compensation need not be concurrent in time with the taking, it is sufficient if an adequate and certain remedy is provided by which the owner may compel payment of damages; In re Appointment of U S Com'rs, 96 N. Y. 227; and this means reasonable legal certainty; Sage v. City of Brooklyn, 89 N. Y. 189; or if there is a definite provision or security for the payment of the compensation; Commissioners' Court of Lowndes County v. Boure, 34 Ala. 461; Cairo & F. R. Co. v. Turner, 31 Ark. 494, 25 Am. Rep. 564; Moody v. R Co., 20 Fla. 597; Briggs v. Canal Co., 137 Mass. 71; Orr v. Quimby, 54 N. H. 590 (but Ash v. Cummings, 50 N. H 591, seems *contra*); Hawley v. Harrall, 19 Conn. 142; Ferris v. Bramble, 5 Ohio St. 109; In re Yost, 17 Pa. 524 (*contra*, as to private roads; In re Clowes' Private Road, 31 Pa. 12); Tuckahoe Canal Co. v. R. Co., 11 Leigh (Va.) 42, 36 Am. Dec. 374; Foster v. Bank, 57 Vt. 128; State v. McIver, 88 N. C. 686; Smeaton v. Martin, 57 Wis. 364, 15 N. W. 403; Great Falls Mfg. Co. v. Garland, 25 Fed. 521. The same rule was formerly followed, in some states in which later constitutions provided for prior payment, or required compensation where none was provided for before, as Maryland; Compton v. Railroad, 3 Bland, Ch. (Md.) 386; Powers v. Armstrong, 19 Ga. 427; People v. R. Co., 3 Mich. 496; Prather v. R. Co., 52 Ind. 16; other states require that the owner shall receive compensation before entry; Brady v. Bronson, 45 Cal. 640 (see Fox v. R. Co., 31 Cal. 538, which reviewed the cases, established a different rule, and was overruled); Vilhac v. R. Co., 53 Cal. 208; City of Paris v. Mason, 37 Tex. 447; Harness v. Canal Co., 1 Md. Ch. 248; Hall v. People, 57 Ill. 307; Chicago, St. L. & W. R. Co. v. Gates, 120 Ill. 86, 11 N. E. 527; but in Maine, while title does not pass, possession may be taken before payment, and a reasonable time—three years being so held—allowed therefor; Cushman v. Smith, 34 Me. 247; Riche v. Water Co., 75 Me. 91. It has been held that the state when acting directly may provide that title shall pass when the amount is ascertained, it being presumed that payment will be made by the state; Ballou v. Ballou, 78 N. Y. 325; but any such declaration in a statute is controlled by the constitution, and it was held in a New York case that payment must be prior to or concurrent with the taking; Garrison v. New York, 21 Wall. (U. S.) 196, 22 L. Ed. 612. In many state constitutions there is a distinction between the direct exercise of the power by the government and the delegated power conferred on private corporations. Under such a provision it was said that in both cases the sovereign power is coupled with the correlative duty; State v. City of Perth Amboy, 52 N. J. L. 132, 18 Atl. 670; but municipal corporations must settle first when exercising delegated power; *id.*; Lowcree v. City of Newark, 38 N. J. L. 151. And it is said by a writer of authority, "the almost invariable, and certainly the just, course being to require payment to precede or accompany the act of appropriation;" 2 Dill Mun Corp. 615. Generally, however, when the compensation is to be paid by the state or is a charge upon the funds of a municipality that is held sufficient: Haverhill Bridge Proprietors v. County Com'rs, 103 Mass. 120, 4 Am Rep. 518; State v. McIver, 88 N. C. 686; Mayor, etc., of Pittsburgh v. Scott, 1 Pa 309; In re Mayor, etc., of City of New York, 99 N. Y. 569, 2 N. E. 642; Jeffersonville, M. & I. R. Co. v. Daugherty, 40 Ind. 33; Brock v. Hishen, 40 Wis. 674; Long v. Fuller, 68 Pa. 170; but if the available resources are shown to be insufficient an entry may be enjoined; Keene v. Borough of Bristol, 26 Pa. 46.

The fact that there is a limitation of the amount to be expended does not invalidate the law for taking property; U. S. v. Ry. Co., 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576.

When the title passes. It naturally follows that no title can be acquired under the proceedings until the compensation is paid

or so secured as to be treated in law as the equivalent of payment. Accordingly when the title is permitted to vest before payment, it is said to be subject to a claim for compensation in the nature of a vendor's lien enforcible in equity; Lewis, Em. Dom. § 620, and note citing cases. And a sale or mortgage of the property could only be made subject to such prior right of the landowner, which is maintained by some courts on the theory of a lien, and by others on that of title remaining in the owner; *id.* § 621. In Pennsylvania, however, an extreme doctrine prevails; the appropriation is valid and effectual where compensation is paid or secured; Levering v. R. Co., 8 W. & S. (Pa.) 459; McClinton v. R. Co., 66 Pa. 404; Dimmick v. Brodhead, 75 Pa. 464; and title passes when the bond is approved by the court under the statute; Fries v. Mining Co., 85 Pa. 73; and remains vested even if the bond is found to be valueless; Wallace v. R. Co., 138 Pa. 168, 22 Atl. 95; and there is no lien for compensation; Appeal of Hoffman, 118 Pa. 512, 12 Atl 57. By the *act of location* the corporation acquires a conditional title as against the land-owner, which becomes absolute upon making or securing compensation; Williamsport & N. B. R. Co. v. R. Co., 141 Pa. 407, 21 Atl. 645, 12 L. R. A. 220; as against third parties there is a valid location after entry made, lines run, map prepared, and a report made to the directors and adopted by them; Pittsburgh, V. & C. Ry. Co. v. R. Co., 159 Pa. 331, 28 Atl. 155; but running a line, making a map, and a report to the directors, not acted on, did not confer title to the location to justify an injunction to restrain another company from taking the land for a railway, though the land was owned by the plaintiff company; Williamsport R. Co. v. R. Co, 141 Pa. 407, 21 Atl. 645, 12 L. R. A. 220.

If a land-owner, knowing that a railroad company has entered upon his land, and is engaged in constructing its road without having complied with a statute requiring either payment by agreement or proceedings to condemn, remains inactive and permits it to go on and expend large sums in the work, he cannot maintain either trespass or ejectment, and will be restricted to a suit for damages; Roberts v. R. Co., 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873.

The actual cash market value, at the time, of property actually taken must be allowed; Burt v. Wigglesworth, 117 Mass. 302; Mississippi River Bridge Co. v. Ring, 58 Mo. 491; Chicago, K. & W. R. Co. v. Parsons, 51 Kan. 408, 32 Pac. 1083; Chicago & E. R. Co. v. Jacobs, 110 Ill. 414; Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206. It has been said that the true criterion of market value is the sum which the property would bring if sold at auction, conducted in the fairest possible way; Low v. Railroad, 63 N. H. 557, 3 Atl. 739; but this is not the result of the best considered cases. "Market value means the fair value of the property as between one who wants to purchase and one who wants to sell an article; not what could be obtained for it under peculiar circumstances; not its speculative value; not a value obtained from the necessity of another. Nor is it to be limited to that price which the property would bring when forced off at auction under the hammer;" Lawrence v. Boston, 119 Mass. 126; it is measured by the difference between what it would have sold for before the injury, and what it would have sold for as affected by it; Setzler v. R. Co., 112 Pa. 56, 4 Atl. 370; what would be accepted by one desiring but not obliged to sell and paid by one under no necessity of buying; Pittsburgh, V. & C. Ry. Co. v. Vance, 115 Pa. 325, 8 Atl. 764; Little Rock Junction Ry. v. Woodruff, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51; it is not to be measured by the interest or necessity of the particular owner; Pittsburgh & L. E. R. Co. v. Robinson, 95 Pa. 426; nor, on the other hand, by those of the appropriator; Montgomery County v. Bridge Co., 110 Pa. 54, 20 Atl 407; San Diego Land & Town Co. v. Neale, 88 Cal. 50, 25 Pac 977, 11 L. R. A. 604; Selma, R. & D. R. Co. v. Keith, 53 Ga. 178; Everett v. R. Co., 59 Ia. 243, 13 N. W. 109; when these principles are fairly applied due consideration may be given to auction value; Pittsburgh, V. & C. Ry. Co. v. Vance, 115 Pa. 325, 8 Atl. 764; but its availability for other special purposes to which it is particularly adapted by reason of "its natural advantages, or its artificial improvements, or its intrinsic character," may be considered as an element of value; Lewis, Em. Dom. § 479, and cases cited; as, for railroad approaches to a large city; Webster v. R Co., 116 Mo. 114, 22 S. W. 474; Mississippi River Bridge Co. v Ring, 58 Mo. 491; or for a bridge site; Young v. Harrison, 17 Ga. 30; Little Rock Junction Ry. v. Woodruff, 49 Ark 381, 5 S. W. 792, 4 Am. St. Rep. 51; or a mill site; Louisville, N. O. & T. R. Co. v. Ryan, 64 Miss. 401, 8 South. 173; so also its situation and surroundings for railroad purposes; Currie v. R. Co., 52 N. J. L. 391, 20 Atl. 56, 19 Am. St. Rep. 452; Cohen v. R. Co., 34 Kan. 158, 8 Pac. 138, 55 Am. Rep. 242; Johnson v. R. Co., 111 Ill. 413; or market-gardening; Chicago & E. R. Co. v. Jacobs, 110 Ill. 414; or subdivision into village lots; Watson v. Ry. Co., 57 Wis. 332, 15 N. W. 468; South Park Com'rs v. Dunlevy, 91 Ill. 49; Cincinnati & S. Ry. Co. v. Longworth's Ex'rs, 30 Ohio St. 108; or in case of a pond, for ice or milling, there being no other one near; Trustees of College Point v. Dennett, 5 Thomp. & C. (N. Y.) 217; or for warehouse purposes; Russell v. R. Co., 33 Minn. 210, 22 N. W. 379. When the water of a stream

running through a farm was taken by a village for its waterworks, the owner was entitled to damages, not only for being deprived of the water for farm purposes, but also for being deprived of the opportunity to sell water rights to prospective purchasers of village lots plotted out for sale in a part of the farm; Bridgeman v. Village of Hardwick, 67 Vt. 653, 31 Atl. 33. The pollution of a stream so as to render it unfit for use in a paper mill, resulting from the opening of a railroad through the land, was a proper element to be considered in estimating the damages; Rudolph v. R. Co., 186 Pa. 541, 40 Atl. 1083, 47 L. R. A. 782. So its adaptability for the particular purpose for which the condemnation is bought may be shown, as islands well situated for boom purposes; Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206; or the bed of an old canal desired for a railroad; In re New York, L. & W. R. Co., 27 Hun (N. Y.) 116. But mere speculative opinions and considerations will be excluded from consideration; Gardner v. Brookline, 127 Mass. 358; Tide Water Canal Co. v. Archer, 9 G. & J. (Md.) 479; Chicago & E. R. Co. v. Blake, 116 Ill. 163, 4 N. E. 488; Pittsburgh & W. R. Co. v. Patterson, 107 Pa. 461; Watson v. R. Co., 57 Wis. 332, 15 N. W. 468; New Jersey R. Co. v. Suydam, 17 N. J. L. 25.

See, generally, Peoria Gas Light & Coke Co. v. R. Co., 146 Ill. 372, 34 N. E. 550, 21 L. R. A. 373; 57 Am. & Eng. R. R. Cas. 508, n; 2 Am. R. R. & Corp. Rep. 744, n.

Assessment of benefits on the remainder of a tract of which part is taken is prohibited by the constitution in some states, either generally, as in Iowa and Ohio, in favor of any corporation, as in Arkansas, Kansas, and South Carolina, or any other than municipal, as in California, North Dakota, and Washington. In the other states there is a diversity of decisions which have been thus classified, as: 1. Not considered. 2. Special benefit is set off against damages to the remainder but not against the value of the part taken. 3. General or special, as in the last class. 4. Special, against both damages to remainder and value of part taken. 5. General and special, as in the last class. Lewis, Em. Dom. § 465.

In the first class the benefit is excluded because compensation is held to be money; Brown v. Beatty, 34 Miss. 227, 241, 69 Am. Dec. 389; Board of Levee Com'rs for Yazoo-Mississippi Delta v. Harkleroads, 62 Miss. 807; Burlington & C. R. Co. v. Schweikart, 10 Cal. 178, 14 Pac. 329; Dulaney v. Nolan County, 85 Tex. 225, 20 S. W. 70; Jones v. R. Co., 30 Ga. 43; Paducah & M. R. Co. v. Stovall, 12 Heisk. (Tenn.) 1. In some states the constitution prohibits the deduction of benefits; though in some of them it is permitted in favor of public corporations; Nichols, Em. Dom. § 278, where these states are enumerated.

The second rule which obtains has been justly criticised as illogical; Lewis, Em. Dom. § 467; but it rests upon the theory that for the part *taken* compensation in money is required, while for incidental damage the legislature may prescribe the rule of compensation. This was the doctrine laid down in Tennessee which, with several other states, adheres to it; Woodfolk v. R. Co., 2 Swan (Tenn.) 422; Robbins v. R. Co., 6 Wis. 636; Shipley v. R. Co., 34 Md. 336; Fremont, E. & M. V. R. Co. v. Whalen, 11 Neb. 585, 10 N. W. 491; Chicago, K. & N. R. Co. v. Wiebe, 25 Neb. 542, 41 N. W. 297.

The third class rests upon the same idea of requiring compensation in money for the part taken, but treating the claim for damage to the remainder as consequential and properly subject to the set-off of all advantages; and in Kentucky, from which comes the leading case, a judgment was reversed for an instruction excluding general benefits; Henderson & N. R. Co. v. Dickerson, 17 B. Monr. (Ky.) 173, 66 Am. Dec. 148; City Council of Augusta v. Marks, 50 Ga. 612 (but see Young v. Harrison, 17 Ga. 30, in which a different doctrine was applied, which was passed without mention in Jones v. Wills Val. R. Co., 30 Ga. 43, which laid down the rule afterwards adhered to); Buffalo, B., B. & C. R. Co. v. Ferris, 26 Tex. 588; Tait v. Matthews, 33 Tex. 112; City of Paris v. Mason, 37 Tex. 447; Texas & St. L. R. Co. v. Matthews, 60 Tex. 215; but see Bourgeois v. Mills, 60 Tex. 76; New Orleans Pac. Ry. Co. v. Gay, 31 La. Ann. 430.

The fourth rule allows special benefits against both the value of the part taken and damage to the remainder, because just compensation is construed to mean recompense for the net resulting injury, and excludes a share of the general advantage, because to allow it would be to distribute it unequally, charging those whose land is taken for that which the rest of the community enjoy without cost; Adden v. R. R., 55 N. H. 413, 20 Am. Rep. 220; Meacham v. R. Co., 4 Cush. (Mass.) 291; Clark v. City of Worcester, 125 Mass. 226; Cross v. Plymouth County, 125 Mass. 557; Trinity College v. City of Hartford, 32 Conn. 452; Gautier v. Board, 55 N. J. L. 88, 25 Atl. 322, 17 L. R. A. 785; Setzler v. R. Co., 112 Pa. 56, 4 Atl. 370 (which lays down the rule with great clearness not only on this point but in confining the consideration of inconvenience and advantage to the effect of both upon the market value); Freedle v. R. Co., 49 N. C. 89; Wyandotte, K. C. & N. W. Ry. Co. v. Waldo, 70 Mo. 629; Daugherty v Brown, 91 Mo. 26, 3 S. W. 210; Winona & St. P. R. Co. v. Waldron, 11 Minn. 515, (Gil. 392), 88 Am. Dec. 100; Arbrush v. Town of Oakdale, 28 Minn. 61, 9 N. W. 30; Beekman v. Jackson County, 18 Or. 283, 22 Pac. 1074 (but see Putnam v. Douglas County, 6 Or. 328, 25 Am. Rep. 527). See L. R. 2 C. P. 638.

The last class permits all benefits to be set off against all damages of either kind, placing the rule on natural equity, and in a leading case (Young v. Harrison, 17 Ga. 30, afterwards apparently overruled as stated *supra*), it is argued that the term compensation comes from the civil law which so construes it. This rule is accepted by many courts which, among other reasons, hold that compensation does not mean money but includes any means of recompense; California Pac. R. Co. v. Armstrong, 46 Cal. 85; Whiteman's Ex'x v. R. Co., 2 Harr. (Del.) 514, 33 Am. Dec. 411; Kramer v. Ry. Co., 5 Ohio St. 140; Platt v. Pennsylvania Co., 43 Ohio St. 228, 1 N. E. 420 (before the constitution of 1851); Ross v. Davis, 97 Ind. 79; Rassier v. Grimmer, 130 Ind. 219, 23 N. E. 866, 29 N. E. 918; Greenville & C. R. Co. v. Partlow, 5 Rich. (S. C.) 428; White v. R. Co., 6 Rich. (S. C.) 47. See Bourgeois v. Mills, 60 Tex. 76. In New York this rule applies to cases where land is taken by the state and municipal corporations; Genet v. City of Brooklyn, 99 N. Y. 296, 1 N. E. 777; Eldridge v. City of Binghampton, 120 N. Y. 309, 24 N. E. 462; but in the case of private corporations the third rule seems to apply; Washington Cemetery v. R. Co., 68 N. Y. 591; Newman v. Ry. Co., 118 N. Y. 618, 23 N. E. 901, 7 L. R. A. 289; Bohm v. R. Co., 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344. See Heath v. Parmore, 50 N. Y. 302. In Illinois the cases prior to 1870 were under the fifth rule; Alton & S. R. Co. v. Carpenter, 14 Ill. 190; and since the constitution of that year and a subsequent statute it has been held that benefits were prohibited as against the value of land taken; Carpenter v. Jennings, 77 Ill. 250; that general benefits cannot be set off against either value or damage; Keithsburg & E. R. Co. v. Henry, 79 Ill. 290; and that special damage may be charged against the damage to the residue; Lewis, Em. Dom. § 470, where the cases are collected and analyzed.

The last rule enumerated seems to be approved by the federal courts; Chesapeake & O. Canal Co. v. Key, 3 Cra. C. C. 599, Fed. Cas. No. 2,649; Kennedy v. Indianapolis, 103 U. S. 599, 26 L. Ed. 550; and upon candid consideration it must be admitted that if benefits are to be allowed at all it is the only logical doctrine. This seems also to be the conclusion of the writer whose classification of the decisions is here given, and to whose discussion of the whole subject reference may profitably be made; Lewis, Em. Dom. § 471. The subject was considered in the United States Supreme Court at length by Gray, J., who held that in applying the law to the District of Columbia it was proper to "take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken;" Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270. This view also prevailed in In re City of New York, 190 N. Y. 350, 83 N. E. 299, 16 L. R. A. (N. S.) 335; Taber v. R. Co., 28 R. I. 269, 67 Atl. 9.

Damage to property injured but not physically taken. A question of great importance arises either under the later constitutional provisions for compensation for injury as well as actual taking, or under the extension of the meaning of the word taking to include consequential damages so called, when the injury to property is so great and permanent as practically to deprive the owner of all use and enjoyment of it.

In such cases the only remedy of the property owner, in the absence of legislation, is a common-law action, and for permanent or continuing injury trespass is totally inadequate, as is evidenced by the fact that to restrain it when continuous is a recognized ground of equitable interference. In many cases it is held that prospective damages cannot be recovered, and the property owner is thus put to the necessity of resorting to repeated actions, but when the trespass is the result of the exercise of a public use authorized by statute this remedy is not only unsatisfactory but illogical. Accordingly it is held in many cases that such damage being of a permanent nature there should be but one recovery for all damages past, present, and future; and it has been held that they may be allowed. An action on the case is the proper remedy in such cases, but the measure of damages applied is not uniform, though when the liberal rule referred to is adopted the payment vests in the defendant a right to maintain its works and operates as a bar to further suits. In some cases such an action has also been held to have the effect of statutory proceedings for the assessment of compensation; Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341; Penn. Mut. Life Ins. Co. v. Heiss, 141 Ill. 35, 31 N. E. 138, 33 Am. St. Rep. 273. This subject is, however, involved in great confusion, which should undoubtedly be removed by legislative enactments providing for the acquisition of the right to cause, and the assessment of compensation for, permanent injury to property whenever consequential damages are provided for by constitution or statute, or recognized by the courts. As to this subject, see discussions with copious citations of cases in Lewis, Em. Dom. § 624; Rand. Em. Dom. § 308; 26 Am. L. Reg. 281, 345.

Who are proper and necessary parties. The compensation must be paid to the true owner as on that the title depends; Hatch v. Mayor, 82 N. Y. 436; South Park Com'rs v. Todd, 112 Ill. 379; Searl v. School Dist., 133 U. S. 553, 10 Sup. Ct. 374, 33 L. Ed. 740; and if paid to the wrong person, it may be recovered from him by one having an inter-

est; De Peyster v. Mali, 92 N. Y. 262; Sherwood v. City of Lafayette, 109 Ind. 411, 10 N. E. 89, 58 Am. Rep. 414; but if title is doubtful, it may be paid into court; Jones v. R. Co., 41 Fed. 70; In re Department of Parks, 73 N. Y. 560; and if afterwards paid out wrongly the person who paid it in is not liable; U. S. v. Dunnington, 146 U. S. 338, 13 Sup. Ct. 79, 36 L. Ed. 996.

The general principle is that the necessary parties to a proceeding, independent of statutory requirements, are all persons having an interest in the property taken, as proprietors, or such as is recognized by the law of the state as property; Lewis, Em. Dom. § 317. When the ownership is divided, each is entitled to his share, as life-tenant and remainderman; Miller v. City of Asheville, 112 N. C. 759, 16 S. E. 762; Kansas City, S. & M. R. Co. v. Weaver, 86 Mo. 473; dowress after admeasurement; Borough of York v. Welsh, 117 Pa. 174, 11 Atl. 390; but not before the dower is assigned; Todemier v. Aspinwall, 43 Ill. 401; and only as against the award when it is inchoate; Wheeler v. Kirtland, 27 N. J. Eq. 531. The interest of a tenant must be compensated; Frost v. Earnest, 4 Whart. (Pa.) 86; if the lease has actual value to him; Corrigan v. City of Chicago, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212; sometimes separately; Atchison, T. & S. F. R. Co. v. Schneider, 127 Ill. 144, 20 N. E. 41, 2 L. R. A. 422; and sometimes by apportionment of the entire amount; Edmands v. Boston, 108 Mass. 535.

When part of land under lease is taken, the lease is not terminated or the tenant discharged; Stubbings v. Village of Evanston, 136 Ill. 37, 26 N. E. 577, 11 L. R. A. 839, 29 Am. St. Rep. 300; but both he and the lessor are entitled to compensation for their respective losses; Patterson v. City of Boston, 20 Pick. (Mass.) 159; Foote v. City of Cincinnati, 11 Ohio 408, 38 Am. Dec. 737; Workman v. Mifflin, 30 Pa. 362; 1 Thayer, Cas. Const. L. 968. See Rand. Em. Dom. § 304; Corrigan v. City of Chicago, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212, with note on rights of tenants, etc., in such cases; 5 Am. R. R. & Corp. Cas. 208, note, as to grantor and grantee, and 29 Am. St. Rep. 304, note, as to leased premises. See also 29 Am. L. Rev. 351, as to the abatement of rent when leased premises are appropriated.

As to mortgagees the decisions lack both uniformity and consistency, and this result is largely due to the differing views taken of the position of a mortgagee before the law. As between the parties to the mortgage the award takes the place of the land and the lien attaches to it; Astor v. Miller, 2 Paige Ch. (N. Y.) 68; Gimbel v. Stolte, 59 Ind. 453; Chicago, M. & St. P. R. Co. v. Baker, 102 Mo. 560, 15 S. W. 64; Union Mut. Life Ins. Co. v. Slee, 123 Ill. 95, 13 N. E. 222; as to all rights and interests; Utter v. Richmond, 112 N. Y. 610, 20 N. E. 554. The damages should be apportioned by the jury between owner, lessee, mortgagee, etc.; Rentz v. Detroit, 48 Mich. 547, 12 N. W. 694, 911. In some cases the remainder of the land must be exhausted before the mortgagee can resort to the fund; Bank of Auburn v. Roberts, 44 N. Y. 192; or to the condemned land; Dodge v. R. Co., 20 Neb. 281, 29 N. W. 936; and the mortgagee, if not a party to the proceedings, may appropriate the fund; Sawyer v. Landers, 56 Ia. 422, 9 N. W. 341; Bright v. Platt, 32 N. J. Eq. 370; but when the land has been sold and bought in by the mortgagee he loses all claim to the fund and new proceedings must be taken to condemn his interest; Lehigh Coal & Nav. Co. v. R. Co., 35 N. J. Eq. 379. As affecting the title of the appropriator who has been said to take no better title than an innocent purchaser for value; Severin v. Cole, 38 Ia. 463; and must protect himself against the claim of the mortgagee; Wooster v. R. Co., 57 Wis. 311, 15 N. W. 401; the more reasonable opinion would seem to be that the mortgagee is a necessary party; if in possession he certainly is; In re Parker, 36 N. H. 84; Ballard v. Ballard Vale Co., 5 Gray (Mass) 468; or after condition broken; Adams v. R. R. Co., 57 Vt. 248; in other cases to be bound he must have notice; Siman v. Rhoades, 24 Minn. 25; Platt v. Bright, 29 N. J. Eq. 128; Warwick Institution for Savings v. City of Providence, 12 R. I. 144; Wade v. Hennessy, 55 Vt. 207; Sherwood v. City of Lafayette, 109 Ind. 411, 10 N. E. 89, 58 Am. Rep. 414; Wilson v. Ry. Co., 67 Me. 358; L. R. 1 Eq. 145; *contra*, Parish v. Gilmanton, 11 N. H. 293; Keystone Bridge Co. v. Summers, 13 W. Va. 476, Whiting v. City of New Haven, 45 Conn. 303; Farnsworth v. City of Boston, 126 Mass. 1; Read v. City of Cambridge, *id.* 427; Schumacker v. Toberman, 56 Cal. 508; Bank of Auburn v. Roberts, 44 N. Y. 192. See Lewis, Em. Dom. § 324; 18 L. R. A. 113, note. It was held that the appropriator must see to the discharge of the mortgage and may pay it off or keep the money until it is due; In re John & Cherry Sts., 19 Wend. (N. Y.) 659; and he may require or provide for its satisfaction; Devlin v. City of New York, 131 N. Y. 127, 30 N. E. 45. It has even been held that a mortgagee cannot move for consequential damages to mortgaged property when the mortgagor has without fraud settled with the company; Knoll v. Ry. Co., 121 Pa. 467, 15 Atl. 571, 1 L. R. A. 366.

Judgment liens may be divested by the proceedings, and the creditor need not be made a party; Watson v. R. Co., 47 N. Y. 157, 162. This is the leading case and well states the reasons on which this settled principle is based. See also Gimbel v. Stolte, 59 Ind. 446; Bean v. Kulp, 7 Phila. (Pa.) 650; Lewis, Em. Dom. § 325; Rand. Em. Dom. §§ 302, 340. As to what interests may be condemned, see, further, *supra*.

Notice and procedure. It is a general rule

that notice of proceedings must be given to the owner of property to be taken; Lewis, Em. Dom. § 363; Rand. Em. Dom. § 333; though a few cases hold contrary to the otherwise uniform course of decisions; Wilson v. R. Co., 5 Del. Ch. 524; George's Creek Coal & Iron Co. v. Coal Co., 40 Md. 425, 437; New Orleans, J. & G. N. R. Co. v. Hemphill, 35 Miss. 17; Johnson v. R. Co., 23 Ill. 202. In the Delaware case there was actual notice, though it was held that the act need not require it; in the Mississippi case the proceeding is considered as *in rem*, which is treated as actual notice, and the Illinois case is in effect though not expressly overruled in Wilson v. R. Co., 59 Ill. 273, and Chicago & A. R. Co. v. Smith, 78 Ill. 96. These cases have been termed "sporadic decisions," by which the current of authority is not disturbed; Rand. Em. Dom. § 333. See DUE PROCESS OF LAW. See also Lewis, Em. Dom. § 361; where the cases are cited, and, for other cases cited in support of the view that notice need not be required in the act; People v. Smith, 21 N. Y. 595; Harper v. R. Co., 2 Dana (Ky.) 227; Kramer v. R. Co., 5 Ohio St. 140; Beekman v. R. Co., 3 Paige (N. Y.) 45, 22 Am. Dec. 679. The questions whether the property shall be taken and what compensation shall be paid need not be tried by a jury; Raleigh & G. R. Co. v. Davis, 19 N. C. 451; Whiteman's Ex'x v. R. Co., 2 Harr. (Del.) 514, 33 Am. Dec. 411; the constitution does not describe the mode or means by which compensation shall be ascertained; these therefore can only be prescribed by the legislature; Wilson v. R. Co., 5 Del. Ch. 524; under the constitution of the United States, a jury is not necessary; U. S. v. Engerman, 46 Fed. 176; and it cannot be demanded as a matter of right; State v. Lyle, 100 N. C. 497, 6 S. E. 379; Backus v. Lebanon, 11 N. H. 19, 35 Am. Dec. 466; Morris v. Heppenheimer, 54 N. J. L. 268, 23 Atl. 664.

It was recently held that due process of law is furnished and equal protection of the law given in such proceedings when the course pursued for the assessment and collection of taxes is that customarily provided in the state, for then the party charged has an opportunity to be heard; Fallbrook Irr Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; and where by state law a burden is imposed upon property for the public use, "whether it be for the whole state or some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections;" *id.*

As to procedure generally, see Rand. Em. Dom. ch. xi.; Lewis, Em. Dom. chs. xvii.–xix.; Mills, Em. Dom. ch. xi.; San Diego Land & Town Co. v. Neale, 3 L. R. A. 83; 14 A. & E. R. R. Cas. 378, 384, 392, note; and for some cases as to the necessity of notice and a hearing to constitute due process of law, see 2 L. R. A. (Ind.) 655, note; 3 L. R. A. (Mont.) 194, note; 11 L. R. A. 224, note.

The power need not be exhausted in the first instance; New York, H. & N. R. Co. v. R. Co., 36 Conn. 196; and a railroad may subsequently take land for laying additional tracks when necessary; Railway Co. v. Petty, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434; or a canal company for a new supply of water; Proprietors of Sudbury Meadows v. Canal, 23 Pick. (Mass.) 36; or a company may take more than at present required, having view to future and other needs, and use of part is not an abandonment; Pittsburgh, Ft. W. & C. R. v. Peet, 152 Pa. 488, 25 Atl. 612, 19 L. R. A. 467.

See, generally, Mills, Lewis, Randolph, Nichols, Eminent Domain; Cooley, Const. Lim. ch. xv.; Gould, Waters, ch. viii.; Redfield, Railways, Part 3; Wood, Railways, ch. xiv.; Harris, Damages; Thompson, Highways; POLICE POWER; TAXATION; RAILROAD; DUE PROCESS OF LAW; DEDICATION.

EMISSION. **In Medical Jurisprudence.** The act by which any matter whatever is thrown from the body: thus, it is usual to say, emission of urine, emission of semen, etc.

Emission is not necessary in the commission of a rape to complete the offence; 1 Hale, P. C. 628; 4 C. & P. 249; 9 *id.* 31; Rodgers v. State, 30 Tex. App. 510, 17 S. W. 1077; Territory v. Edle, 6 N. M. 555, 30 Pac. 851; State v. Dalton, 106 Mo. 463, 17 S. W. 700; [1891] 2 Q. B. 149. It is, however, essential in sodomy; 12 Co. 36; People v. Hodgkin, 94 Mich. 27, 53 N. W. 794, 34 Am. St. Rep. 321. But see Com. v. Thomas, 1 Va. Cas. 307. As to adultery, see that title.

EMIT. To put out; to send forth.

The tenth section of the first article of the constitution contains various prohibitions, among which is the following: "No state shall emit bills of credit." To emit bills of credit is to issue paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. Craig v. Missouri, 4 Pet. (U. S.) 410, 432, 7 L. Ed 903; Briscoe v. Bank, 11 Pet. (U S.) 257, 9 L. Ed 709; Ramsey v. Cox, 28 Ark. 369; Linn v. Bank, 1 Scam. (Ill.) 87, 25 Am. Dec. 71; Story, Const. § 1358. See BILLS OF CREDIT.

EMMENAGOGUES. **In Medical Jurisprudence.** The name of a class of medicines which are believed to have the power of favoring the discharge of the menses. These are "*savine* (see *Juniperus Sabina*), *black hellebore, aloes, gamboge, rue, madder, stinking goosefoot (chenopodium olidum), gin, parsley* (and its active principle, *apiol*), *per-*

manganate of potassium, cantharides, and borax, and for the most part substances which, in large doses, act as drastic purgatives or stimulating diuretics." They are sometimes used for the criminal purpose of producing abortion *(q. v.)*. They always endanger the life of the woman. 1 Beck, Med. Jur. 316; Dunglison, Med. Dict.; Parr, Med. Dict.; 3 Par. & F. Med. Jur. 88; Taylor's Med. Jur. 184.

EMOLUMENT. The profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites; advantage; gain, public or private. Webster. It imports any perquisite, advantage, profit or gain arising from the possession of an office. Apple v. Crawford County, 105 Pa. 303, 51 Am. Rep. 205. See Peeling v. County of York, 113 Pa. 108, 5 Atl. 67.

EMOTIONAL INSANITY. See INSANITY.

EMPANEL. See IMPANEL; JURY.

EMPEROR. This word is synonymous with the Latin *imperator*: they are both derived from the verb *imperare*. Literally, it signifies *he who commands*.

EMPHYTEUSIS. In Civil Law. The name of a contract, in the nature of a perpetual lease, by which the owner of an uncultivated piece of land granted it to another, either in perpetuity or for a long time, on condition that he should improve it, by building on, planting, or cultivating it, and should pay for it an annual rent, with a right to the grantee to alienate it, or transmit it by descent to his heirs, and under a condition that the grantor should never re-enter as long as the rent should be paid to him by the grantee or his assigns. Inst. 3, 25, 3; 18 Toullier, n. 144.

EMPHYTEUTA. The grantee under a contract of *emphyteusis* or *emphyteosis*. Vicat, Voc. Jur.; Calvinus, Lex.; 1 Hallam, c. ii. p. 1.

EMPIRE (Lat. *Imperium*). Supreme power in governing; imperial power; dominion; sovereignty.

The country, region, or union of states or territories under the dominion of an emperor. Cent. Dict.

It was in the sense of the first of these definitions that Chief Justice Marshall is said to have at one time used the phrase "the American Empire." See Downes v. Bidwell, 182 U. S. 279, 21 Sup. Ct. 770, 45 L. Ed. 1088.

It is used on a tablet over the door of the old Friends' Library at Philadelphia: "The Fourth Year of the Empire."

EMPLAZAMIENTO. In Spanish Law. The citation given to a person by order of the judge, and ordering him to appear before his tribunal on a given day and hour.

EMPLOYÉ or EMPLOYEE. A term of rather broad signification for one who is employed, whether his duties are within or without the walls of the building in which the chief officer usually transacts his business. Mallory v. U. S., 3 Ct. Cl. 257; Stone v. U. S., 3 Ct. Cl. 260. It is not usually applied to higher officers of corporations or to domestic servants, but to clerks, workmen, and laborers, collectively.

Strictly and etymologically, it means "a person employed," but in practice, in the French language, it ordinarily is used to signify a person in some official employment, and as generally used with us, though perhaps not confined to any official employment, it is understood to mean some permanent employment or position. It may be any one who renders service to another; Watson v. Mfg. Co., 30 N. J. Eq. 588; and has been extended so far as to embrace attorney and counsel; Gurney v. Ry. Co., 58 N. Y. 358. The servant of a contractor for carrying mail is an employé of the department of the post-office; U. S. v. Belew, 2 Brock. 280, Fed. Cas. No. 14,563; also one who received five per cent. of the cost for superintending the erection of a warehouse was held an employé; Moore v. Heaney, 14 Md. 558. See MASTER AND SERVANT.

EMPLOYED. The act of doing a thing, and the being under contract or orders to do it. U. S. v. Morris, 14 Pet. (U. S.) 464, 475, 10 L. Ed. 543; U. S. v. The Catherine, 2 Paine 721, Fed. Cas. No. 14,755.

Where persons were employed "in and about the works," it was held that although their work as miners was at the bottom of a mine, the term covered them as employés until they arrived safely at the top, even although they discharged themselves; 2 C. P. Div. 397.

EMPLOYERS AND WORKMEN ACT. The English statute of 38 and 39 Vict. c. 90, regulating the jurisdiction of certain courts over disputes between masters and employés. See MASTER AND SERVANT.

EMPLOYERS' LIABILITY ACTS. The English act, 1880, gives to all workmen, except domestic or menial servants and seamen, a right of action if injured by reason of the defective condition of machinery, etc., if the defect was attributable to the negligence of the employer or his agent; to the negligence of his superintendent or one to whom he has given authority over the workman; to some act or omission by a fellow workman in obedience to the employer's by-laws, or to the particular instruction of one placed in authority over him; or to a fellow workman in charge of any railroad signal, locomotive or train. The act abolishes the fellow servant rule, but not the contributory

negligence rule. The employer may set up the defence that the workman knew of the defect but did not complain. A contract not to claim compensation under the act is lawful; Griffiths v. Earl of Dudley, 9 Q. B. D. 357.

The act of congress of June 11, 1906, was declared unconstitutional in the Employers' Liability Case (Howard v. R. Co.) 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, Harlan, Holmes, Moody, and Lurton, JJ., dissenting. The act of April 22, 1908, as amended April 5, 1910, provides for the liability of common carriers engaged in interstate or foreign commerce to their employees injured in such commerce, or in case of death gives a right of action to their personal representatives for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents, and if none, then of the next of kin dependent upon such employee. There shall be only one recovery for the same injury; St. Louis, I. M. & S. Ry. Co. v. Hesterly, 228 U. S. 702, 33 Sup. Ct. 703, 57 L. Ed. ——. It does away with the fellow servant rule, the contributory negligence rule, except that damages shall be diminished in proportion to the amount of contributory negligence attributable to the employee, and the rule that an employee is held to have assumed the risk of his employment in any case where the violation, by the carrier, of any statute enacted for the safety of employees contributed to the injury or death of such employee. Acceptance of relief, such as railway relief, is no bar to an action though agreed to, but simply reduces the damages *pro tanto*.

The following cases define what is interstate commerce within the act. In Johnson v. Great Northern R. R. Co., 178 Fed. 643, 102 C. C. A. 89 (8th Cir.), it was held that an employee charged with the duty of coupling cars and airbrake pipes upon cars standing upon a switch track, some of which cars were engaged in interstate commerce, was himself employed in interstate commerce. In Zikos v Navigation Co, 179 Fed. 893 (C. C., E. D. Wash.), it was held that a section hand, while driving a spike on the track of a railroad over which both interstate and intrastate commerce moved, was employed in interstate commerce. In Central R. Co. of New Jersey v. Colasurdo, 192 Fed. 901, 113 C. C. A. 379 (2d Cir.), where the plaintiff was injured while repairing an interstate road over which interstate commerce and freight, and cars and engines engaged in interstate commerce were constantly passing, he was considered as being engaged in interstate commerce. In Pedersen v. R. Co., 197 Fed. 537, 117 C. C. A. 33 (3d Cir.), the plaintiff was an iron worker on a bridge on which an additional track was being placed. In getting rivets for the bridge he went upon the main east-bound track of the road, where he was struck and injured by a local, intrastate train coming from the other direction; and it was held that neither by operating such local train, nor by building an additional track or bridge, nor by sending the man for the rivets, was the carrier engaged in interstate commerce; nor was the plaintiff, by helping to build such bridge or by going upon a track which the company was not using in interstate commerce employed by such carrier in such commerce. The case was reversed in Pedersen v. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Holmes, Lamar and Lurton, JJ., dissenting. The court held there was evidence to sustain a finding that at the time of the injury the defendant was engaged, and the plaintiff was employed by it, in interstate commerce. In Illinois Cent. R. Co. v. Porter, 207 Fed. 311 (C. C. A., 6th Cir.) a truckman employed by the railroad to wheel interstate freight from a warehouse into a car to be transported in interstate commerce was held to be engaged in such commerce.

An action cannot be maintained under section 1 of the above act where the complainant neither alleges nor pleads facts showing that defendant is a common carrier; Shade v. Northern Pac. R. Co., 206 Fed. 353 (D. C., W. D. Wash.). Where a train of cars was hauled by a switch engine over certain tracks and switches from one part of the railroad yard to another, that they might be classified, inspected, and assembled, they were not engaged in interstate commerce; U. S. v. R. Co., 205 Fed 428 (D. C., W. D. N. Y.). A workman, killed while employed by a railroad company engaged in interstate commerce in repairing a bridge on a line over which such commerce was carried on, was held to be employed in interstate commerce; Thomson v. R. Co., 205 Fed. 203.

A locomotive fireman in the employment of an interstate railroad, who was ordered to report at a station to be transported with others to another station to relieve the crew of an interstate train, and who, when approaching the station over a crossing, was struck and killed through the negligence of other servants of the company also operating an interstate train, was within the act; Lamphere v. Oregon R. & Nav. Co., 196 Fed. 336, 116 C. C. A. 156 (9th Cir.). So of one injured when employed in repair shops connected with an interstate track, in repairing a car used indiscriminately in both interstate and intrastate commerce, but which was at the time engaged in interstate commerce; Northern Pac. R. Co. v. Maerkl, 198 Fed. 1, 117 C. C. A. 237 (9th Cir.). The judgment in the Pedersen Case, *supra*, will doubtless affect some of these decisions in lower courts.

The following cases were held not within act: Bennett v. R. Co., 197 Fed. 578 (D. C., E. D. Pa.), where an employee was killed while riding to his home by permission on one of the company's trains, but who was

not at the time, and, so far as appeared, had not just previously been, employed in interstate commerce, was not within the act; Heimbach v. R. Co., 197 Fed. 579 (D. C., E. D. Pa.); where an employee, who was injured while repairing a car of another company which had reached the end of its run, been unloaded, and was lying at a station awaiting orders, was not within the act; Feaster v. R. Co., 197 Fed. 580 (D. C., E. D. Pa.); and where an extra conductor, directed, on reporting for work, to ride to another point within the same state for service on a work train, and who was injured while proceeding to his train, was not at the time employed in interstate commerce; Taylor v. So. R. Co, 178 Fed. 380 (C. C., N. D. Ga.), where a member of a bridge gang who was injured while repairing a bridge forming a most necessary part of the track of a railroad used for both interstate and intrastate commerce, was not within the act.

A fireman on a switch engine which was ordinarily employed in interstate commerce, though mingled with intrastate commerce, was held engaged in interstate commerce; Behrens v. R. Co., 192 Fed. 581 (D. C, E. D. La). Where a railroad brakeman was injured while engaged in making a flying switch to set out a car transported wholly in intrastate traffic, though it was part of a train carrying both interstate and intrastate freight, his injury did not occur while engaged in interstate commerce; Van Brimmer v. Ry. Co., 190 Fed. 394 (C. C., E. D. Tex.). The causal negligence of a co-employee may be that of one not engaged in interstate commerce; In re Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

A Workman's Compensation Act was passed in England in 1897. It provides that in certain trades and works the employer shall be liable to compensate any workman injured by an accident in the course of his employment, whether the employer or any of his subordinates had been guilty of negligence or had committed any breach of duty or not. This act was repealed in 1906, by an act which provides for compensation for injury from any accident in the course of employment unless attributable to the serious or willful misconduct of the workman, but this exception does not extend to injury resulting in death or serious and permanent disablement. Compensation can also be claimed by one who has suffered from certain specified "industrial diseases"; on the event of his death, his dependants may claim. The utmost amount recoverable is one pound a week during total incapacity to work or three hundred pounds in case of death. Contributory negligence is no defence, nor the voluntary assumption of a known risk, nor the negligence of a fellow servant. Where a principal has engaged a contractor for the work, the act makes the principal liable for compensation although there is no direct relation between him and the injured workman.

A workman injured in the course of his employment has three different modes of procedure open to him. He may sue for damages at common law; he may sue for damages under the Employers' Liability Act of 1880; or he may claim compensation under the Workman's Compensation Act of 1906. Under the Act of 1906, disputed questions are settled by arbitration in the County Courts. See Odgers C. L. 854.

Workmen's Compensation Acts were passed in 1911 in New Jersey, California, Wisconsin, Kansas and Nevada, and in 1912 in Illinois, Michigan, Arizona, New Hampshire and Rhode Island. Under such acts the employer is liable for the compensations to injured workmen. The only negligence recognized on the part of either the employer or the employee, speaking generally, is that of willful negligence. If the employer is guilty of such he is penalized; if the employee is, then his compensation is denied or reduced. The amount of the compensation is determined with a maximum and minimum limit by specified schedules of compensation and graded on a basis of a certain percentage of the loss or impairment of the injured worker's average weekly wage. Jury trials are largely eliminated and the compensation to which the injured worker is entitled under the act is determined by a board of arbitration, a judge of some court or a board of awards created as specified by the act.

Workmen's Industrial Insurance Acts were passed in 1911 in Washington, in 1912 in Massachusetts, Maryland and Ohio, and in 1913 in West Virginia.

The injured workman's claim under a state insurance act is against a fund created by contributions paid by employers, employees and the state or by any of them, in the form of an insurance premium which is collected by the taxing power of the state through the exercise of its police power. The employer's liability to his employees for personal injuries occurring in the course of their employment is discharged when he has paid the premium as provided by the act. The right of trial by jury is entirely eliminated in such cases, excepting the case where the employee is denied compensation of any kind, and in that case he may sue the board of administration created by the act and have his case tried before a jury as heretofore, but cannot sue his employer. No negligence is recognized excepting willful negligence on the part of either. The compensation is paid in installments based upon a certain percentage—usually 50 to 60 per cent—of the impairment of wages caused by the injury. The act usually fixes the length of time that such compensation

may run, and also a maximum and minimum total compensation. In the enactment of these statutes the state exercises its police power for the protection of the peace, safety and general welfare of the public.

The following states have by statute abrogated the fellow servant rule either generally or in particular industries: Arkansas, Colorado, Florida, Georgia, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Dakota, Texas, Wisconsin.

In the following states the rule is modified: California, Mississippi, Maryland, Ohio, Oregon, South Carolina, Utah, Virginia.

See MASTER AND SERVANT; NEGLIGENCE; DEATH; WORKMEN'S COMPENSATION ACTS.

Compensation Acts were passed by congress May 30, 1908, March 4, 1911, and March 11, 1912, providing that artisans or laborers engaged in any of the government manufacturing establishments, arsenals or navy-yards, or in the construction of river and harbor or fortification work, or in hazardous employment or construction work in the reclamation of arid lands or the management or control of the same, or in hazardous employment under the Isthmian Canal Commission, or in any hazardous work under the Bureau of Mines or Forestry Service shall receive compensation from the government for injuries sustained in the course of their employment, and if the employee should die by reason of such injury then his widow or children under sixteen, or a dependent parent shall be entitled to receive as compensation the same pay for one year as if he continued to be employed, unless if only injured he sooner be able to resume work.

EMPLOYMENT AGENCY. A municipal ordinance licensing and regulating employment agencies is a valid exercise of the police power; People v. Warden of City Prison of City, 183 N. Y. 223, 76 N. E. 11, 2 L. R. A. (N. S.) 859, 5 Ann. Cas. 325; Price v. People, 193 Ill. 114, 61 N. E. 844, 55 L. R. A. 588, 86 Am. St. Rep. 306. The Illinois act was held void because forbidding a free employment agency to furnish help to persons whose employees were on a strike or locked out, or to refuse them access to the names of applicants for service, whilst allowing this privilege to other employers; Mathews v. People, 202 Ill. 389, 67 N. E. 28, 63 L. R. A. 73, 95 Am. St. Rep. 241.

EMPRÉSTITO. **In Spanish Law.** A loan. Something lent to the borrower at his request. *Las Partidas*, pt. 3, tit. 18, l. 70.

EMPTIO, EMPTOR (Lat. *emere*, to buy). *Emptio*, a buying. *Emptor*, a buyer. *Emptio et venditio*, buying and selling.

In Roman Law. The name of a contract of sale. Du Cange; Vicat, Voc. Jur.

EN AUTRE DROIT (Fr.). In the right of another.

EN DECLARATION DE SIMULATION. A form of action used in Louisiana. It is one of revendication *(q. v.)*, and has for its object to have the contract declared judicially a simulation and a nullity; Erwin v. Bank, 5 La. Ann. 1; Edwards v. Ballard, 20 La. Ann. 169.

EN DEMEURE (Fr.). In default. Used in Louisiana. Bryan v. Cox, 3 Mart. La. (N. S.) 574.

EN OWEL MAIN (L. Fr.). In equal hand. The word *owel* occurs also in the phrase *owelty* of partition. See 1 Washb. R. P. 427.

EN VENTRE SA MÈRE (Fr.). In its mother's womb. For certain purposes, indeed for all beneficial purposes, a child *en ventre sa mère* is to be considered as born; 5 T. R. 49; 1 P. Wms. 329. It is regarded as *in esse* for all purposes beneficial to itself, but not to another; Marsellis v. Thalhimer, 2 Paige (N. Y.) 35, 21 Am. Dec. 66; Gillespie v. Nabors, 59 Ala. 441, 31 Am. Rep. 20; [1908] 1 Ch. 4; [1907] A. C. 139. Formerly this rule would not be applied if the child's interests would be injured thereby; 2 De G., J. & S. 665; but, for the purpose of the rule against perpetuities, such a child is now regarded as a life in being, even though it is prejudiced by being considered as born; [1903] 1 Ch. 894; [1907] A. C. 139. Its civil rights are equally respected at every period of gestation; it is capable of taking under a will, by descent, or under a marriage settlement, may be appointed executor, may have a guardian assigned to it, may obtain an injunction to stay waste; Stedfast v. Nicoll, 3 Johns. Cas. (N. Y.) 18; Swift v. Duffield, 5 S. & R. (Pa.) 38; 1 Ves. 81; 2 Atk. 117; Bacon, Abr. *Infancy* (B); 2 H. Bla. 399; 2 Vern. 710; 4 Ves. Jr. 227. Such a child is to be considered as living so as to vest in the parent on the death of the life tenant a devise made by a testator to A for life, and on her death to the parent of the child, "for her absolute use and benefit in case she has issue living at the death" of A, "but in case she has no issue then living," then over, when the parent was *enceinte* at the time of A's death; [1895] 2 Ch. 497. The right of an unborn infant to take property by descent or otherwise has been said to be an inchoate right, which will not be completed by a *premature* birth; 1 Sharsw. Bla. Com. 130, n.; but as the word premature is used in the authorities, the rule accurately stated is that it must be born alive or after such period of fœtal existence that it might reasonably be expected to survive; Harper v. Archer, 4 Smedes & M. (Miss.) 99, 43 Am. Dec. 472; Swift v. Duffield, 5 S. & R. (Pa.) 38; 4 Kent 248; Marsellis v. Thalhimer, 2 Paige (N. Y.) 35, 21 Am. Dec. 66.

A bastard *en ventre sa mère* is not regarded as *in esse* because, as it was said, such

child could not take "until they have gained a name by reputation" and "that reputation could not be gained before the child was born"; 1 P. Wms. 529; but in a case decided long afterwards Lord Eldon (with whom, he stated, Sir William Grant concurred) held that a bequest to an illegitimate child *en ventre sa mère* was valid if there were a sufficient description to identify it; 1 Mer. 141; and the court of appeal followed this (though with Selborne, L. C. dissenting); 9 Ch. App. 147, which case was followed in [1906] 1 Ch. 542, and [1905] P. 137. The question whether an illegitimate child *en ventre sa mère* at the testator's death, but not when his will was made, might take as his reputed child, was left undecided; 31 Ch. D. 542; and a bequest to an illegitimate child *en ventre sa mère* at the date of the will was held good and not contrary to public policy; 3 Ch. D. 773. These questions derive special interest in England because they frequently arise in case of marriages with a deceased wife's sister.

Such unborn child may have an injunction to stay waste, have a guardian, and take under a charge of a portion, or be executor; 2 Ves. Jr. 319; but it is held that an infant may not recover damages for injuries received before its birth; Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242.

See an elaborate article on unborn infants, action by, when they take, conveyance to, degree of development necessary and rights of action in detail; 61 C. L. J. 364. And see Tyler, Inf. & Cov. ch. xiv.; 21 Harv. L. Rev. 360; POSTHUMOUS CHILD; FŒTUS; NEGLIGENCE; UNBORN CHILD.

ENABLE. To give power to do something. In the case of a person under disability as to dealing with another, "enable" has the primary meaning of removing that disability; not of conferring a compulsory power as against that other; 66 L. J. Ch. 208; [1897] A. C. 647.

ENABLING POWERS. A term used in equity. When the donor of a power, who is the owner of the estate, confers upon persons not seised of the fee the right of creating interests to take effect out of it, which could not be done by the donee of the power unless by such authority, this is called an *enabling power.*

ENABLING STATUTE. The act of 32 Henry VIII. c. 28, by which tenants in tail, husbands seised in right of their wives, and others, were empowered to make leases for their lives or for 21 years, which they could not do before. 2 Bla. Com. 319; Co. Litt. 44 *a*. The phrase is also applied to any statute enabling persons or corporations to do what before they could not.

As to enabling acts of territories, see TERRITORY.

ENACT. To establish by law; to perform or effect; to decree. The usual formula in a statute is, *Be it enacted.*

ENAJENACION. In Spanish Law. The act by which one person transfers to another a property, either gratuitously, as in the case of a donation, or by an owner's title, as in the case of a sale or an exchange.

In Mexican Law. This word is used in conveyancing to convey the fee, and not a mere servitude upon the land. Mulford v. Le Franc, 26 Cal. 88.

ENCEINTE (Fr.). Pregnant. See PREGNANCY.

ENCLOSURE. An artificial fence around one's estate. Keith v. Bradford, 39 Vt. 34; Porter v. Aldrich, 39 Vt. 326; Taylor v. Welbey, 36 Wis. 42. See CLOSE.

ENCOMIENDA. A charge or mandate conferring certain important privileges on the four military orders of Spain, to wit, those of Santiago, Calatrava, Alcantara, and Montesa. In the legislation of the Indias, it signified the concession of a certain number of Indians for the purpose of instructing them in the Christian religion and defending their persons and property.

ENCOURAGE. To intimate, to incite to anything, to give courage to, to inspirit, to embolden, to raise confidence, to make confident. 7 Q. B. Div. 258.

ENCROACH. To gain unlawfully upon the lands, property, or authority of another: as if one man presseth upon the grounds of another too far, or if a tenant owe two shillings rent-service and the lord exact three. So, too, the Spencers were said to encroach the king's authority. Blount; Plowd. 94 *a*. Quite a memorable instance of punishment for encroaching (accroaching) royal power took place in 21 Edw. III. 1 Hale, Pl. Cr. 80. Taking fees by clerks of the courts has been held encroaching; 1 Leon. 5.

ENCUMBRANCE. See INCUMBRANCE.

ENDORSE. See INDORSEMENT.

ENDOWMENT. Now generally used of a permanent provision for any public object, as a school or hospital. By the endowment of such institutions is commonly understood, not the building or providing sites for them, but the providing of a fixed revenue for their support. 25 L. J. Ch. 82; 6 De G., M. & G. 87; State v. Lyon, 32 N. J. L. 361. But more technically, of the assigning dower to a woman, or the severing of a sufficient portion for a vicar towards his perpetual maintenance. 1 Bla. Com. 387; 2 *id.* 135; 3 Steph. Com. 99; French v. Pratt, 27 Me. 381; State v. Lyon, 32 N. J. L. 360; Runkel v. Winemiller, 4 Harr. & McH. (Md.) 429, 1 Am. Dec. 411.

ENDOWMENT INSURANCE. See INSURANCE.

ENEMY. A nation which is at war with another. A citizen or a subject of such a nation. Any of the subjects or citizens of a state in amity with another state who have commenced or have made preparations for commencing hostilities against the latter state, and also the citizens or subjects of a state in amity with another state who are in the service of a state at war with it. See Salk. 635; Bacon, Abr. *Treason*, G; Monongahela Ins. Co. v. Chester, 43 Pa. 491.

By the term enemy is also understood a person who is desirous of doing injury to another. The Latins had two terms to signify these two classes of persons: the first, or the public enemy, they called *hostis*, and the latter, or the private enemy, *inimicus*.

An enemy subject cannot, as a general rule, enter into any contract which can be enforced in the courts of law; but the rule is not without exceptions: as, for example, in suits brought upon ransom bills (*q. v.*), bills of exchange drawn by prisoners of war, contracts entered into under licenses to trade with the enemy granted by a belligerent to its citizens; Scholefield v. Eichelberger, 7 Pet. (U. S.) 586, 8 L. Ed. 793; Kershaw v. Kelsey, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142.

United States citizens in Cuba during the war with Spain were enemies, and cannot recover from the United States for property destroyed; Juragua Iron Co. v. U. S., 212 U. S. 297, 29 Sup. Ct. 385, 53 L. Ed. 520. See PUBLIC ENEMY.

ENFEOFF. To make a gift of any corporeal hereditaments to another. See FEOFFMENT.

ENFRANCHISE. To make free; to incorporate a man in a society or body politic. Cun. Dict.

ENFRANCHISEMENT. Giving freedom to a person. Admitting a person to the freedom of a city. A denizen of England, or a citizen of London, is said to be enfranchised. So, too, a villein is enfranchised when he obtains his freedom from his lord. *Termes de la Ley;* 11 Co. 91.

The word is now used principally either of the manumission of slaves (*q. v.*), of giving to a borough or other constituency a right to return a member or members to parliament, or of the conversion of copyhold into freehold. Moz. & W. L. Dict.

ENFRANCHISEMENT OF COPYHOLD. The change of the tenure by which lands are held from copyhold to freehold, as by a conveyance to the copyholder or by a release of the seignorial rights. 1 Watk. Copy. 362; 1 Steph. Com. 632; 2 *id.* 51.

ENGAGED. Within the meaning of a by-law of a fraternal order, one is engaged in the sale of liquor who is a partner in the saloon business, though he performs no labor in or about the saloon and takes no active part in the business. Graves v. Knights of Maccabees of the World, 199 N. Y. 397, 92 N. E. 792, 139 Am. St. Rep. 912.

ENGAGEMENT. In French Law. A contract. The obligations arising from a *quasi* contract.

The terms *obligation* and *engagement* are said to be synonymous, 17 Toullier, n. 1; but the Code seems specially to apply the term engagement to those obligations which the law imposes on a man without the intervention of any contract, either on the part of the obligor or the obligee, art. 1370. An engagement to do or omit to do something amounts to a promise, Rue v. Rue, 21 N. J. L. 369.

Promises or debts of a married woman, not expressly charged on her separate estate, are termed her *general engagements*, not binding it unless made with reference to and upon the credit of it. L. R. 4 C. P. 593; L. R. 2 Eq. 182, 3 De G., F. & J. 513. See AGREEMENT; CONTRACT; PROMISE.

ENGLAND. See UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

ENGLESHIRE. A law was made by Canute, for the preservation of his Danes, that, when a man was killed, the hundred or town should be liable to be amerced, unless it could be proved that the person killed was an Englishman. This proof was called *Engleshire*. It consisted, generally, of the testimony of two males on the part of the father of him who had been killed, and two females on the part of his mother. 1 Hale, Pl. Cr. 417; 4 Bla. Com. 195; Spelman, Gloss.

ENGLISH MARRIAGE. This phrase may refer to the place where the marriage was solemnized, or it may refer to the nationality and domicil of the parties between whom it was solemnized, the place where the union so created was to have been enjoyed. 6 Prob. Div. 51.

ENGRAVING. See COPYRIGHT.

ENGROSS. To copy the rude draught of an instrument in a fair, large hand. To write out, in a large, fair hand, on parchment. The term is applied to statutes, which, after being read and acted on a sufficient number of times, are ordered to be engrossed. Anciently, also, used of the process of making the indenture of a fine. 5 Co. 39 *b*.

In Criminal Law. To buy up such large quantities of an article as to obtain a monopoly of it for the purpose of selling at an unreasonable price. The tendency of modern law is very decidedly to restrict the application of the law against engrossing; and is very doubtful if it applies at all except to obtaining a monopoly of provisions; 1 East 143. And now the common-law offence of the total engrossing of any commodity is abolished by Stat. 7 & 8 Vict. c. 24. Merely buying for the purpose of selling again is not necessarily engrossing. 14 East 406; 15 *id.* 511. See COMBINATIONS; RESTRAINT OF TRADE; MONOPOLY.

ENGROSSER. One who engrosses or writes on parchment in a large, fair hand.

One who purchases large quantities of any commodity in order to have the command of the market and to sell them again at high prices.

ENGROSSING. The offence committed by an *engrosser*.

ENHANCED. Taken in an unqualified sense, it is equivalent to "increased," and comprehends any increase in value however caused or arising. Thornburn v. Doscher, 32 Fed. 812.

ENITIA PARS (L. Lat.). The part of the eldest. Co. Litt. 166; Bacon, Abr. *Coparceners* (C).

When partition is voluntarily made among coparceners in England, the eldest has the first choice, or *primer election (q. v.)*; and the part which she takes is called *enitia pars*. This right is purely personal, and descends: it is also said that even her assignee shall enjoy it; but this has been doubted. The word *enitia* is said to be derived from the old French *eisne*, the eldest; Bac. Abr. *Coparceners* (C); Keilw. 1 *a*, 49 *a*; Cro. Eliz. 18.

ENJOIN. To command; to require: as, private individuals are not only permitted, but enjoined, by law, to arrest an offender when present at the time a felony is committed or a dangerous wound given, on pain of fine and imprisonment if the wrong-doer escape through their negligence. 1 Hale, Pl. Cr. 587; 1 East, Pl. Cr. 298; Ry. & M. 93.

To command or order a defendant in equity to do or not to do a particular thing by writ of injunction. See 55 Ch. Div. 418, INJUNCTION.

ENLARGE. To extend, as, to enlarge a rule to plead is to extend the time during which a defendant may plead. To enlarge means, also, to set at liberty: as, the prisoner was enlarged on giving bail.

ENLARGING. Extending, or making more comprehensive: as, an enlarging statute, which is one extending the common law. Enlarging an estate is the increasing an estate in land, as where A. has an estate for life with remainder to B. and his heirs, and B. releases his estate to A. 2 Bla. Com. 324. See RELEASE.

ENLISTMENT. The act of making a contract to serve the government in a subordinate capacity, either in the army or navy. The contract so made is also called an enlistment. A drafted man is said to be "enlisted" as well as a volunteer, but the term does not apply to one entering the army under a commission; Inhabitants of Sheffield v. Inhabitants of Otis, 107 Mass. 282; Hilliard v. Stewartstown, 48 N. H. 280. The contract of enlistment involves a change in the status of the recruit, which he cannot throw off at will, though he may violate his contract; In re Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636.

Fraudulent enlistment is an offense punishable by general court-martial; Act March 3, 1893. Boys between the ages of 16 and 18 are authorized to enlist if they have the consent of their parents or guardians; R. S. § 1419. But a minor who has been enlisted in either service without the consent of his parents or guardian is both *de facto* and *de jure* in the service, and is liable to be tried and punished for any infraction of the regulations The lack of such consent will require his discharge from the service, but it will not absolve him from punishment for offences committed while in the service; Dillingham v. Booker, 163 Fed. 696, 90 C. C. A. 280, 18 L. R. A. (N. S.) 956, 16 Ann. Cas. 127; U. S. v. Reaves, 126 Fed. 127, 60 C. C. A. 675; In re Scott, 144 Fed. 79, 75 C. C. A. 237; In re Lessard, 134 Fed. 305. But in Ex parte Lisk, 145 Fed. 860, it was held that where the statute required the consent of the parents, and such consent was not given, the minor was not a person "belonging to the navy," and the naval authorities could not detain him in custody with a view to having him tried by a naval court-martial for fraudulent enlistment, when the real issue was his legal right to enter the navy, and whether he was lawfully therein or not; followed in Dillingham v. Bakley, 152 Fed. 1022, 82 C. C. A. 659, affirming Ex parte Bakley, 148 Fed. 56.

Where the jurisdiction of the civil courts has attached in habeas corpus proceedings before charges are preferred against a minor for fraudulent enlistment and an arrest made, he is entitled to be discharged; Ex parte Houghton, 129 Fed. 239; *contra*, Ex parte Lewkowitz, 163 Fed. 646. In U. S. v. Wright, 5 Phila. 299, Fed. Cas. No. 16,778, it was held the enlistment of a minor without his parents' consent was illegal, and his subsequent desertion was but a disclaimer of his contract, which he had a right to make, citing and following Com. v. Fox, 7 Pa. 336. But the right to a discharge is denied to a minor, himself the petitioner, on the ground that the contract was valid so far as the minor himself is concerned; In re Morrissey, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644; In re Hearn, 32 Fed. 141. See 22 H. L. R. 144. A federal court may discharge on *habeas corpus*; Ex parte Schneid, 1 Dill. 587, Fed. Cas. No. 12,461; but not a state court; Tarble's Case, 13 Wall. (U. S.) 397, 20 L. Ed. 597.

The receipt of pay seems to be tantamount to an enlistment or perhaps evidence thereof. Art. of War 47 provides for the punishment of "any soldier who, having received pay or having been duly enlisted," etc., "deserts," etc. In Re Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636, it was held that taking the oath of enlistment "was the pivotal fact which operated to change the status."

ENORMIA (Lat.). Wrongs. See ALIA ENORMIA.

ENQUETE or ENQUEST. In Canon Law. An examination of witnesses in the presence of a judge authorized to sit for this purpose, taken in writing, to be used as evidence in the trial of a cause. The day of hearing must be specified in a notice to the opposite party; 9 Low. C. 392. It may be opened, in some cases, before the trial; 10 Low. C. 19.

ENROLL. To register; to enter on the rolls of chancery, or other courts; to make a record.

ENROLMENT. The registering or entering on the rolls of chancery, king's bench, common pleas, or exchequer, or by the clerk of the peace in the records of the quarter sessions, of any lawful act: as, a recognizance, a deed of bargain and sale, and the like. Jacob, Law Dict. For the terms "enrolment" and "registration" as used in the United States merchant shipping laws, see R. S. tit. 50; 21 Stat. L. 271; 18 *id.* 30; The Mohawk, 3 Wall. (U. S.) 566, 18 L. Ed. 67; VESSEL.

ENS LEGIS. A being of the law; a legal entity. Used of corporations.

ENTAIL. A fee abridged or limited to the issue, or certain classes of issue, instead of descending to all the heirs. 1 Washb. R. P. 66; 2 Bla. Com. 112, n.; Wms. R. P. 61.

To restrict the inheritance of lands to a particular class of issue. 1 Washb. R. P. 66; 2 Bla. Com. 113. See FEE-TAIL.

ENTENCION. In Old English Law. The plaintiff's declaration.

ENTER. To go upon lands for the purpose of taking possession; to take possession. In a strict use of terms, entry and taking possession would seem to be distinct parts of the same act; but, practically, entry is now merged in taking possession. 1 Washb. R. P. 10, 32; Stearn, Real Act. 2.

To cause to be put down upon the record. An attorney is said to enter his appearance, or the party himself may enter an appearance. See ENTRY.

ENTERTAINMENT. Something connected with the enjoyment of refreshment rooms, tables, and the like. It is something beyond refreshments; it is the accommodation provided whether that includes musical or other amusements or not. L. R. 10 Q. B. 595. It is synonymous with board; Scattergood v. Waterman, 2 Miles (Pa.) 323; but it may include refreshment, without seating accommodation; 1 Ex. Div. 385. See PLACE OF AMUSEMENT.

ENTICE. To solicit, persuade, or procure. Nash v. Douglass, 12 Abb. Pr. N. S. (N. Y.) 187. The enticing desertions from the army or navy or arsenals of the United States is punishable by fine and imprisonment. R. S. §§ 1553, 1668, 5455, 5525.

A *husband* may recover compensation for enticing his wife away; French v. Deane, 19 Colo. 504, 36 Pac. 609, 24 L. R. A. 387; Tasker v. Stanley, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468. It is no defence to show that they had not lived happily together, though it may go in mitigation of damages; Hadley v. Heywood, 121 Mass. 236; Bailey v. Bailey, 94 Ia. 598, 63 N. W. 341. Stronger evidence is required where a parent harbors his daughter; it ought to appear that there were improper motives; Hutcheson v. Peck, 5 Johns. (N. Y.) 196; Schoul. Husb. & W. § 64; Glass v. Bennett, 89 Tenn. 478, 14 S. W. 1085; White v. Ross, 47 Mich. 172, 10 N. W. 188. So of a wife's action against her husband's parents for enticing him away from her; Reed v. Reed, 6 Ind. App. 317, 33 N. E. 638, 51 Am. St. Rep. 310; and probably of a brother's harboring his sister; Glass v. Bennett, 89 Tenn. 479, 14 S. W. 1085. It has been held that neither at common law nor under statutes giving a *wife* the right to sue has she a right of action for enticing away her husband; Duffies v. Duffies, 76 Wis. 374, 45 N. W. 522, 8 L. R. A. 420, 20 Am. St. Rep. 79; Doe v. Roe, 82 Me. 503, 20 Atl. 83, 8 L. R. A. 833, 17 Am. St. Rep. 499, Hester v. Hester, 88 Tenn. 270, 12 S. W. 446; but the weight of authority is that the action will lie at common law; Holmes v. Holmes, 133 Ind. 386, 32 N. E. 932; Waldron v. Waldron, 45 Fed. 315; Hodgkinson v. Hodgkinson, 43 Neb. 269, 61 N. W. 577, 27 L. R. A. 120, 47 Am. St. Rep. 759; Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; 9 H. L. Cas. 577. See Warren v. Warren, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545. See ALIENATION OF AFFECTION.

A *parent* has a right of action against one who improperly entices his minor child away from him; Grand Rapids & I. R. R. Co. v. Showers, 71 Ind. 451; Caughey v. Smith, 50 Barb. (N. Y.) 351; L. R. 2 C. P. 615; in tort or assumpsit; Tiffany, Pers. & Dom. Rel. 284. The action is on the theory of loss of services, and the relation of master and servant, either actual or constructive, must be proven; *id.*; Magee v. Holland, 27 N. J. L. 86, 72 Am. Dec. 341.

A *master* has a right of action for knowingly enticing his servant; 2 El. & Bl. 216; Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep. 475 and note; Jones v. Blocker, 43 Ga. 331; Duckett v. Pool, 33 S. C. 238, 11 S. E. 689; even though the contract of employment was one which the servant could terminate at will; Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780; L. R. 2 C. P. 615; but not where it had expired by its own limitations; Boston Glass Manufactory v. Binney, 4 Pick. (Mass.) 425. The doctrine extends to all kinds of employés; Walker v. Cronin, 107 Mass. 555; though it has been held to apply, at common law, only to domestic servants

and apprentices; Huff v. Watkins, 15 S. C. 82, 40 Am. Rep. 680.

Where one after notice continues to employ another's servant, the latter has a right of action, though at the time he hired him the second master did not know that he was hiring another man's servant; Schoul. Dom. Rel. § 487; but in Lumley v. Gye, 2 El. & Bl. 216, which was an action for damages caused by the enticement of Wagner, a celebrated singer, from one theatre to another, the majority of the court thought the action would lie.

Enticement in some states renders one liable to criminal prosecution; Bryan v. State, 44 Ga. 328; Roseberry v. State, 50 Ala. 160; State v. Daniel, 89 N. C. 553. See Chipley v. Atkinson, 23 Fla. 206, 1 South. 934, 11 Am. St. Rep. 367.

ENTIRE. That which is not divided; that which is whole.

When a contract is entire, it must, in general, be fully performed before the party can claim the compensation which was to have been paid to him: for example, when a man hires to serve another for one year, he will not be entitled to leave him at any time before the end of the year, and claim compensation for the time unless it be done by the consent or default of the party hiring; Hair v. Bell, 6 Vt. 35; Stark v. Parker, 2 Pick. (Mass.) 267, 13 Am. Dec. 425; McClure v. Pyatt, 4 McCord (S. C.) 26; Byrd v. Boyd, 4 McCord (S. C.) 246, 17 Am. Dec. 740; Rounds v. Baxter, 4 Greenl. (Me.) 454; Hoar v. Clute, 15 Johns. (N. Y.) 224; Watkins v. Hodges, 6 H. & J. (Md.) 38. See Olmstead v. Bach, 78 Md. 132, 27 Atl. 501, 22 L. R. A. 74, 44 Am. St. Rep. 273. A contract is entire if the consideration be single and entire, notwithstanding the subject of the contract consists of several distinct items; 2 Pars. Cont. 517. See DIVISIBLE.

An *entire day* is an undivided day, from midnight to midnight; Robertson v. State, 43 Ala. 325; Haines v. State, 7 Tex. App. 30; Lawrence v. State, 7 Tex. App. 192. The words "entire use, benefit," etc., in a trust deed for the benefit of a married woman, have been construed as equivalent to "sole and separate use"; Heathman v. Hall, 38 N. C. 414. *Entire tenancy* "is contrary to *several tenancy*, signifying a sole possession in one man, whereas the other signifieth joint or common in more." Cowell.

ENTIRETY. This word denotes the whole, in contradistinction to moiety, which denotes the half part. A husband and wife, when jointly seized of land, are seized by entireties *per tout* and not *per my et per tout*, as joint tenants are. Jacob, Law Dict.; 2 Kent 132. See In re Bramberry's Estate, 156 Pa. 628, 27 Atl. 405, 22 L. R. A. 594, 36 Am. St. Rep. 64. PER TOUT ET NON PER MY.

The same words of conveyance that would make two other persons joint tenants will make the husband and wife tenants of the entirety; Georgia, etc., R. Co. v. Scott, 38 S. C. 34, 16 S. E. 185, 839; Oglesby v. Bingham, 69 Miss. 795, 13 South. 852; Noblitt v. Beebe, 23 Or. 4, 35 Pac. 248; Chambers v. Chambers, 92 Tenn. 707, 23 S. W. 67.

Such an estate has the quality of survivorship, whereby the heirs of the survivor take, to the exclusion of the heirs of the first deceased; Marburg v. Cole, 49 Md. 402, 33 Am. Rep. 266; Kunz v. Kurtz, 8 Del. Ch. 404, 68 Atl. 450. There can be no partition between tenants by entireties; Chandler v. Cheney, 37 Ind. 391; no interest in it can be sold on execution for the debts of the husband or wife; *id.*; Almond v. Bonnell, 76 Ill. 537. But in Hiles v. Fisher, 144 N. Y. 306, 39 N. E. 337, 30 L. R. A. 305, 43 Am. St. Rep. 762, a purchaser at a mortgage foreclosure sale which covered the property held in entirety and in which the wife did not join was held to become a tenant in common with the wife as to such property; and to the same effect Washburn v. Burns, 34 N. J. L. 18. In Buttlar v. Rosenblath, 42 N. J. Eq. 651, 9 Atl. 695, 59 Am. Rep. 52, an act which in terms preserves to a married woman her separate right of property was held to change the status of an estate by entirety to the extent of limiting the rights of the creditors of the husband to subject the use of only his half of such an estate to the payment of his debts.

That a judgment against the husband is not a lien on real estate owned by himself and wife by entirety, and that they can convey it free and clear of an unsatisfied judgment lien against him (valid on land owned by him personally), is held; Davis v. Clark, 26 Ind. 424, 89 Am. Dec. 471, where it is said: "As between husband and wife, there is but one owner, and that is neither the one nor the other, but both together. The estate belongs as well to the wife as to the husband." The husband cannot therefore possess any interest separate from his wife, nor can he alienate or encumber the estate. From the peculiar nature of this estate and from the legal relation of the parties, there must be unity of estate, unity of possession, unity of control, and unity in conveying or encumbering it; and it necessarily results that it cannot be seized and sold upon execution for the separate debts of either the husband or the wife; followed in Hulett v. Inlow, 57 Ind. 412, 26 Am. Rep. 64; Barren Creek Ditching Co. v. Beck, 99 Ind. 247; and to the same effect, Alles v. Lyon, 216 Pa. 604, 66 Atl. 81, 10 L. R. A. (N. S.) 463, 116 Am. St. Rep. 791, 9 Ann. Cas. 137; Dickey v. Converse, 117 Mich. 449, 76 N. W. 80, 72 Am. St. Rep. 508; Bank v. Corder, 32 W. Va. 232, 9 S. E. 220; Cole Mfg. Co. v. Collier, 95 Tenn. 115, 31 S. W. 1000, 30 L. R. A. 315, 49 Am. St. Rep. 921; Ray v. Long, 132 N. C. 891, 44 S. E. 652.

Where a husband and wife sold land owned by them as tenants by entirety, taking a

mortgage to husband and wife, the wife died, and the bond was paid, it was held that one-half the proceeds belonged to the wife's legal representatives; In re Baum, 121 App. Div. 496, 106 N. Y. Supp. 113.

Where a wife pays for land and consents that the title may be taken in the name of herself and husband, they hold as tenants in entirety, and a conveyance by the husband passes the rights to the possession of the land during their joint lives, and to the fee in case the husband survive; Hiles v. Fisher, 67 Hun 229, 22 N. Y. Supp. 795; Phelps v. Simons, 159 Mass. 415, 34 N. E. 657, 38 Am. St. Rep. 430.

In Merritt v. Whitlock, 200 Pa. 50, 49 Atl. 786, it was said it might be considered as still an open question whether husband and wife may not, since the married woman's acts, take, as well as hold in common, if there be a clear actual intent, notwithstanding the presumption to the contrary. But a later case in the same state holds that as the quality of the estate is determined at its inception, that estate could not be stripped of any of its incidents except by express statutory provision existing at the time of its inception; Alles v. Lyon, 216 Pa. 604, 66 Atl. 81, 10 L. R. A. (N. S.) 463, 116 Am. St. Rep. 791, 9 Ann Cas. 137.

This estate, where it exists as at common law, is not affected by the statutes for the protection of married women, nor by statutes providing that conveyances to two or more persons shall be deemed to create a tenancy in common and not a joint tenancy; Kunz v. Kurtz, 8 Del. Ch. 404, 68 Atl. 450.

As to the effect of the married woman's acts on estates held by entirety, see MARRIED WOMAN.

The divorce of the parties will not sever an estate by entirety; Alles v. Lyon, 216 Pa. 604, 66 Atl. 81, 10 L. R. A. (N. S.) 463, 116 Am. St. Rep 791, 9 Ann. Cas. 139; *contra*, Joerger v. Joerger, 193 Mo. 133, 91 S. W. 918, 5 Ann. Cas. 534; Hayes v. Horton, 46 Or. 597, 81 Pac. 386 (by changing it into a tenancy in common).

ENTITLE. To give a right to. L. R. 20 Eq. 534.

ENTRY. In Common Law. The act of setting down the particulars of a sale, or other transaction, in a merchant's or tradesman's account-books: such entries are, in general, *prima facie* evidence of the sale and delivery, and of work done; but unless the entry be the original one, it is not evidence. See SHORT ENTRY; SINGLE ENTRY.

In Revenue Law. The submitting to the inspection of officers appointed by law, to collect customs, goods imported into the United States, together with a statement or description of such goods, and the original invoices of the same, for the purpose of estimating the duties to be paid thereon.

The term "entry" in the acts of congress is used in two senses. In many of the acts it refers to the bill of entry,—the paper or declaration which the merchant or importer in the first instance hands to the entry clerk. In other statutes it is used to denote, not a document, but a transaction; a series of acts which are necessary to the end to be accomplished, viz. the entering of the goods; U. S. v. Cargo of Sugar, 3 Sawy. 46, Fed. Cas. No. 14,722.

In Criminal Law. The act of entering a dwelling-house, or other building, in order to commit a crime. See BURGLARY.

Upon Real Estate. The act of going upon the lands of another, or lands claimed as one's own, with intent to take possession. See Gulon v. Anderson, 8 Humph. (Tenn.) 306.

In general, any person who has a right of possession may assert it by a peaceable entry, without the formality of a legal action, and, being so in possession, may retain it, and plead that it is his soil and freehold; 3 Term 295. A notorious act of ownership of this kind was always equivalent to a feodal investiture by the lord, and is now allowed in all cases where the original entry of a wrong-doer was unlawful. But, in all cases where the first entry was lawful and an apparent right of possession was thereby gained, the owner of the estate cannot thus enter, but is driven to his action at law; 3 Bla. Com. 175. See RE-ENTRY; FORCIBLE ENTRY.

At common law, no person could make a valid sale of land unless he had lawfully entered, and could make livery of seisin,—that is, could make an actual delivery of possession to the purchaser This provision was early incorporated into the English statutes, to guard against the many evils produced by selling pretended titles to land. A pretended title within the purview of the law is where one person claims land of which another is in possession holding adversely to the claim; 1 Plowd. 88 *a*; Littleton § 317; Livingston v. Iron Co., 9 Wend. (N. Y.) 511. And now in most of the states, every grant of land, except as a release, is void as an act of maintenance, if, at the time it is made, the lands are in the actual possession of another person claiming under a title adverse to that of the grantor; 4 Kent 446; Williams v. Jackson, 5 Johns. (N. Y.) 489; Wolcot v. Knight, 6 Mass. 418; Cornwell v. Clement, 87 Hun 50, 33 N. Y. Supp. 866; Sneed v. Hope (Ky.) 30 S. W. 20; *contra*, Hadduck v. Wilmarth, 5 N. H. 181, 20 Am. Dec. 570; Stoever v. Whitman's Lessee, 6 Binn. (Pa.) 420; Matthews v. Hevner, 2 App. Cas. D. C. 349. See CHAMPERTY; BUYING TITLES.

In a more limited sense, an entry signifies the simply going upon another person's premises for some particular purpose. The right to land is exclusive, and every unwarranted entry thereon without the owner's leave, whether it be enclosed or not, or unless the person entering have an authority given him

by law, is a trespass; Adams v. Freeman, 12 Johns (N. Y.) 408, 7 Am. Dec. 327; Wells v. Howell, 19 Johns. (N. Y.) 385. But the owner's license will sometimes be presumed, and then will continue in force until it is actually revoked by the owner; Dexter v. Hazen, 10 Johns. (N. Y.) 246; Willes 195; Tayl. L. & T. 766. See LICENSE.

Authority to enter upon lands is given by law in many cases. See ARREST.

The proprietor of chattels may under some circumstances enter the land of another upon which they are placed, and remove them, provided they are there without his default: as, where his tree has blown down into the adjoining close by the wind, or his fruit has fallen from a branch which overhung it; 20 Vin. Abr. 418, 2 Greenl. Ev. § 627.

A landlord also may enter, to distrain or to demand rent, to see whether waste has been committed, or repairs made, and may go into the house for either purpose, provided the outer door be open; Cro. Eliz. 876; 2 Greenl. Ev. § 627. So, if he is bound to repair, he has a right of entry given him by law for that purpose; Moore 889. Or if trees are excepted out of a demise, the lessee has a right of entering to prune or fell them; 11 Co 53; Tayl. L. & T. § 767. A tenant becomes a trespasser after the expiration of his term, though his holding is in good faith under color of a reasonable claim of right; and the landlord may forcibly enter thereon and eject him without legal process; Freeman v. Wilson, 16 R. I. 524, 17 Atl. 921; Allen v. Kelly, 17 R. I. 731, 24 Atl. 776, 16 L. R. A. 798, 33 Am. St. Rep. 905.

So any man may throw down a public nuisance; and a private one may be thrown down by the party grieved, and this before any prejudice happens, but only from the probability that it may happen; Webb, Poll. Torts 513; 5 Co. 102. And see 1 Brownl. 212, 12 Mod. 510; W. Jones 221; 1 Stra. 683; Kiefer v. Carrier, 53 Wis. 404, 10 N. W. 562. To this end, the abator has authority to enter the close in which it stands. See NUISANCE.

In Practice. The placing on record the various proceedings in an action, in technical language and order. The extreme strictness of the old practice is somewhat relaxed, but the term entry is still used in this connection. "Books of Entries" were formerly much relied on, containing forms or precedents of the proceedings in various actions as they appear on record.

In the law books the words entry and entered are frequently used as synonymous with recorded; Lent v. Ry. Co., 130 N. Y. 504, 29 N. E. 988. See Blatchford v. Newberry, 100 Ill. 484; McLaughlin v. Doherty, 54 Cal. 519.

For entry of public lands, see PRE-EMPTION RIGHT. For the terms entry of judgment, entry of appearance, entry for copyright, see JUDGMENT; APPEARANCE; COPYRIGHT.

ENTRY AD COMMUNEM LEGEM. A writ which lay in favor of the reversioner, when the tenant for term of life, tenant for term of another's life, tenant by the curtesy, or tenant in dower had aliened and died. Tomlin, Law Dict. Long obsolete, and abolished in 1833.

ENTRY, WRIT OF. In Old Practice. A real action brought to recover the possession of lands from one who wrongfully withholds possession thereof.

Such writs were said to be in the *Quibus*, where the suit was brought against the party who committed the wrong; in the *Per*, where the tenant against whom the action was brought was either heir or grantee of the original wrong-doer; in the *Per and Cui*, where there had been two descents, two alienations, or descent and an alienation; in the *Post*, where the wrong was removed beyond the degrees mentioned.

The above designations are derived from significant Latin words in the respective forms adapted to the cases given. A descent or alienation on the part of the disseisor constituted a degree (see Co. Litt. 239 *a*), and at common law the writ could be brought only within the degrees (two), the demandant after that being driven to his writ of right. By the statute of Marlbridge (*q. v.*), 52 Hen. III. c. 30 (A. D. 1267), however, a writ of entry, after *(post)* those degrees had been passed in the alienation of the estate, was allowed. Where there had been no descent and the demandant himself had been dispossessed, the writ ran, *Præcipe A quod reddat B sex acras terræ, etc. de quibus idem A, etc.* (command A to restore to B six acres of land, etc., *of which* the said A, etc.), if there had been a descent after the description came, the clause, *in quod idem A non habet ingressum nisi per C qui illud ei demisit* (into which the said A, the tenant, has no entry but *through* C, who demised it to him), where there were two descents, *nisi per D cui C illud demisit* (but by D, to whom C demised it); where it was beyond the degrees, *nisi post disseisinam quam C* (but *after* the disseisin which C, the original disseisor, did, etc.).

The writ was of many varieties, also, according to the character of the title of the claimant and the circumstances of the deprivation of possession. Booth enumerates and discusses twelve of these, of which some are *sur disseisin, sur intrusion, ad communem legem, ad terminum qui præterit, cui in vita, cui ante divortium*, etc. Either of these might, of course, be brought in any of the four degrees, as the circumstances of the case required. The use of writs of entry has been long since abolished in England, but they are still in use in a modified form in some states, as the common means of recovering possession of realty against a wrongful occupant; Emerson v. Thompson, 2 Pick. (Mass.) 473; Tilson v. Thompson, 10 Pick. (Mass.) 359, Bean v. Moulton, 5 N. H. 450; Rowell v. Mitchell, 68 Me. 21; Day v. Philbrook, 85 Me. 90, 26 Atl. 999, Cole v. Inhabitants of Eastham, 124 Mass. 307, Wilbur v. Ripley, 124 Mass. 468; Pettingell v. Boynton, 139 Mass. 244, 29 N. E. 655; Tappan v. Power Co., 157 Mass. 24, 31 N. E. 703, 16 L. R. A. 353. See Stearn, Real Act.; Booth, R. A.; Co. Litt. 238 *b*.

To maintain a writ of entry, the demandant who declares on his own seisin, and alleges a disseisin, is required to prove only that he has a right of entry and need not prove an actual wrongful dispossession or an adverse possession by the tenants; Twomey v. Linnehan, 161 Mass. 91, 36 N. E. 590.

ENURE. To take or have effect. To serve to the use, benefit, or advantage of a person. The word is often written *inure*. A release to the tenant for life *enures* to him in reversion; that is, it has the same effect for him as for the tenant for life. A discharge of the principal enures to the benefit of the surety.

ENVOY. In International Law. A diplomatic agent sent by one state to another.

In accordance with the rules adopted at the Congress of Vienna, in 1815, envoys are placed among diplomatic agents of the second class. They are not regarded as representing the person and dignity of their sovereigns, and thus they rank below ambassadors. On the other hand, they are accredited to the sovereign of the state and, except for the obsolete privilege of treating with the head of the foreign state personally, their position is not substantially different from that of an ambassador (*q. v.*). 1 Opp. 443–446.

EO INSTANTI. At that instant; at the very or same instant; immediately. 1 Bla. Com. 196, 249; 1 Co. 138; Black, L. Dict.

EORLE (Sax.). An earl. Blount; 1 Bla. Com. 398. The governor of a province.

EPILEPSY. A disease of the brain, which occurs in paroxysms with uncertain intervals between them.

These paroxysms are characterized by the loss of sensation, and convulsive motions of the muscles. When long continued and violent, this disease is very apt to end in dementia. It gradually destroys the memory and impairs the intellect, and is one of the causes of an unsound mind.

A statute forbidding the marriage of epileptics is held not unconstitutional as unjustly discriminating against certain persons; Gould v. Gould, 78 Conn. 242, 61 Atl. 604, 2 L. R. A. (N. S.) 531. As to the effect of concealment of epilepsy under this statute, see DIVORCE.

EPIQUEYA. In Spanish Law. The benignant and prudent interpretation of the law according to the circumstances of the time, place, and person. This word is derived from the Greek, and is synonymous with the word equity. See Murillo, nn. 67, 68.

EPISCOPACY. A form of government by diocesan bishops; the office or condition of a bishop.

EPISCOPALIA. Synodals, or payments due the bishop.

EPISCOPUS (L. Lat.). **In Civil Law.** A superintendent; an inspector. Those in each municipality who had the charge and oversight of the bread and other provisions which served the citizens for their daily food were so called. Vicat; Du Cange.

A bishop. These bishops, or *episcopi*, were held to be the successors of the apostles, and have various titles at different times in history and according to their different duties. It was applied generally to those who had authority or were of peculiar sanctity. After the fall of the Roman empire they came to have very considerable judicial powers. Du Cange; Vicat; Calvinus, Lex.

EPISTOLÆ (Lat.). **In Civil Law.** Rescripts; opinions given by the emperors in cases submitted to them for decision.

Answers of the emperors to petitions.

The answers of counsellors (*juris-consulta*), as Ulpian and others, to questions of law proposed to them, were also called *epistolæ*.

Opinions written out. The term originally signified the same as *literæ*. Vicat.

EQUAL PROTECTION OF THE LAWS. The fourteenth amendment of the constitution of the United States, among other provisions respecting the life, liberty, and property of citizens, provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This provision has been subjected to much judicial construction. The protection extends to "acts of the state whether through its legislative, its executive, or its judicial authorities"; Scott v. McNeal, 154 U. S. 45, 14 Sup. Ct. 1108, 38 L. Ed. 896; Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667; Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676; Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567. In Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979, Harlan, J., for the court, said: "But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition, and, as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.'" See Gibson v. Mississippi, 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075; Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220. That amendment conferred no new and additional rights, but only extended the protection of the federal constitution over rights of life, liberty, and property that previously existed under all state constitutions. Prior to the passage of this amendment "the laws of all the states in terms gave equal protection to all white persons. This amendment, however, is general, and forbids the denial to any class of persons the equal protection of the laws by any state; and there is no doubt that class legislation is forbidden;" State v. Holden, 14 Utah, 71, 46 Pac. 756, 37 L. R. A. 103. "What must constitute a denial of the equal protection

of the law will depend, in this view, in a large measure, upon what rights of the law have been conferred, or protection extended, under the constitution and laws of the particular state in which the question arises. As the constitution and laws of the states vary, the proposition that each case must, to an extent, depend upon its own facts, is especially applicable to this class of cases. When the state itself undertakes to deal with its citizens by legislation, it does so under certain limitations, and it may not single out a class of citizens, and subject that class to oppressive discrimination, especially in respect to those rights so important as to be protected by constitutional guaranty. That the prohibitions of that amendment are now regarded as protecting the citizen against a denial of the equal protection of the law, and against taking property without due process of law, under the power of taxation, is a proposition clearly deducible from the many causes in which that question has been considered;" Nashville, C. & St. L. Ry. v. Taylor, 86 Fed. 168, 185. See PRIVILEGES AND IMMUNITIES; CIVIL RIGHTS; DUE PROCESS OF LAW.

The guaranties of due process of law and of equal protection of the laws are rights secured to all persons whether citizens or not. The two are in most cases treated together, though occasionally differentiated. The guaranty means as well equal exemption from all burdens as equal accessibility to the courts; In re Ah Fong, 3 Sawy. 144, Fed. Cas. No. 102; San Mateo County v. R. Co., 13 Fed. 722; Santa Clara County v. R. Co., 18 Fed. 385; and it is not confined to citizens, but applies to all persons, native or foreign, within this country; Fraser v. Torley Co., 82 Fed. 257; In re Ah Fong, 3 Sawy. 144, Fed. Cas. No. 102; though not non-residents; Steed v. Harvey, 18 Utah 367, 54 Pac. 1011, 72 Am. St. Rep. 789. But in State v. Ins. Co., 70 Conn. 590, 40 Atl. 465, 66 Am. St. Rep. 138, it was said to be only for the benefit of persons physically present within the territorial jurisdiction of the state. A corporation is not a citizen within the meaning of the amendment securing privileges and immunities, but it is a person under the equal protection clause; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; McQuire v. R. Co., 131 Ia. 340, 108 N. W. 902, 33 L. R. A. (N. S.) 706; Hammond Beef & Provision Co. v. Best, 91 Me. 431, 40 Atl. 338, 42 L. R. A. 528; and so is a railroad corporation; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; and a mutual insurance company; Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135, 3 L. R. A. (N. S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400. But a private corporation not created by the laws of the state nor doing business in it is not within its jurisdiction so as to invoke the protection of the 14th Amendment; Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432; Hawley v. Hurd, 72 Vt. 122, 47 Atl. 401, 52 L. R. A. (N. S.) 195, 82 Am. St. Rep. 922; the only limitation being when the corporation is in the employment of the federal government or in business which is strictly interstate commerce; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650.

The amendment "was not intended to compel the state to adopt an iron rule of equal taxation," nor "to prevent a state from adjusting its system of taxation in all proper and reasonable ways"; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892. Taxation must be equal and uniform as well as regards the mode of assessment as in the rate of charge; San Mateo County v. R. Co., 13 Fed. 722; Santa Clara County v. R. Co., 18 *id.* 385; but this may be done by different officers if the method is uniform; San Francisco & N. P. R. Co. v. State Board of Equalization, 60 Cal. 12.

The prohibition against the denial of equal protection of the laws does not require that the law shall have an equality of operation, in the sense of an indiscriminate operation on persons merely as such, but on persons according to their relation. It does not prevent states from distinguishing, selecting and classifying objects of legislation within a wide range of discretion, provided only that the discretion must be based upon some reasonable ground; Interstate Consol. St. Ry. Co. v. Massachusetts, 207 U. S. 79, 28 Sup. Ct. 26, 52 L. Ed. 111, 12 Ann. Cas. 555; affirming Com. v. Ry. Co., 187 Mass. 436, 73 N. E. 530, 11 L. R. A. (N. S.) 973, 2 Ann. Cas. 419; some difference which bears a just and proper relation to the classification and not a mere arbitrary selection; Magown v. Bank, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; Watson v. Maryland, 218 U. S. 173, 30 Sup. Ct. 644, 54 L. Ed. 987. Legislation which regulates business may well make distinctions dependent upon the degrees of evil without being unreasonable or in conflict with the equal protection of the laws; Heath & Milligan Mfg. Co. v. Worst, 207 U. S. 338, 28 Sup. Ct. 114, 52 L. Ed. 236. The mere fact of classification will not relieve; it must be based on reasonable grounds and not mere arbitrary selection; but it suffices if the statute is applicable to all persons under like circumstances and does not subject individuals to an arbitrary exercise of power; Jones v. Brim, 165 U. S. 180, 17 Sup. Ct. 282, 41 L. Ed. 677; or if a law operates alike upon all persons similarly situated; Walston v. Nevin, 128 U. S. 578, 9 Sup. Ct. 192, 32 L. Ed. 544; or a law or course of proceedings has been applied to any other person in the state under similar circumstances and conditions; Tinsley v. Anderson, 171 U. S. 101, 18 Sup. Ct. 805, 43 L. Ed. 91. Legislation may be limited as to objects or territory if

all persons subject to it are treated alike under like circumstances and conditions; Hayes v. Missouri, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578; Giles v. Teasley, 193 U. S. 148, 24 Sup. Ct. 359, 48 L. Ed. 655. It cannot discriminate in taxation against foreign corporations lawfully doing business within the state; Southern R. Co. v. Greene, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247.

"Classification must have relation to the purpose of the legislature, but logical appropriateness of the inclusion or exclusion of objects or persons is not required. A classification may not be merely arbitrary, but necessarily there must be great freedom of discretion even though it result in 'ill-advised, unequal and oppressive legislation';" Heath & Milligan Mfg Co. v. Worst, 207 U. S. 338, 28 Sup. Ct. 114, 52 L. Ed. 236, quoting Mobile County v. Kimball, 102 U. S. 691, 26 L. Ed. 238.

In order to avoid denial of equal protection of the laws the police power must be exercised reasonably and not arbitrarily; Yick Wo v. Hopkins, 118 U. S. 365, 6 Sup. Ct. 1064, 30 L. Ed. 220.

The guaranties for equal protection of the laws and of due process of law are not violated by discrimination in the statute; Clark v. Kansas City, 176 U. S. 114, 20 Sup. Ct. 284, 44 L. Ed. 392.

As there is no vested right in procedure, the guaranty of equal protection of the laws is not violated by change of previous decisions of the state court on questions of procedure; Backus v. Union Depot Co., 169 U. S. 557, 18 Sup. Ct. 445, 42 L. Ed. 853.

What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court and the highest courts of the states will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the national constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guaranty of the equal protection of the law means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances." Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 558, 22 Sup. Ct. 431, 46 L. Ed. 679, quoting Bowman v. Lewis, 101 U. S. 22, 25 L. Ed. 989; In re Doo Woon, 18 Fed. 898.

The South Carolina supreme court, in reference to the law imposing special liability for fires caused by locomotives, thus comments on the federal cases "Let it be noted . . . the classification for the imposition of special liability was not affected by the fact that there were other common carriers operating with steam which might communicate fire or whose employés might sustain injury through the negligence of their fellow servants; thus showing that a classification need not include all engaged in a general business, as the business of carrying freight and passengers, it may simply embrace a more limited class, who carry freight and passengers in a particular way, or by particular instrumentalities." McCandless v. R. Co., 38 S. C. 116, 16 S. E. 429, 18 L. R. A. 440.

State laws or official action held not to deny the equal protection of the laws are: Prescribing rules of evidence, as by preventing Chinese from testifying in a case where a white person is a party; People v. Brady, 40 Cal. 198, 6 Am. Rep. 604 (but under the Civil Rights Bill, negroes were entitled to the benefit of this law; People v. Washington, 36 Cal. 658); prohibiting the landing of lewd women from passenger steamers; Ex parte Ah Fook, 49 Cal. 402; regulating slaughter houses; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394; authorizing the recovery of double value for property destroyed by railroad trains; Tredway v. R. Co., 43 Ia. 527; excluding women from employment in saloons or other places where intoxicating liquor is sold; Ex parte Hayes, 98 Cal. 555, 33 Pac. 337, 20 L. R. A. 701; Foster v. Board of Police Com'rs, 102 Cal. 483, 37 Pac. 763, 41 Am. St. Rep. 194; State v. Reynolds, 14 Mont. 383, 36 Pac. 449; City of Hoboken v. Goodman, 68 N. J. L. 217, 51 Atl. 1092; Bergman v. Cleveland, 39 Ohio St. 651; State v. Considine, 16 Wash. 358, 47 Pac. 755; In re Considine, 83 Fed. 157; but *contra*, In re Maguire, 57 Cal. 604, 40 Am. Rep. 125 (and an ordinance making it a misdemeanor for any woman to go into a building where liquor is sold, or to stand within fifty feet of such a building, was held an unnecessary interference with individual liberty; Gastenau v. Com., 108 Ky. 473, 56 S. W. 705, 49 L. R. A. 111, 94 Am. St. Rep. 386); prohibiting women from frequenting places for the sale of intoxicating liquors; Ex parte Smith, 38 Cal. 709; People v. Case, 153 Mich. 98, 116 N. W. 558, 18 L. R. A. (N. S.) 657; Cronin v. Adams, 192 U. S. 108, 24 Sup. Ct. 219, 48 L. Ed. 365, affirming Adams v. Cronin, 29 Colo. 488, 69 Pac. 590, 63 L. R. A. 61; imposing more severe penalties for adultery between persons of different races; Ellis v. State, 42 Ala. 525; Ford v. State, 53 Ala. 150; Green v. State, 58 Ala. 190, 29 Am. Rep. 739; Pace v. Alabama, 106 U. S. 583, 1 Sup. Ct. 637, 27 L. Ed. 207; forbidding marriages between whites and blacks; Hoover v. State, 59 Ala. 57; Ex parte Francois, 3 Woods 367, Fed. Cas. No. 5,047; Ex parte Kinney, 3 Hughes 9, Fed. Cas. No. 7,825; or declaring such marriages null and void; In re Hobbs, 1 Woods 537, Fed. Cas. No. 6,550; regulating the charges of storage warehouses; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Munn v. People, 69 Ill. 80; providing for territorial and municipal regulations for different parts

of the state; Missouri v. Lewis, 101 U. S. 22, 25 L. Ed. 989; forbidding bankers and brokers, knowing that they are insolvent, to receive money; Baker v. State, 54 Wis. 368, 12 N. W. 12; imposing a tax on corporations measured by the amount of dividends paid, part of such dividends being derived from capital invested in United States bonds exempted from taxation; Home Ins. Co. v. New York, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025; the provision of the Mississippi constitution prescribing a test of literacy for voting; Williams v. Mississippi, 170 U. S. 213, 18 Sup. Ct. 583, 42 L. Ed. 1012; an order dismissing a writ of *habeas corpus* and remanding to custody a prisoner held in contempt when it appeared that the same procedure would be applied to any other person in the state under similar circumstances and conditions; Tinsley v. Anderson, 171 U. S. 101, 18 Sup. Ct. 805, 43 L. Ed. 91; as a penalty for non-compliance with police regulations; Dow v. Beidelman, 49 Ark. 455, 5 S. W. 718; allowing a reasonable attorney's fee as part of a judgment against a railroad company for damage by fire; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909 (distinguishing Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, where a statute, allowing such fees in suits against railroad companies, for ordinary claims, was held unconstitutional); allowing a defendant on trial for homicide a less number of challenges with a struck jury than an ordinary one, Brown v. New Jersey, 175 U. S. 172, 20 Sup. Ct. 77, 44 L. Ed. 119; prohibiting any person, corporation or firm from issuing any order, etc., payable otherwise than in money —what are commonly known as store orders, Johnson, Lytle & Co. v. Spartan Mills, 68 S. C. 359, 47 S. E. 695, 1 Ann. Cas 409; Frorer v. People, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492, establishing separate schools for colored children; Bertonneau v. Board, 3 Woods 177, Fed. Cas. No 1,361; Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405; State v. McCann, 21 Ohio St. 198; Chrisman v. City of Brookhaven, 70 Miss. 477, 12 South. 458; Corey v. Carter, 48 Ind. 327, 17 Am. Rep. 738; see Marshall v. Donovan, 10 Bush. (Ky.) 681; denial of injunction against maintaining a high school for white children while failing to maintain one for colored children; Cumming v. County Board of Education, 175 U. S. 528, 20 Sup. Ct. 197, 44 L. Ed. 262; imposing upon railroad companies future liabilities for damages to employees by negligence of their fellow servants, etc., since it met a particular necessity, and all railroad companies without distinction were made subject to the same liability; Missouri Pac. Ry. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; Tullis v. R. Co., 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192, making railroad companies liable for property destroyed by fire communicated by their locomotives, even though the liability did not depend on any negligence of the railroad company; St. Louis & S. F. Ry. Co. v. Mathews, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611; McCandless v. R. Co., 38 S. C. 116, 16 S. E. 429, 18 L. R. A. 440; giving damages for sheep grazing on public lands; Bown v. Walling, 204 U. S. 320, 27 Sup. Ct. 292, 51 L. Ed. 503; taxing transfers of corporate stock; New York v. Reardon, 204 U. S. 152, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736; the separation of white and black persons in public conveyances; Chilton v. Ry. Co., 114 Mo. 88, 21 S. W. 457, 19 L. R. A. 269; U. S. v. Stanley, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835; West Chester & P. R. Co. v. Miles, 55 Pa. 209, 93 Am. Dec. 744; Anderson v. R. Co., 62 Fed. 46; or in theatres if equally good seats were provided for both; Younger v. Judah, 111 Mo. 303, 19 S. W. 1109, 16 L. R. A. 578, 33 Am. St. Rep. 527 (but to require colored persons to occupy particular seats was held a violation of the Illinois Civil Rights Act of June 10, 1885; Baylies v. Curry, 128 Ill. 287, 21 N. E. 595).

In Adair v. U. S., 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764, reversing U. S. v. Adair, 152 Fed. 737, it was held that congress could not make it a criminal offence against the United States for a carrier engaged in interstate commerce to discharge an employé simply because of membership in a labor organization, and that the provision to that effect in section 10 of the Act of June 1, 1898, was an invasion of personal liberty as well as of the right of property guaranteed by the Vth Amendment to the constitution and therefore unenforceable.

Statutes held to violate the guaranty of "equal protection of the laws are: A law taxing miners, which discriminates between persons of different races, U. S. v. Jackson, 3 Sawy. 59, Fed. Cas. No. 15,459; excluding colored children from the benefits of the public school system: Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405; or from sharing in the use of the common school fund; Dawson v. Lee, 83 Ky. 49 (but not establishing separate schools, see *supra*); discriminating against non-residents, with respect to legal remedies; Pearson v. City of Portland, 69 Me. 278, 31 Am. Rep. 276; discriminating between Chinese and other aliens; Baker v. Portland, 5 Sawy. 566, Fed. Cas. No. 777; In re Parrott, 6 Sawy. 349, 1 Fed. 481; a city ordinance requiring the cutting of a prisoner's hair, it being considered more degrading to the Chinese; Ho Ah Kon v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546; forbidding the employment of Chinese; In re Parrott, 1 Fed. 481, 6 Sawy. 349; prohibiting aliens incapable of acquiring citizenship from fishing in public waters; In re Ah Chong, 6 Sawy. 451, 2 Fed. 733; authorizing the overseers of the poor to commit paupers and vagrants to the workhouse without trial,

City of Portland v. City of Bangor, 65 Me. 120, 20 Am. Rep. 681; prescribing a penalty and counsel fees in suits on insurance policies; Gulf, C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed 666; St. Louis, I. M. & S. Ry. Co. v. Williams, 49 Ark. 492, 5 S. W. 883; San Antonio & A. R. Ry. Co. v. Wilson (Tex.) 19 S. W. 910; Wilder v. Ry. Co., 70 Mich. 382, 38 N. W. 289; Lafferty v. Ry. Co., 71 Mich. 35, 38 N. W. 660; New York Life Ins. Co. v. Smith (Tex.) 41 S. W. 680. But it is said in a dissenting opinion in Gulf, C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666: "The constitutionality of statutes allowing plaintiffs only to recover an attorney's fee as part of the judgment in particular classes of actions selected by the legislature appears to have been upheld by the courts of most of the states in which it has been challenged; Kansas Pac. Ry. Co. v. Mower, 16 Kan. 573; Kansas Pac. Ry. Co. v. Yanz, *id.* 583; Missouri, K. & T. Ry. Co. v. Simonson, 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765, 91 Am. St. Rep. 248; Peoria, D. & E. Ry. Co. v. Duggan, 109 Ill. 537, 50 Am. Rep. 619; Vogel v. Pekoc, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491; Dow v. Beidelman, 49 Ark. 455, 5 S. W. 718; Perkins v. Ry. Co., 103 Mo. 52, 15 S. W. 320, 11 L. R. A. 426; Burlington, C. R. & N. Ry. Co. v. Dey, 82 Ia. 312, 48 N. W. 98, 12 L. R. A. 436, 31 Am. St. Rep. 477; Wortman v. Kleinschmidt, 12 Mont. 316, 30 Pac. 280; Gulf, C. & S. F. Ry. Co. v. Ellis, 87 Tex. 19, 26 S. W. 985; Cameron v. Ry. Co., 63 Minn. 384, 65 N. W. 652, 31 L. R. A. 553; Morris-Scarboro-Moffit Co. v. Express Co., 146 N. C. 167, 59 S. E. 667, 15 L. R. A. (N. S.) 983; Gulf, C. & S. F. Ry Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, where it is further said: "The legislature of a state must be presumed to have acted from lawful motives, unless the contrary appears upon the face of the statute. If, for instance, the legislature of Texas was satisfied, from observation and experience, that railroad corporations within the state were accustomed, beyond other corporations or persons, to unconscionably resist the payment of such petty claims, with the object of exhausting the patience and means of the claimants by prolonged litigation and perhaps repeated appeals, railroad corporations alone might well be required, when ultimately defeated in such a claim, to pay a moderate attorney's fee, as a just, though often inadequate, contribution to the expenses to which they had put the plaintiff in establishing a rightful demand."

An act was held void providing that a prisoner who escaped and was retaken should be punished by imprisonment for a term equal to his original one; In re Mallon, 16 Idaho 737, 102 Pac. 374, 22 L. R. A. (N. S.) 1123; so also a statutory provision for the imprisonment of one who after receiving advances commits a breach of a contract for farm labor; Ex parte Hollman, 79 S. C. 9, 60 S. E. 19, 21 L. R. A. (N. S.) 242 with note, 14 Ann. Cas. 1105; and a statute regulating railroad rates, in which the penalties for violation were so excessive and enormous as to deter and intimidate parties affected from testing its validity in the courts; Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 1164.

When a state, either through its legislature, courts, or administrative officers, excludes persons of the African race, solely because of race or color, from serving as grand jurors in the prosecution of a person of that race, the equal protection of the laws is denied him and a judgment of the state court, sustaining the conviction will be reversed; Carter v. Texas, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839; Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664; Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567; Gibson v. Mississippi, 162 U. S. 565, 16 Sup. Ct. 905, 40 L. Ed. 1075; but statutes prescribing counsel fees have been in some distinguishing cases upheld, as in the case of wrongfully discharged railroad employees; St. Louis, I. M. & S. Ry. Co. v. Paul, 173 U. S. 409, 19 Sup. Ct. 419, 43 L. Ed. 746; or statutes against railroad companies for damage by fire from locomotives; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909; and a law requiring monthly payment of corporation employees: Skinner v. Min. Co, 96 Fed. 743; or compelling railroad companies to pay employees at the time of discharge; St. Louis, I. M. & S. Ry. Co. v. Paul, 64 Ark. 83, 40 S. W. 705, 37 L. R. A. 504, 62 Am. St. Rep. 154; or to furnish free return transportation to shippers of live stock; George v. Ry. Co., 214 Mo. 551, 113 S. W. 1099, 127 Am. St. Rep. 690; an act punishing any one who by threats or extortion obtains money from citizens or residents of a state; Greene v. State, 83 Neb. 84, 119 N. W. 6, 131 Am. St. Rep 626; making it a misdemeanor to admit a child under sixteen to theatres except entertainments on piers; In re Van Horne, 74 N. J. Eq. 600, 70 Atl. 986; giving the owner of live stock accidentally killed or destroyed on a railroad track double its value; Atchison & N. R. Co. v. Baty, 6 Neb. 37, 29 Am. Rep. 356; one requiring owners and operators of coal mines to weigh coal in a certain specified manner; Millett v. People, 117 Ill. 294, 7 N. E. 631, 57 Am. Rep. 869.

Probably the most numerous cases requiring the construction of this guaranty have arisen under statutes establishing some classification of persons, property or occupations.

The classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect of which the classification is proposed, and can never be made arbitrarily and without any

such basis. . . . But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground —some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection." Gulf, C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, quoted in Connolly v. Pipe Co., 184 U. S. 540, 560, 22 Sup. Ct. 431, 46 L. Ed 679; Cotting v. Stock Yards Co., 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92; Bachtel v. Wilson, 204 U. S. 41, 27 Sup. Ct. 243, 51 L. Ed. 357.

"The equal protection of the laws which, by the Fourteenth Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of an individual is, without compensation, wrested from him for the benefit of another or of the public." Cotting v. Stock Yards Co., 183 U. S 79, 87, 22 Sup. Ct. 30, 46 L. Ed 92 (quoting Reagan v. Loan & Trust Co., 154 U. S. 362, 399, 14 Sup. Ct. 1047, 38 L. Ed. 1014), where it was held that a classification between stockyards doing a large business and those doing a small business was invalid.

A state may without violating the guaranty put into one class all engaged in business of a special and public character and require them to perform a duty which they can do better and more quickly than others, and impose a penalty for non-performance; Seaboard Air Line Ry. v. Seegers, 207 U. S. 73, 28 Sup. Ct. 28, 52 L. Ed. 108; where a penalty for the failure of a railroad to adjust and average claims within forty days was held constitutional.

Mere direction of the state law that under given circumstances the venue shall be changed does not violate the equal protection of the laws; Cincinnati Street Ry. Co. v. Snell, 193 U. S. 30, 24 Sup. Ct. 319, 48 L. Ed. 604; where it was said: "But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords a fair opportunity to be heard before the issues are decided." "It is fundamental rights which the Fourteenth Amendment safeguards and not the mere form which a state may see proper to designate for the enforcement and protection of such rights."

The following statutes have been held to enact a reasonable classification, valid as not denying equal protection of the laws: Distinguishing between street railways and steam railroads in imposing a tax; Savannah, T. & I. of H. Ry. Co. v. Savannah, 198 U. S. 392, 25 Sup. Ct. 690, 49 L. Ed. 1097; between life and health companies and fire, marine and inland insurance companies with respect to taxation; Fidelity Mut. Life Ass'n v. Mettler, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922; between bituminous coal mines and block coal mines as to working; Barrett v. Indiana, 229 U. S. 26, 33 Sup. Ct. 692, 57 L. Ed. —; a distinction in inheritance tax laws between lineal and collateral relatives; Billings v. Illinois, 188 U. S. 97, 23 Sup. Ct. 272, 47 L. Ed. 400; as also the exemption of step-children from the collateral inheritance tax on bequests and devises from step-parents; Com. v. Randall, 225 Pa. 197, 73 Atl. 1109; the exemption in a medical registration act of those who had practiced before a certain date or gratuitously or in a hospital; Watson v. Maryland, 218 U. S. 173, 30 Sup. Ct. 644, 54 L. Ed. 987; between individuals and corporations, the classification between the two being approved because of the difference of the power which the state may exercise over the doing of business within its borders by an individual on the one hand or a corporation on the other; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 29 Sup. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645; of a municipal ordinance distinguishing between those having cows inside and those outside a city; Adams v. City of Milwaukee, 228 U. S. 572, 33 Sup. Ct. 610, 57 L. Ed. —; a provision of one gas rate act for the municipality and another for individual consumers; Willcox v. Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034; a discrimination between the residential and commercial portions of a city as to the height of buildings based on practical and not merely æsthetic grounds; Welch v. Swasey, 214 U. S. 91, 29 Sup. Ct. 567, 53 L. Ed. 923; or excepting churches from a statute limiting the height of buildings; Cochran v. Preston, 108 Md. 220, 70 Atl. 113, 23 L. R. A. (N. S.) 1163, 129 Am. St. Rep. 432, 15 Ann Cas. 1048; a discrimination by a municipal corporation for the purpose of taxation between automobiles and other vehicles; Kersey v. Terre Haute, 161 Ind. 471, 68 N. E. 1027; classification of distilled spirits in bond as distinguished from other property in regard to the payment of interest on taxes; Thompson v. Kentucky, 209 U. S. 340, 28 Sup. Ct. 533, 52 L. Ed. 822.

So of the following: A state statute imposing a license tax on persons compounding, rectifying, adulterating or blending distilled spirits does not deny equal protection of the laws because it discriminates in favor of the distilleries and rectifiers or straight distilled spirits; Brown-Forman Co. v. Commonwealth of Kentucky, 217 U. S. 563, 30 Sup. Ct. 578, 54 L. Ed. 883, where the court accepted the construction by the highest

court of the state that the tax in question was not a property tax but a license tax imposed on the doing of a business. Other classifications held valid are one prohibiting drumming or soliciting on trains for any hotel, lodging house, eating house, bath house, physician, masseur, surgeon or other medical practitioner; Williams v. Arkansas, 217 U. S. 79, 30 Sup. Ct. 493, 54 L. Ed. 673, 18 Ann. Cas. 865, affirming 85 Ark. 470, 108 S. W. 838, 26 L. R. A. (N. S.) 482, 122 Am. St. Rep. 47 (where as in some other cases the statute was said by the court to meet an existing condition which was required to be met); of express companies with railroad and telegraph companies as subject to the unit rule; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683, where the court said that there was "doubtless a distinction between the property of railroad and telegraph companies and that of express companies, the physical unity existing in the former is lacking in the latter; but there is the same unity in the use of the entire property for one specific purpose and there are the same elements of value arising from such use." The case involved the constitutionality of an act requiring the apportionment of the value of the property of the express companies among the several counties, in which they did business, in the proportion which the gross receipts in each county bore to the gross receipts in the state and provided for a tax for county purposes on such proportion.

A statute defining express companies as those carrying on the business of transportation under contracts with steamboat companies or railroads did not invidiously discriminate as to express companies by exempting other companies from carrying express matter in vehicles of their own; Pacific Exp Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. Ed. 1035; nor did a state license tax on the business of refining sugar and molasses, by exempting planters and farmers refining their own sugar and molasses, deny equal protection of the laws; American Sugar Refining Co v. Louisiana, 179 U. S. 89, 21 Sup. Ct. 43, 45 L. Ed. 102; nor those which adjust the revenue laws of the state to favor certain industries; Quong Wing v. Kirkendall, 223 U. S. 59, 32 Sup. Ct. 192, 56 L. Ed. 350; nor a collateral inheritance tax imposing a higher rate on strangers in blood and on larger sums; Magoun v. Sav. Bank, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037. The objection must come from one claiming to be discriminated against; Darnell v. Indiana, 226 U. S. 390, 33 Sup. Ct. 120, 57 L. Ed. 267, following New York v. Reardon, 204 U. S. 152, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736, distinguishing Spraigue v. Thompson, 118 U. S. 90, 6 Sup. Ct. 988, 30 L. Ed. 115.

A state statute providing that "all telegraph companies doing business in this state shall be liable in damages for mental anguish or suffering even in the absence of bodily injury or pecuniary loss for negligence in receiving, transmitting or delivering messages" is based upon a reasonable and not an arbitrary classification and is not an unconstitutional discrimination against telegraph companies; Ivy v. Tel. Co., 165 Fed. 371; nor is one which recognizes a difference between ordinary vehicles and electric cars; Detroit, Ft. W. & B. I. Ry. v. Osborn, 189 U. S. 383, 23 Sup. Ct. 540, 47 L. Ed. 860, where it was held that the commissioner of railroads had power to require an electric company to install safety devices and share the cost with the steam railroad on the same street notwithstanding the latter was the junior occupant. The exception of newspapers, etc, in a law forbidding the use of the flag for advertising purposes, does not violate the prohibition; Halter v. Nebraska, 205 U. S. 34, 27 Sup. Ct. 419, 51 L. Ed. 696, 10 Ann. Cas. 525; nor does singling out the milk business, in a city, as a proper subject of regulation; New York v. Van De Carr, 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed 305; nor the selection of mine owners as a class to be subjected to responsibility for the defaults of certain employees; Wilmington Mining Co. v. Fulton, 205 U. S. 60, 27 Sup. Ct. 412, 51 L Ed. 708.

Classification was held proper between itinerant dealers in sewing machines and those selling in regularly established places of business; Singer Sewing Mach. Co. v. Brickell, 199 Fed. 654; and also one of railroad employees as distinct from those of other carriers; Mondou v. R. Co., 223 U. S. 1, 32 Sup. Ct 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; and a statute prohibiting the sale of adulterated milk; St. John v. New York, 201 U. S. 633, 26 Sup. Ct. 554, 50 L. Ed. 896, 5 Ann. Cas. 909; and one regulating the sale of mixed paints and requiring a label showing the ingredients is not an unconstitutional discrimination against the manufacture and sale of paste paint, which is a substantial part of the paint business; Heath & Milligen Mfg. Co. v. Worst, 207 U. S. 338, 28 Sup. Ct. 114, 52 L. Ed. 236; nor a statute forbidding the employment of workingmen for more than eight hours a day in mines and in the smelting reduction or refining of ores and metals; Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780 (and see comments thereon in Johnson, Lytle & Co. v. Mills, 68 S. C. 339, 47 S. E. 695, 1 Ann. Cas. 409); a statute requiring, for the safety of persons employed therein, the owner or agent of every coal mine or colliery to make an accurate map of the workings; Daniels v. Hilgard, 77 Ill. 640; and another prohibiting the employment of persons under eighteen and of women from laboring more than sixty hours a week; Com. v. Mfg. Co., 120 Mass. 383; a statute making eight hours a

day's work for all laborers except farm and domestic; People v. Metz, 193 N. Y. 148, 85 N. E. 1070, 24 L. R. A. (N. S.) 201; one authorizing a state commission to fix the maximum price to be charged for service by gas and electric light companies, and an order of the commission fixing the maximum price of gas or electricity for three years was held to be reasonable and valid, but the further provision that the rate so fixed should continue indefinitely thereafter until fixed anew on complaint made was inequitable and violated the guaranty of equal protection of the laws, inasmuch as the statute did not confer equal rights on both parties, authorizing only certain municipal officers or a designated number of consumers to make complaint, and giving no opportunity to the company at the end of three years, or at any time thereafter, to apply for a new adjustment of rates, Village of Saratoga Springs v. Power Co., 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713. An act requiring the substitution of water-closets for school sinks in tenement houses; Tenement House Dep't of New York v. Moeschen, 179 N. Y. 325, 72 N. E. 231, 70 L. R. A. 704, 103 Am. St. Rep. 910, 1 Ann. Cas. 439; one providing that having in possession more than a quart of liquor, without license to sell, shall be *prima facie* evidence of intent to make an illegal sale thereof; State v. Barrett, 138 N. C. 630, 50 S. E. 506, 1 L. R. A. (N. S.) 626, and note; an act regulating the keeping of employment agencies in cities of first and second class; People v. Warden of City Prison, 183 N. Y. 223, 76 N. E. 11, 2 L. R. A. (N. S.) 859, 5 Ann. Cas. 325; an act imposing heavier punishment on criminals for a second offence; McDonald v. Com., 173 Mass. 322, 53 N. E. 874, 73 Am. St. Rep. 293; Moore v. Missouri, 159 U. S. 673, 16 Sup. Ct. 179, 40 L. Ed. 301; Ughbanks v. Armstrong, 208 U. S. 481, 28 Sup. Ct. 372, 52 L. Ed. 582; one imposing a license tax on all laundries not run by steam; Quong Wing v. Kirkendall, 223 U. S. 59, 32 Sup. Ct. 192, 56 L. Ed. 350; an act requiring certain public service corporations to pay employees each week in lawful money; Lawrence v. R. Co., 80 Vt. 370, 67 Atl. 1091, 15 L. R. A. (N. S.) 350, 13 Ann. Cas. 475; an act imposing on railroad companies the weekly payment of wages; Skinner v. Min. Co., 96 Fed. 735 (but see *infra*); were all held valid.

A statute was held valid requiring an examination of graduates of *foreign* medical colleges as a prerequisite to obtaining a license to practice medicine, the same not being required of graduates of colleges in the state; State v. Currens, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252; and so were statutes recognizing the diploma of some named medical schools as sufficient for permission to practice medicine; Shaw, C. J., in Hewitt v. Charier, 16 Pick. (Mass.) 353; Wright v. Lanckton, 19 Pick. (Mass.) 288; Bibber v. Simpson, 59 Me. 181; Brooks v. State, 88 Ala. 122, 6 South. 902; and statutes accepting as sufficient the approval of a state dental association for practicing dentistry; Wilkins v. State, 113 Ind. 514, 16 N. E. 192; or the fact of practicing in the state at the date of the law as a sufficient reason for exemption from examination to practice medicine, State v. Creditor, 44 Kan. 565, 24 Pac. 346, 21 Am. St. Rep. 306; and one which distinguished between graduates of a university or college authorized to grant diplomas in dental surgery and those of a regular college of dentistry; State v. Knowles, 90 Md. 646, 45 Atl. 877, 49 L. R. A. 695.

The legal duty of persons, firms or corporations operating railroads may be of a peculiar nature, and essentially different from the duties of other persons, firms or corporations, or even different from other common carriers, such, for example, as the fencing of tracks, the operation of trains, construction of tracks, maintenance or operation of terminals, depots, or crossings, protection of employees, and the like. As to such matters peculiar to railroads, they may be separately classified for the purposes of legislative regulation; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585; Missouri Pac. R. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 24 Sup. Ct. 638, 48 L. Ed. 971; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909; Tullis v. R. Co., 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702; Pittsburgh, C., C. & St. L. R. Co. v. Lightheiser, 168 Ind. 438, 78 N. E. 1033, and other cases *supra*. That the peculiar rights, duties and responsibilities of common carriers justifies a classification including only common carriers is held in Seaboard Air Line Ry. v. Seegers, 207 U. S. 73, 28 Sup. Ct. 28, 52 L. Ed. 108; but where the particular subject of legislative regulation discriminates against one class of common carriers (in this case railroad companies were required to pay for the loss of or damage to any shipment the sum of 25 per cent per annum on the principal sum of the claim) it was held unreasonable, as imposing upon one class of carriers a burden to which others are not subjected; Seaboard A. L. R. Co. v. Simon, 56 Fla. 545, 47 South. 1001, 20 L. R. A. (N. S.) 126, 16 Ann. Cas. 1234. Where, however a statute imposed a penalty on railroad companies for delay in the delivery of freight, it was held not an unwarranted discrimination against such carriers as singling them out from all other carriers engaged in the same business, as carriage by water is subject to many contingencies which do not affect carriage by rail-

roads, and it would not be reasonable to subject both alike to the same regulations as to time; McCutchen v. R. Co., 81 S. C. 71, 61 S. E. 1108.

Statutes held void as against both guaranties of the 14th Amendment are those imposing a high privilege tax on lenders of money upon furniture etc.; Rodge v. Kelly, 88 Miss. 209, 40 South. 552, 11 L. R. A. (N. S.) 635, 117 Am. St. Rep. 733; Ex parte Sohncke, 148 Cal. 262, 82 Pac. 956, 2 L. R. A. (N. S.) 813, 113 Am. St. Rep. 236, 7 Ann Cas. 475; (*aliter* as to a statute limiting the amount of interest; State v. Cary, 126 Wis. 135, 105 N. W. 792, 11 L. R. A. [N. S.] 174; or requiring certain specifications in the instrument securing the loan; In re Home Discount Co., 147 Fed. 538; or requiring a license to do the business; City Council of Augusta v. Clark & Co., 124 Ga. 254, 52 S. E. 881; Cowart v. City Council of Greenville, 67 S. C. 35, 45 S. E. 122; State v. Wickenhoefer, 6 Pennewill [Del.] 120, 64 Atl. 273).

Among the acts held void as against the equality clause are those forbidding store orders in payment of wages; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. Rep. 863; State v. Coal & Coke Co., 33 W. Va. 188, 10 S. E. 288, 6 L. R. A. 359, 25 Am. St. Rep. 891; requiring weekly payment of wages by certain corporations; Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. Rep. 206 (*contra*, Skinner v. Mining Co., 96 Fed. 735); imposing on private corporations a liability for injuries to employees as being an abrogation of the fellow servant rule which does not exist in case of individuals; Bedford Quarries Co. v. Bough, 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (N. S.) 418; an ordinance prohibiting the use of property for business on certain streets; City of St. Louis v. Dorr, 145 Mo. 466, 41 S. W. 1091, 46 S. W. 976, 42 L. R. A. 686, 68 Am. St. Rep. 575; an act forbidding combinations in restraint of trade, except agricultural products and live stock in the hands of the producer; In re Grice, 79 Fed. 627; an ordinance allowing four livery stables in the business centre of the city while the fifth and all others must be relegated and confined to a remote district; Town of Crowley v. West, 52 La. Ann. 526, 27 South. 53, 47 L. R. A. 652, 78 Am. St. Rep. 355; a Missouri statute prescribing a different registration law for St. Louis from that of other cities in the state; Mason v. Missouri, 179 U. S. 328, 21 Sup. Ct. 125, 45 L. Ed. 214; a classification for taxation distinguishing between retail and wholesale dealers; Cook v. Marshall County, 196 U. S. 261, 25 Sup. Ct. 233, 49 L. Ed. 471; or between different occupations; Kehrer v. Stewart, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663; an act permitting water from coal mines and tunnels and city sewage to flow into streams and prohibiting individuals and corporations to do the same; Com. v. Emmers, 221 Pa. 298, 70 Atl. 762; an act setting apart mineral springs bored in the rock as a class by themselves; Hathorn v. Gas Co., 128 App. Div. 33, 112 N. Y. Supp. 374; forbidding barbers, and barbers only, from keeping open their shops or working their trade on Sundays; Eden v. People, 161 Ill. 296, 43 N. E. 1108, 32 L. R. A. 659, 52 Am. St. Rep. 365; City of Tacoma v. Krech, 15 Wash. 296, 46 Pac. 255, 34 L. R. A. 68 (*contra*, McClelland v. City of Denver, 36 Colo. 486, 86 Pac. 126, 10 Ann. Cas. 1014; Ex parte Northrup, 41 Or. 489, 69 Pac. 445); providing that no costs should be recovered against the city in an action commenced to set aside any assessment or tax deed, or to prevent the collection of taxes in said city; Durkee v. City of Janesville, 28 Wis. 464, 9 Am. Rep. 500; authorizing suits for injunction to be maintained in favor of certain parties under circumstances differing from those which obtained in respect to all other suits of a similar nature; City of Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128, 8 L. R. A. 808, 20 Am. St. Rep. 123; prohibiting persons engaged in mining and manufacturing from issuing for the payment of labor any order or paper, except such as was specified in the act; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. Rep. 863; limiting recovery in suits brought for libel in certain cases to actual damages as defined in the act; Park v. Free Press Co., 72 Mich. 560, 40 N. W. 731, 1 L. R. A. 599, 16 Am. St. Rep. 544; providing that no damages for injury to persons or property caused by a defect in the highway could be recovered of any city or town by any person, who, at the time the damage was done, was a resident of any country where damage done under similar circumstances was not, by the laws of that country recoverable; Pearson v. City of Portland, 69 Me. 278, 31 Am. Rep. 276.

In Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145, the court said: "The specific regulations for one kind of business which may be necessary for the protection of the public can never be a just ground of complaint because like restrictions are not imposed upon a business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions."

Whether a classification under a statute is a denial of equal protection of the laws "is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition. If the distinctions are genuine the courts cannot declare the distinctions void, though they may not consider

it on a sound basis. The test is not wisdom, but good faith in the classification." Seabolt v. Com'rs of Northumberland County, 187 Pa. 318, 41 Atl. 22; Com. v. Randall, 225 Pa. 197, 73 Atl. 1109.

The effect of the prohibition is that a state is hereby prevented from depriving particular persons or classes of persons of equal and impartial justice under the law; Caldwell v. Texas, 137 U. S. 692, 11 Sup. Ct. 224, 34 L. Ed. 816; as was said by the court in other cases, "no person or class shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances," quoted from Missouri v. Lewis, 101 U. S. 22, 31, 25 L. Ed. 989, in Connolly v. Sewer Pipe Co., 184 U. S. 540, 559, 22 Sup. Ct. 431, 46 L. Ed. 679, where the Illinois Anti-Trust Act of 1893 was held unconstitutional.

Congress may not by penal statutes enforce the guaranty of equal protection of the laws, as it is directed against legislation by the states; U. S. v. Harris, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290.

The classification of crimes should be natural and not arbitrary and should be made with reference to the heinousness of the crime and not to matters disconnected therewith; In re Mallon, 16 Idaho 737, 102 Pac. 374, 22 L. R. A. (N. S.) 1123.

EQUALITY. Likeness in possessing the same rights and being liable to the same duties. See 1 Toullier, nn. 170, 193.

The word *equal* implies, not identity, but duality; the use of one thing as the measure of another. Kentucky & I. Bridge Co. v. R. Co., 37 Fed. 624, 2 L. R. A. 289; Little Rock & M. R. Co. v. R. Co., 63 Fed. 775, 11 C. C. A. 417, 26 L. R. A. 192.

Judges in court, while exercising their functions, are all upon an equality, it being a rule that *inter pares non est potestas:* a judge cannot, therefore, punish another judge of the same court for using any expression in court, although the words used might have been a contempt in any other person. Bacon, Abr., *Of the Court of Sessions, Of Justices of the Peace.*

In contracts, the law presumes that the parties act upon a perfect equality: when, therefore, one party uses any fraud or deceit to destroy this equality, the party grieved may avoid the contract. In case of a grant to two or more persons jointly, without designating what each takes, they are presumed to take in equal proportions; Treadwell v. Bulkley, 4 Day (Conn.) 395, 4 Am. Dec. 225; Henderson v. Womack, 41 N. C. 437; Appeal of Young, 83 Pa. 59.

It is a maxim that when the equity of the parties is equal, the law must prevail; Johnson v. Brown, 3 Call (Va.) 259; and that as between different creditors, equality is equity; De La Vergne v. Evertson, 1 Paige, Ch. (N. Y.) 181, 19 Am. Dec. 411. See Kames, Eq. 75; EQUITY.

Equalization in revenue statutes means to bring the assessment of different parts of a taxing district to the same relative standard; Huidekoper v. Hadley, 177 Fed. 1, 100 C. C. A. 395, 40 L. R. A. (N. S.) 505.

See TAX.

EQUINOX. The name given to two periods of the year when the days and nights are equal; that is, when the space of time between the rising and setting of the sun is one-half of a natural day. The *vernal* equinox occurs about March 21, the *autumnal* about September 23.

EQUIPMENT. Furnishings for the required purposes. In a legacy to be applied toward the rebuilding and equipment of a hospital it was held equipment meant everything required to convert an empty building into a hospital; 75 L. J. Ch. 163.

EQUITABLE ASSETS. Such assets as are chargeable with the payment of debts or legacies in equity, and which do not fall under the description of legal assets.

Those portions of the property which by the ordinary rules of law are exempt from debts, but which the testator has voluntarily charged as assets, or which, being non-existent at law, have been created in equity. Ad. Eq. 254.

They are so called because they can be reached only by the aid and instrumentality of a court of equity, and because their distribution is governed by a different rule from that which governs the distribution of legal assets. 2 Fonb. Eq. b. 4, pt. 2, c. 2, § 1, and notes; 2 Vern. 763; Willes 523; 3 Woodd. Lect. 486; Story, Eq. Jur. § 552.

The doctrine of equitable assets has been much restricted in the United States generally, and has lost its importance in England since the act of 1870, providing that simple contract and specialty creditors are, in future, payable *pari passu* out of both legal and equitable assets; Bisph. Eq. § 531; Benson v. Le Roy, 4 Johns. Ch. (N. Y.) 651; Backhouse v. Patton, 5 Pet. (U. S.) 160, 8 L. Ed. 82; Black v. Scott, 2 Brock. 325, Fed. Cas. No. 1,464; Hopkins v. Morgan's Ex'r, 3 Dana (Ky.) 18; Speed's Ex'r v. Nelson's Ex'r, 8 B. Monr. (Ky.) 499; Henderson v. Burton's Ex'r, 38 N. C. 259.

EQUITABLE ASSIGNMENT. An assignment of a *chose in action*, a thing not *in esse*, as a mortgage of personal property to be acquired in the future, and a mere contingency which, though not good at law, equity will recognize. Bisph. Eq. § 164; 10 H. L. Cas. 209; Butt v. Ellett, 19 Wall. (U. S.) 544, 22 L. Ed. 183; Shephard v. Clark, 38 Ill. App. 66; Bacon v. Bonham, 33 N. J. Eq. 614; East Lewisburg Lumber & Mfg. Co. v. Marsh, 91 Pa. 96. In making such an assignment, no particular form of words is necessary; Buck v. Swazey, 35 Me. 41, 56 Am. Dec. 681; Kessel v. Albetis, 56 Barb. (N. Y.) 362; Noyes v. Brown, 33 Vt. 431; Gage v. Dow, 59 N. H.

383; Bower v. Stone Co., 30 N. J. Eq. 171; but the property must be specifically pointed out; Morrill v. Noyes, 56 Me. 465, 96 Am. Dec. 486; Benj. Sales 62; and there must be an appropriation or separation, and the mere intent to appropriate is not sufficient; Putnam Sav. Bank v. Beal, 54 Fed. 577; Shannon v. Mayor, etc., of Hoboken, 37 N. J. Eq. 123. A valid assignment may be made of a portion of the contract price of a building contracted to be erected by the assignor, but not yet erected, and such assignment need not be written nor accompanied by any transfer of the contract itself; Lanigan's Adm'r v. Bradley & Currier Co., 50 N. J. Eq. 201, 24 Atl. 505. The assignee of a *chose in action* takes it subject to existing equities in favor of third persons, as well as to those between the original parties; Schafer v. Reilly, 50 N. Y. 67; 3 Lead. Cas. Eq. 372, n. Equity will not recognize the assignment of certain kinds of property as against the policy of the law, such as, mere litigious rights, pensions, salaries of judges, commissions of officers in the army or navy, claims against the United States, and the like; 1 E. L. & Eq. 153; Appeal of Elwyn, 67 Pa. 369; L. R. 7 Ch. 109; 8 *id.* 76; Wanless v. U. S., 6 Ct. Cl. 123; Bates v. U. S., 4 Ct. Cl. 569; St. Paul & D. R. Co. v. U. S., 112 U. S. 733, 5 Sup. Ct. 366, 28 L. Ed. 861. The assignment of secured notes carries with it an equitable assignment of the security; Himrod v. Bolton, 44 Ill. App. 516. See ASSIGNMENT; EXPECTANCY.

EQUITABLE CONVERSION. See CONVERSION.

EQUITABLE DEFENCE. A defence to an action on grounds which, prior to the passing of the Common Law Procedure Act (17 and 18 Vict. c. 125), would have been cognizable only in a court of equity. Moz. & W. The codes of procedure and the practice in some of the states likewise permit both a legal and equitable defence to the same action.

EQUITABLE ELECTION. See ELECTION OF RIGHTS.

EQUITABLE ESTATE. A right or interest in land, which, not having the properties of a legal estate, but being merely a right of which courts of equity will take notice, requires the aid of such court to make it available.

These estates consist of uses, trusts, and powers. They possess in some respects the qualities of legal estates in modern law; Davis v. Mason, 1 Pet. (U. S.) 508, 7 L. Ed. 239; Houghton v. Hapgood, 13 Pick. (Mass.) 154; Ege v. Medlar, 82 Pa. 86; Dunscomb v. Dunscomb, 1 Johns. Ch. (N. Y.) 508, 7 Am. Dec. 504; 2 Vern. 536; 1 Bro. C. C. 499; Wms. R. P. 134; 1 Spence, Eq. Jur. 501; 1 Washb. R. P. 130, 161.

A contract for the sale of land gives the buyer an equitable estate; an interest which he can resell, or dispose of by will, etc.; his title is good against every one except a "purchaser for value without notice"; Pollock, First Book of Jurispr. 212.

EQUITABLE ESTOPPEL. See ESTOPPEL.

EQUITABLE MORTGAGE. A lien upon real estate of such a character that it is recognized in equity as a security for the payment of money and is treated as a mortgage. A mortgage of a merely equitable estate or interest is also so called.

Such a mortgage may exist by a deposit with the lender of money of the title-deeds to an estate; Story, Eq. Jur. § 1020; Bisph. Eq. 161; 1 Bro. Ch. C. 269, 17 Ves. 230; Mandeville v. Welch, 5 Wheat. (U. S.) 277, 5 L. Ed. 87; 20 Beav. 607. They must have been deposited as a present, *bona fide* security; 1 Washb. R. P. 503; and the mortgagee must show notice to affect a subsequent mortgagee of record; Hall v. McDuff, 24 Me. 311; 3 Hare 416; Story, Eq. Jur. § 1020. Such mortgages are recognized in some states; Hall v. McDuff, 24 Me 311; Williams v. Stratton, 10 Smedes & M. (Miss.) 418; Hackett v. Reynolds, 4 R. I. 512; but under the usual system of the registration of deeds are of infrequent occurrence.

The doctrine is repudiated in many jurisdictions; Lehman, Durr & Co. v. Collins, 69 Ala. 127; Pierce v. Parrish, 111 Ga 725, 37 S. E. 79; Gothard v. Flynn, 25 Miss. 58; Bloomfield State Bank v. Miller, 55 Neb. 243, 75 N. W. 569, 44 L. R. A. 387, 70 Am. St. Rep. 381; Harper v. Spainhour, 64 N. C. 629; Hackett v. Watts, 138 Mo. 502, 40 S. W. 113; on the ground that it would tend to embarrass lands with secret trusts; Lehman, Durr & Co. v. Collins, 69 Ala. 127; as coming in conflict with the statute of frauds, which provides that all agreements for the sale of land, etc., should be in writing, etc.; Williams v. Stratton, 10 Smedes & M. (Miss) 418; and as being contrary to acts for the recording of mortgages, and for recording liens for public information; Shitz v. Dieffenbach, 3 Pa. 233. In Georgia the code declares that the delivery of title deeds creates no pledge; Davis v. Davis, 88 Ga. 191, 14 S. E. 194. When, however, a written agreement accompanies the deposit of the title deeds, such agreement may become the basis for an equitable lien; Woodruff v. Adair, 131 Ala. 530, 32 South. 515.

No particular formality is necessary in order to make a valid mortgage between the parties thereto; Frick v. Fritz, 115 Ia. 438, 88 N. W. 961, 91 Am. St. Rep. 165. If the transaction resolves itself into a security, whatever may be its form, in equity it is a mortgage; Flagg v. Mann, 2 Sumn. 533, Fed. Cas. No. 4,847. A lien created by contract and not sufficient as a legal mortgage, will generally be regarded as partaking of the nature of an equitable mortgage; Kyle v. Bellenger, 79 Ala. 516. Though a lien may not be expressed in terms, equity will imply a security from

the nature of the transaction, and give effect to it, as such, in furtherance of the agreement of the parties, if there appears an intention to create a security; Wood v. Holly Mfg. Co., 100 Ala. 326, 13 South. 948, 46 Am. St. Rep. 56. The form of the writing is not important provided it sufficiently appears that it was thereby intended to create a security; Howard v. Iron & Land Co., 62 Minn. 298, 64 N. W. 896; and to the same effect, Higgins v. Manson, 126 Cal. 467, 58 Pac. 907, 77 Am. St. Rep. 192; Martin v. Bowen, 51 N. J. Eq. 452, 26 Atl. 823; Dulaney v. Willis, 95 Va. 606, 29 S. E. 324, 64 Am. St. Rep. 815; Hackett v. Watts, 138 Mo. 502, 40 S. W. 113.

To place in the hands of another a deed to real estate, together with a written memorandum stating that the property is pledged to secure the other against loss from becoming a surety for the owner, will create an equitable lien enforceable against the owner's assignee for creditors; In re Snyder, 138 Ia. 553, 114 N. W. 615, 19 L. R. A. (N. S.) 206.

Such a mortgage has been said to exist in favor of the vendor of real estate as security for purchase-money due from the purchaser; in which case a lien is recognized in some jurisdictions; 15 Ves. 339; 1 Bro. Ch. C. 420, 424, n. It is occasionally spoken of as an equitable mortgage; Moreton v. Harrison, 1 Bland (Md.) 491, though it is doubtful if it is to be so considered. It is properly termed vendor's lien, which see. See also LIEN.

EQUITABLE WASTE. See WASTE.

EQUITATURA. In Old English Law. Needful equipments for riding or travelling.

EQUITY. A branch of remedial justice by and through which relief is afforded to suitors in the courts of equity.

In the broad sense in which this term is sometimes used it signifies natural justice.

In a more limited application, it denotes equal justice between contending parties. This is its moral signification, in reference to the rights of parties having conflicting claims; but applied to courts and their jurisdiction and proceedings, it has a more restrained and limited signification.

One division of courts is into courts of law and courts of equity. And equity, in this relation and application, is a branch of remedial justice by and through which relief is afforded to suitors in the courts of equity

The difference between the remedial justice of the courts of common law and that of the courts of equity is marked and material. That administered by the courts of law is limited by the principles of the common law (which are to a great extent positive and inflexible), and especially by the nature and character of the process and pleadings, and of the judgments which those courts can render; because the pleadings cannot fully present all the matters in controversy, nor can the judgments be adapted to the special exigencies which may exist in particular cases. It is not uncommon, also, for cases to fail in those courts, from the fact that too few or too many persons have been joined as parties, or because the pleadings have not been framed with sufficient technical precision.

The remedial process of the courts of equity, on the other hand, admits, and, generally, requires, that all persons having an interest shall be made parties, and makes a large allowance for amendments by summoning and discharging parties after the commencement of the suit The pleadings are usually framed so as to present to the consideration of the court the whole case, with its possible legal rights, and all its equities,—that is, all the grounds upon which the suitor is or is not entitled to relief upon the principles of equity. And its final remedial process may be so varied as to meet the requirements of these equities, in cases where the jurisdiction of the courts of equity exists, by "commanding what is right, and prohibiting what is wrong." In other words, its final process is varied so as to enable the courts to do that equitable justice between the parties which the case demands, either by commanding what is to be done, or prohibiting what is threatened to be done

The principles upon which, and the modes and forms by and through which, justice is administered in the United States, are derived to a great extent from those which were in existence in England at the time of the settlement of this country; and it is therefore important to a correct understanding of the nature and character of our own jurisprudence, not only to trace it back to its introduction here on the early settlement of the colonies, but also to trace the English jurisprudence from its earliest inception as the administration of law, founded on principles, down to that period It is in this way that we are enabled to explain many things in our own practice which would otherwise be entirely obscure. This is particularly true of the principles which regulate the jurisdiction and practice of the courts of equity, and of the principles of equity as they are now applied and administered in the courts of law which at the present day have equitable jurisdiction conferred upon them by statutes passed for that purpose And for the purpose of a competent understanding of the course of decisions in the courts of equity in England, it is necessary to refer to the origin of the equitable jurisdiction there, and to trace its history, inquiring upon what principles it was originally founded, and how it has been enlarged and sustained.

The study of equity jurisprudence, therefore, comprises an inquiry into the origin and history of the courts of equity, the distinctive principles upon which jurisdiction in equity is founded; the nature, character, and extent of the jurisdiction itself; its peculiar remedies, the rules and maxims which regulate its administration; its remedial process and proceedings and modes of defence; and its rules of evidence and practice.

"The meaning of the word 'equity,' as used in its technical sense in English jurisprudence, comes back to this, that it is simply a term descriptive of a certain field of jurisdiction exercised in the English system, by certain courts, and of which the extent and boundaries are not marked by lines founded upon principle so much as by the features of the original constitution of the English scheme of remedial law, and the accidents of its development." Bisph. Eq § 11.

ORIGIN AND HISTORY. The courts of equity may be said to have their origin as far back as the Aula or Curia Regis, the great court in which the king administered justice in person, assisted by his counsellors. Of the officers of this court, the chancellor was one of great trust and confidence, next to the king himself; but his duties do not distinctly appear at the present day. On the dissolution of that court, he exercised separate duties.

On the introduction of seals, he had the keeping of the king's seal, which he affixed to charters and deeds; and he had some authority in relation to the king's grants,—perhaps annulling those which were alleged

to have been procured by misrepresentation or to have been issued unadvisedly.

As writs came into use, it was made his duty to frame and issue them from his court, which, as early as the reign of Henry II., was known as the chancery. And it is said that he exercised at this period a sort of equitable jurisdiction by which he mitigated the rigor of the common law,—to what extent it is impossible to determine. He is spoken of as one who "annuls unjust laws, and executes the rightful commands of the pious prince, and puts an end to what is injurious to the people or to morals,"—which would form a very ample jurisdiction; but it seems probable that this was according to the authority or direction of the king, given from time to time in relation to particular cases. He was a principal member of the king's council, after the conquest, in which, among other things, all applications for the special exercise of the prerogative in regard to matters of judicial cognizance were discussed and decided upon. In connection with the council, he exercised a separate authority in cases in which the council directed the suitors to proceed in chancery. The court of chancery is said to have sprung from this council. But it may be said that it had its origin in the prerogative of the king, by which he undertook to administer justice, on petitions to himself, without regard to the jurisdiction of the ordinary courts, which he did through orders to his chancellor. The great council, or parliament, also sent matters relating to the king's grants, etc., to the chancery; and it seems that the chancellor, although an ecclesiastic, was the principal actor as regards the judicial business which the select or king's council, as well as the great council, had to advise upon or transact. In the reign of Edward I. the power and authority of the chancellor were extended by the statute of Westminster 2d.

In the time of Edward III. proceedings in chancery were commenced by petition or bill, the adverse party was summoned, the parties were examined, and chancery appears as a distinct court for giving relief in cases which required extraordinary remedies, the king having, "by a writ, referred all such matters as were of *grace* to be dispatched by the chancellor or by the keeper of the privy seal."

It may be considered to have been fully established as a separate and permanent jurisdiction, from the 17th of Richard II.

In the time of Edward IV. the chancery had come to be regarded as one of the four principal courts of the kingdom. From this time its jurisdiction and the progress of its jurisdiction become of more importance to us.

It is the tendency of any system of legal principles, when reduced to a practical application, to fail of effecting such justice between party and party as the special circumstances of a case may require, by reason of the minuteness and inflexibility of its rules and the inability of the judges to adapt its remedies to the necessities of the controversy under consideration. This was the case with the Roman law; and, to remedy this, edicts were issued from time to time, which enabled the consuls and prætors to correct "the scrupulosity and mischievous subtlety of the law;" and from these edicts a code of equitable jurisprudence was compiled.

So the principles and rules of the common law, as they were reduced to practice, became in their application the means of injustice in cases where special equitable circumstances existed, of which the judge could not take cognizance because of the precise nature of its titles and rights, the inflexible character of its principles, and the technicality of its pleadings and practice. And in a manner somewhat analogous to the Roman mode of modification, in order to remedy such hardships, the prerogative of the king or the authority of the great council was exercised in ancient times to procure a more equitable measure of justice in the particular case, which was accomplished through the court of chancery.

This was followed by the "*invention*" of the writ of subpœna by means of which the chancery assumed, upon a complaint made directly to that court, to require the attendance of the adverse party, to answer to such matters as should be objected against him. Notwithstanding the complaints of the commons, from time to time, that the course of proceeding in chancery "was not according to the course of the common law, but the practice of the holy church," the king sustained the authority of the chancellor, the right to issue the writ was recognized and regulated by statute, and other statutes were passed conferring jurisdiction where it had not been taken before. In this way, without any compilation of a code, a system of equitable jurisprudence was established in the court of chancery, enlarging from time to time; the decisions of the court furnishing an exposition of its principles and of their application. It is said that the jurisdiction was greatly enlarged under the administration of Cardinal Wolsey, in the time of Henry VIII. The courts of equity also began to act *in personam* and to enjoin plaintiffs in common-law courts from prosecuting inequitable suits. A controversy took place between Lord Chancellor Ellesmere and Lord Coke, Chief Justice of the King's Bench, in the time of James I., respecting the right of the chancellor to interfere with any of the proceedings and judgments of the courts of law. The king sustained the chancellor; and from that time the jurisdiction then claimed has been maintained. See The Earl of Oxford's Case, 1 Ch. Rep. 1, 2 Lead. Cas. Eq. 601; Bisph. Eq. § 407; 1 Poll. & Maitl. 172; 1 Hallam, Const. Hist. 472; CANCELLARIUS.

It is from the study of these decisions and

the commentaries upon them that we are enabled to determine, with a greater or less degree of certainty, the time when and the grounds upon which jurisdiction was granted or was taken in particular classes of cases, and the principles upon which it was administered. And it is occasionally of importance to attend to this; because we shall see that, chancery having once obtained jurisdiction, that jurisdiction continues until expressly taken away, notwithstanding the intervention of such changes in common-law practice and rules as, if they had been made earlier, would have rendered the exercise of jurisdiction in equity incompatible with the principles upon which it is founded.

A brief sketch of some of the principal points in the origin and history of the court of chancery may serve to show that much of its jurisdiction exists independently of any statute, and is founded upon an assumption of a power to do equity, having its first inception in the prerogative of the king, and his commands to do justice in individual cases, extending itself through the action of the chancellor, to the issue of a writ of summons to appear in his court without any special authority for that purpose, and, upon the return of the subpœna, to the reception of a complaint, to a requirement upon the party summoned to make answer to that complaint, and then to a hearing and decree, or judgment, upon the merits of the matters in controversy, according to the rules of equity and good conscience.

It appears as a noticeable fact that the jurisdiction of the chancery proceeded originally from and was sustained by successive kings of England against the repeated remonstrances of the commons, who were for adhering to the common law; though not, perhaps, approving of all its rigors, as equity had been to some extent acknowledged as a rule of decision in the common-law courts.

This opposition of the commons may have been owing in part to the fact that the chancellor was in those days usually an ecclesiastic, and to the existing antipathy among the masses of the people to almost everything Roman.

The master of the rolls, who for a long period was a judicial officer of the court of chancery, second only to the chancellor, was originally a clerk or keeper of the rolls or records, but seems to have acquired his judicial authority from being at times directed by the king to take cognizance of and determine matters submitted to him.

DISTINCTIVE PRINCIPLES. It is quite apparent that some principles other than those of the common law must regulate the exercise of such a jurisdiction. That law could not mitigate its rigor upon its own principles. And as, down to the time of Edward III., and, with few exceptions, to the 21st of Henry VIII., the chancellors were ecclesiastics, much more familiar with the principles of the Roman law than with those of the common law, it was but a matter of course that there should be a larger adoption of the principles of that law; and the study of it is of some importance in this connection. Still, that law cannot be said to be of *authority* even in equity proceedings. The commons were jealous of its introduction. "In the reign of Richard II. the barons protested that they would never suffer the kingdom to be governed by the Roman law, and the judges prohibited it from being any longer cited in the common-law tribunals."

This opposition of the barons and of the common-law judges furnished very sufficient reasons why the chancellors should not profess to adopt that law as the rule of decision. In addition to this, it was not fitted, in many respects, to the state of things existing in England; and so the chancellors were of necessity compelled to act upon equitable principles as expounded by themselves. In later times the common-law judges in that country have resorted to the Roman law for principles of decision to a much greater extent than they have given credit to it.

Since the time of Henry VIII. the chancery bench has been occupied by some of the ablest lawyers which England has produced, and they have given to the proceedings and practice in equity definite rules and forms, which leave little to the personal discretion of the chancellor in determining what equity and good conscience require. The discretion of the chancellor is a judicial discretion, to be exercised according to the principles and practice of the court. See DISCRETION.

The avowed principle upon which the jurisdiction was at first exercised was the administration of justice according to honesty, equity, and conscience,—which last, it is said, was unknown to the common law as a principle of decision.

In the 15th of Richard II. two petitions, addressed to the king and the lords of parliament, were sent to the chancery to be heard, with the direction, "Let there be done, by the authority of parliament, that which right and reason and good faith and good conscience demand in the case."

These may be said to be the general principles upon which equity is administered at the present day.

Although in its origin the result of efforts to avoid hardships sometimes resulting from the rigorous application of legal rules and processes, it has in modern times developed into a settled system; McElroy v. Masterson, 156 Fed. 36, 84 C. C. A. 202; and as was said in [1903] 2 Ch. 174, 195, it is not a court of conscience, in the sense that there being no question of legal liability, ripe for discussion, there was no occasion for judicial action.

The distinctive principles of the courts of equity are shown, also, by the classes of cases in which they exercise jurisdiction and

give relief,—allowing it to be sought and administered through process and proceedings of less formality and technicality than are required in proceedings at law. This, however, has its limitations, some of its rules of pleading in defence being quite technical. And it is another peculiar feature that the relief is administered by a decree or process adapted to the exigencies of the particular case.

It was said by Jessel, M. R., in L. R. 13 Ch. D. 696, 710: "It must not be forgotten that the rules of the court of equity are not, like the rules of the common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved, and refined from time to time. In many cases we know the names of the chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but they were invented. Take such things as these: The separate use of a married woman, the restraint on alienation, the modern rule against perpetuities, and the rules of equitable waste. We can name the chancellors who first invented them, and state the date when they were first introduced into equity jurisprudence; and, therefore, in cases of this kind, the older precedents in equity are of very little value. The doctrines are progressive, refined and improved; and if we want to know what the rules of equity are, we must look, of course, rather to the more modern than the more ancient cases."

JURISDICTION. It is difficult to reduce a jurisdiction so extensive and of such diverse component parts to a rigid and precise classification. But an approach to it may be made. The general nature of the jurisdiction has already been indicated. It exists—

First, for the purpose of compelling a *discovery* from the defendant, respecting the truth of the matters alleged against him, by an appeal to his conscience to speak the truth. The discovery is enforced by requiring an answer to the allegations in the plaintiff's complaint, in order that the plaintiff may use the matters disclosed in the answer, as admissions of the defendant, and, thus, evidence is secured for the plaintiff, either in connection with and in aid of other evidence offered by the plaintiff, or to supply the want of other evidence on his part; or it may be to avoid the expense to which the plaintiff must be put in procuring other evidence to sustain his case.

When the plaintiff's complaint, otherwise called a bill, prays for relief in the same suit, the statements of the defendant in his answer are considered by the court in forming a judgment upon the whole case. A party, if uncertain to what specific relief he is entitled, may frame his bill with an alternative prayer for relief; Hardin v. Boyd, 113 U. S. 756, 763, 5 Sup. Ct. 771, 28 L. Ed. 1141; but he may not recognize a transaction and pray for the enforcement of his rights thereunder and ask that it be set aside as a fraud, particularly without specifying in what particular; Cella v. Brown, 144 Fed. 742, 75 C. C. A. 608.

To a certain extent, the statements of the defendant in answer to the bill are evidence for himself also.

The discovery which may be required is not only of facts within the knowledge of the defendant, but may, also, be of deeds and other writings in his possession.

The right to discovery is not, however, an unlimited one: as, for instance, the defendant is not bound to make a discovery which would subject him to punishment, nor, ordinarily, to discover the title upon which he relies in his defence; nor is the plaintiff entitled to require the production of all papers which he may desire to look into. The limits of the right deserve careful consideration. The discovery, when had, may be the foundation of equitable relief in the same suit, in which case it may be connected with all the classes of cases in which relief is sought; or it may be for the purpose of being used in some other court, in which case the jurisdiction is designated as an assistant jurisdiction. Since the new statutes on the admission of evidence of parties, bills of discovery have practically fallen into disuse. See DISCOVERY.

Second, where the courts of law do not, or did not, recognize any right, and therefore could give no remedy, but where the courts of equity recognize equitable rights and, of course, give equitable relief. This has been denominated the exclusive jurisdiction. In this class are *trusts, charities, forfeited and imperfect mortgages, penalties* and *forfeitures, imperfect consideration.*

Uses and trusts have been supposed to have had their origin in the restrictions laid by parliament upon conveyances in mortmain,—that is, to the church for charitable, or rather for ecclesiastical, purposes.

It may well be that the doctrine of equitable titles and estates, unknown to the common law but which could be enforced in chancery, had its origin in conveyances to individuals for the use of the church in order to avoid the operation of these restrictions,—the conscience of the feofee being bound to permit the church to have the use according to the design and intent of the feoffment.

But conveyances in trust for the use of the church were not by any means the only cases in which it was desirable to convey the legal title to one for the use of another. In many instances, such a conveyance offered a convenient mode of making provision for those who, from any circumstances, were unable to manage property advantageously for themselves, or to whom it was not desirable to give the control of it; and the

propriety in all such cases of some protection to the beneficiary is quite apparent. The court of chancery, by recognizing that he had an interest of an equitable character which could be protected and enforced against the holder of the legal title, exercised a jurisdiction to give relief in cases which the courts of common law could not reach, consistently with their principles and modes of procedure.

Mortgages, which were originally estates conveyed upon condition, redeemable if the condition were performed at the day, but absolute on non-performance, the right to redeem being thereby forfeited, owe their origin, in the modern conception of the term, to the court of chancery; which, acting at first, perhaps, in some cases where the non-performance was by mistake or accident, soon recognized an equitable right of redemption after the day, as a general rule, in order to relieve against the forfeiture. This became known as an equity of redemption,—a designation, in use at the present day, although there has long been a legal right of redemption in such cases.

Relief against penalties and forfeitures also was formerly obtained only through the aid of the court of chancery.

In most of the cases which fall under this head, courts of law now exercise a concurrent jurisdiction.

Third, where the courts of equity administer equitable relief for the infraction of legal rights, in cases in which the courts of law, recognizing the right, give a remedy according to their principles, modes, and forms, but the remedy is deemed by equity inadequate to the requirements of the case. This is sometimes called the concurrent jurisdiction This class embraces *fraud*, *mistake*, *accident*, *administration*, *legacies*, *contribution*, and cases where justice and conscience require the *cancellation*, *or reformation of instruments*, *or the rescission*, *or the specific performance of contracts*. (See these several titles.)

The adequate remedy at law to oust equitable jurisdiction must be as certain, prompt and efficient to attain the ends of justice as the remedy in equity; Boyce v. Grundy, 3 Pet. (U. S.) 210, 7 L. Ed. 655; Williams v. Neely, 134 Fed. 1, 67 C. C. A. 171, 69 L. R. A. 232; Castle Creek Water Co. v. City of Aspen, 146 Fed. 8, 76 C. C. A. 516, 8 Ann. Cas. 660; for example, an action requiring submission to jury of matters requiring accounting is insufficient; Castle Creek Water Co. v. City of Aspen, 146 Fed. 8, 76 C. C. A. 171, 8 Ann. Cas. 660; Butler Bros. Shoe Co. v. Rubber Co., 156 Fed. 1, 84 C. C. A. 167; and so, for another instance, if damages for breach of contract are too uncertain to be assessed the failure to provide for liquidated damages does not give an equitable cause for action; Utz v. Wolf, 159 Fed. 696, 86 C. C. A. 564.

The courts of law relieve against fraud, mistake, and accident where a remedy can be had according to their modes and forms; but there are many cases in which the legal remedy is inadequate for the purposes of justice.

The modes of investigation and the peculiar remedies of the courts of equity are often of the greatest importance in this class of cases.

Transfers to defeat or delay creditors, and purchases with notice of an outstanding title, come under the head of fraud.

It has been said that there is a less amount of evidence required to prove fraud, in equity, than there is at law; but the soundness of that position may well be doubted.

The court does not relieve in all cases of accident and mistake.

In many cases the circumstances are such as to require the cancellation or reformation of written instruments or the specific performance of contracts, instead of damages for the breach of them.

Fourth, where the court of equity administers a remedy because the relations of the parties are such that there are impediments to a legal remedy. *Partnership* furnishes a marked instance. *Joint-tenancy and marshalling of assets* may be included. (See these titles.)

From the nature of a partnership, there are impediments to suits at law between the several partners and the partnership in relation to matters involved in the partnership; and impediments of a somewhat similar character exist in other cases.

Fifth, where the forms of proceeding in the courts of law are not deemed adequate to the due investigation of the particulars and details of the case. This class includes *account*, *partition*, *dower*, *ascertainment of boundaries*.

Sixth, where, from a relation of trust and confidence, or from consanguinity, the parties do not stand on equal ground in their dealings with each other: as, the relations of *parent* and *child*, *guardian* and *ward*, *attorney* and *client*, *principal* and *agent*, *executor* or *administrator* and *legatees* or *distributees*, *trustee* and *cestui que trust*, etc.

Seventh, where the court grant relief from considerations of public policy, because of the mischief which would result if the court did not interfere. *Marriage-brokage agreements*, *contracts in restraint of trade*, *buying* and *selling public offices*, *agreements founded on corrupt considerations*, *usury*, *gaming*, and *contracts with expectant heirs*, are of this class.

Many cases of this and the preceding class are sometimes considered under the head of *constructive fraud*.

Eighth, where a party from incapacity to take care of his rights is under the special

care of the court of equity, as *infants, idiots,* and *lunatics.*

This is a branch of jurisdiction of very ancient date, and of a special character, said to be founded in the prerogative of the king.

In this country the court does not, in general, assume the guardianship, but exercises an extensive jurisdiction over guardians, and may hold a stranger interfering with the property of an infant accountable as if he were guardian.

Ninth, where the court recognizes an obligation on the part of a husband to make provision for the support of his wife, or to make a settlement upon her, out of the property which comes to her by inheritance or otherwise.

This jurisdiction is not founded upon either trust or fraud, but is derived originally from the maxim that he who asks equity should do equity.

Tenth, where the equitable relief appropriate to the case consists in restraining the commission or continuance of some act of the defendant, administered by means of a writ of *injunction.*

Eleventh, the court aids in the procuration or preservation of evidence of the rights of a party, to be used, if necessary, in some subsequent proceeding, the court administering no final relief.

See a full note as to equity jurisdiction in 19 Am. L. Reg. N. S. 563.

PECULIAR REMEDIES, AND THE MANNER OF ADMINISTERING THEM. Under this head are *—specific performance of contracts; re-execution, reformation, rescission,* and *cancellation* of contracts or instruments; restraint by *injunction; bills quia timet; bills of peace;* protection of a party liable at law, but who has no interest, by bill of *interpleader; election* between two inconsistent legal rights; *conversion; priorities; tacking; marshalling of securities; application of purchase-money.* (See these several titles.)

In recent periods, the principles of the court of chancery have in many instances been acted on and recognized by the courts of law (as, for instance, in relation to mortgages, contribution, etc.) so far as the rules of the courts of law admitted of their introduction.

In some states the entire jurisdiction has, by statute, been conferred upon the courts of law, who exercise it as a separate and distinct branch of their authority, upon the principles and according to the modes and forms previously adopted in chancery.

In a few, the jurisdictions of the courts of law and of equity have been amalgamated, and an entire system has been substituted, administered more according to the principles and modes and forms of equity than the principles and forms of the common law.

It is to be noted, however, that the equity system is not abolished or abridged by the changes in the courts which administer it, and it is held that the constitutional grant of equity powers to certain courts cannot be impaired by the legislature, so that acts requiring the trial by jury of facts in chancery cases are unconstitutional; Brown v. Kalamazoo Circuit Judge, 75 Mich. 274, 42 N. W. 827, 5 L. R. A. 226, 13 Am. St. Rep. 438; Callanan v. Judd, 23 Wis. 343. So, in an act requiring the court of chancery to direct an issue in suits to quiet title, a provision authorizing that court to set aside a verdict and order a new trial is not unconstitutional as violating the division of powers between courts of equity and law; Brady v. Realty Co., 70 N. J. Eq. 748, 64 Atl. 1078, 8 L. R. A. (N. S.) 866, 118 Am. St. Rep. 778. See an admirable discussion of this head of equitable jurisdiction in the opinion of Phillips, J., in Big Six Development Co. v. Mitchell, 138 Fed. 286, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332, affirmed in the Circuit Court of Appeals in s. c. 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332 (with note), and certiorari denied in *id.*, 199 U. S. 606, 26 Sup. Ct. 746, 50 L. Ed. 330.

RULES AND MAXIMS. In the administration of the jurisdiction, there are certain rules and maxims which are of special significance.

First. Equity having once had jurisdiction of a subject-matter because there was no remedy at law, or because the remedy is inadequate, *does not lose the jurisdiction* merely because the courts of law afterwards give the same or a similar relief.

Second. Equity follows the law. This is true as a general maxim. Equity follows the law, except in relation to those matters which give a title to equitable relief because the rules of law would operate to sanction fraud or injustice in the particular case.

Third. Between equal equities, the law must prevail. The ground upon which the suitor comes into the court of equity is that he is entitled to relief there. But if his adversary has an equally equitable case, the complainant has no title to relief.

It has been said that the maxim that where equities are equal relief will be denied does not apply to a suit to reform a deed; Union Ice Co. v. Doyle, 6 Cal. App. 284, 92 Pac. 112.

Fourth. Equality is equity: applied to cases of contribution, apportionment of moneys due among those liable or benefited by the payment, abatement of claims on account of deficiency of the means of payment, etc.

Fifth. He who seeks equity must do equity. A party cannot claim the interposition of the court for relief unless he will do what it is equitable should be done by him as a condition precedent to that relief. See the eleventh maxim, *infra.*

See General Proprietors of Eastern Division of New Jersey v. Force's Ex'rs, 72 N. J. Eq. 56, 127, 68 Atl. 914. This maxim applies

to one seeking equitable relief, whether he be plaintiff or defendant; Union Stock Yards Nat. Bank v. Day, 79 Neb. 845, 113 N. W. 530 (where in an action of ejectment an equitable defence was pleaded). It was also applied in refusing to permit plaintiff to dismiss after having acquired advantage from the suit; Johnson City Southern Ry. Co. v. R. Co., 148 N. C. 59, 61 S. E. 683.

Sixth. Equity considers that as done which ought to have been done. A maxim of much more limited application than might at first be supposed from the broad terms in which it is expressed. In favor of parties who would have had a benefit from something contracted to be done, and who have an equitable right to have the case considered as if it had been done, equity applies this maxim. Illustration: when there is an agreement for a sale of land, and the vendor dies, the land may be treated as money, and the proceeds of the sale, when completed, go to the distributees of personal estate, instead of to the heir. If the vendee die before the completion of the purchase, the purchase-money may be treated as land for the benefit of the heir.

Seventh. Equity will not permit a wrong without a remedy.

Eighth. Equity regards the spirit and not the letter, the intent and not the form, the substance rather than the circumstance, as it is variously expressed by different courts. See Moring v. Privott, 146 N. C. 558, 60 S. E. 509; Clinton v. Winnard, 135 Ill. App. 274; Curtin v. Krohn, 4 Cal. App. 131, 87 Pac. 243.

Ninth. Where equities are equal the first in time prevails—qui prior est in tempore, potior est in jure.

Tenth. Equity imputes an intention to perform an obligation.

Eleventh. He who comes into equity must come with clean hands. The inequity which deprives a suitor of a right to relief in a court of equity is not general iniquitous conduct unconnected with the cause of action, but evil practice or wrong-doing in the particular matter as to which judicial protection or redress is sought; Liverpool & London & Globe Ins. Co. v. Clunie, 88 Fed. 160; Woodward v. Woodward, 41 N. J. Eq. 224, 4 Atl. 424; or where there is some duty springing from the relations of the parties; Cunningham v. Pettigrew, 169 Fed. 335, 94 C. C. A. 457. A good illustration is found in Toledo Computing Scale Co. v. Scale Co., 142 Fed. 919, 74 C. C. A. 89, where it was held that the manufacturers of a "butcher's computing scale," who advertised it as making a profit for butchers by counting fractions against the purchaser, could not have equitable relief against a competitor for calling attention to the fraudulent character of such scale. See CLEAN HANDS.

Twelfth. It is to the vigilant and not to those who sleep upon their rights, that Equity leads assistance—vigilantibus et non dormientibus equitas subvenit. This is a mere adaptation or limitation of the general maxim, *vigilantibus et non dormientibus jura* (or *leges*) *subveniunt.*

Thirteenth. Equity acts in personam and not in rem. As a result of this principle, jurisdiction of the person gives power to affect by the decree property outside the jurisdiction; Willhite v. Skelton, 149 Fed. 67, 78 C. C. A. 635; Massie v. Watts, 6 Cra. (U. S.) 159, 3 L. Ed. 181; Carpenter v. Strange, 141 U. S. 105, 11 Sup. Ct. 960, 35 L. Ed. 640; Selover, Bates & Co. v. Walsh, 226 U. S. 112, 33 Sup. Ct. 69, 57 L. Ed. 146. This power was notably exercised in the great case of Penn v. Lord Baltimore, 1 Ves. 444, where the Chancellor made a decree for the specific performance of a contract relating to land in the colonies.

Fourteenth. Equity delights to do justice and not by halves.

Most of these maxims are given by Francis or Story and all but the first and last by Indermaur and Pomeroy; all of them are recognized and stated by approved writers on Equity and they are here collected as including all those principles which have been by competent authority selected as fundamental and designated as maxims of equity.

Story only enumerates the first six, and of those he states the first, not as a maxim strictly so termed, but as a doctrine of equity. The last one is given by Story in his Eq. Pl. § 72, where he quotes it from Talbott, Ld Ch., in 3 P. Wms 331.

Francis sets out fourteen maxims, as he terms them, but those numbered by him VII, VIII, IX, XI, XII, inclusive, are not stated *supra*, because they are mere statements of equitable rules of decision, or doctrines, rather than maxims. These, briefly stated, are that he who received the benefit should make, and he who sustained the loss should receive, satisfaction; Francis, Max. IV & V; that equity relieves against accidents, prevents mischief and multiplicity of suits; *id.* VII, VIII, IX; and that equity will not suffer a double satisfaction nor permit advantage to be taken of a forfeiture when satisfaction can be made; *id.* XI, XII.

To the above authorities reference may be made for the cases which gave early expression to these maxims, which have been so universally recognized as fundamental that, except in a few cases of special application or limitation, the citations are omitted.

REMEDIAL PROCESS, AND DEFENCE. A suit in equity is ordinarily instituted by a complaint, or petition, called a bill; and the defendant is served with a writ of summons, requiring him to appear and answer, called a subpœna.

In Pennsylvania the suit is begun by filing and serving a copy of the bill, the subpœna having been dispensed with by a rule of court.

The forms of proceedings in equity are

such as to bring the rights of all persons interested before the court; and, as a general rule, all persons interested should be made parties to the bill, either as plaintiffs or defendants.

There may be amendments of the bill; or a supplemental bill,—which is sometimes necessary when the case is beyond the stage for amendment.

In case the suit fails by the death of the party, there is a bill of revivor, and after the cause is disposed of, there may be a bill of review.

The defence is made by demurrer, plea, or answer. If the defendant has no interest, he may disclaim. Discovery may be obtained from the plaintiff, and further matter may be introduced, by means of a cross-bill, brought by the defendant against the plaintiff, in order that it may be considered at the same time. Issue is joined by the plaintiff's filing a replication to the defendant's answer; Sto. Eq. Pl. § 878 n. But the new Equity Rule 31 (1913) of the United States Supreme Court (33 Sup. Ct. xxvii) does away with a replication unless required by a special order of the court. New or affirmative matter in the answer is deemed to be denied by the plaintiff. If the answer includes a set-off or counter-claim, the party against whom it is asserted must reply within 10 days. In some states, as Delaware, the replication is entered as of course without filing; and special replications are now as a rule not used.

The final process is directed by the decree, which being a special judgment can provide relief according to the nature of the case. This is sometimes by a perpetual injunction.

There may be a bill to execute, or to impeach, a decree.

EVIDENCE AND PRACTICE. The rules of evidence, except as to the effect of the answer and the taking of the testimony, are, in general, similar to the rules of evidence in cases at law. But to this there are exceptions.

The answer, if made on oath, is evidence for the defendant, so far as it is responsive to the calls of the bill for discovery, and as such it prevails, unless it is overcome by something more than what is equivalent to the testimony of one witness. If without oath, it is a mere pleading, and the allegations stand over for proof.

If the answer is incomplete or improper, the plaintiff may except to it, and it must, if the exceptions are sustained, be so amended as to be made sufficient and proper.

The case may be heard on the bill and answer, if the plaintiff so elects, and sets the case down for a hearing thereon.

If the plaintiff desires to controvert any of the statements in the answer, he files a replication by which he denies the truth of the allegations in the answer, and testimony is taken.

The testimony, according to the former practice in chancery, is taken upon interrogatories filed in the clerk's office, and propounded by the examiner, without the presence of the parties. But this practice has been very extensively modified. Equity rule 46 (33 Sup. Ct. xxxi) of the United States Supreme Court (in effect February 1, 1913), provides that the testimony of witnesses shall be taken in open court except as otherwise provided by statute or by the equity rules.

If any of the testimony is improper, there is a motion to suppress it.

The case may be referred to a master to state the accounts between the parties, or to make such other report as the case may require; and there may be an examination of the parties in the master's office. Exceptions may be taken to his report.

The hearing of the case is before the equity judge, who may make interlocutory orders or decrees, and who pronounces the final decree or judgment. There may be a rehearing, if sufficient cause is shown.

At the present day, wherever equity forms are used, the proceedings have become very much simplified.

The system of two distinct sets of tribunals administering different rules for the adjudication of causes has been changed in England. By the Judicature Acts of 1873 and 1876, the courts of law and equity were consolidated into one Supreme Court of Judicature, in which equitable rights and defences are recognized in all proceedings to the same effect as a court of chancery would have recognized them before the passing of the act. Equitable remedies are substantially applied.

In America, the federal courts have equity powers under the constitution, where an adequate remedy at law does not exist; R. S. § 723; Smyth v. Banking Co., 141 U. S. 656, 12 Sup. Ct. 113, 35 L. Ed. 891; Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873. The adequate remedy at law, which is the test of the equitable jurisdiction of the courts of the United States, is that which existed when the judiciary act of 1789 was adopted, unless subsequently changed by congress; McConihay v. Wright, 121 U. S. 201, 7 Sup. Ct. 940, 30 L. Ed. 932. The equity jurisdiction conferred on the federal courts is the same as that of the former court of chancery in England, is subject to neither limitation nor restraint by state legislation, and is uniform throughout the states; Mississippi Mills v. Cohn, 150 U. S. 202, 14 Sup. Ct. 75, 37 L. Ed. 1052; Kirby v. R. Co., 120 U. S. 130, 7 Sup. Ct. 430, 30 L. Ed. 569; Smith v. Burnham, 2 Sumn. 612, Fed. Cas. No. 13,018; but these are only the powers which are judicial in their character, and not such as belong to the chancellor of England as the keeper of the conscience of the king, as representing his person and administering as his agent his pre-

rogatives and duties; Gallego's Ex'rs v. Attorney General, 3 Leigh (Va.) 450, 24 Am. Dec. 650.

In the administration of that jurisdiction the federal courts are not to "look only to the statutes of congress. The principles of equity exist independently of, and anterior to, all congressional legislation, and the statutes are either enunciations of those principles or limitations upon their application in particular cases"; U. S. v. Lumber Co., 200 U. S. 321, 26 Sup. Ct. 282, 50 L. Ed. 499, where it was held that even "in passing upon transactions between the government and its vendees" the principles of equity must be borne in mind and applied, and that although, while the legal title to land remains in the government, the holder of an equitable title may not be able to enforce his equity by reason of inability to sue the government except upon contract, he may protect that equity when sued by the government.

Equity jurisdiction does not accrue to the federal courts because it is thought that the law as administered in equity is more favorable to a party seeking its aid than the law as administered by the courts of a state in which such party has been sued, Cable v. Ins. Co., 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188.

Courts of chancery were constituted in some of the states after 1776; and in Pennsylvania, for a short time, as early as 1723, a court of chancery existed; see Rawle, Eq. in Penna.; and in most of the colonies before the revolution; Bisph. Eq. § 14, n.

In colonial Pennsylvania, and until the act of June 16, 1836, equity, in the absence of courts of equity, was administered through common-law forms. It is pointed out in Rawle, Equity in Penna., that it was not first and only in Pennsylvania that common-law courts enforced equitable principles, and he mentions several heads going back to the Year Books. But the Pennsylvania courts administered under common-law forms all the principles and doctrines of equity. The earliest reported case is Riche v. Broadfield, 1 Dall. 16, 1 L. Ed. 18 (1768). The subject is treated in Laussat's Equity in Penna. and by Sidney G. Fisher in 1 L. Q. R. 455 (2 Sel. Essays in Anglo-Amer. L. H. 810). See also Brightly, Eq. in Penna. A paper in the Report of the Texas Bar Assoc. (1896) states that "Texas was unquestionably the first state in the American Union controlled by common-law principles to abolish the distinction between law and equity in the enforcement of private rights and redress of private wrongs."

At the present time, distinct courts of chancery now exist in but six states: Alabama, Arkansas, Delaware, Mississippi, New Jersey and Tennessee. In the greater number of states chancery powers are exercised by judges of common-law courts according to the ordinary practice in chancery. In the remaining states, the distinctions between actions at law and suits in equity have been abolished, but certain equitable remedies are still administered under the statutory form of the civil action. See Bisph. Eq. § 15.

EQUITY EVIDENCE. See EQUITY; EVIDENCE.

EQUITY PLEADING. See EQUITY; ANSWER; BILL; DEMURRER; PLEA.

EQUITY OF REDEMPTION. A right which the mortgagor of an estate has of redeeming it after it has been forfeited at law by the non-payment at the time appointed of the money secured by the mortgage to be paid, by paying the amount of the debt, interest, and costs.

The phrase of equity of redemption is indiscriminately, though often incorrectly, applied to the right of the mortgagor to regain his estate, both *before* and *after* breach of condition In North Carolina, by statute, the former is called a *legal right of redemption*, and the latter the *equity of redemption*, thereby keeping a just distinction between these estates; 1 N C, Rev. Stat. 266, State v. Laval, 4 McCord (S. C.) 340 The interest is recognized at law for many purposes: as a subsisting estate, although the mortgagor in order to enforce his right is obliged to resort to an equitable proceeding, administered generally in courts of equity, but in some states by courts of law, Anderson v. Neff, 11 S. & R. (Pa.) 23; or in some states may pay the debt and have an action at law, Jackson v. Davis, 18 Johns (N. Y.) 7, Den v. Spinning, 6 N. J. L. 466, Morgan's Lessee v. Davis, 2 H. & McH. (Md.) 9.

This estate in the mortgagor is one which he may devise or grant; 2 Washb. R. P. 40; and which is governed by the same rules of devolution or descent as any other estate in lands; Chamberlain v. Thompson, 10 Conn. 243, 26 Am. Dec. 390; 2 Hare 35. He may mortgage it; Bigelow v. Willson, 1 Pick. (Mass.) 485; and it is liable for his debts, Fox v. Harding, 21 Me. 104; Pierce v. Potter, 7 Watts. (Pa.) 475; Freeby v. Tupper, 15 Ohio 467; United States Bank v. Huth, 4 B. Monr. (Ky.) 429; Curtis v. Root, 20 Ill. 53; Punderson v. Brown, 1 Day (Conn.) 93, 2 Am. Dec. 53; State v. Laval, 4 McCord (S. C.) 336; but see Palmer v. Foote, 7 Paige Ch. (N. Y.) 437; Goring's Ex'x v. Shreve, 7 Dana (Ky.) 67; Powell v. Williams, 14 Ala. 476, 48 Am. Dec. 105; Baldwin v. Jenkins, 23 Miss. 206; Buck v. Sherman, 2 Dougl. (Mich.) 176; Thornton v. Pigg, 24 Mo. 240; Van Ness v. Hyatt, 13 Pet. (U. S.) 294, 10 L. Ed. 168; and in many other cases, if the mortgagor still retains possession, he is held to be the owner; 5 Gray 470, note; Parish v. Gilmanton, 11 N. H. 293; City of Norwich v. Hubbard, 22 Conn. 587; Ralston v. Hughes, 13 Ill. 469.

Any person who is interested in the mortgaged estate, or any part of it, having a legal estate therein, or a legal or equitable lien thereon, provided he comes in as privy in estate with the mortgagor, may exercise the right; including heirs, devisees, executors, administrators, and assignees of the

mortgagor; Sheldon v. Bird, 2 Root (Conn.) 509; Craik's Adm'rs v. Clark, 3 N. C. 22; Merriam v. Barton, 14 Vt. 501; Coombs v. Warren, 34 Me. 89; Bell v. Mayor, etc., of New York, 10 Paige, Ch. (N. Y.) 49; Smith v. Manning, 9 Mass. 422; H. B. Claflin Co. v. Banking Co., 113 Fed. 958; Bovey De Laittre Lumber Co. v. Tucker, 48 Minn. 223, 50 N. W. 1038; subsequent incumbrancers; Burnett v. Denniston, 5 Johns. Ch. (N. Y.) 35; Cooper v. Martin, 1 Dana (Ky.) 23; Farnum v. Metcalf, 8 Cush. (Mass.) 46; Hoover v. Johnson, 47 Minn. 434, 50 N. W. 475; judgment creditors; Dabney v. Green, 4 Hen. & M. (Va.) 101, 4 Am. Dec. 503; Elliot v. Patton, 4 Yerg. (Tenn.) 10; Kent v. Laffan, 2 Cal. 595; Bowen v. Van Gundy, 133 Ind. 670, 33 N. E. 687; Schroeder v. Bauer, 140 Ill. 135, 29 N. E. 560; tenants for years; Loud v. Lane, 8 Metc. (Mass.) 517; even if only tenant of a portion of the land mortgaged; Kebabian v. Shinkle, 26 R. I. 505, 59 Atl. 743; one having an easement; Bacon v. Bowdoin, 22 Pick. (Mass.) 401; one having an interest as a partner; Emerson v. Atkinson, 159 Mass. 356, 34 N. E. 516; a jointress; 1 Vern. 190; 2 Wh. & T. Lead. Cas. 752; dowress and tenant by curtesy; Eaton v. Simonds, 14 Pick. (Mass.) 98; Jackson v. Mfg. Co., 86 Ark. 591, 112 S. W. 161, 20 L. R. A. (N. S.) 454; Davis v. Mason, 1 Pet. (U. S.) 503, 7 L. Ed. 239; Gatewood v. Gatewood, 75 Va. 407; Wilkins v. French, 20 Me. 111; Denton v. Nanny, 8 Barb. (N. Y.) 618; Wade v. Miller, 32 N. J. L. 296; Hart v. Chase, 46 Conn. 207; Robinson v. Lakenan, 28 Mo. App. 135 (but to be endowed by the law, the widow must pay the mortgage; Rossiter v. Cossit, 15 N. H. 38); a widow who had joined in the mortgage; McArthur v. Franklin, 15 Ohio St. 485; Posten v. Miller, 60 Wis. 494, 19 N. W. 540; McGough v. Sweetser, 97 Ala. 361, 12 South. 162, 19 L. R. A. 470; 34 U. C. Q. B. 389; or where the husband had mortgaged prior to the marriage; Merselis v. Van Riper, 55 N. J. Eq. 618, 38 Atl. 196; or where she had joined in the mortgage but the equity of redemption was reserved to the husband alone; [1894] 2 Ch. 133; and where she had released her dower, she was entitled to redeem as dowress, though the dower had not been assigned; Gibson v. Crehore, 5 Pick. (Mass.) 146 (followed in McCabe v. Bellows, 1 Allen [Mass.] 269); Simonton v. Gray, 34 Me. 50; also where she did not join in the mortgage, which was for purchase money; May v. Fletcher, 40 Ind. 575 (overruling Fletcher v. Holmes, 32 *id.* 497); Wing v. Ayer, 53 Me. 138; Wheeler v. Morris, 2 Bosw. (N. Y.) 524; and she may redeem where the husband alone had given a second mortgage; Hays v. Cretin, 102 Md. 695, 62 Atl. 1028, 4 L. R. A. (N. S.) 1039; so a widow, though not entitled under the statute to redeem as such, may do so when the mortgage property is the family homestead; Walden v. Speigner, 87 Ala. 379, 6 South. 81; and where she had not joined in a mortgage during coverture, she was held, on a bill to redeem, dowable of the whole premises and not merely in the equity of redemption and she was not required to redeem; Opdyke v. Bartles, 11 N. J. Eq. 133.

A wife is entitled by reason of her inchoate right of dower to redeem during the lifetime of her husband; Lamb v. Montague, 112 Mass. 352; Mackenna v. Trust Co., 184 N. Y. 411, 77 N. E. 721, 3 L. R. A. (N. S.) 1068, 112 Am. St. Rep. 620, 6 Ann. Cas. 471; Gatewood v. Gatewood, 75 Va. 413; and her equity of redemption is stronger in case of homestead property; Moore v. Smith, 95 Mich. 71, 54 N. W. 701; Smith v. Hall, 67 N. H. 200, 30 Atl. 409.

A mortgagee for adequate value and in good faith may acquire the equity of redemption; Wilson v. Vanstone, 112 Mo. 315, 20 S. W. 612; and a second mortgagee who purchases such equity is entitled to any payments that may have been made on the first mortgage, but which were not credited thereon; Babbitt v. McDermott (N. J.) 26 Atl. 889.

Where the necessary amount has been tendered within the statutory period for redemption, it can be followed up by suit to redeem at any time before the right to bring suit is barred; Wood v. Holland, 57 Ark. 198, 21 S. W. 223. A court of equity has the discretion governed by the equities of each case, to name terms on which it will let in a party to redeem; Hannah v. Davis, 112 Mo 599, 20 S. W. 686.

Where a bill to redeem is filed before the debt is due, it must be dismissed, although the hearing is not had until after the debt is due; Bernard v. Toplitz, 160 Mass. 162, 35 N. E. 673, 39 Am. St. Rep. 465.

Any provision or stipulation in a mortgage which will fetter or "clog the equity of redemption" (as the phrase goes) is void; [1902] A. C. 24; [1903] A. C. 253; and these two cases in the House of Lords may be considered as settling the question in England after many and varying decisions since the leading case of Howard v. Harris, 1 Vern. 33. The same doctrine prevails in this country; Parmer v. Parmer, 74 Ala. 285; Walling v. Aiken, 1 McMul. Eq. (S. C.) 1; Clark v. Henry, 2 Cow. (N. Y.) 324; Quartermous v. Kennedy, 29 Ark. 544; Baxter v. Child, 39 Me. 110; Stover's Heirs v. Bounds' Heirs, 1 Ohio St. 107; Bayley v. Bailey, 5 Gray (Mass.) 505; Hazeltine v. Granger, 44 Mich. 503, 7 N. W. 74. The "equity of redemption is inseparably connected with a mortgage and the right cannot be abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage"; Peugh v. Davis, 96 U. S. 332, 24 L. Ed. 775; the rule protecting the equity of redemption is "well settled" and "characterized by a jealous and salutary policy," and a sale by the mortgagor must be almost as closely examined as one

by a *cestui que trust;* Villa v. Rodriguez, 12 Wall. (U. S.) 323, 20 L. Ed. 406.

The doctrine that equity will not permit the parties to a mortgage to "clog the equity of redemption" is only another expression of the maxim "once a mortgage always a mortgage"; 1 Vern. 33 (where the latter expression seems to have originated).

The provision is invalid, not only if contained in the mortgage, but also if there is a separate contract which is part of the same transaction, whether in writing or by parol; Mooney v. Byrne, 163 N. Y. 86, 57 N. E. 163; Turpie v. Lowe, 114 Ind. 37, 15 N. E. 834; Wright v. Bates, 13 Vt. 341; [1904] A. C. 323; 11 Ir. Ch. 367; [1892] A. C. 1; Plummer v. Ilse, 41 Wash. 5, 82 Pac. 1009, 2 L. R. A. (N. S.) 627, 111 Am. St. Rep. 997; First Nat. Bank of David City v. Sargeant, 65 Neb. 594, 91 N. W. 595, 59 L. R. A. 296; Ind. Rep. Allahabad Series 559 (where the rule was enforced in India); though not necessarily of the same date; Batty v. Snook, 5 Mich. 231; Tennery v. Nicholson, 87 Ill. 464; Bradbury v. Davenport, 114 Cal. 593, 46 Pac. 1062, 55 Am. St. Rep. 92; but a separate and independent agreement, *subsequent* to the mortgage, depriving the mortgagor, in effect, of his right to redeem, has been held valid; [1902] A. C. 461; Gleason's Adm'x v. Burke, 20 N. J. Eq. 300; Wynkoop v. Cowing, 21 Ill. 570; Bradbury v. Davenport, 120 Cal. 152, 52 Pac. 301; Trull v. Skinner, 17 Pick. (Mass.) 213 (where the subject is discussed by Shaw, C. J.); Shouler v. Bonander, 80 Mich. 531, 45 N. W. 487; McMillan v. Jewett, 85 Ala. 478, 5 South. 145; though it "will be closely scrutinized to guard the debtor from oppression" and there must be a new and adequate consideration; Linnell v. Lyford, 72 Me. 280; Brown v. Gaffney, 28 Ill. 149; and indeed cases may be found which treat the subject wholly with respect to the question whether the transaction was unconscionable; Pritchard v. Elton, 38 Conn. 434; or deny that there is any fiduciary relation between a mortgagor and mortgagee; De Martin v. Phelan, 115 Cal. 538, 47 Pac. 356, 56 Am. St. Rep. 115. See MORTGAGE.

Many of the cases cited *supra* are those of absolute conveyances held to be mortgages carrying an equity of redemption and this fact may be shown by parol; Strong v. Stewart, 4 Johns. Ch. (N. Y.) 167; Cullen v. Carey, 146 Mass. 50, 15 N. E. 131; Miller v. Thomas, 14 Ill. 428.

So where the parties to a mortgage negotiated an absolute sale for a larger amount, with conveyance in fee and a lease with an option to purchase if rent were punctually paid, a default was held fatal to the right to repurchase; 1 Russ. & M. 506; it being no debt, but a conditional sale, which carries no equity of redemption; Conway v. Alexander, 7 Cra. (U. S.) 218, 3 L. Ed. 321; Haynie v. Robertson, 58 Ala. 37; Robinson v. Cropsey, 2 Edw. Ch. (N. Y.) 138; but the transaction will be closely scrutinized; Spence v. Steadman, 49 Ga. 133. See a full discussion of the "The Clog on the Equity of Redemption" by Prof. Bruce Wyman in 21 Harv. L. Rev. 459.

Where a mortgagee of the equitable interest of the beneficiary in a resulting trust purchased the equity of redemption of such beneficiary, they did not merge where such merger was not for the interest of the mortgagee; Coryell v. Klehm, 157 Ill. 463, 41 N. E. 864.

A foreclosure sale without redemption may be decreed in case of a mortgage of a railroad or a business plant, of which the value is in keeping it in its entirety; Hammock v. Loan & Trust Co., 105 U. S. 77, 26 L. Ed. 1111; even when a state statute provides that all sales of real estate shall be subject to redemption; Pacific Northwest Packing Co. v. Allen, 116 Fed. 312, 54 C. C. A. 648; Sioux City Terminal R. & Warehouse Co. v. Trust Co., 82 Fed. 124, 27 C. C. A. 73.

See MORTGAGE.

EQUIVALENT. Of the same value. Sometimes a condition must be literally accomplished in *forma specifica;* but some may be fulfilled by an equivalent, *per æquipolens,* when such appears to be the intention of the parties: as, if I promise to pay you one hundred dollars, and then die, my executor may fulfill my engagement; for it is equivalent to you whether the money be paid to you by me or by him. Rolle, Abr. 451. For its meaning in patent law, see Tyler v. Boston, 7 Wall. (U. S.) 327, 19 L. Ed. 93; PATENT.

EQUIVOCAL. Having a double sense.

In the construction of contracts, it is a general rule that when an expression may be taken in two senses, that shall be preferred which gives it effect. See CONSTRUCTION; INTERPRETATION.

EQUULEUS (Lat.). A kind of rack for extorting confessions. Encyc. Lond.

ERASURE. The obliteration of a writing. The effect of an erasure is not *per se* to destroy the writing in which it occurs, but is a question for the jury, and will render the writing void or not, under the same circumstances as an interlineation. See 11 Co. 88; 5 Bingh. 183; Bailey v. Taylor, 11 Conn. 531, 29 Am. Dec. 321; Solibellas v. Reeves' Curator, 3 La. 56; Brooks v. Allen, 62 Ind. 401; Whittlesey v. Hughes, 39 Mo. 34; Cole v. Hills, 44 N. H. 227; Page v. Donaher, 43 Wis. 221; Dodge v. Haskell, 69 Me. 429; Simpson v. Davis, 119 Mass. 269, 20 Am. Rep. 324. See ALTERATION; INTERLINEATION.

ERCISCUNDUS (Lat. *erciscère*). For dividing. *Familiæ erciscundæ actio.* An action for dividing a way, goods, or any matter of inheritance. Vicat, Voc. Jur.; Calvinus, Lex.

ERECTION. This term is generally used of a completed building. McGary v. People, 45 N. Y. 153; Shaw v. Hitchcock, 119 Mass. 254; but it is held to be of wider import; it may include trade fixtures; 17 W. R. 153; or a fence; 36 J. P. 743.

The repairing, alteration, and enlarging, or the removal from one spot to another, of a building, is not erection within the meaning of a statute forbidding the erection of wooden buildings; Brown v. Hunn, 27 Conn. 332, 71 Am. Dec. 71; Douglass v. Com., 2 Rawle (Pa.) 262; Martine v. Nelson, 51 Ill. 422. The moving of a building is not an erection of a building; Trask v. Searle, 121 Mass. 229; but the painting of a house has been held to be part of the erection; Martine v. Nelson, 51 Ill. 422. See LIEN.

EREGIMUS (Lat. we have erected). A word proper to be used in the creation of a new office by the sovereign. Bac. Abr. *Offices*, E.

EROSION. The gradual eating away of the soil by the operation of currents or tides. Mulry v. Norton, 100 N. Y. 433, 3 N. E. 581, 53 Am. Rep. 206. See RIPARIAN PROPRIETOR; ACCRETION.

EROTIC MANIA, EROTOMANIA. In Medical Jurisprudence. A name given to a morbid activity of the sexual propensity. It is a disease or morbid affection of the mind, which fills it with a crowd of voluptuous images, and hurries its victim to acts of the grossest licentiousness, often in the absence of any lesion of the intellectual powers. It is to be distinguished from Nymphomania and Satyriasis. See Krafft-Ebing, Psycopathia Sexualis, Chaddock's ed.; MANIA.

ERRANT (Lat. *errare*, to wander). Wandering. Justices in eyre were formerly said to be *errant* (itinerant). Cowell.

ERRONEOUS. Deviating from the law. Thompson v. Doty, 72 Ind. 338.

ERROR. A mistake in judgment or deviation from the truth in matters of fact, and from the law in matters of judgment.

Error of fact will excuse the party acting illegally but honestly, in many cases, will avoid a contract in some instances, and when mutual will furnish equity with a ground for interference; Norton v. Marden, 15 Me. 45, 32 Am. Dec. 132; Wheadon v. Olds, 20 Wend. (N. Y.) 174; Eagle Bank of New Haven v. Smith, 5 Conn. 71, 13 Am. Dec. 37; Bond v. Hays, 12 Mass. 36. See MISTAKE; IGNORANCE.

Error in law will not, in general, excuse a man for its violation. A contract made under an error in law is, in general, binding; for, were it not so, error would be urged in almost every case; Bisph. Eq. 187. 2 East 469. See Storrs v. Barker, 6 Johns. Ch. (N. Y.) 166, 10 Am. Dec. 316; Waite v. Leggett, 8 Cow. (N. Y.) 195, 18 Am. Dec. 441; 2 J. & W. 249; 1 Y. & C. 232; 6 B. & C. 671. But a foreign law will for this purpose be considered as a fact; Norton v. Marden, 15 Me. 45, 32 Am. Dec. 132; Haven v. Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353; 2 Pothier, Obl. 369, etc.

ERROR, CONFESSION OF. See APPEAL AND ERROR.

ERROR, WRIT OF. See APPEAL AND ERROR.

ESCAMBIO. A writ granting power to an English merchant to draw a bill of exchange on another who is in a foreign country. Reg. Orig. 194. Abolished by Stats. 59 Geo. III. c. 49, and 26 & 27 Vict. c. 125.

ESCAMBIUM. Exchange, which see.

ESCAPE. The deliverance of a person who is lawfully imprisoned, out of prison, before such a person is entitled to such deliverance by law. Colby v. Sampson, 5 Mass. 310.

The voluntarily or negligently allowing any person lawfully in confinement to leave the place. 2 Bish. Cr. L. § 917.

Departure of a prisoner from custody before he is discharged by due process of law.

Escape takes place without force; prison-breach, with violence; rescue, through the intervention of third parties.

Actual escapes are those which take place when the prisoner in fact gets out of prison and unlawfully regains his liberty.

Constructive escapes take place when the prisoner obtains more liberty than the law allows, although he still remains in confinement. Bac. Abr. *Escape* (B); Plowd. 17; Colby v. Sampson, 5 Mass. 310; Steere v. Field, 2 Mas. 486, Fed. Cas. No. 13,350.

Negligent escape takes place when the prisoner goes at large, unlawfully, either because the building or prison in which he is confined is too weak to hold him, or because the keeper by carelessness lets him go out of prison.

Voluntary escape takes place when the prisoner has given to him voluntarily any liberty not authorized by law. Colby v. Sampson, 5 Mass. 310; Lowry v. Barney, 2 D. Chip. (Vt.) 11.

When a man is imprisoned in a proper place under the process of a court having jurisdiction in the case, he is lawfully imprisoned, notwithstanding the proceedings may be irregular; 1 Crawf. & D. 203; see Com. v. Barker, 133 Mass. 399; but if the court has not jurisdiction the imprisonment is unlawful, whether the process be regular or otherwise. Bacon, Abr. *Escape in Civil Cases* (A 1); Scott v. Shaw, 13 Johns. (N. Y.) 378; Ontario Bank v. Hallett, 8 Cow. (N. Y.) 192; Austin v. Fitch, 1 Root (Conn.) 288. See State v. Leach, 7 Conn. 452, 18 Am. Dec. 113.

Letting a prisoner, confined under final process, out of prison for any, even the

shortest, time, is an escape, although he afterwards return; 2 W. Bla. 1048; Browning's Ex'r v. Rittenhouse, 40 N. J. L. 230; Servis v. Marsh, 38 Fed. 794; De Grand v. Hunnewell, 11 Mass. 160; and this may be (as in the case of imprisonment under a *ca. sa.*) although an officer may accompany him; 3 Co. 44 *a;* 1 B. & P. 24. Where an insolvent debtor whose discharge has been refused by the court, surrenders himself to the keeper of a prison, who will not receive him because he has no writ or record showing that he is an insolvent debtor and is not in charge of an officer, the surrender is not sufficient to make the keeper liable for the debt in case of the debtor's escape; Saunders v. Perkins, 140 Pa. 102, 21 Atl. 257.

In criminal cases, the prisoner is indictable for a misdemeanor, whether the escape be negligent or voluntary; 2 Hawk. Pl. C. 189; Cro. Car. 209; State v. Doud, 7 Conn. 384; State v. Brown, 82 N. C. 585; and the officer is also indictable; Martin v. State, 32 Ark. 124; State v. Ritchie, 107 N. C. 857, 12 S. E. 251. If the offence of the prisoner was a felony, a voluntary escape is a felony on the part of the officer; 2 Hawk. Pl. C. c. 19, § 25; if negligent, it is a misdemeanor only in any case; 2 Bish Cr. L. § 925. See State v. Sparks, 78 Ind. 166. It is the duty of the officer to rearrest after an escape; Clark v. Cleveland, 6 Hill (N. Y.) 344; People v. Hanchett, 111 Ill. 90; 1 Russ. Cr. 572.

In civil cases, a prisoner may be arrested who escapes from custody on mesne process, and the officer will not be liable if he rearrest him; Cro. Jac. 419; but if the escape be voluntary from imprisonment on mesne process, and in any case if the escape be from final process, the officer is liable in damages to the plaintiff, and is not excused by retaking the prisoner; 2 B. & A. 56; Doane v. Baker, 6 Allen (Mass.) 260. Nothing but an act of God or the enemies of the country will excuse an escape. Fairchild v. Case, 24 Wend. (N. Y.) 381; Rainey's Ex'rs v. Dunning, 6 N. C. 386; Shattuck v. State, 51 Miss. 575. See Lash v. Ziglar, 27 N. C. 702; Shuler v. Garrison, 5 W. & S. (Pa.) 455.

Attempts to escape by one accused of crime are presumptive of guilt, and the conduct of a defendant in arrest, either before or after being accused of the crime, may be competent evidence against him, as indicating a guilty mind; Bowles v. State, 58 Ala. 335; People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401. Where a prisoner being in the corridor of a jail unlocks a door between the corridor and a cell, and thence escapes, he commits prison breach; Randall v. State, 53 N. J. L. 488, 22 Atl. 46. An unsuccessful attempt at prison breach is indictable; People v. Rose, 12 Johns. (N. Y.) 339.

On an escape and recapture, the party has a day in court to deny his identity as the person sentenced; Com. v. Hill, 185 Pa. 397, 39 Atl. 1055.

See Whart. Cr. L. § 1667; 26 Am. L. Reg. 345; FLIGHT; PRISONER.

ESCAPE WARRANT. A warrant addressed to all sheriffs throughout England, to retake an escaped prisoner for debt, and commit him to gaol till the debt is satisfied.

ESCHEAT (Fr. *escheoir*, to happen). An accidental reverting of lands to the original lord.

Coke says the word "signifieth properly when by accident the lands fall to the lord of whom they are holden, in which case we say the fee is escheated." And he enumerates the instances of failure of blood on the one hand and *per delictum tenentis*, i. e., for felony, on the other. Co. Litt. 13a.

An obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency; in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee; 2 Bla. Com. 244 et seq.

Care must be taken to distinguish between forfeiture of lands to the king and this species of escheat to the lord, which by reason of their similitude in some circumstances, and because the crown is very frequently the immediate lord of the fee, and therefore entitled to both, have been often confounded together. Forfeiture of lands, and of whatever else the offender possessed, was the doctrine of the old Saxon law, as a part of punishment for an offence, and does not at all relate to the feodal system, nor is the consequence of any seigniory or lordship paramount; but, being a prerogative vested in the crown, was neither superseded nor diminished by the introduction of the Norman tenures, a fruit and consequence of which, escheat must undoubtedly be reckoned. Escheat therefore operates in subordination to this more ancient and superior law of forfeiture.

The doctrine of escheat upon attainder, taken singly, is this. That the blood of the tenant, by the commission of any felony (under which denomination all treasons were formerly comprised), is corrupted and stained and the original donation of the feud is thereby determined, it being always granted to the vassal on the implied condition of *dum bene se gesserit*. Upon the thorough demonstration of which guilt, by legal attainder, the feodal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out forever. In this situation the law of feodal escheat was brought into England at the Conquest; and in general superadded to the ancient law of forfeiture In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revest in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage. In case of treason, forever; in case of other felony, for only a year and a day; after which time it goes to the lord in the regular course of escheat, as it would have done to the heir of the felon in case the feodal tenures had never been introduced. 2 Bla. Com. 251.

See YEAR, DAY AND WASTE.

The estate itself which so reverted was called an escheat. Spelman. The term included also other property which fell to the lord; as, trees which fell down, etc. Cowell.

All escheats under the English laws are declared to be strictly feudal and to import

the extinction of tenure. Wr. Ten. 115; 1 W. Bla. 123.

It was not until after the statute of *quia emptores* that the title of the reversioner became distinct from that of the lord who took by escheat. Before that statute "revert" and "escheat" were used indiscriminately to express the fact that the land went back to the lord who gave it; 3 Holdsw. Hist. E. L. 115.

That if the ownership of a property become vacant, the right must necessarily subside into the whole community in which, when society first assumed the elements of order and subordination, it was originally vested, is a principle which lies at the foundation of property; 4 Kent 425, and this seems to be the universal rule of civilized society. Domat, *Droit Pub* lib. 1, t 6, s. 3, n. 1. See 10 Viner, Abr. 139; 1 Bro. Civ. Law 250; Lock v. Lloyd's Estate, 5 Binn. (Pa.) 375; McCaughal v. Ryan, 27 Barb. (N. Y.) 376, People v. Folsom, 5 Cal. 373; Armstrong v. Bittinger, 47 Md 103, Appeal of Olmsted, 86 Pa. 284. It was recognized by Justinian, and by the civil law an officer was appointed, called the escheator, whose duty it was to assert the right of the emperor to the *hæreditas jacens* or *caduca* when the owner left no heirs or legatee to take it Code 10, 10, 1. By the earlier English usages the estate of the vassal escheated to his lord when there were no representatives in the seventh degree, and this custom was later extended to include male descendants *ad infinitum;* Lib Feud. I 1, s 4

In case of escheat by failure of heirs, by corruption of blood, or by conviction of certain crimes, the feud fell back into the lord's hands by a termination of the tenure. 1 Washb R. P. 24 At the present day, in England, escheat can only arise from the failure of heirs. By the Felony Act, 33 and 34 Vict. c. 23, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony, or *felo de se*, shall cause any forfeiture or escheat; 3 Steph. Com. 660. An action of ejectment, commenced by writ of summons, has taken the place of an ancient *writ of escheat*, against the person in possession on the death of the tenant without heirs.

The early English law is thus stated. "By the law of England, before the Declaration of Independence, the lands of a man dying intestate and without lawful heirs reverted by escheat to the king as the sovereign lord; but the king's title was not complete without an actual entry upon the land, or judicial proceedings to ascertain the want of heirs and devisees, 8 App. Cas. 767, 772; 2 Bla. Com. 245. The usual form of proceeding for this purpose was by an inquisition or inquest of office before a jury, which was had upon a commission out of the court of chancery, but was really a proceeding at common law; and, if it resulted in favor of the king, then, by virtue of ancient statutes, any one claiming title in the lands might, by leave of that court, file a traverse in the nature of a plea or defense to the king's claim, and not in the nature of an original suit; Lord Somers in 14 How. St. Tr. 1, 83; 6 Ves. 809; 4 Madd. 281; L. R. 2 Eq. 95; People v. Cutting, 3 Johns. (N. Y.) 1; Briggs v. Light-Boat Upper Cedar Point, 11 Allen (Mass) 157, 172. The inquest of office was a proceeding *in rem;* when there was proper office found for the king, that was notice to all persons who had claims to come in and assert them; and, until so traversed, it was conclusive in the king's favor; Bayley, J., in 12 East 96, 103; 16 Vin. Abr. 86, pl. 1." Hamilton v. Brown, 161 U. S 256, 16 Sup. Ct. 585, 40 L. Ed. 691.

In mediæval law there was an escheat to the lord *propter defectum sanguinis*, if the tenant died without heirs; and *propter delictum tenentis*, if the tenant committed any gross breach of the feudal bond. The right to escheat depended on tenure alone.

In this country, however, the state steps in, in the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction; 4 Kent 424. See Matthews v. Ward, 10 Gill & J. (Md.) 450; 3 Dane, Abr. 140. And it escheats to the state as part of its common ownership, either by mere operation of law, or upon an inquest of office according to the law of the particular state; Hamilton v. Brown, 161 U. S. 256, 16 Sup. Ct. 585, 40 L. Ed. 691; Smith v. Doe, 111 N. Y. Supp. 525. See 21 Harv. L. Rev. 452. It is, perhaps, questionable how far this incident exists at common law in the United States generally. In Maryland the lord proprietor was originally the owner of the land, as the crown was in England. In most of the states the right to an escheat is secured by statute; 4 Kent 424; 1 Washb. R. P. 24, 27; 2 *id.* 443.

Such a statute is "not unconstitutional, but only asserts an indisputable, but long-neglected and dormant right in the commonwealth;" Com. v. Blanton's Ex'rs, 2 B. Mon. (Ky.) 393; Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 430; and the state, in a just and proper exercise of its police power, may declare new causes of escheat of lands within its territory; Com. v. R. Co., 124 Ky. 497, 99 S. W. 596.

In Indiana and Missouri it was held that at common law, if a bastard died intestate, his property escheated; Doe v. Bates, 6 Blackf. (Ind.) 533; Bent's Adm'r v. St. Vrain, 30 Mo. 268; but this is now otherwise by statute in those states and in most of the others. See BASTARD. So at common law there was an escheat if the purchaser or heirs of the decedent were aliens; Montgomery v. Dorion, 7 N. H. 475; Co. Litt. 2 *b;* but it is usually otherwise by the statutes of the several states. See ALIEN.

Hereditaments which, although they may be held in fee-simple, are not strictly subjects of tenure, such as fairs, markets, commons in gross, rents charge, rents seck, and the like, do not escheat, but become extinct upon a failure of heirs of the tenant; Challis, R. P. 30.

The method of proceeding, and *subject-matter*. To determine the question of escheat a proceeding must be brought in the nature of an inquest of office or office found; Jackson v. Adams, 7 Wend. (N. Y.) 367; People v. Folsom, 5 Cal. 373; Gresham v. Rickenbacher, 28 Ga. 227; State v. Tilghman, 14 Ia. 474; Louisville School Board v. King, 127 Ky. 824, 107 S. W. 247, 15 L. R. A. (N. S.) 379; In re Miner's Estate, 143 Cal. 194, 76 Pac. 968; and to give the inquisition the effect of a lien the same must be filed, as the record of it is the only competent evidence by which title by escheat can be established; Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 430; People v. Cutting, 3 Johns. (N. Y.) 1; and such action must also be taken to recover escheated lands held in adverse possession; after which an entry must be made

to give the state a right of possession; Jackson v. Adams, 7 Wend. (N. Y.) 367; Com. v. Hite, 6 Leigh (Va.) 588, 29 Am. Dec. 226; Reid v. State, 74 Ind. 252; and the facts which support the escheat must be stated; Catham v. State, 2 Head (Tenn.) 553; Appeal of Ramsey, 2 Watts (Pa.) 228, 27 Am. Dec. 301; a bill of information must be filed and a *scire facias* issued against all alleged to have, hold, claim, or possess such estate; Wallahan v. Ingersoll, 117 Ill. 123, 7 N. E. 519; and the names of all persons in possession of the premises, and all who were known to claim an interest therein, must be set forth and the *scire facias* served on them personally; to all other persons constructive notice is sufficient; *id.* In Texas, no proceedings can be had, except under and according to an act of the legislature; Wiederanders v. State, 64 Tex. 133; Hamilton v. Brown, 161 U. S. 256, 16 Sup. Ct. 585, 40 L. Ed. 691.

In many of the states, however, the doctrine in force is, that land cannot remain without an owner; it must vest somewhere, and on the death of an intestate without heirs it becomes *co instante* the property of the state; Mooers v. White, 6 Johns. Ch. (N. Y.) 360; Hall v. Gittings' Lessee, 2 Harr. & J. (Md.) 112; State v. Reeder, 5 Neb. 203; Montgomery v. Dorion, 7 N. H. 475; Rubeck v. Gardner, 7 Watts (Pa.) 455; Haigh v. Haigh, 9 R. I. 26; Colgan v. McKeon, 24 N. J. L. 566. In Wallahan v. Ingersoll, 117 Ill. 123, 7 N. E. 519, it was held that on the death of an intestate without heirs, the title to his estate devolves immediately upon the state, but, in order to make that title available, it must be established in the manner prescribed by law by proceedings in the proper court, in the name of the people, for the purpose of establishing by judicial determination the title of the state. After a long lapse of time an inquest will be presumed; Doe v. Roe, 26 Ga. 582. A right of action for the recovery of lands is vested in the state at the death of the owner whose property escheats; Johnston v. Spicer, 107 N. Y. 185, 13 N. E. 753. Persons claiming as heirs may come in under the statute and obtain leave to make up an issue at law to have their rights determined; Ex parte Williams, 13 Rich. (S. C.) 77; In re Alton's Estate, 220 Pa. 258, 69 Atl. 902; State v. Knott, 54 Fla. 138, 44 South. 744. The legislature is under no constitutional obligation to leave the title to such property in abeyance, and a judicial proceeding for ascertaining an escheat on due notice, actual to known, and constructive to all possible unknown, claimants, is due process of law; and a statute, providing for such proceeding does not impair the obligation of any contract, contained in the grant under which the former owner held whether from the state or a private person; Hamilton v. Brown, 161 U. S. 256, 275, 16 Sup. Ct. 585, 40 L. Ed. 691.

Not only do estates in possession escheat, but also those in remainder, if vested; People v. Conklin, 2 Hill (N. Y.) 67; and equitable as well as legal estates; Cross v. De Valle, 1 Wall. (U. S.) 5, 17 L. Ed. 515; Atkins v. Kron, 40 N. C. 207; 3 Washb. R. P. 446; Matthews v. Ward, 10 Gill & J. (Md.) 443; 4 Kent 424; (in many states this provision is statutory, but the rule in England is contrary; 1 Eden 177;) also those held in trust, when the trust expires; In re Linton's Estate, 198 Pa. 438, 48 Atl. 298; and an equity of redemption; Seitz v. Messerschmitt, 117 App. Div. 401, 102 N. Y. Supp. 732; and lands subject to dower, and the right is not waived by the appearance of the attorney-general of the state in an action to admeasure dower; Smith v. Doe, 111 N. Y. Supp. 525; also property devised by a void will, and the state is the proper party to contest the will; State v. Lancaster, 119 Tenn. 638, 105 S. W. 858, 14 L. R. A. (N. S.) 991, 14 Ann. Cas. 953; and duly constituted officials may intervene; Gombault v. Public Adm'r, 4 Bradf. Sur. (N. Y.) 226; *contra*, Hopf v. State, 72 Tex. 281, 10 S. W. 589.

Proceedings to traverse an inquest. An inquisition is traversable, the traverser being considered as a defendant, and being only required to show failure of title in the state and bare possession in himself; People v. Cutting, 3 Johns. (N. Y.) 1; *contra*, in Pennsylvania, where such traverser is in the position of plaintiff in ejectment and must show a title superior to the commonwealth; proceedings may be brought by any one claiming an interest and including an administratrix in possession; Com. v. Compton, 137 Pa. 138, 20 Atl. 417; In re Alton's Estate, 220 Pa. 258, 69 Atl. 902; it is a proceeding at law and not in equity; In re Fenstermacher v. State, 19 Or. 504, 25 Pac. 142; and the court of common pleas has jurisdiction over it; Com. v. Compton, 137 Pa. 138, 20 Atl. 417; the traverser being allowed to begin and conclude to the jury; Com. v. Desilver, 2 Ashm. (Pa.) 163. And if only one of those notified appear, he is entitled to a separate trial of his traverse; In re Malone's Estate, 21 S. C. 435; but such traverser has no precedence over others on the dockets of cases; Lance v. Dobson, Riley (S. C.) 301.

When all the members of a partnership have died intestate and without heirs, the property escheats to the state, but the heirs or kindred of any one of the partners may traverse the inquisition; Com. v. Land Co, 57 Pa. 102.

The law favors the presumption of the existence of heirs, and there must be something shown by those claiming by virtue of escheat to rebut that presumption; Appeal of Ramsey, 2 Watts (Pa.) 228, 27 Am. Dec. 301; State v. Teulon's Estate, 41 Tex. 249; but see *contra*, Brown v. State, 36 Tex. 283; Hammond's Lessee v. Inloes, 4 Md. 138, University of North Carolina v. Harrison, 90 N. C. 385, overruling as to this point University

of North Carolina v. Johnston, 2 N. C. 373. Proceedings for an escheat for want of heirs or devisees, like ordinary provisions for the administration of his estate, presuppose that he is dead; if he is still alive, the court is without jurisdiction and its proceedings are null and void, even in a collateral proceeding; Hamilton v. Brown, 161 U. S. 256, 267, 16 Sup. Ct. 585, 40 L. Ed. 691, citing Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896; Hall v. Claiborne, 27 Tex. 217.

Equity cannot enjoin proceedings to have an escheat declared, where every question presented could be decided on a traverse should such escheat be found; Appeal of Olmsted, 86 Pa. 284; and an *amicus curiæ* cannot move to quash an inquisition, unless he has an interest himself or represents some one who has; Dunlop v. Com., 2 Call. (Va.) 284.

Disposition of escheated lands by the state. Where the state takes the title of escheated land, it is entitled to the rights of the last owner; therefore, such lands cannot be taken up by location as vacant land; Hughes v. State, 41 Tex. 13; or be regarded as ungranted land; but it must be sold pursuant to the statute; Bodden v. Speigner, 2 Brev. (S. C.) 321; Straub v. Dimm, 27 Pa. 36; and a grant of such lands by the state before office found is valid; Rubeck v. Gardner, 7 Watts (Pa.) 456; Colgan v. McKeon, 24 N. J. L. 566; McCaughal v. Ryan, 27 Barb. (N. Y.) 376; as is also a grant of land to escheat *in futuro;* Nettles v. Cummings, 9 Rich. Eq. (S. C.) 440; but no authority is vested in officers of the land office to issue warrants for the taking up of escheated lands. After seven years from the inquisition they shall be sold at auction; Straub v. Dimm, 27 Pa. 36; and the power to order the sale of the property is vested in the district court; Hughes v. State, 41 Tex. 10. The disposition of funds secured by the sale of such property must be strictly in conformity with the state statute; and the legislature of a state can pass no act diverting the funds to another purpose; State v. Reeder, 5 Neb. 203; where the constitution gives to the legislature the power to provide methods to enforce the forfeiture, there can be no proceedings until the legislature acts; Wiederanders v. State, 64 Tex. 133.

In addition to the escheat for want of heirs of a decedent, there are in some states provisions for forfeiture to the state of lands held by corporations under certain circumstances; in Kentucky, property of a corporation not necessary to its business and held for more than five years is forfeited for the benefit of schools; Com. v. Property Co., 128 Ky. 790, 109 S. W. 1183; in Pennsylvania it is provided that land held by or for corporations, either directly or indirectly, unless specially authorized by statute, shall "escheat" to the state, but land belonging to a mining company, all of whose stock was held by a railroad company, was held not to be within the mischief of such statute; Com. v. R. Co., 132 Pa. 591, 19 Atl. 291, 7 L. R. A. 634. Corporate property so forfeited is taken however subject to the payment of debts of the corporation; War Eagle Consol. Min. Co. v. Dickie, 14 Idaho 534, 94 Pac. 1034. Though in passing or construing such statutes as these, both legislatures and courts have employed the term "escheat," it would appear to be a departure from its precise meaning as used in the common law.

In some states statutes provided that certain unclaimed funds held by corporations shall go to the state; such acts are constitutional; Deaderick v. Washington County Court, 1 Coldw. (Tenn.) 202.

A statute, providing that all moneys remaining in the registry of the United States courts unclaimed for ten years or longer shall be paid over to the government, is unconstitutional; the United States cannot be regarded as a *parens patriæ*, and the right of escheat belongs only to the states; American Loan & Trust Co. v. Grand Rivers Co., 159 Fed. 775.

See, generally, American Mortgage Co. of Scotland v. Tennille, 87 Ga. 28, 13 S. E. 158, 12 L. R. A. 529; ALIEN; BASTARD, DISSOLUTION; FOREIGN CORPORATION.

ESCHEATOR. The name of an officer whose duties are generally to ascertain what escheats have taken place, and to prosecute the claim of the sovereign for the purpose of recovering the escheated property. 10 Vin. Abr 158; Co. Litt. 13 *b;* Toml. L. D. His office was to be retained but one year; and no one person could hold the office more than once in three years

This office has fallen into desuetude. There was formerly an escheator-general in Pennsylvania but his duties have been transferred to the auditor-general, and in most of the states the duties of this office devolve upon the attorney-general.

ESCRIBANO. *In Spanish Law.* The public officer who is lawfully authorized to reduce to writing and verify by his signature all judicial acts and proceedings as well as all acts and contracts entered into between private individuals.

ESCROW. A deed delivered to a stranger, to be by him delivered to the grantee upon the happening of certain conditions, upon which last delivery the transmission of title is complete.

The delivery must be to a stranger; Fairbanks v. Metcalf, 8 Mass. 230. See 9 Co. 137 *b;* Foley v. Cowgill, 5 Blackf. (Ind.) 18, 32 Am. Dec. 49; Gilbert v. Ins. Co., 23 Wend. (N. Y.) 43, 35 Am. Dec. 543; Den v. Partee, 19 N. C. 530; Simonton's Estate, 4 Watts (Pa.) 180; Jackson v. Sheldon, 22 Me. 569; for when delivered directly to the grantee; Campbell v. Jones, 52 Ark. 493, 12 S. W. 1016, 6 L. R. A. 783; Stevenson v. Crapnell, 114 Ill. 19, 28 N. E. 379; East Texas Fire Ins. Co. v. Clarke, 1 Tex. Civ. App. 238, 21 S. W. 277; Hubbard v. Greeley, 84 Me. 340,

24 Atl. 799, 17 L. R. A. 511; or to the agent or attorney of the grantee; Day v. Lacasse, 85 Me. 242, 27 Atl. 124; it cannot be treated as an escrow; but see McLaughlin v. Wheeler, 1 S. D. 497, 47 N. W. 816; Shelby v. Tardy, 84 Ala 327, 4 South. 276.

In Cincinnati, W. & Z. R. Co. v. Iliff, 13 Ohio St. 235, the court, after giving Kent's definition, says: "The phrase 'a stranger' used in this definition, or the phrase 'a third person' which in many of the books is used interchangeably with it, it seems to me can mean no more than this, a stranger to the deed as not being a party to it; or at most this, a person so free from any personal or legal identity with the parties to the instrument as to leave him free to discharge his duties as a depositary to both parties, without involving a breach of duty to either." It was there held that an agent of one party was not incapacitated from becoming the depositary of an escrow. An officer of a corporation may receive a deed in escrow though the corporation be a party thereto; Southern Life Ins & Trust Co. v. Cole, 4 Fla. 359; Bank of Healdsburg v. Baillache, 65 Cal. 327, 4 Pac. 106. The second delivery must be conditioned, and not merely postponed; O'Kelly v. O'Kelly, 8 Metc. (Mass.) 436, 2 B. & C. 82; Shep. Touch. 58. Care should be taken to express the intent of the first delivery clearly; Clark v. Gifford, 10 Wend. (N. Y.) 310; Fairbanks v. Metcalf, 8 Mass. 230; Jackson v. Sheldon, 22 Me. 569; White v. Bailey, 14 Conn. 271. An escrow has no effect as a deed till the performance of the condition; Hinman v. Booth, 21 Wend. (N. Y.) 267; Gaston v. City of Portland, 16 Or. 255, 19 Pac. 127; Harkreader v. Clayton, 56 Miss. 383, 31 Am. Rep. 369; Patrick v. McCormick, 10 Neb. 1, 4 N. W. 312; and takes effect from the second delivery; Green v. Putnam, 1 Barb. (N. Y.) 500. See Foster v. Mansfield, 3 Metc. (Mass.) 412, 37 Am. Dec. 151; Jackson v. Rowland, 6 Wend. (N. Y.) 666, 22 Am. Dec. 557; Stiles v. Brown, 16 Vt. 563; Rhodes v. School Dist., 30 Me 110; Blight v. Schenck, 10 Pa. 285, 51 Am. Dec. 478; White Star Line Steamboat Co. v. Moragne, 91 Ala 610, 8 South 867. But where the parties announce their intention that the escrow shall, after the performance of the condition, take effect from the date of the deed, such intention will control; Devl. Deeds 329; Price v. R. Co., 34 Ill. 13.

A deed delivered in escrow cannot be revoked: McDonald v. Huff, 77 Cal. 279, 19 Pac. 499.

The term, though usually applied to deeds, is sometimes applied to any written instrument; Andrews v. Thayer, 30 Wis. 228; Foy v. Blackstone, 31 Ill. 538, 83 Am. Dec. 246; Stewart v. Anderson, 59 Ind. 375; Ortmann v. Bank, 49 Mich. 56, 12 N. W. 907; Kemp v. Walker, 16 Ohio, 118; 12 Q. B. 317; Benton v. Martin, 52 N. Y. 570; Sweet v. Stevens, 7 R. I. 375; Clark v. Campbell, 23 Utah, 569, 65 Pac. 496, 54 L. R. A. 508, 90 Am. St. Rep. 716. They are usually cases of incomplete instruments, not strictly escrow. As to negotiable instruments the law aims to secure their free and unrestrained circulation and to protect the rights of persons taking them bona fide without notice. It therefore places the consequences which follow from the negotiation of promissory notes and bills of exchange, through the fraud, deception or mistake of the persons to whom they are intrusted by the maker, on those who enable them to hold themselves out as owners of the paper *jure disponendi*, and not on innocent holders who have taken it for value without notice; Fearing v. Clark, 16 Gray (Mass.) 74, 77 Am. Dec. 394, followed in Provident Life & Trust Co. v. Mercer County, 170 U. S. 593, 18 Sup. Ct. 788, 42 L. Ed. 1156. To the same effect Burson v. Huntington, 21 Mich. 415, 4 Am. Rep. 497; Vallett v. Parker, 6 Wend. (N. Y.) 615; Long Island Loan & Trust Co. v. Ry. Co., 65 Fed. 455.

It is held a delivery in escrow for one person to sign a note as surety upon the express condition that another person's signature is also to be obtained, and to deliver the note to the maker for that purpose; Perry v. Patterson, 5 Humph. (Tenn.) 133, 42 Am. Dec. 424. But it is held that signing a note and placing it in the hands of one of the signers, with direction to deliver it only on condition that it should be signed by other designated persons, is not a delivery in escrow, but of an incomplete instrument, and there can be no recovery against those executing it when it has not been executed by all; Keener v. Crago, 81 Pa. 166.

It has been held that notes cannot be delivered in escrow to the agent of the payee to hold until the maker could investigate the indebtedness for which they were given, Murray v. W. W. Kimball Co., 10 Ind. App. 184, 37 N. E. 734; *id.*, 10 Ind. App 141, 37 N. E. 736; *contra*, Stewart v. Anderson, 59 Ind. 375; or so as to make the signature of another person essential to its validity; Hurt v. Ford, 142 Mo. 283, 44 S. W. 228, 41 L. R. A 823. But it is held that if the deposit is of such character as to negative its being delivered to the grantee, it may nevertheless operate as a delivery in escrow, although placed in the hands of the grantee's solicitor, if he was intended to hold it as an incomplete instrument; L. R. 20 Eq. 262; Ashford v. Prewitt, 102 Ala. 264, 14 South. 663, 48 Am. St. Rep. 37.

As a general rule, when an instrument is placed in the hands of a third person in escrow, it takes effect from the second delivery; but such a rule does not apply where either justice or necessity requires a resort to a fiction in order to avoid injury (as in case of intervening rights between the first and second delivery, it shall take effect from its first delivery); Shirley's Lessee v. Ayres, 14 Ohio 307, 45 Am. Dec. 546; Bank v. Lum-

ber Co., 32 W. Va. 357, 9 S. E. 243. In such a case, much depends on the intent of the parties to be collected from the nature of the transaction; Calhoun County v. Emigrant Co., 93 U. S. 124, 23 L. Ed. 826. This fiction is adopted to prevent a manifest hardship; Craddock v. Barnes, 142 N. C. 89, 54 S. E. 1003; and there is no reason why it should not be invoked to effectuate the lawful intent of the parties; *id.*

In Gish v. Brown, 171 Pa. 479, 33 Atl. 60, the fiction of relation back was adopted where the grantor delivered the deed to a third person with absolute instructions to hold it until his death and then deliver it to the grantee. So where one of the parties has come under a disability such as mental incapacity; Wheelwright v. Wheelwright, 2 Mass. 447, 3 Am. Dec. 66; and where a woman, after delivering a bond on condition, marries before the happening of the condition; 1 Ves. Jr. 275; and where the condition was capable of performance within the lifetime of the grantor, though the instrument, delivered to a third person, provided that it should not take effect until the death of the grantor; Nolan v. Otney, 75 Kan. 311, 89 Pac. 690, 9 L. R. A. (N. S.) 317, where the provision was construed to mean that the title was to vest at once, and only the enjoyment to be postponed until the death of the grantor.

It is the performance of the condition and not the second delivery that gives it vitality as a deed; State Bank at Trenton v. Evans, 15 N. J. L. 155, 28 Am. Dec. 400; Clark v. Campbell, 23 Utah 569, 65 Pac. 496, 54 L. R. A. 508, 90 Am. St. Rep. 716; Calhoun County v. Emigrant Co., 93 U. S. 124, 23 L. Ed. 826. No title passes until the condition is performed; Calhoun County v. Emigrant Co., 93 U. S. 124, 23 L. Ed. 826; but the instant the conditions are performed the instrument takes effect, though the depositary has not formally delivered it; Taylor v. Thomas, 13 Kan. 217; Missouri Pac. R. Co. v. Atkison, 17 Mo. App. 484. The depositary then holds possession for the grantee; Cannon v. Handley, 72 Cal. 133, 13 Pac. 315.

Where dividends are declared on stock deposited in escrow, they are the property of the seller; Clark v. Campbell, 23 Utah 569, 65 Pac. 496, 54 L. R. A. 508, 90 Am. St. Rep. 716.

One acting in escrow acts at his peril with either party without the consent of the other; Citizens' Nat. Bank of Roswell, N. M., v. Davisson, 229 U. S. 212, 33 Sup. Ct. 625, 57 L. Ed. ——.

See, generally, Shirley's Lessee v. Ayres, 14 Ohio 309, 45 Am. Dec. 546; Ruggles v. Lawson, 13 Johns. (N. Y.) 285, 7 Am. Dec. 375; Carr v. Hoxie, 5 Mas. 60, Fed. Cas. No. 2,438; Evans v. Gibbs, 6 Humph. (Tenn.) 405; Foster v. Mansfield, 3 Metc. (Mass.) 412, 37 Am. Dec. 154; Crane v. Hutchinson, 3 Ill. App. 30; Clements v. Hood, 57 Ala. 459; Miller v. Sears, 91 Cal. 282, 27 Pac. 589, 25 Am. St. Rep. 176; Minah Consol. Min. Co. v. Briscoe, 47 Fed. 276; 10 L. R. A. 469, n.

As to the validity of a deed to take effect at the death of the grantor, see DELIVERY.

ESCUAGE. In Old English Law. Service of the shield. Tenants who hold their land by escuage hold by knight's service. 1 Thomas, Co. Litt. 272; Littleton § 95, 86 *b*. Abolished by Stat. 12 Car. II. c. 24. SCUTAGE.

ESKETORES. Robbers or destroyers of other men's lands and fortunes. Cowell.

ESKIPPAMENTUM. Tackle or furniture; outfit. Certain towns in England were bound to furnish certain ships at their own expense and with double *skippage* or tackle. The modern word outfit would seem to render the passage quite as satisfactorily; though the conjecture of Cowell has the advantage of antiquity.

ESKIPPER, ESKIPPARE. To ship. Kelh. Norm. L. D.; Rast. 409.

ESKIPPESON. Shippage, or passage by sea. Spelled, also, *skippeson*. Cowell.

ESNECY. Eldership. In the English law, this word signifies the right which the eldest coparcener of lands has to choose first one of the parts of the estate after it has been divided.

ESPERA. The period fixed by a competent judge within which a party is to do certain acts, as, *e. g.*, to effect certain payments, present documents, etc.; and more especially the privilege granted by law to debtors, allowing them certain time for the payment of their indebtedness.

ESPLEES. The products which the land or ground yields; as, the hay of the meadows, the herbage of the pasture, corn or other produce of the arable, rents, and services. See Witherow v. Keller, 11 S. & R. (Pa.) 275; Dane, Abr. Index; Fosgate v. Mfg. & Hydraulic Co., 9 Barb. (N. Y.) 293.

ESPOUSALS. A mutual promise between a man and a woman to marry each other at some other time: it differs from a marriage, because then the contract is completed. Wood, Inst. 57. See BETROTHMENT.

ESQUIRE. A title applied by courtesy to officers of almost every description, to members of the bar, and others. No one is entitled to it by law; and therefore it confers no distinction in law.

In England, it is a title next above that of a gentleman and below that of a knight. Camden reckons up four kinds of esquires particularly regarded by the heralds: the eldest sons of knights, and their eldest sons in perpetual succession; the eldest sons of the younger sons of peers, and their eldest sons in like perpetual succession; esquires created by the king's letters patent, or other investiture, and their eldest sons; esquires by virtue of their office, as justices of the peace, and others who bear any office of trust under the crown. 2 Steph. Com. 673. A miller or a farmer may be an esquire; L. R. 2 Eq. 435.

ESSART. **In Forest Law.** The destruction of the forest and the reduction of it to a state of cultivation. 1 Holdsw. Hist. E. L. 342.

ESSE. See IN ESSE.

ESSENDI QUIETAM DE TOLONEO (Lat. of being quit of toll). A writ which lay anciently for the citizens or burgesses of a town which was entitled to exemption from toll, in case toll was demanded of them. Fitzh. N. B. 226, I.

ESSOIN, ESSOIGN. **In Old English Law.** An excuse for not appearing in court at the return of the process. Presentation of such excuse. Spelman, Gloss.; 1 Sell. Pr. 4; Com. Dig. *Exoine*, B 1. *Essoin* is not now allowed at all in personal actions. 2 Term 16; 3 Bla. Com. 278, n.

ESSOIN DAY. Formerly, the first day in the term was essoin day; now practically abolished. Dowl. 448; 3 Bla. Com. 278, n.

ESSOIN ROLL. The roll containing the *essoins* and the day of adjournment. Rosc. R. Act. 162 *et seq.*

ESTABLISH. This word occurs frequently in the constitution of the United States, and it is there used in different meanings. 1. To settle firmly, to fix unalterably: as, to establish justice, which is the avowed object of the constitution. 2. To make or form: as, to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies,—which evidently does not mean that these laws shall be unalterably established as justice. 3. To found, to create, to regulate: as, Congress shall have power to establish postroads and post-offices. 4. To found, recognize, confirm, or admit: as, Congress shall make no law respecting an establishment of religion. 5. To create, to ratify, or confirm: as, We, the people, etc., do ordain and establish this constitution. 1 Story, Const. § 454.

For decisions upon the scope and meaning of the word, see Ketchum v. City of Buffalo, 14 N. Y. 356; People v. Lowber, 28 Barb (N. Y.) 65; Wartman v. City of Philadelphia, 33 Pa. 202; Com. v. Simonds, 11 Gray (Mass.) 306, Smith v. Forrest, 49 N. H. 230; Succession of Weigel, 18 La. Ann. 49.

The Established Church in England is the Church of England; so of Wales. The Irish Church has been disestablished.

ESTABLISHMENT, ETABLISSEMENT. An ordinance or statute. Especially used of those ordinances or statutes passed in the reign of Edw. I. Co. 2d Inst. 156; Britt. c. 21. That which is instituted or established for public or private use, as the trading establishments of a government.

Etablissement is also used to denote the settlement of dower by the husband upon his wife. Britt. c. 102.

ESTADAL. **In Spanish Law.** A measure of land of sixteen square varas, or yards. 2 White, Rec. 139.

ESTADIA. **In Spanish Law.** Called, also, *Sobrestadia*. The time for which the party who has chartered a vessel, or is bound to receive the cargo, has to pay demurrage on account of his delay in the execution of the contract.

ESTATE (Lat. *status*, the condition or circumstances in which the owner stands with reference to his property). The degree, quantity, nature, and extent of interest which a person has in real property.

It signifies the quantity of interest which a person has, from absolute ownership down to naked possession; Jackson v. Parker, 9 Cow. (N. Y.) 81.

This word has several meanings. 1. In its most extensive sense, it is applied to signify every thing of which riches or fortune may consist, and includes personal and real property: hence we say, personal estate, real estate; 8 Ves. 504; Jackson v. Robins, 16 Johns. (N. Y.) 587; Deering v. Tucker, 55 Me. 284; Bates v. Sparrell, 10 Mass. 323; Archer v. Deneale, 1 Pet. (U. S.) 585, 7 L. Ed. 272; Donovan's Lessee v. Donovan, 4 Harr. (Del.) 177, Andrews v. Brumfield, 32 Miss. 107; Blewer v. Brightman, 4 McCord (S. C.) 60; Den v. Snitcher, 14 N. J. L. 53. 2. In its more limited sense, the word estate is applied to lands. It is so applied in two senses. The first describes or points out the land itself, without ascertaining the extent or nature of the interest therein, as, "my estate at A." Godfrey v. Humphrey, 18 Pick. (Mass.) 537, 29 Am. Dec. 621. The second, which is the proper and technical meaning of estate, is the degree, quantity, nature, and extent of interest which one has in real property: as, an estate in fee, whether the same be a free-simple or fee-tail, or, an estate for life or for years, etc. Coke says, Estate signifies such inheritance, freehold, term of years, tenancy by statute merchant, staple, eligit, or the like, as any man hath in lands or tenements, etc. Co. Litt. §§ 345, 650 *a*. See Jones, Land Off. Titles in Penna. 165. Estate does not include rights in action, Pippin v. Ellison, 34 N. C. 61, 55 Am. Dec. 403, McIntyre v. Ingraham, 35 Miss. 25; In re Sibbald's Estate, 18 Pa. 249. But as the word is commonly used in the settlement of estates, it does include the debts as well as the assets of a bankrupt or decedent, all his obligations and resources being regarded as one entirety. See Davis's Heirs v. Elkins, 9 La. 135. Also the status or condition in life of a person; State v. Bishop, 15 Me. 122. See ESTATES OF THE REALM.

ESTATE AT WILL. An estate in lands which the tenant has, by entry made thereon under a demise, to hold during the joint wills of the parties to the same. Co. Litt. 55 *a*; Tud. L. Cas. R. P. 10; 2 Bla. Com. 145, 4 Kent 110. Estates properly at will are of very infrequent occurrence, being generally turned into estates for years or from year to year by decisions of the courts or by statute; 4 Kent 115; Tud. L. Cas. R. P. 14; Lesley v. Randolph, 4 Rawle (Pa.) 123; 1 Term 159.

They may be created by express words or may arise by implication of law. Where created by express contract, the writing necessarily so indicates, and reserves the right of termination to either party, as where the lease provides that the tenant shall occupy the premises so long as agreeable to both parties; 4 Taunt. 128; Say v. Stoddard, 27 Ohio St. 478. They arise by implication of law where no definite time is stated in the

contract, or where the tenant enters into possession under an agreement to execute a contract for a specific term and he subsequently refuses to do so, or where one enters under a void lease, or where he holds over pending negotiations for a new lease; Thompson v. Baxter, 107 Minn. 122, 119 N. W. 797, 21 L. R. A. (N. S.) 575. The chief characteristics of this form of tenancy are (1) uncertainty respecting the term and (2) the right of either party to terminate it by proper notice. See TENANCY AT SUFFERANCE.

ESTATE BY ELEGIT. See ELEGIT.

ESTATE BY STATUTE MERCHANT. See STATUTE MERCHANT.

ESTATE BY STATUTE STAPLE. See STATUTE STAPLE.

ESTATE BY THE CURTESY. That estate to which a husband is entitled upon the death of his wife in the lands or tenements of which she was seised in possession, in fee-simple, or in fee-tail during their coverture; provided they have had lawful issue born alive and possibly capable of inheriting her estate. Co. Litt. 30 *a;* 2 Bla. Com. 126; 4 Kent 29; Leach v. Leach, 21 Hun (N. Y.) 381; Crumley v. Deake, 8 Baxt. (Tenn.) 361; Carter v. Dale, 3 Lea. (Tenn.) 710, 31 Am. Rep. 660; McKee v. Cattle, 6 Mo. App. 416; Tremmel v. Kleiboldt, 6 Mo. App. 549; [1892] 2 Ch. 336. See CURTESY.

ESTATE DUTY. A duty imposed in England (act of 1894) superseding probate duty, taxing not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death. Hansen, Death Duties 63. It is leviable on property which was left untouched by probate duty, such as real estate, yet it is in substance of the same nature as the old probate duty; *id.* See TAX.

ESTATE FOR LIFE. A freehold estate, not of inheritance, but which is held by the tenant for his own life or the life or lives of one or more other persons, or for an indefinite period, which may endure for the life or lives of persons in being, and not beyond the period of a life. 1 Washb. R. P. 88; Co. Litt. 42 *a;* Bract. lib. 4, c. 28, § 207; Hurd v. Cushing, 7 Pick. (Mass.) 169; Chal. R. P. 89. When the measure of duration is the tenant's own life, it is called simply an estate "for life;" when the measure of duration is the life of another person, it is called an estate "*per* (or *pur*) *autre vie;*" 2 Bla. Com. 120; Co. Litt. 41 *b;* 4 Kent 23, 24.

Estates for life may be created by act of law or by act of the parties: In the former case they are called legal, in the latter conventional. The legal life estates are estates-tail after possibility of issue extinct, estates by dower, estates by curtesy, jointures; Mitch. R. P. 118, 133; Eldridge v. Preble, 34 Me. 151; Dejarnatte v. Allen, 5 Gratt. (Va.) 499; Fay v. Fay, 1 Cush. (Mass.) 95; Irwin v. Covode, 24 Pa. 162; 3 E. L. & Eq. R. 345; Miller v. Williamson, 5 Md. 219; Gourley v. Woodbury, 51 Vt. 37; Brooks v. Brooks, 12 S. C. 422; Slemmer v. Crampton, 50 Ia. 302; Rountree v. Talbot, 89 Ill. 246; Noe v. Miller's Ex'rs, 31 N. J. Eq. 234. A life estate may be created by implication; Nicholson v. Drennan, 35 S. C. 333, 14 S. E. 719.

A right given by a will to occupy, at a specified rent, certain premises as long as the devisee "may desire to occupy the same as a drug store," was held to amount to an estate for life; and to the same effect Warner v. Tanner, 38 Ohio St. 118; Jones v. Mason, 5 Rand. (Va.) 584, 16 Am. Dec. 761; as was a grant "so long as the waters of the Delaware shall run"; Foster v. Joice, 3 Wash. C. C. 498, Fed. Cas. No. 4,971; and a lease at a specified monthly rent of certain premises whilst the defendant continued to wish to live in a certain city; Thompson v. Baxter, 107 Minn. 122, 119 N. W. 797, 21 L. R. A. (N. S.) 575. A devise of the use and improvement of the testator's real estate, so long as the devisee should choose personally to occupy and improve any portion of the estate, was held to create a life estate, though terminable by the tenant ceasing to occupy; Wilmarth v. Bridges, 113 Mass. 407.

The chief incidents of life estates are a right to take reasonable estovers, and freedom from injury by a sudden termination or disturbance of the estate; Smith v. Jewett, 40 N. H. 532. A tenant for life may not operate for oil or gas, or make an oil or gas lease, unless operations for oil or gas were commenced before the life estate accrued; Marshall v. Mellon, 179 Pa. 371, 36 Atl. 201, 35 L. R. A. 816, 57 Am. St. Rep. 601; nor can the owner of such an estate maintain an action of partition against the owners of the estate in remainder; Love v. Blauw, 61 Kan. 496, 59 Pac. 1059, 48 L. R. A. 257, 78 Am. St. Rep. 334. Under-tenants have the same privileges as the original tenant; and acts of the original tenant which would destroy his own claim to these privileges will not affect them; see Neel v. Neel, 19 Pa. 323.

Their right, however, does not of course, as against the superior lord, extend beyond the life of the original tenant; 2 Bla. Com. 122; 1 Rolle, Abr. 727; Co. Litt. 41 *b.*

ESTATE FOR YEARS. An interest in lands by virtue of a contract for the possession of them for a definite and limited period of time. 2 Bla. Com. 140; 2 Crabb, R. P. § 1267; Bac. Abr. *Leases;* Wms. R. P. 195. Such estates are frequently called terms. See TERM. The length of time for which the estate is to endure is of no importance in ascertaining its character, unless otherwise declared by statute; Chapman v. Gray, 15 Mass. 439; Brewster v. Hill, 1 N. H. 350; Diller v. Roberts, 13 S. & R. (Pa.) 60, 15 Am. Dec. 578; Brown's Adm'rs v. Bragg, 22 Ind. 123; 4 Kent 93.

ESTATE FROM YEAR TO YEAR. It is an example of an estate for years. It is of later origin and is not found in Littleton (see § 381). It exists in cases where the parties stipulate for it, and also where the parties by their conduct have placed themselves in the relation of landlord and tenant without adopting any other term. If a tenant has been allowed to hold over after the expiration of his term in such a way as to preclude the possibility of his becoming a tenant on sufferance, it is a tenancy from year to year. Jenks, Mod. Land Law 88.

A tenancy from year to year exists where both landlord and tenant are entitled to notice before the tenancy can be terminated by either. At common law such notice must be given at least one-half year before the expiration of the current year. The tenant must occupy for a certain number of complete years; Odger, C. L. 869. A tenancy from year to year in England lasts as long only as both parties please; it is terminable by either at the end of any year on a half year's notice; 7 Q. B. 958.

It was originally a development of a tenancy at will, by which the tenancy was terminable only at the time of the year at which it began, and on notice.

ESTATE IN COMMON. An estate held in joint possession by two or more persons at the same time by several and distinct titles. 1 Washb. R. P. 415; 2 Bla. Com. 191; 1 Pres. Est. 139. This estate has the single unity of possession, and may be of real or personal property; Harvey v. Cherry, 76 N. Y. 436; Jones v. Cohen, 82 N. C. 75; Withrow v. Biggerstaff, 82 N. C. 82; Stookey v. Carter, 92 Ill. 129. Kean v. Connelly, 25 Minn. 222, 33 Am Rep. 458; Goell v. Morse, 126 Mass. 480; Ennis v. Hutchinson, 30 N. J. Eq. 110; Butler v. Roys, 25 Mich. 53, 12 Am. Rep. 218.

Where one dies intestate, the joint ownership of his property by his children is generally that of tenants in common; Fenton v. Miller, 94 Mich. 204, 53 N. W. 957.

ESTATE IN COPARCENARY. An estate which several persons hold as one heir, whether male or female. In the latter case, it arises at common law, when an estate descends to two or more females; in the former, when an estate descends to all the males in equal degree by particular custom. This estate has the three unities of time, title, and possession; but the interests of the coparceners may be unequal. 1 Washb. R. P. 414; 2 Bla. Com. 188; 4 Kent 366; Flynn v. Herye, 4 Mo. App. 360. See COPARCENARY, ESTATES IN.

ESTATE IN DOWER. See DOWER.

ESTATE IN EXPECTANCY. An estate giving a present or vested contingent right of future enjoyment. One in which the right to pernancy of the profits is postponed to some future period. Such are estates in remainder and reversion. Lawrence v. Bayard, 7 Paige, Ch. (N. Y.) 70, 76; Underhill v. R. Co., 20 Barb. 455. See EXPECTANCY.

ESTATE IN FEE-SIMPLE. See FEE-SIMPLE.

ESTATE IN FEE-TAIL. See FEE-TAIL.

ESTATE IN JOINT TENANCY. See JOINT TENANCY.

ESTATE IN POSSESSION. An estate where the tenant is in actual pernancy or receipt of the rents and other advantages arising therefrom. 2 Crabb, R. P. § 2322; 2 Bla. Com. 163. See Campau v. Campau, 19 Mich. 116; Valle v. Clemens, 18 Mo. 486; EXPECTANCY.

ESTATE IN REMAINDER. See REMAINDER.

ESTATE IN REVERSION. See REVERSION.

ESTATE IN SEVERALTY. See SEVERALTY, ESTATE IN.

ESTATE IN VADIO. See MORTGAGE.

ESTATE OF FREEHOLD or FRANK-TENEMENT. Any estate of inheritance, or for life, in either a corporeal or incorporeal hereditament, existing in or arising from real property of free tenure. 2 Bla. Com. 104. It thus includes all estates but copyhold and leasehold, the former of which has never been known in this country. Freehold *in deed* is the real possession of land or tenements in fee, fee-tail, or for life. Freehold *in law* is the right to such tenements before entry. The term has also been applied to those offices which a man holds in fee or for life. Mozl. & W. Dict.; 1 Washb. R. P. 71, 637. See Gage v. Scales, 100 Ill. 221; State v. Ragland, 75 N. C. 12, L. R. 11 Eq. 454; LIBERUM TENEMENTUM.

ESTATE OF INHERITANCE. An estate which may descend to heirs. 1 Washb. R. P. 51; 1 Steph. Com. 218.

All freehold estates are estates of inheritance, except estates for life. Crabb, R. P. § 945.

ESTATE PUR AUTRE VIE. An estate for the life of another. It arises most frequently when a tenant for his own life conveys his estate to a third person. He can only convey what he has, and his grantee takes an estate during the life of the grantor. If the tenant died during the life of the grantor (who was called the *cestui que vie*), at common law the residue of the estate went to the first person who took it, termed a general occupant. If the original gift was to the tenant and his heirs, the heir took it as special occupant. By statute in England, if there is no special occupant, the estate goes to the executors as personalty, if not disposed of by will. This rule has been adopted in most of the United States, except a few, where it still descends

as personalty; 1 Washb. R. P. 88; 2 Bla. Com. 120.

Where two estates come to one person, so that if in the same right they would merge, if one of them be *in autre droit*, there will be no merger. 2 Bla. Com. 177, but see Sharsw. note 17.

ESTATE TAIL. See FEE-TAIL.

ESTATE UPON CONDITION. See CONDITION.

ESTATES OF THE REALM. The lords spiritual, the lords temporal, and the commons of Great Britain. 1 Bla. Com. 153; 3 Hallam, ch. 6, pl. 3. Sometimes called the three estates.

ESTER IN JUDGMENT. To appear before a tribunal either as plaintiff or defendant. Kelh. Norm. L. D.

ESTIMATE. A word used to express the mind or judgment of the speaker or writer on the particular subject under consideration. It implies a computation or calculation. People v. Clark, 37 Hun (N. Y.) 203.

ESTOPPEL. The preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question.

A preclusion, in law, which prevents a man from alleging or denying a fact, in consequence of his own previous act, allegation, or denial of a contrary tenor. Steph. Pl. 239.

A plea which neither admits nor denies the facts alleged by the plaintiff, but denies his right to allege them. Gould, Pl. c. 2, § 39.

A special plea in bar, which happens where a man has done some act or executed some deed which precludes him from averring anything to the contrary. 3 Bla. Com. 308.

Where a fact has been admitted or asserted for the purpose of influencing the conduct or deriving a benefit from another so that it cannot be denied without a breach of good faith, the law enforces the rule of good morals as a rule of policy, and precludes the party from repudiating his representations or denying the truth of his admissions; Douglass v. Scott, 5 Ohio 199; Rawle, Cov 407.

This doctrine of law gives rise to a kind of pleading that is neither by way of traverse, nor confession and avoidance, viz.: a pleading that, waiving any question of fact, relies merely on the estoppel, and, after stating the previous act, allegation, or denial of the opposite party, prays judgment if he shall be received or admitted to aver contrary to what he before did or said. This pleading is called a pleading by way of estoppel. Steph. Pl. 240; Blackington v. Johnson, 126 Mass. 21; Andrews v. Ins. Co, 18 Hun (N. Y.) 163; Cross v. Levy, 57 Miss. 634; Byrne v. Bank, 31 La. Ann. 81; Stephenson v. Walker, 8 Baxt. (Tenn.) 289; Hull v. Johnston, 90 Ill. 604; Walker v. Baxter, 6 Wash. 244, 33 Pac. 426.

Formerly the questions regarding estoppel arose almost entirely in relation to transfers of real property, and the rules in regard to one kind of estoppel were quite fully elaborated. In more modern time the principle has come to be applied to all cases where one by words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief or to alter his own previous position; 2 Exch 653; Den v. Baldwin, 21 N. J. L. 403; Titus v. Morse, 40 Me 348, 63 Am. Dec. 665. See, as to the reason and propriety of the doctrine, Co. Litt. 352 *a*; Pelletreau v. Jackson, 11 Wend. (N. Y.) 117; Jones v. Sasser, 18 N. C. 464; Blake v. Tucker, 12 Vt. 44.

"The correct view of estoppel is that taken in a recent work (Bigelow, Est.). 'Certain admissions,' it is there said, 'are indisputable, and estoppel is the agency of the law by which evidence to controvert their truth is excluded.' In other words, when an act is done, or a statement made by a party the truth or efficacy of which it would be a fraud on his part to controvert or impair, the character of an estoppel will be given to what would otherwise be a mere matter of evidence. The law of estoppel, therefore, is a branch of the law of evidence, it has become a part of the jurisdiction of chancery, simply because in equity alone, or rather by equitable construction alone, has that full effect been given to this species of evidence which is necessary to the due administration of justice." Bisph. Eq. § 280 See Tiedm Eq Jur 106

"Estoppel is only a rule of evidence and you cannot found an action upon estoppel Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something he has said." (1891) 3 Ch 82, 105, per Bowen, L. J. The doctrine of estoppel was applied to a case of the transfer of shares upon a forged order; L. R. 3 Q. B. 584.

Where there is an attempt to apply the doctrine of estoppel, one essential in such a case is that the party in whose favor it is invoked must himself act in good faith; Vaughn v. Hixon, 50 Kan. 773, 32 Pac. 358, and it is of the essence of estoppels that they must be mutual and certain to every intent; Sutton v. Dameron, 100 Mo. 141, 13 S. W. 497; Sullivan v. R. Co., 128 Ala. 97, 30 South. 528; and they cannot rest on argument or inference; *id.* They arise out of matters of fact, not of law; Snyder v. Studebaker, 19 Ind. 462, 81 Am. Dec. 415.

Estoppels are of three kinds. 1. By deed. 2. By matter of record. 3. By matter *in pais*, which last are also termed equitable estoppels.

BY DEED. Such as arises from the provisions of a deed. It is a general rule that a party to a deed is estopped to deny any thing stated therein which has operated upon the other party: as, the inducement to accept and act under such deed; Stow v. Wyse, 7 Conn. 214, 18 Am. Dec. 99; Green v. Clark, 13 Vt. 158; Douglass v. Scott, 5 Ohio 199; Bennett v. Conant, 10 Cush. (Mass.) 163; Reinhard v. Min. Co., 107 Mo. 616, 18 S. W. 17, 28 Am. St. Rep. 441; Carson v. Cochran, 52 Minn. 67, 53 N. W. 1130; Craig v. Reeder, 3 McCord (S. C.) 411; including a deed made with covenant of warranty, which estops even as to a subsequently acquired title; Jackson v. Matsdorf, 11 Johns. (N. Y.) 91, 6 Am. Dec. 355; Baxter v. Bradbury, 20 Me. 260, 37 Am. Dec. 49; Blake v. Tucker, 12 Vt. 39; Jenkins v. Collard, 145 U. S. 546, 12 Sup. Ct. 868, 36 L. Ed. 812; Moore v. Crawford, 130 U. S. 122, 9 Sup. Ct. 447, 32 L. Ed. 878; Ayer v. Brick Co., 157 Mass. 57, 31 N. E. 717; Woods v. Bonner, 89 Tenn. 411, 18 S. W. 67; but, while this is the general rule, there is

no estoppel where the deed is a release with a covenant of restricted warranty merely of the title granted; Comstock v. Smith, 13 Pick. (Mass.) 116, 23 Am. Dec. 670; nor will a deed of release without covenant of warranty estop the grantor from contesting the seisin of the grantor and showing seisin in himself by an older and better title; Ham v. Ham, 14 Me. 351; so a conveyance of all of the grantor's right, title and interest does not convey more than he has at the time and the covenants apply only to the grant and do not enlarge it; Coe v. Persons Unknown, 43 Me. 432. A grantor who covenants against incumbrances without reservation is estopped to sue for obstruction to a right of way across the granted premises; De Rochemont v. R. R., 64 N. H. 500, 15 Atl. 131. A grantor whose deed recites or affirms his seisin of the estate granted, either expressly or by implication, is estopped to deny that such estate passed, though there is no warranty; Reynolds v. Cook, 83 Va. 817, 3 S. E. 710, 5 Am. St. Rep. 317; but while he may not show that he had no such estate as the deed purported to convey, he is not estopped to show a subsequently acquired, independent title consistent with the deed; Cuthrell v. Hawkins, 98 N. C. 203, 3 S. E. 672; and a conveyance with warranty by one who had no title, but who afterwards acquired title as trustee, did not operate by estoppel so as to make the latter enure to the former grantee, since an estoppel arises only when the new title is taken in the same right; Dewhurst v. Wright, 29 Fla. 229, 10 South. 682. The doctrine of estoppel by deed has been applied to one who, having as agent leased land for a term of years, was not permitted to set up want of authority to make the lease; Lee v. Lee, 83 Ia. 565, 50 N. W. 33; to a vendor who, having only a certificate of purchase at a tax sale, and having given bond to make a quitclaim deed on payment of the purchase money, was precluded from acquiring any title by virtue of the tax sale, as was also one claiming from him by descent or as a purchaser with notice; Jernigan v. Flowers, 94 Ala. 508, 10 South. 437; to a tenant for life who, having recognized the right of the remainderman in a bequest of personal property and executed a deed of trust therefor, could not afterwards deny the right; Welsch v. Bank, 94 Ill. 191; to one who attempts to convey title to the property as executor or administrator; Millican v. McNeill, 102 Tex. 189, 114 S. W. 106, 132 Am. St. Rep. 863, 20 Ann. Cas. 74, 21 L. R. A. (N. S.) 60, and note in which are collected many cases and the conclusion reached that the question is to be determined by the general principles of the law of estoppel and not by any considerations peculiar to this class of cases.

There was held to be no estoppel against the setting up of a subsequently acquired title by one who quitclaimed lands in which at that time he had no interest; Jackson v. Peek, 4 Wend. (N. Y.) 300; where, after the purchase of a mortgage, the premises were conveyed subject to it, and the deed had contained a covenant to pay it, the grantee was permitted to insist, as against the purchaser of the mortgage, that he was not liable; Real Estate Trust Co. v. Balch, 45 N. Y. Super. Ct. 528, in which the court held that the case presented no one of the necessary elements of an estoppel, and critically examined the New York cases on the question of liability under such covenants. A partition deed between tenants in common and assignment thereunder does not estop one of the parties from setting up an after-acquired title to land so assigned; Doane v. Willcutt, 5 Gray (Mass.) 328, 66 Am. Dec. 369.

"Where under the law there is an entire lack of power to do the act in question, it cannot be made good by estoppel. But if the power to do the act existed, and there was a way in which it could be lawfully exercised, and it purports to have been done in a lawful way, a person who has induced another to act upon the assumption that it was in fact done, may be estopped from questioning its validity." Mut. Life Ins. Co. v. Corey, 135 N. Y. 326, 334, 31 N. E. 1095.

A corporation accepting conveyance of a water works plant by deed describing certain mortgages thereon, and expressly declaring that the conveyance was made subject thereto, is thereby estopped from questioning the validity of the mortgages; American Waterworks Co. of Illinois v. Loan & Trust Co., 73 Fed. 956, 20 C. C. A. 133. So also a city taking property by eminent domain subject to liens is estopped to deny their validity; City Safe Deposit & Agency Co. v. City of Omaha, 79 Neb. 446, 112 N. W. 598, 23 L. R. A. (N. S.) 72. And a corporation may be estopped to deny the execution of a mortgage when the directors assented, but, by reason of the absence of some, there was no formal action of the board directing the signing and sealing by the officers; Nevada Nickel Syndicate v. Nickel Co., 96 Fed. 133.

To create an estoppel, the deed must be good and valid in its form and execution; 2 Washb. R. P. 41; Alt v. Banholzer, 39 Minn. 511, 40 N. W. 830, 12 Am. St. Rep. 681; and must convey no title upon which the warranty can operate in case of a covenant; Jackson v. Hoffman, 9 Cow. (N. Y.) 271; 2 Pres. Abs. 216.

Estoppels affect only parties and privies in blood, law, or estate; 6 Bing. N. C. 79; Corbett v. Norcross, 35 N. H. 99; Patterson's Lessee v. Pease, 5 Ohio 190; Phelps v. Blount, 13 N. C. 177; Wark v. Willard, 13 N. H. 389; Calhoun v. Pierson, 44 La. Ann. 584, 10 South. 880; Campbell v. Carruth, 32 Fla. 264, 13 South. 432. See Knight v. Thayer, 125 Mass. 25; Stockstill v. Bart, 47 Fed. 231. Estop-

pels, it is said, must be reciprocal; Co. Litt. 352 *a;* Furgeson v. Jones, 17 Or. 204, 20 Pac. 842, 3 L. R. A. 620, 11 Am. St. Rep. 808. But see Winlock v. Hardy, 4 Litt. (Ky.) 272; Small v. Procter, 15 Mass. 499; Crittenden v. Woodruff, 11 Ark. 82; 2 Sm. L. C. 664. And see 2 Washb. R. P. 458.

The rule requiring mutuality is subject to exceptions which are discussed at large by Van Devanter, J., in Portland Gold Mining Co. v. Stratton's Independence, 158 Fed. 63, 85 C. C. A. 393, 16 L. R. A. (N. S.) 677, and note. Persons claiming under a common source of title are mutually estopped to deny its validity; Gilliam v. Bird, 30 N. C. 280, 49 Am. Dec. 379, and note in which the cases are collected.

An estoppel relating to an interest in land passes with the land, and an estoppel by deed creates what in law is termed a title by estoppel; Mutual Life Ins. Co. v. Corey, 135 N. Y. 326, 335, 31 N. E. 1095.

A grantor is not estopped by recitals in his deed of payment of consideration, from suing for the unpaid purchase money; Smith v. Arthur, 110 N. C. 400, 15 S. E. 197; nor are recitals an estoppel when the deed containing them is not operative; Wallace's Lessee v. Miner, 6 Ohio 366. But one who defended his possession on the sole ground that one of the grantors in the series of deeds had no title was bound by the recitals of the deed to the same extent as if he were privy to the grantor; Kinsman's Lessee v. Loomis, 11 Ohio 475; and a ward after coming of age was held bound by the recitals of a deed made by her guardian; Esterbrook v Savage, 21 Hun (N. Y.) 145. A recital in a bond that it was under seal estops the obligor from denying that it was so executed; Metropolitan Life Ins. Co. v. Bender, 124 N. Y. 47, 26 N. E. 345, 11 L. R. A. 708. A grantee cannot enter and hold under a deed and at the same time repudiate the title thereby conveyed; Kelso v. Stigar, 75 Md. 376, 24 Atl. 18. See White v. R. Co., 156 Mass. 181, 30 N. E. 612; Raby v. Reeves, 112 N. C. 688, 16 S. E. 760; Oglesby v. Foley, 46 Ill. App. 119; Coward v. Clanton, 79 Cal. 23, 21 Pac. 359.

The doctrine of estoppel by deed did not at common law apply to a married woman, except as to her equitable separate estate, Big. Est. 371, citing the cases; Bank of America v. Banks, 101 U. S. 240, 25 L. Ed. 850; Jones v. Reese, 65 Ala. 134; but under the statutes enabling married women to deal with their own property, her liability to be estopped is doubtless coterminous with her capacity to contract; Neal v. Bleckley, 36 S. C. 468, 478, 15 S. E. 733; Appeal of Powell, 98 Pa. 403, 413; Knight v. Thayer, 125 Mass. 25. Nor is an infant estopped by his deed unless ratified after majority; Cook v. Toumbs, 36 Miss. 685; Houston v. Turk, 7 Yerg. (Tenn.) 13.

It has been held that a state may be estopped by deed; Com. v. Andre's Heirs, 3 Pick. (Mass.) 224; Bartlett Land & Lumber Co. v. Saunders, 103 U. S. 316, 26 L. Ed. 546; State v. Ober, 34 La. Ann. 359; Penrose v. Griffith, 4 Binn. (Pa.) 231; and this is said to be "perhaps the better opinion"; Big. Est. 371; but there are expressions to the contrary, though generally qualified so as not to conflict with the doctrine that the state may be estopped by legislative action; State v. Williams, 94 N. C. 891; Alexander v. State, 56 Ga. 478; People v. Brown, 67 Ill. 435; but not by official laches or error; State v. Brewer, 64 Ala. 287; U. S. v. Kirkpatrick, 9 Wheat. (U. S.) 735, 6 L. Ed. 199; The Floyd Acceptances, 7 Wall. (U. S.) 670, 19 L. Ed. 169.

By Matter of Record. Such as arises from the adjudication of a competent court. Judgments of courts of record, and decrees and other final determinations of ecclesiastical, maritime, and military courts, work estoppels; 2 B. & Ald. 362; Buck v. Collins, 69 Me. 445; Bradner v. Howard, 75 N. Y. 417; Adams v. Adams, 25 Minn. 72; Butterfield v. Smith, 101 U. S. 570, 25 L. Ed. 868; Henning v. Warner, 109 N. C. 406, 14 S. E. 317, Denver City Irr. & Water Co. v. Middaugh, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 234. Admissions in pleadings, either express or implied, cannot afterwards be controverted in a suit between the same parties; Com. Dig. *Estoppel* A 1. It is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment; De Sollar v. Hanscome, 158 U. S. 216, 15 Sup. Ct. 816, 39 L. Ed. 956; Nashua & L. R. Corp. v. R., 164 Mass. 226, 41 N. E. 268, 49 Am. St. Rep. 454; Empire State Nail Co. v. Button Co., 74 Fed. 868, 21 C. C. A. 152. See Res Judicata, where the subject of estoppel by matter of record is treated.

Estoppels by deed and by record are common-law doctrines.

By Matter in Pais. Such as arises from the acts and declarations of a person by which he designedly induces another to alter his position injuriously to himself; Brown v. Wheeler, 17 Conn. 345, 44 Am. Dec. 550; Kinney v. Farnsworth, 17 Conn. 355; Frost v. Ins. Co., 5 Denio (N. Y.) 154, 49 Am. Dec. 234; Ensel v. Levy, 46 Ohio St. 255, 19 N. E. 597; Tousley v. Board of Education, 39 Minn. 419, 40 N. W. 509; Pennypacker v. Latimer, 10 Idaho 618, 81 Pac. 55; Harrison National Bank of Cadiz, Ohio, v. Austin, 65 Neb. 632, 91 N. W. 540, 59 L. R. A. 294, 101 Am. St. Rep. 639. See Humphreys v. Finch, 97 N. C. 303, 1 S. E. 870, 2 Am. St. Rep. 293; Joyce v. Ry. Co., 43 Ill. App. 157; Vaile v. City of Independence, 116 Mo. 333, 22 S. W. 695; Westbrook v. Guderian, 3 Tex. Civ. App. 406, 22 S. W. 59. Equitable estoppel, or estoppel by conduct, is said to have its foundation in fraud, considered in its most general sense; Bisph. Eq. § 282. It is said (Bigelow, Estop. 437) that the following elements must be present in order to constitute an estoppel by

conduct: 1. There must have been a representation or concealment of material facts. 2. The representation must have been made with knowledge of the facts. 3. The party to whom it was made must have been ignorant of the truth of the matter. 4. It must have been made with the intention that the other party would act upon it. 5. The other party must have been induced to act upon it. Ergenbright v. Henderson, 72 Kan. 29, 82 Pac. 524; Blodgett v. Perry, 97 Mo. 263, 10 S. W. 891, 10 Am. St. Rep. 307. See Bynum v. Preston, 69 Tex. 287, 6 S. W. 428, 5 Am. St. Rep. 49; Tiedm. Eq. Jur. 107. The rule of equitable estoppel is, that where one by his acts, declarations, or silence where it is his duty to speak, has induced another, in reliance on such acts, declarations, or silence, to enter into a transaction, he shall not, to the prejudice of the person misled, impeach the transaction; per Bates, Ch., in Marvel v. Ortlip, 3 Del. Ch. 9; Woodruff v. Morristown Instit. for Savings, 34 N. J. Eq. 174; Miles v. Lefl, 60 Ia. 168, 14 N. W. 233; Stowe v. U. S., 19 Wall. (U. S.) 13, 22 L. Ed. 144; Davis v. Williams, 49 Ia. 83; Griffin v. City of Lawrence, 135 Mass. 365; Given v. Printing Co., 114 Fed. 92, 52 C. C. A. 40; Linton v. Ins. Co., 104 Fed. 584, 44 C. C. A. 54; Greer v. Mitchell, 42 W. Va. 494, 26 S. E. 302. "He who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted." Dickerson v. Colgrove, 100 U. S. 578, 25 L. Ed. 618, where an estoppel *in pais* in regard to real estate was held to have been created by a letter disavowing intention to claim the same.

Representations, in order to constitute an estoppel must be made to induce the other party to act, and he must have been induced so to act; Booth v. Lenox, 45 Fla. 191, 34 South. 566; Welty v. Vulgamore, 24 Ohio C. C. 572; to his injury; Appeal of Columbus, S. & H. R. Co., 109 Fed. 177, 48 C. C. A. 275. They must amount to misrepresentation or concealment of material facts; Brian v. Bonvillain, 111 La. 441, 35 South. 632; Mining Co. v. Juab County, 22 Utah 395, 62 Pac. 1024; Atkinson v. Plum, 50 W. Va. 104, 40 S. E. 587, 58 L. R. A. 788; of which the other party is actually and permissively ignorant; City of Ft. Scott v. Brokerage Co., 117 Fed. 51, 54 C. C. A. 437; or such negligence as amounts to fraud in law; Dye v. Crary, 13 N. Mex. 439, 85 Pac. 1038; 9 L. R. A. (N. S.) 1136, affirmed, 208 U. S. 515, 28 Sup. Ct. 360, 52 L. Ed. 595. In some cases it is held that there need not be intent to deceive; Maxon v. Lane, 124 Ind. 592, 24 N. E. 683; Rogers v. St. Ry., 100 Me. 86, 60 Atl. 713, 70 L. R. A. 574; Vanneter v. Crossman, 42 Mich. 465, 4 N. W. 216; Lydick v. Gill, 68 Neb. 273, 94 N. W. 109; Globe Nav. Co. v. Casualty Co., 39 Wash. 299, 81 Pac. 826; *contra*, see Stiff v. Ashton, 155 Mass. 130, 29 N. E. 203; Beacon Trust Co. v. Souther, 183 Mass. 413, 67 N. E. 345; Pearson v. Hardin, 95 Mich. 360, 54 N. W. 904; Centennial Eureka Min. Co. v. Juab County, 22 Utah 395, 62 Pac. 1024. There is no estoppel by acts *in pais* done under a misapprehension of facts induced by the party setting up the estoppel; Mason v. St. Albans Furniture Co., 149 Fed. 898.

In some cases representations as to future conduct may be the basis of estoppel, if their purpose and effect involves the abandonment of an existing right and affects the conduct of another; Union Mut Life Ins. Co. v. Mowry, 96 U. S. 544, 24 L. Ed. 674; Edison Electric Light Co. v. Electric Co., 59 Fed. 691, 699; Shields v. Smith, 37 Ark. 47; Stayton v. Graham, 139 Pa. 1, 21 Atl. 2; but in England it is otherwise; 5 H. L. Cas. 185, 214; 8 App. Cas. 467; [1902] A. C. 117, 130.

In the leading case on this subject (Pickard v. Sears, 6 Ad. & El. 469) a mortgagee of personalty was held to be estopped from asserting his title under the mortgage because he had passively acquiesced in a purchase of the same by the defendant under an execution against the mortgagor. The rule of that case was that an estoppel arose from *wilfully* causing another to believe in a certain state of facts, and to act on that belief; in Gregg v. Wells, 9 A. & E. 97, Lord Denman stated the rule more broadly as subjecting to an estoppel one who negligently and culpably stands by and allows another to contract on the faith of a fact which he can contradict; and in Freeman v. Cooke, 2 Exch. 654, it was said by Parke, B., that the rule of Pickard v. Sears must be considered as established, but that by the term "wilfully" it must be understood, "if not that the party represents that to be true which he knows to be untrue, at least, that he *means* his representations to be acted upon, and that it is acted upon accordingly." The establishment of the rule as thus limited was followed by Folger, J., in Continental Nat. Bank v. Bank, 50 N. Y. 575, where the principle was recognized that doing an act and the omission to act are the same; Howard v. Hudson, 2 El. & Bl. 1; Knights v. Wiffen, L. R. 5 Q. B. 660; Casco Bank v. Keene, 53 Me. 103. Cases of estoppel by silence are numerous; Appeal of Thompson, 126 Pa. 367, 17 Atl. 613; Silloway v. Ins. Co., 12 Gray (Mass.) 73; Blake v. Ins. Co., 12 Gray (Mass.) 265; 35 Can. Sup. Ct. 133 (criticised at length; 19 Harv. L. Rev. 113); but silence does not always amount to fraud; Lawrence v. Luhr, 65 Pa. 241; and there is no estoppel by silence where a party has had no opportunity to speak; National Newark Banking Co. v. Bank, 63 Pa. 417. See Carroll v. Tucker, 2 Misc. Rep. 397, 21 N. Y. Supp. 952.

The estoppel will be limited to the acts which were based upon the representations out of which the estoppel arose; thus, where a sheriff had a writ against A, but took B

into custody, upon B's representations that she was A, but detained her after he was informed that she was not A, B was estopped to recover damages for the false arrest but not for the subsequent detention; 2 C. B. N. S. 495. See Burney v. Collins, 50 Ga. 90; Tilton v. Nelson, 27 Barb. (N. Y.) 595; Bisph. Eq. § 292.

The acts alleged as an estoppel must be executed and not merely executory; Rorer Iron Co. v. Trout, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285; as when a statement is not accepted and acted upon, it does not constitute an estoppel; Nosler v. R. Co., 73 Ia. 268, 34 N. E. 850; Gilbert v. Vail, 60 Vt. 261, 14 Atl. 542.

The doctrine of estoppel *in pais* is applied at law as well as in equity; Dickerson v. Colgrove, 100 U. S. 578, 25 L. Ed. 618 (where the early cases are cited); Drexel v. Berney, 122 U. S. 241, 253, 7 Sup. Ct. 1200, 30 L. Ed. 1219; Wehrman v. Conklin, 155 U. S. 327, 15 Sup. Ct. 129, 39 L. Ed. 167; Tracy v. Roberts, 88 Me. 317, 34 Atl. 68, 51 Am. St. Rep. 394; Hagan v. Ellis, 39 Fla. 472, 22 South. 727, 63 Am. St. Rep. 167; Duke v. Griffith, 9 Utah 476, 35 Pac. 512; Marine Iron Works v. Wiess, 148 Fed. 145, 78 C. C. A. 279; Campbell v. Min. Co., 141 Fed. 610, 73 C. C. A. 260; and therefore it is neither necessary nor permissible to resort to equity to obtain the benefit of it; Barnard v. German American Seminary, 49 Mich. 444, 13 N. W. 811; Vermont Copper Min. Co. v. Ormsby, 47 Vt. 709, 713; Anglo-American Land, Mortgage & Agency Co. v. Lombard, 132 Fed. 721, 68 C. C. A. 89; to be available it must be specifically pleaded; *id.* A title by estoppel has been held sufficient to maintain ejectment or defend against it; George v. Tate, 102 U. S. 570, 26 L. Ed. 232; where the subject of acquiring title to land by estoppel is fully considered. See ADVERSE POSSESSION.

Whether "title by estoppel," so called, may be acquired to personal property is the subject of interesting discussion in the English courts in cases of registration of a forged transfer of stock. Such a transfer was held to work an estoppel in favor of subsequent transferees; L. R. 3 Q. B. 584; but not in favor of the holder under the forged transfer; 49 L. J. Q. B. N. S. 392, where Brett, L. J., said that "an estoppel gives no title to that which is the subject-matter of it." He considered that the meaning of the phrase "legal title by estoppel," as used in the older cases, is simply an expression of the recognition of the doctrine of estoppel by the courts of law as much as in those of equity, and while "the estoppel assumes that the reality is contrary to that which the person is estopped from denying, it has no effect whatever upon the reality of the circumstances."

It is said that the contract of a person under disability cannot be made good by estoppel; Bisph. Eq. § 293. See Lowell v. Daniels, 2 Gray (Mass.) 161, 61 Am. Dec. 448; Merriam v. R. Co., 117 Mass. 241; Glidden v. Strupler, 52 Pa. 400. It makes no difference that the person, if a married woman, falsely represented herself to be *sole;* 9 Ex. 422; Weathersbee v. Farrar, 97 N. C. 107, 1 S. E. 616. But estoppel may operate to prevent such a person from enforcing a right. For instance, if a married woman were to induce A to buy property from B, knowing that the title was not in B, but in herself, she would be estopped from asserting her title against A; Connolly v. Branstler, 3 Bush (Ky.) 702, 96 Am. Dec. 278; Brinkerhoff v. Brinkerhoff, 23 N. J. Eq. 477; Drake v. Glover, 30 Ala. 382. The same principle would extend to similar acts on the part of an infant; 3 Hare 503; Whittington v. Doe, 9 Ga. 23; but not unless the conduct was intentional and fraudulent; Harmon v. Smith, 38 Fed. 482; but infancy, being in law a shield and not a sword, cannot be pleaded to avoid liability for frauds, trespasses or torts; 1 Lev. 169; International Land Co. v. Marshall, 22 Okl. 693, 98 Pac. 951, 19 L. R. A. (N. S.) 1056, where the cases are discussed by Williams, C. J. See notes in 57 L. R. A. 684; 9 L. R. A. (N. S.) 1117; 16 L. R. A. 672

"Equitable estoppel is not applied in favor of a volunteer;" [1898] 1 Ch. 82. An unexecuted contract void as against public policy cannot be validated by invoking the doctrine of estoppel; Robinson v. Patterson, 71 Mich. 141, 39 N. W. 21; McKinney v. Development Co., 167 Fed. 770, 93 C. C. A. 258.

The doctrine that estoppels bind not only parties, but privies of blood, law, and estate, is said to apply equally to this class of estoppels; Bigelow, Estop. 554, 629; but a ward cannot be estopped by an act of his guardian which the other party to the agreement knew to be unauthorized; Heisen v. Heisen, 145 Ill. 658, 34 N. E. 597, 21 L. R. A. 434.

An agent or attorney having received money for his principal is in general estopped to deny his liability to pay it over to him, but it is a good defence that he was divested of the property or required to pay over the money by one having a paramount title; Moss Mercantile Co. v. Bank, 47 Or. 361, 82 Pac. 8, 2 L. R. A. (N. S.) 657, and note, 8 Ann. Cas. 569.

One who accepts a benefit under a will is thereby estopped to deny its validity; Drake v. Wild, 70 Vt. 52, 39 Atl. 248; Branson v. Watkins, 96 Ga. 55, 23 S. E. 204; Fry v. Morrison, 159 Ill. 244, 42 N. E. 774; Utermehle v. Norment, 197 U. S. 40, 25 Sup. Ct. 291, 49 L. Ed. 655, 3 Ann. Cas. 520; though ignorant of the rule of law on the subject; *id.*

At common law there was no estoppel against the sovereign; 10 Mod. 199, and the doctrine is applied in some states; State v. Williams, 94 N. C. 891; but, as appears *supra*, the state has been held estopped by matter of record and by deed. The weight of authority is against the estoppel of the govern-

ment by matter *in pais*, though it has been questioned whether there should not be; 19 Harv. L. Rev. 126; and where the sovereign asserts a pecuniary demand in court, it has been applied, though with hesitation; Walker v. U. S., 139 Fed. 409, where it was held that acts of officers of the United States, authorized to shape its conduct as to the transaction, may work an estoppel against the government. As to estoppels against the state or the United States, see note to State of Michigan v. Jackson, L. & S. R. Co., 16 C. C. A. 353.

Estoppel has been sustained as against a municipal corporation; Beadles v. Smyser, 209 U. S. 393, 28 Sup. Ct. 522, 52 L. Ed. 849; and it has been held that an estoppel *in pais* (by reason of a mistake of an officer which misled a person searching records) cannot be set up against a municipal government; Philadelphia Mortgage & Trust Co. v. Omaha, 63 Neb. 280, 88 N. W. 523, 93 Am. St. Rep. 442; but in a note on this case it is contended that the doctrine of estoppel is available as against the sovereign; 15 Harv. L. Rev. 737. It is sometimes said, though usually denied, that there can be no estoppel against alleging unconstitutionality, and for an examination of cases on this point, see 21 Harv. L. Rev. 133. It is also held that parties cannot estop themselves by a contract "in the face of an act of parliament"; 14 Ch. D. 432.

An estoppel against one of two joint plaintiffs, whose right is to a joint recovery, will defeat the action; McIntosh v. Dierken, 222 Pa. 612, 72 Atl. 232; one who applies for company shares in a fictitious name will not be permitted to deny liability as a shareholder; 5 Manson 336.

Where the facts are undisputed, the question whether they amount to an estoppel is one of law for the court; Keating v. Orne, 77 Pa. 89; Cox v. Rogers, 77 Pa 160; Lewis v. Carstairs, 5 W. & S. (Pa.) 205. Otherwise the facts are of course to be submitted to the jury under proper instructions as to what will constitute an estoppel.

The maxim *vigilantibus non dormientibus leges adjuvant* specially applies to a claim of equitable estoppel, since in such cases the interposition of equity is extraordinary and restrictive of what but for the estoppel would be a clear legal right; Marvel v. Ortlip, 3 Del. Ch. 9. The representations must be such as to lead a reasonably prudent man to act on them and he must have done this in ignorance of the truth and in good faith; Davis v. Pryor, 112 Fed. 274, 50 C. C. A. 579.

This principle has been applied to cases of dedication of land to the public use; Cincinnati v. White, 6 Pet. (U. S.) 438, 8 L. Ed. 452; Hobbs v. Inhabitants of Lowell, 19 Pick. (Mass.) 405, 31 Am. Dec. 145; of the owner's standing by and seeing land improved; Favill v. Roberts, 50 N. Y. 222; Smith v. McNeal, 68 Pa. 164; Truesdail v. Ward, 24 Mich. 134; Forbes v. McCoy, 24 Neb. 702, 40 N. W. 132; Alabama G. S. R. Co. v. R. Co., 84 Ala. 570, 3 South. 286, 5 Am. St. Rep. 401; Robertson v. Winchester, 85 Tenn. 171, 1 S. W. 781; Stone v. Tyree, 30 W. Va. 687, 5 S. E. 878; Marines v. Goblet, 31 S. C. 153, 9 S. E. 803, 17 Am. St. Rep 22; or sold; Epley v. Witherow, 7 Watts (Pa.) 168; Thompson v. Sanborn, 11 N. H. 201, 35 Am. Dec. 490; Morrison v. Morrison's Widow, 2 Dana (Ky.) 13; Snodgrass v. Ricketts, 13 Cal. 359; Shapley v. Rangeley, 1 Woodb. & M. 213, Fed. Cas. No. 12,707; Titus v. Morse, 40 Me. 348, 63 Am. Dec. 665; Planet Property & Financial Co. v. Ry. Co., 115 Mo. 613, 22 S. W. 616; without making any claim; Planet Property & Financial Co. v. Ry. Co., 115 Mo. 613, 22 S. W. 616; Winters v. Armstrong, 37 Fed. 508; Griffeth v. Brown, 76 Cal. 260, 18 Pac. 372; Weinstein v. Bank, 69 Tex. 38, 6 S. W. 171, 5 Am. St. Rep. 23; Bynum v. Preston, 69 Tex. 287, 6 S. W. 428, 5 Am. St. Rep. 49; McMartin v. Ins. Co., 41 Minn. 198, 42 N. W. 934; Irvine v. Scott, 85 Ky. 260, 3 S. W. 163. But the owner is not estopped by the unlawful occupation of a trespasser for less than the legal period of limitation; Woll v. Voight, 105 Minn. 371, 117 N. W. 608, 23 L. R. A. (N. S.) 270, and note.

What is termed an *estoppel by negligence* occurs when one who is under a legal duty, either to the person injured or to the public, to act with due care, fails to do so, and such failure is the natural and proximate cause of misleading that person to alter his position; but to create the estoppel all these elements must concur; Bradford v. Ins. Co., 102 Fed. 48, 43 C. C. A. 310, 49 L. R. A. 530; Andrus v. Bradley, 102 Fed. 54; Central R. R. Co. of New Jersey v. McCartney, 68 N. J. L. 165, 52 Atl. 575; Brown & Co. v. Ins. Co., 42 Md. 384, 20 Am Rep. 90; Nye v. Denny, 18 Ohio St. 246, 98 Am. Dec. 118; Tisher v. Beckwith, 30 Wis. 55, 11 Am. Rep. 546; 1 C. P. D. 578; [1905] 1 K. B. 677 (where, however, payment of a stolen cheque with a forged indorsement was held good under the law of Austria where the transaction occurred though it would not have been good in England).

But this doctrine does not apply between original parties, or where the defence is that, by reason of fraud, the writing, on which the estoppel is claimed, does not embrace the contract as originally made; Ward v. Spelts, 39 Neb. 809, 58 N. W. 426; Spelts v. Ward, 2 Neb. (Unof.) 177, 96 N. W. 56.

The phrase "estoppel by negligence" has been characterized as "an expression usual but not accurate, since negligence prevents a right of action accruing, estoppel a right that has accrued from being set up"; 2 Beven, Negl. 1332, where, however, a chapter is devoted to the subject. So also Bigelow treats the doctrine as above stated as a recognized branch of estoppel; Big. Est. (6th ed.) 711; and while considering it quite clear that "cases of estoppel arising out of negligence with-

out a representation must be uncommon," thinks it well settled that "negligence when naturally and directly tending to indicate intention" is equivalent to it in creating an estoppel.

See an interesting discussion of the doctrine, with critical examination of the English cases, by John S. Ewart in 15 L. Q. R. 384.

As to whether the doctrine of estoppel has any place in criminal law, see 12 Harv. L. Rev. 56; 2 Bish. Cr. L. § 364; State v. Spaulding, 24 Kan. 1; Moore v. State, 53 Neb. 831, 74 N. W. 319.

QUASI-ESTOPPEL. A term used by Bigelow to cover a group of cases in which a party is precluded from occupying inconsistent positions, either in litigations or in ordinary dealings; Big. Est. (6th ed.) 732. The principle covers a variety of cases under wills where a party who elects to take a benefit is required to give effect to an otherwise void devise; 31 Ch. D. 466; or appointment; 2 Atk. 88; or one taking a benefit under it cannot dispute the validity of a deed; Pickett v. Bank, 32 Ark. 346, Robinson v. Pebworth, 71 Ala. 240; Jacobs v. Miller, 50 Mich. 119, 15 N. W. 42; Wood v. Seely, 32 N. Y. 105; or of a contract of affreightment; The Water Witch, 1 Black (U. S.) 494, 17 L. Ed. 155. So also a person who has procured the enactment of a statute and received benefits under it, is precluded from alleging its unconstitutionality; Vose v. Cockcroft, 44 N. Y. 415; Sherman v. McKeon, 38 N. Y. 266; Cloud v. Coleman, 1 Bush (Ky.) 548; one who has petitioned for opening a street or acquiesced in it cannot dispute the validity of the assessment for it; City of Burlington v. Gilbert, 31 Ia. 356, 7 Am. Rep. 143; Appeal of Ferson, 96 Pa. 140.

It has been held that a party, who in a cause applies for affirmative relief, is estopped from setting up an original lack of jurisdiction; Thompson v. Greer, 62 Kan. 522, 64 Pac. 48; Chandler v. Bank, 149 Ind. 601, 49 N. E. 579; Lower v. Wilson, 9 S. D. 252, 68 N. W. 545, 62 Am. St. Rep. 865; F. C. Austin Mfg. Co. v. Hunter, 16 Okl. 86, 86 Pac. 293; Champion v. R. Co., 145 Mich. 676, 108 N. W. 1078; Montague v. Marunda, 71 Neb. 805, 99 N. W. 653; *contra*, Freer v. Davis, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep 895; State v. Dist. Court of Second Judicial Dist., 34 Mont. 226, 85 Pac. 1022; and it is suggested that the latter view should prevail upon the principle that consent can never give jurisdiction; 20 Harv. L. Rev. 150, 237.

It is to be noted that in the cases grouped under this title the courts have generally used the simple term "estoppel" which, it has been suggested, is a questionable use of terms, since many of the cases are mere instances of ratification or acquiescence; Big. Est. 755.

Estoppel *in pais* need not be pleaded, but this rule is altered in many states; Big. Est. 763.

The doctrine of estoppel is said to be the basis of another equitable doctrine, that of election; Bisph. Eq. § 294. See ELECTION.

ESTOVERS (*estouviers*, necessaries; from *estoffer*, to furnish). The right or privilege which a tenant has *to furnish himself* with so much wood from the demised premises as may be sufficient or necessary for his fuel, fences, and other agricultural operations. 2 Bla. Com. 35; Van Rensselaer v. Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582.

Any tenant may claim this right, whether he be a tenant for life, for years, or at will; and that without waiting for any special leave or assignment of the lessor, unless he is restrained by some provision contained in his lease; Shepp. Touchst. 3, n. 1; Chal. R. P. 311. Nor does it appear to be necessary that the wood should all be consumed upon the premises, provided it is taken in good faith for the use of the tenant, and in reasonable quantities, with the further qualification, also, that no substantial injury be done to the inheritance; Gardner v. Dering, 1 Paige, Ch. (N. Y.) 573.

Where several tenants are granted the right of estovers from the same estate, it becomes *a common of estovers;* but no one of such tenants can, by underletting his land to two or more persons, apportion this right among them; for in this way he might surcharge the land, and the rights of his cotenants, as well as those of the landlord, would be thereby invaded. In case, therefore, of the division of a farm among several tenants, neither of the under-tenants can have estovers, and the right, consequently, becomes extinguished; Van Rensselaer v. Radcliff, 10 Wend. (N. Y.) 650, 25 Am. Dec. 582; 4 Co. 36; 8 *id.* 78. There is much learning in the old books relative to the creation, apportionment, suspension, and extinguishment of these rights, very little of which, however, is applicable to the condition of things in this country, except perhaps in New York, where the grants of the manor-lands have led to some litigation on the subject. Tayl. Landl. & T. § 220. See 4 Washb. R. P. 99; 7 Bing. 640; Padelford v. Padelford, 7 Pick. (Mass.) 152; Richardson v. York, 14 Me. 221; Dalton v. Dalton, 42 N. C. 197; Owen v. Hyde, 6 Yerg. (Tenn.) 334, 27 Am. Dec. 467; Loomis v. Wilbur, 5 Mas. 13, Fed. Cas. No. 8,498.

The allimony allowed to a wife was called at common law, *estovers*. See DE ESTOVERIIS HABENDIS; COMMON.

ESTRAY. Cattle whose owner is unknown. Spelman, Gloss.; Walters v. Glats, 29 Ia. 437; Roberts v. Barnes, 27 Wis. 422; Shepherd v. Hawley, 4 Or. 206; Lyman v. Gipson, 18 Pick. (Mass.) 426; but see Worthington v. Brent, 69 Mo. 205; State v. Apel, 14 Tex. 431. Any beast, not wild, found with-

in any lordship, and not owned by any man. Cowell; 1 Bla. Com. 297; 2 *id.* 14. These belonged to the lord of the soil. Britt. c. 17.

An animal turned on a range by its owner is not an estray, although its immediate whereabouts is unknown to the owner, unless it wanders from the range and becomes lost; Stewart v. Hunter, 16 Or. 62, 16 Pac. 876, 8 Am. St. Rep. 267.

It is used of flotsam at sea. 15 L. Q. R. 357.

See ANIMAL; RUNNING AT LARGE.

ESTREAT. A true copy or note of some original writing or record, and especially of fines and amercements imposed by a court, *extracted* from the record, and certified to a proper officer or officers authorized and required to collect them. Fitzh. N. B. 57, 76. A forfeited recognizance taken out from among the other records for the purpose of being sent up to the exchequer, that the parties might be sued thereon, was said to be estreated. 4 Bla. Com. 253.

ESTREPEMENT. A common-law writ for the prevention of waste.

The same object being attainable by a motion for an injunction in chancery, the writ became obsolete in England, and was abolished by 3 & 4 Will. IV. c. 27.

The writ lay at common law to prevent a party in possession from committing waste on an estate the title to which was disputed, after judgment obtained in any real action and before possession was delivered by the sheriff

But, as waste might be committed in some cases pending the suit, the statute of Gloucester gave another writ of estrepement *pendente placito*, commanding the sheriff firmly to inhibit the tenant *"ne faciat vastum vel estrepementum pendente placito dicto indiscusso"* By virtue of either of these writs, the sheriff may resist those who commit waste or offer to do so, and he might use sufficient force for the purpose, 3 Bla Com 225, 226.

The writ was sometimes directed to the sheriff and the party in possession of the lands, in order to make him amenable to the court as for a contempt in case of his disobedience to the injunction of the writ. At common law the process proper to bring the tenant into court is a *venire facias*, and thereon an attachment Upon the defendant's coming in, the plaintiff declares against him. The defendant usually pleads "that he has done no waste contrary to the prohibition of the writ." The issue on this plea is tried by a jury, and in case they find against the defendant they assess damages which the plaintiff recovers. But, as this verdict convicts the defendant of a contempt, the court proceed against him for that cause as in other cases; Co. 2d Inst. 329; Rast. 317; 1 B. & P. 121; 2 Lilly, Reg. *Estrepement;* 5 Co. 119; Reg. Brev. 76.

In Pennsylvania, by statute, the remedy by estrepement is extended for the benefit of any owner of lands leased for years or at will, at any time during the continuance or after the expiration of such demise, and due notice given to the tenant to leave the same, agreeably to law; or for any purchaser at sheriff or coroner's sale of lands, etc., after he has been declared the highest bidder by the sheriff or coroner; or for any mortgagee or judgment-creditor, after the lands bound by such judgment or mortgage shall have been condemned by inquisition, or which may be subject to be sold by a writ of *venditioni exponas* or *levari facias*. See 10 Viner, Abr. 497; Woodf. Landl. & T. 447; Arch. Civ. Pl. 17; 7 Com. Dig. 659; Irwin v. Covode, 24 Pa. 162; Byrne v. Boyle, 37 Pa. 260.

ET ADJOURNATUR (Lat.). And it is adjourned. A phrase used in the old reports, where the argument of a cause was adjourned to another day, or where a second argument was had. 1 Keb. 692, 754.

ET ALIUS (Lat.). And another. The abbreviation *et al.*, sometimes in the plural written *et als.*, is affixed to the name of the first plaintiff or defendant, in entitling a cause, where there are several joined as plaintiffs or defendants

On an appeal from a judgment in favor of two or more parties, a bond payable to one of the appellees *et al* will be good, Conery v Webb, 12 La Ann. 282. But where a summons should state the parties to the action, the name of one followed by the words *et al* is not sufficient, Lyman v. Milton, 44 Cal. 630.

ET CÆTERA (Lat.) And others; and other things. See Lathers v. Keogh, 39 Hun (N. Y.) 576; Agate v. Lowenbein, 4 Daly (N. Y.) 62.

The addition of the abbreviation etc. to some minor provisions of an agreement for a lease does not introduce such uncertainty as to prevent a decree for specific performance where the material points are clear; 2 De G. & J. 559; but such an agreement "for letting and taking coals, etc.," was too indefinite a statement of the *subject-matter* of the agreement to admit of such a decree; 1 De G. M. & G. 80; an agreement "to do all the painting, papering, repairing, decorating, etc., during the term of the lease" was not so uncertain as to prevent a specific performance; 21 L. J. R. 185.

Under a bequest of "all her household furniture and effects, plate, linen, china, glass, books, wearing apparel, etc.," it was claimed that the testatrix had disposed of the general residue of her estate, but she was held by Romilly, M. R., to be intestate "except as to the articles specified in the will and those which are *ejusdem generis*;" 26 Beav. 220; and the same judge held the words good-will, etc., in a contract, to include "such other things as are necessarily connected with and belong to the good-will, . . . for instance, the use of trade-marks," and a covenant not to engage in similar business in Great Britain for a reasonable time to be limited in the conveyance having regard to the nature of such undertakings.

"All these things would be included in the words *et cætera;*" 28 L. J. Ch. 212; "all my furniture, etc.," passed only property *ejusdem generis* and not shares of a waterworks company; L. R. 11 Eq. 363; a bequest to his widow of "all my money, cattle, farming implements, etc., she paying" certain sums named to testator's two brothers, was sufficient to make the widow residuary legatee of real and personal estate, the latter being insufficient to pay debts; Jessel, M. R., L. R. 4 Ch. Div. 800.

The abbreviation etc. was formerly much used in pleading to avoid the inconveniences attendant upon making full and half defence. See DEFENCE. It is not generally to be used in solemn instruments; see Com. v. Ross, 6 S. & R. (Pa.) 427; when used in pleadings to avoid repetition, it usually refers to things unnecessary to be stated; Dano v. R. Co., 27 Ark. 564.

Where the sense of the abbreviation may be gathered from the preceding words there is sufficient certainty; but where the abbreviation cannot be understood and affects a vital part of the contract or instrument the uncertainty will be fatal.

See Hayes v. Wilson, 105 Mass. 21; Gray v. R. Co., 11 Hun (N. Y.) 70; EJUSDEM GENERIS.

ET DE HOC PONIT SE SUPER PATRIAM (Lat.). And of this he puts himself upon the country. The Latin form of concluding a traverse. See 3 Bla. Com. 313.

ET HOC PARATUS EST VERIFICARE (Lat.). And this he is prepared to verify. The form of concluding a plea in confession and avoidance; that is, where the defendant has confessed all that the plaintiff has set forth, and has pleaded new matter in avoidance. 1 Salk. 2.

ET HOC PETIT QUOD INQUIRATUR PER PATRIAM (Lat.). And this he prays may be inquired of *by the country.* The conclusion of a plea tendering an issue to the country. 1 Salk. 3.

ET INDE PRODUCIT SECTAM (Lat.). And thereupon he brings suit. The Latin conclusion of a declaration, except against attorneys and other officers of the court. 3 Bla. Com. 295.

ET MODO AD HUNC DIEM (Lat.). And now at this day. The Latin form of the commencement of the record on appearance of the parties.

ET NON (Lat.). And not. These words are sometimes employed in pleading to convey a pointed denial. They have the same effect as "without this," *absque hoc.* 2 Bouvier, Inst., 2d ed. n. 2985, note.

ET SIC AD PATRIAM (Lat.). And so to the country. A phrase used in the Year Books, to record an issue to the country.

ET UXOR (Lat. and wife). Used to show that the wife of the grantor is a party to the deed. The abbreviation is *et ux.*

ETHICS, LEGAL. That branch of moral science which treats of the duties which a member of the legal profession owes to the public, to the court, to his professional brethren, and to his client.

Perhaps the most comprehensive and satisfactory treatment of the subject is the essay of Judge Sharswood, originally embodied in a series of lectures to the law school of the University of Pennsylvania, in 1854. The republication of the fifth edition, forty-two years after the issue of the first, attests the interest of the profession in the work. It was republished by the American Bar Association in 1907. From it the following is mainly extracted:

The relation of the profession to the public is so intimate and far-reaching, that it "can hardly be over-estimated." This arises from its influence both on legislation and jurisprudence; the latter of which it controls entirely and "the former almost entirely." Accordingly there is involved the study of the true ends of society and government and the conservation of life, liberty, and property, and as means to these ends it is the office of the Bar to diffuse sound principles among the people, to aid in forming correct public opinion, "to maintain the ancient landmarks, to respect authority, and to guard the integrity of the law as a science."

The responsibilities, legal and moral, of the lawyer, arising from his relations to the court, to his professional brethren, and to his client, are thus treated: "Fidelity to the court, fidelity to the client, fidelity to the claims of truth and honor: these are the matters comprised in the oath of office."

"*Fidelity to the court* requires outward *respect* in words and actions. The oath, as it has been said, undoubtedly looks to nothing like allegiance to the person of the judge, unless in those cases where his person is so inseparable from his office, that an insult to the one is an indignity to the other. In matters collateral to official duty, the judge is on a level with the members of the Bar, as he is with his fellow-citizens; his title to distinction and respect resting on no other foundation than his virtues and qualities as a man." Per Gibson, C. J., in In re Austin, 5 Rawle (Pa.) 204, 28 Am. Dec. 657.

"There are occasions, no doubt, when duty to the interests confided to the charge of the advocate demands firm and decided opposition to the views expressed or the course pursued by the court, nay, even manly and open remonstrance; but this duty may be faithfully performed, and yet that outward respect be preserved, which is here inculcated. Counsel should ever remember how necessary it is for the dignified and honorable administration of justice, upon which the dignity and honor of their profession entirely depend, that the courts and the members of the courts should be regarded with respect by the suitors and people; that on all occasions of difficulty or danger to that department of government, they should have the good opinion and confidence of the public on their side."

"Indeed it is highly important that the *temper* of an advocate should be always equal. He should most carefully aim to repress everything like excitability or irritability. When passion is allowed to prevail, the judgment is dethroned. Words are spoken, or things done, which the parties afterwards wish could be unsaid or undone. Equanimity and self-possession are qualities of unspeakable value."

"Another plain duty of counsel is to present everything in the cause to the court *openly* in the course of the public discharge of its duties. It is not often, indeed, that gentlemen of the Bar so far forget themselves as to attempt to exert privately an influence upon the judge, to seek private interviews, or take occasional opportunities of accidental or social meetings to make *ex parte* statements, or to endeavor to impress their views. . . . They

know that such conduct is wrong in itself, and has a tendency to impair confidence in the administration of justice, which ought not only to be pure but unsuspected. A judge will do right to avoid social intercourse with those who obtrude such unwelcome matters upon his moments of relaxation."

"There is one thing, however, of which gentlemen of the Bar are not sufficiently careful,—*to discourage and prohibit their clients* from pursuing a similar course. The position of the judge in relation to a cause, under such circumstances, is very embarrassing, especially, as is often the case, if he hears a good deal about the matter before he discovers the nature of the business and object of the call upon him."

"Counsel should set their faces against all *undue influences* of the sort; they are unfaithful to the court if they allow any improper means of the kind to be resorted to. *Judicem nec de obtinendo jure orari oportet nec de injuria exorari.* It may be in place to remark here that the counsel in a cause ought to avoid all unnecessary communication with the jurors before or during any trial in which he may be concerned. He should enforce the same duty upon his client."

"There is another duty to the court, and that is, *to support* and *maintain it* in its proper province wherever it comes in conflict with the co-ordinate tribunal—the jury."

"It need hardly be added that a practitioner ought to be particularly cautious, in all his dealings with the court, to use no *deceit, imposition,* or *evasion*—to make no statements of facts which he does not know or believe to be true—to distinguish carefully what lies in his own knowledge from what he has merely derived from his instructions—to present no paper-books intentionally garbled. 'Sir Matthew Hale abhorred,' says his biographer, 'those too common faults of misreciting witnesses, quoting precedents or books falsely, or asserting anything confidently; by which ignorant juries and weak judges are too often wrought upon.'"

"The topic of *fidelity to the client* involves the most difficult questions in the consideration of the duty of a lawyer."

"He is legally responsible to his client only for the want of ordinary care and ordinary skill. That constitutes gross negligence. It is extremely difficult to fix upon any rule which shall define what is negligence in a given case. The habits and practice of men are widely different in this regard. It has been laid down that if the ordinary and average degree of diligence and skill could be determined, it would furnish the true rule. Though such be the extent of legal liability, that of moral responsibility is wider. Entire devotion to the interest of the client, warm zeal in the maintenance and defence of his rights, and the exertion of his utmost learning and ability,—these are the higher points which can only satisfy the truly conscientious practitioner."

"But what are the limits of his duty when the legal demands or interests of his client conflict with his own sense of what is just and right? This is a problem by no means of easy solution. That lawyers are as often the ministers of injustice as of justice, is the common accusation in the mouth of gainsayers against the profession. It is said there must be a right and a wrong side to every lawsuit. In the majority of cases it must be apparent to the advocate on which side is the justice of the cause; yet he will maintain, and often with the appearance of warmth and earnestness, that side which he must know to be unjust, and the success of which will be a wrong to the opposite party. Is he not then a participator in the injustice? It may be answered in general: Every case is to be decided, by the tribunal before which it is brought for adjudication, upon the evidence, and upon the principles of law applicable to the facts as they appear upon the evidence."

"Now the lawyer is not merely the agent of the party; he is an officer of the court. The party has a right to have his case decided upon the law and the evidence, and to have every view presented to the minds of the judges which can legitimately bear upon the question. This is the office which the advocate performs. He is not morally responsible for the act of the party in maintaining an unjust cause, nor for the error of the court, if they fall into error, in deciding it in his favor. The court or jury ought certainly to hear and weigh both sides; and the office of the counsel is to assist them by doing that which the client in person, from want of learning, experience, and address, is unable to do in a proper manner. The lawyer who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury."

"As an answer to any sweeping objection made to the profession in general, the view thus presented may be quite satisfactory. It by no means follows, however, as a principle of private action for the advocate, that all causes are to be taken by him indiscriminately, and conducted with a view to one single end, success. It is much to be feared, however, that the prevailing tone of professional ethics leads practically to this result. He has an undoubted right to refuse a retainer, and decline to be concerned in any cause, at his discretion. It is a discretion to be wisely and justly exercised. When he has once embarked in a case, he cannot retire from it without the consent of his client or the approbation of the court."

"Lord Brougham, in his justly celebrated defence of the Queen, went to very extravagant lengths upon this subject; no doubt he was led by the excitement of so great an occasion to say what cool reflection and sober reason certainly never can approve. 'An advocate,' said he, 'in the discharge of his duty knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among them to himself, is his first and only duty, and in performing this duty he must not regard the alarm, the torments, the destruction he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on, reckless of consequences: though it should be his unhappy lot to involve his country in confusion.'"

"On the other hand, and as illustrative of the practical difficulty which this question presented to a man with as nice a perception of moral duty as perhaps ever lived, it is said by Bishop Burnet of Sir Matthew Hale: 'If he saw a cause was unjust, he for a great while would not meddle further in it, but to give his advice that it was so; if the parties after that would go on, they were to seek another counsellor, for he would assist none in acts of injustice; if he found the cause doubtful or weak in point of law, he always advised his clients to agree their business. Yet afterwards he abated much of the scrupulosity he had about causes that appeared at first unjust, upon this occasion: there were two causes brought him which, by the ignorance of the party or their attorney, were so ill-represented to him that they seemed to be very bad, but he inquiring more narrowly into them, found they were really very good and just; so after this he slackened much of his former strictness of refusing to meddle in causes upon the ill circumstances that appeared in them at first.'"

"There is a distinction to be made between the case of prosecution and defence for crimes; between appearing for a plaintiff in pursuit of an unjust claim, and for a defendant in resisting what appears to be a just one. Every man, accused of an offence, has a constitutional right to a trial according to law; even if guilty, he ought not to be convicted and undergo punishment unless upon legal evidence; and with all the forms which have been devised for the security of life and liberty. These are the panoply of innocence, when unjustly arraigned; and guilt cannot be deprived of it, without removing it from innocence. He is entitled, therefore, to the benefit of counsel to conduct his defence, to cross-examine the witnesses for the State, to scan, with legal knowledge, the forms of the proceeding against him, to present his defence in an intelligible shape, to suggest all those reasonable doubts which may arise from the evidence as

to his guilt, and to see that if he is convicted, it is according to law."

As to contingent fees Judge Sharswood says:

"Regard should be had to the general usage of the profession, especially as to the rates of commission to be charged for the collection of undefended claims. Except in this class of cases, agreements between counsel and client that the compensation of the former shall depend upon final success in the lawsuit—in other words, contingent fees—however common such agreements may be, are of a very dangerous tendency, and to be declined in all ordinary cases. In making his charge, after the business committed to him has been completed, as an attorney may well take into consideration the general ability of his client to pay, so he may also consider the pecuniary benefit which may have been derived from his services. For a poor man, who is unable to pay at all, there may be a general understanding that the attorney is to be liberally compensated in case of success. What is objected to is an agreement to receive a certain part or proportion of the sum or subject-matter, in the event of a recovery, and nothing otherwise."

He considers that the practice should be discouraged not necessarily on the consideration of unlawfulness but of morality and its effect on the lawyer.

"It is to be observed, then, that such a contract changes entirely the relation of counsel to the cause. It reduces him from his high position of an officer of the court and a minister of justice, to that of a party litigating his own claim. Having now a deep personal interest in the event of the controversy, he will cease to consider himself subject to the ordinary rules of professional conduct He is tempted to make success, at all hazards and by all means, the sole end of his exertions He becomes blind to the merits of the case, and would find it difficult to persuade himself no matter what state of facts might be developed in the progress of the proceedings, as to the true character of the transaction, that it was his duty to retire from it."

"He has now an interest, which gives him a right to speak as principal, not merely to advise as to the law, and abide by instructions It is either unfair to him or unfair to the client If he thinks the result doubtful, he throws all his time, learning, and skill away upon what, in his estimation, is an uncertain chance. He cannot work with the proper spirit in such a case. If he believes that the result will be success, he secures in this way a higher compensation than he is justly entitled to receive

"It is an undue encouragement to litigation. Men, who would not think of entering on a lawsuit, if they knew that they must compensate their lawyers whether they win or lose, are ready upon such a contingent agreement to try their chances with any kind of a claim. It makes the law more of a lottery than it is.

"The worst consequence is yet to be told,—its effect upon professional character. It turns lawyers into higglers with their clients Of course it is not meant that these are always its actual results; but they are its inevitable tendencies, in many instances its practical working. To drive a favorable bargain with the suitor in the first place, the difficulties of the case are magnified and multiplied, and advantage taken of that very confidence which led him to intrust his interests to the protection of the advocate. The parties are necessarily not on an equal footing in making such a bargain A high sense of honor may prevent counsel from abusing his position and knowledge; but all have not such high and nice sense of honor. If our example goes towards making the practice of agreements for contingent fees general, we assist in placing such temptations in the way of our professional brethren of all degrees—the young, the inexperienced, and the unwary, as well as those whose age and experience have taught them that a lawyer's honor is his brightest jewel, and to be guarded from being sullied, even by the breath of suspicion, with the most sedulous care."

On the same subject Mr Eli K. Price, in an essay on Limitations and Liens, thus expresses his opinion: "And further permit me to advise and earnestly to admonish you, for the preservation of professional honor and integrity, to avoid the temptation for bargaining for fees or shares of any estate or other claim, contingent upon a successful recovery. The practice directly leads to a disturbance of the peace of society, and to an infidelity to the professional obligation promised to the court, in which is implied an absence of desire or effort of one in the ministry of the temple of justice, to obtain a success that is not just as well as lawful. It is true, as a just equivalent for many cases honorably advocated and incompetently paid by the poor, a compensation may and will be received, the more liberal because of the ability produced by success; but let it be the result of no bargain, exacted as a price before the service is rendered, but rather the grateful return for benefits already conferred. If rigid in your terms, in protection of the right of the profession to a just and honorable compensation, let it rather be in the amount of the required retainer, when it will have its proper influence in the discouragement of litigation" See CHAMPERTY.

"The boundaries of professional privilege and professional obligation are clearly defined and in no way doubtful Counsel represents the prisoner to defend his rights. In so doing he is bound to exercise competent learning, and to be faithful, vigilant, resolute. But he is at the same time an officer of the court, part of the system which the law provides for the preservation of individual rights in the administration of justice, and bound by his official oath to fidelity as well to the court as to the client It was well said by the Chief Justice in Com. v. Jongrass, 181 Pa. 172, 37 Atl. 207: 'There is no code of professional ethics which is peculiar to the criminal courts There are no methods of practice to be tolerated there that are not equally entitled to recognition in the civil courts.' The duty of the counsel is to see that his client is tried with proper observance of his legal rights, and not convicted except in strict accordance with law. His duty to his client requires him to do this much, his duty to the court forbids him to do more An independent and fearless bar is a necessary part of the heritage of a people free by the standards of Anglo-Saxon freedom, and courts must allow a large latitude to the individual judgment of counsel in determining his action, but it must never be lost sight of that there is a corresponding obligation to the court, which is violated by excessive zeal or perverted ingenuity that seeks to delay or evade the due course of legal justice." Com. v. Hill, 185 Pa 387, 39 Atl. 1055, per Mitchell, J.

In an address of Joseph B. Warner before the American Bar Association (1896) on "The Responsibilities of the Lawyer," will be found a discussion of this subject. It is said upon the much-discussed question of how an honorable man can advocate what he knows to be a bad cause, that it is important to look at the profession from the non-professional standpoint, and that the familiar argument that every man has the right to have the law fairly applied to his case is a solution, less satisfactory in theory than in practice, of the problem as it confronts the individual lawyer. This assumes the presentation of a cause by an official spokesman before a competent and impartial tribunal. The theory might fit a mere intermediary in the public function of the administration of justice, but does not answer when, as in modern practice, it concerns the intimate and confidential adviser of the client who is thoroughly identified with the client at the inception and during the preparation for the progress of the trial at every stage. "Such being the lawyer's immersion in his client's cause, it is out of the question to consider him merely as a perfunctory representative. His responsibility for litigation in its inception, its progress, and its results, must be, to some extent at least, commensurate with his identification with the cause. If he wholly adopts the client he must acknowledge the relationship. This leaves the lawyer's responsibility where he chooses to put it. He may limit it by limiting his relations to those external services which are guardedly professional; he may, on the other hand,

enter so far into the case as to become as answerable for it as the client is, or even more. This is, I think, the position which the lawyer must accept. He cannot make a case his own, and push it as if he were a party, and yet disclaim responsibility for it on the ground that his connection with it is wholly official. He must openly accept the consequences of whatever he does, and expect no shelter from any theory of the professional relation which does not squarely recognize all the facts."

Nor does Mr. Warner consider that the unavoidable influence of powerful counsel on courts is to be disregarded as a disturbing factor in the cause of justice. While the danger may be slight as to courts, with juries it is by no means so, and "in proportion as the lawyer purposely carries a jury against the facts, or beyond the facts, so far the verdict is his act. To that responsibility he must be held." The shadowy impression of an obligation to undertake any cause is dismissed as untenable and inconsistent with present conditions. The counsel is in a measure responsible for the cause he has chosen to take. It is true he is not required to settle all doubts against his client, and due regard is to be had for the uncertainty of the law and the unquestioned fact that the lawyer must administer it as it is, and not in each case sit in judgment upon its wisdom or policy The law, therefore, he does not control, but as to facts there is grave responsibility. No special rule can be formulated to distinguish between true and false advocacy, and allowance is to be made for the avowedly partisan attitude of the counsel, but "from a piece of false evidence, or a false statement in argument, every decent lawyer starts back. . . . Certainly nothing could be worse than to give any sanction whatever to a theory which, though never avowed, may sometimes be tacitly assumed, that the practice of the law is a game, or a species of warfare, in which there may be a few rules agreed on, but in the main there is but one thing to consider, and that is victory As in the strange, unethical ethics of war you may not use poisoned bullets, but may use explosive shells, and may not poison the well in the besieged city, but may destroy the provision train on its way thither, so in a court of law, on this monstrous theory, though you may not actually suborn witnesses, you may take advantage of every piece of falsehood which in any other way can pass in, undetected, in evidence or argument. But if law is a game, it is a game in which the stakes are human happiness and character, if it is war, it is not a war for plunder, but one for principles, which cannot be set up with glory in the end if they have been first defiled and trampled under foot by the victors." The subject is thus fairly summed up: "At last the moralities of the practice of the law must rest on the individual lawyer, and perhaps little more can be said by way of particular rules for professional conduct than that the lawyer is under all the obligations which the highest standard, rightly understood, imposes on any man From these he neither gets, nor claims, an exemption by reason of any convention which would permit falsehood, nor by reason of working within a system which, to some extent, settles conduct by general rules of law without regard to the moral aspect of particular cases."

Our system is not devised primarily to discover truth, nor is the lawyer chiefly a searcher after truth. If he were, his methods would seem strange, indeed. Our administration of law is made, or rather has grown, by forces which are virtually the great forces of nature, to meet human needs, to control the elemental passions of men, to regulate the affairs of life. . . . It has the imperfections and the contradictions of all human things. It does not always conform to rules, however unquestionable and right. It touches all of life and takes on both good and evil by the contact. In its critical moments, when it is centred in a trial in court, it is the modern phase of all ancient strife, the visible struggle, old as the world, of all the passions of anger, hate, greed, and avarice, less wild than of old, but still full of their inherited spirit, and now forced into an arena which, excepting war itself, is left as the only battlefield for the irrepressible fighting instincts of the race.

That these contests should not always proceed in irreproachable methods and infallibly end in right results, is not to be wondered at: that the men who engage in them as trained contestants sometimes fight with indefensible tactics must be laid to traits which yet survive in the human animal. The vigorous participation in affairs, with a purpose to do right, is the most wholesome moral tonic that our nature can have. This way lies open in the practice of the law. It cannot be said to be free from perplexities. The practitioner will not find himself in a plain way in which the fool cannot err. But he will find himself in the midst of abundant opportunities for service to mankind, will see before him ideals among the highest which our minds can reach, and will have the encouragement of examples which are not behind the farthest mark that human nature has touched in its approach to justice.

Among numerous works and articles, the following may be referred to: Virginia State Bar Assoc. Reports, 1894; Butler, Lawyer & Client, 1871; Eaton, Public Relations, etc, of the Legal Profession, 1882; Hearn, Legal Duties & Rights, 1883; Hill, The Bar; Its Ethics, 1881; Hoffman, Legal Studies, Pollock, Essays in Jurispr. & Ethics, 1882; Sedgwick, Relation & Duty of the Lawyer to the State, 1892, Warren, Professional Duties, 1870; F. C. Brewster's Address before the Phila. Law Academy, 1861; Woolworth, Duty, etc., of the Profession, Nebraska State Bar Assoc. 1877; Lord Herschell, Rights & Duties of an Advocate, Glasgow Jurid Soc. 1890; The Responsibilities of the Lawyer, by Joseph B Warner, Amer. Bar. Assoc. 1896; Henry Wade Rogers, 16 Yale L. J. 225.

Canons of legal ethics have been published by several State Bar Associations. As to the civil law, see ADVOCATI.

EUGENICS. Acts forbidding marriage except upon proof of the good health of one or both of the parties have recently been passed in a few states. The Wisconsin act has been declared invalid in an unreported case.

EUNDO, MORANDO ET REDEUNDO (Lat.). This Latin phrase signifies going, remaining, and returning. It is employed in cases where a person is privileged from arrest, in order to give him the freedom necessary to the performance of his respective obligations, to signify that he is protected from arrest *eundo, morando et redeundo.*

EUNOMY. Equal laws and a well-adjusted constitution of government.

EVASION (Lat. *evadere*, to avoid). A subtle device to set aside the truth or escape the punishment of the law: as, if a man should tempt another to strike him first, in order that he might have an opportunity of returning the blow with impunity. He is, nevertheless, punishable, because he becomes himself the aggressor in such a case. Hawk. Pl. Cr. c. 31, §§ 24, 25; Bac. Abr. *Fraud*, A.

EVENT. The consequences of anything, the issue, conclusion, end; that in which an action, operation, or series of operations, terminates. Fitch v. Bates, 11 Barb. (N. Y.) 473.

EVERY. All the separate individuals who constitute the whole regarded one by one. State v. Penny, 19 S. C. 221. See ALL.

EVICTION. Deprivation of the possession of lands or tenements.

Originally and technically, the dispossession must be by judgment of law; if otherwise, it was an *ouster;* Lansing v. Van Alstyne, 2 Wend. (N. Y.) 563, note; Webb v. Alexander, 7 Wend. (N. Y.) 285; but the necessity of legal process was long ago abandoned in England: 4 Term 617; and in this country also it is settled that there need not be legal process; Greenvault v. Davis, 4 Hill (N. Y.) 645; Grist v. Hodges, 14 N. C. 200; Green v. Irving, 54 Miss. 450, 28 Am. Rep. 360. The word is difficult to define with technical accuracy; 17 C. B. 30; but it may be fairly stated that any actual entry and dispossession, adversely and lawfully made under paramount title, will be an eviction; Rawle, Cov. § 133.

Total eviction takes place when the possessor is wholly deprived of his rights in the premises. Partial eviction takes place when the possessor is deprived of only a portion of them; as, if a third person comes in and ejects him from the possession of half his land, or establishes a right to some easement over it, by a title which is prior to that under which he holds.

With respect to the demised premises, an eviction consists in taking from a tenant some part of the premises of which he was in possession, not in refusing to put him in possession of something which by the agreement with his landlord he should have enjoyed; Etheridge v. Osborn, 12 Wend. (N. Y.) 529. And in order to effect a suspension of rent there must be something equivalent to an expulsion from the premises, and not a mere trespass, or disturbance in the enjoyment of them; Allen v Pell, 4 Wend (N. Y.) 595; City of New York v. Price, 5 Sandf (N. Y.) 542; T. Jones 148; Nelson v. Allen, 1 Yerg (Tenn.) 379; Bartlett v. Farrington, 120 Mass. 284. The entry of a landlord upon demised premises for the purpose of rebuilding does not operate as an eviction, where it was with the tenant's assent and not to his entire seclusion; Heller v. Ins. Co., 151 Pa. 101, 25 Atl. 83.

It is not necessary, however, in order to produce the eviction of a tenant, that there should be an actual physical expulsion; for a landlord may do many acts tending to diminish the enjoyment of the premises, short of an expulsion, which will amount to an eviction in law: as if he intentionally disturb the tenant's enjoyment to such an extent as to injure his business or destroy the comfort of himself and family, or render the premises unfit for the purposes for which they were leased, it will amount to an eviction; Dyett v. Pendleton, 8 Cow. (N. Y.) 727; Edmison v. Lowry, 3 S. D. 77, 52 N. W. 583, 17 L. R. A. 275, 44 Am. St. Rep. 774; Duff v. Hart, 16 N. Y. Supp. 163; O'Neill v. Manget, 44 Mo. App. 279; Hoeveler v. Fleming, 91 Pa. 322; Royce v. Guggenheim, 106 Mass. 201, 8 Am. Rep. 322; Alger v. Kennedy, 49 Vt. 109, 24 Am. Rep. 117; Wade v. Herndl, 127 Wis. 544, 107 N. W. 4, 5 L. R. A. (N. S.) 855, 7 Ann. Cas. 591.

Constructive eviction may arise from any wrongful act of the lessor which deprives the tenant of the full enjoyment of the leased premises: as, by forbidding an undertenant to pay rent to the tenant; Leadbeater v. Roth, 25 Ill. 587; building a fence in front of the premises to cut off the tenant's access thereto; see Boston & W. R. Co. v. Ripley, 13 Allen (Mass.) 421; erecting a permanent structure which renders unfit for use two rooms; Royce v. Guggenheim, 106 Mass. 201, 8 Am. Rep. 322; refusal to do an act indispensably necessary to enable the tenant to carry on the business for which the premises were leased: as, when premises were let for a grog-shop, the landlord refused to sign the necessary documents required by statute to enable the tenant to obtain a license; Grabenhorst v Nicodemus, 42 Md 236; *contra*, Kellogg v. Lowe, 38 Wash. 293, 80 Pac 458, 70 L R. A 510; also where lessor tears down an adjoining building, making it evident that lessee's building would fall; Snow v. Pulitzer, 142 N. Y. 263, 36 N. E. 1059. And when a landlord, who owned another building adjoining that occupied by a tenant, the two being constructed together, tore the former down, rendering the latter unsafe for occupancy, and then procured its condemnation and destruction by the city authorities, these acts constituted an eviction; Silber v. Larkin, 94 Wis 9, 68 N. W. 406. So also failure to furnish elevator service to an office building; McCall v. Ins Co., 201 Mass 223, 87 N. E. 582, 21 L. R. A. (N. S.) 38; Lawrence v. Marble Co., 1 Misc 105, 20 N. Y. Supp. 698; Ess-Eff Realty Co. v. Buttenheim, 125 N Y. Supp. 401; and such failure together with a failure to heat the premises; Minneapolis Co-Operative Co. v. Williamson, 51 Minn. 53, 52 N. W. 986, 38 Am. St. Rep. 473; leasing part of a building to an automobile company whose work caused vibrations, to the disturbance of an artist; Wade v Herndl, 127 Wis. 544, 107 N. W. 4, 5 L. R. A. (N. S.) 855, 7 Ann. Cas. 591; renting a floor to lewd and disorderly persons; Lay v. Bennett, 4 Colo. App. 252, 35 Pac. 748; renting a lower floor for a laundry, as against a florist on an upper floor; Duff v. Hart, 16 N. Y Supp. 163; or for a noisy and disorderly saloon; Halligan v. Wade, 21 Ill. 470, 74 Am. Dec. 108; permitting rats and offensive odors in a part of a building; Barnard Realty Co. v. Bonwit, 155 App. Div. 182, 139 N. Y. Supp. 1050.

But a mere failure of the landlord to make repairs, although such act may cause the

place to be untenantable, will not amount to an eviction; Coddington v. Dunham, 35 N. Y. Super. Ct. 412; Bussman v. Ganster, 72 Pa. 285. See Alger v. Kennedy, 49 Vt. 109, 24 Am. Rep. 117. Nor the presence of vermin; Jacobs v. Morand, 59 Misc. 200, 110 N. Y. Supp. 208. If the objectionable acts are done on an adjoining property it is not eviction; Solomon v. Fantozzi, 43 Misc. 61, 86 N. Y. Supp. 754; Kellogg v. Lowe, 38 Wash. 293, 80 Pac. 458, 70 L. R. A. 510; Gray v. Gaff, 8 Mo. App. 329.

The doctrine of constructive eviction amounts only to a right to abandon the premises; it is not a defence against an action for rent when the tenant waives the eviction and remains in possession; Edgerton v. Page, 20 N. Y. 281.

The ownership of adjacent premises, and the doing of an act, solely as owner of such premises, which injures a tenant's use of his land, do not infringe a right of the tenant and will not amount to a constructive eviction; Palmer v. Wetmore, 2 Sandf. (N. Y.) 316; Solomon v. Fantozzi, 43 Misc. 61, 86 N. Y. Supp. 754; Kellogg v. Lowe, 38 Wash. 293, 80 Pac. 458, 70 L. R. A. 510; Gray v. Gaff, 8 Mo. App. 329.

The remedy for an eviction depends chiefly upon the covenants in the deed under which the party held. When the grantee suffers a total eviction, if he has a covenant of seisin or for quiet enjoyment, he recovers from the grantor the consideration-money which he paid for the land, with interest, and not the enhanced value of the premises, whether such value has been created by the expenditure of money in improvements thereon, or by any other more general cause; Kinney v. Watts, 14 Wend. (N. Y.) 38; Marston v. Hobbs, 2 Mass. 433, 3 Am. Dec. 61. And this seems to be the general rule; Bennet v. Jenkins, 13 Johns. (N. Y.) 50; Bender v. Fromberger, 4 Dall. (U. S.) 441, 1 L. Ed. 898; Talbot v. Bedford's Heirs, Cooke (Tenn.) 447; Lowther v. Com., 1 Hen. & M. (Va.) 202; Stewart v. Drake, 9 N. J. L. 139; Cox's Heirs v. Strode, 2 Bibb (Ky.) 273, 5 Am. Dec. 603.

With respect to a lessee, however, who pays no purchase-money, the rule of damages upon an eviction is different; for he recovers nothing, except such expenses as he has been put to in defending his possession; and as to any improvements he may have made upon the premises, he stands upon the same general footing with a purchaser. The rents reserved in a lease, where no other consideration is paid, are regarded as a just equivalent for the use of the demised premises. Upon an eviction the rent ceases, and the lessee is thereby relieved from a burden which must be deemed equal to the benefit he would have derived from the continued enjoyment of the property; Kelly v. Dutch Church, 2 Hill (N. Y.) 105; The Richmond v. Cake, 1 App. D. C. 447; Holmes v. Guion, 44 Mo. 164; Alger v. Kennedy, 49 Vt. 109, 24 Am. Rep. 117; McClurg v. Price, 59 Pa. 420, 98 Am. Dec. 356; Leadbeater v. Roth, 25 Ill. 587. It is no defence, however, to an action for rent which was due at the time of the eviction; Johnson v. Barg, 8 Misc. 307, 28 N. Y. Supp. 728.

When the eviction is only *partial*, the damages to be recovered under the covenant of seisin are a ratable part of the original price, and they are to bear the same ratio to the whole consideration that the value of the land to which the title has failed bears to the value of the whole tract. The contract is not rescinded, so as to entitle the vendee to the whole consideration-money, but only to the amount of the relative value of the part lost; Guthrie v. Pugsley, 12 Johns. (N. Y.) 126; 4 Kent 462. See 6 Bac. Abr. 44; 1 Saund. 204, 322 *a*; Colburn v. Morrill, 117 Mass. 262, 19 Am. Rep. 415; Tunis v. Grandy, 22 Gratt. (Va.) 109; Hunter v. Reiley, 43 N. J. L. 480; Home Life Ins. Co. v. Sherman, 46 N. Y. 370. See MEASURE OF DAMAGES.

EVIDENCE. That which tends to prove or disprove any matter in question, or to influence the belief respecting it. Belief is produced by the consideration of something presented to the mind. The matter thus presented, in whatever shape it may come, and through whatever material organ it is derived, is evidence. Prof. Parker, Lectures on Medical Jurisprudence, in Dartmouth College.

The word evidence, in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. 1 Greenl. Ev. c. I. § 1; Will, Cir. Ev. 1. Testimony is not synonymous with evidence. Harvey v. Smith, 17 Ind. 272; the latter is the more comprehensive term; Whart. Cr. L. § 783; and includes all that may be submitted to the jury whether it be the statement of witnesses, or the contents of papers, documents, or records, or the inspection of whatever the jury may be permitted to examine and consider during the trial; Will, Cir. Ev. 2; Jones v. Gregory, 48 Ill. App. 230.

The means sanctioned by law of ascertaining in a judicial proceeding the truth respecting a question of fact. Cal. Code Civ. Proc. § 1823. And the law of evidence is declared to be a collection of general rules established by law:

1. For declaring what is to be taken as true without proof.

2. For declaring the presumptions of law both disputable and conclusive.

3. For the production of legal evidence.

4. For the exclusion of what is not legal.

5. For determining in certain cases the value and effect of evidence. *Id.* § 1825.

"The rules of evidence," says a discriminating writer, "are the maxims which the

sagacity and experience of ages have established, as the best means of discriminating truth from error, and of contracting as far as possible the dangerous power of judicial discretion." Will, Cir. Ev. 2.

That which is legally submitted to a jury, to enable them to decide upon the questions in dispute, or issue, as pointed out by the pleadings, and distinguished from all comment and argument, is termed evidence. 1 Stark. Ev. pt. 1, § 3.

Evidence may be considered with reference to its *instruments*, its *nature*, its *legal character*, its *effect*, its *object*, and the *modes of its introduction*.

The instruments of evidence, in the legal acceptation of the term, are:

1. *Judicial notice* or *recognition*. There are divers things of which courts take judicial notice, without the introduction of proof by the parties: such as the territorial extent of their jurisdiction, local divisions of their own countries, seats of courts, all public matters directly concerning the general government, the ordinary course of nature, divisions of time, the meanings of words, and, generally, of whatever ought to be generally known in the jurisdiction. If the judge needs information on subjects, he will seek it from such sources as he deems authentic. See JUDICIAL NOTICE.

2. *Public records;* the registers of official transactions made by officers appointed for the purpose; as, the public statutes, the judgments and proceedings of courts, etc.

3. *Judicial writings:* such as inquisitions, depositions, etc.

4. *Public documents* having a semi-official character: as, the statute-books published under the authority of the government, documents printed by the authority of congress, etc.

5. *Private writings:* as, deeds, contracts, wills.

6. *Testimony of witnesses.*

7. *Personal inspection*, by the jury or tribunal whose duty it is to determine the matter in controversy: as, a view of the locality by the jury, to enable them to determine the disputed fact, or the better to understand the testimony, or inspection of any machine or weapon which is produced in the cause.

Real evidence is evidence of the thing or object which is produced in court. When, for instance, the condition or appearance of any thing or object is material to the issue, and the thing or object itself is produced in court for the inspection of the tribunal, with proper testimony as to its identity, and, if necessary, to show that it has existed since the time at which the issue in question arose, this object or thing becomes itself "real evidence" of its condition or appearance at the time in question. 1 Greenl. Ev. § 13 *a*, note. For a full discussion of this species of evidence, see Gaunt v. State, 50 N. J. L. 491, 14 Atl. 600.

There are rules prescribing the limits and regulating the use of these different instruments of evidence, appropriate to each class.

In its *nature*, evidence is *direct*, or *presumptive*, or *circumstantial*.

Direct evidence is that means of proof which tends to show the existence of a fact in question, without the intervention of the proof of any other fact.

It is that evidence which, if believed, establishes the truth of a fact in issue, and does not arise from any presumption. Evidence is direct and positive when the very facts in dispute are sworn to by those who have the actual knowledge of them by means of their senses. 1 Stark. Ev. 19; Tayl. Ev. 84. In one sense, there is but little direct or positive proof, or such proof as is acquired by means of one's own sense; all other evidence is presumptive; but, in common acceptation, direct and positive evidence is that which is communicated by one who has actual knowledge of the fact.

Extrinsic evidence is external evidence, or that which is not contained in the body of an agreement, contract, and the like.

It is a general rule that extrinsic evidence cannot be admitted to contradict, explain, vary, or change the terms of a contract or of a will, except in a latent ambiguity, or to rebut a resulting trust; Mann v. Mann, 14 Johns. (N. Y.) 1, 7 Am. Dec. 416; Spalding v. Huntington, 1 Day (Conn.) 8. Excepting where evidence is admissible to vary a written contract on the ground that it does not represent the actual contract between the parties. See Wigram, Extrinsic Evidence; 14 L. R. A. 459, note.

Presumptive evidence is that which shows the existence of one fact, by proof of the existence of another or others, from which the first may be inferred; because the fact or facts shown have a legitimate tendency to lead the mind to the conclusion that the fact exists which is sought to be proved.

Presumptive evidence has been divided into presumptions of law and presumptions of fact.

Presumptions of law, adopted from motives of public policy, are those which arise in certain cases by force of the rules of law, directing an inference to be drawn from proof of the existence of a particular fact or facts. They may be conclusive or inconclusive.

Conclusive presumptions are those which admit of no averment or proof to the contrary. Thus, the records of a court, except in some proceeding to amend them, are conclusive evidence of the matter there recorded, being presumed to be rightly made up.

Inconclusive or *disputable* presumptions of law are those where a fact is presumed to exist, either from the general experience

of mankind, or from policy, or from proof of the existence of certain other facts, until something is offered to show the contrary. Thus, the law presumes a man to be sane until the contrary appears, and to be innocent of the commission of a crime until he is proved to be guilty. So, the existence of a person, or of a particular state of things, being shown, the law presumes the person or state of things to continue until something is offered to conflict with the presumption. See Best, Presumption, ch. ii.

But the presumption of life may be rebutted by another presumption. Where a party has been absent from his place of residence for the term of seven years, without having been heard of, this raises a presumption of his death, until it is encountered by some evidence showing that he is actually alive, or was so within that period.

Presumptions of fact are not the subject of fixed rules, but are merely natural presumptions, such as appear, from common experience, to arise from the particular circumstances of any case. Some of these are "founded upon a knowledge of the human character, and of the motives, passions, and feelings by which the mind is usually influenced." 1 Stark. Ev. 27.

They may be said to be the conclusions drawn by the mind from the natural connection of the circumstances disclosed in each case, or, in other words, from circumstantial evidence.

Circumstantial evidence is the proof of facts which usually attend other facts sought to be proved; that which is not direct evidence. For example, when a witness testifies that a man was stabbed with a knife, and that a piece of the blade was found in the wound, and it is found to fit exactly with another part of the blade found in the possession of the prisoner, the facts are directly attested, but they only prove circumstances; and hence this is called circumstantial evidence.

Circumstantial evidence is of two kinds, namely, certain and uncertain. It is *certain* when the conclusion in question necessarily follows: as, where a man had received a mortal wound, and it was found that the impression of a bloody *left* hand had been made on the *left* arm of the deceased, it was certain some other person than the deceased must have made such mark; 14 How. St. Tr. 1334. But it is *uncertain* whether the death was caused by suicide or by murder, and whether the mark of the bloody hand was made by the assassin, or by a friendly hand that came too late to the relief of the deceased.

Circumstantial evidence warrants a conviction in a criminal case, provided it is such as to exclude every reasonable hypothesis but that of guilt of the offence charged to the defendant, but it must always rise to that degree of convincing power which satisfies the mind beyond reasonable doubt of guilt. This can never be the case when the evidence, as produced, is entirely consistent with innocence in a given transaction; Hayes v. U. S., 169 Fed. 101, 94 C. C. A. 449. When the evidence can be reconciled either with the theory of innocence or of guilt, the law requires that the defendant be given the benefit of the doubt and that the theory of innocence be adopted; Vernon v. U. S., 146 Fed. 121, 76 C. C. A. 547, citing People v. Ward, 105 Cal. 335, 38 Pac. 945; Asbach v. Ry. Co., 74 Ia. 248, 37 N. W. 182; Smith v. Bank, 99 Mass. 605, 97 Am. Dec. 59. It is not a question of the weakest link of a chain, but the weakest strand of a rope cable; Ex parte Hayes, 6 Okl. Cr. 321, 118 Pac. 609.

While it has thus been contended that, in order to justify the inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused; Wills, Cir. Ev. 300; Stark. Ev. 160; 1 Crim. L. Mag. 234; State v. Miller, 9 Houst. (Del.) 564, 32 Atl. 137; other writers have held that the distinction between this species of evidence and that which is direct is merely one of logic, and of no practical significance; that all evidence is more or less circumstantial; all statements of witnesses, all conclusions of juries, are the results of inference; or as it was expressed by Gibson, C. J., "the difference being only in degree;" Com. v. Harman, 4 Pa. 269. See U. S. v. Gibert, 2 Sumn. 27, Fed. Cas. No. 15,204, Com. v. Harman, 4 Pa. 269; Whart. Cr. Ev. § 10. Even in its strictest sense, circumstantial evidence is legal evidence, and when it is satisfactory beyond reasonable doubt, a jury is bound to act upon it as if it were the most direct; 1 Greenl. Ev. § 13; 3 Rice, Ev. 544. See CIRCUMSTANCES; EVIDENCE.

Circumstantial evidence is sometimes used as synonymous with presumptive evidence, but not with strict accuracy; for presumptive evidence is not necessarily and in all cases what is usually understood by circumstantial evidence. The latter is that evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency, from the laws of nature, the usual connection of things, and the ordinary transactions of business, etc., to lead the mind to a conclusion that the fact exists which is sought to be established. See 1 Stark. Ev. 478; Whart. Ev. 1, 2, 15.

A writer on this subject, already quoted, thus states the distinction: the word presumption, *ex vi termini*, imports an inference from facts known, based upon previous experience of the ordinary connection between the two, and, the word itself implies a certain relation between fact and inference. Circumstances, however, generally but not necessarily lead to particular inferences; for the facts may be indisputable, and yet their relation to the principal fact may be only

apparent, not real; and even where the connection is real, the deduction may be erroneous. Circumstantial and presumptive evidence differ therefore as genus and species. Will, Cir. Ev. 17.

Presumptive evidence may sometimes be the result, to some extent, of any arbitrary rule—as in the case of the presumption of death after an absence of seven years without being heard of—derived by analogy from certain statutes.

The judge and the jury draw conclusions from circumstantial evidence, and find one fact from the existence of other facts shown to them,—some of the presumptions being so clear and certain that they have become fixed as rules of law, and others having greater or less weight according to the circumstances of the case, leaving the matter of fact inquired about in doubt until the proper tribunal to determine the question draws the conclusion.

In its *legal character*, evidence is *primary* or *secondary*, and *prima facie* or *conclusive*.

Primary evidence is the best evidence, or that proof which most certainly exhibits the true state of facts to which it relates. The law requires this, and rejects secondary or inferior evidence when it is attempted to be substituted for evidence of a higher or superior nature. For example, when a written contract has been entered into, and the object is to prove what it was, it is requisite to produce the original writing, if it is to be attained; and in that case no copy or other inferior evidence will be received.

This is a rule of policy, grounded upon a reasonable suspicion that the substitution of inferior for better evidence arises from sinister motives, and an apprehension that the best evidence, if produced would alter the case to the prejudice of the party. This rule relates not to the measure and quantity of evidence, but to its quality when compared with some other evidence of superior degree.

To this general rule there are several exceptions. 1. As it refers to the *quality* rather than to the *quantity* of evidence, it is evident that the fullest proof that every case admits of is not requisite: if, therefore, there are several eye-witnesses to a fact, it may be sufficiently proved by one only. 2. It is not always requisite, when the matter to be proved has been reduced to writing, that the writing should be produced: as, if the narrative of a fact to be proved has been committed to writing, it may yet be proved by parol evidence. A receipt for the payment of money, for example, will not exclude parol evidence of payment; 4 Esp. 213. And see 3 B. & Ald. 566; Meade v. Keane, 3 Cra. C. C. 51, Fed. Cas. No. 9,373; Bonesteel v. Gardner, 1 Dak. 372, 46 N. W. 590; Chapin v. Dobson, 78 N. Y. 82, 34 Am. Rep. 512. The evidence of a father and mother, cognizant of their child's birth, is primary evidence of its date or the age of the child, although there is a written record thereof in the family Bible; State v. Woods, 49 Kan. 237, 30 Pac. 520; Hawkins v. Taylor, 1 McCord (S. C.) 164; Hermann v. State, 73 Wis. 248, 41 N. W. 171, 9 Am. St. Rep. 789. A stenographer's notes of the testimony of a witness are not the best evidence of such testimony, so as to prevent any other person who was present from testifying in relation thereto; Brice v. Miller, 35 S. C. 537, 15 S. E. 272; Nasanowitz v. Hanf, 17 Misc. 157, 39 N. Y. Supp. 327. Documentary evidence is not the best evidence of marriage; People v. Perriman, 72 Mich. 184, 40 N. W. 425. Oral admissions of a party against himself as to the contents of a writing are primary evidence; Morey v. Hoyt, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611.

Secondary evidence is that species of proof which is admissible when the primary evidence cannot be produced, and which becomes by that event the best evidence that can be adduced. Armstrong's Lessee v. Morgan, 3 Yeates (Pa.) 530.

But before such evidence can be allowed it must be clearly made to appear that the superior evidence is not to be had; Phillips v. O'Neal, 87 Ga. 727, 13 S. E. 819; Curtis v. Wilcox, 91 Mich. 229, 51 N. W. 992. The person who possesses it must be applied to, whether he be a stranger or the opposite party: in the case of a stranger, a subpœna and attachment, when proper, must be taken out and served; and in the case of a party, notice to produce such primary evidence must be proved before the secondary evidence will be admitted; Patton's Adm'rs v. Ash, 7 S. & R. (Pa.) 116; 3 B. & Ald. 296; Susquehanna & W. V. R. & Coal Co. v. Quick, 61 Pa. 328; Gallagher v. Assur. Corp., 149 Pa. 25, 24 Atl. 115; King Optical Co. v. Treat, 72 Mich. 599, 40 N. W. 912; 7 Exch. 639; Louisville & N. R. Co. v. Orr, 94 Ala. 602, 10 South. 167; De Barle v. Pardo, 6 Sadler (Pa.) 148, 8 Atl. 876, where this rule is discussed at large by Arnold, J., whose views were affirmed without an opinion. "If there are several sources of information of the same fact, it is not ordinarily necessary to show that all have been exhausted before secondary evidence can be resorted to." Smith v. Brown, 151 Mass. 338, 24 N. E. 31. See Kleimann v. Geiselmann, 45 Mo. App. 497; McCormick v. Anderson, 83 Ala. 401, 3 South. 796; McClure v. Campbell, 25 Neb. 57, 40 N. W. 595. Secondary evidence of the contents of a written contract is inadmissible in the absence of proper diligence to secure the original; Low v. Tandy, 70 Tex. 745, 8 S. W. 620; Whaun & Co. v. Atkinson, 84 Ala. 592, 4 South. 681. After proof of the due execution of the original, the contents should be proved by a counterpart, if there be one, for this is the next best evidence; and it seems that no evidence of a copy is admissible until proof has been given that the counterpart cannot be produced; 6 Term

236. If there be no counterpart, a copy may be proved in evidence by any witness who knows that it is a copy, from having compared it with the original; Meyer v. Barker, 6 Binn. (Pa.) 234; Buttrick v. Allen, 8 Mass. 273, 5 Am. Dec. 105. If regularly recorded, an office copy may be given in evidence. If there be no copy, the party may produce an abstract, or even give parol evidence of the contents of a deed; 6 Term 556. A transcribed telegraphic message which is actually delivered is primary evidence, and if lost or destroyed its contents may be proved by parol; Magie v. Herman, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660. See Terre Haute & I. R. Co. v. Stockwell, 118 Ind. 98, 20 N. E. 650; Anheuser-Busch Brewing Co. v. Hutmacher, 127 Ill. 652, 21 N. E. 626, 4 L. R. A. 575. Letterpress copies of writings are secondary evidence; Thompson-Houston Electric Co. v. Berg, 10 Tex. Civ. App. 200, 30 S. W. 454; and where there were such, next to the originals, they were the best evidence and oral evidence should have been rejected; Ford v. Cunningham, 87 Cal. 209, 25 Pac. 403; and as to copies of documents made by mechanical means, as originals, see 12 L. R. A. (N. S.) 343, note.

If books or papers necessary as evidence in the courts of one state be in the possession of a person living in another state, secondary evidence without further showing may be given to prove the contents of such papers, and notice to produce them is unnecessary; Burton v. Driggs, 20 Wall. (U. S.) 125, 22 L. Ed. 299. See Thomson-Houston Electric Co. v. Palmer, 52 Minn. 174, 53 N. W. 1137, 38 Am. St. Rep. 536. Where the attesting witness to a deed lives out of the state, secondary evidence of its execution is admissible; Trustees of Smith Charities v. Connolly, 157 Mass. 272, 31 N. E. 1058.

It has been decided in England that there are no degrees in secondary evidence; and when a party has laid the foundation for such evidence, he may prove the contents of a deed by parol, although it appear that an attested copy is in existence; 6 C. & P. 206; 8 *id.* 389; 7 M. & W. 102. It is urged on the one hand that the rule requiring the best evidence has reference to its nature, not to its strength, and the argument *ab inconvenienti* is invoked against the extension of the rule recognizing degrees. On the other hand it is contended that such an extension is an equitable one and rests on the same principle which forbids the introduction of any secondary evidence while the primary is available. English cases cited in favor of the recognition of degrees are said to be not so much decisions of the point as *dicta*, as they refer to it as a rule existing but not involved in the case; 2 Atk. 71; 1 Nev. & Per. 8. But in the latter case the rule is doubted, and in 6 C. & P. 359 impliedly denied by Patteson, J., as it is also by Parke, J.; 6 C. & P. 81; *id.* 206. See 8 Dowl. 389; 3 Scott, N. R. 577. The question is not settled in the United States; Greenl. Ev. § 84, note; and the United States Supreme Court, declining to adopt the English rule without qualification, observe that the secondary evidence "must be the best the party has in his power to produce" and also that the rule of exclusion or admission must be so applied as to promote the ends of justice, and guard against fraud, surprise, and imposition; Cornett v. Williams, 20 Wall. (U. S.) 226, 22 L. Ed. 254. This doctrine was followed in Johnson v. Arnwine, 42 N. J. L. 458, 36 Am. Rep. 532; Jaques v. Horton, 76 Ala. 246. See Kentzler v. Kentzler, 3 Wash. 166, 28 Pac. 370, 28 Am. St. Rep. 21; Florida Cent. & P. R. Co. v. Buckl, 68 Fed. 864, 16 C. C. A. 42. The American doctrine seems to be "that if from the nature of the case itself it is manifest that a more satisfactory kind of secondary evidence exists, the party will be required to produce it; but that when the nature of the case does not of itself disclose the existence of such better evidence, the objector must not only prove its existence, but also must prove that it was known to the other party in time to have been produced at the trial;" 1 Gr. Ev. § 84, note; Lewis v. San Antonio, 7 Tex. 315; Lane v. Jones, 2 Cold. (Tenn.) 321; Harvey v. Thorpe, 28 Ala. 250, 65 Am. Dec. 344; Graham v. Campbell, 56 Ga. 258; Illinois Land & Loan Co. v. Bonner, 75 Ill. 315; Nason v. Jordan, 62 Me. 480; Winn v. Patterson, 9 Pet. (U. S.) 663, 9 L. Ed. 266.

Cases holding that there are no degrees in secondary evidence are Goodrich v. Weston, 102 Mass. 362, 3 Am. Rep. 469, Smith v. Brown, 151 Mass. 338, 24 N. E. 31; Dra. K. B. U. C. 357; at least unless it appears that there is better evidence than is offered; Eslow v. Mitchell, 26 Mich. 500. Cases holding that there are such degrees are Coman v. State, 4 Blackf. (Ind.) 241; Cornett v. Williams, 20 Wall. (U. S.) 226, 22 L. Ed 254, Williams v. Waters, 36 Ga. 454, where it was said that the same rule applies as in the case of primary evidence; Dillon v. Howe, 98 Mich. 168, 57 N. W. 102.

Prima facie evidence is that which appears to be sufficient proof respecting the matter in question, until something appears to controvert it, but which may be contradicted or controlled

Conclusive evidence is that which, while uncontradicted, establishes the fact: as in the instance of conclusive presumptions; it is also that which cannot be contradicted.

The record of a court of common law jurisdiction is conclusive as to the facts therein stated; Shelton v. Barbour, 2 Wash. (Va.) 64; Dennison v. Hyde, 6 Conn. 508. But the judgment and record of a prize-court is not conclusive evidence in the state courts, unless it had jurisdiction of the subject-matter; and whether it had or not, the state courts may decide; Slocum v. Wheeler, 1

Conn. 429. See, as to the conclusiveness of the judgments of foreign courts of admiralty; Maley v. Shattuck, 3 Cra. (U. S.) 458, 2 L. Ed. 498; Pollard v. Dwight, 4 Cra. (U. S.) 421, 2 L. Ed. 666; Croudson v. Leonard, 4 Cra. (U. S.) 434, 2 L. Ed. 670; Bourke v. Granberry, Gilm. (Va.) 16, 9 Am. Dec. 589; Groning v. Ins. Co., 1 Nott & McC. (S. C.) 537.

Evidence may be conclusive for some purposes but not for others.

Admissibility of evidence. In considering the legal character of evidence, we are naturally led to the rules which regulate its competency and admissibility, although it is not precisely accurate to say that evidence is in its legal character competent or incompetent; because what is incompetent for the consideration of the tribunal which is to pronounce the decision is not, strictly speaking, evidence.

But the terms incompetent evidence and inadmissible evidence are often used to designate what is not to be heard as evidence: as, witnesses are spoken of as competent or incompetent.

The admissibility of evidence is not affected by the fact that it was obtained by unfair means; Williams v. State, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269; 14 East 302; Com. v. Dana, 2 Metc. (Mass.) 329; 1 Gr. Ev. § 254a; as when illegally seized by a public official; Starchman v. State, 62 Ark. 538, 36 S. W. 940; State v. Flynn, 36 N. H. 64; Com. v. Henderson, 140 Mass. 303, 5 N. E. 832; or a private detective; Gindrat v. People, 138 Ill. 103, 27 N. E. 1085; or surreptitiously taken by a person unknown; Firth Sterling Steel Co. v. Steel Co., 199 Fed. 353. But evidence was held to be inadmissible because obtained in violation of rights secured by the IVth and Vth Amendments of the Constitution either by production under order of the court; Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; or by means of an illegal search by a custom officer; U. S. v. Wong Quong Wong, 94 Fed. 832. In criminal cases personal property is sometimes introduced in evidence as burglar's tools, appliances used in counterfeiting, gaming and the like. See SEARCH.

Evidence of experiments to throw light upon any question at issue is admissible or not, largely in the discretion of the trial court. Evidence of experiments made eight years after as to what sound could be heard through a wall, to show that a certain conversation could not have been heard through it, was rejected; Dow v. Bulfinch, 192 Mass. 281, 78 N. E. 416.

It is competent on a second trial of a civil case in a federal court, under the general rule, to prove the testimony given on the former trial by a witness who has since died, there being no federal statute on the subject; Nome Beach Lighterage & Transp. Co. v. Ins. Co., 156 Fed. 484; Mattox v. U. S., 156 U. S. 237, 15 Sup. Ct. 337, 39 L. Ed. 409; it is not necessary to prove the precise language of the deceased witness, but only to express clearly the substance; Ruch v. Rock Island, 97 U. S. 693, 24 L. Ed. 1101; and in a criminal case where the witness was dead and had been cross-examined, his evidence was held admissible; U. S. v. Macomb, 5 McLean 286, Fed. Cas. No. 15,702; Brown v. Com., 73 Pa. 326, 13 Am. Rep. 740; State v. Able, 65 Mo. 371; but where the proof was insufficient to connect the present respondent with the defense in the prior suit, the deposition of a deceased witness was held inadmissible; Rumford Chemical Works v. Chemical Co., 154 Fed. 65, 83 C. C. A. 177. The notes of testimony on a former trial by deceased and absent witnesses are admissible when the accuracy of the copy is agreed to; Emerson v. Burnett, 11 Colo. App. 86, 52 Pac. 752; or admitted; Chicago, St. P. M. & O. R. Co. v. Myers, 80 Fed. 365, 25 C. C. A. 486; but not when there is no proof of accuracy other than the certificate of the stenographer; Williams v. Min. Co., 37 Colo. 62, 86 Pac. 337, 7 L. R. A. (N. S.) 1170, 11 Ann. Cas. 111.

As the common law excludes certain classes of persons from giving testimony in particular cases, because it deems their exclusion conducive, in general, to the discovery of the truth, so it excludes certain materials and statements from being introduced as testimony in a cause, for a similar reason. Thus, as a general rule, it requires witnesses to speak to facts within their own knowledge, and excludes hearsay evidence.

Hearsay is the evidence, not of what the witness knows himself, but of what he has heard from others.

It is the general rule that hearsay is inadmissible; Central Pac. R. Co. v. Feldman, 152 Cal. 303, 92 Pac. 849; and evidence which appears to be hearsay should be excluded; Moore v. Maxwell & Delhomme, 155 Ala. 299, 46 South. 755; so also facts which the witness could know only by hearsay are inadmissible. See HEARSAY.

Such mere recitals or assertions cannot be received in evidence for many reasons, but principally for the following: First, that the party making such declarations is not on oath; and, secondly, because the party against whom it operates has no opportunity of cross-examination; 1 Phil. Ev. 185. See, for other reasons, 1 Stark. Ev. pt. 1, p. 44; Tayl. Ev. 508. The general rule excluding hearsay evidence does not apply to those declarations to which the party is privy, or to admissions which he himself has made.

Many facts, from their very nature, either absolutely or usually exclude direct evidence to prove them, being such as are either necessarily or usually imperceptible by the senses, and therefore incapable of the ordinary means of proof. These are questions of pedigree or relationship, character, pre-

scription, custom, boundary, and the like; as also questions which depend upon the exercise of particular skill and judgment. Such facts, some from their nature, and others from their antiquity, do not admit of the ordinary and direct means of proof by living witnesses: and, consequently, resort must be had to the best means of proof which the nature of the case affords. The rule permitting a resort to hearsay evidence, however, in cases of pedigree extends only to the admission of declarations by deceased persons who were related by blood or marriage to the person in question, and not to declarations by servants, friends, or neighbors; Flora v. Anderson, 75 Fed. 217. And "general reputation in the family," which is admissible in matters of pedigree, or to establish the facts of birth, marriage, or death, is confined to declarations of deceased members of the family, and family history and traditions handed down by declarations of deceased members, in either case made *ante litem motam*, and originating with persons presumed to have competent knowledge of the facts stated; and evidence of the opinion or belief of living members of a family as to the death of another member, or of general reputation among a person's living friends and acquaintances as to his death, is not within the rule, and is inadmissible; In re Hurlburt's Estate, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794. See BOUNDARY; CUSTOM; PEDIGREE; PRESCRIPTION.

Admissions are the declarations which a party by himself, or those who act under his authority, make of the existence of certain facts. But where an admission is made the foundation of a claim, the whole statement must be taken together; Perkins v. Lane, 82 Va. 59. See Bryan v. Kelly, 85 Ala. 569, 5 South. 346; ADMISSIONS.

A statement of all the distinctions between what is to be regarded as hearsay and what is to be deemed original evidence would extend this article too far. The general principle is that the mere declaration, oral or written, of a third person, as to a fact, standing alone, is inadmissible.

Res gestæ. But where evidence of an act done by a party is admissible, his declarations made at the time, having a tendency to elucidate or give a character to the act, and which may derive a degree of credit from the act itself, are also admissible, as part of the *res gestæ;* Sessions v. Little, 9 N. H. 271; Steph. Dig. Ev. §§ 2, 7. See RES GESTÆ.

So, declarations of third persons, in the presence and hearing of a person, which tend to affect his interest, may be shown in order to introduce his answer or to show an admission by his silence, but this species of evidence must be received with great caution; 1 Greenl. Ev. 236.

Confessions of guilt in criminal cases come within the class of admissions, provided they have been voluntarily made and have not been obtained by the hope of favor or by the fear of punishment. And if made under such inducements as to exclude them, a subsequent declaration to the same effect, made after the inducement has ceased to operate, and having no connection with the hopes or fears which have existed, is admissible as evidence; State v. Howard, 17 N. H. 171. Actions as well as verbal declarations may constitute a confession, and the same rule as to admissibility applies to both; State v. Crowson, 98 N. C. 595, 4 S. E. 143. There is, however, a growing unwillingness to rest convictions on confessions unless supported by corroborating circumstances, and in all cases there must be at least proof of the *corpus delicti*, independently of the confession; 1 Whart. Cr. Law, § 683; Cooley, Const. Lim. 385; Tayl. Ev. 744. See ADMISSIONS; CONFESSION; RES GESTÆ.

Dying declarations are an exception to the rule excluding hearsay evidence, and are admitted, under certain limitations in cases of homicide, so far as the circumstances attending the death and its cause are the subject of them. See DECLARATION, DYING DECLARATIONS.

Opinions of persons of skill and experience, called experts, are also admissible in certain cases, when, in order to the better understanding of the evidence or to the solution of the question, a certain skill and experience are required which are not ordinarily possessed by jurors. A non-expert witness on the question of the sanity of one accused of crime "after stating such particulars as he can remember,—generally only the more striking facts,— . . . is permitted to sum up the total remembered and unremembered impressions of the senses by stating the opinion which they produced;" Queeman v. Oklahoma, 190 U. S. 548, 23 Sup. Ct. 762, 47 L. Ed. 1175. See EXPERT; OPINION.

In several instances proof of facts is excluded from public policy; as professional communications between lawyer and client, and physician and patient; secrets of state, proceedings of grand juror, and communications between husband and wife. See CONFIDENTIAL COMMUNICATIONS; PRIVILEGED COMMUNICATIONS.

The *effect* of evidence. As a general rule, a judgment rendered by a court of competent jurisdiction directly upon a point in issue is a bar between the same parties; 1 Phill. Ev. 242; and privies in blood, as an heir; 3 Mod. 141; or privies in estate; 1 Ld. Raym. 730; Bull. N. P. 232, stand in the same situation as those they represent: the verdict and judgment may be used for or against them, and is conclusive. See RES JUDICATA; JUDGMENT.

The constitution of the United States, art. 4, s. 1, declares that "full faith and credit shall be given in each state to the public

acts, records, and judicial proceedings of every other state. And congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." See Hampton v. M'Connel, 3 Wheat. (U. S.) 234, 4 L. Ed. 378; Com. v. Green, 17 Mass. 546; Stephenson v. Bannister, 3 Bibb (Ky.) 369; Manwaring v. Griffing, 5 Day (Conn.) 563; Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95; Ritchie v. McMullen, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. Ed. 133; 2 Black, Judg. § 857; FOREIGN JUDGMENT.

Statutes defining what shall be held conclusive are, in general, unconstitutional, as a deprivation of due process of law, and as depriving the courts of their function of determining the weight and sufficiency of evidence; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970; Missouri, K. & T. R. Co. v. Simonson, 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765, 91 Am. St. Rep. 248; Cairo & F. R. Co. v. Parks, 32 Ark. 131; Wantlan v. White, 19 Ind. 470; Meyer v. Berlandi, 39 Minn. 438, 40 N. W. 513, 1 L. R. A. 777, 12 Am. St. Rep. 663; Cooley Const. Lim. (5th ed.) 453; but the legislature may make the deliberate statement of a party conclusive evidence against him; Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552.

Foreign laws must be proved as facts in the courts of this country, and mere citations to English statutes and authorities cannot be accepted as showing the English law, Dickerson v. Matheson, 50 Fed. 73. See FOREIGN LAW. For the force and effect of foreign judgments, see FOREIGN JUDGMENT.

The *object* of evidence is next to be considered. It is to ascertain the truth between the parties. It has been discovered by experience that this is done most certainly by the adoption of the following rules, which are now binding as law: 1. The evidence must be confined to the point in issue. 2. The substance of the issue must be proved; but only the substance is required to be proved. 3. The affirmative of the issue must be proved.

It is a general rule, both in civil and criminal cases, that *the evidence shall be confined to the point in issue.* Justice and convenience require the observance of this rule, particularly in criminal cases; for when a prisoner is charged with an offence it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, and which alone he has come prepared to answer; 2 Russ. Cr. 694; 1 Phill. Ev. 166.

To this general rule there are several exceptions, and a variety of cases which do not fall within the rule. In general, evidence of collateral facts is not admissible; but when such a fact is material to the issue joined between the parties, it may be given in evidence: as, for example, in order to prove that the acceptor of a bill knew the payee to be a fictitious person, or that the drawer had general authority from him to fill up bills with the name of a fictitious payee, evidence may be given to show that he had accepted similar bills before they could, from their date, have arrived from the place of date; 2 H. Bla. 288.

When special damage sustained by the plaintiff is not stated in the declaration, it is not one of the points in issue, and, therefore, evidence of it cannot be received; yet a damage which is a necessary result of the defendant's breach of contract may be proved notwithstanding it is not in the declaration; 11 Price 19.

In general, evidence of the character of either party to a suit is inadmissible; yet in some cases such evidence may be given. See CHARACTER.

When evidence incidentally applies to another person or thing not included in the transaction in question, and with regard to whom or to which it is inadmissible, yet if it bear upon the point in issue it will be received; 8 Bing. 376. And see 4 B. & P. 92; State v. Watkins, 9 Conn. 47, 21 Am. Dec. 712; 1 Whart. Cr. Law § 649.

The *acts* of others, as in the case of conspirators, may be given in evidence against the prisoner, when referable to the issue; but *confessions* made by one of several conspirators after the offence has been completed, and when the conspirators no longer act in concert, cannot be received. See Livermore v. Herschell, 3 Pick. (Mass.) 33; Mackaboy v. Com., 2 Va. Cas. 269; Reitenbach v. Reitenbach, 1 Rawle (Pa.) 362, 18 Am. Dec. 638; Wilbur v. Strickland, 1 Rawle (Pa.) 458; Martin v. Com., 2 Leigh (Va.) 745; Gardner v. Preston, 2 Day (Conn.) 205, 2 Am. Dec. 91; 2 B. & Ald. 573, 574; Perigo v. State, 25 Tex. App. 533, 8 S. W. 660; CONSPIRACY; CONFESSION.

In criminal cases, when the offence is a cumulative one, consisting itself in the commission of a number of acts, evidence of those acts is not only admissible, but essential to support the charge. On an indictment against a defendant for a conspiracy to cause himself to be believed a man of large property, for the purpose of defrauding tradesmen after proof of a representation to one tradesman, evidence may thereupon be given of a representation to another tradesman at a different time; 1 Campb. 399; Gardner v. Preston, 2 Day (Conn.) 205, 2 Am. Dec. 91; Snell v. Moses, 1 Johns. (N. Y.) 99.

Evidence of similar occurrences is admissible, to show the quality of the act, in many cases, as the value of land, the dangerous character of a drug, or the reasonableness of the act; 17 Harv. L. Rev. 349, where the principles regulating the subject are discussed, and the decisions are said to be chaotic

and arbitrary, as a result of the rule that the admissibility is made to depend on the opinion of the judge as to whether it raises a multiplicity of issues or occasions undue surprise. In civil cases such evidence seems to be admitted in very few instances. It is inadmissible to prove negligence; Missouri, K. & T. Ry. Co. v. Johnson, 92 Tex. 380, 48 S. W. 568; but, to prove due care, evidence of a general custom of switchmen to ride on the side of a freight car was admitted; Boyce v. Lumber Co., 119 Wis. 642, 97 N. W. 563 So it has been admitted to prove similarity of conditions, as the effect of the passing of trains over a certain curve; Louisville & N. R. Co. v. Sandlin, 125 Ala. 585, 28 South. 40; or the supply of gas to other houses, where the appliances were such as to furnish as much or more gas than those in dispute; Indiana Natural & Illuminating Gas Co. v. Anthony, 26 Ind. App. 307, 58 N. E. 868; or the relative quantity of water obtained under similar conditions in other pastures, where the action was for an insufficient supply in the case of a contract to pasture cattle; Tuttle v. Robert Moody & Son (Tex.) 94 S. W. 134. In criminal cases such evidence is admissible to show mental condition; [1899] 1 Q. B. D. 77; 12 Cox, C. C. 612; Com. v. Coe, 115 Mass. 481, 501. In prosecutions for crime, evidence of similar offences is not admissible except for the purpose of showing the intent; Topolewski v. State, 130 Wis. 244, 109 N. W. 1037, 7 L. R. A. (N. S.) 756, 118 Am. St. Rep. 1019, 10 Ann. Cas. 627; Lightfoot v. People, 16 Mich. 507; Olson v. U. S., 133 Fed. 849, 67 C. C. A. 21; U. S. v. Flemming, 18 Fed. 907; Dillard v. U. S., 141 Fed. 303, 72 C. C. A. 451; Com. v. Russell, 156 Mass. 196, 30 N. E. 763; Packer v. U. S., 106 Fed. 906, 46 C. C. A. 35; Brown v. U. S., 142 Fed. 1, 73 C. C. A. 187; or some element of the present charge; Paulson v. State, 118 Wis. 89, 94 N. W. 771; but evidence of previous offences is not admissible to raise the presumption of present guilt; Lightfoot v. People, 16 Mich. 507; 2 Can. L. Rev. 689; 20 Harv. L. Rev. 151; but evidence otherwise admissible is not rendered inadmissible merely because likely to raise a prejudice; [1894] A. C. 57; and when a guilty knowledge or intent is an essential part of the offence, commission of similar acts may be proved to raise an inference of such knowledge or intent; 2 Can. L. Rev. 690; where a prisoner had passed a counterfeit dollar, evidence that he had other counterfeit dollars in his possession is evidence to prove the guilty knowledge; State v. Odel, 2 Const. (S. C.) 758; State v. Antonio, *id.* 776; State v. Houston, 1 Bail. (S. C.) 300; Martin v. Com., 2 Leigh (Va.) 745; People v. Lagrille, 1 Wheel. Cr. Cas. (N. Y.) 415; Russ. & R. 132; Finn v. Com., 5 Rand. (Va.) 701; and when a wife was tried for poisoning her husband by arsenic, evidence was admitted of the death of two sons and similar illness of the third from same cause, to show that the husband died of arsenical poisoning, and not accidentally; 18 L. J. M. C. 215; 15 Cox, Cr. C. 403; and see People v. Molineaux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, where both in the opinions and in an extended note the subject is discussed from every point of view, and the cases are collected.

Where the crime charged is part of a plan or system of criminal action, evidence of other crimes near to it in time, and of similar character, is relevant and admissible to show the knowledge and intent of the accused, and that the act charged was not the result of accident or inadvertence; Griggs v. U. S., 158 Fed. 572, 85 C. C. A. 596; or where the other and independent criminal acts of themselves form the motive for committing the crime alleged in the case on trial; Thompson v. U. S., 144 Fed. 14, 75 C. C. A. 172, 7 Ann. Cas. 62; or is an incident to, or part of, or leads up to the latter; People v. McLaughlin, 150 N. Y. 365, 44 N. E. 1017; but as such evidence, if wrongfully admitted, would greatly prejudice the prisoner, its relevancy should be carefully scrutinized; Com. v. Shepard, 1 Allen (Mass.) 575, 581; hence its admission upon an issue as to which it is not relevant will be prejudicial and therefore reversible error; People v. Collins, 144 Mich. 121, 107 N. W. 1114.

The substance of the issue joined between the parties *must be proved;* 1 Phill. Ev. 190; Tayl. Ev. 233. Under this rule will be considered the *quantity* of evidence required to support particular averments in the declaration or indictment.

And, *first*, of *civil* cases. 1. It is a fatal variance in a contract if it appear that a party who ought to have been joined as plaintiff has been omitted; 1 Saund. 291 *h*, n.; 2 Term 282; and so where a bill for specific performance alleges the execution of a contract in a certain year, and the proof shows that it was made in another; Johnston v. Jones, 85 Ala. 286, 4 South. 748. But it is no variance to omit a person who might have been joined as defendant; because the non-joinder ought to have been pleaded in abatement; 1 Saund. 291 *d*, n. 2. The consideration of the contract must be proved; but it is not necessary for the plaintiff to set out in his declaration, or prove on the trial, the several parts of a contract consisting of distinct and collateral provisions: it is sufficient to state so much of the contract as contains the entire consideration of the act, and the entire act to be done in virtue of such consideration, including the time, manner, and other circumstances of its performance; 6 East 568; 4 B. & Ald. 387.

Second. In *criminal* cases, it may be laid down that it is, in general, sufficient to prove what constitutes the offence. 1. It is enough to prove so much of the indictment as shows that the defendant has committed a sub-

stantive crime therein specified; 2 Campb. 585; U. S. v. Vickery, 1 H. & J. (Md.) 427, Fed. Cas. No. 16,619. See Daniels v. State, 78 Ga. 98, 6 Am. St. Rep. 238; People v. Wakely, 62 Mich. 297, 28 N. W. 871. If a man be indicted for robbery, he may be found guilty of larceny and not guilty of the robbery; 2 Hale, Pl. Cr. 302. The offence of which the party is convicted must, however, be of the same class with that of which he is charged; 1 Leach 14; 2 Stra. 1133.

2. When the intent of the prisoner furnishes one of the ingredients in the offence, and several intents are laid in the indictment, each of which, together with the act done, constitutes an offence, it is sufficient to prove one intent only; 3 Stark. 35.

3. When a person or thing necessary to be mentioned in an indictment is described with circumstances of greater particularity than is requisite, yet those circumstances must be proved; U. S. v. Porter, 3 Day (Conn.) 283, Fed. Cas. No. 16,074; Clark v. State, 26 Tex. App. 486, 9 S. W. 767. For example, if a party be charged with stealing a *black* horse, the evidence must correspond with the averment, although it was unnecessary to make it; Hooker v. State, 4 Ohio 350; Berrien v. State, 83 Ga. 381, 9 S. E. 609; but see People v. Monteith, 73 Cal. 7, 14 Pac. 373, where an indictment charging a murder with a "bludgeon" is supported by proof that death was produced by a blow with a bolt or club; Long v. State, 23 Neb. 33, 36 N. W. 310. See State v. Weddington, 103 N. C. 364, 9 S. E. 577; Douglass v. State, 26 Tex. App. 109, 9 S. W. 489, 8 Am. St. Rep. 459.

4. The name of the prosecutor or party injured must be proved as laid; and the rule is the same with reference to the name of a third person introduced into the indictment, as descriptive of some person or thing. See Robinson v. Com., 88 Ky. 386, 11 S. W. 210, 10 Ky. L. Rep. 972; State v. Quinlan, 40 Minn. 55, 41 N. W. 299.

The affirmative of the issue must be proved. The general rule with regard to the burden of proving the issue requires that the party who asserts the affirmative should prove it. But this rule ceases to operate the moment the presumption of law is thrown into the other scale. When the issue is on the legitimacy of a child, therefore, it is incumbent on the party asserting the illegitimacy to prove it; 2 Selw. N. P. 709. Or where an answer admits all the averments of the complaint, and sets up a counter-claim as a defence, the affirmative of all the issues raised by the pleadings is on the defendant; Hamilton Coal Co. v. Bernhard, 61 Hun 624, 16 N. Y. Supp. 55. See ONUS PROBANDI; PRESUMPTION; U. S. v. Hayward, 2 Gall. 485, Fed. Cas. No. 15,336; State v. Geuing, 1 McCord (S. C.) 573; 2 So. L. Rev. (N. S.) 126; Delachaise v. Maginnis, 44 La. Ann. 1043, 11 South. 715.

Modes of proof. Records are to be proved by an exemplification, duly authenticated according to law, in all cases where the issue is *nul tiel record*. In other cases, an examined copy, duly proved, will, in general, be evidence; Leathers v. Wrecking, etc., Co., 2 Woods 680, Fed. Cas. No. 8,164. Foreign laws are proved in the mode pointed out under the article FOREIGN LAW. See *supra*.

Incompetent and irrelevant evidence cannot be rendered competent and relevant by being contained in an official document; U. S. v. Corwin, 129 U. S. 381, 9 Sup. Ct. 318, 32 L. Ed. 710.

Private writings are proved by producing the attesting witness; or in case of his death, absence, or other legal inability to testify, as if after attesting the paper he becomes infamous, his handwriting may be proved. When there is no witness to the instrument, it may be proved by the evidence of the handwriting of the party, by a person who has seen him write, or who in a course of correspondence or business relations has become acquainted with his hand. See Munns v. De Nemours, 3 Wash. C. C. 31, Fed. Cas. No. 9,926; Arnold v. Gorr, 1 Rawle (Pa.) 223; 4 Am. L. Rev. 625; Berg v. Peterson, 49 Minn. 420, 52 N. W. 37. As to the question whether the genuineness of a signature may be proved or disproved by comparison, or the signature to documents not a part of the case be proven for the purpose of using them as standards of comparison with the signature to the instrument sued on, see HANDWRITING.

Books of original entry, when duly proved, are *prima facie* evidence of goods sold and delivered, and of work and labor done. See ORIGINAL ENTRY.

A full opinion laid down some general rules in relation to the use of the ballots as evidence in an election contest, which present the law in that regard in a very terse and lucid form. It holds (1) that one who has received a certificate of election to office is not estopped in case of contest from going behind the returns from ballot boxes which were counted without objection by either party, and which formed the basis of the certificate; (2) that in an election contest, the ballots of a certain box, which had been opened before a legislative committee after the election, are admissible when it appears that the opportunity for the ballots to have been tampered with was a mere possibility; and (3) that the fact that a discrepancy exists between the returns of the votes counted from that ballot box and a recount made by the court in an election contest does not indicate that there was any alteration in the ballots after being voted, nor tend to cast suspicion thereon, when the evidence shows that, when the count was concluded by the election officers, there were discrepancies between the tally sheets of the different clerks of the election, which it was attempted to rec oncile by guessing at the result, and making

changes accordingly; Henderson v. Albright, 12 Tex. Civ. App. 368, 34 S. W. 992. See ELECTION.

Proof by witnesses. The testimony of witnesses is called oral evidence, or that which is given *viva voce*, as contradistinguished from that which is written or documentary. Testimony is oral evidence as distinguished from documentary or written. Proof is the effect of evidence and evidence is the means or medium of proof; Elliot, Ev. § 9, and cases cited. It is a general rule that oral evidence shall in no case be received as equivalent to, or as a substitute for, a written instrument, where the latter is required by law; or to give effect to a written instrument which is defective in any particular which by law is essential to its validity; or to contradict, alter, or vary a written instrument, either appointed by law, or by the contract of the parties, to be the appropriate and authentic memorial of the particular facts it recites; for by doing so, oral testimony would be admitted to usurp the place of evidence decidedly superior in degree; Christ v. Diffenbach, 1 S. & R. (Pa.) 464, 7 Am. Dec. 624; Querry v. White, 1 Bibb (Ky.) 271; Stackpole v. Arnold, 11 Mass. 30, 6 Am. Dec. 150; Barber v. Brace, 3 Conn. 9, 8 Am. Dec. 149; Chemical Electric Light & Power Co. v. Howard, 150 Mass. 496, 23 N. E. 317; Butler v. Trust Co., 122 Ga. 371, 50 S. E. 132; Colton v. Vandervolgen, 87 Ind. 361; Chariton Ice Co. v. Ice Co., 129 Ia. 523, 105 N. W. 1014; O'Connor v. Green, 60 App. Div. 553, 69 N. Y. Supp. 1097; Town of Kane v. Farrelly, 192 Ill. 521, 61 N. E. 648; Milwaukee Carnival Ass'n v. King Co., 112 Wis. 647, 88 N. W. 598; Northern Assur. Co. v. Building Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213 (where many cases are considered), criticised, 15 Harv. L. Rev. 575, but this rule does not apply in suits between persons not parties to the writing; Williams v. Fisher, 8 Misc. 314, 28 N. Y. Supp. 739; Clapp v. Banking Co., 50 Ohio St. 528, 35 N. E. 308; Brown v. Thurber, 77 N. Y. 613; Kellogg v. Tompson, 142 Mass. 76, 6 N. E. 860.

But parol evidence is admissible to defeat a written instrument, on the ground of fraud, mistake, etc., or to apply it to its proper subject-matter, or, in some instances, as ancillary to such application, to explain the meaning of doubtful terms, or to rebut presumptions arising extrinsically. Such evidence is admissible if the contract was obtained by fraud; Cass v. Brown, 68 N. H. 85, 44 Atl. 86; Cushwa v. Imp. Loan & Bldg. Ass'n, 45 W. Va. 490, 32 S. E. 259; McCrary v. Pritchard, 119 Ga. 876, 47 S. E. 341; Moore v. Harmon, 142 Ind. 555, 41 N. E. 599; or false representations; Machin v. Trust Co., 210 Pa. 253, 59 Atl. 1073; Davis v. Driscoll, 22 Tex. Civ. App. 14, 54 S. W. 43; or if the written contract is ambiguous or obscure so that the intent of the parties cannot be ascertained; Jacobs v. Parodi, 50 Fla. 541, 39 South. 833; Leverett v. Bullard, 121 Ga. 534, 49 S. E. 591; Stone v. Mulvaine, 217 Ill. 40, 75 N. E. 421; Gregory v. Lake Linden, 130 Mich. 368, 90 N. W. 29; but the ambiguity must be a latent one; Okie v. Person, 23 App. D. C. 170; Hogan v. Wallace, 166 Ill. 328, 46 N. E. 1136; Camden & T. R. Co. v. Adams, 62 N. J. Eq. 656, 51 Atl. 24; Armstrong v. Ferguson, 54 N. Y. 659; if patent on the face of the deed, parol evidence is not admissible; Storer v. Freeman, 6 Mass. 435, 4 Am. Dec. 155; Holman v. Whitaker, 119 N. C. 113, 25 S. E. 793; Gatewood v. Burrus, 3 Call (Va.) 194. Where the contract is obscurely expressed, so that a knowledge of the subject-matter and relation of the parties becomes necessary, parol evidence, as to that, may be admitted; Black River Lumber Co. v. Warner, 93 Mo. 374, 6 S. W. 210; so also it may be admitted to show the meaning of words used, where they have some other than the ordinary sense; Richmond Union Pass. R. Co. v. R. Co., 95 Va. 386, 28 S. E. 573; McIntosh v. Miner, 53 App. Div. 240, 65 N. Y. Supp. 735; Wilcox v. Baer, 85 Mo. App. 587; or the identification of parties, where that does not appear certain by the instrument, as that the grantees in a deed were husband and wife; McLaughlin v. Rice, 185 Mass. 212, 70 N. E. 52, 102 Am. St. Rep. 339; Aplin v. Fisher, 84 Mich. 128, 47 N. W. 574; or that the words "bodily heirs" meant children; Edins v. Murphree, 142 Ala. 617, 38 South. 639; or that one of the contractors was a partnership and not a corporation; Hubbard v. Chappel, 14 Ind. 601; or where the identity of the parties is not clear; Haskell v. Tukesbury, 92 Me. 551, 43 Atl. 500, 69 Am. St. Rep. 529; or where a signature is made with initials only; Sanborn v. Flagler, 9 Allen (Mass.) 474; or to establish the liability of an undisclosed principal; City Trust, Safe-Deposit & Surety Co. of Philadelphia v. Brewing Co., 174 N. Y. 486, 67 N. E. 62; Smith v. Felter, 63 N. J. L. 30, 42 Atl. 1053; Heywood Bros. & Wakefield Co. v. Andrews, 89 Ill. App. 195; Belt v. Power Co., 24 Wash. 387, 64 Pac. 525; *contra*, Vail v. Life Ins. Co., 192 Ill. 567, 61 N. E. 651; Finan v. Babcock, 58 Mich. 301, 25 N. W. 294; David Belasco Co. v. Klaw, 48 Misc. 597, 97 N. Y. Supp. 712; or whether the notes were made by individuals or a firm; In re L. B. Weisenberg & Co., 131 Fed. 517; Huguenot Mills v. George F. Jempson & Co., 68 S. C. 363, 47 S. E. 687, 102 Am. St. Rep. 673; Markham v. Cover, 99 Mo. App. 83, 72 S. W. 474; Daugherty v. Heckard, 189 Ill. 239, 59 N. E. 569; or where two persons have the same name; Simpson v. Dix, 131 Mass. 179; or there is a mistake or variance in the name; Hicks v. Ivey, 99 Ga. 648, 26 S. E. 68; or where evidence is necessary to identify the subject-matter; Ætna Ins. Co. v. Strout, 16 Ind. App. 160, 44 N. E. 934; Axford v. Meeks, 59 N. J. L. 502, 36 Atl. 1036; and, in some cases, evidence of conversations between the par-

ties during negotiations is competent to show the construction of the contract; Hart v. Thompson, 10 App. Div. 183, 41 N. Y. Supp. 909; or to explain an ambiguity; Sabin v. Kendrick, 58 App. Div. 108, 68 N. Y. Supp. 546; Wright v. Gas Co., 2 Pa. Super. Ct. 219; Wussow v. Hase, 108 Wis. 382, 84 N. W. 433; but not to change the terms of the contract; Hart v. Hart, 117 Wis 639, 94 N W. 890.

But parol evidence is not admissible to contradict the terms of the agreement or show the intent of the parties; Delaware Indians v. Cherokee Nation, 193 U. S. 127, 24 Sup. Ct. 342, 48 L. Ed. 646; Packer v. Roberts, 140 Ill. 671, 29 N. E. 668; Willis v. Weeks, 129 Ia. 525, 105 N. W. 1012, or to construe a term which may be done without extrinsic evidence; Sullivan v. R. Co., 138 Ala. 650, 35 South. 694; or to explain away or destroy the effect of the agreement; King v. Ins. Co., 45 Ind. 43.

Extrinsic evidence is inadmissible to contradict or control court records; Bent v. Stone, 184 Mass. 92, 68 N E. 46, Marrow v. Brinkley, 85 Va. 55, 6 S. E. 605, in which an appeal was dismissed; Marrow v. Brinkley, 129 U. S. 178, 9 Sup. Ct. 267, 32 L. Ed. 651; Cook v. Penrod, 111 Mo. App. 128, 85 S W. 676; or to supply, extend or modify the record of judicial action by a municipal board, Kidson v. City of Bangor, 99 Me. 139, 58 Atl. 900; and this rule extends to official records generally; Ferguson v. Brown, 75 Miss. 214, 21 South. 603; Austin v. Rodman, 8 N. C. 71, legislative journals and records; Auditor General v. Board, 89 Mich. 552, 51 N. W. 483; Wilson v. Markley, 133 N. C. 616, 45 S. E. 1023; municipal records; Chippewa Bridge Co. v. Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931; corporation records, State v. Hancock, 2 Pennewill (Del.) 252, 45 Atl. 851 (at least in the absence of fraud or mistake); Snyder v. Lindsey, 157 N. Y. 616, 52 N. E. 592; *contra*, Rose v. Independent Chevra Kadisho, 215 Pa. 69, 64 Atl. 401; Hequembourg v. Edwards, 155 Mo. 514, 56 S. W. 490. If there be no fraud, accident, or mistake, a deed cannot be contradicted or varied by parol evidence; Kruse v. Koelzer, 124 Wis. 536, 102 N. W. 1072; Wishart v. Gerhart, 105 Mo. App. 112, 78 S. W. 1094; nor can an official deed; Bower v. Chess & Wymand Co., 83 Miss. 218, 35 South. 444; Wells v. Savannah, 181 U. S. 531, 21 Sup. Ct. 697, 45 L. Ed. 986; or a sealed instrument generally; Finck v. Bauer, 40 Misc. 218, 81 N. Y. Supp. 625.

See a "Brief History of the Parol Evidence Rule," by Wigmore; 4 Colum. L. Rev. 338; 20 L. Q. R. 245; 9 L. R. A. (N. S.) 967, note; [1898] 2 Q. B. 487; also as to contracts against public policy and good in part; 16 Y. L. J. 531; and where the writing was delivered conditionally; 18 L. R. A. (N. S.) 434, note.

In these cases, the parol evidence does not usurp the place, or arrogate the authority of written evidence, but either shows that the instrument ought not to be allowed to operate at all, or is essential in order to give to the instrument its legal effect; Smith v. Williams, 5 N. C. 426, 4 Am. Dec. 564; White v. Eagan, 1 Bay (S. C.) 247; Querry v. White, 1 Bibb (Ky.) 271; Stackpole v. Arnold, 11 Mass. 30, 6 Am. Dec. 150. See Gilpins v. Consequa, Pet. C. C. 85, Fed. Cas. No. 5,452; Barnet v. Gilson, 3 S. & R. (Pa.) 340; Otis v. Von Storch, 15 R. I. 41, 23 Atl. 39; Olds v. Conger, 1 Okl. 232, 32 Pac. 337; Bradley Fertilizer Co. v. Caswell, 65 Vt. 231, 26 Atl. 956; Bulkeley v. House, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247; O'Leary v. McDonough, 2 Misc. 219, 23 N. Y. Supp 665; Lonergan v. Buford, 148 U. S. 581, 13 Sup. Ct. 684, 37 L. Ed. 569; Shepherd v. Busch, 154 Pa. 149, 26 Atl. 363, 35 Am. St. Rep. 815. Where the facts do not appear on the face of the judgment, oral evidence is admissible to show how credits thereon come to be allowed, and what they were allowed for; Humphreys v. Bank, 75 Fed. 852, 21 C. C. A. 538. And parol evidence has been admitted to establish a contemporaneous oral agreement which induced the execution of the written contract though the effect be to alter or reform the latter; Cullmans v. Lindsay, 114 Pa. 170, 6 Atl. 332; Cake v. Bank, 116 Pa. 270, 9 Atl. 302, 2 Am. St. Rep. 600; so when the contract was a letter "confirming our verbal contract," proof of the latter was permitted although inconsistent with the letter; Holt v. Pie, 120 Pa. 439, 14 Atl 389. As a general rule the withdrawal of evidence from the consideration of the jury, by direction of the court, cures any error caused by its admission; Pennsylvania Co. v. Roy, 102 U. S. 452, 26 L Ed. 141; Hopt v. Utah, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed 708; but there are exceptions, as where too strong an impression has been made to be cured by the withdrawal; *id.*; or where the language of the withdrawal is insufficient to identify clearly what is withdrawn, Throckmorton v. Holt, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663.

It was held to be no cause of action to give false evidence negligently but not wilfully or corruptly, whereby the plaintiff was convicted of a criminal offence, the conviction still standing; [1902] 1 K. B. 467; which was based on a long line of authorities ending with Basely v. Mathews, L. R. 2 C. P. 684, which is said to be a novel case, and that there would probably be no cause of action even if the conviction were reversed; 18 L. Q. R. 107 See PERJURY.

As to the distinction between *évidence*, which corresponds with *probatio*, and *preuve*, see PREUVE.

See, generally, the treatises on Evidence, of Gilbert, Phillipps, Starkie, Roscoe, Swift, Bentham, Macnally, Peake, Greenleaf, Wharton, Stephen, Rice; Wigmore; Chamberlayne; McKelvey; Jones; Best on Presumption; Browne, Parol Ev.; Will. Circ. Ev.; TELEGRAPH AND TELEPHONE.

EVIDENCE, CIRCUMSTANTIAL. See EVIDENCE.

EVIDENCE, CONCLUSIVE. See EVIDENCE.

EVIDENCE, DIRECT. See EVIDENCE.

EVIDENCE, EXTRINSIC. See EVIDENCE.

EVIDENTIA. See PREUVE.

EVOCATION. **In French Law.** The act by which a judge is deprived of the cognizance of a suit over which he had jurisdiction, for the purpose of conferring on other judges the power of deciding it. It is like the process by writ of *certiorari*.

EWAGE. A toll paid for water-passage. Cowell. The same as *aquagium*.

EWBRICE. Adultery; spouse-breach; marriage-breach. Cowell; Tomlin, Law Dict.

EX ÆQUO ET BONO (Lat.). In justice and good dealing. 1 Story, Eq. Jur. § 965.

EX CONTRACTU (Lat.). From contract. A division of actions is made in the common and civil law into those arising *ex contractu* (from contract) and *ex delicto* (from wrong or tort). 3 Bla. Com. 117; 1 Chit. Pl. 2; 1 Mackeldey, Civ. Law § 195.

EX DEBITO JUSTITIÆ (Lat.). As a debt of justice. As a matter of legal right. 3 Bla. Com. 48.

EX DELICTO (Lat.). Actions which arise in consequence of a crime, misdemeanor, or tort are said to arise *ex delicto:* such are actions of case, replevin, trespass, trover. 1 Chit. Pl. 2; See EX CONTRACTU; ACTIONS.

EX DOLO MALO (Lat.). Out of fraud or deceit. When a cause of action arises from fraud or deceit, it cannot be supported; *ex dolo malo non oritur actio.* See MAXIMS.

EX EMPTO. Out of purchase; founded on purchase. A term of the civil law, adopted by Bracton. Inst. 4, 6, 28; Brac. fol. 102; Black, L. Dict.

EX GRATIA (Lat.). Of favor. Of grace. Words used formerly at the beginning of royal grants, to indicate that they were not made in consequence of any claim of legal right.

EX INDUSTRIA (Lat.). Intentionally. From fixed purpose.

EX MALEFICIO (Lat.). On account of misconduct. By virtue of or out of an illegal act. Used in the civil law generally, and sometimes in the common law. Browne, Stat. Frauds 110, n.; Broom, Leg. Max. 351.

EX MERO MOTU (Lat.). Of mere motion. The term is derived from the king's letters patent and charters, where it signifies that he grants them of his own mere motion, without petition. To prevent injustice, the courts will, *ex mero motu*, make rules and orders which the parties would not strictly be entitled to ask for. See EX GRATIA; EX PROPRIO MOTU.

EX MORA (Lat.). From the delay; from the default.

EX MORE (Lat.). According to custom.

EX NECESSITATE LEGIS (Lat.). From the necessity of law.

EX NECESSITATE REI (Lat.). From the necessity of the thing. Many acts may be done *ex necessitate rei* which would not be justifiable without it; and sometimes property is protected *ex necessitate rei* which under other circumstances would not be so, or a way of necessity will be allowed; Bass v. Edwards, 126 Mass. 445. Property put upon the land of another from necessity cannot be distrained for rent. See DISTRESS.

EX OFFICIO (Lat.). By virtue of his office.

Many powers are granted and exercised by public officers which are not expressly delegated. A judge, for example, may be *ex officio* a conservator of the peace and a justice of the peace.

EX OFFICIO INFORMATION. A criminal information filed by the attorney-general *ex officio* on behalf of the crown, in the court of queen's bench, for offences more immediately affecting the government, and to be distinguished from informations in which the crown is the nominal prosecutor. 4 Steph. Com. 372.

EX OFFICIO OATH. An oath used in the Ecclesiastical Courts, by which the person who took it swore to make true answer to all such questions as should be demanded of him. Stephen, Cr. Proc.

EX PARTE (Lat.). Of the one part. Many things may be done *ex parte*, when the opposite party has had notice. An affidavit or deposition is said to be taken *ex parte* when only one of the parties attends to taking the same. An injunction is granted *ex parte* when but one side has had a hearing. The term *ex parte* implies an examination in the presence of one of the parties and the absence of the other. Lincoln v. Cook, 2 Scam. (Ill.) 62.

"*Ex parte*," in the title of a reported case, signifies that the name following is that of the party upon whose application the case is heard.

EX PARTE MATERNA (Lat.). On the mother's side. The words *ex parte materna* and *ex parte paterna* have a well-known signification in the law. They are found used in the books to denote the line, or blood of the mother or father, and have no such restricted or limited sense, as from the mother or father, exclusively; Banta v. Demarest, 24 N. J. L. 433; 2 Bla. Com. 224.

EX PARTE PATERNA (Lat.). On the father's side. See EX PARTE MATERNA; DESCENT AND DISTRIBUTION.

EX POST FACTO (Lat.). From or by an after act: by subsequent matter. The correlative term is *ab initio*. An estate granted may be made good or avoided by matter *ex post facto*, when an election is given to the party to accept or not to accept; 1 Coke 146. A remainderman or reversioner may confirm *ex post facto* a lease granted by a life-tenant to last beyond his own life.

EX POST FACTO LAW. A statute which would render an act punishable in a manner in which it was not punishable when it was committed. Fletcher v. Peck, 6 Cra. (U. S.) 138, 3 L. Ed. 162; 1 Kent 408.

A law made to punish acts committed before the existence of such law, which had not been declared crimes by preceding laws. Mass. Declar. of Rights, pt. 1, s. 24; Md. Decl. of Rights, art. 15.

A law passed after the commission of the offence charged, which inflicts a greater punishment than was annexed to the crime at the time of commission, or which alters the situation of the accused to his disadvantage. In re Wright, 3 Wyo. 478, 27 Pac. 565, 13 L. R. A. 748, 31 Am. St. Rep. 94.

A law which, in its operation, makes that criminal which was not so at the time the action was performed; or which increases the punishment, or, in short, which, in relation to the offence or its consequences, alters the situation of a party to his disadvantage. U. S. v. Hall, 2 Wash. C. C. 366, Fed. Cas. No. 15,285; see Lindzey v. State, 65 Miss. 542, 5 South. 99, 7 Am. St. Rep. 674; Fletcher v. Peck, 6 Cra. (U. S.) 87, 3 L. Ed. 162; Moore v. State, 43 N. J. L. 203, 39 Am. Rep. 558; Ratzky v. People, 29 N. Y. 124; Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061; In re Medley, 134 U. S. 160, 10 Sup. Ct. 384, 33 L. Ed. 835.

Parliament, in virtue of its supreme power, may pass such laws, being sustained by discretion alone; 1 Bla. Com. 46, 160.

By the constitution of the United States, congress is forbidden to pass *ex post facto* laws. U. S. Const. art. 1, § 9. And by § 10 of the same instrument, as well as by the constitutions of most, if not all, of the states, a similar restriction is imposed upon the state legislatures. Such an act is void as to those cases in which, if given effect, it would be *ex post facto;* but so far only. In cases arising after it, it may have effect; for as a rule for the future, it is not *ex post facto.*

There is a distinction between *ex post facto* laws and *retrospective* or *retroactive* laws: every *ex post facto* law must necessarily be retrospective, but not every retrospective law is an *ex post facto* law; in general, *ex post facto* laws only are prohibited.

Ex post facto laws differ from *retroactive* laws. The latter, when imposing taxes or providing for their assessment and collection, are not forbidden by the constitution; the former, in that constitution, has reference to criminal punishment only; Kentucky Union Co. v. Kentucky, 219 U. S. 140, 31 Sup. Ct. 171, 55 L. Ed. 137. Retrospective laws are prohibited by the constitutions of the states of New Hampshire and Ohio. See Rairden v. Holden, 15 Ohio St. 207; John v. Bridgman, 27 Ohio St. 22; Blackburn v. State, 50 Ohio 428, 36 N. E. 18; Kring v. Missouri, 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506; White v. Wayne, T. U. P. Charlt. 94.

It is fully settled that the term *ex post facto*, as used in the constitution, is to be taken in a limited sense as referring to criminal or penal statutes alone, and that the policy, the reason, and the humanity of the prohibition against passing *ex post facto* laws do not extend to civil cases, to cases that merely affect the private property of citizens. But the prohibition cannot be evaded by giving a civil form to what is, in substance, criminal; Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. Ed 356; In re Garland, 4 Wall. (U. S.) 333, 18 L. Ed. 366; Burgess v. Salmon, 97 U. S. 383, 24 L. Ed. 1104; Green v. Shumway, 39 N. Y. 418; Hare, Am. Const. L. 547. Divorce not being a punishment may be authorized for causes happening previous to the passage of the divorce act; Carson v. Carson, 40 Miss. 349.

The constitution does not prohibit the states from passing retrospective laws generally. Some of the most necessary acts of legislation are, on the contrary, founded upon the principles that private rights must yield to public exigencies; Carpenter v. Pennsylvania, 17 How. (U. S.) 463, 15 L. Ed. 127; Watson v. Mercer, 8 Pet. (U. S.) 88, 8 L. Ed. 876; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 421, 9 L. Ed. 773; Satterlee v. Matthewson, 2 Pet. (U. S.) 380, 7 L. Ed. 458; Bank of Hamilton v. Dudley, 2 Pet. (U. S.) 523, 7 L. Ed. 496; Dash v. Van Kleeck, 7 Johns. (N. Y.) 488, 5 Am. Dec. 291; Com. v. Lewis, 6 Binn. (Pa.) 271; Wellshear v. Kelley, 69 Mo 343; United States Mortg. Co. v. Gross, 93 Ill. 483; Cooley, Const. Lim. 265; Callahan v. Callahan, 36 S. C. 454, 15 S. E. 727. See Drake v. Jordan, 73 Ia. 707, 36 N. W. 653; Campbell v. Manderscheid, 74 Ia. 708, 39 N. W. 92.

Test oaths of past loyalty to the government have been held void as *ex post facto;* In re Garland, 4 Wall. (U. S.) 333, 18 L. Ed. 366; except as pre-requisites to the exercise of the elective franchise; Green v. Shumway, 39 N. Y. 418. A law prohibiting the sale of intoxicating liquors is not *ex post facto*, State v. Paul, 5 R. I. 185; or a law imposing a retrospective tax; Bonny v. Reed, 31 N. J. L. 133; Stockdale v. Ins. Co., 20 Wall. (U. S.) 323, 22 L. Ed. 348; see, Carpenter v. Pennsylvania, 17 How. (U. S.) 456, 15 L. Ed. 127; Pullen v. Com'rs of Wake

County, 66 N. C. 361; or a law providing for the infliction of the death penalty by means of electricity which did not apply to crimes committed before it took effect; People v. Nolan, 115 N. Y. 660, 21 N. E. 1060; or a law authorizing a divorce for past offences; Carson v. Carson, 40 Miss. 349; Clark v. Clark, 10 N. H. 380, 34 Am. Dec 165; compare Dickinson v. Dickenson, 7 N. C. 327, 9 Am. Dec. 608; or a law providing that the punishment of future crimes shall be increased by reason of past offences; State v. Woods, 68 Me. 409.

Statutes providing for the revocation of licenses of physicians of bad moral character by state boards have been questioned as being *ex post facto*, but the case of People v. Hawker, 152 N. Y. 234, 46 N. E. 607, affirmed Hawker v. New York, 170 U. S. 189, 18 Sup. Ct. 573, 42 L. Ed. 1002, is said to have settled that they are not; People v. Reetz, 127 Mich 87, 86 N. W. 396, affirmed Reetz v. Michigan, 188 U. S. 505, 23 Sup. Ct. 390, 47 L. Ed 563; Meffert v. Board of Medical Registration, 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811, affirmed Meffert v. Packer, 195 U. S. 625, 25 Sup. Ct. 790, 49 L. Ed. 350. See POLICE POWER.

Where an act provided that one who has been convicted of crime shall no longer engage in the practice of medicine, it was held not to be an additional punishment for past offences or *ex post facto*, but that it simply prescribed the qualifications for the position and the appropriate evidence of such qualification; Hawker v. New York, 170 U. S. 189, 18 Sup. Ct. 573, 42 L. Ed. 1002.

Corporations cannot pass *ex post facto* by-laws; People v. Fire Dept., 31 Mich. 458.

Laws under the following circumstances are to be considered *ex post facto* laws within the words and intent of the prohibition: 1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2. Every law that aggravates a crime, or makes it greater than it was when committed. 3. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed (though it would be otherwise of a law mitigating the punishment; 3 Story, Const. 212). 4. Every law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offence, in order to convict the offender; Calder v. Bull, 3 Dall. (U. S.) 390, 1 L. Ed 648. This construction, it is said, "has been accepted and followed as correct by the courts ever since"; Cooley, Const. Lim. 325; its substance remains unchanged; Com. v. Kalck, 239 Pa. 533, 87 Atl. 61. See People v. McNulty, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61; Com. v. Graves, 155 Mass. 163, 29 N. E. 579, 16 L. R. A. 256.

This classification has been generally adopted as accurate and complete, but is not entirely so. Thus a law has been decided to be *ex post facto* which was intended to punish a criminal act, prosecution as to which was already barred by a statute of limitations; Moore v. State, 43 N. J. L. 203, 39 Am. Rep. 558; but an act which reduces a punishment is not *ex post facto* as to crimes committed prior to its enactment; People v. Hayes, 140 N. Y. 484, 35 N. E. 951, 23 L. R. A. 830, 37 Am. St. Rep. 572; State v. Kent, 65 N. C. 311; Dolan v. Thomas, 12 Allen (Mass.) 421; McInturf v. State, 20 Tex. App 335. The statement under the fourth head also requires modification. Convictions under changes in the rules of evidence have been held not unconstitutional; Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492; Jacquins v. Com., 9 Cush. (Mass.) 279; State v. Williams, 14 Rich. (S. C.) 281; Mrous v State, 31 Tex. Cr. R. 597, 21 S. W. 764, 37 Am. St. Rep. 834; Maguiar v. Henry, 84 Ky. 1, 4 Am. St. Rep. 182; Robinson v. State, 84 Ind. 452; Thompson v. Missouri, 171 U. S 380, 18 Sup. Ct. 922, 43 L. Ed. 204; though it seems to be settled that a law requiring a *less* degree of evidence cannot be applied to a previous offence. But changes in the forms, in the manner of passing sentence, or the qualifications of jurors, do not fall within the prohibition; Com. v. Phillips, 11 Pick. (Mass.) 28; Lybarger v. State, 2 Wash. 552, 27 Pac. 449, 1029; In re Wright, 3 Wyo. 478, 27 Pac. 565, 13 L. R. A 748, 31 Am. St. Rep 94; City Council of Anderson v. O'Donnell, 29 S. C. 355, 7 S. E. 523, 1 L. R. A. 632, 13 Am. St. Rep. 728; nor will a provision reducing the number of peremptory challenges on a prosecution for a capital offence, though applied to cases where the offence was committed before the change was made; Mathis v. State, 31 Fla. 291, 12 South. 681; South v. State, 86 Ala. 617, 6 South. 52; nor an amendment which confers jurisdiction in a criminal cause upon a division of the supreme court less in numbers and different in personnel from the court as organized when the crime was committed; Duncan v. Missouri, 152 U. S. 377, 14 Sup. Ct. 570, 38 L. Ed. 485. A change of criminal procedure applied to the trial of crimes committed before it took effect is not *ex post facto*, unless it affects some substantial right to which the accused was entitled when the alleged offence was committed; State v. Carter, 33 La. Ann. 1214; Kring v. Missouri, 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506.

Statutes regulating procedure, if they leave untouched all the substantial protections with which existing law surrounds the person accused of crime, are not within the constitutional inhibition; Duncan v. Missouri, 152 U. S. 378, 14 Sup. Ct. 570, 38 L. Ed. 485; Thompson v. Missouri, 171 U. S. 380, 18 Sup. Ct. 922, 43 L. Ed. 204. A statute admitting evidence of a particular kind in a criminal case upon an issue of fact, which was not

admissible under the rules of evidence at the time the offence was committed, is not *ex post facto;* Thompson v. Missouri, 171 U. S. 380, 18 Sup. Ct. 922, 43 L. Ed. 204; though in his classification of *ex post facto* laws Mr. Justice Chase, in Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. Ed. 648, includes every law that alters the legal rules of evidence, and requires less or different testimony than the law required at the time of the commission of the offence in order to convict the offender.

In Missouri, after conviction of a capital offence and verdict set aside because of the admission of papers for comparison of handwriting merely, the legislature changed the law so as to admit such papers; on a new trial, it was held merely a change of a rule of evidence, which could be applied in the trial of an offence committed before its enactment; Thompson v. Missouri, 171 U. S. 380, 18 Sup. Ct. 922, 43 L. Ed. 204.

The supreme court of the United States has decided that a constitutional provision, requiring all grand and petit jurors to be qualified electors, able to read and write, and enjoining on the legislature to provide by law for listing and drawing persons so qualified, but declaring that, until otherwise provided by law, all crimes should be tried as though no change had been made (Const. Miss. 1890), went into effect immediately on its adoption, so far as the qualifications of jurors were concerned; that one who committed a crime after the adoption of the constitution, but before the legislature passed a new jury law, could be tried, after the passage of such a law, by a jury selected under its provisions; and that, as the new law did not aggravate the crime previously committed, or inflict a greater punishment, or alter the rules of evidence, its application to the trial of the accused did not make it an *ex post facto* law; Gibson v. Mississippi, 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075. But where the constitution of Utah provided for the trial in courts of general jurisdiction of criminal cases not capital by a jury of eight, it was held *ex post facto* in its application to felonies committed before the territory became a state, because the constitution of the United States, gave the accused, at the time of the commission of the offence, the right to be tried by a jury of twelve persons, and made it unlawful to deprive him of his liberty except by the unanimous verdict of such a jury; Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061.

For a review of the history of the *ex post facto* clause of the constitution in connection with its adoption, and with its subsequent construction by the federal and state courts, see Kring v. Missouri, 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506.

See also In re Medley, 134 U. S. 160, 10 Sup. Ct. 384, 33 L. Ed. 835; Cooley, Const. Lim. ch. ix.; Sto. Const. §§ 1345, 1373; Wade, Retro. L.; Pat. Fed. Restr. ch. vi.; Johnson, Ex Post Facto Laws; Black, Const. Prohibitions; Pomeroy, Const. Law; 4 L. Mag. & Rev., 4th 59; Savigny, Confl. Laws; 22 Am. L. Rev. 523; Myer, Vested Rights; 3 L. R. A. 181, note; 1 L. R. A. 632, note; Fisher, Evolution of Const.; RETROSPECTIVE.

EX PROPRIO MOTU (Lat.). Of his own accord.

EX PROPRIO VIGORE (Lat.). By its own force. 2 Kent 457.

EX REL. See EX RELATIONE.

EX RELATIONE (Lat.). At the information of; by the relation. A bill in equity, for example, may in many cases be brought for an injunction to restrain a public nuisance *ex relatione* (by information of) the parties immediately interested in or affected by the nuisance; 18 Ves. 217; Van Bergen v. Van Bergen, 2 Johns. Ch. (N. Y.) 382; Corning v. Lowerre, 6 Johns. Ch. (N. Y.) 439; Pennsylvania v. Bridge Co., 13 How. (U. S.) 518, 14 L. Ed. 249; Georgetown v. Canal Co., 12 Pet. (U. S.) 91, 9 L. Ed. 1012.

It is frequently abbreviated *ex rel.* See RELATOR.

EX TEMPORE (Lat.). From the time; without premeditation.

EX VI TERMINI (Lat.). By force of the term.

EX VISCERIBUS (Lat. from the bowels). From the vital part, the very essence of the thing. 10 Co. 24 *b;* Homer v. Shelton, 2 Metc. (Mass) 213. *Ex visceribus verborum* (from the mere words and nothing else); 1 Story, Eq. § 980.

EX VISITATIONE DEI (Lat.). By or from the visitation of God. In the ancient law, upon a prisoner arraigned for treason or felony standing mute, a jury was impanelled to inquire whether he stood obstinately mute, or was dumb *ex visitatione Dei;* 4 Steph. Com. 391. This phrase is frequently employed in inquisitions by the coroner, where it signifies that the death of the deceased is a natural one.

EXACTION. A wilful wrong done by an officer, or by one who, under color of his office, takes more fee or pay for his services than the law allows.

Between *extortion* and *exaction* there is this difference, that in the former case the officer extorts more than his due, when something is due to him; in the latter, he exacts what is not his due, when there is nothing due to him. Co. Litt. 368

EXACTOR. In Old English and Civil Law. A collector. *Exactor regis* (collector for the king). A collector of taxes or revenue. Vicat, Voc. Jur.; Spelman, Gloss. The term exaction early came to mean the wrong done by an officer, or one pretending to have authority, in demanding or taking any reward or fee for that matter, cause, or thing which the law allows not. *Termes de la Ley.*

EXAMINATION. In Criminal Law. The investigation by an authorized magistrate of the circumstances which constitute the grounds for an accusation against a person arrested on a criminal charge, with a view to discharging the person so arrested, or to securing his appearance for trial by the proper court, and to preserving the evidence relating to the matter.

Practically, it is accomplished by bringing the person accused, together with witnesses, before a magistrate (generally a justice of the peace), who thereupon takes down in writing the evidence of the witnesses, and any statements which the prisoner may see fit to make If no cause for detention appears, the party is discharged from arrest If sufficient cause of suspicion appears to warrant putting him on trial, he is committed, or required to give bail or enter into a recognizance to appear at the proper time for trial The witnesses are also frequently required to recognize for their appearance; though in ordinary cases only their own recognizance is required. The magistrate signs or certifies the minutes of the evidence which he has taken, and it is delivered to the court before whom the trial is to be had. The object of an examination is to enable the judge and jury to see whether the witnesses are consistent, and to ascertain whether the offence is bailable. 2 Leach 552. And see 4 Sharsw. Bla. Com. 296.

At common law, the prisoner could not be interrogated by the magistrate; but under the statutes 1 & 2 Phil. & M. c. 13, 2 & 3 Phil. & M. c. 10, the provisions of which have been substantially adopted in most of the states, the magistrate is to examine the prisoner as well as the witnesses. 1 Greenl. Ev. § 224; 4 Bla. Com. 296, Rose. Cr. Ev. 44; Ry. & M. 432.

The examination should be taken and completed as soon as the nature of the case will admit; Cro. Eliz 829; 1 Hale, Pl. Cr. 585; 2 *id.* 120. The prisoner must not be put upon oath, but the witnesses must; 1 Phil. Ev. 106; Archb. Cr. Pr. & Pl. 386. The prisoner formerly had no *right* to the assistance of an attorney; but the privilege was granted at the discretion of the magistrate; 2 Dowl. & R. 86; 1 B. & C. 37. Now, however, a prisoner is permitted to have counsel as a matter of course. The magistrate's return and certificate are conclusive evidence, and exclude parol evidence, of what the prisoner said on that occasion with reference to the charge; 2 C. & K. 223; 5 C. & P. 162; 1 Mood. & M. 403. See CONFESSION; RECOGNIZANCE.

In Practice. The interrogation of a witness, in order to ascertain his knowledge as to the facts in dispute between parties.

The *examination in chief* is that made by the party calling the witness; the *cross-examination* is that made by the other party. In the examination in chief the counsel cannot ask leading questions, except in particular cases. See CROSS-EXAMINATION; LEADING QUESTIONS.

The examination is to be made in open court, when practicable; but when, on account of age, sickness, absence from the jurisdiction, or other cause, the witness cannot be so examined, then in civil causes it may be made before authorized commissioners.

The interrogation of a person who is desirous of performing some act, or availing himself of some privilege of the law, in order to ascertain if all the requirements of the law have been complied with, conducted by and before an officer having authority for the purpose.

There are many acts which can be of validity and binding force only upon an examination. Thus, in many states, a married woman must be privately examined as to whether she has given her consent freely and without restraint to a deed which she appears to have executed, see ACKNOWLEDGMENT, an insolvent who wishes to take the benefit of the insolvent laws, one who is about to become bound for another in legal proceedings, a bankrupt, etc., must submit to an examination.

EXAMINED COPY. A phrase applied to designate a paper which is a copy of a record, public book, or register, and which has been compared with the original. 1 Campb. 469.

Such examined copy is admitted in evidence, because of the public inconvenience which would arise if such record, public book, or register were removed from place to place, and because any fraud or mistake made in the examined copy would be so easily detected; 1 Greenl. Ev § 91; 1 Stark. Ev. 189 But in an answer in chancery on which the defendant was indicted for perjury, or where the original must be produced in order to identify the party by proof of handwriting, an examined copy would not be evidence; 1 Mood. & R. 189. See COPY.

EXAMINERS. See EXAMINATION; SPECIAL EXAMINER.

EXAMINERS IN CHANCERY. Officers who examine, upon oath, witnesses produced on either side upon such interrogatories as the parties to any suit exhibit for that purpose. Cowell.

The examiner is to administer an oath to the party, and then repeat the interrogatories one at a time, writing down the answer himself; 2 Dan. Ch. Pr. 1062. Anciently, the examiner was one of the judges of the court; hence an examination before the examiner is said to be an examination in court; 1 Dan. Ch. Pr. 1053.

EXANNUAL ROLL. A roll containing the illeviable fines and desperate debts, which was read yearly to the sheriff (in the ancient way of delivering the sheriff's accounts), to see what might be gotten. Hale, Sheriffs 67; Cowell.

EXCAMB. In Scotch Law. To exchange. *Excambion*, exchange. The words are evidently derived from the Latin *excambium*. Bell, Dict. See EXCHANGE.

EXCAMBIATOR. An exchanger of lands; a broker. Obsolete.

EXCAMBIUM (Lat.). **In English Law.** Exchange; a recompense. 1 Reeve, Hist. Eng. Law 442.

EXCELLENCY. A title given by courtesy to the governors of the states, to the President of the United States, and to ambassadors.

EXCEPTIO REI JUDICATÆ. A Roman law term equivalent to a plea of former judgment. Bigelow, Estoppel 41.

EXCEPTION (Lat. *excipere: ex*, out of, *capere*, to take). A clause in a deed by which the lessor excepts something out of that which he before granted by the deed.

The exclusion of something from the effect or operation of the deed or contract which would otherwise be included.

An *exception* differs from a *reservation (q. v.)*,—the former being always of part of the thing granted, the latter of a thing not *in esse*, but newly created or reserved; the exception is of the whole of the part excepted; the reservation may be of a right or interest in the particular part affected by the reservation. See Ballou v. Harris, 5 R. I. 419, Hammond v Woodman, 41 Me 177, 66 Am Dec. 219, State v Wilson, 42 Me 9, Adams v. Morse, 51 Me 498; Gould v. Glass, 19 Barb. (N. Y.) 192, 2 B. & C 197 The two words, however, are often used indiscriminately, Stockwell v. Couillard, 1.9 Mass 231; Barnes v. Burt, 38 Conn. 541. An exception differs, also, from an explanation, which, by the use of a *videlicet, proviso*, etc, is allowed only to explain doubtful clauses precedent, or to separate and distribute generals into particulars; Cutler v. Tufts, 3 Pick. (Mass) 272. See RESERVATION.

To make a valid exception, these things must concur: *first*, the exception must be by apt words, as, "saving and excepting," etc.; see Keeler v. Wood, 30 Vt. 242; Ballou v. Harris, 5 R. I. 419; Hammond v. Woodman, 41 Me. 177, 66 Am. Dec. 219; Midgett v. Wharton, 102 N. C. 14, 8 S. E. 778; *second*, it must be of part of the thing previously described, and not of some other thing; *third*, it must be of part of the thing only, and not of all, the greater part, or the effect of the thing granted; Richardson v. Milburn, 11 Md. 339; Adams v. Warner, 23 Vt. 395; an exception, therefore, in a lease which extends to the whole thing demised is void; *fourth*, it must be of such thing as is severable from the demised premises, and not of an inseparable incident; Backenstoss v. Stahler's Adm'rs, 33 Pa. 251, 75 Am. Dec. 592; Goodrich v. R. R., 37 N. H. 167; *fifth*, it must be of such a thing as he that excepts may have, and which properly belongs to him; *sixth*, it must be of a particular thing out of a general, and not of a particular thing out of a particular thing; *seventh*, it must be particularly described and set forth; a lease of a tract of land except one acre would be void, because that acre was not particularly described; Co. Litt. 47 *a*; Hay v. Storrs, Wright (Ohio) 711; Jackson v. Hudson, 3 Johns. (N. Y.) 375, 3 Am. Dec. 500; Darling v. Crowell, 6 N. H. 421; Altman v. McBride, 4 Strobh. (S. C.) 208; see Painter v. Water Co., 91 Cal. 74, 27 Pac. 539. Exceptions against common right and general rules are construed as strictly as possible; Hays v. Askew, 50 N. C. 63. When a grantor makes a valid exception, the thing excepted remains the property of himself or his heirs; but if he has no valid title to it, neither he nor his heirs can recover; Fisher v. Min. Co., 97 N. C. 95, 4 S. E. 772.

In Equity Practice. The allegation of a party, in writing, that some pleading or proceeding in a cause is insufficient.

In Civil Law. A plea. Merlin, *Répert.*

Declinatory exceptions are such dilatory exceptions as merely decline the jurisdiction of the judge before whom the action is brought. La. Code Proc.

Dilatory exceptions are such as do not tend to defeat the action, but only to retard its progress.

Declinatory exceptions have this effect, as well as the exception of discussion offered by a third possessor or by a surety in an hypothecary action, or the exception taken in order to call in the warrantor. Noble v. Martin, 7 Mart. N. S. (La.) 282; Howard v. The Columbia, 1 La. 420.

Peremptory exceptions are those which tend to the dismissal of the action.

Some relate to forms, others arise from the law. Those which relate to forms tend to have the cause dismissed, owing to some nullities in the proceedings. These must be pleaded *in limine litis*. Peremptory exceptions founded on law are those which, without going into the merits of the cause, show that the plaintiff cannot maintain his action, either because it is prescribed, or because the cause of action has been destroyed or extinguished These may be pleaded at any time previous to definitive judgment, Pothier Proc Civ. pt 1, c. 2, ss. 1, 2, 3 These, in the French law, are called *Fins de non recevoir*.

In Practice. Objections made to the decisions of the court in the course of a trial. See BILL OF EXCEPTION.

EXCEPTION TO BAIL. An objection to the special bail put in by the defendant to an action at law made by the plaintiff on grounds of the insufficiency of the bail. 1 Tidd, Pr. 255.

EXCESS. When a defendant pleaded to an action of assault that the plaintiff trespassed on his land, and he would not depart when ordered, whereupon he *molliter manus imposuit*, gently laid hands on him, the replication of excess was to the effect that the defendant used more force than necessary. Wharton.

EXCESSIVE BAIL. Bail which is *per se* unreasonably great and clearly disproportionate to the offence involved, or which under the peculiar circumstances appearing is shown to be so in the particular case. Ex parte Ryan, 44 Cal. 558; Ex parte Duncan, 53 Cal. 410.

EXCHANGE. In Commercial Law. A negotiation by which one person transfers to another funds which he has in a certain place, either at a price agreed upon or which is fixed by commercial usage.

This transfer is made by means of an instrument which represents such funds and is well known by the name of a bill of exchange (*q. v.*). The price above the par value of the funds so transferred is

called the *premium* of exchange, and if under that value the difference is called the *discount*,—either being called the *rate* of exchange.

The par of exchange is the value of the money of one country in that of another, and is either real or nominal. The nominal par is that which has been fixed by law or usage, and, for the sake of uniformity, is not altered, the rate of exchange alone fluctuating. The real par is that based on the weight and fineness of the coins of the two countries, and fluctuates with changes in the coinage. The nominal par of exchange in this country on England, settled in 1799 by act of congress, was four dollars and forty-four cents for the pound sterling; but by successive changes in the coinage this value has been increased, the real mint par at present being $4.86½. The *course* of exchange means the quotations for any given time.

The transfer of goods and chattels for other goods and chattels of equal value. This is more commonly called barter. Where a party deposits wheat with a mill company, expecting to receive a proportionate amount of flour, it constitutes an exchange and not a sale; Martin v. Mill Co., 49 Mo. App. 23. One cannot, as having been defrauded thereby, rescind an exchange of property, without tendering a return of his property to the other, unless it is absolutely worthless; Johnson v. Flynn, 97 Mich. 581, 56 N. W. 939.

The distinction between a sale and exchange of property is rather one of shadow than of substance. In both cases the title to property is absolutely transferred, and the same rules of law are applicable to the transaction, whether the consideration of the contract is money or by way of barter. It can make no essential difference in the rights and obligations of parties that goods and merchandise are transferred and paid for by other goods and merchandise instead of by money, which is but the representative of value or property; Com. v. Clark, 14 Gray (Mass.) 372.

The profit which arises from a maritime loan, when such profit is a percentage on the money lent, considering it in the light of money lent in one place to be returned in another, with a difference in amount in the sum borrowed and that paid, arising from the difference of time and place. The term is commonly used in this sense by French writers. Hall, Mar. Loans 56, n.

The place where merchants, captains of vessels, exchange-agents, brokers, etc., assemble to transact their business. *Code de Comm.* art. 71. See STOCK EXCHANGE.

In Conveyancing. A mutual grant of equal interests in land, the one in consideration of the other. 2 Bla. Com. 323; Littleton 62; Shep. Touchst. 289; Digby, R. P. 368. It is said that exchange in the United States does not differ from bargain and sale. 1 Bouvier, Inst. n. 2059.

There are five circumstances necessary to an exchange. That the estates given be equal. That the word *excambium*, or exchange, be used,—which cannot be supplied by any other word, or described by circumlocution. That there be an execution by entry or claim in the life of the parties. That if it be of things which lie in grant, it be by deed. That if the lands lie in several counties, or if the thing lie in grant, though they be in one county, it be by deed indented. In practice this mode of conveyancing is nearly obsolete.

See Cruise, Dig. tit. 32; Com. Dig.; Co. Litt. 51; 1 Washb. R. P. 159; Cass v. Thompson, 1 N. H. 65, 8 Am. Dec. 36; Maydwell v. Carroll, 3 Harr. & J. (Md.) 361; Stroff v. Swafford Bros., 79 Ia. 135, 44 N. W. 293; Close v. Crossland, 47 Minn. 500, 50 N. W. 694; Williamson v. Woten, 132 Ind. 202, 31 N. E. 791; Gunter v. Leckey, 30 Ala. 591; REAL ESTATE BROKER.

EXCHANGE, BILLS OF. See BILLS OF EXCHANGE.

EXCHEQUER (Law Lat *scaccarium*; Nor. Fr. *eschequier*). **In English Law.** A department of the government which has the management of the collection of the king's revenue.

The name is said to be derived from the chequered cloth which covered the table on which some of the king's accounts were made up and the amounts indicated by counters.

It consisted of two divisions, one for the receipt of revenue, the other for administering justice. Co. 4th Inst. 103; 3 Bla. Com. 44, 45. See COURT OF EXCHEQUER; COURT OF EXCHEQUER CHAMBER.

EXCHEQUER BILLS. Bills of credit issued by authority of parliament.

They constitute the medium of transaction of business between the bank of England and the government. The exchequer bills contain a guarantee from government which secures the holders against loss by fluctuation. Wharton; McCulloch, Comm. Dict.

EXCISE. An inland imposition, paid sometimes upon the consumption of the commodity, and frequently upon the retail sale 1 Bla. Com. 318; Story, Const. § 950; Cooley, Tax. 4. See Oliver v. Washington Mills, 11 Allen (Mass.) 268.

Excises are a species of taxes, consisting generally of duties laid upon the manufacture, sale, or consumption of commodities within the country, or upon certain callings or occupations, often taking the form of exactions for licenses to pursue them. Pollock v. Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759.

In Art. I, sec. 8, of the constitution congress has power to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare of the United States, but all du-

ties, imposts and excises shall be uniform throughout the United States. The power of congress under this clause is co-extensive with the territory of the United States and extends to the territories; Loughborough v. Blake, 5 Wheat. (U. S.) 317, 5 L. Ed. 98; The Cherokee Tobacco, 11 Wall. (U. S.) 616, 20 L. Ed. 227.

Duties, imposts, and excises were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like; Thomas v. U. S., 192 U. S. 363, 24 Sup. Ct. 305, 48 L. Ed. 481. "Excises usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc. They are or may be as varied in form as the acts or dealings with which the taxes are concerned. Impost duties take every conceivable form, as may by the legislative authority be deemed best for the general welfare. They have been at all times often specific. They have sometimes been discriminatory, particularly when deemed necessary by reason of the tariff legislation of other countries;" Knowlton v. Moore, 178 U. S. 41, 88, 20 Sup. Ct. 747, 44 L. Ed. 969.

Taxes held to be excises, and to be distinguished from direct taxes, are: Upon the business of an insurance company; Pacific Ins. Co. v. Soule, 7 Wall. (U. S.) 433, 19 L. Ed. 95; on the circulation of state banks; Veazie Bank v. Fenno, 8 Wall. (U. S.) 533, 19 L. Ed. 482; or notes of any town, city, or municipal corporation paid out by any bank or banker; Merchants' Nat. Bank v. U. S., 101 U. S. 1, 25 L. Ed. 979; a succession tax; Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969; on the interest paid by a corporation on its bonds; Michigan C. R. Co. v. Collector, 100 U. S. 595, 25 L. Ed. 647; on carriages; Hylton v. U. S., 3 Dall. (U. S.) 171, 1 L. Ed. 556; on passing title to real estate; Scholey v. Rew, 23 Wall. 331, 23 L. Ed. 99; internal revenue tax; U. S. v. Vassar, 5 Wall. (U. S.) 462, 18 L. Ed. 497; Springer v. U. S., 102 U. S. 586, 26 L. Ed. 253; stamp duties; Treat v. White, 181 U. S. 264, 21 Sup. Ct. 611, 45 L. Ed. 853; Patton v. Brady, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713; on oleomargarine or artificial butter; McCray v. U. S., 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; on sales of property at an exchange; Nicol v. Ames, 173 U. S. 509, 19 Sup. Ct. 522, 43 L. Ed. 786; on the business of sugar refining; Spreckels Sugar Refin. Co. v. McClain, 192 U. S. 397, 24 Sup. Ct. 376, 48 L. Ed. 496; on contracts of sale of stock; Thomas v. U. S., 192 U. S. 363, 24 Sup. Ct. 305, 48 L. Ed. 481; on agreements to sell shares of stock, denominated *calls* by New York stockbrokers; Treat v. White, 181 U. S. 264, 21 Sup. Ct. 611, 45 L. Ed. 853; on tobacco manufactured for consumption; Patton v. Brady, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713.

Taxes held not valid as excises are: On the occupation of an importer the same as on the imports; Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. Ed. 678; on the income of United States securities the same as a tax on the securities; Weston v. Charleston, 2 Pet. (U. S.) 449, 7 L. Ed. 481; income from an office the same as a tax on the office; Minis v. U. S., 16 Pet. (U. S.) 435, 10 L. Ed. 791; on a bill of lading the same as a duty on the article represented by it; Almy v. California, 24 How. (U. S.) 169, 16 L. Ed. 644; a tax upon interest on bonds as upon the security; Northern C. R. Co. v. Jackson, 7 Wall. (U. S.) 262, 19 L. Ed. 88; on auction sales of goods as a tax on the goods sold; Cook v. Pennsylvania, 97 U. S. 566, 24 L. Ed. 1015; tax on income from interstate commerce as a tax on the commerce; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200; Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; tax on the rents or income of real estate is a direct tax; Pollock v. Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759; tax upon income from municipal bonds, *id.*; license fees on certain lines of business in a single territory; Binns v. U. S., 194 U. S. 486, 24 Sup. Ct. 816, 48 L. Ed. 1087.

It is within the power of congress to increase an excise as well as a property tax, and such an increase may be made at least while the property is held for sale and before it has passed into the hands of the consumer; and it is no part of the function of the court to inquire into the reasonableness of the excise, either as respects the amount or the property upon which it is imposed; Patton v. Brady, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713. See TAX.

Though an excise tax be so onerous that it amounts to a destruction of the business, or even if intended to do so, it is within the power of congress and the courts have no power to revise its judgment; McCray v. U. S., 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78; Patton v. Brady, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713, where it was said "that it is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount, or the property upon which it is imposed."

Territory acquired as a result of the Spanish War became territory appurtenant to the United States, but not a part of it within the revenue clause of the constitution; Downes v. Bidwell, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088; Dooley v. U. S., 183 U. S. 153, 22 Sup. Ct. 62, 43 L. Ed. 128.

EXCLUSIVE (Lat. *ex*, out, *claudere*, to shut). Not including; debarring from participation. Shut out; not included.

An exclusive right or privilege, as a copyright or patent, is one which may be ex-

ercised and enjoyed only by the person authorized, while all others are forbidden to interfere.

EXCOMMUNICATION. An ecclesiastical sentence pronounced by a spiritual judge against a Christian man, by which he is excluded from the body of the church, and disabled to bring any action or sue any person in the common-law courts. Bac. Abr.; Co. Litt. 133, 134; Nance v. Busby, 91 Tenn. 303, 18 S. W. 874, 15 L. R. A. 801.

In early times it was the most frequent and the most severe method of executing ecclesiastical censure, although proper to be used, said Justinian (Nov. 123), only upon grave occasions. The effect of it was to remove the excommunicated person not only from the sacred rites, but from the society of men In a certain sense it interdicted the use of fire and water, like the punishment spoken of by Cæsar (lib. 6, *de Bell. Gall*) as inflicted by the Druids Innocent IV. called it the nerve of ecclesiastical discipline. On repentance, the excommunicated person was absolved and received again to communion These are said to be the powers of binding and loosing,—the keys of the kingdom of heaven. This kind of punishment seems to have been adopted from the Roman usage of interdicting the use of fire and water. Fr. Duaren, *De Sacris Eccles Ministeriis*, lib. 1, cap. 3. See Ridley, View of the Civil and Ecclesiastical Law 245

It was the process by which the English ecclesiastical courts enforced their process If the excommunicate did not submit within 40 days, the court signified the fact to the crown and thereon a writ *excommunicato capiendo* issued to the sheriff, who took and imprisoned the offender till he submitted. When he submitted, the bishop signified this fact, and a writ *de excommunicato deliberando* (to release an excommunicate) issued An excommunicate could not serve upon juries, be a witness in any court, or bring an action, real or personal In 1813 the writ *de contumace capiendo* was substituted to enforce appearance and punish contempt, the rules applicable being the same as before Excommunication is still a punishment by the earlier writ for offences of ecclesiastical cognizance, but the only penalty is imprisonment not exceeding six months; 1 Holdsw Hist. E L. 400. For the form of the writ see *id* 433

EXCOMMUNICATO CAPIENDO (Lat. for taking an excommunicated person). **In Ecclesiastical Law.** A writ issuing out of chancery, founded on a bishop's certificate that the defendant had been excommunicated, returnable to the king's bench. 4 Bla. Com. 415; Bac. Abr. *Excommunication*, E. See Cro. Eliz. 224, 680; Cro. Car. 421; Cro. Jac. 567; 1 Salk. 293.

EXCULPATION. See LETTERS OF EXCULPATION.

EXCUSABLE HOMICIDE. The killing of a human being, when the party killing is not altogether free from blame, but the necessity which renders it excusable may be said to have been partly induced by his own act. 1 East, Pl. Cr. 220. See HOMICIDE.

EXCUSATIO (Lat.). **In Civil Law.** Excuse. A cause from exemption from a duty, such as absence, insufficient age, etc. Vicat, Voc. *Jur.*, and reference there given.

EXCUSE. A reason alleged for the doing or not doing a thing.

This word presents two ideas, differing essentially from each other. In one case an excuse may be made in order to show that the party accused is not guilty; in another, by showing that though guilty he is less so than he appears to be. Take, for example, the case of a sheriff who has an execution against an individual, and who, in performance of his duty, arrests him. In an action by the defendant against the sheriff, the latter may prove the facts, and this shall be a sufficient excuse for him, this is an excuse of the first kind, or a complete justification; the sheriff was guilty of no offence But suppose, secondly, that the sheriff has an execution against Paul, and by mistake, and without any malicious design, he arrests Peter instead of Paul: the fact of his having the execution against Paul and the mistake being made will not justify the sheriff, but it will extenuate and excuse his conduct, and this will be an excuse of the second kind.

Persons are sometimes excused for the commission of acts which ordinarily are crimes, either because they had no intention of doing wrong, or because they had no power of judging, and therefore had no criminal will, or, having power of judging, they had no choice, and were compelled by necessity Among the first class may be placed infants under the age of discretion, lunatics, and married women committing certain offences in the presence of their husbands Among acts of the second kind may be classed the beating or killing another in self-defence, the destruction of property in order to prevent a more serious calamity, as the tearing down of a house on fire to prevent its spreading to the neighboring property, and the like. See Dalloz, Dict.

EXCUSSIO (Lat.). **In Civil Law.** Exhausting the principal debtor before proceeding against the surety. Discussion is used in the same sense in Scotch law. Vicat, *Excussionis Beneficium*.

EXECUTE. To complete; to make; to perform; to do; to follow out.

The term is frequently used in law; as, to *execute* a deed, which means to make a deed, including especially signing, sealing, and delivery. To execute a contract is to perform the contract. To execute a use is to merge or unite the equitable estate of the *cestui que use* in the legal estate, under the statute of uses. To execute a writ is to do the act commanded in the writ. To execute a criminal is to put him to death according to law, in pursuance of his sentence.

EXECUTED. Done; completed; effectuated; performed; fully disclosed; vested; giving present right of employment.

EXECUTED CONSIDERATION. See CONSIDERATION.

EXECUTED CONTRACT. One which has been fully performed. The statute of frauds does not apply to such contracts; Anderson School Tp. v. Milroy Lodge F. & A. M., 130 Ind. 108, 29 N. E. 411, 30 Am. St. Rep. 206; Harris v. Harper, 48 Kan. 418, 29 Pac. 697; Brown v. Bailey, 159 Pa. 121, 28 Atl. 245; Lagerfelt v. McKie, 100 Ala. 430, 14 South. 281; Doherty v. Doe, 18 Colo. 456, 33 Pac. 165; Showalter v. McDonnell, 83 Tex. 158, 18 S. W. 491. See CONTRACTS.

EXECUTED ESTATE. An estate whereby a present interest passes to and resides in the tenant, not dependent upon any subsequent circumstance or contingency. They

are more commonly called estates in *possession*. 2 Bla. Com. 162.

An estate where there is vested in the grantee a present and immediate right of present or future enjoyment. An estate which confers a present right of present enjoyment.

When the right of enjoyment in possession is to arise at a future period, only the estate is executed; that is, it is merely vested in point of interest: where the right of immediate enjoyment is annexed to the estate, then only is the estate vested in possession. 1 Prest. Est. 62; Fearne, Cont. Rem. 392.

Executed is synonymous with vested. 1 Washb. R. P. 11.

EXECUTED REMAINDER. One giving a present interest, though the enjoyment may be future. Fearne, Cont. Rem. 31; 2 Bla. Com. 163. See REMAINDER.

EXECUTED TRUST. A trust of which the scheme has in the outset been completely declared. Ad. Eq. 151. One in which the devise or trust is *directly and wholly declared* by the testator or settler, *so as to attach* on the lands immediately under the deed or will itself. 1 Greenl. Cruise, Dig. 385; 1 Jac. & W. 570. "A trust in which the estates and interest in the subject-matter of the trust are completely limited and defined by the instrument creating the trust, and require no further instruments to complete them." Bisph. Eq. 31. See TRUST; EXECUTORY TRUST.

Also used when, by the statute of uses, the property passes directly to the beneficiary, being *executed* by the statute. See EXECUTED USE.

EXECUTED USE. A use with which the possession and legal title have been united by the statute of uses. 1 Steph. Com. 339; 2 Sharsw. Bla. Com. 335, note; 7 Term 342; 12 Ves. Ch. 89; 4 Mod. 380.

EXECUTED WRIT. A writ the command in which has been obeyed by the person to whom it was directed.

EXECUTION. The accomplishment of a thing; the completion of an act or instrument; the fulfilment of an undertaking. Thus, a contract is executed when the act to be done is performed, a deed is executed when it is signed, sealed, and delivered. See Gaskill v. King, 34 N. C. 221. Where the party is present and directs another to sign for him, no written authority is necessary; Mut. Ben. Life Ins. Co. v. Brown, 30 N. J. Eq. 193; McMurtry v. Brown, 6 Neb. 368; Jansen v. McCahill, 22 Cal. 563, 83 Am. Dec. 84; Fitzpatrick v. Engard, 175 Pa. 393, 34 Atl. 803; Reed, St. of Fr. § 1063.

In Criminal Law. Putting a convict to death, agreeably to law, in pursuance of his sentence. This is to be performed by the sheriff or his deputy; (see 4 Bla. Com. 403;) or under the laws of the United States, by the marshal. Under the Pennsylvania practice, the governor issues a mandate to execute the sentence of death. The origin of the custom and the forms of mandate and return thereto are found in Com. v. Hill, 185 Pa. 385, 39 Atl. 1055, per Mitchell, J. He points out that the superior courts at Westminster issued warrants of death, and the Court of King's Bench, being held before the king himself, had further power to issue execution of judgments on attainder in parliament or in other courts. The practice of mandates prevails in other states. See Com. v. Costley, 118 Mass. 35; Lowenberg v. People, 27 N. Y. 336; In re Dyer, 56 Kan. 489, 43 Pac. 783; Holden v. Minnesota, 137 U. S. 483, 11 Sup. Ct. 143, 34 L. Ed. 734; State v. Oscar, 13 La. Ann. 297.

Where a day of execution is fixed by the court and is an integral part of the sentence, and the day has passed, the court should fix a new day; Com. v. Hill, 185 Pa. 397, 39 Atl. 1055; Ex parte Howard, 17 N. H. 545; Nicholas v. Com., 91 Va. 813, 22 S. E. 507; State v. Cardwell, 95 N. C. 643; In re Cross, 146 U. S. 271, 13 Sup. Ct. 109, 36 L. Ed. 969 (apparently on a statutory direction). See CRIMES; ELECTROCUTION; GARROTE; GUILLOTINE; HANGING.

In Practice. Putting the sentence of the law in force. 3 Bla. Com. 412. The act of carrying into effect the final judgment or decree of a court.

The writ which directs and authorizes the officer to carry into effect such judgment.

Final execution is one which authorizes the money due on a judgment to be made out of the property of the defendant.

Execution *quousque* is such as tends to an end, but is not absolutely final: as, for example, a *capias ad satisfaciendum*, by virtue of which the body of the defendant is taken, to the intent that the plaintiff shall be satisfied of his debt, etc., the imprisonment not being absolute, but until he shall satisfy the same. 6 Co. 87.

Execution, in civil actions, is the mode of obtaining the debt or damages or other thing recovered by the judgment; and it is either for the *plaintiff* or *defendant*. For the *plaintiff* upon a judgment in *debt*, the execution is for the debt and damages; or in *assumpsit*, *covenant*, *case*, *replevin*, or *trespass*, for the damages and costs; or in *detinue*, for the goods, or their value, with damages and costs. For the *defendant* upon a judgment in *replevin*, the execution at common law is for a return of the goods, to which damages are superadded by the statutes 7 Hen. VIII. c. 4, § 3, and 21 Hen. VIII. c. 19, § 3; and in other actions upon a judgment of *non pros.*, *non suit*, or verdict, the execution is for the costs only; Tidd, Pr. 993.

After final judgment signed, and even before it is entered of record, the plaintiff may, in general, at any time within a year and a day, and whilst the parties to the judgment continue the same, take out exe-

cution; provided there be no writ of error depending or agreement to the contrary, or, where this is allowed, security entered for stay of execution. But after a year and a day from the time of signing judgment the plaintiff cannot regularly take out execution without reviving the judgment by *scire facias*, unless a *fieri facias*, or *capias ad satisfaciendum*, etc., was previously sued out, returned, and filed, or he was hindered from suing it out by a writ of error; and if a writ of error be brought, it is, generally speaking, a *supersedeas* of execution from the time of its allowance; provided bail, when necessary, be put in and perfected, in due time See Tidd, Pr. 994; Elliott v. Mayfield, 3 Ala. 223.

Writs of execution are judicial writs issuing out of the court where the record is upon which they are grounded. Hence, when the record has been removed to a higher court by writ of error or *certiorari*, or on appeal, either the execution must issue out of that court, or else the record must be returned to the inferior court by a *remittitur* (*q. v.*) for the purpose of taking out execution in the court below. The former is the practice in England; the latter, in some of the United States.

The object of execution in personal actions is effected in one or more of the three following ways. 1. By the seizure and sale of personal property of the defendant. 2. By the seizure of his real property, and either selling it or detaining it until the issues and profits are sufficient to satisfy the judgment. 3. By seizing his person and holding him in custody until he pays the judgment or is judicially declared insolvent.

These proceedings, though taken at the instance and under the direction of the party for whom judgment is given, are considered the act of the law itself, and are in all cases performed by the authorized minister of the law. The party or his attorney obtains, from the office of the court where the record is, a writ, based upon and reciting the judgment, and directed to the sheriff (or, where he is interested or otherwise disqualified, to the coroner) of the county, commanding him, in the name of the sovereign or of the state, that of the goods and chattels or of the lands and tenements of the defendant in his bailiwick he cause to be *made* or *levied* the sum recovered, or that he seize the person of the defendant, as the case may be, and have the same before the court at the return day of the writ. This writ is delivered by the party to the officer to whom it is directed, who thenceforth becomes responsible for his performance of its mandate, and in case of omission, mistake, or misconduct is liable in damages to the person injured, whether he be the plaintiff, the defendant, or a stranger to the writ.

When property is sold under execution, the proceeds are applied to the satisfaction of the judgment and the costs and charges of the proceedings; and the surplus, if there be any, is paid to the defendant in execution.

Execution against personal property. When the property consists of goods and chattels, in which are included terms for years, the writ used is the *fieri facias* (*q. v.*). If, after levying on the goods, etc., under a *fieri facias*, they remain unsold for want of buyers, etc., a supplemental writ may issue, which is called the *venditioni exponas*. At common law, goods and chattels might also be taken in execution under a *levari facias;* though now perhaps the most frequent use of this writ is in executions against real property.

Where it is sought to reach an equitable interest a bill in equity is sometimes filed in aid of an execution; Lant v. Manley, 75 Fed. 627, 21 C. C. A. 457.

When the property consisted of *choses in action*, whether debts due the defendant or any other sort of credit or interest belonging to him, it could not be taken in execution at common law; but now, under statutory provisions in many of the states, such property may be reached by a process in the nature of an attachment, called an *attachment execution* or *execution attachment*. See ATTACHMENT; CREDITORS' BILL.

Execution against real estate. Where lands are absolutely liable for the payment of debts, and can be sold in execution, the process is by *fieri facias* and *venditioni exponas*. In Pennsylvania the land cannot be sold in execution unless the sheriff's jury, under the *fieri facias*, find that the profits will not pay the debt in seven years. But, practically, lands are almost never extended. And, in general, under common-law practice, lands are not subject to sale under execution, until after a levy has been made under the *fieri facias*, and they are appraised under an inquisition. They are then liable to be sold under a *venditioni exponas*.

There are in England writs of execution against land which are not in general use here. The extent (*q. v.*), or *extendi facias*, is the usual process for the king's debt. The *levari facias* (*q. v.*) is also used for the king's debt, and for the subject on a *recognizance* or *statute staple* or *merchant* (*q. v.*), and on a judgment in *scire facias*, in which latter case it is also generally employed in this country.

Execution against the person. This is effected by the writ of *capias ad satisfaciendum*, under which the sheriff arrests the defendant and imprisons him till he satisfies the judgment or is discharged by process of law; Freem. Ex. 451. See INSOLVENCY. This execution is not final, the imprisonment not being absolute; whence it has been called an execution *quousque;* 6 Co. 87.

Besides the ordinary judgment for the

payment of a sum certain, there are specific judgments, to do some particular thing. To this the execution must correspond: on a judgment for plaintiff in a real action, the writ is a *habere facias seisinam;* in ejectment it is a *habere facias possessionem;* for the defendant in replevin, as has already been mentioned, the writ is *de retorno habendo.*

Still another sort of judgment is that *in rem*, confined to a particular thing: such are judgments upon mechanics' liens and municipal claims, and, in the peculiar practice of Pennsylvania, on *scire facias* upon a mortgage. In such cases the execution is a writ of *levari facias.* A confession of judgment upon warrant of attorney, with a restriction of the lien to a particular tract, is an analogous instance; but in such case there is no peculiar form of execution; though if the plaintiff should, in violation of his agreement, attempt to levy on other land than that to which his judgment is confined, the court on motion would set aside the execution

An execution issued in direct violation of an express agreement not to do so, except in a certain contingency which has not happened, will be set aside; Feagley v. Norbeck, 127 Pa. 238, 17 Atl. 900.

The lien of an execution from the judgment or decree of a court of record relates to its teste, and attaches to all personalty owned by the debtor between the teste and the levy so as to defeat the title of all intermediate purchasers; Edwards v. Thompson, 85 Tenn. 720, 4 S. W. 913, 4 Am. St. Rep. 807; not only in the county in which judgment was rendered, but everywhere in the state; Cecil v. Carson, 86 Tenn. 139, 5 S. W. 532. A sale under execution transmits only the debtor's estate, in the same plight and subject to all the equities under which he held it; Threadgill v. Redwine, 97 N. C. 241, 2 S. E. 526.

In Connecticut, Massachusetts, and Maine by common law and immemorial usage, under a judgment against a town, the property of any inhabitant may be taken in execution; Bloomfield v. Bank, 121 U. S. 121, 7 Sup. Ct. 865, 30 L. Ed. 923.

See EXEMPTION; FIERI FACIAS; HOMESTEAD; SHERIFF.

EXECUTION PAREE. In French Law. A right founded on an act passed before a notary, by which the creditor may immediately, without citation or summons, seize and cause to be sold the property of his debtor, out of the proceeds of which to receive his payment. It imports a confession of judgment, and is not unlike a warrant of attorney. La. Code of Proc. art. 732; 6 Toullier, n. 208; 7 *id.* 99.

EXECUTIONER. The name given to him who puts criminals to death, according to their sentence; a hangman.

In the United States there are no executioners by profession. It is the duty of the sheriff or marshal to perform this office, or to procure a deputy to do it for him.

EXECUTIVE. That power in the government which causes the laws to be executed and obeyed.

It is usually confided to the hands of the chief magistrate; the president of the United States is invested with this authority under the national government; and the governor of each state has the executive power of the state in his hands.

The officer in whom the executive power is vested.

EXECUTIVE COMMITTEE. See DIRECTORS.

EXECUTIVE POWER. Authority exercised by that department of government which is charged with the administration or execution of the laws as distinguished from the legislative and judicial functions.

"'Executive power,' which the constitution declares shall be 'vested' in the president, includes power to carry into execution the national laws—and including such other powers, not legislative or judicial in their nature, as might from time to time be delegated to the president by congress—as the prosecution of war when declared—and to take care that the law be faithfully executed." 1 Curtis, Const. Hist. 578.

The separation of the three primary governmental powers as found in the constitution of the United States and of the separate states is the culmination of a revolution which had long been in progress in Europe As is pointed out by a recent writer all governmental power was formerly united in the monarch of the middle ages. As the result of experience there was a separation of the state from the government, the former being termed the constitution-making power and the latter the instrumentalities by which administration was from time to time set in motion and carried on. Further advances in experience indicated the necessity of the distribution of powers by which there should be a deliberative body for the formulation of the rules and regulations under which the state should exist and its affairs be administered; another which should be the medium by which these rules and regulations forming the body of municipal law should be carried into effect, and a third to which should be committed the functions known in the science of government as judicial. The latter, under the government of the United States, has reached its highest development and exercises an authority in some instances over the other two departments of the government elsewhere unknown, even going so far as to define the limits of their authority and to declare void legislative acts. See CONSTITUTIONAL. This theory of the distribution of the powers of government among three distinct authorities, independent of each other, was first formulated by Montesquieu, *Esprit des Lois*, b. xi. c. vi. The absolute independence of the three branches of government which was advocated by Montesquieu has not been found entirely practicable in practice, and, although the threefold division of powers is the basis of the American constitution, there are many cases in which the duties of one department are to a certain extent devolved upon and shared by another. This is illustrated in the United States and in many of the states by the veto power which vests in the executive a part of the legislative authority, and on the other hand by the requirement of the confirmation by one branch of the legislature of executive appointments. The practical

difficulty in the way of an exact division of powers is thus well expressed: "Although the executive, legislative, and supreme judicial powers of the government ought to be forever separate and distinct, it is also true that the science of government is a practical one; therefore, while each should firmly maintain the essential powers belonging to it, it cannot be forgotten that the three co-ordinate parts constitute one brotherhood whose common trust requires a mutual toleration of the occupancy of what seems to be a 'common because of 'vicinage' bordering on the domains of each;" Brown v. Turner, 70 N. C. 93, 102 In England, there is in parliament a practical union of all the governmental powers, that body having absolute power of selecting the agents through whom, in fact, is exercised the executive power theoretically vested in the crown, and the final judicial authority on appeal remaining in the House of Lords. There is, notwithstanding, a complete recognition of the threefold nature of governmental power which is not lost nor destroyed by the unity of the final depositary of it all.

While the science of government in modern times may be said to accept the general theory of the separation of powers, subject to limitations and exceptions suggested, the application of the theory has not been uniform. Great difficulty has been found in practice in determining the depositary of executive power and whether it should be vested in one man or a board of control, the latter being supposed to insure deliberation and possibly to prevent tyranny, and the other being more conducive to efficient administration See 2 Sto Const. §§ 1419-23, Montesq *Espr. de L.* b xi. ch. vi.; De Lolme, Const Eng b 2, ch 2; Federalist No. 70, 1 Kent 271. The necessity for the latter has led to the almost universal adoption of the plan of having a single executive head, and the principal remaining difficulty has been the extent and character of the power to be entrusted to it. This is in part the result of the effort to apply too rigidly the theory of the absolute separation of powers already shown to be impracticable Another difficulty has been said to arise from the failure to recognize that executive power really comprises two functions, the political or governmental and the administrative The former concerns the relations of the chief executive authority with the great powers of government, the latter relates to the practical management of the public service It has been said that the executive authority, as understood in the American states, is mainly a political chief, that in France and to a less extent in England its position as an administrator is more important, while in the federal government in this country it is both, as it is also in Germany; 1 Goodnow, Comp. Adm. L 51

The proper treatment of this subject involves the consideration of the systems of executive administration developed in the principal countries of the world which have adopted the principle of the distribution of powers Only the briefest summary, however, is here practicable

The general theory of the distribution of powers in Great Britain is very much like that in the princely governments of Germany. The residuum of governmental powers is in the crown, and the crown may exercise all authority not expressly otherwise delegated, but it rests with parliament to decide ultimately what powers shall be exercised by the crown and how it shall exercise them; herein it differs from the German system. From the comprehensive Norman idea of royalty which combined all the sovereign powers of the Saxon and Dane with those of the feudal theory of monarchy exemplified at the time in France, there developed at first hereditary and despotic power which was gradually limited by the necessity of the concurrent action of parliament for the imposition of taxes and the enactment of laws affecting the ordinary relations of individuals. Later it was considered that a law once enacted could not be changed without the consent of parliament, and finally the latter body assumed the right to initiate as well as approve laws, and the crown lost its original power of veto which has certainly become obsolete, though it has been said to be merely dormant and susceptible of being revived; 2 Todd, Parl. Govt. in Eng. 390. See 1 Stubbs, Const. Hist. of Eng 338. The result of this development is that parliament has assumed most of the legislative power, though many matters not regulated by it are controlled by the crown which exercises a large ordinance power both independent and supplementary The crown has lost both the taxing power and the judicial power, but retains in large part its old executive powers, and its action is controlled very largely by a body whose power has gradually developed, viz, the privy council The crown may do anything which it is not forbidden to do and possesses the administrative as well as the political power. It may create offices as well as fill them, and both remove and direct the incumbents. The crown is, therefore, the chief both of the administrative and political departments of the executive power, its position being modified by the principle that its advisers, without whom it cannot act, must possess the confidence of the majority in the house of commons. The principle of parliamentary responsibility puts the crown in the position of reigning but not governing; but so long as it possesses the confidence of the house of commons it has very extensive executive powers, and in council may declare war and make treaties, which in other countries can be done only with the consent of the legislature The crown is in theory irresponsible, but when its ministers are in a minority in the house of common it chooses new ministers who will have the confidence of parliament, or dissolves parliament in the hope that the new body will have confidence in the existing ministers, but the theory is that in all cases the crown and not parliament administers See Pom. Const. Law § 176; 1 Goodn. Comp Adm. L. ch. vi.

In France the executive power is vested in a president elected by the legislature. His position is said by a recent writer, probably on account of the monarchical traditions in France, to be more important from the administrative point of view and less from a political point of view than that of the President of the United States, he having no veto power He has quite an unlimited power of appointment and also a very extensive power of removal, not only of officers appointed by himself, but of local administrative officers, as mayors of communes, Law, Apr. 5, 1884, and he may dissolve local and municipal legislative bodies in the departments and communes, LL. Aug 10, 1871, and Apr. 5, 1884 In addition to his power of executing laws, he has in many cases authority to supplement the law without any delegation of legislative power by what are known as decrees. This supplemental power is accorded to him under a constitutional provision that he shall watch over and secure the execution of the laws, and the difference between the interpretation put upon this and the similar provision in the United States constitution is accredited to the monarchical traditions of the country, and the resulting idea that the residuary governmental power is vested in the executive and not, as in this country, in congress. The president is also held to a greater responsibility for his action than in the American system. 1 Goodnow, Comp. Adm. L. ch iv.

In Germany the conception of executive power is much broader than in the United States, and it is more important from the administrative point of view. There are important constitutional limitations on the action of the Prince, or executive head of the subdivisions of the empire, but in the absence of such limitations he is recognized as having the governmental power, being as in France the possessor of the residuum of the governmental power. The limitations upon his action by the constitution are found in the requirement of legislative consent for the validity of legislative acts affecting freedom of person and property and the financial affairs of the government, judicial power administered by courts independent of the control of the executive, and the necessity that each of his official acts must be countersigned by a minister who is responsible for it either to the legislature

or to the criminal courts. The administrative powers are very extensive, including that of appointment and removal, and a very wide power of direction, together with the authority to make decrees or ordinances as to all matters not regulated in detail by legislation.

In the imperial government, the Emperor occupies, from the administrative point of view, about the same position as the President of the United States. He has a general power of appointment and of administrative direction, which latter is, however, exercised under the responsibility of the chancellor, who must countersign all acts by which it is exercised; but just what the responsibility of the latter officer is seems to be undefined other than that he may be called upon to defend his policy before the federal council. The Emperor does not have any ordinance power except such as is expressly mentioned in the constitution or delegated by the legislature, and in the exercise of it he often requires the consent of the federal council. He is entirely irresponsible. *id.* ch. v. A leading German commentator regards the governmental form of the empire as a republic; 1 Zorn, *Das Reichsstaatsrecht*, 162.

In the United States, the federal executive power is vested in the president. In all the states the chief executive is the governor. With respect to the power of the latter the differences in the state constitutions make it necessary, for brief statements of the executive officers and their duties, to refer for more detailed information to the constitutions of the states, while comparative views of the provisions on particular points may be found in Stimson, Am. Stat. Law. Many features are common to most of the states and, making due allowance for differences of detail, the character of the officer is substantially the same. In general, it may be noted that he is commander of the state militia, subject to the paramount federal constitutional control when it is in the actual service of the United States: he has in most cases a pardoning power (except in some states for treason), as to which, however, there is a growing tendency to limit it by requiring the recommendation of a board of pardons, either such in name or effect, usually composed of several executive officers, *virtute officii;* he has usually a veto power which compels the reconsideration of legislation by a two-thirds vote in most cases, but in some, three-fifths, and in others a mere majority; in most of the states he has power to summon the legislature in extra session, and to adjourn its sessions when the two houses disagree as to the time. As a rule, the governor's power of appointment is confined to minor state officials, and he has no power of removal except for cause and after a hearing. He is usually charged with the duty of sending messages to the legislature containing his views and recommendations upon public questions. The constitutional powers vested in the governor alone are addressed to and regulated by his own uncontrolled discretion; for example, where an officer assuming to act as governor, in his absence, had issued a proclamation convening the legislature in extraordinary session, the governor having returned previous to the time named for the meeting, and issued a second proclamation, revoking the first, it was held that, the power of convening the legislature being discretionary, the call might be recalled before the meeting took place; People v. Parker, 3 Neb. 409, 19 Am. Rep. 634.

Under the United States constitution the governor of a state may call upon the president, when necessary, for aid in the enforcement of the laws.

His limited power of removal makes his power of direction and administration very slight. He is in effect a political rather than an administrative officer, his powers of the former class having increased while those of the latter class have been gradually curtailed. In this respect his relative position is quite the reverse of that of the president. For a discriminating review of this subject, see 1 Goodn. Comp. Adm. L. ch. iii.

The right of the executive officers named in the constitution to exercise all the powers properly belonging to the executive department is given indisputably by the constitution; State v. Savage, 64 Neb. 684, 90 N. W. 898, 91 N. W. 557. They may, unless limited by constitution or statute, determine as to the time and place where the exercise of their jurisdiction is necessary, and the people and local officers of that locality have no constitutional or statutory right to be heard on that question; Gilmore v. Penobscot, 107 Me. 345, 78 Atl. 454.

The executive power possessed by the president must be considered historically in order to reach an adequate view, both of its present scope and limitations and its growth since the adoption of the constitution. It is to be observed primarily that in the United States there is the fundamental condition that the executive power, whether of president or governor, is expressly granted, and the residuum of sovereignty is in the legislature, either federal or state as the case may be, and not in the executive, as in France and Germany, actually so, or, as in England, theoretically so. This remark is equally true as to its general results, notwithstanding decisions, that the *express* grant of executive power carries with it certain *implied* powers. These were still powers of executing the laws, and not, as in the countries named, of supplementing or adding to them.

Though it is often said that the framers of the United States constitution, in creating the office of president, had in view, as a model, the English king, Pom. Const. Law § 176, a more recent and probably correct view is that the office was rather modelled upon the colonial governor, 1 Goodnow, Comp. Adm. L. 52, and 1 Bryce, Am. Com. 36. An examination of the powers of the executive in each of the three colonies of New York, Massachusetts, and Virginia leads Professor Goodnow to the conclusion that the American constitutional executive power was that which has been called the political or governmental power, and which had usually been exercised by the colonial governor, to which was added the carrying on of foreign relations, which,

in the colonial period, were under the control of the mother country, and afterwards of the continental congress. The fact that the constitution, in vesting in the president the executive power, used the term as one whose meaning would be readily understood, undoubtedly leads to the conclusion that the general powers so characterized were such as people of the states were accustomed to have exercised by the governors, first of the colonies and then of the states. But see Stevens, Sources Const. U. S. ch. vi.

The specific powers conferred by the constitution in addition to the general provision vesting the executive power in him, are that he shall be commander-in-chief of the army and navy and the militia of the states when in service; that he may require the opinions of the officers of the executive departments; grant reprieves and pardons, except in cases of impeachment; make treaties with the advice and consent of the senate, two-thirds thereof concurring, and, the senate consenting, appoint ambassadors, judges, and other officers whose appointment is not otherwise provided for by law; give information to congress; convene both houses, or either, and adjourn them, when they disagree with respect to the time of adjournment, to such time as he shall think proper; receive ambassadors and other public ministers; take care that the laws be faithfully executed; and commission all officers; Const. art. ii. §§ 1, 2, 3.

This grant is said to have conferred upon the president the political power of an executive and one administrative power, viz., the power of appointment, beyond which he had no control over the administration; 1 Goodnow, Comp. Adm. L. 63; Pom. Const. L. § 633.

The original powers of the president, under the constitution, have been increased by acts of congress conferring specific powers upon him and by decisions that his power is not limited by the express terms of legislative acts but includes certain "rights, duties, and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the constitution"; In re Neagle, 135 U. S. 1, 64, 10 Sup. Ct. 658, 34 L. Ed. 55. Under this implied power it was held that the president could take measures to protect a United States judge or a mail-carrier in the discharge of his duty without an act of congress authorizing him to do so; In re Neagle, 135 U. S. 67, 10 Sup. Ct. 658, 34 L. Ed. 55; or, in the same manner, to place guards upon the public lands to protect the property of the government. As an illustration of the exercise of this power the supreme court cites the executive action which resulted in the release of Koszta from a foreign prison where he was confined in derogation of his rights as a person who had declared his intention to become an American citizen; In re Neagle, 135 U. S. 64, 10 Sup. Ct. 658, 34 L. Ed. 55. He may remove obstructions to interstate commerce and the transportation of the mails; and enforce the full and free exercise of all national powers and the security of all rights under the constitution; In re Debs, 158 U. S. 568, 15 Sup. Ct. 900, 39 L. Ed. 1092.

Another increase of the administrative power of the president was due to his power of removal, which was not expressed in the constitution, but it was held by a majority vote in the first congress to be a part of the executive power; 1 Lloyd's Debates 351, 366, 450, 480–600; 2 *id.* 1–12; 5 Marsh. Life of Washington, ch. 3, 196; and this construction of the constitution was judicially approved; U. S. v. Avery, Deady 204, Fed. Cas. No. 14,481; and was undoubtedly the recognized practice of the government until the passage of the Tenure of Office Acts of 1867–9; U. S. R. S. §§ 1767 to 1769; which were repealed in 1887. See 2 Sto. Const. §§ 1537–43; Paper of W. A. Dunning on the Impeachment and Trial of President Johnson; 4 Papers Am. Hist. Assoc. 491; 1 Kent 310; Pom. Const. L. §§ 647–657. To the power of removal thus recognized has been attributed the evolution of "the president's power of direction and supervision over the entire national administration" and "the recognition of the possession by the president of the administrative power"; 1 Goodnow, Comp. Adm. L. 66. Whatever theories may be formed of the conception of the office in the minds of the framers of the constitution, and however the result may have been brought about, it cannot be doubted that the executive head of the federal government is now in fact the depositary of the complete executive power, as it is understood to comprehend both political and administrative power. He is authorized to appoint certain officers in the executive departments, the discharge of whose duties is under his direction; Marbury v. Madison, 1 Cra. (U. S.) 165, 2 L. Ed. 60; Kendall v. U. S., 12 Pet. (U. S.) 524, 9 L. Ed. 1181; U. S. v. Kendall, 5 Cra. C. C. 163, Fed. Cas. No. 15,517. This is considered by the writer last cited to be a great enlargement of the American conception; and this view seems to be well supported by the considerations already suggested. It is true that at the time of the adoption of the constitution the powers conferred upon the president were considered by many to be so great as to endanger the stability of the Union, and it is considered by one of the ablest authorities on constitutional law that no one of the three great departments "has been more shorn of its just powers, or crippled in the exercise of them, than the presidency;" Miller, Const. U. S. 20, 95. But the context shows that this has reference solely to the encroachments on the appointing power by the extra-legal participation of members of congress therein—an evil much mitigated by the extension of the civil serv-

ice system to the greater number of offices which were formerly not subject to its operation.

The administrative power of the president includes not only the control of the personnel of the public service but also the vast number of powers brought into action in the course of the administration of the government growing out of powers vested in the president by his duty under the constitution to see that the laws are faithfully executed. These duties, aside from this specific enumeration in the constitution as already stated, are those imposed upon the president by act of congress, and may be either of a special or general character, as the promulgation of regulations for the control of particular branches of the public service, such as consular regulations and the civil service rules; but in most cases such executive regulations proceed from the heads of departments and not from the president directly, although they are in law presumed to proceed from him; Wilcox v. Jackson, 13 Pet. (U. S.) 498, 513, 10 L. Ed. 264; U. S. v. Eliason, 16 Pet. (U. S.) 291, 10 L. Ed. 968; The Confiscation Cases, 20 Wall. (U. S.) 92, 109, 22 L. Ed. 320; U. S. v. Farden, 99 U. S. 10, 19, 25 L. Ed. 267; Wolsey v Chapman, 101 U. S. 755, 25 L. Ed. 915. Executive acts, as to the manner of doing which there is no provision of law, may be done through the head of the proper department whose acts are the acts of the president in contemplation of law; Jones v. U. S., 137 U. S. 202, 217, 11 Sup. Ct. 80, 34 L. Ed. 691. The president may act in special cases by directions to his subordinate officers, either directly or through the head of a department, or by his decision on appeal from either of them, though, as a rule, he is not considered to be authorized to entertain such appeals except as to the jurisdiction of the officer appealed from; 15 Op. Atty. Gen. 94, 100, reviewing opinions on this question. In other cases the appeal does not go beyond the head of the department; 4 *id.* 515; 9 *id.* 462; 10 *id.* 526.

Nearly if not all the state constitutions contain provisions similar to that of the United States making it the duty of the chief executive to see that the laws are faithfully executed This provision has been drawn into construction by the supreme court of Mississippi. The governor believed that a contract made by a state board of which the attorney-general was a member was contrary to the constitution, and, having ineffectually endeavored to induce the attorney-general to act in the matter, brought suit himself in the name of the state and the court dismissed the bill, the majority opinion being that no warrant could be found in the constitution or laws of the state for the action of the governor; Henry v. State, 87 Miss. 1, 39 South. 856. See note on this case; 1 The Law 806. In that state the right of the governor to sue in a foreign state is given by statute; Rev. Code (1892) § 2167.

A governor, being under the constitutional injunction to see that the laws are executed, appears to have no right to execute them himself; Shields v. Bennett, 8 W. Va. 74; In re Fire & Excise Com'rs, 19 Colo. 482, 36 Pac. 234; Cahill v. Board, 127 Mich. 487, 86 N. W. 950, 55 L. R. A. 493. As to his right to employ counsel for the state, see 55 L. R. A. 493, n. There are state statutes authorizing the governor to employ other counsel in certain cases, where the attorney-general is under a disability; State v. Dubuclet, 25 La. Ann. 161; Orton v. State, 12 Wis. 509. A governor has also been permitted to bring action on bonds payable to him for the use of the state; Governor v. Allen, 8 Humph. (Tenn.) 176. See note on this subject; 19 Harv. L. Rev. 524.

In most if not all of the states, the governor has a veto power, and in such case an act of the legislature is not valid unless presented to him for approval, the opportunity for his action being essential to the validity of the law; Wartman v. City of Philadelphia, 33 Pa. 202; Burritt v. Com'rs of State Contracts, 120 Ill. 322, 11 N. E. 180; State v. Newark, 25 N. J. L. 399. In some cases not only a bill but an order or resolution must be presented to the executive, but in most cases adjournment is excepted; Trammell v. Bradley, 37 Ark. 374.

Some question has arisen as to whether the veto power of the governor extends to proposals for the amendment of the constitution. In Delaware, the governor's power over such proposals is recognized in the constitution, and in some other states they are exempted, but as a general rule there is no mention of the governor in connection with such proposals. It has been held that the veto power of the executive does not apply to them in Com. v. Griest, 196 Pa. 396, 46 Atl. 505, 50 L. R. A. 568; Nesbit v. People, 19 Colo. 441, 36 Pac. 221; Warfield v. Vandiver, 101 Md. 78, 60 Atl. 538, 4 Ann. Cas. 692; but it has also been held that, while proposing constitutional amendments is not legislation in the ordinary sense, it is such so far as that it must be included in the governor's proposals for legislation in a special session in order to be valid; People v. Curry, 130 Cal. 82, 62 Pac. 516.

The practice of the federal government is that proposals by congress of amendments to the constitution are not submitted to the president for his approval. Of the seventeen amendments thus far adopted, none have been approved by the president except the XIIIth. The resolution proposing that particular amendment is published with the note at the foot, "Approved February 1st, 1865"; 13 Stat. 567; but this does not appear in the resolution as published by the secretary of state in his announcement of its ratification. Prior to the XIIIth, no res-

olution proposing amendments, as published, has any note at the foot. Subsequent to the XIIIth they appear with "Received at Department of State" or "Deposited in Department of State," noted at the foot of the resolution as published in the Statutes at Large. The only exception to the general practice of having no approval by the president is the XIIIth which seems to have been inadvertence.

In Hollingsworth v. Virginia, 3 Dall. (U. S.) 380, 1 L. Ed. 644, it was argued by W. Tilghman and Rawle, upon the question whether the XIth amendment did, or did not, supersede all pending suits against states, that the amendment was not proposed in due form because never submitted for approval of the president. When Lee, Atty. Gen., answered that the same course had been pursued relative to all the other amendments, Chase, J., interrupted: "There can, surely, be no necessity to answer that argument. The negative of the president applies only to the ordinary cases of legislation. He has nothing to do with the proposition, or adoption, of amendments to the constitution."

The date is no necessary part of executive approval of a bill either by the president; Gardner v. The Collector, 6 Wall. (U. S.) 499, 18 L. Ed. 890 (where it is said that neither the constitution nor any act of congress requires him to affix a date to his signature); nor in the case of a governor; State v. Hitchcock, 1 Kan. 178, 81 Am. Dec. 503; and the signature in any place on the bill is sufficient; National Land & Loan Co. v. Mead, 60 Vt. 257, 14 Atl. 689.

Where the constitution provides that measures submitted for executive approval "shall be presented" to him, it is held that it is unnecessary that they should be presented to him in person; but it is sufficient that they be left at the executive chamber, or other place determined by usage where communications are made to the governor; Opinion of Justices, 45 N. H. 607; otherwise, as was said *arguendo*, the executive, by simply absenting himself, could defeat any law; Hamilton v. State, 61 Md. 14; on the other hand, it is said that it is not sufficient that the bill is sent to the secretary of state; Opinion of Justices, 99 Mass. 636; or the governor's private secretary, who returned it as not properly signed; Monroe v. Green, 71 Ark. 527, 76 S. W. 199; and see Lyth v. City of Buffalo, 48 Hun (N. Y.) 175, and Harpending v. Haight, 39 Cal. 189, 2 Am. Rep. 432, where it was held that merely exhibiting a measure to the governor was not a proper presentation; which must be such as to notify the executive that it is intended to secure his final action; State v. Newark, 25 N. J. L. 399. The presentation must be of the same bill which was passed; State v. Wendler, 94 Wis. 369, 68 N. W. 759; Padavano v. Fagan, 66 N. J. L. 167, 48 Atl. 998; and if the title has been changed it is material, particularly where the title is required to express the substance of the bill; Simpson v. Stockyards Co., 110 Fed. 799; People v. Onondaga Sup'rs, 16 Mich. 254; the presentation must be within a reasonable time before the expiration of the time limit for approval; State v. Michel, 52 La. Ann. 936, 57 South. 565, 49 L. R. A. 218, 78 Am. St. Rep. 364. In the absence of any express provision for the approval of bills after the adjournment of the legislature, it has been held that the power of the executive is at an end and the legislation void; Fowler v. Peirce, 2 Cal. 165; Hardee v. Gibbs, 50 Miss. 802, overruled in State v. Sup'rs of Coahoma County, 64 Miss. 358, 1 South. 501; but where the constitution provided that a bill should become a law if not returned within ten days, and that within five days after adjournment the governor might sign any act passed within the last five days of the session, his signature within ten days after the passage of the bill, although it was passed more than five days before adjournment, was valid; City of Detroit v. Chapin, 108 Mich. 136, 66 N. W. 587, 37 L. R. A. 391 (where the cases are examined at large in the opinion and a note); but where he is allowed five days and returns it in less time with a notification that he does not sign it, it will become a law, as the five days allowed is a matter of privilege; Hunt v. State, 72 Ark. 241, 79 S. W. 769, 65 L. R. A. 71, 105 Am. St. Rep. 34, 2 Ann. Cas. 33. Of course, this question is settled by a constitutional provision authorizing executive action after the adjournment, and such action has been sustained upon the basis of long-established custom; Solomon v. Com'rs of Cartersville, 41 Ga. 157. On the other hand, custom to the contrary was held to be abrogated by a single departure from it by the president; U. S. v. Weil, 29 Ct. Cl. 523. But when that question arose in a case before the supreme court, that court held that an act was not invalid by reason of its being signed during a recess of Congress, but it declined to decide whether the president could sign after the final adjournment; La Abra Silver Min. Co. v. U. S., 175 U. S. 423, 20 Sup. Ct. 168, 44 L. Ed. 223.

Where there were rival bodies each claiming to be the legislature, it has been held that the recognition of the governor is not effective to determine between them; Ex parte Screws, 49 Ala. 57; In re Gunn, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519; but under the United States constitution, the president, by virtue of the guaranty to the states against domestic violence, upon the application of the legislature, and his authority to suppress insurrection, necessarily has the power to determine who constitute the legislature, as it was held in Luther v. Borden, 7 How. (U. S.) 1, 12 L. Ed. 581.

In the absence of constitutional authority to the contrary, the governor must approve or veto a bill as a whole; Porter v. Hughes, 4 Ariz. 1, 32 Pac. 165, where without such authority the governor vetoed part of an appropriation bill, but his signature affixed to it was held to be an approval of the whole bill; but in State v. Holder, 76 Miss. 158, 23 South. 643, the contrary was held and the action of the executive was treated as a nullity; where, however, he is authorized to veto separate items, he may also veto a part of an item; Com. v. Barnett, 199 Pa. 161, 48 Atl. 976, 55 L. R. A. 882; but he may not veto some items before adjournment and others after it; Pickle v. McCall, 86 Tex. 212, 24 S. W. 265. Where the governor inadvertently approved one bill believing it to be another and recalled his action, it was held valid so long as the bill was before him, but would not have been so if returned to the legislature; People v Hatch, 19 Ill. 283; Allegany County v. Warfield, 100 Md 516, 60 Atl. 599, 108 Am. St. Rep. 446. Where he had deposited the bill in the office of the secretary of state with his approval endorsed on it, it had passed beyond his control, and he had no authority afterwards to veto it; People v. McCullough, 210 Ill 488, 71 N. E. 602. The return of a bill to either house, or notification of its approval, is a matter of courtesy only and not required by law; State v. Whisner, 35 Kan. 271, 10 Pac. 852

Whether a measure may be recalled by the legislature after having been sent to the executive is in doubt; Wolfe v. McCaull, 76 Va. 876, where its return is said to be "a mere act of courtesy"; and see People v. Devlin, 33 N. Y. 269, 88 Am. Dec. 377. An opinion of the attorney-general of Wisconsin holds the practice of the surrender of bills by the executive as questionable, and doubts whether, if returned, it may be changed by the legislature; Op. Atty. Gen. Wis. Sen. Jour. (1897) 690. See also Smith v. Jennings, 67 S. C. 324, 45 S. E. 821; In re Duffy, 4 Brewst. (Pa.) 533; Sank v. City of Philadelphia, 8 Phila. (Pa.) 117. The return of a bill after veto must put it clearly in the possession of the legislature and out of the control of the executive; Harpending v. Haight, 39 Cal. 189, 2 Am. Rep. 432; but the return must be before final adjournment; Opinion of Justices, 45 N. H. 607.

The approval or veto by the governor is held in some cases to be a legislative act; Trustees of School District No. 1 v. County Com'rs, 1 Nev. 335; Thornburg v. Hermann, 1 Nev. 473; Fowler v. Peirce, 2 Cal. 165; State v. Deal, 24 Fla. 293, 4 South. 899, 12 Am. St. Rep. 204; Opinion on Governor's Communication, 23 Fla. 298, 6 South. 925; Hardee v. Gibbs, 50 Miss. 802; State v. Fagan, 22 La. Ann. 545; Arnold v. McKellar, 9 S. C. 335; Weis v. Ashley, 59 Neb. 494, 81 N. W. 318, 80 Am. St. Rep. 704; *contra*, People v. Bowen, 30 Barb. (N. Y.) 24; U. S. v. Weil, 29 Ct. Cl. 523. It is said by way of conclusion, after an examination of the cases, in an article in 41 Am. L. Rev. 396, cited *infra:* "Usually the controversy has been entirely unnecessary to a decision of a case. Though the legislative character of the executive's action would seem to be obvious enough, insisting on this truth has been very 'unfruitful,' since the same results could generally have been obtained without it, and when pushed to the extreme, unreasonable results are likely to follow."

The power of a governor to summon the legislature in extraordinary sessions, expressed in various terms in the state constitutions, is held to leave the occasion wholly to the discretion of the executive; Whiteman's Ex'x v. R. Co., 2 Harr. (Del.) 514, 33 Am. Dec. 411; In re Governor's Proclamation, 19 Colo. 333, 35 Pac. 530; State v. Fair, 35 Wash. 127, 76 Pac. 731, 102 Am. St. Rep. 897; and in one case it was held that the governor had power to revoke his proclamation; People v. Parker, 3 Neb. 409, 19 Am. Rep. 634. Where the constitution authorized the governor to limit the subject-matters of legislation at the special session, they must be presented in writing and a "parol request" or a mere reference to the subject is insufficient; Manor Casino v. State (Tex.) 34 S. W. 769; Jones v. Theall, 3 Nev. 233; but it has been decided by the United States senate that the election of a senator, which has failed at a regular session, may take place at a special session, though not named by the governor as one of the purposes; Taft, El. Cas. 722. The governor's proclamation need not be specific as to the details of particular legislation, as to which the general subject is recommended; In re Governor's Proclamation, 19 Colo. 333, 35 Pac. 530; Chicago, B. & Q. R. Co. v. Wolfe, 61 Neb. 502, 86 N. W. 441; Parsons v. People, 32 Colo. 221, 76 Pac. 666.

In many states the executive has the power to convene the legislature at a place other than its usual place of meeting, in the case of grave emergency, the existence of which must be determined by him, and in one case, that of Alabama, he has power to remove it after it has convened, but the ordinary provision is held to apply only to the place of assembly and not to a subsequent change; Taylor v. Beckham, 108 Ky. 278, 56 S. W. 177, 49 L. R. A. 258, 94 Am. St. Rep. 357.

The usual provision of state constitutions authorizing the governor to adjourn the legislature in case of disagreement between the two houses is held to vest the decision whether such occasion exists in the executive; In re Legislative Adjournment, 18 R. I. 824, 27 Atl. 324, 22 L. R. A. 716, where it was held that the governor might disregard a certificate of disagreement and examine the records of the two houses to ascertain whether one existed. In another case the power of the governor was not determined, as it was deem-

ed sufficient by the court that the legislature had in fact adjourned; People v. Hatch, 33 Ill. 9. See an interesting discussion of "The Executive Control of the Legislature," by James B. Barnett, 41 Am. L. Rev. 215, 384.

Congress may impose on any executive officer any duty which is not repugnant to any right which is secured and protected by the constitution; Marbury v. Madison, 1 Cra. (U. S.) 137, 2 L. Ed. 60; Kendall v. U. S., 12 Pet. (U. S.) 524, 9 L. Ed. 1181. With respect to certain executive functions which spring from the legislation of congress, after the occasion is created by the passage of a law, the authority of the legislature is ended, and the uncontrolled discretion of the executive attaches and is exercised independently of the other departments of the government. In the exercise of such powers the discretion of the subordinate officer, within his sphere, is the discretion of the president. Of this character are the control of the military resources of the government; the pardoning power and the power of appointment, all of which are dormant until legislation has been enacted for creating an army and navy, or defining crimes and punishments and the creation of offices. As to another class of executive powers which depend entirely upon the legislation of congress both for their existence and their scope, the president merely executes the law. Within this class necessarily fall the greater number of executive functions, and they differ from the other classes in that, with respect to them, the president may be deprived of all discretion.

The power to appoint to an office is an executive function, but may be exercised by the legislature or the courts as an incident of the principal power; that is, where necessary to the exercise of full legislative or judicial power; State v. Hyde, 121 Ind. 20, 22 N. E. 644.

A law providing that the governor, lieutenant governor and attorney-general shall constitute a board to appoint members of a railroad commission is not the appointment of those officers to a new office, but merely imposing new duties upon them and is valid; Southern Pac. Co. v. Bartine, 170 Fed. 725; and the same was held to be the effect of a similar designation of certain executive officers to act as a state board of elections to appoint election officers; Richardson v. Young, 122 Tenn. 471, 125 S. W. 664.

Where the executive has the power and duty of appointing the fish and game commissioner, an act appropriating money for the department and providing that no part of the appropriation shall be available, so long as the present commissioner remains in office, is unconstitutional as an encroachment upon the appointing power of the executive; State v. Gordon, 236 Mo. 142, 139 S. W. 403.

A constitutional provision prohibiting the legislative department from exercising executive powers is violated when the legislature attempts to interfere with an action taken by the executive under existing laws; In re Opinion of the Justices, 208 Mass. 610, 94 N. E. 852.

The authority, vested by the constitution in the legislature, to make laws, may be exercised, leaving, in the particular instance, to an executive officer, or some other agency, the duty of determining questions of fact essential to the application thereof which involves administrative discretion; State v. Chittenden, 127 Wis. 468, 107 N. W. 500. See LEGISLATIVE POWER; and as to powers, duties, acts of executive officers, boards or commissions under legislative authority, see DELEGATION.

In some cases the courts may go behind the execution of statutory power by an executive officer as: Where, a statute authorizing the summary killing of diseased animals, with no provision for compensation to the owner, an adjudication of the cattle commissioners is not conclusive and an order issued by them for killing an animal, not in fact infected, is no defense to those executing the order in a subsequent action by the owner for compensation, Miller v. Horton, 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850; so in case of the destruction of property when required to secure the public safety, where there is a statute authorizing it, the destruction of the property is conclusive, so far as the *res* is concerned; Salem v. R. Co., 98 Mass. 431, 96 Am. Dec. 650; but the right is preserved to the owner for a hearing in a subsequent proceeding for compensation; Miller v. Horton, 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St Rep. 850.

In other cases the courts will not go behind the decision of the officer charged with the execution of a statute as, under the Chinese exclusion and immigration laws, the finding of the designated officer, when approved on appeal by the secretary of commerce and labor, will not be reviewed by the courts, but is treated by them as final and conclusive; U. S. v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040.

The executive powers which are derived directly from the constitution would still remain if all the legislative acts of congress were repealed. As to these the president is clothed with unrestrained discretion, and his acts in pursuance of them are purely political. He cannot be controlled nor can his powers be enlarged or diminished by legislation, though through the medium of proper laws he may be aided in the performance of the duties thus imposed upon him. For example, an attempt to limit the pardoning power or control its effect has been held unconstitutional, where the supreme court having declared that the power of the president dispensed with the necessity of proof of loyalty

in cases authorizing claims for the value of property seized as captured or abandoned during the war; congress subsequently enacted that such proof should be required irrespective of any executive pardon or amnesty. This the court held unconstitutional, saying:—"Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the court to be instrumental to that end." U. S. v. Klein, 13 Wall. (U. S.) 128, 148, 20 L. Ed. 519. But when a claim was made against the government for payment for supplies furnished before the war, it was held that the prohibitory legislation of congress prevented a recovery, because the disability of the claimant to receive a debt from the United States did not arise as a consequence of any offence but out of a state of war, and ended with the close of the war, and not by reason of the pardon, which operated only to relieve him from punishment for his acts and gave him no new rights; Hart v. U. S., 118 U. S. 62, 6 Sup. Ct. 961, 30 L. Ed. 96.

The question has been considered from time to time of the extent of the power of the president over newly acquired territory. After the acquisition of territory it has been generally considered in countries governed by the English law that the temporary powers of government are vested in the executive until it is assumed by the legislative branch of the government; Cowp. 204; Leitensdorfer v. Webb, 20 How. (U. S.) 176, 15 L. Ed. 891; Cross v. Harrison, 16 How. (U. S.) 164, 14 L. Ed. 889, where after the Mexican war the exercise by the president of what were really legislative powers, in relation to customs, was sustained by the supreme court. And after the acquisition of the canal zone on the Isthmus of Panama, in the absence of congressional action with respect to its government, the president exercised all the power of government. See 21 Harv. L. Rev. 547, where this subject is discussed and the conclusion reached that the action of the president was warranted.

As to his express powers the president is equally independent of the courts and can be held for maladministration of them only by impeachment; Marbury v. Madison, 1 Cra. (U. S.) 165, 2 L. Ed. 60; Kendall v. U. S., 12 Pet. 524, 9 L. Ed. 1181; U. S. v. Kendall, 5 Cra. C. C. 163, Fed. Cas. No. 15,517.

The command of the army and navy is essentially an executive power; 2 Sto. Const. § 149; 2 Kent 282; though it did not pass without criticism; 2 Elliot, Deb. 365; 3 *id.* 103, 108; the power to call out the militia is discretionary and his judgment of the necessity is final; Martin v. Mott, 12 Wheat. (U. S.) 29, 6 L. Ed. 537; and he may delegate the command of it; Rawle, Const. 193; 2 Sto. Const. (5th ed.) § 1492, n. 2. See Dillingham v. Snow, 5 Mass. 548.

The power to require opinions from the heads of departments has been termed a mere redundancy; Federalist, No. 74; but it is said to be not without its use and frequently acted upon; 2 Sto. Const. § 1493; especially in two notable instances, by President Washington, 1793, relative to the condition of affairs between France and Great Britain, and by President Grant in 1873 in reference to the subject of expatriation; Miller, Const. U. S. 185.

The pardoning power of the president extends to any case in which it might have been exercised under the English law; U. S. v. Wilson, 7 Pet. (U. S.) 150, 8 L. Ed. 640; In re Wells, 18 How. (U. S.) 307, 15 L. Ed. 421; and includes the power to grant a conditional pardon; In re Garland, 4 Wall. (U. S.) 333, 18 L. Ed. 366; to relieve against forfeiture of property under a confiscation act; Armstrong's Foundry, 6 Wall. (U. S.) 766, 18 L. Ed. 882, or release from fines, penalties, and forfeiture which accrue from the offence; Osborn v. U. S., 91 U. S. 474, 23 L. Ed. 388; or contempt of court; State v. Sauvinet, 24 La. Ann. 119, 13 Am. Rep. 115. It includes amnesty; U. S. v. Klein, 13 Wall. (U. S.) 128, 20 L. Ed. 519; and a general amnesty proclamation includes domiciled aliens; Carlisle v. U. S., 16 Wall. (U. S.) 148, 21 L. Ed. 426. The power of the president to issue a proclamation of general amnesty has been much drawn into question, and it was denied in a report of the judiciary committee of the senate made Feb. 17, 1869, that he could do it without the authority or assent of congress. It was the subject of legislation, an express power being granted to the president by section 13 of the act of June 17, 1862, which was repealed by act of Jan. 19, 1867. It was, however, generally considered that the subject was within the power of the executive, and it was exercised by Presidents Washington, Adams, Madison, Lincoln, and Johnson, and independently of congressional action. See an extended discussion of the subject in 8 Am. Law Reg. N. S. 513, 577. The president may act on pardons immediately, or first refer them to the executive departments; 14 Op. Att. Gen. 20.

The president has no power to interfere with a public prosecution, except to put an end to it and discharge the accused. He may not change the proceedings or place of trial; U. S. v. Corrie, Fed. Cas. No. 14,869; 1 Brunner, Col. Cas. 686.

The executive cannot, except as permitted by the constitution, grant a reprieve or fix a day for the execution of a convicted criminal, that being a judicial power; Clifford

v. Heller, 63 N. J. L. 105, 42 Atl. 155, 57 L. R. A. 312. His pardoning power is not affected by a provision in an act giving one-half of the fine imposed to an informer; Meul v. People, 198 Ill. 258, 64 N. E. 1106; nor by a provision authorizing the commutation of sentence for good conduct and defining the credit to be given; Fite v. Snider, 114 Tenn. 646, 88 S. W. 941, 1 L. R. A. (N. S.) 520, 4 Ann. Cas. 1108; or a provision for indeterminate sentences; People v. Cook, 147 Mich. 127, 110 N. W. 514; or release on parole; People v. Madden, 120 App. Div. 338, 105 N. Y. Supp. 554; People v. Nowasky, 254 Ill. 146, 98 N. E. 242; so that in none of these cases was the act considered unconstitutional as an invasion of the pardoning power of the executive. So an act creating a medical council and state boards of medical examiners whereby the appointing power of the governor was limited by restricting the choice to a certain class of applicants was valid; In re Registration of Campbell, 197 Pa. 581, 47 Atl. 860; and, since the power of appointment to office is not exclusively an executive prerogative, so was an act making officers of the board of agriculture elective by general assembly; Cunningham v. Sprinkle, 124 N. C. 638, 33 S. E. 138; but the legislature has no power to authorize a state board of auditors to determine the guilt or innocence of a person convicted of crime, as the result of such action would be to constitute such board a court of appeals without any constitutional warrant therefor; Allen v. Board, 122 Mich. 324, 81 N. W. 113, 47 L. R. A. 117, 80 Am. St. Rep. 573.

The constitutional pardoning power of a governor does not apply to penalties for the violation of municipal ordinances, and consequently a statute authorizing the mayor, with the consent of the aldermen, to remit such penalties, is not invalid as an interference with the pardoning power of the governor; Allen v. McGuire, 100 Miss. 781, 57 South. 217, 38 L. R. A. (N. S.) 196.

The power to make treaties "embraces all sorts of treaties, for peace or war; for commerce or territory; for alliances or succors; for indemnity for injuries or payment of debt; for the recognition and enforcement of principles of public law; and for any other purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other." 2 Sto. Const. sec. 1508. This power is plenary; Holmes v. Jennison, 14 Pet. (U. S.) 540, 614, 10 L. Ed. 579; U. S. v. Forty-Three Gallons of Whiskey, etc., 93 U. S. 188, 23 L. Ed. 846; it includes removing the disabilities of aliens to inherit; 5 Cal. 381; or enabling them to purchase and hold lands in the United States; Chirac v. Chirac, 2 Wheat. (U. S.) 259, 4 L. Ed. 234.

An important question has frequently arisen as to the effect of this power where legislation was required to give effect to a treaty. "In regard to this, any serious difficulty has been averted by the wisdom and forbearance of the house of representatives;" Miller, Const. U. S. 168. See also *id.* 181, and authorities cited; Pom. Const. L. §§ 676–681; 1 Kent 286; TREATIES.

In the La Abra Mining Case, it was held no interference with the constitutional functions of the president, in connection with matters involved in the relations between this country and Mexico, that provision was made by act of congress for a suit in the court of claims to determine whether there had been fraud in obtaining the award, the amount of which had been paid by Mexico to the United States for the claimants; La Abra Silver Min. Co. v. U. S., 175 U. S. 423, 20 Sup. Ct. 168, 44 L. Ed. 223.

The power of appointment includes nomination and appointment, and the power to commission is distinct, but when the commission is signed and sealed, the legal right of the officer is vested and delivery of the commission is not essential; Marbury v. Madison, 1 Cra. (U. S.) 137, 2 L. Ed. 60; U. S. v. Le Baron, 19 How. (U. S.) 74, 15 L. Ed. 575. See CONSTITUTION OF THE UNITED STATES. The nomination is a recommendation in writing; Marbury v. Madison, 1 Cra. (U. S.) 137, 2 L. Ed. 60; 7 Op. Att. Gen. 186; and the senate can only affirm or reject; 3 Op. Att. Gen. 188; congress cannot by law designate the person to fill an office; U. S. v. Ferreira, 13 How. (U. S.) 40, 14 L. Ed. 42.

It was held by Cadwalader, J., in the Case of the District Attorney, 2 Cadw. Cas. 138, 7 Am. L. Reg. (N. S.) 786, Fed. Cas. No. 3,924, that the president cannot make a temporary appointment in a recess, if the senate was in session when or since the vacancy occurred; but Woods, J., held directly *contra* in a case also involving the right to a similar office; In re Farrow, 4 Woods 491, 3 Fed. 112, where he cited the opinions of ten attorney-generals which are treated as authoritative and declared "to outweigh" the opinion of Judge Cadwalader. The latter, however, disputes the statement of an unbroken practice or an acquiescence of the senate and considers the executive opinions to have been based upon erroneous assumptions of both. The two opinions appear to present fully the arguments on each side of the question and no other case has been found except a decision that an original recess appointment cannot be made to fill an office created at the previous session; Schenck v. Peay, 1 Dill. 268, Fed. Cas. No. 12,451, where the opinion of Cadwalader, J., is said to dispense with further argument.

Judge Woods cited the opinions of at least ten attorney-generals, beginning with Wirt and ending with Evarts. Since that time opinions to the same effect have been given by Attorney-General Williams; 14 Opin. 563 (where he said, "So far as this department is concerned, the question is settled"); Stan-

bery, 12 Opin. 32 (where the power of the president to make recess appointments to fill vacancies was said to be "without any limitation as to the time when they first occurred"); Devens, 15 Opin. 207; 16 *id.* 522 (where alone among these opinions is a reference to Judge Cadwalader's decision as the opinion of a single judge of admitted ability, but of a subordinate court and "not of great authority or weight against the opinions cited"); he also, citing Cushing, holds that "may happen" means may *happen to exist;* quoted by Hoyt; 26 Opin. 234; following Devens, as conclusive, is Brewster, 17 Opin. 530; 18 *id.* 29; and Miller, 19 *id.* 261.

Nor can a governor appoint a senator to fill a vacancy which occurred during a previous recess, a session of the senate having intervened. This was determined in the Cases of Johns, Williams and Phelps (1 Cont. El. Cas. 874; 2 *id.* 612 and 613), all of which were cited by Judge Cadwalader as pertinent by reason of the use in both sections of the constitution of the words "may happen" which he interprets as meaning *occur* and not *exist;* and no vacancy can occur in an office until it has once been filled; Ex parte Dodd, 11 Ark. 152; *contra,* State v. Irwin, 5 Nev. 111, where it was held that when a new office is created and no person appointed to fill it, there is a vacancy, and this was the view taken by Attorney-General Miller, who said that a vacancy means that an office exists of which there is no incumbent; 19 Opin. 261.

With respect to state offices it has also been held that a governor cannot make a recess appointment unless the vacancy occurred since the adjournment of the general assembly; People v. Forquer, 1 Breese (Ill.) 104; but where the sittings of the senate are terminated by a long adjournment, it is not "in session," and an appointment by the governor during such adjournment is valid; People v. Fancher, 50 N. Y. 288. Atty. Gen. Knox, however, decided that the president cannot make a recess appointment in a holiday adjournment, and that a recess means the period after the final adjournment of congress; 23 Opin. 599.

Whether a newly created office, not before filled, is a *vacancy,* within the constitutional power of the president to make temporary appointments, is a question upon which courts and attorneys-general have differed. The most reasonable conclusion and that best supported by authority seems to be that it is not; Cooley, Const. Law 104, n. 5; Ordronaux, Const. Leg. 107; and it is said that if the senate is in session when offices are created by law and no appointment is made, no vacancy exists in such sense that the president can appoint during the recess; *id.;* 2 Sto. Const. § 1559; Case of District Attorney of United States, 7 Am. L. Reg. (N. S.) 786, Fed. Cas. No. 3,924; In re Farrow, 3 Fed. 112.

Strictly speaking, an appointment to office is an executive act; Taylor v. Com., 3 J. J. Marsh. (Ky.) 404; 2 Goodn. Comp. Adm. L. 22; but in many cases it has been held that it may be exercised by the legislative power, and this in the absence of negative constitutional limitation is held valid; *id.;* Cooley, Const. Lim. 115, n.; Mayor, etc., of Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572; People v. Mahaney, 13 Mich. 481; People v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; Bridges v. Shallcross, 6 W. Va. 562; *contra,* State v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; City of Evansville v. State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; State v. Kennon, 7 Ohio St. 546; State v. Covington, 29 Ohio St. 102.

See, generally, as to the president's power of appointment and removal, 2 Sto. Const. §§ 1545–1553; Rawle, Const. 166; Sergeant, Const. ch. 29; Miller, Const. U. S. 156; Pom. Const. L. §§ 642–651.

Among the executive powers of first importance vested in the president is the management of foreign affairs, including the treaty power, to be exercised with the consent of the senate, and the power to appoint and receive foreign ministers, both of which are expressed in the constitution.

A question much discussed prior to the war with Spain is whether the recognition of a foreign revolutionary government is a matter entrusted, under the constitution, to the discretion of the president acting alone, or whether it is vested in congress, or requires the joint action of both of the political departments of the government. It has been contended on the one hand that this power "rests exclusively with the executive," and that, "a resolution on the subject by the senate or by the house, by both bodies or by one, whether concurrent or joint, is inoperative as legislation, and is important only as advice of great weight voluntarily tendered to the executive regarding the manner in which he shall exercise his constitutional functions."

Such is the view said to have been expressed by Secretary Olney in a public statement, which, although not an official document, was generally accepted as a fit expression of the opinion of those who take the extreme view of the prerogative of the executive on this subject. The occasion of this utterance was a unanimous report of the Committee on Foreign Affairs of the Senate, recommending the passage of a joint resolution, "That the independence of the Republic of Cuba be, and the same is, hereby acknowledged by the United States of America."

This precise view was maintained by Secretary Seward in an instruction to Minister Dayton, *infra.*

The opposite opinion is based upon the idea that, because the constitution vests in congress the power to declare war (which is liable to be a consequence of the recognition of a new government) not only is the action of that body necessary, but it is the proper department of the government to act in such

case. At least it is contended that congress has the power to act even if its power is not exclusive.

The argument in favor of the absolute and exclusive control of the subject by congress is substantially this: The recognition of the independence of a people is from its very nature the creation of obligations arising from international law, and therefore must belong to the law-making power; it is also a supreme act of sovereignty and must be done by that department of the government in which the national sovereignty resides. Under the constitution, congress is invested with almost all the prerogatives of sovereignty, the only one granted to the president being the pardoning power, and even that is denied in cases of impeachment. The power in question is not directly granted to the president; therefore, is not one of his functions unless necessary to the full and proper exercise of some power directly granted to him or inherent in the office. His general inherent function is to *execute the laws*, to which this power of recognition has no relation, unless it be exercised in pursuance of law. The only expressed power from which it is sought to imply this far-reaching authority is that of receiving ambassadors and ministers, and that, it is urged, is simply a ceremonial duty, imposed upon him as the medium through which the government communicates with foreign governments. As the power of receiving ambassadors and ministers can be exercised pursuant to the direction of congress in doubtful cases, the power to determine the existence or independence of a nation is not necessarily involved in the constitutional grant of power to receive ambassadors, etc. If this power is vested in the executive, it is unlimited and involves the authority, so far as this government is concerned, to alter the map of the world, change the relation of this government to other governments, and involve the country in war. That such uncontrolled executive power over foreign relations was intended, it is contended, cannot be reconciled with the fact that the president cannot declare war, or make a treaty, or appoint an ambassador or consul without the consent of the senate.

The argument from this point of view is very forcibly stated in a speech by Senator Bacon, Jan. 13, 1897, in the United States senate, made expressly to take issue with the position taken by Secretary Olney, *supra*.

A third view, as stated in the preliminary statement of the question in the Hale memorandum, is that, under the constitution and according to precedent,

"the recognition of the independence of a new foreign power is an act of the executive (president alone, or president and senate), and not of the legislative branch of the government, although the executive branch may properly first consult the legislative. While the legislative branch of the government cannot directly exercise the power of recognizing a foreign government, because that is a power executive or judicial in nature (and one which the judiciary, by refusing independently to examine the question, cast entirely upon the executive), nevertheless, if a recognition of such independence is liable to become a *casus belli* with some other foreign power, it is most advisable as well as proper for the executive first to consult the legislative branch as to its wishes and postpone its own action if not assured of legislative approval." Cong. Rec. 54th Cong. 2d Sess. 663.

The basis of the argument in favor of legislative participation in such action is mainly the power to declare war and, as particularly urged by Mr. Clay, as quoted in the Hale memorandum (*id.* 681), the power to regulate commerce. The argument in favor of exclusive executive power is found in the general control of foreign relations, as to which the only expressed powers are to "make treaties" and to "receive ambassadors and other ministers." The argument of greater force in favor of executive control is, however, not that the power in question is included in the specific powers named but that it is a part of the general grant of executive power; that all duties in connection with foreign relations, not otherwise specified, are placed upon the executive, and that the two powers enumerated are merely illustrative and not exclusive. This third view is thus stated in a memorandum submitted to the United States senate by Senator Hale in connection with resolutions pending for the recognition of Cuba, and printed as Ex. Doc. No. 56, 2d Sess. 54th Cong.

"It is in the light of this conception of the executive character of foreign negotiations and acts concerning foreign relations that our constitution gave the president power to send and receive ministers and agents to or from any country he sees fit, and when he sees fit, and not to send or receive any, as he may think best. Also, the power to make treaties, that is, to negotiate with or without agents, as he may prefer, when he may prefer, or not at all, if he prefer, to draw up such articles as may suit him, and to ratify the acts of his plenipotentiaries, instructed by him, the only qualification of his power being the advice and consent of the states in the senate to the treaty he makes. These grants confirm the executive character of the proceedings, and indicate an intent to give all the power to the president, which the federal government itself was to possess—the general control of foreign relations.

At the time of the presentation to the senate of the Hale memorandum, Senator Hoar, after remarking that it was not the time for full debate, said:

"Therefore, I wish to bring out distinctly, if I can, by a question to the senator from Maine, whether, in his researches into the history of this country for a hundred years, in which we must have recognized foreign governments more than a hundred times, taking all the numbers of the governments of the world and their political changes and revolutions which have established new governments—

"Mr. Hale. Over a hundred.

"Mr. Hoar. There must be over a hundred cases, as the senator says. Is there a single instance where in fact our relations with the foreign country have not been determined by the act of recognition by the president of the United States and without congress? Has there been a single one?

"Mr. Hale. As the result of some considerable, and what I have tried to make faithful, examination of the subject and of what others have done

for me, I answer the senator from Massachusetts that I do not find one.

"Mr. ALLEN. As this question is very important and going out to the country to be criticised, I ask the senator from Maine whether he will not state to the senate whether he finds any instance in the history of this country where the question of independency was determined to belong to the executive department exclusively?

"Mr. HALE. In every one of the cases that have been referred to by the senator from Massachusetts (Mr. Hoar) the recognition was made by the executive department, acted upon, submitted to, and not questioned." Cong. Rec. 54th Cong., 2nd Sess. 682.

The extent of executive control of foreign relations was the subject of an extended debate in congress in 1796, upon a resolution calling upon the president for details of the negotiations leading up to the Jay treaty with England, the exact question, however, being the effect of a treaty when negotiated. See TREATY.

With respect to the express power of the executive to make treaties, that is shared with the senate and there is no precedent for the primary act of recognition of a new foreign state, by the joint action of president and senate under the treaty-making power. As to the power to "receive ambassadors and other ministers," though it was much debated as giving the president too much power, the only comments on it in the Federalist are the following:

"This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the Government, and it was far more convenient that it should be arranged in this manner, than that there should be necessity for convening the legislature, or one of its branches, upon every arrival of a foreign minister; though it were merely to take the place of a departed predecessor." Federalist, No. 69, p. 326.

"Except some cavils about the power of . . . receiving ambassadors, no objection has been made to this class of authorities; nor could they possibly admit of any . . . As to the reception of ambassadors, what I have said in a former paper will furnish a sufficient anwer." *Id.* No. 77, p. 362.

The executive can alone appoint a diplomatic representative to a new government, but to do this there is required congressional action to provide for the payment of his salary, and it might be an inference from the practice of the government that the creation of an office, either directly or by provision for compensation to its incumbent, is a prerequisite to the appointment of a person to exercise any public functions. It has been argued, on the other hand, that such an officer, appointed by the president and senate, and his position as an officer having been established, might serve gratuitously or be paid out of the contingent fund. It would seem, however, that it might be urged with more force that merely from an appointment authorized by the constitution, there would arise an obligation to provide compensation, of the same character as those created in many cases without the direct action of congress, notably under the power to make a treaty *(q. v.)*.

In 1798 a discussion arose as to this power, in which was considered the possible clashing between the appointing power of the president and the appropriating financial power of congress. In the course of debate Mr. Otis concluded his remarks with some observations not less pertinent to the present question than to that to which they were addressed: "It was owing to the apparent contradictions arising from a theoretical view of constitutions like ours that they were pronounced to be impracticable by some of the best writers of antiquity. And these abstract questions and extreme cases were not calculated to reconcile the minds of our citizens to our excellent form of government. It is a plain and conclusive reply, by which all such objections are obviated, that the constitution is not predicated upon a presumed abuse of power by any department, but on the more reasonable confidence that each will perform its duty within its own sphere with sincerity, that division of sentiment will yield to reason and explanation, and that extreme cases are not likely to happen."

And Attorney-General Cushing objected to an act in which it was provided that the president "shall" appoint a consul at Port au Prince, that it involved the diplomatic recognition of the Haytien empire, which rested entirely within the discretion of the president. 7 Op. Attys Gen. 212

Turning to the *precedents*, the right to recognize a foreign power was first discussed in 1818 with reference to the South American republics. The matter first came up on an appropriation to pay a minister, which was defeated, after a debate, in which Mr. Clay maintained that recognition might be either by the president in receiving or sending a minister, or by congress under the commerce clause; and the relation of the two powers of government to the subject was much considered; Ann of Cong (1818), pp. 1168-1608-1655. The subject was at this time much discussed both in congress and between the president and individual members, so much so that Mr Adams, the secretary of state, in his memoirs, mentions jocular remarks made in the cabinet in that connection about the power of impeachment; 4 Memoirs, J. Q Adams 201-206. Subsequently the subject was revived in the house and various resolutions were considered, with the result of a request for information from the president, which was responded to by the message of March 8, 1822, in which he said it was his duty to invite the attention of congress to a very important subject, and to communicate the sentiments of the executive on it; that, should congress entertain other sentiments, then there might be such co-operation between the two departments of the government as their respective rights and duties might require. And after stating that in his judgment the time had come to recognize the republics, he said: "Should congress concur in the view herein presented, they will doubtless see the propriety of making the necessary appropriations for carrying it into effect.' The house then resolved that it "concur in the opinion expressed by the president in his message of the 8th of March, 1822, that the late American provinces of Spain which have declared their independence and are in the enjoyment of it, ought to be recognized by the United States as independent nations," and directed an appropriation "to enable the President of the United States to give due effect to such recognition." The Hale memorandum concludes a review of this matter with a protest against the conclusion which has been drawn that President Monroe, after all the discussion, had admitted the power of recognition in congress, but concedes that he did acknowledge "the importance of consulting the legislative branch when a step was about to be taken whose expediency might be doubted, and which would necessarily result in a request for appropriations."

In June, 1836, in reporting a resolution declaring that the independence of Texas ought to be recognized. the committee on foreign affairs of the senate

made a report in which it was said: "The recognition of Texas as an independent power may be made by the United States in various ways: First, by treaty, second, by the passage of a law regulating commercial intercourse between the two powers, third, by sending a diplomatic agent to Texas with the usual credentials, or, lastly, by the executive receiving and accrediting a diplomatic representative from Texas, which would be a recognition as far as the executive only is competent to make it. . . . The President of the United States, by the constitution, has the charge of their foreign intercourse. Regularly he ought to take the initiative in the acknowledgment of the independence of any new power, but in this case he has not yet done it, for reasons which he, without doubt, deems sufficient. If in any instance the president should be tardy, he may be quickened in the exercise of his power by the expression of the opinion, or by other acts, of one or both branches of congress, as was done in relation to the republics formed out of Spanish America." Quoted in Senate Report, No. 1160, 54th Cong 2d Sess

President Jackson, in his message of Dec 21, 1836, after referring to the resolution, said that there had never been any deliberate inquiry as to where belonged the power of recognizing a new state,—a power in some instances equivalent to a declaration of war, and nowhere expressly given, but only as it is implied from some of the great powers given to congress or in that given to the president to make treaties and receive and appoint ministers. Then he continues. "In the preamble to the resolution of the house of representatives it is distinctly intimated that the expediency of recognizing the independence of Texas should be left to the decision of congress. In this view, on the ground of expediency, I am disposed to concur, and do not, therefore, consider it necessary to express any opinion as to the strict constitutional right of the executive, either apart from or in conjunction with the senate, over the subject It is to be presumed that on no future occasion will a dispute arise, as none has heretofore occurred, between the executive and the legislature in the exercise of the power of recognition. It will always be considered consistent with the spirit of the constitution and most safe that it should be exercised, when probably leading to war, with a previous understanding with that body by whom war can alone be declared, and by whom all the provisions for sustaining its perils must be furnished. Its submission to congress, which represents in one of its branches the states of this Union, and in the other the people of the United States, where there may be reasonable ground to apprehend so grave a consequence, would certainly afford the fullest satisfaction to our own country and a perfect guaranty to all other nations of the justice and prudence of the measures which might be adopted."

As to this message the Hale memorandum, which, it is to be remembered, is an argument for the absolute and unqualified *power* of the executive (but modified only by what might be termed a moral *duty* to consult congress in extreme cases) remarks:

"President Jackson plainly was of the opinion that, in a doubtful case, when international complications might be involved, the president should not recognize a revolutionary government without the assent of congress. His language is so carefully guarded that no inference can be made with entire confidence as to the proper course if the executive were strongly of the opinion that facts justifying the recognition of independence did not exist."

With respect to other expressions on this subject from the executive department of the government, Secretary Seward wrote to Minister Dayton, April 7, 1864: "The question of recognition of foreign revolutionary or reactionary governments is one exclusively for the executive, and cannot be determined internationally by congressional action." This had reference to the action of the house of representatives, which had unanimously adopted a resolution protesting against the establishment of an empire in Mexico under Maximilian. The senate did not act on it. The French government asked an explanation, and the secretary of state, using the expression quoted, said that a vote of the house or the senate could neither coerce the executive to modify its policy nor deprive it of its freedom of action. In Dec., 1861, the house by a large majority affirmed their right to advise on questions of foreign policy; but, as was remarked by an intelligent foreign writer, this declaration does not appear to have had any influence on the course of the administration. Chambrun, Exec. Pow in the U. S. 101.

On the other hand, Secretary Clayton, writing to Mr. Mann, a special agent to investigate the Hungarian insurrection, says: "Should the new government prove to be, in your opinion, firm and stable, the president will cheerfully recommend to congress, at their next session, the recognition of Hungary, and you might intimate, if you should see fit, that the president would in that event be gratified to receive a diplomatic agent from Hungary in the United States by or before the next meeting of congress, and that he entertains no doubt whatever that in case her new government should prove to be firm and stable, her independence would be speedily recognized by that enlightened body" In his Digest of International Law, from which the foregoing is quoted, Dr. Wharton concludes his statement of precedents on this subject as follows: "As to this it is to be remarked that while Mr. Webster, who shortly afterwards, on the death of President Taylor, became secretary of state, sustained the sending of Mr. Mann as an agent of inquiry, he was silent as to this paragraph, and suggests, at the utmost, only a probable congressional recognition in case the new government should prove to be firm and stable In making congress the arbiter, President Taylor followed the precedent of President Jackson, who, on March 3, 1837, signed a resolution of congress for the recognition of the independence of Texas. The recognition, however, by the United States, of the independence of Belgium, of the powers who threw off Napoleon's yoke, and of the South American states who have from time to time declared themselves independent of prior governments, has been primarily by the executive, and such also has been the case in respect to the recognition of the successive revolutionary governments of France.

The conclusion of the extended discussion of Cuban affairs, which covered the subject of the recognition of a new government in a foreign state and intervention in its affairs, was reached in 1898 when President McKinley sent a special message dated April 11, recommending intervention and stating the grounds on which he did so. And on April 20 congress passed a joint resolution declaring that the people of Cuba were free and independent, and demanding that the government of Spain relinquish its authority and government in the island, and authorizing the president to use the entire land and naval forces of the United States to carry the resolutions into effect. There was also a disclaimer of any purpose to exercise sovereignty or control over the island except for its pacification. The result was that diplomatic relations between this country and Spain were immediately broken off and war followed. 6 Moore Int. L. Dig. Sec. 909.

The action of our government in this case does not bear upon the direct question as to which department of the government is directly charged with the recognition of new states, except that it shows that President McKinley acted in accordance with the views, already cited, of his predecessors, Presidents Monroe and Jackson, in consult-

ing congress and securing its joint action in a case which was likely to result in war.

Since the settlement of the affairs of Cuba, it is believed that the question of executive power with relation to new or insurrectionary governments has not been raised or discussed.

In 1899, a revolutionary government having been established in Venezuela, the United States minister was authorized by the department of state to recognize it, and, when he had done so, his action was approved; 1 Moore, Int. L. Dig. sec. 52. In the same year similar action was taken with respect to a successful insurrection in Bolivia; *id.* sec. 53.

Early in 1911, a revolution occurred in Portugal which resulted in the abdication of the king and the proclamation of a republic. On the 6th of June, 1911, the American minister in Lisbon was instructed, as soon as the constituent assembly, which was to meet on the 19th of June, should have expressed the voice of the people and settled upon the form of government to be adopted by Portugal, to inform the minister of foreign affairs of its official recognition by the government of the United States. The minister was to do this, if possible, on the day on which the constituent assembly took definite and final action.

On the following day, the American minister was explicitly instructed that the government of the United States desired to recognize the republic of Portugal as soon as it should be officially proclaimed by the constituent assembly, without awaiting the choice of a president or the adoption of a constitution. On June 19, the constituent assembly met and definitely proclaimed the republic. On the same day the diplomatic representative of the United States handed to the minister of foreign affairs a note stating that the government of the Portuguese republic was on that day officially recognized by the government of the United States.

It may be remarked that the republic of Portugal had previously been recognized by Switzerland.

Late in the same year there occurred a revolution in China which resulted in the establishment by the insurgent military leaders in the various Yangtze provinces and in southern China, of a cabinet form of government with headquarters at Nanking, and an assembly convoked in that city, which on December 29, 1911, elected a provisional president of the republic of China, who was inaugurated as such on New Year's day. On February 12, 1912, the throne abdicated in favor of a republic and conferred full power to organize such a government on Yuan Shih-kai, who three days later was elected by the Nanking assembly provisional president. The resignation of the provisional president and his cabinet was accepted to take effect on the inauguration of Yuan, which occurred at Peking March 10, 1912. The provisional government meanwhile had notified the American minister that the Chinese minister in the United States would continue in the discharge of his functions as "provisional diplomatic agent." On March 10, the date of the inauguration, a provisional constitution, previously approved by the Peking authorities, was adopted by the Nanking assembly, under which it was provided that within ten months the provisional president should convene a representative national assembly to adopt a permanent constitution and elect a president.

President Taft in his annual message of December, 1912, announced to congress the course of events in China and stated that the United States was, according to precedent, maintaining full and friendly *de facto* relations with the provisional government.

On April 6, 1913, the American diplomatic representative at Peking was instructed that upon the convening of the national assembly with a quorum, organized for business by the election of officers, he should communicate to the president of China as coming from the president of the United States a message recognizing the new government and welcoming the new China into the family of nations. This message of the president of the United States was delivered on May 2, and on the same day the new president, Yuan Shih-kai, sent an appreciative message to the president of the United States acknowledging his greeting and thanking him for his sentiments of amity and good will.

Meanwhile none of the European governments had recognized the Chinese republic.

The courts have frequently had occasion to determine whether the independence of a foreign country should be recognized as existing for the purpose of the pending case, but not to pass upon the question of power as between the executive and legislative departments. In an early case Marshall, C. J., said that before a nation

"could be considered independent by the judiciary of foreign nations, it was necessary that its independence should be recognized by the executive authority of those nations. That as our executive had never recognized the independence of Buenos Ayres, it was not competent to the court to pronounce its independence." U. S. v. Hutchings, 2 Wh. Cr. Cas. (N. Y.) 543, Fed. Cas. No. 15,429.

A little later, on certificate of division, the supreme court had before it the direct question of the rights of a revolting colony, or portion of a nation which has declared its independence. The case was the trial for piracy of one of the revolutionary subjects.

Marshall, C. J., speaking for the court, said:

"Those questions which respect the rights of a part of a foreign empire, which asserts and is contending for its independence, and the conduct which must be observed by the courts of the Union towards the subjects of such section of an empire who may be brought before the tribunals of this country, are equally delicate and difficult. . . .

Such questions are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations, than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it." The certificate of opinion was " . . . The court is further of opinion that when a civil war rages in a foreign nation, a part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the Union must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States." U. S. v. Palmer, 3 Wheat. (U. S.) 610, 4 L. Ed. 471.

In a case involving the question of the right of citizens of the United States to the use of the seal fisheries at the Falkland Islands claimed by Buenos Ayres, Williams v. Ins. Co., 3 Sumn. 270, 273, Fed. Cas. No. 17,738, Mr. Justice Story said,

"It is very clear that it belongs exclusively to the executive department of our government to recognize from time to time any new governments which may arise in the political revolutions of the world; and until such new governments are so recognized they cannot be admitted by our courts of justice to have or to exercise the common rights and prerogatives of sovereignty."

He adds that "this doctrine was fully recognized by the supreme court" in Gelston v. Hoyt; which was one of those cases cited *infra* in which the court had referred to the recognition of independence, by the "government." On appeal from Judge Story's decision the supreme court held that the action, of the executive department of the government, on the question to whom the sovereignty of the islands belonged was binding and conclusive on the courts, and it was enough that in the exercise of his constitutional functions the president had decided that question; Williams v. Ins. Co., 13 Pet. (U. S.) 417, 420, 10 L. Ed. 226. In several cases the court has said that the question of the recognition of belligerency or independence is one for the *government* of the United States; The Divina Pastora, 4 Wheat. (U. S.) 52, 4 L. Ed. 512; The Nueva Anna, 6 Wheat. (U. S.) 193, 5 L. Ed. 239; Gelston v. Hoyt, 3 Wheat. (U. S.) 324, 4 L. Ed. 381; Rose v. Himely, 4 Cra. (U. S.) 241, 272, 2 L. Ed. 608; and again congress and the president are referred to as "those departments" having the control of such matters; U. S. v. Lynde, 11 Wall. (U. S.) 632, 638, 20 L. Ed. 230. On a bill to enforce an agreement the validity of which turned on the question whether at its date Texas was, or was not, independent, Taney, C. J., said that "was a question for that part of our government which is charged with our foreign relations," and it was held that the court could not inquire whether it had not in fact become an independent sovereign state before its recognition as such by the treaty-making power; Kennett v. Chambers, 14 How. (U. S.) 38, 51, 14 L. Ed. 316.

In the Prize Cases, 2 Black (U. S.) 635, 17 L. Ed. 459, much later than any of those above cited (relating not to foreign but to domestic relations, and therefore not strictly applicable), this language is used:

"As in the case of an insurrection, the President must, in the absence of congressional action, determine what degree of force the crisis demands, and as in political matters the courts must be governed by the decisions and acts of the political department to which this power is entrusted, the proclamation of blockade by the president is of itself conclusive evidence that a state of war existed which demanded and authorized recourse to such a measure."

In this case, the court terms the executive the political department of the government, and in a later case it so designates congress; U. S. v. Yorba, 1 Wall. (U. S.) 412, 17 L. Ed. 635. More recently in a case in which the president was authorized, by act of congress, to declare that a guano island belonged to the United States, the court said:

"Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens, and subjects of that government," Jones v. U. S., 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691.

With reference to the status of the revolutionary party of Chile, the circuit court of appeals said that it was to be regarded by the courts as determined by the executive department of the United States; The Itata, 56 Fed. 505, 5 C. C. A. 608; affirming U. S. v. Trumbull, 48 Fed. 99.

The earliest reference to this subject by a text-writer is by Rawle, who says:

"The power of receiving foreign ambassadors carries with it, among other things, the right of judging in the case of a revolution in a foreign country, whether the new ruler ought to be recognized. The legislature, indeed, possesses a superior power, and may declare its dissent from the executive recognition or refusal, but until their sense is declared, the act of the executive is binding. The judicial power can take no notice of a new government, until one or the other of those two departments has acted on it. Circumstances may render the decision of great importance to the interests and peace of the country. A precipitate acknowledgment of the independence of part of a foreign nation, separating itself from its former head, may provoke the resentment of the latter; a refusal to do so may disgust the former, and prevent the attainment of amity and commerce with them if they succeed. The principle on which the separation takes place must also be taken into consideration, and if they are conformable to those which led to our own independence, and appear likely to be preserved, a strong impulse will arise in favor of recognition. . . . The power of congress on this subject cannot be controlled; they may, if they think proper, acknowledge a small and helpless community, though with a certainty of drawing war upon our country; but greater circumspection is required from the president, who, not having the constitutional power to declare war, ought ever to abstain from a measure likely to produce it." Rawle, Const. 195.

A little later Story wrote:

"The exercise of this prerogative of acknowledging new nations or ministers is, therefore, under such circumstances, an executive function of great delicacy, which requires the utmost caution and deliberation. . . . If such recognition is made, it is conclusive upon the nation, unless indeed, it can be reversed by an act of congress repudiating it. If,

on the other hand, such recognition has been refused by the executive, it is said that congress may, notwithstanding, solemnly acknowledge the sovereignty of the nation or party (citing Rawle). These, however, are propositions which have hitherto remained as abstract statements under the constitution, and therefore can be propounded, not as absolutely true, but as still open to discussion if they should ever arise in the course of our foreign diplomacy. The constitution has expressly invested the executive with power to receive ambassadors and other ministers. It has not expressly invested congress with the power either to repudiate or acknowledge them." 2 Sto. Const. § 1566.

In connection with this treatment of the subject is to be considered the judicial utterance of Judge Story, before cited from Williams v. Ins. Co., 3 Sumn. 270, Fed. Cas. No. 17,738. Pomeroy is also cited in Senator Hale's memorandum as an authority in favor of the exclusive executive control, which he does assert strongly with reference to foreign relations, and the treaty-making power in general, but he does not discuss the particular question under consideration; while he enforces with great earnestness the necessity of harmonious action of congress and the executive, and of their co-operation in giving due effect to the powers confided to each; Pom. Const. Law § 675.

Dr. Wharton, in his Digest of International Law, in discussing the subject of the recognition of various revolutionary governments, entitles section vii. of chap. iii., vol. 1, thus: "Such recognition determinable by executive," thus implying the opinion that the right rests with the executive alone. The author states the proposition embodied in his caption more fully thus:

"In political matters the courts follow the department of the government to which those matters may be committed, and will not recognize the existence of a new government until it has been recognized by the executive." Most of the cases, however, which are cited by him under this caption are among the authorities upon the proposition already noted, that it is not a matter for the judicial department of the government, but that the courts will not take cognizance of the existence of a new government until it has been recognized by the *political* department of the government, without discriminating between the executive and legislative branches of the government.

From an examination of all the decisions touching this question by the judicial department, no precise principle can be deduced unless it be that the references to it rest upon an assumption of entire harmony of action between the executive and legislative departments And the fact that the direct issue arising from the claim of exclusive control by one of those two departments has not heretofore been made, will readily account for the absence of direct judicial authority or authoritative expression of opinion by text-writers. The duties and powers of what the supreme court frequently terms the political departments are so closely interwoven that it is unlikely that such an issue will be sharply drawn. Every approach to it hitherto has resulted, after discussion, in the recognition by congress of the right of the executive to full control of foreign relations and to the initiative in the practical recognition of a new foreign power, and, on the other hand, by a prudent disposition on the part of the executive not to act in a doubtful case or one likely to create a *casus belli* without ascertaining the disposition of congress. This has been simply the application to this particular subject of the principle of mutual recognition of the distribution of powers, and at the same time, the interdependence of the executive and congress which, with the prudent reserve of the judiciary in keeping closely within the limits of its own sphere, has enabled the government to avoid the dangers of mere theoretical construction alluded to by Otis in the quotation made from his remarks upon the subject. The undoubted constitutional powers of both departments bearing upon the question make harmony of action as necessary in dealing with this subject as with most, if not all, of the ordinary details of the government. While the president may undoubtedly recognize a foreign government, as has frequently been done, such action, if it involved war, would still require the action of congress to make it effective, and doubtless the precedents established by Presidents Jackson and Monroe, neither of whom was indifferent to the respect due to his office, will always have very great, if not controlling, weight Again, the question recently raised of the right of congress by independent action and against the views of the president, to recognize the independence of a new nation, is more likely to be met hereafter, as heretofore, in the spirit of co-operation and full recognition of the executive control of foreign relations than to be asserted, to the extent of making a direct issue, as it would need to be by a majority of two-thirds of each house.

The United States government has always held, and, on occasion, exercised, the right in case of disturbances of the peace, either general or local in foreign countries, to land forces and adopt all necessary measures to protect the life and property of our citizens, whenever menaced by lawless acts, which the general or local authority is unwilling or impotent to prevent. This power has always been exercised by the executive department of the government. The power was asserted in a dispatch of Mr Toucey, secretary of the navy, to Captain Jarvis, U. S. N., March 13, 1860, with reference to the unsettled state of affairs in Mexico; by Mr. Adee, acting secretary of state to the Korean minister, July 8, 1895, with reference to the affairs in Korea; by President McKinley in his annual message of Dec. 5, 1899, with reference to disturbances in China, and the power was also asserted with reference to disturbances in that country, by Mr. Hill, acting secretary of state to the secretary of the navy, Sept. 11, 1900; and by a dispatch

from Mr. Merry, United States minister to Nicaragua, Feb. 27, 1899, with reference to disturbances in that country and the landing of American and English forces. See 2 Moore, Int. L. Dig. 400–402.

Executive officers, including the president, are required to execute the laws as enacted by the legislature or congress, and can in no case nullify them by refusing to execute them so long as their unconstitutionality or invalidity has not been judicially established, for, until this is done, the constitutionality is presumed, and in the judicial power alone resides the power to decide as to the validity of a statute; Pom. Const. L. secs. 148, 662–668; Martin v. Hunter, 1 Wheat. (U. S.) 304, 4 L. Ed. 97; Cohens v. Virginia, 6 Wheat. (U. S.) 264, 5 L. Ed. 257; Ableman v. Booth, 21 How. (U. S.) 506, 16 L. Ed. 169.

The question whether an executive officer has, under any circumstances, the right to question the constitutionality of an act of congress, and to make this decision the basis of acting upon claims to be passed upon by him, was the subject of consideration and extended discussion in the sugar bounty case lately pending before the comptroller of the treasury. It was contended on the one hand that every law must be considered valid until declared otherwise by the supreme court, and that although the comptroller is an independent officer, and not a mere subordinate of the secretary of the treasury or the president, such an exercise of jurisdiction would be a dangerous usurpation by an executive officer of judicial authority, which is confided by the constitution exclusively to the courts. On the other hand, it was urged that the constitution is the supreme law, and that an executive officer is responsible for a wrongful act under an unconstitutional statute. It was replied that his responsibility is political. The claim was disallowed by the comptroller upon the ground that the act was unconstitutional and the case sent to the court of claims under the authority of U. S. Rev. Stat. § 1065. The act in question had been held unconstitutional, but not by the court of last resort; U. S. v. Carlisle, 5 App. D. C. 138. Subsequently the act was held to be constitutional by the supreme court, but the question of the power of the comptroller was not determined; U. S. v. Realty Co., 163 U. S. 427, 16 Sup. Ct. 1120, 41 L. Ed. 215. This decision of the comptroller and the questions involved have been elaborately discussed by Mr. Black, the writer on constitutional law, who, after an examination of the authorities, reaches the conclusion that the power of an executive officer to judge of the constitutionality of a statute (in advance of a determination by the courts) is confined to cases in which it is necessary for the regulation of his own conduct, and that where the rights of others are involved he must enforce the law; 29 Am. L. Rev. 801. See also 11 Op. Atty. Gen. 214; Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185; U. S. v. Kaufman, 96 U. S. 567, 24 L. Ed. 792; U. S. v. Bank, 104 U. S. 728, 26 L. Ed. 908; Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; Huntington v. Worthen, 120 U. S. 102, 7 Sup. Ct. 469, 30 L. Ed. 588.

The same principle is applied in the state governments. In a recent case in Louisiana it was held that the executive officers of the state government have no authority to decline the performance of purely ministerial duties imposed upon them by a statute, on the ground that it is unconstitutional. An executive officer cannot nullify a law by neglecting or refusing to act under it; State v. Heard, 47 La. Ann. 1679, 18 South. 746, 47 L. R. A. 512.

The so-called war powers of the executive, so much discussed during the Civil War, do not now present a practical subject for discussion, and may be passed, with this quotation from a judicious writer on the subject:

"During our Civil War, many powers were claimed and exercised by the president under a stringency of circumstances for which no provision had been made in the constitution. Secession being the outgrowth of the doctrine of states governed by compact and not by law, it became necessary, in the complication growing out of the war, whether in the form of military occupancy and blockade, legislative reconstruction, or judicial protection of persons and property in the seceded states, to find by implication, in the executive department, certain war powers not hitherto contemplated and never before invoked. While the general results of their exercise doubtless contributed to the restoration of the Union, and the re-establishment of the government of the United States over all its territory, these powers were so far anomalous in their assumption as to afford no justifiable precedents for the government of the executive, in the ordinary circumstances of our federal administration A formal discussion of their scope and application has accordingly been omitted, because they present exceptions in the body of our constitutional legislation that are never again likely to be repeated" Ordronaux, Const Leg 109 See Whiting, War Powers under the Constitution; Campbell, Collection of Pamphlets on *Habeas Corpus*, Martial Law, etc.

The president is not responsible to the courts, civil or criminal; Durand v. Hollins, 4 Blatchf. 451, Fed. Cas. No. 4,186; nor are his acts reviewable by them to the extent of bringing them into conflict with him; Mississippi v. Johnson, 4 Wall. (U. S.) 475, 18 L. Ed. 437; except that they may declare void an order or regulation in excess of his powers; U. S. v. The Franklin, 1 Gall. 137, Fed. Cas No. 10,585; 9 Am. Law Reg. 524; but with respect to all of his political functions growing out of the foreign relations, the control of military officers, and his relations with congress, it is settled that the courts have no control whatever; Cherokee Nation v. Georgia, 5 Pet. (U. S.) 1, 20, 8 L. Ed. 25; Luther v. Borden, 7 How. (U. S.) 1, 12 L. Ed. 581; Mississippi v. Johnson, 4 Wall. (U. S.) 475, 18 L. Ed. 437; 1 Goodn. Comp. Adm. L. 34, 73; Pom. Const. L. § 633. See also 1 Ves. 467; 1 Ves. Jr. 375; 2 *id.* 56.

All the acts of the president by which his political powers are exercised are considered equally political, and are only brought within the scope of judicial examination where the act of some inferior ministerial officer, who is the direct instrument for exercising the executive function, is submitted to the scrutiny of the courts. This usually occurs where the constitutionality of a law is questioned by the judicial examination of the act of some officer who has attempted to carry the law into execution. In such a case there is not a direct judicial examination of the president's acts, or those of his subordinates, but merely the determination of the question whether there is a valid law; *id.* 419; Marbury v. Madison, 1 Cranch (U. S.) 137, 2 L. Ed. 60; Mississippi v. Johnson, 4 Wall. (U. S.) 475, 18 L. Ed. 437; Pom. Const. Law § 633.

So, as a necessary incident of the power to perform his executive duties, must be included freedom from any obstruction or impediments; accordingly, the president cannot be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability; 2 Sto. Const. § 1569.

Whether in any case a court may issue a mandamus to the governor of a state is a question on which the decisions are not uniform. In some states it is held that, although conceding the independence of the executive from the control of the judiciary with respect to political duties and powers, as to ministerial duties imposed upon the executive, which might have been committed to another officer, the writ may be resorted to; Cotten v. Ellis, 52 N. C. 545; State v. Chase, 5 Ohio St. 528; Harpending v. Haight, 39 Cal. 189, 2 Am. Rep. 432; Groome v. Gwinn, 43 Md. 572; Greenwood Cemetery Land Co. v. Routt, 17 Colo. 156, 28 Pac. 1125, 15 L. R. A. 369, 31 Am. St. Rep. 284; Tennessee & C. R. Co. v. Moore, 36 Ala. 371; State v. Thayer, 31 Neb. 82, 47 N. W. 704; Chumasero v. Potts, 2 Mont. 242; Martin v. Ingham, 38 Kan. 641, 17 Pac. 162. But the weight of authority would seem to be in favor of the contrary opinion; In re Dennett, 32 Me. 508, 54 Am. Dec. 602; Mauran v. Smith, 8 R. I. 192, 5 Am. Rep. 564; People v. Cullum, 100 Ill. 472; State v. Stone, 120 Mo. 428, 25 S. W. 376, 23 L. R. A. 194, 41 Am. St. Rep. 705; Hovey v. State, 127 Ind. 588, 27 N. E. 175, 11 L. R. A. 763, 22 Am. St. Rep. 663; State v. Governor, 25 N. J. L. 331; State v. Towns, 8 Ga. 360; State v. Stone, 120 Mo. 428, 25 S. W. 376, 23 L. R. A. 194, 41 Am. St. Rep. 705; Hawkins v. Governor, 1 Ark. 571, 33 Am. Dec. 346; People v. Governor, 29 Mich. 320, 18 Am. Rep. 89; State v. Drew, 17 Fla. 67; State v. Warmoth, 22 La. Ann. 1, 2 Am. Rep. 712; Rice v. Austin, 19 Minn. 103 (Gil. 74), 18 Am. Rep. 330; Vicksburg & M. R. Co. v. Lowry, 61 Miss. 102, 48 Am. Rep. 76.

In some cases it is held that the courts have no power, "in the absence of express constitutional provisions, to control the action of the governor, or to compel him by mandamus to perform any duty either political or municipal, and whether commanded by the constitution or by law"; State v. Stone, 120 Mo. 428, 25 S. W. 376, 23 L. R. A. 194, 41 Am. St. Rep. 705; State v. Huston, 27 Okl. 606, 113 Pac. 190, 34 L. R. A. (N. S.) 380; but the mayor of a city is not such an executive officer as is exempt from judicial control; State v. Noonan, 59 Mo. App. 524.

As to other executive officers, such as secretary of state, treasurer, auditor, and the like, though some conflict exists, the better-considered doctrine, and that supported by the great weight of authority, is properly said to be that courts will apply the general principle of law and issue the writ in the case of purely ministerial acts; High, Ext. Leg. Rem. §§ 124*a*–126, where the cases are collected.

The same principle is applied to determine how far the courts will interfere in like manner with the heads of executive departments, or bureaus thereof, of the federal government. If the act is purely ministerial the writ will issue; Kendall v. U. S., 12 Pet. (U. S.) 524, 9 L. Ed. 1181; Ballinger v. U. S., 216 U. S. 240, 30 Sup. Ct. 338, 54 L. Ed. 464; Garfield v. U. S., 211 U. S. 249, 29 Sup. Ct. 62, 53 L. Ed. 168; U. S. v. Bayard, 16 D. C. 428; but it must be an act not growing out of the inherent powers of the officer; U. S. v. Guthrie, 17 How. (U. S.) 284, 15 L. Ed. 102; and in no case where the act involves the exercise of discretion will the court interfere; Holloway v. Whiteley, 4 Wall. (U. S.) 522, 18 L. Ed. 335; Secretary v. McGarrahan, 9 Wall. (U. S.) 298, 19 L. Ed. 579; Carrick v. Lamar, 116 U. S. 423, 6 Sup. Ct. 424, 29 L. Ed. 677; U. S. v. Black, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354; U. S. v. Blaine, 139 U. S. 306, 11 Sup. Ct. 607, 35 L. Ed. 183; U. S. v. Lamont, 155 U. S. 303, 15 Sup. Ct. 97, 39 L. Ed. 160; and findings of fact by an executive officer are conclusive in the absence of palpable error; Central Trust Co. v. Trust Co., 216 U. S. 251, 30 Sup. Ct. 341, 54 L. Ed. 469, 17 Ann. Cas. 1066.

See, generally, Desty; Rawle; Story; Miller; Black, Constitution; Sergeant; Sedgwick, Const. Law; Thayer, Cas. Const. L.; Cooley, Const. Lim.; Elliot's Debates; Elmes, Executive Departments; Kent, Com. Lect. XIII.; Stubbs, Const. Hist. Eng.; Todd. Parl. Gov. in Eng.; Lowell, Gov't of England; Von Holst, Hist. U. S.; Whiting, War Powers; Ordronaux, Const. Leg. 99–110; Goodnow, Comp. Adm. Law; Bryce, Am. Com.; Chambrun, Executive Power in the U. S.; Fisher, Evolution of the Const.; Stevens, Sources

Const. U. S.; Wilson, Legislative Government; Farrand; Willoughby; Watson; Dicey, Constitution; JUDICIAL POWER; LEGISLATIVE POWER; PRESIDENT OF THE UNITED STATES.

EXECUTOR DE SON TORT. One who attempts to act as executor without lawful authority.

A person who, without any authority, intermeddles with the estate of a decedent and does such acts as properly belong to the office of executor or administrator, thereby becoming a sort of *quasi* executor, though only for the purpose of being sued or made liable for the assets with which he has intermeddled. Grace v. Seibert, 235 Ill. 190, 85 N. E. 308, 22 L. R. A. (N. S.) 301; and such executor, having assumed a representative character, cannot deny it, and therefore suffers all the liabilities of an executor without acquiring the rights or privileges of such office; *id.*

If a stranger takes upon him to act as executor without any just authority (as, by intermeddling with the goods of the deceased, and many other transactions), he is called in law an executor of his own wrong, *de son tort;* 2 Bla. Com. 507; Bacon v. Parker, 12 Conn. 213; Wilbourn v. Wilbourn, 48 Miss. 38; 14 E. L. & Eq. 510; Johnston v. Duncan, 3 Litt. (Ky.) 163, 14 Am. Dec. 54; White v. Cooper, 3 Pa. 130; Brown v. Walter, 58 Ala. 310; Barron v. Burney, 38 Ga. 264. If a man kill the cattle of the testator, or take his goods to satisfy a debt, or collect money due him, or pay out such money, or carry on his business, or take possession of his house, etc, he becomes an executor *de son tort.* Where a person with whom a will had been left filed it, but took out no letters with the will annexed, or any other legal authority to administer on the estate, he became an executor *de son tort;* Morrow v. Cloud, 77 Ga. 114.

But a stranger may perform many acts in relation to a testator's estate without becoming liable as executor *de son tort.* Such are locking up his goods for preservation, burying the deceased in a manner suitable to his fortune, paying for the funeral expenses and those of the last sickness, making an inventory of his property to prevent loss or fraud solely, feeding his cattle, milking his cows, repairing his houses, etc. Such acts are held to be offices of kindness and charity; Magner v. Ryan, 19 Mo. 196; Emery v. Berry, 28 N. H. 473, 61 Am. Dec. 622. Nor does paying the debts of the deceased with one's own money make one an executor *de son tort;* Carter v. Robbins, 8 Rich. (S. C.) 29; Bogue v. Watrous, 59 Conn. 247, 22 Atl. 31. Nor does one become executor *de son tort* by obtaining payment of a debt from an executor *de son tort;* 65 L. T. N. S. 709. The fact that a widow has taken possession of community property is not sufficient to authorize suit against her on a note of her deceased husband; Vela v. Guerra, 75 Tex. 595, 12 S. W. 1127. As to what acts will render a person so liable, see Godolphin, Orph. Leg. 91; 1 Wms. Exec. 290; 1 Dane, Abr. 561; Bull. N. P. 48; Com. Dig. *Administration* (C 3); Rattoon v. Overacker, 8 Johns. (N. Y.) 126; In re Huff's Estate, 15 S. & R. (Pa.) 39; White v. Mann, 26 Me. 361; Chandler v. Davidson, 6 Blackf. (Ind.) 367.

An executor *de son tort* is liable only for such assets as come into his hands, and is not liable for not reducing assets to possession; Kinard's Adm'r v. Young, 2 Rich. Eq. (S. C.) 247; Roumfort v. McAlarney, 82 Pa. 193. And it has been held that he is only liable to the rightful administrator; Muir v. Trustees of Orphan House, 3 Barb. Ch. (N. Y.) 477; Brown v. Walter, 58 Ala. 310. But see Hansford v. Elliott, 9 Leigh (Va.) 79; Swift v. Martin, 19 Mo. App. 488; which imply that he is also liable to the heir at law. He cannot be sued except for fraud, and he must be sued as executor; Buckminster v. Ingham, Brayt. (Vt.) 116; Francis v. Welch, 33 N. C. 215; Nass v. Vanswearingen, 10 S. & R. (Pa.) 144; Brown's Ex'rs v. Durbin's Adm'r, 5 J. J. Marsh. (Ky.) 170. But in general he is liable to all the trouble of an executorship, with none of its profits. And the law on this head seems to have been borrowed from the civil-law doctrine of *pro haerede gestio.* See Heineccius, Antiq. Syntagma, lib. 2, tit. 17, § 16, p. 468.

An executor *de son tort* is an executor only for the purpose of being sued, and not for the purpose of suing; Francis v. Welch, 33 N. C. 215. He is sued as if rightful executor. But if he defends as such he becomes thereby also an executor *de son tort;* Lawes, Pl. 190, note; Davis v. Connelly's Ex'rs, 4 B. Monr. (Ky.) 136; Gregory's Ex'rs v. Forrester, 1 McCord, Ch. (S. C.) 318; Hill v. Henderson, 13 Smedes & M. (Miss.) 688; Norfolk's Ex'r v. Gantt, 2 H. & J. (Md.) 435. When an executor *de son tort* takes out letters of administration, his acts are legalized, and are to be viewed in the same light as if he had been rightful administrator when the goods came into his hands; Magner v. Ryan, 19 Mo. 196; Shillaber v. Wyman, 15 Mass. 325; Rattoon v. Overacker, 8 Johns. (N. Y.) 126. But see, *contra,* Clements v. Swain, 2 N. H. 475. A voluntary sale by an executor *de son tort* confers only the same title on the purchaser that he himself had; 6 Exch. 164; 20 E. L. & Eq. 145; Carpenter v. Going, 20 Ala. 587; Meigan v. McDonough, 10 Watts (Pa.) 287.

It is held that in regard to land no man can be an executor *de son tort;* Green v. Dewit, 1 Root (Conn.) 183; Nass v. Vanswearingen, 7 S. & R. (Pa.) 192; *id.,* 10 S. & R. (Pa.) 144. In Arkansas it is said that there is no such thing as a technical executor *de son tort:* Barasien v. Odum, 17 Ark. 122; Rust v. Witherington, *id.* 129; and so in

Missouri; Rozelle v. Harmon, 103 Mo. 339, 15 S. W. 432, 12 L. R. A. 187. See, on this subject, Smith v. Porter, 35 Me. 287; Leach v. Pillsbury, 15 N. H. 137; Grave's Adm'r v. Poage, 17 Mo. 91; Hardy v. Thomas, 23 Miss. 544, 57 Am. Dec. 152; Josey v. Rogers, 13 Ga. 478, Woolfork's Adm'r v. Sullivan, 23 Ala. 548, 58 Am. Dec. 305; Simonton v. McLane's Adm'r, 25 Ala. 353; Morrison v. Smith, 44 N. C. 399; Walworth v. Ballard, 12 La. Ann. 245; Lee v. Wright, 1 Rawle (Pa.) 149; Schoul. Ex'rs & Adm'rs § 184.

EXECUTORS AND ADMINISTRATORS. The person or persons to whom is committed the administration of the estates of decedents, the first being that of a person named in a will to execute its provisions, the latter that of the officer designated under the law to administer the estate of one who has died intestate.

An *executor* is one to whom another man commits by his last will the execution of that will, and testament 2 Bla. Com. 503.

A person to whom a testator by his will commits the *execution*, or putting in force, of that instrument and its codicils. Fonbl. Rights and Wrongs 307. See LETTERS TESTAMENTARY; HEIRES

An *administrator* is a person authorized to manage and distribute the estate of an intestate, or of a testator who has no executor. In South African law the term is used as equivalent to trustee.

An administrator is merely the agent or trustee of the estate of the decedent, acting under the immediate direction of the law prescribing his duties, regulating his conduct and limiting his powers; Collamore v. Wilder, 19 Kan. 67.

ADMINISTRATION. The management of the estate of an intestate, or of a testator who has no executor. 2 Bla. Com. 494; 1 Williams, Ex. 401. The term is applied broadly to denote the management of an estate by an executor, and also the management of estates of minors, lunatics, etc., in those cases where trustees have been appointed by authority of law to take charge of such estates in place of the legal owners.

No administration is necessary where there are no creditors and the heirs divide the assets in kind or otherwise by mutual agreement; McCracken v. McCaslin, 50 Mo. App. 85; Cadmus v. Jackson, 52 Pa. 307; Brown v. Baxter, 77 Kan. 97, 94 Pac. 155, 574; or where the property of the intestate is exempt; Rivera v. R. Co. (Tex.) 149 S. W. 223; or where the widow is sole legatee and all debts and expenses are paid; Block v. Butt, 41 Ind. App. 487, 84 N. E. 357; or where persons in interest settle their rights outside of the probate court; Prichard v. Mulhall, 140 Ia. 1, 118 N. W. 43; and, in some states, such settlement, without administration, is authorized by statute; Rogan v. Arnold, 233 Ill. 19, 84 N. E. 58.

The controlling place of administration is the domicile of the testator; Higgins v. Eaton, 188 Fed. 938.

The right of administration is a valuable one and not to be taken away, except as provided by statute; Williams v. Williams, 24 App. D. C. 214.

Originally in England the crown claimed the right of administering the personal property of intestates and exercised it by its ministers, or granted it as a franchise to lords of manors or others and afterwards to prelates, who greatly abused the trust, until, under the Statute of Westminster II, the ordinary was bound to pay the debts of the deceased so far as his goods would extend, but still the ecclesiastical persons who were entrusted with the duty, appropriated large portions of them upon the pretext of pious uses, until they were required by Stat. 31 Edw. III. c. 11, § 1, to grant administration to "the next of kin and most lawful friends of the dead person intestate," who were held accountable in the common-law court as executors were. The administration of personal estates then became assimilated to carrying out the provisions of wills, and the function of the ecclesiastical courts was merely the grant of letters and the supervision of their execution. Next, under 21 Hen. VIII., the ordinary could appoint the widow or next of kin, or both, at his discretion. The jurisdiction in England was taken away from the ecclesiastical court by Stat. 20 & 21 Vic. c. 77, and vested in a judge of probate. The court of probate is now part of the Probate, Divorce and Admiralty Division of the High Court of Justice.

In the United States, what is known as probate jurisdiction is exercised generally by courts known as probate courts held by surrogates, judges of probate, registers of wills, etc.

There are various kinds of administration:

Ad colligendum. That which is granted for collecting and preserving goods about to perish (*bona peritura*). The only power over these goods is under the form prescribed by statute.

Ancillary. That which is subordinate to the principal administration taken out in another state or country where there are assets; Appeal of Barry, 88 Pa. 131; Stevens v. Gaylord, 11 Mass. 256; Rosenthal v. Renick, 44 Ill. 202; Trimble v. Dzieduzyiki, 57 How. Pr. (N. Y.) 208. In the absence of a statute allowing it (as in some states) an administrator in one state cannot sue as such in another, unless ancillary letters are taken out; Noonan v. Bradley, 9 Wall. (U. S.) 394, 19 L. Ed. 757; and this may be done by amendment after the bill is filed; Black v. Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433. One who is both ancillary and domiciliary administratrix of the same estate cannot be called on, in one jurisdiction, to account for assets received in

the other; Hamilton v. Carrington, 41 S. C. 385, 19 S. E. 616.

Executors in the state of testator's domicil are not bound, under the full faith and credit clause, by a decree of the court of another state against an administrator c. t. a., in a case submitted to arbitration before the testator's death; Brown v. Fletcher's Estate, 210 U. S. 82, 28 Sup. Ct. 702, 52 L. Ed. 966.

Cæterorum. That which is granted as to the residue of an estate, which cannot be administered under the limited power already granted; 4 Hagg. Eccl. 382, 386; 4 M. & G. 398; 1 Curt. Eccl. 286.

It differs from administration *de bonis non* in this, that in *cæterorum* the full power granted is exercised and exhausted, while in the other the power is, for some cause, not fully exercised.

Cum testamento annexo. That which is granted where no executor is named in the will, or where the one named dies, or is incompetent or unwilling to act. Such an administrator must follow the statute rules of distribution, except when otherwise directed by the will; Ex parte Brown, 2 Bradf (N. Y.) 22; Farwell v. Jacobs, 4 Mass. 634; Stacy v. Thrasher, 6 How. (U. S.) 59, 12 L. Ed. 337. The residuary legatee is appointed such administrator rather than the next of kin; Estate of Donnelly, 2 Phil. (Pa.) 54; Thornton v. Winston, 4 Leigh (Va.) 152; 2 Add. 352.

De bonis non. That which is granted when the first administrator dies before having fully administered. The person so appointed has in general the powers of a common administrator; Bacon, Abr. *Executors*, B, 1; Rolle, Abr. 907; Matthews v. Douthitt, 27 Ala. 273, 62 Am. Dec. 765; State v. Porter, 9 Ind. 342; Thomas v. Stanley, 4 Sneed (Tenn.) 411; Watson v. Jacobs, 29 Vt. 170; Johnson v. Bank, 11 Md 412; Coffin v. Heath, 6 Metc. (Mass.) 78; Wiggin v. Swett, 6 Metc. (Mass.) 198, 39 Am. Dec. 716; Prusa v. Everett, 78 Neb. 250, 110 N. W. 568; Prusa v. Everett, 78 Neb. 251, 113 N. W. 571.

A residuary legatee has sufficient interest in an estate to request the appointment of an administrator d. b. n. to collect debts, whether it will make the estate solvent or not; Mallory's Appeal from Probate, 62 Conn. 218, 25 Atl. 109.

De bonis non cum testamento annexo. That which is granted when an executor dies leaving a part of the estate unadministered. Comyns, Dig. Adm. B, 1; Ellmaker's Estate, 4 Watts (Pa.) 34, 38, 39. It cannot be based on a will made in a foreign country if invalid there because of defective execution; Coleman's Estate, 13 Pa. Co. Ct. 81.

Durante absentia. That which subsists during the absence of the executor and until he has proved the will. In England, by statute, such an administration is raised during the absence of the executor, and is not determined by the executor's dying abroad; 4 Hagg. Eccl. 360; 3 Bos. & P. 26; see Willing v. Perot, 5 Rawle (Pa.) 264.

Durante minori ætate. That which is granted when the executor is a minor. It continues until the minor attains his lawful age to act, which at common law is seventeen years; 5 Coke 29. When an infant is sole executor, the statute 38 Geo. III. c. 87, s. 6 provides that probate shall not be granted to him until his full age of twenty-one years, and that *adm. cum test. annexo* shall be granted in the mean time to his guardian or other suitable person. A similar statute provision exists in most of the United States. This administrator may collect assets, pay debts, sell *bona perituræ*, and perform such other acts as require immediate attention. He may sue and be sued; Bacon, Abr. *Executor*, B, 1; Cro. Eliz. 718; 2 Bla. Com. 503; 5 Coke 29; Taylor v. Barron, 35 N. H. 484, 493.

Where there are no creditors or heirs of age, the tutor of minor heirs has a right to take possession of succession property and administer their interests in it; Succession of Bourgeois, 43 La. Ann. 247, 9 South. 34.

Foreign administration. That which is exercised by virtue of authority properly conferred by a foreign power.

The general rule in England and the United States is that letters granted in one jurisdiction, give no authority to sue or be sued in another jurisdiction, though they may be ground for new probate authority; 5 Ves. 44; Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed 439; Doe v. M'Farland, 9 Cra. (U. S.) 151, 3 L. Ed. 687; Armstrong v. Lear, 12 Wheat. (U. S.) 169, 6 L. Ed. 589; Perkins v. Williams, 2 Root (Conn.) 462; Dangerfield's Ex'x v. Thurston's Heirs, 8 Mart. (N. S.) [La.] 232; M'Cullough v. Young, 1 Binn. (Pa.) 63; Matthews v. Douthitt, 27 Ala. 273, 62 Am. Dec. 765; Fisk v. Norvel, 9 Tex. 13, 58 Am. Dec. 128; State v. Price, 21 Mo. 434; Cocke v. Finley, 29 Miss. 127; Dickinson v. M'Craw, 4 Rand. (Va.) 158; Allsup v. Allsup's Heirs, 10 Yerg. (Tenn.) 283, Stearns v. Burnham, 5 Greenl. (Me.) 261, 17 Am. Dec. 228; Taylor v. Barron, 35 N. H. 484; Wood v. Gold, 4 McLean C. C. 577, Fed. Cas. No. 17,947; Vaughan v. Northup, 15 Pet. (U. S.) 1, 10 L. Ed. 639; Hill v. Tucker, 13 How. (U. S.) 458, 14 L. Ed. 223; Black v. Allen Co., 42 Fed. 618, 9 L. R. A. 433; Farrington v. Trust Co., 9 N. Y. Supp. 433. Hence, when persons are domiciled and die in one country as A, and have personal property in another as B, the authority must be had in B, but exercised according to the laws of A; Story, Confl. Laws 23, 447; Leach v. Pillsbury, 15 N. H. 137; Spraddling v. Pipkin, 15 Mo. 118; Williams v. Williams, 5 Md. 467; Ex parte McComb, 4 Bradf. (N. Y.) 151; King v. U. S., 27 Ct. Cl. 529; Rutherford v. U. S., 27 Ct. Cl. 539; and see DOMICIL.

There is no legal privity between admin-

istrators in different states; nor between executors of a will in one state and administrators c. t. a. in another; Wilson v. Ins. Co., 164 Fed. 817, 90 C. C. A. 593, 19 L. R. A. (N. S.) 553. The principal administrator is to act in the intestate's domicil, and the ancillary is to collect claims and pay debts in the foreign jurisdiction and pay over the surplus to his principal; Pond v. Makepeace, 2 Metc. (Mass.) 114; 3 Hagg. Eccl. 199; Jones v. Marable, 6 Humph. (Tenn.) 116; Lawrence v. Kitteridge, 21 Conn. 577, 56 Am. Dec. 385; Stokely's Estate, 19 Pa. 476; Riley v. Riley, 3 Day (Conn.) 74, 3 Am. Dec. 260; The Boston, 1 Blatchf. & H. 309, Fed. Cas. No. 1,669; Kilpatrick v. Bush, 23 Miss. 199; 2 Curt. Eccl. 241; Carmichael v. Ray, 1 Rich. (S. C.) 116.

Payment to an ancillary administrator is no bar to a suit by the administrator of the domicile; Maas v. Bank, 36 Misc. 154, 72 N. Y. Supp. 1068; nor is it a defence to a prior action by the domiciliary administrator in another state, of which the defendant had knowledge before payment; Steele v. Ins. Co., 160 N. Y. 703, 57 N. E. 1125. For other cases see 15 Harv. L. Rev. 412. But in Quebec a foreign administrator is recognized; 12 Harv. L. Rev. 287; as well as foreign guardians and receivers, and this rule is said to be satisfactory in operation; *id.*, citing Lafleur, Conf. L.

An administrator appointed in Michigan cannot sue a resident of New York in the United States circuit court in that state when he had not taken out letters of administration in New York; Johnson v. Powers, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112.

But some courts hold that the probate of a will in a foreign state, if duly authenticated, dispenses with the necessity of taking out new letters in their state; Lancaster v. McBryde, 27 N. C. 421; Gray v. Patton, 2 B. Monr. (Ky.) 12; Rice v. Jones, 4 Call (Va.) 89; Vaughan v. Northup, 15 Pet. (U. S.) 1, 10 L. Ed. 639; Ives v. Allyn, 12 Vt. 589; Hayes v. Pratt, 147 U. S. 557, 13 Sup. Ct. 503, 37 L. Ed. 279.

Where a deceased plaintiff was domiciled in another state, an executor appointed in the domicil will be preferred to a temporary administrator appointed in the state of the forum, as the new party; Norman v. Goode, 113 Ga. 121, 38 S. E. 317.

It has been held that possession of property may be taken in a foreign state, but a suit cannot be brought without taking out letters in that state; Watt's Ex'rs v. Sheppard, 2 Ala. 429; Trotter v. White, 10 Smedes & M. (Miss.) 607; Suarez v. City of New York, 2 Sandf. Ch. (N. Y.) 173. In Arizona suit may be brought upon a foreign judgment without taking out new letters of administration; Arizona Cattle Co. v. Huber, 4 Ariz. 69, 33 Pac. 555. See CONFLICT OF LAWS.

For the purpose of administration, the *situs* of a debt is the domicil of the debtor and not the place where the evidence of the debt is located; Michigan Trust Co. v. Probasco, 29 Ind. App. 109, 63 N. E. 255; Murphy v. Crouse, 135 Cal. 14, 66 Pac. 971, 87 Am. St. Rep. 90, where it was said that in this respect certificates of stock do not differ from other choses in action. The *situs*, as property, of corporate stock owned by a non-resident decedent is within the county where the corporate property is or where the corporation has its principal place of business; In re Arnold, 114 App. Div. 244, 99 N. Y. Supp. 740.

Pendente lite. That which is granted pending the controversy respecting an alleged will or the right of appointment. An officer of the court is appointed to take care of the estate only till the suit terminates; 2 P. Will. 589; 1 Hagg. Eccl. 313; Bergin v. McFarland, 26 N. H. 533; Fisk v. Norvel, 9 Tex. 13, 58 Am. Dec. 128; Barksdale v. Cobb, 16 Ga. 13; Cole v. Wooden, 18 N. J. L. 15. He may maintain suits, but cannot distribute the assets; 1 Ball & B. 192; Cain v. Warford, 7 Md. 282; Appeal of Patton, 31 Pa. 465; Rogers v. Dively, 51 Mo. 193.

Public. That which the public administrator performs. This is in many of the states by statute in those cases where persons die intestate, without leaving any who are entitled to apply for letters of administration; Ferrie v. Public Administrator, 3 Bradf. (N. Y.) 151; Public Adm'rs v. Burdell, 4 *id.* 252.

In many states there is provision of law for the appointment of a public administrator whose duty it is to administer upon the estate of any person found dead within his jurisdiction. Such officer is competent to administer on the estate within his county of any decedent irrespective of the place of his death; In re Richardson's Estate, 120 Cal. 344, 52 Pac. 832; and such administrator has no authority to refuse to enter upon or to continue the administration of an estate, which by law he should administer. He cannot retain the office and choose for himself which of its duties he will perform; State v. Kennedy, 73 Mo. App. 384.

The authority of a public administrator to take charge of an estate cannot be collaterally questioned; Dunn v. German-American Bank, 109 Mo. 90, 18 S. W. 1139; Weir v. Monahan, 67 Miss. 434, 7 South. 291.

Special. That which is limited either in time or in power. Such administration does not come under the statutes of 31 Edw. III. c. 11, and 21 Hen. VIII. c. 5, on which the modern English and American laws are founded. A judgment against a special administrator binds the estate; 1 Sneed 430; although there is no property but merely a right of action, and if there is delay in granting the administration, a special administrator might be appointed where immediate settlement could be made; Groce v. Helm, 91 Mich. 450, 51 N. W. 1106. In the

United States, administration is a subject charged upon courts of civil jurisdiction. A multiplicity of statutes defines the powers of such courts in the various states. The public officer authorized to delegate the trust is called surrogate, judge of probate, register of wills, etc. In some states, these courts are of special jurisdiction, while in others the power is vested in county courts.

Death of the intestate must have taken place, or the court will have no jurisdiction. Probate proceedings on the estate of a person who is not dead are void; Fay v. Costa, 2 Cal. App. 241, 83 Pac. 275; Steele's Unknown Heirs v. Belding (Tex.) 148 S. W. 592. A decree of the court is *prima facie* evidence of his death, and puts the burden of disproof upon the party pleading in abatement; 3 Term 130; Munro v. Merchant, 26 Barb. (N. Y.) 383; Barkaloo's Adm'r v. Emerick, 18 Ohio 268.

Estates of absentees. Statutes authorizing administration on the estate of an absentee after a fixed period, as if he were dead, have been held void as a deprivation of property without due process of law; Carr v. Brown, 20 R. I. 215, 38 Atl. 9, 38 L. R. A. 294, 78 Am. St. Rep. 855; Lavin v. Bank, 1 Fed 641, 18 Blatchf. 1; Clapp v. Houg, 12 N. D. 600, 98 N. W. 710, 65 L. R. A. 757, 102 Am. St. Rep. 589; Savings Bank of Baltimore v. Weeks, 103 Md. 601, 64 Atl. 295, 6 L. R. A. (N. S.) 690; Selden v. Kennedy, 104 Va. 826, 52 S. E. 635, 4 L. R. A. (N. S.) 944, 113 Am. St. Rep. 1076, 7 Ann. Cas. 879; in the absence of a statute; Scott v. McNeal, 154 U. S. 49, 14 Sup. Ct. 1108, 38 L. Ed. 896; Springer v. Shavender, 118 N. C. 53, 23 S. E. 976, 54 Am. St. Rep. 708; Devlin v. Com., 101 Pa. 273, 47 Am. Rep. 710; subsequently a statute was passed in Pennsylvania and held constitutional; Cunnius v. School Dist., 206 Pa. 469, 56 Atl. 16, 98 Am. St. Rep. 790; this judgment was affirmed in 198 U. S. 458, 25 Sup. Ct. 721, 49 L. Ed. 1125, 3 Ann. Cas. 1121, where the court distinguished the case from that in 154 U. S., *supra*, upon the ground that in the former case there was no statute, and that in the present one, a statute having been passed and the period of absence being fixed and not unreasonably brief, it was valid and not open to the objection of want of due process of law; and similar statutes have been held valid; Barton v. Kimmerley, 165 Ind. 609, 76 N. E. 250, 112 Am. St. Rep. 252; Roderigas v. Savings Inst., 63 N. Y. 460, 20 Am. Rep. 555, which appeared for a time to stand alone and was frequently referred to as having been decided by a mere majority of the court. The same statute was held invalid by the federal court in Lavin v. Savings Bank, 18 Blatchf. 1, 1 Fed. 641. So far as the federal constitution is concerned, the Pennsylvania case in Cunnius v. School Dist., 198 U. S. 458, 25 Sup. Ct. 721, 49 L. Ed. 1125, would seem to settle the question, at least so far as to determine that such statutes are not obnoxious to the XIVth Amendment of the federal constitution. So far as the state constitutions are concerned the cases differ, as appears by the above citations. The case in Maryland is put mainly upon the ground that the act contained no provision requiring that before the distribution of the property of the absentee, security should be given for its refund if he should prove to be alive.

APPOINTMENT OF EXECUTORS AND ADMINISTRATORS AND THE LETTERS TESTAMENTARY OR OF ADMINISTRATION. The appointment of executors and administrators is made upon application to the proper officer having jurisdiction, in some states by a petition followed by a citation to the interested parties, to be served upon them or published according to law. Any one of such interested parties may appear and show cause against the appointment. In other states the appointment is made without notice, upon proof to the probate officer of the jurisdictional facts. The evidence of appointment which is delivered to the appointee is termed, in the case of administrators, *Letters of Administration*, and in the case of executors, *Letters Testamentary*. In either case the letters certify that there is given to the executor or administrator, as the case may be, full power of administration of the goods, chattels, rights, and credits which were of the deceased, and the person appointed is required to make an inventory and file the same, to pay the debts of the deceased so far as the property will extend, in the legal order of payment, and render a true and just account of his transactions in the administration of the trust. In respect to all matters relating thereto, there is little or no difference in the law relating to letters of administration or letters testamentary. The grant of such letters is a judicial act and recorded as such, and the letters themselves should be duly authenticated under the seal of the court; Schoul. Ex. & Ad. § 118. For the form of letters, see Smith, Prob. Pract. App.; Witzel v. Pierce, 22 Ga. 112.

In most of the states it is provided by law that both executors and administrators shall be required to give bond before receiving their letters from the probate authority. Such requirements have been held to impose on the executors and administrators no new duties, but their effect is merely to give additional remedy to creditors, legatees, and distributees; Eaton v. Benefield, 2 Blackf. (Ind.) 52. In some jurisdictions it is quite usual to find a provision in the will dispensing with the giving of the bond by the executors and such indication of the will of the testator is respected. It has been held, however, that a provision of a will that the executor may act without executing a bond is at all times subject to the control of the courts; Busch v. Rapp, 63 S. W. 479, 23 Ky. L. Rep. 605. One who is not interested in

the assets of the estate can raise no question as to the sufficiency or legality of the bond which has been accepted; Jones v. Smith, 120 Ga. 642, 48 S. E. 134. The failure of an administrator to give a bond is ground for removal; Toledo, St. L. & K. C. R. Co. v. Reeves, 8 Ind. App. 667, 35 N. E. 199; but the fact that an executor's bond is invalid, is no ground for his removal; Barricklow v. Stewart, 31 Ind. App. 446, 68 N. E. 316.

Executors and administrators are charged with a trust, and liable for the want of due care such as prudent men exercise in managing their own affairs; State v. Dickson, 213 Mo. 66, 111 S. W. 817; In re Chadbourne, 15 Cal. App. 363, 114 Pac. 1012.

The grant of letters has been held to be *prima facie* evidence of all the essential jurisdictional facts; Davis v. Swearingen, 56 Ala. 31; but it is generally considered that the probate court, in granting letters of administration does not adjudicate that the person is dead, but that letters shall be granted to the applicant; Carroll v. Carroll, 60 N. Y. 121, 19 Am. Rep. 144; Newman v. Jenkins, 10 Pick. (Mass.) 515; and the letters are not legal evidence of the death; Mutual Ben. Life Ins. Co. v. Tisdale, 91 U. S. 238, 23 L. Ed. 314. Letters of administration upon the estate of a person who is in fact alive have no validity or effect as against him; Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896.

As to the grant of letters of administration upon the estate of a person presumed to be dead, see *supra*.

A grant of letters which includes two estates under one administration would be irregular and objectionable, but it has been held not to be void; Grande v. Herrera, 15 Tex. 533; the letters should be signed by the judge or other probate officer; Succession of Carlon, 26 La. Ann. 329; Matthews v. Joyce, 85 N. C. 258; and they are not void though the seal of the court is affixed in the wrong place; Sharp v. Dye, 64 Cal. 9, 27 Pac. 789.

Letters testamentary and of administration are, according to their terms and extent, conclusive as to personal property while they remain unrevoked. They cannot be questioned in a court of law or of equity, and cannot be impeached, even by evidence of fraud or forgery. Proof that the testator was insane, or that the will was forged, is inadmissible; 12 Ves. 298; Broderick's Will, 21 Wall. (U. S.) 503, 22 L. Ed. 599; Hall v. Woodman, 49 N. H. 295; Appeal of Hegarty, 75 Pa. 503; Inhabitants of Dublin v. Chadbourn, 16 Mass. 433; Jackson v. Le Grange; 19 Johns. (N. Y.) 386, 10 Am. Dec. 237; Irwin v. Scriber, 18 Cal. 499; Carroll v. Carroll, 60 N. Y. 123, 19 Am. Rep. 144; Moore's Estate v. Moore, 33 Neb. 509, 50 N. W. 443; O'Connor v. Huggins, 113 N. Y. 511, 21 N. E. 184; Robinson v. Epping, 24 Fla. 237, 4 South. 812. But if the nature of the plea raise the issue, it may be shown that the court granting the supposed letters had no jurisdiction, and that its action is therefore a nullity; 3 Term 130; see Knox v. Nobel, 77 Hun 230, 28 N. Y. Supp. 355; or that the seal attached to the supposed probate has been forged, or that the letters have been revoked, or that the testator is alive; In re Huff's Estate, 15 S. & R. (Pa.) 42; Griffith v. Frazier, 8 Cra. (U. S.) 9, 3 L. Ed. 471; Jochumsen v. Bank, 3 Allen (Mass.) 87; Duncan v. Stewart, 25 Ala. 408, 60 Am. Dec. 527; Harwood v. Wylie, 70 Tex. 538, 7 S. W. 789. Where an executor qualified and acted for many years under his appointment, he will not be allowed to dispute the recitation in his appointment that citation to the heirs was issued and served; In re Moore, 95 Cal. 34, 30 Pac. 106.

Though the probate court has exclusive jurisdiction of the grant of letters, yet where a legacy has been obtained by fraud, or the probate has been procured by fraud on the next of kin, a court of equity would hold the legatee or wrong-doer as bound by a trust for the party injured; Wms. Ex. 552. While a court of equity cannot remove an executor; Mannhardt v. Staats Zeitung Co., 90 Ill. App. 315; it may restrain him from acting, though such restraint will incidentally prevent him from performing his duties as executor; Bentley v. Dixon, 60 N. J. Eq. 353, 46 Atl. 689; and even take the estate out of his hands and place it in the custody of a receiver; Bolles v. Bolles, 44 N. J. Eq. 385, 14 Atl. 593.

Letters may be revoked by the court which made the grant, or on appeal to a higher tribunal, reversing the decision by which they were granted. Special or limited administration will be revoked on the occasion ceasing which called for the grant. An executor or administrator will be removed when the letters were obtained improperly; Wms. Ex. 571.

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

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

A foreign probate at the place of domicil has in itself no force or effect beyond the jurisdiction in which it was granted, but on its production fresh probate will be granted thereon in all other jurisdictions where assets

are found. This is the general rule, but is liable to be varied by statute, and is so varied in some of the states of the United States.

Letters testamentary or of administration confer no power beyond the limits of the state in which they are granted, and do not authorize the person to whom they are issued to maintain any suit in the state or federal courts in any other state; Johnson v. Powers, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112; Wilkins v. Ellett, 108 U. S. 256, 2 Sup. Ct. 641, 27 L. Ed. 718; the executor or administrator has therefore, as such, no right of control over property in another state or country; Mansfield v. Turpin, 32 Ga. 260; Upton v. Adam's Ex'rs, 27 Ind. 432; Wood v. Gold, 4 McLean 577; Fed. Cas. No. 17,947; Lewis v. McMillen, 41 Barb. (N. Y.) 431; Carmichael v. Ray, 40 N. C. 365; he cannot interfere with assets, collect or discharge debts, control lands, sue or be sued; Schoul. Ex. & Ad. § 173. The principle is, that a grant of power to administer the estate of a decedent operates only as of right within the jurisdiction which grants the letters, and in order that a foreign representative may exercise any such function he must be clothed with authority from the jurisdiction into which he comes, and conform to the requirements imposed by local law; Moore v. Fields, 42 Pa. 467; Beckham v. Wittkowski, 64 N. C. 464; Price v. Morris, 5 McLean, 4, Fed. Cas. No. 11,414; Bell's Adm'r v. Nichols, 38 Ala. 678; Graveley v. Graveley, 25 S. C. 1, 60 Am. Rep. 478; Laurence v. Nelson, 143 U. S. 215, 12 Sup. Ct. 440, 36 L. Ed. 130; Duchesse d'Auxy v. Porter, 41 Fed. 68; Reynolds v. McMullen, 55 Mich. 568, 22 N. W. 41, 54 Am. Rep. 386. In most, probably all, of the states there is statutory provision, either for the grant of ancillary letters or for authorizing and regulating suits by foreign executors and administrators. In many of them these officers, properly qualified abroad, are permitted to sue for and recover local assets without other qualification, within the new jurisdiction, than putting on record their authority as conferred by the home jurisdiction, and such authority must be strictly followed. In many of the states there is authority to sue and defend without ancillary administration; Hayes v. Pratt, 147 U. S. 557, 13 Sup. Ct. 503, 37 L. Ed. 279; Banta v. Moore, 15 N. J. Eq. 97; Marrett v. Babb's Ex'r, 91 Ky. 88, 15 S. W. 4; Lewis v. Adams, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423; Tyer v. Melling Co., 32 S. C. 598, 10 S. E. 1067; and this right to sue has been extended to a foreign corporation duly authorized to act in its own jurisdiction; Deringer's Adm'r v. Deringer's Adm'r, 5 Houst. (Del.) 416, 1 Am. St. Rep. 150; in some statutes there is express authority to defend suits; Moss v. Rowland, 3 Bush (Ky.) 505; but it has been held that statutory authority to sue does not imply capacity to be sued; Jones v. Lamar, 77 Ga. 149; nor to sue for intestate lands where they were made by statute assets in the hands of a domestic administrator; Fairchild v. Hagel, 54 Ark. 61, 14 S. W. 1102; but to sue for the grant of local administration; Gibson v. Ponder, 40 Ark. 195; where no suit is necessary a foreign executor or administrator has been permitted to remove personal property and carry it away for the purpose of administration; Petersen v. Bank, 32 N. Y. 21, 88 Am. Dec. 298; Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790, 11 L. R. A. 41; McNamara v. McNamara, 62 Ga. 200; Selleck v. Rusco, 46 Conn. 370, and in the absence of local administration payment to a foreign representative is recognized; Wilkins v. Ellett, 108 U. S. 256, 2 Sup. Ct. 641, 27 L. Ed. 718; Wyman v. Halstead, 109 U. S. 656, 3 Sup. Ct. 417, 27 L. Ed. 1068; Parsons v. Lyman, 20 N. Y. 103.

The latter may assign choses in action belonging to the estate, and the assignee may sue thereon in his own name in another state, unless prevented by its laws respecting assignments from so doing; Wilkins v. Ellett, 108 U. S. 256, 2 Sup. Ct. 641, 27 L. Ed. 718; Campbell v. Brown, 64 Ia. 425, 20 N. W. 745, 52 Am. Rep. 446; Solinsky v. Bank, 82 Tex. 244, 17 S. W. 1050; Petersen v. Bank, 32 N. Y. 21, 88 Am. Dec. 298; he may also sue in another state on a judgment there recovered; Talmage v. Chapel, 16 Mass. 71; Biddle v. Wilkins, 1 Pet. (U. S.) 686, 7 L. Ed. 315; Trecothick v. Austin, 4 Mas. 16, Fed. Cas. No. 14,164; Barton v. Higgins, 41 Md. 539; or he may sue in his individual capacity in another state, on a judgment recovered by him in his official capacity in his own state, Tittman v. Thornton, 107 Mo. 500, 17 S. W. 979, 16 L. R. A. 410; Arizona Cattle Co. v. Huber, 4 Ariz. 69, 33 Pac. 555; and upon a contract made with himself as such a foreign executor or administrator may sue; Barrett v. Barrett, 8 Greenl. (Me.) 346; Du Val v. Marshall, 30 Ark. 230; Sto. Confl. L. §§ 513-516. The term foreign as applied to executors and administrators refers to the jurisdiction from which their authority is derived and not to residence; Fugate v. Moore, 86 Va. 1045, 11 S. E. 1063, 19 Am. St. Rep. 926; Hopper v. Hopper, 125 N. Y. 400, 26 N. E. 457, 12 L. R. A. 237. The estate of a deceased person is substantially one estate, in which those entitled to the residue are interested as a whole, even though situated in various jurisdictions, and although each distinct part of it must be settled in the jurisdiction by which letters were granted whether for the purpose of ancillary or principal administration; Schoul. Ex. & Ad. § 174; ordinarily it is the practice to recognize the person appointed executor or administrator at the domicil of the deceased as the person to whom ancillary letters will be granted; In re Blancan, 4 Redf. (N. Y.) 151; Whart. Confl. L. § 608; but there is no privity between persons appointed in differ-

ent jurisdictions whether they be different or the same, and the executor or administrator in one state is not concluded in a subsequent suit by the same plaintiff in another state against a person having administration on the estate of the deceased; Johnson v. Powers, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112; Braithwaite v. Harvey, 14 Mont. 208, 36 Pac. 38, 27 L. R. A. 101, 43 Am. St. Rep. 625; Jones v. Jones, 39 S. C. 247, 17 S. E. 587, 802. But a different rule has been applied where different executors are appointed by the will in different states, and they are held to be in privity with each other, and a judgment against those in one state is evidence against those in another; Hill v. Tucker, 13 How. (U. S.) 458, 14 L. Ed. 223; Goodall v. Tucker, 13 How. (U. S.) 469, 14 L. Ed. 227.

When any surplus remains in the hands of a foreign or ancillary appointee after the discharge of all debts in that jurisdiction, it is usually, as a matter of comity, ordered to be paid over to the domiciliary appointee; Wright v. Phillips, 56 Ala. 69; 50 L. J. Ch. 740; and in his hands becomes applicable to debts, legacies, and expenses; Schoul. Ex. & Ad. § 174. It is the policy of the law with respect to these matters to encourage the spirit of comity in subordination to the rights of local creditors who are considered to be entitled to the benefit of assets within their own jurisdiction, rather than to be driven to the assertion of their claims in a foreign state or country; *id.;* but see LEX FORI.

As a general rule it is the duty of the principal personal representative to collect and make available to the estate all such assets as are available to him consistently with foreign law; 4 M. & W. 171; 1 Cr. & J. 157; even to the extent of seeing that foreign letters are taken out for the collection of foreign assets; or of collecting and realizing upon property and debts so far as it may be done by him, without resort to a foreign jurisdiction; Trecothick v. Austin, 4 Mas. 33, Fed. Cas. No. 14,164; In re Butler, 38 N. Y. 397; Merrill v. Ins. Co., 103 Mass. 245, 4 Am. Rep. 548; but the domestic representative is not to be held in this respect to too onerous a responsibility with respect to foreign property which he cannot realize by virtue of his appointment. See Sto. Confl. L. § 514 *a;* Schoul. Ex. & Ad. § 175. It is the policy of the courts to sustain, if possible, even irregular acts of executors or administrators done in good faith and without detriment of the estate; Duffy v. McHale (R. I.) 85 Atl. 36.

There is some difference of opinion as to whether a voluntary surrender of assets to the domiciliary representative protects the debtor against claims made by virtue of an administration within his own jurisdiction. The United States supreme court, supported by the current of American authority, maintains that, as between the states such payment or delivery of assets is sufficient to discharge the local debtor in the absence of local administration; U. S. v. Cox, 18 How. (U. S.) 104, 15 L. Ed. 299; Wilkins v. Ellett, 9 Wall. (U. S.) 740, 19 L. Ed. 586; Wilkins v. Ellett, 108 U. S. 256, 2 Sup. Ct. 641, 27 L. Ed. 718; Hatchett v. Berney, 65 Ala. 39; Ramsay v. Ramsay, 97 Ill. App. 270; In re Williams' Estate, 130 Ia. 553, 107 N. W. 608; Maas v. Bank, 176 N. Y. 377, 68 N. E. 658, 98 Am. St. Rep. 689; Dexter v. Berge, 76 Minn. 216, 78 N. W. 1111; Gardiner v. Thorndike, 183 Mass. 82, 66 N. E. 633; Maas v. Bank, 176 N. Y. 377, 68 N. E. 658, 98 Am. St. Rep. 689 (where it was also held that failure to inquire whether a resident administrator had been appointed was negligence sufficient to charge a bank making payment with the knowledge which inquiry would have furnished). But, as a rule, the power of the executor or administrator is confined to the state appointing; In re Crawford's Estate, 68 Ohio St. 58, 67 N. E. 156, 96 Am. St. Rep. 648. The domiciliary administrator will sometimes be recognized *ex comitate* by courts of another state; State v. Fulton (Tenn.) 49 S. W. 297. The English doctrine is otherwise; Whart. Confl. L. 626; Sto. Confl. L. 515 *a*. See Dicey, Confl. L. ch. X. (c), ch. XVII. (B), with Moore's American notes. So, by agreement of the parties, he was allowed to become a party in his representative capacity; Ellis v. Ins. Co., 100 Tenn. 177, 43 S. W. 766; though it was held that he should not sue in New York for the wrongful death of his intestate without taking out ancillary letters; Dodge v. North Hudson, 188 Fed. 489.

EXECUTORS. An executor is, as above defined, a person charged with the administration of the estate of one who leaves a will.

Lord Hardwicke, in 3 Atk. 301, says, "The proper term in the civil law, as to goods, is *hæres testamentarius;* and executor is a barbarous term, unknown to that law." And again, "What we call executor and residuary legatee is, in the civil law, universal heir." *Id* 300.

The word executor, taken in its broadest sense, has three acceptations. 1. *Executor a lege constitutus.* He is the ordinary of the diocese. 2. *Executor ab episcopo constitutus* or *executor dativus;* and that is he who is called an administrator to an intestate. 3. *Executor a testatore constitutus,* or *executor testamentarius;* and that is he who is usually meant when the term executor is used. 1 Wms. Ex. 185. See ORDINARY.

The power of an executor under modern probate law is derived not so much from the will of the testator as from the appointment of the court and the powers conferred upon it by law; Lamb v. Helm, 56 Mo. 420. While he is a trustee in the broadest sense, he is not such in the general acceptation of the term; In re Hibbler, 78 N. J. Eq. 217, 78 Atl. 188, affirmed In re Hibbler's Estate, 79 N. J. Eq. 230, 81 Atl. 1133.

If the executor be legally competent and accepts the trust, it is the duty of the probate court to grant letters testamentary to him; Clark v. Patterson, 214 Ill. 533, 73 N. E. 806, 105 Am. St. Rep. 127, where it was said

that legally competent meant of legal age, sound mind and memory and not convicted of crime.

One should not be appointed an executor pending a suit by him on a claim against the estate; Cogswell v. Hall, 183 Mass. 575, 67 N. E. 638. The renunciation of an executor may be by oral statement in open court; In re Baldwin's Will, 27 App. Div. 506, 50 N. Y. Supp. 872. Where one declines the appointment and another person is appointed, the former has no legal right thereafter; Briggs v. Probate Court, 23 R. I. 125, 50 Atl. 335.

A general executor is one who is appointed to administer the whole estate, without any limit of time or place, or of the subject-matter.

A rightful executor is one lawfully appointed by the testator, by his will. Deriving his authority from the will, he may do most acts before he obtains letters testamentary; but he must be possessed of them before he can declare in an action brought by him as such; 1 P. Wms. 768; Wms. Ex. 173.

An instituted executor is one who is appointed by the testator without any condition, and who has the first right of acting when there are substituted executors.

A substituted executor is a person appointed executor if another person who has been appointed refuses to act.

An example will show the difference between an instituted and a substituted executor. Suppose a man makes his son his executor, but if he will not act he appoints his brother, and if neither will act, his cousin. here the son is the instituted executor in the first degree, the brother is said to be substituted in the second degree, the cousin in the third degree, and so on. See Swinb. Wills, pt. 4, s. 19, pl. 1.

An executor de son tort is one who, without lawful authority, undertakes to act as executor of a person deceased. See EXECUTOR DE SON TORT.

A special executor is one who is appointed or constituted to administer either a part of the estate, or the whole for a limited time, or only in a particular place.

An executor to the tenor is a person who is not directly appointed by the will an executor, but who is charged with the duties which appertain to one: as, "I appoint A B to discharge all lawful demands against my will;" 3 Phill. Eccl. 116; 1 Eccl. 374; Swinb. Wills 247; Wentw. Ex. pt. 4, s. 4, p. 230; [1892] Prob. 227, 380; 66 Law T. N. S. 382.

Qualification. Generally speaking, all persons who are capable of making wills, and many others besides, may be executors; 2 Bla. Com. 503. The king may be an executor. So may a corporation sole. So may a corporation aggregate; Toller, Exec. 30; Schoul. Ex. & Ad. 32. So may an alien, if he be not an alien enemy residing abroad or unlawfully continuing in the country. See McGregor v. McGregor, 3 Abb. Dec. (N. Y.) 92. So may married women and infants; and even infants unborn, or *en ventre sa mère*, may be executors; 1 Dane, Abr. c. 29 *a* 2, § 3; Swift v. Duffield, 5 S. & R. (Pa.) 40. But in England an infant cannot act solely as executor until his full age of twenty-one years. Meanwhile, his guardian or some other person acts for him as administrator *cum test. ann.* See Christopher v. Cox, 25 Miss. 162; Schoul. Dom. Rel. § 416; ADMINISTRATION. It was held that a married woman cannot be executrix without her husband's consent; Appeal of Stewart, 56 Me. 300; English's Ex'r v. McNair's Adm'rs, 34 Ala. 40, and that a man by marrying an executrix became executor in her right, and was liable to account as such; 2 Atk. 212; Lindsay v. Lindsay's Adm'rs, 1 Des. (S. C.) 150.

Persons attainted, outlaws, insolvents, and persons of bad moral character may be qualified as executors, because they act *en autre droit* and it was the choice of the testator to appoint them; 6 Q. B. 57; Berry v. Hamilton, 12 B. Mon. (Ky.) 191, 54 Am. Dec. 515; Sill v. McKnight, 7 W. & S. (Pa.) 244; 3 Salk. 162. It is the duty of the court, when a will has been proven, to grant letters testamentary to the person named in it upon application, if he is not disqualified by statute; Holladay v. Holladay, 16 Or. 147, 19 Pac. 81. Poverty or insolvency is no ground for refusing to qualify an executor; but an insolvent executor may be compelled to give security; Longberger's Estate, 148 Pa. 564, 24 Atl. 120. In some states a bond is required from executors, similar to or identical with that required from administrators. The testator may, by express direction, exempt from the obligation of giving a bond with sureties any trustees whom he appoints or directs to be appointed, but not his executor, unless permitted to do so by state statute; because the creditors of the estate must look to the funds in the executor's hands.

Idiots and lunatics cannot be executors; and an executor who becomes *non compos* may be removed; 1 Salk. 36. In Massachusetts, when any executor shall become insane, or otherwise incapable of discharging his trust, or *evidently unsuitable therefor*, the judge of probate may remove him; Thayer v. Homer, 11 Metc. (Mass.) 104. A drunkard may perform the office of executor; Berry v. Hamilton, 12 B. Monr. (Ky.) 191, 54 Am. Dec. 515; Sill v. McKnight, 7 W. & S. (Pa.) 244; but in some states, as Massachusetts and Pennsylvania, there are statutes providing for his removal.

Appointment. Executors can be appointed only by will or codicil; but the word "executor" need not be used. He may be appointed and designated, by committing to his charge those duties which it is the province of an executor to perform; 3 Phill. Eccl. 118; Myers v. Daviess, 10 B. Monr. 394; Ex parte McDonnell, 2 Bradf. Surr. (N. Y.) 32; State v. Watson, 2 Speers (S. C.) 97; Carpenter v. Cameron, 7 Watts (Pa.) 51. Even a direction

to keep accounts will, in the absence of any thing to the contrary, constitute the person addressed an executor. A testator may project his power of appointment into the future and exercise it after death through an agent pointed out by name or by his office; Bishop v. Bishop, 56 Conn. 208, 14 Atl. 808.

The appointment of an executor may be absolute, qualified, or conditional. It is *absolute* when he is constituted certainly, immediately, and without any restriction in regard to the testator's effects or limitation in point of time; Toller, Ex. 36. It may be *qualified* as to the time or place wherein, or the subject-matters whereon, the office is to be exercised; 1 Will. Ex. 204. Thus, a man may be appointed executor, and his term made to begin or end with the marriage of testator's daughter; or his authority may be limited to the state: or to one class of property, as if A be made executor of goods and chattels in possession, and B of *choses* in action; Swinb. Wills, pt. 4, s. 17, pl. 4; 3 Phill. Eccl. 424. Still, as to creditors, three limited executors all act as one executor, and may be sued as one; Cro. Car. 293. Finally, an executor may be appointed *conditionally*, and the condition may be precedent or subsequent. Such is the case when A is appointed in case B shall resign. Godolphin, Orph. Leg. pt. 2, c. 2, § 1. As to appointment, see Manning v. Leighton, 65 Vt. 84, 26 Atl. 258, 24 L. R. A. 684; 39 Sol. J. 228, 244.

Removal. An executor who fails to keep proper accounts or to render any account for a long period, who retains the trust funds mixed with his own and who makes improper investments, should be dismissed; Simon's Estate, 155 Pa. 215, 26 Atl. 424; but failure to account is not compulsory ground of removal; Cosby v. Weaver, 107 Ga. 761, 33 S. E. 656; and the mere delay of an executor to convert real estate into personalty when the same has increased in value, is not such misconduct as to warrant his removal; Wilcox v. Quinby, 65 Hun 621, 20 N. Y. Supp. 5. He may be removed, however, where he has any conflicting personal interest; Putney v. Fletcher, 148 Mass. 247, 19 N. E. 370.

Assignment. An executor cannot assign his office. In England, if he dies having proved the will, his own executor becomes also the original testator's executor. But if he dies intestate, an administrator *de bonis non* of the first testator succeeds to the executorship. And an administrator *de bonis non* succeeds to the executorship in both these events, in the United States generally, wherever a trust is annexed to the office of executor; Hendren v. Colgin, 4 Munf. (Va.) 231; Patterson v. High, 43 N. C. 52; Vance v. Vance, 17 Me. 204; In re Van Wyck, 1 Barb. Ch. (N. Y.) 565; *Lott v. Meacham*, 4 Fla. 144.

Acceptance. The appointee may accept or refuse the office of executor; 3 Phill. Eccl. 577; Stebbins v. Lathrop, 4 Pick. (Mass.) 33; Williams v. Cushing, 34 Me. 370; Leavitt v. Leavitt, 65 N. H. 102, 18 Atl. 920. His acceptance may be implied by acts of authority over the property which evince a purpose of accepting, and by any acts which would make him an executor *de son tort*, which see. So his refusal may be inferred from his keeping aloof from all management of the estate, Van Horne v. Fonda, 5 Johns. Ch. (N. Y.) 388; Ayres v. Weed, 16 Conn. 291; Marr v. Peay, 6 N. C. 85, 5 Am. Dec. 521; Ralston's Estate, 158 Pa. 645, 28 Atl. 139. But he cannot be compelled to accept and qualify or renounce in some formal manner; Cable v. Cable, 76 Ia. 163, 40 N. W. 700. If one of two or more appointees accepts, and the other declines or dies, or becomes insane, he becomes sole executor; Croft v. Steele, 6 Watts (Pa.) 373. An administrator *de bonis non* cannot be joined with an executor.

Acts before probate. The will itself is the sole source of an executor's title. Probate is the evidence of that title. See Wolfe v. Underwood, 97 Ala. 375, 12 South. 234; Clapp v. Stoughton, 10 Pick. (Mass.) 463; Shirley v. Healds, 34 N. H. 407. Before probate, an executor may do nearly all the acts which he can do after. He can receive payments, discharge debts, collect and recover assets, sell bank-stock, give or receive notice of dishonor, initiate or maintain proceedings in bankruptcy, sell or give away goods and chattels, and pay legacies. And when he has acted before probate he may be sued before probate; 6 Term 295; Rand v. Hubbard, 4 Metc. (Mass.) 252. He may commence, but he cannot maintain, suits before probate, except such suits as are founded on his actual possession; 3 C. & P. 123; Hutchins v. Adams, 3 Greenl. (Me.) 174; Strong v. Perkins, 3 N. H. 517; 2 Atk. 285. So in some states he cannot sell land without letters testamentary; Kerr v. Moon, 9 Wheat. (U. S.) 565, 6 L. Ed. 161; or transfer a mortgage; Cutter v. Davenport, 1 Pick. (Mass.) 81, 11 Am. Dec. 149; or remain in his own state and sue by attorney elsewhere; Hutchins v. Bank, 12 Metc. (Mass.) 423; or indorse a note so as to be sued, in some states; Stearns v. Burnham, 5 Greenl. (Me.) 261, 17 Am. Dec. 228; Thompson v. Wilson, 2 N. H. 291. And see Harper v. Butler, 2 Pet. (U. S.) 239, 7 L. Ed 410; Byles, Bills 40; Story, Pr. Notes 304; Story, Bills 250; Horn v. Johnson, 87 Ga. 448, 13 S. E. 633.

Co-executors. Co-executors are regarded in law as one individual; and hence, in general, the acts of one are the acts of all; Com. Dig. *Administration* (B, 12); Gates v. Whetstone, 8 S. C. 244, 28 Am. Rep. 284; Armstrong v. O'Brien, 83 Tex. 635, 19 S. W. 268; Viele v. Keeler, 129 N. Y. 190, 29 N. E. 78. Hence the assent of one executor to a legacy is sufficient, and the sale or gift of one is the sale or gift of all. So a payment by or to

one is a payment by or to all; Herald v. Harper, 8 Blackf. (Ind.) 170; Hoke's Ex'rs v. Fleming, 32 N. C. 263; Adair v. Brimmer, 74 N. Y. 539; a release by one binds all; Devling v. Little, 26 Pa. 502. But each is liable only for the assets which have come into his own hands; Douglass v. Satterlee, 11 Johns. (N. Y.) 21. So he alone who is guilty of tort or negligence is answerable for it, unless his co-executor has connived at the act or helped him commit it; Estate of Sanderson, 74 Cal. 199, 15 Pac. 753. An executor is not liable for a *devastavit* of his co-executor; Anderson v. Earle, 9 S. C. 460. A power to sell land, conferred by will upon several executors, must be executed by all who proved the will; Wasson v. King, 19 N. C. 262. But if only one executor consents to act, his sale under a power in the will would be good, and such refusal of the others may be *in pais;* Cro. Eliz. 80; Ross v. Clore, 3 Dana (Ky.) 195; Herrick v. Carpenter, 92 Mich. 440, 52 N. W. 747. If the will gives no direction to the executors to sell, but leaves the sale to the discretion of the executors, all must join. But see less strict rules in Miller v. Meetch, 8 Pa. 417; Meakings v. Cromwell, 2 Sandf. (N. Y.) 512; Taylor v. Morris, 1 N. Y. 341. Where all the executors must unite to make a valid conveyance, no valid contract to convey can be made by a part of them; Crowley v. Hicks, 72 Wis. 539, 40 N. W. 151. One executor cannot bind his co-executors by a confession of judgment without their consent; Karl v. Black's Ex'rs, 2 Pittsb. (Pa.) 19. On the death of one or more of several joint executors, their rights and powers survive to the survivor; Bac. Abr. *Executor* (D); Shepp. Touchst. 484.

ADMINISTRATOR. The appointment of an administrator is required in the case of one who dies intestate.

The appointment of the administrator must be lawfully made with his consent, and by an officer having jurisdiction. If an improper administrator be appointed, his acts are not void *ab initio*, but are good, usually, until his power is rescinded by authority. But they are void if a will had been made, and a competent executor appointed under it; Griffith v. Frazier, 8 Cra. (U. S.) 23, 3 L. Ed. 471; 1 Dane, Abr. 556–561; Beers v. Shannon, 73 N. Y. 292. But, in general, anybody may be administrator who can make a contract. An infant cannot; McGooch v. McGooch, 4 Mass. 348; a *feme covert* may at common law with her husband's permission; 4 Bac. Abr. 67; In re Gyger's Estate, 65 Pa. 311; English's Ex'r v. McNair's Adm'rs, 34 Ala. 40. Improvident persons, drunkards, gamblers, and the like are in some states disqualified by statute; McMahon v. Harrison, 6 N. Y. 443.

Failure to apply for administration within the time prescribed is a waiver by the party entitled to it under the statute; In re Sprague's Estate, 125 Mich. 357, 84 N. W. 293; and the right of a creditor to be appointed administrator as "particular creditor" is waived by his signing a petition for the appointment of another person; In re Sullivan's Estate, 25 Wash. 430, 65 Pac. 793.

The formalities and requisites in regard to valid appointments and rules, as to notice, defective proceedings, etc., are widely various in the different states. If letters appear to have been unduly granted, or to an unfaithful person, they will be revoked; Cole v. Dial, 12 Tex. 100; Jeroms v. Jeroms, 18 Barb. (N. Y.) 24; Marcy v. Marcy, 6 Metc. (Mass.) 370; as they may be where it appears that the estate has been wasted or mismanaged; Taylor v. Taylor, 154 Ill. App. 258.

The personal property of a decedent is appropriated to the payment of his debts, so far as required, and must be first resorted to by creditors. And, by statutes, courts may grant an administrator power to sell, lease, or mortgage land, when the personal estate of the deceased is not sufficient to pay his debts; Ferguson v. Broome, 1 Bradf. (N. Y.) 10; Farrington v. King, 1 Bradf. (N. Y.) 182; Renwick v. Renwick, 1 Bradf. (N. Y.) 234; Matheson's Heirs v. Hearin, 29 Ala. 210; In re Estate of Godfrey, 4 Mich. 308; Weed v. Edmonds, 4 Ind. 468; McCoy v. Morrow, 18 Ill. 519, 68 Am. Dec. 578. The court may direct lands to be sold in order to pay taxes levied against decedent's property; Sales v. Cosgrove (Ky.) 25 S. W. 594.

Persons holding certain relations to the intestate are considered as entitled to an appointment to administer the estate in established order of precedence; Bradley v. Bradley, 3 Redf. (N. Y.) 512.

Order of appointment.—*First in order of appointment.*—The husband has his wife's personal property, and takes out administration upon her estate. But in some states it is not granted to him unless he is to receive the property eventually. So the widow can ordinarily claim sole administration, though in the discretion of the judge it may be refused her, or she may be joined with another; 2 Bla. Com. 504; Stearns v. Fiske, 18 Pick. (Mass.) 26; Edelen v. Edelen, 10 Md. 52; Jones v. Ritter's Adm'r, 56 Ala. 270; Scanlon's Estate, 2 Pa. Dist. R. 742. The widow is entitled to preference though she was not living with her husband at the time; Ross' Estate, 11 Pa. Co. Ct. R. 601.

Second in order of appointment are the next of kin. Kinship is usually computed by the civil-law rule. The English order, which is adopted in some states, is, *first*, husband or wife; *second*, sons or daughters; *third*, grandsons or granddaughters; *fourth*, great-grandsons or great-granddaughters; *fifth*, father or mother; *sixth*, brothers or sisters; *seventh*, grandparents; *eighth*, uncles, aunts, nephews, nieces, etc.; 1 P. Will. 41; 2 Add. Eccl. 352; Succession of Sloane, 12 La. Ann. 610; 2 Kent 514; Davis v. Swearingen, 56 Ala. 539.

In New York the order is, the widow; the

children; the father; the brothers; the sisters; the grandchildren; any distributee being next of kin; McCosker v. Golden, 1 Bradf. (N. Y.) 64; Peters v. Public Adm'r, 1 Bradf. (N. Y.) 200; In re Com'rs of Emigration, 1 Bradf. (N. Y.) 259.

When two or three are in the same degree, the probate judge may decide between them; and in England he is usually guided by the wishes of the majority of those interested. This discretion, however, is controlled by certain rules of priority as to persons of equal grades, which custom or statute has made. *Males* are generally preferred to females, though from no superior right. *Elder* sons are preferred to younger, usually, and even when no doctrine of primogeniture subsists. So *solvent* persons to insolvent, though the latter may administer. So *business* men to others. So *unmarried* to married women. So relations of the *whole* blood to those of the half blood. So *distributees* to all other kinsmen. As between kindred of equal degree a son will be preferred to a daughter; In re Hill's Estate, 55 N. J. Eq. 764, 37 Atl. 952; and although generally men of the same degree are preferred to women, a niece is preferred to a grand-nephew, being one degree nearer; In re Hawley's Estate, 37 Misc. 667, 76 N. Y. Supp. 461. The next of kin having the right of administration and not desiring to exercise it may nominate another in his stead, who shall be nominated if fit and suitable under the same rules which would be applied to the next of kin himself; In re Wooten's Estate, 114 Tenn. 289, 85 S. W. 1105; a non-resident may be an administrator; Fulgham v. Fulgham, 119 Ala. 403, 24 South. 851; Jones v. Smith, 120 Ga. 642, 48 S. E. 134.

The appointment in all cases is voidable when the court did not give a chance to all parties to come in and claim it.

Third in order of appointment.—Creditors (and, ordinarily, first the largest one) have the next right; 67 Law T. (N. S.) 503 A creditor has no right of administration if there are next of kin; In re Barr's Estate, 38 Misc. 355, 77 N. Y. Supp. 935; but if there be no widow and next of kin, a creditor is entitled to administration; Stebbins v. Palmer, 1 Pick. (Mass.) 71, 11 Am. Dec. 146. To prevent fraud, a creditor may be appointed when the appointee of the two preceding classes does not act within a reasonable time. A creditor may make oath of his account to prove his debt, but no rule establishes the size of the debt necessary to be proved before appointment; Arnold v. Sabin, 1 Cush. (Mass.) 525. After creditors, any suitable person may be appointed. Generally, consuls administer for deceased aliens; and this is sometimes provided by treaties, which see.

Where all the persons applying for appointment are equally qualified, and competent, the court must appoint the one having a prior right under the statute, and it has no discretion; In re Nickals, 21 Nev. 462, 34 Pac. 250.

Co-administrators, in general, must be joined in suing and in being sued; but, like executors, the acts of each, in the delivery, gift, sale, payment, possession, or release of the intestate's goods, are the acts of all, for they have joint power; Bac. Abr. *Exec.* C. 4; Com. Dig. *Administration* (B, 12); 1 Dane, Abr. 383; Saunders' Heirs v. Saunders' Ex'rs, 2 Litt. (Ky.) 315; Turner's Ex'rs v. Wilkins, 56 Ala. 173. If one is removed by death, or otherwise, the whole authority is vested in the survivor; Lewis' Ex'rs v. Brooks, 6 Yerg. (Tenn.) 167; Treadwell v. Cordis, 5 Gray (Mass.) 341; Shippen's Heirs v. Clapp, 29 Pa. 265. Each is liable only for the assets which have come into his hands, and is not liable for the torts of others except when guilty of negligence or connivance; 2 Ves. 267; Appeal of Jones, 8 Watts & S. (Pa.) 143, 42 Am. Dec. 282; Hall v. Carter, 8 Ga. 388; Smith's Ex'rs v. Chapman's Ex'r, 5 Conn. 19; Appeal of Hengst, 24 Pa. 413; Boudereau v. Montgomery, 4 Wash. C. C. 186, Fed. Cas. No. 1,694; Banks v. Wilkes, 3 Sandf. Ch. (N. Y.) 99; Atcheson v. Robertson, 3 Rich. Eq. (S. C.) 132, 55 Am. Dec. 634.

A note payable to two administrators for a debt due the estate may be transferred by the endorsement of one; Mackay v. St. Mary's Church, 15 R. I. 121, 23 Atl. 108, 2 Am. St. Rep. 881; a surviving administrator has full power to act alone; Saul v. Frame, 3 Tex. Civ. App. 596, 22 S. W. 984.

POWERS AND DUTIES OF AN EXECUTOR OR ADMINISTRATOR. *The duty of an administrator* is in general to do the things set forth in his bond; and for this he is generally obliged to give security; Baldwin v. Buford, 4 Yerg. (Tenn) 20; Colwell v. Alger, 5 Gray (Mass.) 67.

The *duties of an executor* are the same, so far as concerns the collection of the assets and up to the point at which the estate is ready for distribution. It is then to be disposed of, if an administrator, according to law, and if an executor, pursuant to the will. See *infra*.

An executor or administrator, coming into possession of property by virtue of his position, is estopped, while in possession, from disputing the title of his intestate or testator; Wiseman v. Swain (Tex.) 114 S. W. 145.

Duties. They may be thus summarized. Those of an executor and administrator are alike except so far as those of the former spring from the will.

First. He must be responsible for the burial of the deceased in a manner suitable to the estate; 2 Bla. Com. 508. But no unreasonable expenses will be allowed, nor any unnecessary expenses if there is any danger of the estate proving insolvent; 2 C. & P. 207; Barclay's Estate, 2 W. N. C. (Pa.) 447; Succession of Hearing, 28 La. Ann. 149; Pat-

terson v. Patterson, 59 N. Y. 582, 17 Am. Rep. 384. The estate and not the widow is liable for funeral expenses; Compton v. Lancaster (Ky.) 114 S. W. 260; but she may order the interment on a scale proportionate to the financial condition of the deceased and the estate will be liable; Wagoner Undertaking Co. v. Jones, 134 Mo. App. 101, 114 S. W. 1049. See FUNERAL EXPENSES.

Second. The executor must prove the will, and take out letters testamentary, and an administrator must procure his letters of administration; see *supra*. In England, there are two ways of proving a will,—in *common form*, and in *form of law*, or solemn form. In the former, the executor *propounds* the will, *i. e.* presents it to the registrar, in the absence of all other interested parties. In the latter, all parties interested are summoned to show cause why probate should not be granted.

Third. Ordinarily, he must make an inventory of personal property at least, and, in some states, of real estate also; Griswold v. Chandler, 5 N. H. 492; Freeman v. Anderson, 11 Mass. 190; Bourne v. Stevenson, 58 Me. 499; Pursel v. Pursel, 14 N. J. Eq. 514. This duty rests on executors and not on adult legatees; Mills v. Smith, 65 Hun 619, 19 N. Y. Supp. 854.

Fourth. He must give notice of his appointment in the statute form, and should advertise for debts and credits; Gilbert's Adm'r v. Little's Adm'r, 2 Ohio St. 156; but the giving or not giving it does not affect the statute of limitations, nor does the failure to publish, affect a creditor who did not present his claim; McMillan v. Hayward, 94 Cal. 357, 29 Pac. 774.

Fifth. He must collect the goods and chattels, and the claims inventoried, with reasonable diligence. And he is liable for a loss by the insolvency of a debtor, if it results from his gross delay; Long's Estate, 6 Watts (Pa.) 46; Dean v. Rathbone's Adm'r, 15 Ala. 328.

Sixth. The personal effects he must deal with as the will directs, and the surplus must be turned into money *and divided as if there were no will.* The safest method of sale is a public auction.

Seventh. He must collect the outstanding claims and convert property into money; 2 Kent 415; Bailey v. Dilworth, 10 Smedes & M. (Miss.) 404, 48 Am. Dec. 760; 1 Mylne & C. 8; Evans v. Iglehart, 6 Gill & J. (Md.) 171; Bogart v. Van Velsor, 4 Edw. Ch. (N. Y.) 718; Moore v. Hamilton, 4 Fla. 112; Smyth v. Burns' Adm'rs, 25 Miss. 422; Weyer v. Bank, 57 Ind. 198; Roumfort v. McAlarney, 82 Pa. 193; but he cannot occupy or lease the lands of the estate, or receive rents or profits therefrom, as these descend to the heir; Estate of Merkel, 131 Pa. 584, 18 Atl. 931.

Eighth. He must keep the money of the estate safely, but not mixed with his own, or he may be charged interest on it. He is also charged when he has misemployed funds or let them lie idle, provided a want of ordinary prudence is proved against him; Hammond v. Hammond, 2 Bland, Ch. (Md.) 306; Sullivan v. Winthrop, 1 Sumn. 14, Fed. Cas. No. 13,600; Hite's Ex'r v. Hite's Legatees, 2 Rand. (Va.) 409; Lake v. Park, 19 N. J. L. 109; Darrell v. Eden, 3 Des. (S. C.) 241, 4 Am. Dec. 613; Appeal of Mayberry, 33 Pa. 258; In re Myers, 131 N. Y. 409, 30 N. E. 135. When a debtor is appointed executor of the creditor's will, equity will presume that the debt has been paid, and will treat it as an asset in the executor's hands; Crow v. Conant, 90 Mich. 247, 51 N. W. 450, 30 Am. St. Rep. 427. And generally, interest is to be charged on all money received by an executor and not applied to the use of the estate; McCaw v. Blewitt, Bailey, Eq. (S. C.) 98; Arnett v. Linney, 16 N. C. 369; Thompson v. Sanders' Heirs, 6 J. J. Marsh. (Ky.) 94; Lloyd's Estate, 82 Pa. 143. See Good's Estate, 150 Pa. 301, 24 Atl. 624. But an executor cannot be charged with interest on money allowed him for commission; Brinton's Estate, 10 Pa. 408; he is not chargeable with compound interest; Appeal of Light, 24 Pa. 180. Where investments have been made contrary to the requirements of the will, on personal security, they are at the executor's risk, and he must answer personally for any loss; Brewster v. Demarest, 48 N. J. Eq. 559, 23 Atl. 271. See INTEREST; INVESTMENTS.

Ninth. He must be at all times ready to account to the proper authorities, and must actually file an account at the end of the year generally prescribed by statute. The burden of proving items of a discharge in an accounting is upon the accountant; Brewster v. Demarest, 48 N. J. Eq. 559, 23 Atl. 271.

Tenth. He must pay the debts and legacies in the order required by law. There is no universal order of payment adopted in the United States; but debts of the last sickness and the funeral are preferred debts everywhere; Bacon, Abr. Ex. L. 2; 2 Kent 416; Lawson's Adm'rs v. Hansborough, 10 B. Monr. (Ky.) 147; Moye v. Albritton, 42 N. C. 62; Burruss v. Fisher, 23 Miss. 228; Johnston v. Morrow, 28 N. J. Eq. 327; Chapman v. Barnes, 29 Ill. App. 184.

Next to these, as a general rule, debts due the state or the United States are privileged. This priority of the United States only extends to the net proceeds of the property of the deceased, and therefore the necessary expenses of the administration are first paid. The act of burial and its accompaniments may be done by third parties, who have a preferred claim therefor, if reasonable; 3 Nev. & M. 512; 8 Ad. & E. 348; U. S. v. Eggleston, 4 Sawy. 199, Fed. Cas. No. 15,027. A claim for costs recovered by a creditor in an action to establish his claim is entitled to priority over the debts of the estate; In

re Randell's Estate, 8 N. Y. Supp. 652. If the administrator pays debts of a lower degree first, he will be liable out of his own estate in case of a deficiency of assets; 2 Kent 419. If he pays decedent's debts from his own funds he is entitled to repayment from the proceeds of lands originally liable for such debt; Doty v. Cox (Ky.) 22 S. W. 321. . A valid claim against an estate cannot be defeated on the ground that the estate had been settled before the claim was filed; Ury v. Bush, 85 Ia. 698, 52 N. W. 666.

Powers. The authority of the executor or administrator dates from the moment of death; Com. Dig. *Administration* (B, 10); 2 W. Bla. 692; 10 Ad. & El. 212. When once probate is granted, his acts are good until formally reversed by the court; 3 Term 125; Appeal of Peebles, 15 S. & R. (Pa.) 39. In some states he has power over both real and personal estate; Goodwin v. Jones, 3 Mass. 514, 3 Am. Dec. 173; Stearns v. Stearns, 1 Pick. (Mass.) 157. In the majority, he has power over the real estate only when expressly empowered by the will, or when the personal estate is insufficient; see *infra*.

His power is that of a mere trustee, who must apply the goods for such purposes as are sanctioned by law; 4 Term 645; 9 Co. 88; Co. 2d Inst. 236; Warfield v. Brand's Adm'r, 13 Bush (Ky.) 77; Ferris v. Van Vechten, 9 Hun (N. Y.) 12. The personal representative has the legal title to the *choses* in action of the deceased, and may transfer, discharge, or compound them as if he were the absolute owner; Curry v. Peebles, 83 Ala. 225, 3 South 622; Kahl v. Schober, 35 N. J. Eq. 461; and having at common law absolute power of disposal of the personal effects, he may compromise any claim; Olston v. R. Co., 52 Or. 343, 96 Pac. 1095, 97 Pac. 538, 20 L. R. A. (N. S.) 915. But where an executor pledged goods belonging to an estate, not holding himself out to act as executor, and the pledgee having no notice that he was such, no title passed and the pledgee was required to surrender the goods; [1912] 1 Ch. 451.

In order that he may be enabled to reduce them to possession the executor or administrator acquires a property in the assets of the intestate. As to what constitutes assets, see ASSETS, and for a definition of "asset," within the administration laws, see Louisville & N. R. Co. v. Herb, 125 Tenn. 408, 143 S. W. 1138.

His right is not a personal one, but an incident to his office; Weeks v. Gibbs, 9 Mass. 74; Dawes v. Boylston, 9 Mass. 352, 6 Am. Dec. 72; Hillman v. Stephens, 16 N. Y. 278. He owns all his intestate's personal property from the day of death, and for any cause of action accruing after that day may sue in his own name; Patchen v. Wilson, 4 Hill (N. Y.) 57; Manwell v. Briggs, 17 Vt. 176; Cullen v. O'Hara, 4 Mich. 132; Bates v. Sabin, 64 Vt. 511, 24 Atl. 1013. This happens by *relation* to the day of death; Hutchins v. Bank, 12 Metc. (Mass.) 425; 7 Jur. 492; Shirley v. Healds, 34 N. H. 407. An administrator is a trustee, who holds the legal property but not the equitable. If he is a debtor to the estate, and denies the debt, he may be removed; but if he inventories it, it is cancelled by the giving of his bond; Stevens v. Gaylord, 11 Mass. 268.

He may declare, whenever the money when received will be assets; and he may sue on a judgment once obtained, as if the debt were his own He may summon supposed debtors or holders of his intestate's property to account, and has the right to an investigation in equity. He may bind the estate by arbitration; Kendall v. Bates, 35 Me. 357; Appeal of Peters, 38 Pa. 239. He may assign notes, etc. See Ladd v. Wiggin, 35 N. H. 421, 69 Am. Dec. 551; Griswold v. Clark, 28 Vt. 661; Miller v. Henderson, 10 N. J. Eq. 320; Patterson v. Edwards, 29 Miss. 70; Thomas v. Reister, 3 Ind. 369; Walker v. Craig, 18 Ill. 116; Shoenberger's Ex'rs v. Sav. Inst., 28 Pa. 459; Morris' Ex'r v. Duke's Adm'r, 2 Patt. & H. (Va.) 462. Nearly all debts and actions survive to the administrator. But he has no power over the firm's assets, as to which his intestate was a partner, until the debts are paid; Thomson v. Thomson, 1 Bradf. (N. Y.) 24; he should merely refer in his inventory to the intestate's interest in the partnership without attempting to give the items of property, as he can have no control over it until the affairs of the partnership are settled; Loomis v. Armstrong, 63 Mich. 355, 29 N. W. 867.

At common law the executor or administrator has no power over real estate; Ryder v. Lyon, 85 Conn. 245, 82 Atl. 573; Wilson v. Hamilton, 9 S. & R. (Pa.) 431; Livingston v. Bird, 2 Root (Conn.) 438; Egerton's Adm'r v. Conklin, 25 Wend. (N. Y.) 224; Sorrell v. Ham, 9 Ga. 55; Smith v. Smith's Adm'r, 27 N. J. Eq. 445; Hankins v. Kimball, 57 Ind. 42; nor is the probate even admissible as evidence that the instrument is a will, or is an execution of a power to charge land; Wms. Ex. 562. By statute, in some states, the probate is made *prima facie* or conclusive evidence as to realty; Brown v. Wood, 17 Mass. 68; Fortune v. Buck, 23 Conn. 1; Darby v. Mayer, 10 Wheat. (U. S.) 470, 6 L. Ed. 367; Jones v. McKee, 3 Pa. 498, 45 Am. Dec. 661; Singleton v. Singleton, 8 B. Monr. (Ky.) 340; Lewis' Heirs v. His Executor, 5 La. 388. In some states the probate is made after the lapse of a certain time conclusive as to realty; Tarver v. Tarver, 9 Pet. (U. S.) 180, 9 L. Ed. 91; Appeal of Hegarty, 75 Pa. 512; Bailey v. Bailey, 8 Ohio, 246; Hardy v. Hardy's Heirs, 26 Ala. 524; Parker's Ex'rs v. Brown's Ex'rs, 6 Gratt. (Va.) 564; Kenyon v. Stewart, 44 Pa. 189. Land in England under the Land Title

and Transfer Act of 1897 goes to the executor or administrator.

The administrator has no interest in the decedent's real estate unless the personal property is insufficient to pay debts and expenses; Pratt v. Millard, 154 Mich. 112, 117 N. W. 552; and an executor has, ordinarily, no power to sell land unless it is expressly given or necessarily implied in the will; Hanson v. Hanson, 149 Ia. 82, 127 N. W. 1032; but one to whom all the testator's residuary estate is devised, "in trust to receive, hold, invest and reinvest," has, by implication, power to sell real estate; Powell v. Wood, 149 N. C. 235, 62 S. E. 1071.

The will may direct the executor to sell lands to pay debts, but the money resulting is usually held to be equitable assets only; 9 B. & C. 489; Haskell v. House, 3 Brev. (S. C.) 242; Speed's Ex'r v. Nelson's Ex'r, 8 B. Monr. (Ky.) 499; Smith v. Knoebel, 82 Ill. 392; Lindley v. O'Reilly, 50 N. J. L. 636, 15 Atl. 379, 1 L. R. A. 79, 7 Am. St. Rep. 802; but the title and right of possession to the land remain in the heirs until the sale, and they are the proper parties to maintain ejectment; Cohea v. Jemison, 68 Miss. 510, 10 South. 46; but see Smathers v. Moody, 112 N. C. 791, 17 S. E. 532; and to collect the rents; Appeal of Pennsylvania Co. for Insurance on Lives & Granting Annuities, 168 Pa. 431, 32 Atl. 25, 47 Am. St. Rep. 893. In equity, the testator's intention will be regarded as to whether the surplus fund, after a sale of the real estate and payment of debts, shall go to the heir; 1 Wms. Ex. 555, Am. note.

Chattels real pass to the executor or administrator, and such is the interest of the tenant of a farm from year to year; In re Ring's Estate, 132 Ia. 216, 109 N. W. 710. But the wife's chattels real, unless taken into possession by her husband during his lifetime, do not pass to his executor; 1 Wms. Ex. 579, n; In re Hind's Estate, 5 Whart. (Pa.) 138, 34 Am. Dec. 542; Pitts v. Curtis, 4 Ala. 350; Wade v. Grimes, 7 How. (Miss.) 425. The husband's act of possession must effect a complete alteration in the nature of the joint interest of husband and wife in her chattels real, or they will survive to her.

Chattels personal go to the executor; Harris v. Meyer, 3 Redf. (N. Y.) 450; Kahl v. Schober, 35 N. J. Eq. 461; Highnote v. White, 67 Ind. 596; Beecher v. Buckingham, 18 Conn. 110, 44 Am. Dec. 580. Such are emblements; Brooke, Abr. *Emblements;* Bevans v. Briscoe, 4 H. & J. (Md.) 139; Kesler v. Cornelison, 98 N. C. 383, 3 S. E. 839; but see Wright v. Watson, 96 Ala. 536, 11 South. 634. Heirlooms and fixtures go to the heir; and as to what are fixtures, see FIXTURES, and 1 Wms. Ex. 615; 2 Sm. L. Cas., 9th Am. ed. 1450; Crosw. Ex. & Ad. 352. The widow's separate property and paraphernalia go to her. For elaborate collections of cases on the effect of nuptial contracts about property upon the executor's right, see 1 Wms. Ex. *660, Am. note 2; 2 *id.* 636, note 1; 1 Sm. Lead. Cas. 65. Donations *mortis causa* go to the donee at once, and not to the executor; Murdock v. McDowell, 1 Nott & McC. (S. C.) 237, 9 Am. Dec. 684; Michener v. Dale, 23 Pa. 59; Rockwood v. Wiggin, 16 Gray (Mass.) 403; Hatch v. Atkinson, 56 Me. 327, 96 Am. Dec. 464.

An executor may sell terms for years, and may even make a good title against a specific legatee, unless the sale be fraudulent. So he may underlet a term. He may indorse a promissory note or a bill payable to the testator or his order; Miller v. Helm, 2 Smedes & S. (Miss.) 687. The rule that executors have no power to confess judgment is not applicable to offers of judgments to firm creditors, by a firm composed of a surviving member and the executor of a deceased member, conducting the interests of the deceased therein; Columbus Watch Co. v. Hodenpyl, 61 Hun 557, 16 N. Y. Supp. 337; but they may compromise claims; Bacon v. Crandon, 15 Pick. (Mass.) 79; Chase v. Bradley, 26 Me. 531; or submit matters in dispute to arbitration; Wills v. Rand's Adm'rs, 41 Ala. 198; Wood v. Tunnicliff, 71 N. Y. 38. Without the sanction of the probate court, he has no power to bind the estate by contract, even for the necessities of infant devisees; Roscoe v. McDonald, 91 Mich. 270, 51 N. W. 939. His right to employ counsel depends upon the right to litigate; In re Riviere's Estate, 8 Cal. App. 773, 98 Pac. 46.

Wife's choses. In general, *choses* in action given to the wife either before or after marriage survive to her, provided her husband have not reduced them to possession before his death. A promissory note given to the wife during coverture comes under this rule in England; 12 M. & W. 355; 7 Q. B. 864; but not so in this country generally; Jones' Adm'r v. Warren's Adm'r, 4 Dana (Ky.) 333; Fourth Ecclesiastical Society in Middletown v. Mather, 15 Conn. 587; Savage v. King, 17 Me. 301. Mere intention to reduce *choses* into possession is not a reduction, nor is a mere appropriation of the fund, 5 Ves. 515; Petrie v. Clark, 11 S. & R. (Pa.) 377, 14 Am. Dec. 636; In re Hinds' Estate, 5 Whart. (Pa.) 138, 34 Am. Dec. 542; Wardlow v. Tray's Adm'r, 2 Hill, Eq. (S. C.) 644; Pitts v. Curtis, 4 Ala. 350; Curry v. Fulkinson's Ex'rs, 14 Ohio 100.

A statutory right of a husband to sue for a *chose* in action of his wife without administration is confined to the cases expressly declared by the statute and will not be extended by construction; Ferguson v. R. Co., 6 App. D. C. 525.

When the same persons are both executors and trustees, and as executors have paid the debts and passed their final account, they no longer hold the assets as executors but as trustees; [1913] A. C. 76. But where the same person was appointed executor and tes-

tamentary trustee, and he qualified as executor, but gave no undertaking as trustee and secured no order for his discharge as executor, and he had failed to file current accounts until compelled to render a final account, it was held that his relation as executor remained and that the court was empowered to direct the final accounting; In re Roach's Estate, 50 Or. 179, 92 Pac. 118.

SUITS BY OR AGAINST EXECUTORS AND ADMINISTRATORS. 1. *By.* In general, a right of action founded on a tort or malfeasance dies with the person. But personal actions founded upon any obligation, contract, debt, covenant, or other duty to be performed, survive, and the executor may maintain them; Cowp. 375; 1 Wms. Saund. 216, n. See Brannock v. Stocker, 76 Ind. 573; 5 B. & Ad. 78. By statutes in England and the United States this common-law right is much extended. An executor may now have trespass, trover, etc., for injuries done to the intestate during his lifetime. Except for slander, for libels, and for injuries inflicted on the person, executors may bring personal actions, and are liable in the same manner as the deceased would have been; 2 Brod. & B. 102; Van Rensselaer's Ex'rs v. Platner's Ex'rs, 2 Johns. Cas. (N. Y.) 17; Kennerly v. Wilson, 1 Md. 102; Tait v. Parkman, 15 Ala. 253; Martin v. Baker, 5 Blackf. (Ind.) 232; Rice's Heirs v. Spotswood's Heirs, 6 T. B. Monr. (Ky.) 40, 17 Am. Dec. 115; Backus' Adm'rs v. McCoy, 3 Ohio 211, 17 Am. Dec. 585; Hagarty v. Morris, 2 W. N. C. (Pa.) 154. See Coleman v. Woodworth, 28 Cal. 567; Manwell v. Briggs, 17 Vt. 176; Richardson v. R. Co., 98 Mass. 85. Should his death have been caused by the negligence of any one, they may bring an action for the benefit of the family in some states. Executors may also sue for stocks and annuities, as being personal property. A right of action for the breach of a parol contract for the sale of land survives to the executors; Irwin v. Hamilton, 6 S. & R. (Pa.) 208. So they may sue for an insurance policy.

The courts of New Jersey will enforce the Pennsylvania statute giving a right of action to the widow of one who dies of injuries inflicted by the wrongful act of another, that statute not being repugnant to the policy of the former state; but such an action cannot be brought in New Jersey by the personal representative of the deceased, as required by the laws of that state in similar cases; Lower v. Segal, 59 N. J. L. 66, 34 Atl. 945.

For actions accruing after the testator's death, the executor may sue either in his own name or as executor. This is true of actions for tort, as trespass or trover, actions on contract and on negotiable paper; 3 Nev. & M. 391; Patchen v. Wilson, 4 Hill (N. Y.) 57; Williams v. Moore, 9 Pick. (Mass.) 432; Hailey v. Wheeler, 49 N. C. 159. So he may bring replevin in his own name; Branch v. Branch, 6 Fla. 314; and so, in short, wherever the money, when recovered, will be assets, the executor may sue as executor; Flower's Ex'rs v. Garr, 20 Wend. (N. Y.) 668; Sheets v. Pabody, 6 Blackf. (Ind.) 120, 38 Am. Dec. 132; Biddle v. Wilkins, 1 Pet. (U. S.) 686, 7 L. Ed. 315. See Pope's Heirs v. Boyd's Adm'x, 22 Ark. 535; Linsenbigler v. Gourley, 56 Pa. 166, 94 Am. Dec. 51. An executor cannot recover in ejectment without producing the will; Mays v. Killen, 56 Ga. 527; Horn v. Johnson, 87 Ga. 448, 13 S. E. 633.

2. *Against.* An action of trespass *quare clausum fregit* survives against the executor; McCallion v. Gegan, 9 Phila. (Pa.) 240. So also in causes of action wholly occurring after the testator's death, the executor is liable individually; Kerchner v. McRae, 80 N. C. 219. The actions of trespass and trover do not survive against the executors of deceased defendants. But the action of replevin does. The general rule is that causes of action *ex contractu* survive, while those *ex delicto* do not. "Executors and administrators are the representatives of the personal property of the deceased and not of his wrongs except so far as the tortious act complained of was beneficial to his estate;" 2 Kent 416.

As an administrator merely stands in place of the deceased, and does not represent creditors, he cannot file a bill to set aside a conveyance in fraud of creditors, the right to do so being in the creditors defrauded; Hoyt v. Northup, 256 Ill. 604, 100 N. E. 164.

The statute prescribes a fixed time for settling estates within which the executor or administrator cannot be sued, or compelled to file an account, unless he waives the right; Moses v. Jones, 2 Nott & McC. (S. C.) 259; Baggott v. Boulger, 2 Duer (N. Y.) 160. If he makes payments erroneously, supposing the estate to be solvent, he may recover them, it being a mistake of fact; Walker v. Bradley, 3 Pick. (Mass.) 261; Swope v. Chambers, 2 Gratt. (Va.) 319.

As to whether an executor or administrator is bound to plead the statute of limitation, the decisions are not uniform. That he is not bound to do so is held in Hodgdon v. White, 11 N. H. 208; Wiggins v. Lovering's Adm'r, 9 Mo. 262; Semmes v. Magruder, 10 Md. 242; Batson v. Murrell, 10 Humph. (Tenn.) 301, 51 Am. Dec. 707; Conway's Ex'r v. Reyburn's Ex'rs, 22 Ark. 290; Chambers v. Fennemore's Adm'r, 4 Harr. (Del.) 368; Appeal of Ritter, 23 Pa. 95; Barnawell v. Smith, 58 N. C. 168; Woods v. Irwin, 141 Pa. 278, 21 Atl. 603, 23 Am. St. Rep. 282; In re Baumhover's Estate, 151 Ia. 146, 130 N. W. 817; but a different rule applies when the personal estate is insufficient to pay the debts and a resort to the realty is necessary; Pollard v. Scears' Adm'r, 28 Ala. 484, 65 Am. Dec. 364. That it is his duty to plead the statute is held in Patterson v. Cobb, 4 Fla. 481 (and if he does not he is liable for a devastavit); Tunstall v. Pollard's Adm'r, 11

Leigh (Va.) 1; Matter of Milligan's Estate, 112 App. Div. 373, 98 N. Y. Supp. 480. But the executor was held bound by a waiver of the statute contained in the will; Glassell v. Glassell, 147 Cal. 510, 82 Pac. 42. If one co-administrator declines to plead it, the other may do so; Scull v. Wallace's Ex'rs, 15 S. & R. (Pa.) 231, and if the administrator does not plead it, the next of kin may do so; In re Clarke's Estate, 1 Phila. (Pa.) 356; or a creditor interested in the estate; Smith v. Pattie, 81 Va. 654. The bar of the statute having attached to a claim against an estate, it cannot be waived by an acknowledgment of the debt by the personal representative; Lee's Adm'r v. Downey, 68 Ala. 98; Vrooman v. Li Po Tai, 113 Cal. 302, 45 Pac. 470; Burnett v. Noble, 5 Redf. Sur. (N. Y.) 69; Seig v. Acord's Ex'r, 21 Gratt. (Va.) 365, 8 Am. Rep. 605. And the executor or administrator cannot waive the statute as against a claim in his own favor; Grinnell v. Baxter, 17 Pick. (Mass.) 383; In re Brown's Estate, 77 Misc. 507, 137 N. Y. Supp. 978; Clayton v. Dinwoodey, 33 Utah 251, 93 Pac. 723, 14 Ann. Cas. 926; or the next of kin may set in up; Willcox v. Smith, 26 Barb. (N. Y.) 316. He is, in some states, chargeable with interest, *first*, when he receives it upon assets put out at interest; *second*, when he uses them himself; *third*, when he has large sums paid him which he ought to have put out at interest; Griswold v. Chandler, 5 N. H. 497; Wyman v. Hubbard, 13 Mass. 232; but he is not liable where he has funds which he holds pending legal proceedings to determine the rights of the remaindermen; In re Howard's Estate, 3 Misc. 170, 23 N. Y. Supp. 836. In some cases of need, as to relieve an estate from sale by a mortgagee, he may lend the estate money and charge interest thereon; Jennison v. Hapgood, 10 Pick. (Mass.) 77. The widow's support is usually decreed by the judge. But the administrator is not liable for the education of infant children, or for mourning-apparel for relatives and friends of the deceased; Johnson v. Corbett, 11 Paige Ch. (N. Y.) 265; Appeal of Flintham, 11 S. & R. (Pa.) 16.

The liability is in general measured by the amount of assets. On his contracts he may render himself liable personally, or as administrator merely, according to the terms of the contract which he makes; 7 B. & C. 450; Murrell v. Wright, 78 Tex. 519, 15 S. W. 156. But to make him liable personally for contracts about the estate, a valid consideration must be shown; 3 Sim. 543; 2 Brod. & B. 460. And, in general, assets or forbearance will form the only consideration; 5 My. & C. 71; Bank of Troy v. Topping & Holme, 13 Wend. (N. Y.) 557. But a bond of itself imports consideration; and hence a bond given by administrators to submit to arbitration is binding upon them personally; Ten Eyck v. Vanderpoel, 8 Johns. (N. Y.) 120; Robinson v. Lane, 14 Smedes & M. (Miss.) 161. He may compromise a suit brought for the widow and next of kin, for the death of the intestate; Washington v. R. Co., 136 Ill. 49, 26 N. E. 653. In general, he is not liable when he has acted in good faith, and with that degree of caution which prudent men exhibit in the conduct of their own affairs; In re Bosio's Estate, 2 Ashm. (Pa.) 437.

An administrator cannot ratify decedent's void transactions, nor make any contracts for him; Smith v. Brennan, 62 Mich. 349, 28 N. W. 892, 4 Am. St. Rep. 867.

An administrator is liable for torts and for gross negligence in managing his intestate's property. This species of misconduct is called in law a *devastavit;* Cartwright v. Cartwright, 4 Hayn. (Tenn.) 134; Jeffreys v. Yarborough, 16 N. C. 516; In re Holladay's Estate, 18 Or. 168, 22 Pac. 750. Such is negligence in collecting notes or debts; In re Merkel's Estate, 131 Pa. 584, 18 Atl. 931; an unnecessary sale of property at a discount; Pinckard v. Woods, 8 Gratt. (Va.) 140; paying undue funeral expenses; 1 B. & Ad. 260; and the like mismanagements. So he may be liable for not laying out assets for the benefit of the estate, or for turning the money to his own profit or advantage. In such cases he is answerable for both principal and interest. In England he may be charged with increased interest for money withheld by fraud; 2 Cox, Ch. 113; 4 Ves. 620, and he is sometimes made chargeable with compound interest in this country; Jennison v. Hapgood, 10 Pick. (Mass.) 77. Finally, a refusal to account for funds, or an unreasonable delay in accounting, raises a presumption of a wrongful use of them; Johnson v. Beauchamp, 5 Dana (Ky.) 70; Evans v. Iglehart, 6 Gill & J. (Md.) 186. If he receives rents and profits of land for a long period without accounting, he is liable to the heirs for the reasonable rental value of the land for the entire period; Shuffler v. Turner, 111 N. C. 297, 16 S. E. 417.

Where real estate is sold by executors to a co-executor, the sale is voidable at the instance of those interested in the estate; In re Richard's Estate, 154 Cal. 478, 98 Pac. 528. One executor may sue another where questions arise between the latter and the estate, jeopardizing the rights of parties in interest; Monmouth Inv. Co. v. Means, 151 Fed. 159, 80 C. C. A. 527.

After the debts have been paid and the final account passed, and a legacy ordered paid, an action will lie against the executor to recover it; Anderson v. Patty, 168 Ill. App. 151.

An insolvent bank cannot sue an executor for an assessment on the stock of his decedent, which was levied after a final decree for the distribution of the estate; Union Savings Bank of San Jose v. De Laveaga, 150 Cal. 395, 89 Pac. 84.

DISTRIBUTION. The distribution or disposal of the estate by an executor is as directed

by the will. The administrator *must distribute* the residue among those entitled to it, under direction of the court and according to law; Lamb v. Carroll, 28 N. C. 4; Appeal of Stewart, 86 Pa. 149; Appeal of Kline, 86 Pa. 363; Marshall v. Hitchcock, 3 Redf. (N. Y.) 461. But if he recognizes a claim as proper to be paid, and subsequently finds that there is no legal foundation for it, it is not binding upon the estate; Webster v. Le Compte, 74 Md. 249, 22 Atl. 232. And even after action brought against him by a creditor he may apply the assets in payment of the debt of another creditor; 24 Q. B. Div. 364.

The great rule is, that personal property is regulated by the law of the domicil. The rights of the distributees vest as soon as the intestate dies, but cannot be sued for till the lapse of the statute period of distribution. See 118th Novel of Justinian, Cooper's trans. 393: DISTRIBUTION; CONFLICT OF LAWS.

Compensation. An executor cannot pay himself. His compensation must be ordered by the court: Collins v. Tilton, 58 Ind. 374. Faithful service by an executor is a condition to the right of commissions. Misappropriation of funds may forfeit the right; In re Clauser's Estate, 84 Pa. 51.

Commissions are not allowed on a legacy given in trust to an executor; Westerfield v. Westerfield, 1 Bradf. Surr. (N. Y.) 198; Ames v. Downing, 1 Bradf. Surr. (N. Y.) 321. Reasonable expenses are always allowed an executor; Thacher v. Dunham, 5 Gray (Mass.) 26; Wilson v. Bates, 28 Vt. 765; Ord v. Little, 3 Cal. 287; Noel v. Harvey, 29 Miss. 72. When one of two co-executors has done nothing, he should get no commission; White v. Bullock, 20 Barb. (N. Y.) 91. Where a stranger was appointed administrator, upon his statement that his service would be gratuitous, he should not be allowed commissions; Hilton v. Hilton's Adm'r, 109 S. W. 905, 33 Ky. L. Rep. 276. In England, executors cannot charge for personal trouble or loss of time, and can only be paid for reasonable expenses.

An administrator receives no compensation in England; 3 Mer. 24; but in this country he is paid in proportion to his services, and all reasonable expenses are allowed him; Appeal of Culbertson, 84 Pa. 303. Additional allowance may be made where extraordinary services have been rendered; In re Moore's Estate, 96 Cal. 522, 31 Pac. 584. An administrator cannot pay himself. His compensation must be ordered by the court; Collins v. Tilton, 58 Ind. 374. If too small a compensation be awarded him, he may appeal; Jewett v. Woodward, 1 Edw. Ch. (N. Y.) 195; Edelen v. Edelen, 11 Md. 415; Ord v. Little, 3 Cal. 287; Andrew's Ex'rs v. Andrew's Adm'rs, 7 Ohio St. 143; Fowler v. Lockwood, 3 Redf. (N. Y.) 465. Allowance by a probate court cannot be impeached in a court of equity unless fraud or deception has been practiced; Smith v. Worthington, 53 Fed. 977, 4 C. C. A. 130. He cannot buy the estate, or any part of it, when sold by a common auctioneer to pay debts; but he may when the auctioneer is a state officer, and the sale public and *bona fide;* Toler's Adm'r v. Toler, 2 Patt. & H. (Va.) 71; Weeks v. Gibbs, 9 Mass. 75; Babbitt v. Doe, 4 Ind. 355; Barrington v. Alexander, 6 Ohio St. 189.

Federal Jurisdiction. Matters of pure probate are not within the jurisdictions of courts of the United States; but where a state law gives citizens of the state, in an action or suit *inter partes*, the right to question the probate of a will, federal courts, at the suit of citizens of other states or aliens will enforce such remedies; Farrell v. O'Brien, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101.

The possession of a state court which will exclude the exercise of power by the federal court, and *vice versa*, must be the possession of some thing, corporeal or incorporeal, which has been taken under the dominion of the court. A controversy or inquiry is not such a thing, and the pendency of a suit or proceeding in one court, involving a question, controversy, or inquiry, is no bar to the exercise of jurisdiction in the determination of the same question, etc., in the other; Ball v. Tompkins, 41 Fed. 486; American Baptist Home Mission Society v. Stewart, 192 Fed. 976; Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867.

The right to administer property left by a foreigner within the jurisdiction of a state is primarily committed to state law and the public administrator is entitled to administer the estate of an Italian subject dying and leaving an estate in California, in preference to the Italian Consul General, who claimed the right under treaty; In re Ghio's Estate, 157 Cal. 552, 108 Pac. 516, 37 L. R. A. (N. S.) 549, 137 Am. St. Rep. 145, affirmed in Rocca v. Thompson, 223 U. S. 317, 32 Sup. Ct. 207, 56 L. Ed. 453, where the question whether it is within the treaty-making power to provide for administration upon the estates of foreigners dying within a state, by the consul of their country, was suggested but not discussed or decided. See TREATY.

See Schouler; Williams; Croswell, Exrs. and Admrs.; Woerner, Law of Adm.; 2 Lawson, Rights & Rem. 889-1008; Holmes, Executors in Early English Law, 3 Sel. Essays in Anglo-Amer. L. H. 736 (9 Harv. L. R. 42); Caillemer, The Executor in England and on the Continent, *id.* 746.

EXECUTORY. Performing official duties; contingent; also, personal estate of a deceased; whatever may be executed,—as, an executory sentence or judgment.

EXECUTORY CONSIDERATION. Something which is to be done after the promise

is made, for which it is the legal equivalent. See CONSIDERATION.

EXECUTORY CONTRACT. One in which some future act is to be done: as, where an agreement is made to build a house in six months, or to do any act at a future day. See CONTRACT; PERFORMANCE.

An agreement to sell and convey land, which is not a conveyance, operating as a present transfer of legal estate and seisin, is wholly executory, though it contains the words "grant, bargain and sell;" and produces no effect upon the estates and titles of the parties; and creates no lien or charge on the land itself; Simpson v. Breckenridge, 32 Pa. 287; Stewart's Adm'rs v. Lang, 37 Pa. 201, 78 Am. Dec. 414; Watson v. Coast, 35 W. Va. 463, 14 S. E. 249.

EXECUTORY DEVISE. Such a limitation of a future estate in lands or chattels as the law admits in case of a will, though contrary to the rules of limitation in conveyances at common law.

It is a limitation by will of a future estate or interest in lands or chattels. In re Brown's Estate, 38 Pa. 294.

By the executory devise no estate vests at the death of the devisor or testator, but only on the future contingency. It is only an indulgence to the last will and testament which is supposed to be made by one *inops consilii*. When the limitation by devise is such that the future interest falls within the rules of contingent remainders, it is a contingent remainder, and not an executory devise. 4 Kent 257, 3 Term 763.

If a particular estate of freehold be first devised, capable in its own nature of supporting a remainder, followed by a limitation which is not immediately connected with, or does not immediately commence from, the expiration of the particular estate of freehold, the latter limitation cannot take effect as a remainder, but may operate as an executory devise: *e. g.*, if land be devised to A for life, and after his decease to B in fee, B takes a (vested) remainder, because his estate is immediately connected with, and commences on, the limitation of A's estate. If land be limited to A for life, and one year after his decease to B in fee, the limitation to B is not such a one as will be a remainder, but may operate as an executory devise. Fearne, Cont. Rem. 399. If land be limited to A for life, and after his decease to B and his heirs, with a proviso that if B survive A and die, without issue of his body living at his decease; then to C and his heirs, the limitation to B, etc., prevents an immediate connection of the estate limited to C with the life estate of A, and prevents its commencement on the death of A. It must operate, if at all, as an executory devise; Butler's note (c) to Fearne, Cont. Rem. 397. If a chattel interest be bequeathed for life, with remainder over, this latter disposition cannot take effect as a remainder, but may as an executory devise, or more properly bequest; *id.* 407.

An executory devise differs from a remainder in three very material respects:

First. It needs no particular estate to support it. *Second.* By it a fee-simple or other less estate may be limited on a fee-simple. *Third.* By it a remainder may be limited of a chattel interest after a particular estate for life created in the same.

The first is a case of freehold commencing *in futuro*. A makes a devise of a future estate on a certain contingency, and till the contingency happens does not dispose of the fee-simple, but leaves it to descend to his heirs at law. 1 T. Raym. 82; 1 Salk. 226; 1 Lutw. 798.

The second case is a fee upon a fee. A devises to A and his heirs forever, which is a fee-simple, and then, in case A dies, before he is twenty-one years of age, to B and his heirs. Cro. Jac. 590; 10 Mod. 420.

The third case, a limitation in a term of years after a life estate. A grants a term of one thousand years to B for life, remainder to C. The common law regards the term for years as swallowed up in the grant for life, which, being a freehold, is a greater estate, and the grantee of such a term for life could alien the whole. A similar limitation in a will may take effect, however, as an executory bequest, Scott v. Price, 2 S. & R. (Pa.) 59, 7 Am. Dec. 629, Logan v. Ladson's Ex'r, 1 Des. (S. C.) 271; Clifton v. Haig's Ex'rs, 4 Des. (S. C.) 330.

It is not a mere possibility, but a substantial interest, and in respect to its transmissibility stands on the same footing with a contingent remainder; Medley v. Medley, 81 Va. 268.

In order to prevent perpetuities, the rule has been adopted that executory interests must be so limited that from the time of their limitation they will necessarily vest in right (not necessarily in possession) at a period not exceeding that occupied by the life or lives of a person or persons then living, or *in ventre matris*, and the minority of any person or persons born or *in ventre matris* prior to the decease of such first named person or persons, or at a period not exceeding that occupied by the life or lives of such first named person or persons, and an absolute term of twenty-one years afterwards, or within, or at the expiration of an absolute term of twenty-one years without reference to any life. For example, lands are devised to such unborn son of a *feme covert* as shall first reach the age of twenty-one years. The utmost length of time that can happen before the estate can vest is the life of the mother and the subsequent infancy of her son. Such an executory devise is therefore good. If, however, such limitation had been to the first unborn son who shall attain the age of twenty-five years, the rule against perpetuities would be infringed and the limitations bad; Smith, Ex. Int. 391; 2 Bla. Com. 174.

An executory devise limited after an indefinite failure of issue is bad as leading to a perpetuity; 4 Kent 273; and so of an executory bequest, but the courts are in the latter case much less apt to construe limitations as contemplating a definite failure of issue; 4 Kent 281; 1 P. Wms. 663; Gray, Perpet. 212.

An executory devise is generally indestructible by any alteration in the estate out of or after which it is limited. But if it is limited on an estate tail the tenant in tail can bar it, as well as the entail, by common recovery or by deed enrolled, etc., where such deed is by statute given the force and effect of a common recovery; Butler's note to Fearne, Cont. Rem. 562; Wms. R. P. 319.

EXECUTORY ESTATES. Interests which depend for their enjoyment upon some subsequent event or contingency. Such estate

may be an *executory devise*, or an *executory remainder*, which is the same as a contingent remainder, because no present interest passes.

EXECUTORY PROCESS (*Via Executoria*). In Louisiana, a process which can be resorted to in two cases, namely: 1. When the right of the creditor arises from an act importing confession of judgment, and which contains a privilege or mortgage in his favor. 2. When the creditor demands the execution of a judgment which has been rendered by a tribunal different from that within whose jurisdiction the execution is sought. Code of Practice, art. 732.

EXECUTORY TRUSTS. A trust is called *executory* when some further act is requisite to be done by the author of the trust to give it its full effect. See Bisph. Eq. 31; Lewin, Tr. 144.

The distinction between executed and executory trusts is well settled; Dennison v. Goehring, 7 Pa. 177, 47 Am. Dec. 505; though once doubted in England; 1 Ves. 142; but see 2 Ves. 323. The test is said to be: Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the court to make out from general expressions what his intention is? or has he so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates? per Lord St. Leonards, Ld. Ch., in 4 H. L. Cas. 210; see Tillinghast v. Coggeshall, 7 R. I. 383; Bisph. Eq. 86.

In the case of articles made in contemplation of marriage, and which are, therefore, preparatory to a settlement, so in the case of a will directory of a future conveyance to be made or executed by the trustees named therein, it is evident that something remains to be done. The trusts are said to be executory, because they require an ulterior act to raise and perfect them: *i. e.* the actual settlement is to be made or the conveyance to be executed. They are instructions, rather than complete instruments, in themselves.

The court of chancery will, in promotion of the supposed views of the parties or the testator and to support their manifest intention, give to the words a more enlarged and liberal construction than in the case of legal limitations or trusts executed; 1 Fonbl. Eq. b. 1; White, Lead. Cas. 18. Where a voluntary trust is executory and not executed, if it could not be enforced at law because it is a defective conveyance, it is not helped in favor of a volunteer in a court of equity; Minturn v. Seymour, 4 Johns. Ch. (N. Y.) 498, 500; Acker v. Phœnix, 4 Paige, Ch. (N. Y.) 305; Dawson v. Dawson, 16 N. C. 93, 18 Am. Dec. 573. But where the trust, though voluntary, has been executed in part, it will be sustained or enforced in equity; Bunn v. Winthrop, 1 Johns. Ch. (N. Y.) 329; Dennison v. Goehring, 7 Pa. 175, 178, 47 Am. Dec. 505. White, Lead. Cas. 176; 6 Ves. 656; 18 *id.* 140; 1 Keen 551; 3 Beav. 238.

EXECUTORY USES. Springing uses which confer a legal title corresponding to an executory devise.

Thus, when a limitation to the use of A in fee is defeasible by a limitation to the use of B to arise at a future period, contingency, or event, these contingent or springing uses differ herein from an executory devise. there must be a person seized to such uses at the time the contingency happens, else they can never be executed by the statute. Therefore, if the estate of the feoffee to such use be destroyed by alienation or otherwise, before the contingency arises, the use is destroyed forever; 1 Co. 134, 138; Cro. Eliz 439; whereas by an executory devise the freehold itself is transferred to the future devisee. In both cases, a fee may be limited after a fee; 10 Mod. 423.

EXECUTRIX. A woman who has been appointed by will to execute such will or testament. See EXECUTOR.

EXECUTRY. In Scotch Law. The movable estate of a person dying, which goes to his nearest of kin. So called as falling under the distribution of an executor. Bell, Dict.

EXEMPLARY DAMAGES. See MEASURE OF DAMAGES.

EXEMPLIFICATION. A perfect copy of a record or office-book lawfully kept, so far as relates to the matter in question. See, generally, 1 Stark. Ev. 151; 1 Phill. Ev. 307; Mills v. Duryee, 7 Cra. (U. S.) 481, 3 L. Ed. 411; Drummond v. Magruder, 9 Cra. (U. S.) 122, 3 L. Ed. 677; Hampton v. M'Connel, 3 Wheat. (U. S.) 234, 4 L. Ed. 378; Baker v. Field, 2 Yeates (Pa.) 532; Ellmore v. Mills, 2 N. C. 359; Smith v. Blagge, 1 Johns. Cas. (N. Y.) 238; Schaben v. U. S., 6 Ct. Cl. 230; Thomas v. Stewart, 92 Ind. 246; Cox v. Jones, 52 Ga. 438. As to the mode of authenticating records of other states, see FOREIGN JUDGMENTS.

EXEMPLUM (Lat.). **In Civil Law.** A copy. A written authorized copy. Used also in the modern sense of example: *ad exemplum constituti singulares non trahi* (exceptional things must not be taken for examples). Calv. Lex. *Exempli gratia*, for the sake of example. Abb. *e. g.*

EXEMPTION. The right given by law to a debtor to retain a portion of his property without its being liable to execution at the suit of a creditor, or to a distress for rent.

In general, the sheriff may seize and sell all the property of a defendant which he can find, except such as is exempted by the common law or by statute. The common law was very niggardly of these exceptions: it allowed only the necessary wearing apparel; and it was once holden that if a defendant had two gowns the sheriff might sell one of them; Comb. 356. But in mod-

ern times, with perhaps a prodigal liberality, a considerable amount of property, both real and personal, is exempted from execution by the statutes of the several states; 19 Am. L. Reg. 1; 4 So. L. Rev. N. S. 1; In re Radway, 3 Hughes 609, Fed. Cas. No. 11,523; Carlton v. Watts, 82 N. C. 212; Mapp v. Long, 62 Ga. 568; Singletary v. Singletary, 31 La. Ann. 374; Rutledge v. Rutledge, 8 Bax. (Tenn.) 33; Creath v. Dale, 69 Mo. 41; Vanderhorst v. Bacon, 38 Mich. 669, 31 Am. Rep. 328; Murphy v. Harris, 77 Cal. 194, 19 Pac. 377; In re Robb, 99 Cal. 202, 33 Pac. 890, 37 Am. St. Rep. 48; Carter v. Davis, 6 Wash. 327, 33 Pac. 833; Bean v. Ins. Co., 54 Minn. 366, 56 N. W. 127; Hamberger v. Marcus, 157 Pa. 133, 27 Atl. 681, 37 Am. St. Rep. 719; and there is now hardly a state or nation which has not by statute made certain exemptions designed as a protection for the family; Woodward v. Murray, 18 Johns. (N. Y.) 403; and such statutes are to be liberally construed; Butner v. Bowser, 104 Ind. 259, 3 N. E. 889; Kuntz v. Kinney, 33 Wis. 510; Good v. Fogg, 61 Ill. 449, 14 Am. Rep. 71; Carty v. Drew, 46 Vt. 346; Allison v. Brookshire, 38 Tex. 199; Seeley v. Gwillim, 40 Conn. 106. Some of the exemptions are the following: household furniture; Towns v. Pratt, 33 N. H. 345, 66 Am. Dec. 726; Tanner v. Billings, 18 Wis. 163, 86 Am. Dec. 755; Dunlap v. Edgerton, 30 Vt. 224; Haswell v. Parsons, 15 Cal. 266, 76 Am. Dec. 480; Heidenheimer v. Blumenkron, 56 Tex. 308; tools of trade; Atwood v. De Forest, 19 Conn. 513; Enscoe v. Dunn, 44 Conn. 93, 26 Am. Rep. 430; Boston Belting Co. v. Ivens & Co., 28 La. Ann. 695; Wicker v. Comstock, 52 Wis. 315, 9 N. W. 25; work horses; Tishomingo Sav. Inst. v. Young, 87 Miss. 473, 40 South. 9, 3 L. R. A. (N. S.) 693, 112 Am. St. Rep. 454, 6 Ann. Cas. 776; Forsyth v. Bower, 54 Cal. 639; Jaquith v. Scott, 63 N. H. 5, 56 Am. Rep. 476; Steele v. Lyford, 59 Vt. 230, 8 Atl. 736 (but this will not include high bred horses used for pleasure and to drive to and from business; Tishomingo Sav. Inst. v. Young, 87 Miss. 473, 40 South. 9, 3 L. R. A. [N. S.] 693, 112 Am. St. Rep. 454, 6 Ann. Cas. 776); the interest of a legatee in lands, until the court has held it to be a charge on such, although the legacy is given with a view that it shall be such a charge; Hiscock v. Fulton, 63 Hun 624, 17 N. Y. Supp. 408; curtesy initiate; Bruce v. Nicholson, 109 N. C. 202, 13 S. E. 790, 26 Am. St. Rep. 562; property held in trust; Mosher v. Neff, 33 Neb. 770, 51 N. W. 138; the bridge of a public corporation; Overton Bridge Co. v. Means, 33 Neb. 857, 51 N. W. 240, 29 Am. St. Rep. 514; blackberries while growing; Sparrow v. Pond, 49 Minn. 412, 52 N. W. 36, 16 L. R. A. 103, 32 Am. St. Rep. 571; trade-mark, apart from the articles it has served to identify; Prince Mfg. Co. v. Paint Co., 20 N. Y. Supp. 462; a vendor's lien reserved for the purchase price of lands conveyed; Willis & Bro. v. Sommerville, 3 Tex. Civ. App. 569, 22 S. W. 781; the interest of a *cestui que trust* under a trust for maintenance and support; Brooks v. Raynolds, 59 Fed. 923, 8 C. C. A. 370; the interest of the grantor in property transferred in fraud of creditors; Stonebridge v. Perkins, 141 N. Y. 1, 35 N. E. 980. State exemption laws are inapplicable to debts due from a citizen to the United States; U. S. v. Howell, 9 Fed. 674. See Fink v. O'Neil, 106 U. S. 280, 1 Sup. Ct. 325, 27 L. Ed. 196.

Exemption laws are not a part of the contract; they are part of the remedy and subject to the law of the forum; Chicago, R. I. & P. Ry. Co. v. Sturm, 174 U. S. 710, 17 Sup. Ct. 797, 43 L. Ed. 1144; Mineral Point R. Co. v. Barron, 83 Ill. 365; Carson v. Ry. Co., 88 Tenn. 646, 13 S. W. 588, 8 L. R. A. 412, 17 Am. St. Rep. 921; Conley v. Chilcote, 25 Ohio St. 320; Albrecht v. Treitschke, 17 Neb. 205, 22 N. W. 418; Moore v. R. Co., 43 Ia. 385; Broadstreet v. Clark, 65 Ia. 670, 22 N. W. 919; Stevens v. Brown, 20 W. Va. 450. That a debt is exempt from judicial process in the state where it was created will not make it exempt in another jurisdiction. The exemption does not follow the debt as an incident thereto; Chicago, R. I. & P. Ry. Co. v. Sturm, 174 U. S. 710, 17 Sup. Ct. 797, 43 L. Ed. 1144.

See, generally, BANKRUPTCY; DISTRESS; EXECUTION; HOMESTEAD; FAMILY; TOOLS; TAX.

EXEMPTS. Persons who are not bound by law, but excused from the performance of duties imposed upon others.

By act of congress Feb. 24, 1864, it was enacted that such persons as were rejected as physically or mentally unfit for the service, all persons actually in the military or naval service of the United States at the time of the draft, and all persons who had served in the military or naval service two years during the then war and been honorably discharged therefrom, and no others, were exempt from enrolment and draft under said act, and act of congress, March 3, 1863.

EXEQUATUR (Lat.). **In French Law.** A Latin word which was, in the ancient practice, placed at the bottom of a judgment emanating from another tribunal, and was a permission and authority to the officer to execute it within the jurisdiction of the judge who put it below the judgment.

We have something of the same kind in our practice. When a warrant for the arrest of a criminal is issued by a justice of the peace of one county, and he flies into another, a justice of the latter county may indorse the warrant, and then the ministerial officer may execute it in such county. This is called *backing* a warrant.

In International Law. An official recognition of a consul or commercial agent, made by the foreign department of the state to which he is accredited, authorizing him to exercise his power. He cannot act without it, and it may be refused or revoked at the pleasure of the same government. 3 Chit. Com. Law 56; 3 M. & S. 290; 5 Pardessus,

n. 1445; Twiss, Law of Nations; 1 Halleck, Int. Law 351.

EXERCITOR MARIS (Lat.). **In Civil Law.** One who fits out and equips a vessel, whether he be the absolute or qualified owner, or even a mere agent. Emerigon, Mar. Loans, c. 1, s. 1. We call him *exercitor* to whom all the returns come. Dig. 14. 1. 1. 15; 14. 1. 7; 3 Kent 161; Molloy, de Jur. Mar. 243.

The managing owner, or ship's husband. These are the terms in use in English and American laws, to denote the same as *exercitor maris*. See SHIP'S HUSBAND.

EXERCITORIA ACTIO (Lat.). **In Civil Law.** An action against a managing owner (*exercitor maris*), founded on acts of the master. 3 Kent 161; Vicat, Voc. Jur.

EXFESTUCARE (Lat.). To abdicate; to resign by passing over a staff. Du Cange. To deprive one's self of the possession of lands, honors, or dignities, which was formerly accomplished by the delivery of a staff or rod. Said to be the origin of the custom of *surrender* as practised in England formerly in courts baron. Spelman, Gloss. See also, Vicat, Voc. Jur.; Calvinus, Lex.

EXHÆREDATIO (Lat.). **In Civil Law.** A disinheriting. The act by which a forced heir is deprived of his legitimate or legal portion. In common law, a disherison. Occurring in the phrase, in Latin pleadings, *ad exhæredationem* (to the disherison), in case of abatement.

EXHÆRES (Lat.). **In Civil Law.** One disinherited. Vicat, Voc. Jur.; Du Cange.

EXHIBERE (Lat.). To present a thing corporeally, so that it may be handled. Vicat, Voc. Jur. To appear personally to conduct the defence of an action at law.

EXHIBIT. To produce a thing publicly, so that it may be taken possession of and seized. Dig. 10. 4. 2.

To file of record. Thus, it is the practice in England in personal actions, when an officer or prisoner of the king's bench is defendant, to proceed against such defendant in the court in which he is an officer, by *exhibiting*, that is, *filing*, a bill against him. Steph. Pl. 52, n. (*l*); 2 Sellon, Pr. 74; Newell v. State, 2 Conn. 38.

A paper or writing proved on motion or other occasion.

A supplemental paper referred to in the principal instrument, identified in some particular manner, as by capital letter, and generally attached to the principal instrument. 1 Stra. 674; 2 P. Wms. 410; Gresl. Eq. Ev. 98.

A paper referred to in, and filed with the bill, answer, or petition in a suit in equity, or with a deposition. Brown v. Bedwyne, 16 Ga. 68.

In the absence of a positive statutory provision, exhibits properly identified need not be attached to the deposition in connection with which they are offered in evidence; Toby v. R. Co., 98 Cal. 490, 33 Pac. 550. It has been held that the exhibits filed with a petition form no part thereof, and cannot be considered in determining its sufficiency on demurrer; Pomeroy v. Fullerton, 113 Mo. 440, 21 S. W. 19; and if the exhibit is not the foundation for the cause of action or of the defence, it will not be considered; Barnes v. Mowry, 129 Ind. 568, 28 N. E. 535.

Documents and other things, produced by a witness on cross-examination and marked for identification, are not before the court unless offered and admitted; Byerley v. Sun Co., 181 Fed. 138.

EXHIBITANT. A complainant in articles of the peace. 12 Ad. & E. 599.

EXHIBITION. In Scotch Law. An action for compelling the production of writings. See DISCOVERY.

EXHUMATION. The exhumation of a body should be ordered, if at all, only on a strong showing that, without its examination, a fraud is likely to be accomplished which an insurance company has exhausted every other legal means of exposing; Granger's Life Ins. Co. v. Brown, 57 Miss. 308, 34 Am. Rep. 446. Disinterment may be compelled by public authorities whenever conditions become such as that the public health is threatened, or in the interest of justice, Gray v. State, 55 Tex. Cr. R. 90, 114 S. W. 635, 22 L. R. A. (N. S.) 513; or for the purpose of ascertaining whether a crime has been committed; People v. Fitzgerald, 105 N. Y. 146, 11 N. E. 378, 59 Am. Rep. 483; or where an examination may disclose facts which prove an accused person innocent of crime; Gray v. State, 55 Tex. Cr. R. 90, 114 S. W. 635, 22 L. R. A. (N. S.) 513.

Such an order was refused in Moss v. State, 152 Ala. 30, 44 South. 598, because it appeared that two reputable physicians, available at the trial, had examined the body before burial. There is said to be no law requiring a court, at the prisoner's request, but at the expense of the state, to order the body to be exhumed in order to furnish him with evidence; Salisbury v. Com., 79 Ky. 425. In Com. v. Grether, 204 Pa. 203, 53 Atl. 753, the court refused to set aside a conviction of murder in the first degree because the district attorney and not the coroner had caused the body to be exhumed. In an insurance case, exhumation was ordered, to obtain evidence bearing on the question of suicide; the marshal was directed to exhume the body and the court appointed a pathologist and a chemist to make the examination; it was held, also, that such order could be made only in a case where the widow was a party; Mutual Life Ins. Co. of New York v. Griesa, 156 Fed. 398. The right to make the order, in an insurance case, was recognized in People v. Fitzgerald, 105 N. Y. 146, 11 N.

E. 378, 59 Am. Rep. 483; Grangers Life Ins. Co. v. Brown, 57 Miss. 308, 34 Am. Rep. 446; but in the latter case the order was refused on the ground of delay. See 22 L. R. A. (N. S.) 513, note.

EXIGENDARY. **In English Law.** An officer who makes out exigents.

EXIGENT, EXIGI FACIAS. See OUTLAWRY; Com. v. Hagerman, 2 Va. Cas. 244; Fitzh. N. B. 236; Rawle, Exmoor 55. See Appeal of Coleman, 75 Pa. 456.

EXIGENT LIST. A phrase used to indicate a list of cases set down for hearing upon various incidental and ancillary motions and rules.

EXIGENTER. An officer who made out exigents and proclamations. Cowell. The office is now abolished. Holthouse.

EXIGIBLE. Demandable; that which may be exacted.

EXILIUM (Lat.). **In Old English Law.** Exile. Setting free or wrongly ejecting bond-tenants. *Waste* is called *exilium* when bondmen (*servi*) are set free or driven wrongfully from their tenements. Co. Litt. 536. Destruction; waste. Du Cange. Any species of waste which drove away the inhabitants, into exile, or had a tendency to do so. Bac. Abr. *Waste* (*a*); 1 Reeve, Hist. Eng. Law 386.

EXISTIMATIO (Lat.). The reputation of a Roman citizen. The decision of arbiters. Vicat, Voc. Jur.; 1 Mackeldey, Civ. Law § 123.

EXISTING. The force of this word is not necessarily confined to the present. Thus a law for regulating "all existing railroad corporations" extends to such as are incorporated after as well as before its passage, unless exception is provided in their charters; Indianapolis & St. L. R. Co. v. Blackman, 63 Ill. 117; Lawrie v. State, 5 Ind. 525; Fox v. Edwards, 38 Ia. 215.

EXIT WOUND. The wound made in coming out by a weapon which has passed through the body or any part of it. 2 Beck. Med. Jur. 119.

EXITUS (Lat.). An export duty. Issue, child, or offspring. Rent or profits of land.

In Pleading. The issue or the end, termination or conclusion, of the pleadings; so called because an issue brings the pleadings to a close. 3 Bla. Com. 314.

EXLEX (Lat.). An outlaw. Spelman, Gloss.

EXOINE. **In French Law.** An act or instrument in writing which contains the reasons why a party in a civil suit, or a person accused, who has been summoned, agreeably to the requisitions of a decree, does not appear. Pothier, *Procéd. Crim.*, s. 3, art. 3. See ESSOIN.

EXONERATION. The taking off a burden or duty. The usual use of the word is in the rule in the distribution of an intestate's estate that the debts which he himself contracted and for which he mortgaged his land as security, shall be paid out of the personal estate in exoneration of the real.

But when the real estate is charged with the payment of a mortgage at the time the intestate buys it, and the purchase is made subject to it, the personal estate is not in that case to be applied in exoneration of the real estate; 2 Pow. Mortg. 780; Hurt v. Reeves, 5 Hayw. (Tenn.) 57; Duke of Cumberland v. Codrington, 3 Johns. Ch. (N. Y.) 229, 8 Am. Dec. 492; 1 Lead. Cas. in Eq. n. *646; Appeal of Hirst, 92 Pa. 491.

But the rule for exonerating the real estate out of the personal does not apply against specific or pecuniary legatees, nor the widow's right to paraphernalia, and, with reason, not against the interest of creditors; 2 Ves. 64; 1 P. Wms. 693; 3 *id.* 367. See 26 Beav. 522; Appeal of Clery, 35 Pa. 54; Canfield v. Bostwick, 21 Conn. 550.

Like the right of contribution between those equally liable for the same debt, the right of exoneration exists between debtors successively liable. A surety who discharges an obligation is entitled to look to the principal for reimbursement, and to invoke the aid of a court of equity for this purpose, and a subsequent surety, who, by the terms of the contract, is responsible only in the case of the default of the principal and a prior surety, may claim exoneration at the hands of either; Bisph. Eq. § 331; 3 Pom. Eq. Jur. § 1416.

As to exoneration of simple contract debts, see 1 Sm. L. Cas., 9th Am. ed. 614.

EXONERETUR (Lat.). **In Practice.** A short note entered on a bail-piece, that the bail is exonerated or discharged in consequence of having fulfilled the condition of his obligation, made by order of the court or of a judge upon a proper cause being shown. See RECOGNIZANCE.

EXPATRIATION. The voluntary act of abandoning one's country and becoming the citizen or subject of another.

The right of expatriation is the right of a person to transfer his allegiance from the country of which he is a citizen to another country.

This right has been much discussed. The question has been settled in the United States by the act of July 27, 1868, which declares the right of expatriation to be the inherent right of all people, disavows the claim made by foreign states that naturalized American citizens are still the subjects of such states, and extends to such naturalized citizens, while in foreign countries, the same protection accorded to native-born citizens. R. S. §§ 1999, 2000. This declaration comprehends our own citizens as well as those of

other countries; 14 Op. Atty. Gen. 295. Since the passage of this act, the United States has entered into treaties with nearly all the nations of Europe by which the contracting powers mutually concede to subjects and citizens the right of expatriation *on conditions and under qualifications.* And in case of conflict between the above act of congress and any treaty, it would seem the treaty must be held paramount; Morse, Citizenship § 179. See TREATY. To be legal, the expatriation must be for a purpose which is not unlawful nor in fraud of the duties of the emigrant at home.

Most foreign governments permit their citizens to become naturalized in other countries, but generally upon condition of the prior fulfilment of military service. Hershey 243–244. In Switzerland the consent of the canton is required, and a like rule exists in Japan; Meilli, Intern. C. & C. 121.

A citizen may acquire in a foreign country commercial privileges attached to his domicil, and be exempted from the operation of commercial acts embracing only persons resident in the United States or under its protection. See DOMICIL; NATURALIZATION. See also Miller, Const. U. S. 285, 297; Murray v. The Charming Betsy, 2 Cra. (U. S.) 120, 2 L. Ed. 208; 2 Kent 36; Grotius, b. 2, c. 5, s. 24; Puffendorff, b. 8, c. 11, ss. 2, 3; Vattel, b. 1, c. 19, ss. 218, 223, 224, 225; U. S. v. Gillies, 1 Pet. C. C. 161, Fed. Cas. No. 15,206; Ainslie v. Martin, 9 Mass. 461; 21 Am. L. Reg. 77; 11 *id.* 447; 3 Can. L. T. 463, 511; 25 Law Mag. & Rev. 124; Lawrence's Wheat. Int. L. 891.

By act of March 2, 1907, a citizen who is naturalized in any foreign state is expatriated; also a naturalized citizen who has resided two years in his native state or five years in any other foreign state, except upon presenting satisfactory evidence to a diplomatic or consular agent under the rules of the state department, and no citizen can be expatriated in time of war.

A Pennsylvania court, following her constitution framed by Franklin, first declared the right of expatriation an original and indefeasible right of man. Baldwin's Modern Political Institutions 241, citing Murray v. McCarty, 2 Munf. (Va.) 393; Wharton's State Trials 652.

For the doctrine of the English courts on this subject, see 1 Barton, Conv. 31, note; Vaugh. 227, 281; 7 Co. 16; Dy. 2, 224, 298 *b*, 300 *b*; 2 P. Wms. 124; 1 Hale, Pl. Cr. 68; 1 Wood, Conv. 382; Westl. Priv. Int. Law; Story, Confl. Laws; Cockburn, Nationality.

See ALIEN; NATURALIZATION.

EXPECTANCY. Contingency as to possession. That which is expected or hoped for. Frequently used to imply an estate in expectancy.

Estates are said to be *in possession* when the person having the estate is in actual enjoyment of that in which his estate subsists, or *in expectancy* when the enjoyment is postponed, although the estate or interest has a present legal existence.

A bargain in relation to an expectancy is, in general, considered invalid, unless the proof of good faith is strong; 2 Ves. 157; 1 Bro. C. C. 10; Jeremy, Eq. Jur. 397; McCall's Adm'r v. Hampton, 98 Ky. 166, 32 S. W. 406, 33 L. R. A. 266, 56 Am. St. Rep. 335.

But it is well settled in equity that a deed which purports to convey property, which is in expectancy or to be subsequently acquired, or which is not the subject of grant at law, though inoperative as a grant or conveyance, will be upheld as an executory agreement, and enforced according to its intent, if supported by a valid consideration, whenever the grantor is in a condition to give it effect; per Strong, J., in Bayler v. Com., 40 Pa. 37, 43, 80 Am. Dec. 551; Varick v. Edwards, 11 Paige (N. Y.) 290; McWilliams v. Nisly, 2 S. & R. (Pa.) 507, 7 Am. Dec. 654; Bailey v. Hoppin, 12 R. I. 560, 568; 10 H. L. Cas. 189, 211; East Lewisburg Lumber & Mfg Co. v. Marsh, 91 Pa. 96; Ruple v. Bindley, *id.* 296; Fritz's Estate, 160 Pa. 156, 28 Atl. 642; Hudson v. Hudson, 222 Ill. 527, 78 N. E. 917; Hale v. Hollon, 90 Tex. 427, 39 S. W. 287, 36 L. R. A. 75, 59 Am. St. Rep. 819; Betts v. Harding, 133 Ia. 7, 109 N. W. 1074; Johnson v. Johnson, 170 Mo. 34, 70 S. W. 241, 59 L. R. A. 748. So it is said that an estate in expectancy, though contingent, is a fair subject of contract, and an agreement by an expectant heir in respect thereto, fairly made upon valuable considerations, will be enforced in equity; Parsons v. Ely, 45 Ill. 232; Varick v. Edwards, 1 Hoffm. Ch. (N. Y.) 382; McDonald v. McDonald, 58 N. C. 211, 75 Am. Dec. 434; a mere agreement to appropriate the money when received from a legacy will not operate as an assignment of it; Appeal of Wylie, 92 Pa. 196. An executory agreement between the husbands of two expectant legatees to divide equally what should be left to either of them has been enforced; 2 P. Wms. 182; 2 Sim. 183. Such assignments are prohibited by statute in California; Cal. Civ. Code 700, 1045; In re Wickersham's Estate, 138 Cal. 355, 70 Pac. 1070, 71 Pac. 437; and in Louisiana; Succession of Jacobs, 104 La. 447, 29 South. 241; and in some states have been held unenforceable; thus an attempted conveyance by heirs-apparent of their interest in the property of an ancestor, even with the latter's consent, has been held void; Wheeler's Ex'rs v. Wheeler, 2 Metc. (Ky.) 474, 74 Am. Dec. 421; McCall's Adm'r v. Hampton, 98 Ky. 166, 32 S. W. 406, 33 L. R. A. 266, 56 Am. St. Rep. 335; on the ground that it is essential to the legal validity of the thing sold that it have an actual or potential existence, and that a mere possibility or contingency, not founded on a right or coupled with an interest, cannot be the subject of a sale or assignment; Spears v. Spaw, 118 S. W. 275, 25 L. R. A. (N. S.) 436; and

on the ground that, as no one can be the heir of a living person, a transaction based on the idea of a future right to the succession of a living person is devoid of consideration and can have no effect, notwithstanding the agreement is valid under the law of a foreign state where it was made; Cox v. Von Ahlefeldt, 105 La. 543, 30 South. 175.

An assignment without consideration by a married woman of an expectant interest in her father-in-law's estate, which was contingent upon her surviving her husband, in order to secure her husband's indebtedness, is not valid at law, although, when based upon a sufficient consideration, it might be enforced in equity when the interest became vested in the assignor; In re Baeder's Estate, 224 Pa. 452, 73 Atl. 915; and see, to the same effect, Bayler v. Com., 40 Pa. 37, 80 Am. Dec. 551.

That a grant by an expectant is simply a covenant to convey; 1 P. Wms. 387 (Lord Chancellor Hardwicke); McDonald v. McDonald, 58 N. C. 211, 75 Am. Dec. 434; and that chancery will give effect to the assignment of an expectancy or possibility, not as a grant, but as a contract entitling the assignee to a specific performance as soon as the assignor has the power to perform it; are held too well established to be disregarded; McDonald v. McDonald, 58 N. C. 211, 75 Am. Dec. 434; Philadelphia, W. & B. R. Co. v. Woelpper, 64 Pa. 366, 3 Am. Rep. 596. Such a sale may be enforced as against the heir through the doctrine of estoppel springing from his covenants contained in the deed of assignment; Johnson v. Johnson, 170 Mo. 34, 70 S. W. 241, 59 L. R. A. 748, citing Steele v. Frierson, 85 Tenn. 430, 3 S. W. 649; Bohon v. Bohon, 78 Ky. 408; Somes v. Skinner, 3 Pick. (Mass.) 52; Robertson v. Wilson, 38 N. H. 48; House v. McCormick, 57 N. Y. 310; Habig v. Dodge, 127 Ind. 31, 25 N. E. 182; followed and approved; Jerauld v. Dodge, 127 Ind. 600, 25 N. E. 186; Fairbanks v. Williamson, 7 Greenl. (Me.) 96; Stover v. Eyeleshimer, 46 Barb. (N. Y.) 84; Rosenthal v. Mayhugh, 33 Ohio St. 155.

The general doctrine is undoubtedly to treat such an assignment as a contract enforcible in equity, but Pomeroy considers it inadequate; 3 Pom. Eq. Jur. § 1287, n. 2; and prefers the theory that it is an actual transfer of the ownership of an equitable property right which ripens into an absolute title; *id.* § 1271.

Equity will, in general, relieve a party from unequal contracts for the sale or pledge of expectancies, as they are in fraud of the ancestor. See 2 P. Wms. 182; 2 Sim. 183, 192; 5 *id.* 524; 1 Sto. Eq. Jur. § 342. But relief will be granted only on equitable terms; for he who seeks equity must do equity; *id.*

In dealing with such cases, the rule applied by courts of equity is, as laid down in Chesterfield v. Janssen, to scrutinize them carefully according to the circumstances of each; 2 Ves. Sr. 125; and, if upon inadequate consideration, or otherwise fraudulent, they will be relieved against and wholly or partially set aside; *id.;* 1 L. Cas. in Eq. 773; 2 Pom. Eq. Jur. § 953, and note, where the cases are collected.

In a leading English case the principle is thus stated: "The court will relieve 'expectant heirs' against bargains relating to their reversionary or expectant interest in cases of undervalue, of weakness due to age or poverty, and of the absence of independent advice. But all these circumstances must co-exist in order to entitle them to relief;" L. R. 8 Ch. 484. In that case it was held that the repeal of the usury laws in England has not altered the doctrine by which the court of chancery affords relief against improvident and extravagant bargains. In the opinion Lord Selborne directed attention to the fact that concealment was usually a feature of these cases, but agreed with Lord St. Leonards that it was not an indispensable condition of equitable relief; Sugd. Vend. & Pur., 11th ed. 316; differing, as to this point, with Lord Brougham; 2 Myl. & K. 456. The independent advice of a father seems to rebut the presumption of fraud; 2 App. Cas. 814; but old age or youth increases it; 2 Giff. 157; 4 D. J. & S. 388; or poverty and ignorance; L. R. 10 Ch. 389; 40 Ch. D. 312. In the first of these two cases, Jessel, M. R., thus defined the term "expectant heir": "The phrase is used not in its literal meaning, but as including every one who has either a vested remainder, or a contingent remainder in a family property, including a remainder in a portion, as well as a remainder in an estate, and every one who has the hope of succession to the property of an ancestor, either by reason of his being the heir-apparent or presumptive, or by reason, merely, of the expectation of a devise or bequest on account of the supposed or presumed affection of his ancestor or relation. More than this, the doctrine as to expectant heirs has been extended to all reversioners and remaindermen. So that the doctrine not only included the class mentioned, who in some popular sense might be called 'expectant heirs,' but also all remaindermen and reversioners."

The principle has been held to include younger sons of peers; 15 Ch. D. 679. As to what is a reversionary interest for this purpose, see 11 Eq. 265, 276; L. R. 2 Ch. 542; and as to what is independent advice, see 10 Eq. 611, in which the borrower, though accompanied by a friend who was a solicitor but did not act as such, or know the terms of the contract, was held not to have independent advice.

Undervaluation is not alone a sufficient ground for setting aside a contract, conveyance, or mortgage of a reversion, otherwise

fair; Stat. 31 Vict. c. 4; 2 Ch. Cas. 136; 35 Beav. 570; 32 L. J. Ch. 201.

By the civil law, such contracts are held *contra bonos mores*, and they are forbidden in general terms; Code 2, 3, *de pactis* 30; and in the French code it is forbidden to sell the succession of a living person, even with his consent; art. 1600; the same is the rule of the Italian code; art. 1460; and of that of Austria; § 879.

As to expectancy of life, see LIFE TABLES.

See, generally, 2 Lead. Cas. in Eq., 4th Am. ed. 1530, 1559, 1605; 3 Pom. Eq. Jur. ch. 8, sec. 3; Brett, L. Cas. Mod. Eq. 3d ed. 69, n.; 9 Harv. L. Rev. 476; CATCHING BARGAIN; POST OBIT.

EXPECTANT. Contingent as to enjoyment.

EXPEDITATION. A cutting off the claws or ball of the fore-feet of mastiffs, to prevent their running after deer; a practice for the preservation of the royal forests. Cart. de For. c. 17; Spelman, Gloss.; Cowell. See COURT OF REGARD.

EXPENDITORS. Paymasters. Those who expend or disburse certain taxes. Especially the sworn officer who supervised the repairs of the banks of the canals in Romney Marsh. Cowell.

EXPENSÆ LITIS (Lat.). Expenses of the suit; the costs, which are generally allowed to the successful party.

EXPERTS (Lat. *experti*, instructed, proved by experience). Persons selected by the court or parties in a cause, on account of their knowledge or skill, to examine, estimate, and ascertain things and make a report of their opinions. Merlin, *Répert.*

Witnesses who are admitted to testify from a peculiar knowledge of some art or science, a knowledge of which is requisite or of value in settling the point at issue.

Persons professionally acquainted with the science or practice in question. Strickl. Ev. 408. Persons conversant with the subject-matter on questions of science, skill, trade, and others of like kind. Best, Ev. § 346.

The qualification of a witness as an expert is largely within the discretion of the trial judge; Mutual Fire Ins. Co. of New York v. Alvord, 61 Fed. 752, 9 C. C. A. 623; Ballard v. R. Co., 126 Pa. 141, 19 Atl. 35; Slocovich v. Ins. Co., 108 N. Y. 61, 14 N. E. 892; City of Fort Wayne v. Coombs, 107 Ind. 84, 7 N. E. 743. Such a witness may be asked whether the examination made by him was superficial or otherwise; Northern Pac. R. Co. v. Urlin, 158 U. S. 271, 15 Sup. Ct. 840, 39 L. Ed. 977; he need not be engaged in his profession, it is sufficient that he has studied it; Tullis v. Kidd, 12 Ala. 648.

Dealers in precious stones are not competent to testify to the uses of imitation precious stones; Lorsch v. U. S., 119 Fed. 476. One who has been a practicing physician for eight years is competent to testify as an expert whether a death was caused by arsenic, though he never had a case of arsenical poisoning; State v. Kammel, 23 S. D. 465, 122 N. W. 420.

Experts alone can give an opinion based on facts shown by others, assuming them to be true; State v. Potts, 100 N. C. 457, 6 S. E. 657.

"It is not sufficient to warrant the introduction of expert testimony that the witness may know more of the subject of inquiry and may better understand and appreciate it than the jury; but to warrant its introduction, the subject of the inquiry must be one relating to some trade, profession, science, or art in which persons instructed therein by study and experience may be supposed to have more skill and knowledge than jurors of average intelligence may generally be presumed to have;" Ferguson v. Hubbell, 97 N. Y. 511, 49 Am. Rep. 544; and not only may they testify to facts but they may give their opinions on them as experts; Van Wycklen v. City of Brooklyn, 118 N. Y. 429, 24 N. E. 179. The practical result of the rule admitting such testimony is far from satisfactory; its principal defect being that such witnesses are usually called because their known theories are understood to support the fact which the party calling them wishes to prove; Grigsby v. Water Co., 40 Cal. 405. "They come," says Lord Campbell, speaking of scientific witnesses, "with a bias on their minds to support the cause in which they are embarked, and hardly any weight should be given to their evidence;" 10 Cl. & F. 154. It is said to be generally safer to take the judgments of unskilled jurors than the hired and biassed opinions of experts; Ferguson v. Hubbell, 97 N. Y. 511, 49 Am. Rep. 544.

A jury is not bound by the opinions of experts on an issue of insanity; U. S. v. Chisholm, 149 Fed. 284; Mitchell v. State, 6 Ga. App. 554, 65 S. E. 326; but should form their own judgment from all the proof in the case; U. S. v. Chisholm, 153 Fed. 808. It has been said that they "are generally mere arguments in behalf of the side calling them"; Ideal Stopper Co. v. Seal Co., 131 Fed. 249, 65 C. C. A. 436; and such testimony is frequently characterized by the courts as of little value; American Middlings Purifier Co. v. Christian, 3 Bann. & A. 42, Fed. Cas. No. 307; King v. Cement Co., 6 Fish. 336, Fed. Cas. No. 7,798; L. R. 6 Ch. Div. 415, n.

On the other hand, the necessity of such testimony in certain classes of cases, particularly those involving patent law, is thus set forth in 3 Rob. Pat. § 1012:

"Notwithstanding the strictures passed upon expert testimony by many jurists on each side of the Atlantic, and the truth of the assertions by which these censures have been justified, it is still certain that in most patent cases expert evidence is, and must always be, indispensable. That the expert is consulted before he is summoned as a witness; that when his opinion is unfavorable to the party who consults him he is not produced in court, at least

on that side of the case; that when called as a witness his testimony is expected to support, and generally does support, the claims of the litigant on whose behalf he is presented,—are no doubt true; but this is only what occurs in every other trial where counsel have properly prepared their case. The error lies with those who ascribe judicial functions to the patent-expert, and demand of him such freedom from partisanship as the exercise of judicial powers requires. That there are experts in other departments of affairs upon whose opinion the court is forced to rely as the foundation of its own judgments, because incapable of forming an opinion for itself, and that such experts consequently fill the places of judges and should be beyond the influence and control of parties, must be conceded. But such is not the case with patent-experts, whose opinion is received in evidence only in connection with the reasons on which it is based, and is to be accepted or rejected by the jury according to their own view of its fallacy or truth. The patent-expert, considered in his real character, is an explorer, gifted with unusual powers of discernment and apprehension; a chronicler, trained to preserve the recollection of the essential attributes of things; an expositor, fitted to embody those essential attributes in accurate and intelligible language; a monitor, able to suggest the conclusions which follow from the premises he has described. His relation to the jury is not unlike that which counsel sustain to the court, as guides to a correct decision of the issues severally confided to their judgments,—the one pointing out facts and applying them in support of the claims advanced by his employer, as the other produces his authorities and applies them to the maintenance of his claims of law"

Such assistance, it is suggested, it would not be wise in any tribunal to undervalue or reject; 3 Rob. Pat. § 1012.

The fact that the opinions of experts in patent cases are often diametrically opposite does not necessarily discredit their testimony but merely emphasizes the fact that their opinions are to be regarded as *opinions*, merely, and a decision rendered between them; Conover v. Roach, 4 Fish. 12, Fed. Cas. No. 3,125. A patent expert is in effect an "auxiliary counsel" who argues upon the law and the facts; Steam-Gauge & Lantern Co. v. Mfg. Co., 28 Fed. 618.

The practice of introducing a large number of expert witnesses in patent causes is not to be commended, one competent witness on each side being usually sufficient to insure a full and fair elucidation of what is recondite in the case; American Stove Co. v. Foundry Co., 158 Fed. 978, 86 C. C. A. 182. While expert evidence is not conclusive on the jury; Many v. Sizer, 1 Fish. 17, Fed. Cas. No. 9,056; and is to be judged by the same standards as ordinary evidence; May v. Fond du Lac County, 27 Fed. 691; Carter v. Baker, 4 Fish. 404, Fed. Cas. No. 2,472, 1 Sawyer 512; Page v. Ferry, 1 Fish. 298, Fed. Cas. No. 10,662; and to be accorded by the jury such weight as they see fit; Johnson v. Root, 1 Fish. 351, Fed. Cas. No. 7,411; Allen v. Hunter, 6 McLean 303, Fed. Cas. No. 225; Brooks v. Jenkins, 3 McLean 432, Fed. Cas. No. 1,953; it is nevertheless of great value in patent cases; French v. Rogers, 1 Fish. 133, Fed. Cas. No. 5,103; Carr v. Rice, 1 Fish. 198, Fed. Cas. No. 2,440; Morris v. Barrett, 1 Fish. 461, Fed. Cas. No. 9,827; Parker v. Stiles, 5 McLean 44, Fed. Cas. No. 10,749; Allen v. Blunt, 3 Sto. 742, Fed. Cas. No. 216; Brooks v. Jenkins, 3 McLean 432, Fed. Cas. No. 1,953.

It has been held that, without explanatory evidence, the defense of anticipation will not be considered in a patent case, where it is supported by prior patents for complicated machinery; Bell v. MacKinnon, 149 Fed. 205, 79 C. C. A. 163.

The value of such testimony depends on the skill, not the number; Brooks v. Bicknell, 4 McLean 70, Fed. Cas. No. 1,946; and is to be measured by their reasons; U. S. Annunciator v. Sanderson, 3 Blatchf. 184, Fed. Cas. No. 16,790; Whipple v. Baldwin Mfg. Co., 4 Fish. 29, Fed. Cas. No. 17,514; Parham v. American Mfg. Co., 4 Fish. 468, Fed. Cas. No. 10,713.

There are said to be two classes of patent experts, scientific and mechanical, each having a distinct sphere. The scientific expert is one familiarized by his studies and experiments with the principles of a science and qualified to understand, distinguish, and explain the subject-matter and application thereto of such science. His services are invoked to determine the character and scope of an invention with reference to the condition of the art at the date of its production. His testimony is directed to the question whether the alleged invention is the result of an inventive act; whether it embraces or excludes a different invention or is substantially the same in principle, function, or effect with any other. The mechanical expert represents the skilled workman in his art, who by practical training in it could comprehend and apply to it various instruments and methods. His evidence will bear upon the defence of want of novelty, prior patent, inutility of the invention, or ambiguity of the description in the specification of the patent. One person may appear in both capacities. 3 Rob. Pat. § 1013. See Curt. Pat. § 479.

Expert testimony is admissible upon questions for the court as well as upon those for the jury, where it can be properly applied to the subject-matter of the question as the construction of the patent and whether a prior patent covers the same invention; 3 Rob. Pat. § 1014. In dealing with such questions the court is at liberty to admit expert evidence, but cannot be compelled to do so, and it is not error to refuse it; *id.;* Day v. Stellman, 1 Fish. 487, Fed. Cas. No. 3,690; Winans v. R. Co., 21 How. (U. S.) 88, 16 L. Ed. 68.

The opinions of experts are admissible to prove insanity; U. S. v. Chisholm, 153 Fed. 808; to prove indebtedness by the general results shown by books of account; Brown v. U. S., 142 Fed. 1, 73 C. C. A. 187; to show whether a writing is genuine or disguised; Rinker v. U. S., 151 Fed. 755, 81 C. C. A. 379; or whether a child had passed through

the full period of gestation based upon the appearance of the child at the age of 13 months; People v. Johnson, 70 Ill. App. 634; or the cause of a death from facts stated by other witnesses and without personal examination; State v. Kammel, 23 S. D. 465, 122 N. W. 420; but such evidence is inadmissible to destroy the plain and obvious meaning of a contract where the words used are plain and unambiguous; Bowers Dredging Co. v. U. S., 211 U. S. 176, 29 Sup. Ct. 77, 53 L. Ed. 136; nor is it admissible upon the question of damages; Lincoln v. R. Co., 23 Wend. (N. Y.) 425; Bain v. Cushman, 60 Vt. 343, 15 Atl. 171; Chandler v. Bush, 84 Ala. 102, 4 South. 207; nor as to whether they were caused by negligence; East Tennessee, V. & G. R. v. Wright, 76 Ga. 532; International & G. N. Ry. Co. v. Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58; Hankins v. Watkins, 77 Hun 360, 28 N. Y. Supp. 867. See OPINION.

It has been a matter of grave discussion whether an expert is bound to testify on matters of *opinion* without extra compensation, the weight of decisions being that he is not bound to do so; 1 C. & K. 25; Ex parte Roelker, Sprague 276, Fed. Cas. No. 11,995; Dills v. State, 59 Ind. 15; Clark County v. Kerstan, 60 Ark. 508, 30 S. W. 1046; *contra*, Ex parte Dement, 6 Cent. L. J. 11; U. S. v. Cooper, 21 D. C. 491; Buchman v. State, 59 Ind. 1, 26 Am. Rep. 75; Dills v. State, 59 Ind. 15; 6 So. Law Rev. 706. In the absence of statutory authority, an expert for the state cannot demand extra compensation, at least when not compelled to make any preliminary examination or preparation, or to attend and listen to the testimony; Flinn v. Prairie County, 60 Ark. 204, 29 S. W. 459, 27 L. R. A. 669, 46 Am. St. Rep. 168; and when no demand is made in advance for special compensation, he can recover only the statutory witness fees; Board of Com'rs of County of Larimer v. Lee, 3 Colo. App. 177, 32 Pac. 841; Tiffany v. Iron Works, 59 Misc. 113, 109 N. Y. Supp. 754. When an expert is required to make a preliminary examination or to prepare specially for his testimony, he is allowed extra compensation in addition to the ordinary witness fees; Keller v. Harrison, 151 Ia. 320, 128 N. W. 851, 131 N. W. 53, Ann. Cas. 1913A, 300; Gordon v. Conley, 107 Me. 286, 78 Atl. 365, 33 L. R. A. (N. S.) 336; Burnett v. Freeman, 125 Mo. App. 683, 103 S. W. 121; Schofield v. Little, 2 Ga. App. 286, 58 S. E. 666; Philler v. Waukesha County, 139 Wis. 211, 120 N. W. 829, 25 L. R. A. (N. S.) 1040, 131 Am. St. Rep. 1055, 17 Ann. Cas. 712; and it has been held that a physician testifying as an expert comes within such rule; People v Board of Sup'rs, 148 App. Div. 584, 132 N. Y. Supp. 868; but usually a physician is required to give expert testimony without extra compensation; People v. Conte, 17 Cal. App. 771, 122 Pac. 450, 457; State v. Bell, 212 Mo. 111, 111 S. W. 24; North Chicago St. R. Co. v. Zeiger, 78 Ill. App. 463, affirmed in 182 Ill. 9, 54 N. E. 1006, 74 Am. St. Rep. 157; especially when the physician is attending professionally one of the parties; Anderson v. Ry. Co., 103 Minn. 184, 114 N. W. 744; Burnett v. Freeman, 134 Mo. App. 709, 115 S. W. 488. It is held that an expert who testifies on a subject requiring special knowledge and skill is entitled only to the statutory fee; Main v. Sherman County, 74 Neb. 155, 103 N. W. 1038; and so where a witness had knowledge common to persons in a particular neighborhood, not based on study or investigation, and in spite of a special contract for extra compensation; Ramschasel's Estate, 24 Pa. Super. Ct. 262. Expenses of expert witnesses cannot be allowed as between the parties at a rate exceeding the usual fees; [1900] 1 Ir. Rep. 22; Randall v. Journal Ass'n, 22 Misc. 715, 49 N. Y. Supp. 1064; Linforth v. Gas Co., 9 Cal. App. 434, 99 Pac. 716.

Under equity rule 48 (S. C. of U. S., in effect Feb. 1, 1913, 33 Sup. Ct. xxxi), the district court, in a case involving the scope or validity of a patent or trade-mark, may, upon petition, order that the examination in chief of the experts be set forth in affidavits and filed: Those of plaintiff within 40 days after the cause is at issue; those of defendant 20 days after plaintiff's time has expired; and rebutting affidavits 15 days after the time for filing the originals has expired. The court or a judge may direct the cross-examination and any re-examination before the court at the trial. If the expert be not produced, the affidavit shall not be used.

A statute providing for the appointment of expert witnesses by the court without notice to the respondent or prosecuting attorney in cases of homicide was declared unconstitutional in People v. Dickerson, 164 Mich. 148, 129 N. W. 199, 33 L. R. A. (N. S.) 917, Ann. Cas. 1912B, 688.

In Germany expert witnesses are appointed by the court and are regarded as assistants to the trial judge. The judge decides whether they shall be called or not; he may inform himself from other sources upon the questions raised. There are lists of experts made under local laws; they are usually nominated by the various trades and professions. They are sworn in and need not be sworn in the particular case. If the parties have agreed upon an expert, he must be examined together with others designated by the judge if he so desires.

Frequently the experts furnish a written opinion and are not examined. The rules are the same in civil and criminal cases.

In France in civil cases each court selects expert witnesses and publicly announces their names. They are classified under 49 different categories. Usually three are examined; but the parties may agree to examine only one. If the parties cannot agree within three days on their choice of the ex-

perts to be called, the court appoint. They report in writing signed by all. If they differ in opinion, the grounds of difference must be stated, but not the name of the dissentient. The report need not be sworn to.

In criminal cases the experts are selected by the procureur (district-attorney) or they may be called by the examining magistrate or the trial judge.

Lists of experts of various professions are published by the official registrars of the courts and are appointed by the minister of justice with the advice of the presidents of the courts and the district attorney. They are entitled to ask for any fee they consider due for their services, there being no fixed schedule. Each profession is considered on its merits. Sometimes an expert not on the list may be selected by the judge. The rule that there must be an uneven number of experts does not apply in the criminal courts.

See OPINION; PATENT; HYPOTHETICAL QUESTION.

EXPILATION. **In Civil Law.** The crime of abstracting the goods of a succession.

This is said not to be a theft, because the property no longer belongs to the deceased, nor to the heir before he has taken possession. In the common law, the grant of letters testamentary, or letters of administration, relates back to the time of the death of the testator or intestate: so that the property of the estate is vested in the executor or administrator from that period.

EXPIRATION. Cessation; end: as, the expiration of a lease, of a contract or statute.

In general, the expiration of a contract puts an end to all the engagements of the parties, but not to the obligations which arise from the non-fulfillment of obligations created during its existence. See PARTNERSHIP; CONTRACT.

The term is specially used to denote the day upon which the risk of an insurance policy terminates. When before the expiration of policies the companies agreed to "hold" the policies for renewal, and after the expiration the agent of the insured told them to continue to hold them until the form could be arranged, the policies were held to be in force; Baker v. Assur. Co., 162 Mass. 358, 38 N E. 1124. Temporary insurance from one day "until" a certain other date, includes all of the day of expiration; Thompson v. Ins. Co., 4 Pa. Dist. R. 382. See INSURANCE.

When a statute is limited as to time, it expires by mere lapse of time, and then it has no force whatever; and, if such a statute repealed or supplied a former statute, the first statute is, *ipso facto*, revived by the expiration of the repealing statute; Collins v. Smith, 6 Whart. (Pa.) 294, 36 Am. Dec. 228; unless it appear that such was not the intention of the legislature; 3 East 212; Bacon. Abr. *Statute* (D).

EXPIRY OF THE LEGAL. **In Scotch Law.** The expiration of the term within which the subject of an adjudication may be redeemed on payment of the debt adjudged for. Bell, Dict.; 3 Jurid. Styles, 3d ed. 1107.

EXPLICATIO (Lat.). **In Civil Law.** The fourth pleading; equivalent to the sur-rejoinder of the common law. Calvinus, Lex.

EXPLOSION. A sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report. United Life, Fire & Marine Ins. Co. v. Foote, 22 Ohio St. 348, 10 Am. Rep. 735.

There is no difference in ordinary use between "explode" and "burst." The ordinary idea is that the explosion is the cause, while the rupture is the effect; Evans v. Ins. Co., 44 N. Y. 151, 4 Am. Rep. 650; Mitchell v. Ins. Co., 183 U. S. 42, 22 Sup. Ct. 22, 46 L. Ed. 74. See INSURANCE.

The insurer against fire is not liable for loss or damage to a building caused by explosion; Hustace v. Ins. Co., 175 N. Y. 292, 67 N. E. 592, 62 L. R. A. 651; Briggs v. Ins. Co., 53 N. Y. 446; German Fire Ins. Co. v. Roost, 55 Ohio St. 587, 45 N. E. 1097, 36 L. R. A. 236, 60 Am. St. Rep. 711; Heuer v. Ins. Co., 144 Ill 393, 33 N. E. 411, 19 L. R. A. 594; Phœnix Ins. Co. v. Greer, 61 Ark. 509, 33 S. W. 840. See INSURANCE also as to liability for fire caused by explosions, and for explosions caused by fire; FIRE.

EXPLOSIVES. The standard form of policy issued by the New York fire insurance companies includes benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder, exceeding 25 pounds in quantity, nitro-glycerin, or other explosives. Blasting powder is held to be included by the words "other explosives" within the meaning of such a policy; Penman v. Ins. Co., 216 U. S. 311, 30 Sup. Ct. 312, 54 L. Ed. 493; St. Paul Fire & Marine Ins. Co. v. Penman, 151 Fed. 961, 81 C. C. A. 151.

A person in possession of dynamite is bound to exercise the highest degree of care to take every reasonable precaution to prevent explosion; Sowers v. McManus, 214 Pa. 244, 63 Atl. 601.

The regulations of The Hague tribunal of 1899 forbid the throwing of explosives from balloons or other airships. Inasmuch as this provision is only binding upon the contracting powers, it is provided that, if either of the nations at war form an alliance with a non-contracting power, the prohibition shall be null.

See BLASTING; DANGEROUS GOODS; FIRE.

EXPORTS. Goods and merchandise sent from one country to another. 2 M. & G. 155; 3 *id.* 959.

While the word *export* technically includes the landing in as well as the shipment to a foreign country, it is often used as meaning only the shipment from this country, and it will be so construed when used in a suit the manifest purpose of which would be defeated by limiting the word to its strict techni-

cal meaning; U. S. v. Chavez, 228 U. S. 525, 33 Sup. Ct. 595, 57 L. Ed. —, where the word is construed as used in the joint resolution of March 14, 1912.

In order to preserve equality among the states in their commercial relations, the constitution provides that "no tax or duty shall be laid on articles exported from any state." Art. 1, s. 9. And, to prevent a pernicious interference with the commerce of the nation, the tenth section of the first article of the constitution contains the following prohibition: "No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress." See Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. Ed. 678; IMPORTATION.

EXPOSÉ. A French word, sometimes applied to a written document containing the reasons or motives for doing a thing. The word occurs in diplomacy.

EXPOSE. To cast out to chance, to place abroad, or in a situation unprotected; Shannon v. People, 5 Mich. 90.

EXPOSURE OF PERSON. Such an intentional exposure, in a public place, of the naked body, as is calculated to shock the feelings of chastity or to corrupt the morals.

This offence is indictable on the ground that every public show and exhibition which outrages decency, shocks humanity, or is contrary to good morals, is punishable at common law. 1 Bish. Cr. Law § 1125; State v. Rose, 32 Mo. 560. An indecent exposure, though in a place of public resort, if visible by only one person, is not indictable as a common nuisance. An omnibus is a public place sufficient to support the indictment; Clark, Cr. L. 306, n.; 1 Den. 338; Templ. & M. 23; 2 C. & K. 933; 2 Cox, Cr. Cas. 376; 3 *id.* 183; Dearsl. 207. But see State v. Roper, 18 N. C. 208; State v. Pepper, 68 N. C. 259, 12 Am. Rep. 637. An ordinance making it an offence to expose the person indecently without reference to the intent which accompanies the act, is a valid exercise of police power; City of Grand Rapids v. Bateman, 93 Mich. 135, 53 N. W. 6.

See, generally, 1 Benn. & H. Lead. Cr. Cas. 442; Knowles v. State, 3 Day (Conn.) 103; Fowler v. State, 5 Day (Conn.) 81; State v. Millard, 18 Vt. 574, 46 Am. Dec. 170; Com. v. Catlin, 1 Mass. 8; Com. v. Sharpless, 2 S. & R. (Pa.) 91, 7 Am. Dec. 632; Miller v. People, 5 Barb. (N. Y.) 203

See INDECENCY.

EXPRESS. Stated or declared, as opposed to implied. That which is made known and not left to implication. It is a rule that when a matter or thing is expressed it ceases to be implied by law; *expressum facit cessare tacitum.* Co. Litt. 183.

EXPRESS ABROGATION. A direct repeal in terms by a subsequent law referring to that which is abrogated.

EXPRESS ASSUMPSIT. A direct undertaking. See ASSUMPSIT; ACTION.

EXPRESS COMPANIES. Companies organized to carry small and valuable packages expeditiously in such manner as not to subject them to the danger of loss and damage which to a greater or less degree attends the transportation of heavy or bulky articles of commerce. Southern Express Co. v. R. Co., 10 Fed. 213.

A common carrier that carries at regular and stated times, over fixed and regular routes, money and other valuable packages, which cannot be conveniently or safely carried as common freight; and also other articles and packages of any description which the shipper desires or the nature of the article requires should have safe and rapid transit and quick delivery, transporting the same in the immediate charge of its own messenger on passenger steamers and express and passenger railway trains, which it does not own or operate, but with the owners of which it contracts for the carriage of its messengers and freights; and within cities and towns or other defined limits, it collects from the consignors and delivers to the consignees at other places of business the goods which it carries. Pacific Exp. Co. v. Seibert, 44 Fed. 310. The right to use the facilities afforded by a railroad depends entirely on contract; St. Louis, I. M. & S. R. Co. v. Express Co., 117 U. S. 3, 6 Sup. Ct. 542, 628, 29 L. Ed 791. In St. Louis, I. M. & S. R. Co. v. Express Co., 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791; it was held that a railroad company might make an exclusive contract with a single express company, and this has been followed by many state courts; but it is held that under the anti-trust laws such exclusive contract is not valid; State v. R. Co., 99 Tex. 516, 91 S. W. 214, 5 L. R. A. (N. S.) 783, 13 Ann. Cas. 1072.

They are common carriers; Southern Express Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140; U. S. Express Co. v. Backman, 28 Ohio St. 144; notwithstanding a declaration in their bill of lading that they are not to be so considered; Bank of Kentucky v. Express Co., 93 U. S. 174, 23 L. Ed. 872; Christenson v. Express Co., 15 Minn. 270 (Gil. 208), 2 Am. Rep. 122.

In section 1 of the Railroad Rate Act (June 29, 1906), it is provided that the term "common carrier" in that act should include express companies; State v. Express Co., 171 Ind. 138, 85 N. E. 337, 19 L. R. A. (N. S.) 93, where it was said that congress has assumed jurisdiction over interstate traffic by express down to the point where the transit is entirely at an end; and a state statute requiring such companies to make free deliveries of parcels committed to their care was held void.

The Interstate Commerce Act and its amendments provide that the term "common

carrier" as used in the act shall include express companies; U. S. Comp. St. Stat. Supp. 1911, 1285; and in an indictment of express companies under that act it was held that where a joint stock company did a general interstate express business and had filed a schedule of its rates with the Interstate Commerce Commission it was a *quasi* corporation and subject to indictment as a legal entity; U. S. v. Am. Express Co., 199 Fed. 321.

See COMMON CARRIERS.

Like all other common carriers they must receive all goods offered for transportation, on being paid or tendered the proper charge; Jordan v. R. Co., 5 Cush. (Mass.) 69, 51 Am. Dec. 44; and if they cannot transport them within a reasonable time, must refuse them or be responsible for loss caused by the delay; Condict v. R. Co., 54 N. Y. 500; Tierney v. R. Co., 76 N. Y. 305; Illinois Cent. R. Co. v. Cobb, 64 Ill. 128. They may also refuse to receive dangerous articles for transportation; Parrot v. Wells, 15 Wall. (U. S.) 524, 21 L. Ed. 206; Boston & A. R. Co. v. Shanly, 107 Mass. 568.

An express company insures the safe delivery of goods received at the destination, if on its own route; if not, safe delivery at the end of its route to the next carrier; and will be relieved only by act of God or of the public enemy; Stephens & C. Transp. Co. v. Tuckerman, Milligan & Co., 33 N. J. L. 543; U. S. Exp. Co. v. Hutchins, 58 Ill. 44; Southern Exp. Co. v. Craft, 49 Miss. 480, 19 Am. Rep. 4; Babcock v. Ry. Co., 49 N. Y. 491; American Exp. Co. v. Bank, 69 Pa. 394, 8 Am. Rep. 268; Hadd v. Exp. Co., 52 Vt. 335, 36 Am. Rep. 757.

An express company may by special contract limit its liability for the value of goods lost; Oppenheimer v. Exp. Co., 69 Ill. 62, 18 Am. Rep. 596; Magnin v. Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442; Baldwin v. Steamship Co., 74 N. Y. 125, 30 Am. Rep. 277; U. S. Exp. Co. v. Backman, 28 Ohio St. 144; except for losses due to its own negligence or misconduct; Bank of Kentucky v. Exp. Co., 93 U. S. 174, 23 L. Ed. 872; Boscowitz v. Exp. Co., 93 Ill. 523, 34 Am. Rep. 191; Harvey v. R. Co., 74 Mo. 538; Whitworth v. Ry. Co., 87 N. Y. 413. A contract between an express company and its messenger exempting it from liability for injury to him by the negligence of the carrier, is valid and may extend so far as to authorize the express company to contract with the carrier against liability to the messenger; but such contract will not enure to the benefit of the carrier having no knowledge of it or not having availed itself of it by contracting with the express company; Louisville, N. A. & C. Ry. Co. v. Keefer, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348.

An express company is liable for damages to perishable freight injured by delay; Adams Exp. Co. v. Williams (Ark.) 14 S. W. 40; but a delay, to create a liability, must be "an unreasonable delay which is such as involves some want of ordinary care or diligence"; Adams Exp. Co. v. Bratton, 106 Ill. App. 563.

Where it was a habit to carry large sums of money for hire and keep the same for several hours after its transportation before called for, the liability for its loss is as a warehouseman and not as a common carrier; President, etc., of Conway Bank v. Exp. Co., 8 Allen (Mass.) 512. The liability of an express company as a common carrier terminates on the safe carriage of the goods to their destination and notice to the consignee; Hasse v. Exp. Co., 94 Mich. 133, 53 N. W. 918, 34 Am. St. Rep. 328; and where goods are sent C. O. D., and the consignee refuses to accept them, and the shipper on notice directs the company to hold them until called for, its liability is only that of a warehouseman; Byrne v. Fargo, 36 Misc. 543, 73 N. Y. Supp. 943; but it is held that in the absence of a special contract the duty of the company is not completed on the arrival of the goods, but includes delivery; Burr v. Exp. Co., 71 N. J. L. 263, 58 Atl. 609; or constructive delivery by notice to the consignee; Rogers v. Fargo, 47 Misc. 155, 93 N. Y. Supp. 550; where there is such local usage; Hutchinson v. Exp. Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A. (N. S.) 393, and note on delivery.

An express company is not denied the equal protection of the laws by classifying it with railroad and telegraph companies as subject to the unit rule of taxation, which estimates the value of the whole plant, though situated in different states, as an entirety, for the purpose of determining the value of the property in one state; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683; *id.*, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965; and a state statute, requiring foreign express companies to file a statement before doing business and an agreement in reference to suits brought against them, did not give them a vested right to carry on business subject to the then existing laws or exempt them from future legislative control; Adams Exp. Co. v. State, 161 Ind. 328, 67 N. E. 1033.

Under a state statute providing that one who offers to carry persons, property or messages is a common carrier of what he thus offers to carry, an express company offering to carry money for hire is a common carrier thereof; Platt v. Le Cocq, 150 Fed. 391, where it was held that the railroad commissioners' order requiring it to receive money, of which it held itself out to be a common carrier, at all reasonable business hours preceding the departure of trains, was reasonable. A state statute regulating express companies by requiring equal terms to all, without discrimination, does not violate the XIVth amendment of the United States con-

stitution; Am. Express Co. v. Express Co., 167 Ind. 292, 78 N. E. 1021.

In some states statutes relating to the transportation of property by railroad companies are applicable to express companies; MacMillan v. Express Co., 123 Ia. 236, 98 N. W. 629; but a statute prescribing the duties of railroads with reference to intersecting lines relates to the mere physical connection of the tracks and has no application to express companies; Southern Ind. Express Co. v. Ex. Co., 92 Fed. 1022, 35 C. C. A. 172.

See an epitome of the law on this subject at that date by Judge Redfield in 5 Am. Law Reg. N. S. 1; and three articles on express companies as common carriers; *id.* 449, 513, 648.

See RAILROAD; COMMON CARRIERS.

EXPRESS CONSIDERATION. A consideration expressed or stated by the terms of the contract.

EXPRESS CONTRACT. One in which the terms are openly uttered and avowed at the time of making. 2 Bla. Com. 443; 1 Pars. Contr. 4. One made in express words. 2 Kent 450. See CONTRACT.

EXPRESS COVENANTS. Those stated in words more or less distinctly expressing the intent to covenant. McDonough v. Martin, 88 Ga. 675, 16 S. E. 59, 18 L. R. A. 343.

EXPRESS TRUST. One declared in express terms. See TRUSTS.

EXPRESS WARRANTY. One expressed by particular words. 2 Bla. Com. 300. The statements in an application for insurance are usually construed to constitute an express warranty. 1 Phil. Ins. 346. See WARRANTY.

EXPROMISSIO (Lat.). **In Civil Law.** The species of novation by which a creditor accepts a new debtor, who becomes bound instead of the old, the latter being released. See NOVATION.

EXPROMISSOR. In Civil Law. The person who alone becomes bound for the debt of another, whether the latter were obligated or not. He differs from a surety, who is bound together with his principal. Dig. 12. 4. 4; 16. 1. 13; 24. 3. 64. 4; 38. 1. 37. 8.

EXPROPRIATION. A taking of private property for public use upon providing compensation. Brownsville v. Pavazos, 2 Woods 293, Fed. Cas. No. 2,043. It corresponds to the right of eminent domain in our law. In Louisiana expropriation is used as is taking under eminent domain in most of the other states. In England "compulsory purchase" is used; Halsbury, Laws of England.

In French Law. The compulsory realization of a debt by the creditor out of the lands of a debtor, or the usufruct thereof; confined first to lands (if any) in *hypothèque*, and then extending to others. Black, L. Dict.

EXPULSION (Lat. *expellere*, to drive out). The act of depriving a member of a body politic or corporate, or of a society, of his right of membership therein, by the vote of such body or society, for some violation of his duties as such, or for some offence which renders him unworthy of longer remaining a member of the same.

By the constitution of the United States, art. 1, s. 5, § 2, each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member. In the case of John Smith, a senator from Ohio, who was expelled from the senate in 1807, the committee made a report which embraces the following points:

First. That the senate may expel a member for a high misdemeanor, such as a conspiracy to commit treason. Its authority is not confined to an act done in its presence.

Second That a previous conviction is not requisite in order to authorize the senate to expel a member from their body for a high offence against the United States

Third. That although a bill of indictment against a party for treason and misdemeanor has been abandoned, because a previous indictment against the principal party had terminated in an acquittal, owing to the inadmissibility of the evidence upon that indictment, yet the senate may examine the evidence for themselves, and if it be sufficient to satisfy their minds that the party is guilty of a high misdemeanor it is sufficient ground of expulsion.

Fourth. That the fifth and sixth articles of the amendments of the constitution of the United States, containing the general rights and privileges of the citizens as to criminal prosecutions, refer only to prosecutions at law, and do not affect the jurisdiction of the senate as to expulsion.

Fifth. That before a committee of the senate, appointed to report an opinion relative to the honor and privileges of the senate, and the facts respecting the conduct of the member implicated, such member is not entitled to be heard in his defence by counsel, to have compulsory process for witnesses, or to be confronted with his accusers It is before the senate that the member charged is entitled to be heard

Sixth In determining on expulsion the senate is not bound by the forms of judicial proceedings or the rules of judicial evidence, nor, it seems, is the same degree of proof essential which is required to convict of a crime. The power of expulsion must, in its nature, be discretionary, and its exercise of a more summary character. 1 Hall, Law Journ. 459, 465; Anderson v. Dunn, 6 Wheat. (U. S.) 204, 5 L. Ed. 242; Cooley, Const Lim. 162

Corporations have the right of expulsion in certain cases, as such power is necessary to the good order and government of corporate bodies; and the cases in which the inherent power may be exercised are classified by Lord Mansfield as follows: 1. When an offence is committed which has no immediate relation to a member's corporate duty, but is of so infamous a nature as to render him unfit for the society of honest men; such as the offences of perjury, forgery, and the like. But before an expulsion is made for a cause of this kind it is necessary that there should be a previous conviction by a jury according to the law of the land. 2. When the offence is against his duty as a corporator, in which case he may be expelled on trial and conviction before the corporation. 3. The third is of a mixed nature, against the member's duty as a corpo-

rator, and also indictable by the law of the land; 1 Burr. 517; Diligent Fire Co. v. Com., 75 Pa. 291; Evans v. Philadelphia Club, 50 Pa. 107; Gregg v. Medical Society, 111 Mass. 185, 15 Am. Rep. 27.

The decisions of any kind of a voluntary association in admitting, disciplining, suspending or expelling members are of a quasi-judicial character; the courts will not interfere in such cases except to ascertain whether or not the proceeding was pursuant to the rules of the society, in good faith, and not in violation of the law of the land. If so found, the proceeding is conclusive, like that of a judicial proceeding; Connelly v. Masonic Ass'n, 58 Conn. 552, 20 Atl. 671, 9 L. R. A. 428, 18 Am. St. Rep. 296. Upon questions of doctrine and policy the society is the sole and exclusive judge; Grand Lodge, K. P. v. People, 60 Ill. App. 550.

Rules enacted for the government of its members must be conformed to by it in all matters relating to the disciplining of the members; Green v. Board of Trade, 174 Ill. 585, 51 N. E. 599, 49 L. R. A. 365; Lewis v. Wilson, 121 N. Y. 284, 24 N. E. 474; Farmer v. Board of Trade, 78 Mo. App. 557. When suspension or expulsion results necessarily in affecting the financial standing of the complainants as well as depriving them of the use of property that is common to all, however insignificant its value, there is no reason to deny relief by injunction; Huston v. Reutlinger, 91 Ky. 333, 15 S. W. 867, 34 Am. St. Rep. 225. So where it appears that the complainant, unless aided by the courts, will be expelled from an association for some cause which under no circumstances can justify his expulsion; Otto v. Tailors' Union, 75 Cal. 315, 17 Pac. 217, 7 Am. St. Rep. 156.

A mutual benefit society cannot expel a member or deprive him of his rights in the society without giving him notice and a full opportunity to be heard in defence of the charges against him, and the proceeding for his expulsion must be conducted fairly and in good faith; State v. Temperance Soc., 42 Mo. App. 485; Berkhout v. Royal Arcanum, 62 N. J. L. 103, 43 Atl. 1; Wachtel v. Benev. Soc., 84 N. Y. 28, 38 Am. Rep. 478; People v. Alpha Lodge, 13 Misc. 677, 35 N. Y. Supp. 214, affirmed 8 App. Div. 591, 40 N. Y. Supp. 1147. Irregularities in the proceedings by which a member was suspended will not afford ground for relief in equity, where they were waived by the member's appearance and failure to raise them before the tribunals of the society; Sperry's Appeal, 116 Pa. 391, 9 Atl. 478. If the rules authorize the expulsion of a member, and he is given an opportunity to be heard, and the investigation is conducted in good faith, the decision of the association is conclusive upon the court in mandamus proceedings to compel his restoration; Lewis v. Wilson, 121 N. Y. 284, 24 N. E. 474; White v. Brownell, 2 Daly (N. Y.) 329.

It is generally held that persons who join churches, secret societies, benevolent associations, or temperance societies, etc., voluntarily submit themselves to the jurisdiction of those bodies, and in matters of faith and individual conduct affecting their relations as members thereof subject themselves to the tribunals established by those bodies to pass upon such questions; if aggrieved by a decision against them, made in good faith by such judicatories, they must seek their redress within the organization, as provided by its laws and regulations; Landis v. Campbell, 79 Mo. 433, 49 Am. Rep. 239; Shannon v. Frost, 3 B. Monr. (Ky.) 253; Grosvenor v. Society of Believers, 118 Mass. 78.

A complaining member should exhaust the remedies provided by the laws of the organization before applying to the courts; Union Fraternal League of Boston v. Johnston, 124 Ga. 902, 53 S. E. 241; Beeman v. Supreme Lodge, 215 Pa. 627, 64 Atl. 792; Weigand v. Fraternities Order, 97 Md. 443, 55 Atl. 530; but where those laws provide no remedy, and the organization provides none, it becomes a question for the courts to determine whether or not the member has done all that could reasonably be expected of him; Schneider v. Local Union No. 60, 116 La. 270, 40 South 700, 5 L. R. A. (N. S.) 891, 114 Am St. Rep. 549, 7 Ann. Cas. 868. His compensatory remedies against an association which denies him some property right to which he is entitled are the same as if he were entitled to some right or property from a natural person or a private corporation which has refused to concede it. If the contingencies have arisen in which the association has agreed to pay him a sum of money, an action may be maintained therefor as in the case of any other creditor against a debtor; Supreme Sitting Order of Iron Hall v. Stein, 120 Ind. 270, 22 N. E. 136; Supreme Lodge of Ancient Order of United Workmen v. Zuhlke, 129 Ill 298, 21 N. E. 789.

See Barbour on Parties; 2 L. R. A. (N. S.) 789, n.; BY-LAW; CLUB; RELIGIOUS SOCIETY; CHURCH; BENEFICIAL SOCIETY; ASSOCIATION; AMOTION; DISFRANCHISEMENT. The subject is treated with fulness in Thomps. Corp. 806-930. See State v. Chamber of Commerce, 47 Wis. 670.

EXTENSION. This term is applied among merchants to signify an agreement made between a debtor and his creditors, by which the latter, in order to enable the former, embarrassed in his circumstances, to retrieve his standing, agree to wait for a definite length of time after their several claims become due and payable, before they will demand payment. It is often done by the issue of notes of various maturities.

Among the French, a similar agreement is known by the name of attermoiement. Merlin, *Répert.* mot *Attermoiement.*

EXTENSION OF PATENT (sometimes termed *Renewal of Patent*). Under the earlier patent acts (1836 and 1848) a patent was granted for the term of fourteen years. But the law made provision that when any patentee, without neglect or fault on his part, had failed to obtain a reasonable remuneration for the time, ingenuity, and expense bestowed upon the same and the introduction thereof into use, he might obtain an extension of such patent for the term of seven years longer. No extension could be granted after the patent had once expired. The extension was intended for the sole benefit of the inventor; and where it was made to appear that he would receive no benefit therefrom, it would not be granted. The assignee, grantee, or licensee of an interest in the original patent retained no right in the extension, unless by reason of some stipulation to that effect. Where any person had a right to use a specific machine under the original patent he still retained that right after the extension. By act March 2, 1861, it was provided that patents should be granted for the term of seventeen years and further extension was forbidden. Congress may still extend a patent.

EXTENT. A writ, issuing from the exchequer, by which the body, goods, and lands of the debtor may all be taken at once to satisfy the judgment.

It is so called because the sheriff is to cause the lands to be appraised at their full extended value before he delivers them to the plaintiff. Fitzh. N. B. 131. The writ originally lay to enforce judgments in case of recognizances or debts acknowledged on statutes merchant or staple, see stat. 13 Edw. I *de Mercatoribus;* 27 Edw. III. c. 9; and by 33 Hen. VIII. c. 39, was extended to debts due the crown. The term is sometimes used in the various states of the United States to denote writs which give the creditor possession of the debtor's lands for a limited time till the debt be paid. Roberts v. Whiting, 16 Mass. 186.

Extent in aid is an extent issued at the suit or instance of a crown-debtor against a person indebted to himself. This writ was much abused, owing to some peculiar privileges possessed by crown-debtors, and its use was regulated by stat. 57 Geo. III. c. 117. See 3 Bla. Com. 419.

Extent in chief is an extent issued to take a debtor's lands into the possession of the crown.

Manorial extent. A survey of a manor made by a jury of tenants, often of unfree men sworn to sit for the particulars of each tenancy, and containing the smallest details as to the nature of the service due.

These manorial extents "were made in the interest of the lords, who were anxious that all due services should be done; but they imply that other and greater services are not due, that the customary tenants, even though they be unfree men, owe these services for their tenements, no less and no more. Statements that the tenants are not bound to do services of a particular kind are not very uncommon;" 1 Poll. & Maitl. 343. "Many admissions against their own (the lords) interests the extent of their manors may contain; they suffer it to be recorded that a 'day's work' ends at noon, that in return for some works they must provide food, even that the work is not worth the food that has to be provided; but they do not admit that for certain causes, and for certain causes only, may they take there tenements into their own hands. As a matter of fact it is seldom of an actual ejectment that the peasant has to complain;" *id.* 359. Many examples of the manorial extents have been preserved in the monastic cartularies and elsewhere. "Among the most accessible are the Boldon Book (printed at the end of the official edition of the Domesday); the Black Book of Peterborough, the Domesday of St. Paul's, the Worcester Register, the Battle Cartulary, all published by the Camden Society; the Ramsey, Gloucester, and Malmesbury Cartularies or registers published in the Rolls series; the Burton Cartulary of the Salt Society and the Yorkshire Inquisitions of the Yorkshire Record Society," *id.* 189.

The "extents" of manors are descriptions which give the numbers and names of the tenants, the size of their holdings, the legal kind of their tenure and the kind and amount of their service; Maitland, Material for Hist. E. L. in 2 Sel. Essays in Anglo-Amer. Leg. Hist. 87.

EXTENUATION. That which renders a crime or tort less heinous than it would be without it. It is opposed to aggravation.

In general, extenuating circumstances go in mitigation of punishment in criminal cases, or of damages in those of a civil nature.

EXTERRITORIALITY. The exemption from the operation of the ordinary laws of the state accorded to foreign monarchs temporarily within the state and their retinue, to diplomatic agents and the members of their household, to consuls in non-Christian states, and to foreign men of war in port. 1 Opp. 460–469. See AMBASSADOR; CONFLICT OF LAWS; PRIVILEGE FROM ARREST.

EXTINGUISHMENT. The destruction of a right or contract. The act by which a contract is made void. The annihilation of a collateral thing or subject in the subject itself out of which it is derived. Prest. Merg. 9. For the distinction between an extinguishment and passing a right, see 2 Sharsw. Bla. Com. 325.

An extinguishment may be by matter of fact and by matter of law. It is by matter of fact either express, as when one receives satisfaction and full payment of a debt and the creditor releases the debtor; Jackson v. Shaffer, 11 Johns. (N. Y.) 513; or implied, as when a person hath a yearly rent out of lands and becomes owner, either by descent or purchase, of the estate subject to the payment of the rent, and the latter is extinguished; Martin v. Searcy, 3 Stew. (Ala.) 50, 20 Am. Dec. 64; but the person must have as high an estate in the land as in the rent, or the rent will not be extinct; Co. Litt. 147 *b*.

There are numerous cases where the claim is extinguished by operation of law: for example where two persons are jointly but not severally liable for a simple contract-debt, a judgment obtained against one is at common

law an extinguishment of the claim on the other debtor; Willings v. Consequa, 1 Pet. C. C. 301, Fed. Cas. No. 17,767; Tom v. Goodrich, 2 Johns. (N. Y.) 213.

A conveyance of mortgaged land by the mortgagor to the mortgagee extinguishes the mortgage; Lyman v. Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871. Taking a note for the amount due does not deprive a claimant of his right to a lien, but merely suspends its enforcement until the note is payable; Keogh Mfg. Co. v. Eisenberg, 7 Misc. 79, 27 N. Y. Supp. 356.

See Co. Litt. 147 *b;* Morris v. Brady, 5 Whart. (Pa.) 541; Derby Bank v. Landon, 3 Conn. 62; Jackson v. Shaffer, 11 Johns. (N. Y.) 513; Cattel v. Warwick, 6 N. J. L. 190; McMurphy v. Minot, 4 N. H. 251; Caldwell v. Fulton, 31 Pa. 475, 72 Am. Dec. 760; Boston & P. R. Corp. v. Doherty, 154 Mass. 314, 28 N. E. 277; Fitzpatrick v. R. R., 84 Me. 33, 24 Atl. 432; Sowles v. Witters, 54 Fed. 568; I. Smith & Son Co. v. Parsons, 37 Neb. 677, 56 N. W. 326.

EXTINGUISHMENT OF COMMON. Loss of the right to have common. This may happen from various causes; by the owner of the common right becoming owner of the fee; by severance from the land; by release; by approvement; 2 Steph. Com. 41; Co. Litt. 280; 1 Bacon, Abr. 628; Cro. Eliz. 594.

EXTINGUISHMENT OF COPYHOLD. This takes place by a union of the copyhold and freehold estate in the same person; also by an act of the tenant showing an intention not to hold any longer of his lord; Hutt. 81; Cro. Eliz. 21; Wms. R. P. 287; Watk. Copyh.

EXTINGUISHMENT OF A DEBT. Destruction of a debt. This may be by the creditor's accepting a higher security; 1 Salk. 304; Davidson v. Kelly, 1 Md. 492; Brewer v. Branch Bank, 24 Ala. 439. A judgment recovered extinguishes the original debt; Gibbs v. Bryant, 1 Pick. (Mass.) 118. A trust deed given to secure the payment of a bond is not affected by the rendition of a judgment on the bond, since the original debt is not thereby merged, but only the form of the evidence of the debt charged; Gibson v. Green's Adm'r, 89 Va. 524, 16 S. E. 661, 37 Am. St. Rep. 888. A debt evidenced by a note may be extinguished by a surrender of the note; Bryant v. Smith, 10 Cush. (Mass.) 169; Albert's Ex'rs v. Ziegler's Ex'rs, 29 Pa. 50; Sherman v. Sherman, 3 Ind. 337. As to the effect of payment in extinguishing a debt, see PAYMENT.

EXTINGUISHMENT OF RENT. A destruction of the rent by a union of the title to the lands and the rent in the same person. *Termes de la Ley;* Cowell; 3 Sharsw. Bla. Com. 325, note. A ground rent in Pennsylvania is usually extinguished by a conveyance thereof from the owner of the ground rent to the terre-tenant.

EXTINGUISHMENT OF WAYS. Destruction of a right of way, effected usually by a purchase of the close over which it lies by the owner of the right of way. 2 Washb. R. P.

EXTORSIVELY. A technical word used in indictments for extortion.

When a person is charged with extorsively taking, the very import of the word shows that he is not acquiring possession of his own; 4 Cox, Cr. Cas. 387. In North Carolina the crime may be charged without using this word; State v. Dickens, 2 N. C. 406.

EXTORTION. The unlawful taking by any officer, by color of his office, of any money or thing of value that is not due to him, or more than is due, or before it is due. 4 Bla. Com. 141; Com. v. Saulsbury, 152 Pa. 554, 25 Atl. 610; 1 Hawk. Pl. Cr. c. 68, s. 1; 1 Russ. Cr.* 144; 2 Bish. Cr. L. 390; U. S. v. Deaver, 14 Fed. 595.

At common law, any oppression by color of right; but technically the taking of money by an officer, by reason of his office, where none at all was due, or when it was not yet due. The obtaining of money by force or fear is not extortion; People v. Barondess, 61 Hun 571, 16 N. Y. Supp. 436; Whart. Cr. L. 833.

In a large sense the term includes any oppression under color of right; but it is generally and constantly used in the more limited technical sense above given.

The incumbent of an office, which it was attempted to create by an unconstitutional statute, cannot be guilty of extortion, as he is neither a *de jure* nor a *de facto* officer; Kitby v. State, 57 N. J. L. 320, 31 Atl. 213.

To constitute extortion, there must be the receipt of money or something of value; the taking a promissory note which is void is not sufficient to make an extortion; Com. v. Cony, 2 Mass. 523; Com. v. Pease, 16 Mass. 93. See Bacon, Abr.; Co. Litt. 168. It is extortion and oppression for an officer to take money for the performance of his duty, even though it be in the exercise of a discretionary power; 2 Burr. 927. See People v. Whaley, 6 Cow. 661; Helser v. Pott, 3 Pa. 183; Com. v. Saulsbury, 152 Pa. 554, 25 Atl. 610; Com. v. Bagley, 7 Pick. (Mass.) 279; 4 Cox, Cr. Cas. 387. See Brackenridge v. State, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360; People v. Barondess, 133 N. Y. 649, 31 N. E. 240.

EXTRA-DOTAL PROPERTY. In Louisiana this term designates that property which forms no part of the dowry of a woman, and which is also called paraphernal property. Civ. Code, art. 2315.

EXTRA-JUDICIAL. That which does not belong to the judge or his jurisdiction, notwithstanding which he takes cognizance of it. Extra-judicial judgments and acts are absolutely void. See CORAM NON JUDICE; Merlin, *Répert., Excès de Pouvoir.*

EXTRA QUATUOR MARIA (Lat. beyond four seas). Out of the realm. 1 Bla. Com. 157. See BEYOND SEA.

EXTRA SERVICES. When used with reference to officers it should be construed to embrace all services rendered by such for which no compensation is given by law. Board of Com'rs of Miami Co. v. Blake, 21 Ind. 32.

EXTRA TERRITORIUM. Beyond or outside of the territorial limits of a state. Milne v. Moreton, 6 Binn. (Pa.) 353, 6 Am. Dec. 466.

EXTRA VIAM. Out of the way. When, in an action of trespass, the defendant pleads a right of way, the defendant may reply *extra viam*, that the trespass was committed beyond the way, or make a new assignment. 16 East 343, 349.

EXTRACT. A part of a writing. In general, an extract is not evidence, because the *whole* of the writing may explain the part extracted, so as to give it a different sense; but sometimes extracts from public books are evidence, as extracts from the registers of births, marriages, and burials, kept according to law, when the whole of the matter has been extracted which relates to the cause or matter in issue.

EXTRADITION. (Lat. *ex*, from, *traditio*, handing over). The surrender by one sovereign state to another, on its demand, of persons charged with the commission of crime within its jurisdiction, that they may be dealt with according to its laws; the surrender of persons by one federal state to another, on its demand, pursuant to their federal constitution and laws.

Without treaty stipulations. Public jurists are not agreed as to whether extradition, independent of treaty stipulations, is a matter of imperative duty or of discretion merely. Some have maintained the doctrine that the obligation to surrender fugitive criminals is perfect, and the duty of fulfilling it is, therefore, imperative, especially where the crimes of which they are accused affected the peace and safety of the state; but others regard the obligation as imperfect in its nature, and a refusal to surrender such fugitives as affording no ground of offence. Of the former opinion are Grotius, Heineccius, Burlamaqui, Vattel, Rutherforth, Schmelzing, and Kent; the latter opinion is maintained by Puffendorf, Voet, Martens, Klüber, Leyser, Kluit, Saalfeld, Schmaltz, Mittermeyer, Heffter, and Wheaton.

Except under the provisions of treaties, the delivery by one country to another of fugitives from justice is a matter of comity, not of obligation; U. S. v. Rauscher, 119 U. S. 407, 7 Sup. Ct. 234, 30 L. Ed. 425.

Many nations have practised extradition without treaty engagements to that effect, as the result of mutual comity and convenience; others have refused. The United States has always declined to surrender criminals unless bound by treaty to do so; 1 Kent 39 n.; 1 Opin. Attys. Gen. 511; 6 *id.* 85, 431; People v. Curtis, 50 N. Y. 321, 10 Am. Rep. 483; Holmes v. Jennison, 14 Pet. (U. S.) 540, 10 L. Ed. 579; Ex parte Holmes, 12 Vt. 631. The existence of an extradition treaty does not prohibit the surrender by either country of a person charged with a crime not enumerated in the treaty; Ex parte Foss, 102 Cal. 347, 36 Pac. 669, 25 L. R. A. 593, 41 Am. St. Rep. 182. No state has an absolute right to demand of another the delivery of a fugitive criminal, though it has what is called an *imperfect* right, but a refusal to deliver the criminal is no just cause of war. Per Tilghman, C. J., in Com. v. Deacon, 10 S. & R. (Pa.) 125.

Under treaty stipulations. The sovereignty of the United States, as it respects foreign states, being vested by the constitution in the federal government, it appertains to it exclusively to perform the duties of extradition which, by treaties, it may assume; Holmes v. Jennison, 14 Pet. (U. S.) 540, 10 L. Ed. 579; U. S. v. Rauscher, 119 U. S. 407, 7 Sup. Ct. 234, 30 L. Ed. 425; and, to enable the executive to discharge such duties, congress passed the acts of Aug. 12, 1848, July 12, 1889, and June 6, 1900. The general government alone has the power to enact laws for the extradition of foreign criminals. It possesses that power under the treaty power in the constitution; Holmes v. Jennison, 14 Pet. (U. S.) 540, 10 L. Ed. 579; People v. Curtis, 50 N. Y. 321, 10 Am. Rep. 483; In re De Giacomo, 12 Blatch. 391, Fed. Cas. 3,747.

While a violation of an extradition treaty with Italy might render the treaty denounceable by the United States, it does not render it void and of no effect. The refusal of Italy to surrender its nationals has not had the effect of abrogating the treaty but of merely placing the government in the position of having the right to denounce it; Charlton v. Kelly, 229 U. S. 447, 33 Sup. Ct. 945, 57 L. Ed. ——.

In the absence of a treaty, it has been said the president has no power as well as no duty to surrender a fugitive; Ex parte McCabe, 46 Fed. 363, 12 L. R. A. 589. As to whether congress has this power was said in Neely v. Henkel, 180 U. S. 109, 21 Sup. Ct. 302, 45 L. Ed. 448, to be an undecided question. It was there said to be competent for congress to enforce or give efficacy to the provisions of the treaty between the U. S. and Spain with respect to Cuba, and that the act of June 6, 1900, providing for the extradition of criminals in certain cases "to foreign countries or territories" occupied by or under the control of the United States was constitutional. See 14 Harv. L. Rev. 607.

Treaties have been made between the United States and many foreign powers for the

mutual surrender of persons charged with certain crimes. These treaties may be found in full in the United States Statutes at Large, in 2 Moore on Extradition 1072; Haswell, Treaties, etc., U. S.; see 4 Moore, Int. L. Dig.

The United States interstate extradition laws extend to Porto Rico; People v. Bingham, 211 U. S. 468, 29 Sup. Ct. 190, 53 L. Ed. 286; and to any portion of the country not within the limits of a state, but organized under the laws of congress, with an executive, legislative and judicial system of its own; In re Lane, 135 U. S. 443, 10 Sup. Ct. 760, 34 L. Ed. 219; this does not include the Cherokee Nation; Ex parte Morgan, 20 Fed. 298, approved in People v. Bingham, 211 U. S. 468, 29 Sup. Ct. 190, 53 L. Ed. 286; nor (at that time) Oklahoma; In re Lane, 135 U. S. 443, 10 Sup. Ct. 760, 34 L. Ed. 219.

The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both countries. For nearly all crimes, the laws of the states, and not the enactments of congress, must be looked to for the definition of the offence; Wright v. Henkel, 190 U. S. 40, 23 Sup. Ct. 781, 47 L. Ed. 948; Pettit v. Walshe, 194 U. S. 210, 24 Sup. Ct. 657, 48 L. Ed 938. Where a British fugitive was demanded in New York, and the British and New York statutes both covered the publication of fraudulent statements by corporate officers, it was held that the two statutes were substantially analogous under an extradition treaty relating to fraud by corporate officers; Wright v. Henkel, 190 U. S. 40, 23 Sup. Ct. 781, 47 L. Ed. 948.

In the construction and carrying out of such treaties, the ordinary technicalities of criminal proceedings are applicable only to a limited extent. Proceedings for surrender simply demand of the accused that he shall do what all good citizens are required and ought to be willing to do, viz. submit themselves to the law of their country. Care should be taken that the treaty be not made a pretext for collecting private debts, wreaking individual malice, or forcing the surrender of political offenders; but where the proceeding is manifestly taken in good faith, a technical non-compliance with some formality should not be allowed to stand in the way of a faithful discharge of our obligations; Grin v. Shine, 187 U. S. 181, 23 Sup. Ct. 98, 47 L. Ed. 130.

When a person is held in custody as a fugitive from justice under an extradition warrant in proper form and showing upon its face all that is required by law to be shown, he should not be discharged from custody until it is made clearly to appear that he is not a fugitive from justice within the meaning of the constitution and laws of the United States; People v. Pease, 207 U. S. 100, 28 Sup. Ct. 58, 52 L. Ed. 121; Ex parte Massee, 95 S. C. 315, 79 S. E. 97.

The extradition act of Canada provides that a prisoner shall be surrendered only upon such evidences of criminality as would, under the Canadian law, justify his committal for trial if the crime had been committed in Canada. Canadian law should determine whether the act alleged constitutes one of the extradition crimes; 6 B. & S. 522; 4 U. C. P. R. 215. The further question as to whether the act must also be shown to be a crime according to the laws of the demanding country was raised but not decided in 31 Can. L. J. 594.

The preliminary examination of a person sought to be extradited under the treaties of August 9, 1842, and July 12, 1889, between the United States and Great Britain on a conviction of murder, must be had in the state where he was arrested, in view of the tenth article of the earlier treaty providing that the alleged fugitive criminal shall be arrested and delivered up only upon such evidence of criminality as, according to the laws of the place where he is found, would justify his arrest and commitment for trial if the crime had been committed there, and of the proviso in the sundry civil appropriations act of August 18, 1894, by which it is made the duty of a marshal arresting a person charged with any offence to take him before the nearest United States commissioner, or judicial officer having jurisdiction, for a hearing, commitment, or taking bail for trial, notwithstanding those parts of the act of August 12, 1848, and of R. S. § 5270, which provide for bringing the accused in extradition proceedings before the justice, judge or commissioner who issued the warrant of arrest; Pettit v. Walshe, 194 U. S. 205, 24 Sup. Ct. 657, 48 L. Ed. 938.

Desertion from a foreign army or navy is said not to be an extraditable offence; 15 Harv. L. Rev. 657; but in Tucker v. Alexandroff, 183 U. S. 424, 22 Sup. Ct. 195, 46 L. Ed. 264, where the provisions of the treaty with Russia for the extradition of deserters from ships of war and merchant vessels were under consideration, it was held that a deserting seaman might be extradited, though the vessel to which he had been assigned was in the course of building and had not yet been accepted by the Russian government.

The treaties enumerate the crimes for which persons may be surrendered, and in some other particulars limit their own application. They also contain some provisions relating to the mode of procedure; but, as it was doubted whether such stipulations had the force of law; Park. Cr. Cas. 108; congress passed the act of August 12, 1848, entitled "An act for giving effect to certain treaty stipulations between this and foreign governments for the apprehension and delivery up of certain offenders." 9 Stat. L.

302. This has since been amended; and the statutes on the subject are found in U. S. R. S. §§ 5270–5277, as amended June 6, 1900.

These acts embody those provisions contained in the treaties relating to the procedure, and contain others designed to facilitate the execution of the duty assumed by treaty.

The following are the main provisions of the law relating to the practice: 1. A complaint under oath or affirmation charging the person with the commission of one of the enumerated crimes. 2. A warrant may be issued by any of the justices of the supreme court or judges of the several circuit or district courts of the United States, or of a court of record of general jurisdiction of any state, or the commissioners authorized so to do by any of the courts of the United States. 3. The person arrested is to be brought before the officer issuing the warrant, to the end that the evidence of criminality may be considered. 4. Copies of the depositions upon which an original warrant in the country demanding the fugitive may have been granted, certified under the hand of the person issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person apprehended. 5. The degree of evidence must be such as, according to the laws of the place where the person arrested shall be found, would justify his apprehension and commitment for trial if the crime or offence had there been committed. 6. If the evidence is deemed sufficient, the officer hearing it must certify the same, together with a copy of all the testimony taken before him, to the secretary of state, and commit the prisoner to the proper gaol until the surrender be made, which must be within two calendar months. 7. The secretary of state, on the proper demand being made by the foreign government, orders, under his hand and seal of office, in the name and by authority of the president, the person so committed to be delivered to such person as may be authorized, in the name and on behalf of such foreign government, to receive him. 8. The demand must be made by and upon those officers who represent the sovereign power of their states. 7 Op. Attys. Gen. 6; 8 *id.* 521. By act of Aug. 3, 1882, it is directed that all extradition cases under treaties shall be heard publicly; 22 Stat. 215.

The usual method is for some police officer or other special agent, after obtaining the proper papers in his own country, to repair to the foreign country, carry the case through with the aid of his minister, receive the fugitive, and conduct him back to the country having jurisdiction of the crime; 8 Op. Attys. Gen. 521. In all the treaties the parties stipulate upon mutual requisitions, etc., to deliver up to justice all persons who, being charged with crime, shall seek an asylum or shall be found in the territories of the other. The terms of the stipulation embrace cases of absence without flight as well as those of actual flight; 8 Op. Attys. Gen. 306.

The treaties of the United States do not guarantee an asylum to a fugitive from any foreign country. They only provide how he shall be deprived of an asylum; Ker v. Illinois, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421. See as to the right of asylum 6 L. Mag. & Rev. 4th, 262. If the prisoner escapes, he may be retaken in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall so escape shall be retaken on an escape; U. S. R. S. § 5272. The expense of the apprehension and delivery shall be borne by the party making the requisition.

Between the several states. By art. iv. sec. ii. of the constitution of the United States, it is provided that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having the jurisdiction of the crime."

The act of congress of Feb. 12, 1793, U. S. R. S. §§ 5278, 5279, prescribed the mode of procedure in such cases. It requires, on demand of the executive authority of a state and production of a copy of an indictment found or an affidavit made before a magistrate charging the person demanded with treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state from whence the person so charged fled, that the executive authority of the state or territory to which such person shall have fled shall cause the person charged to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and cause the fugitive to be delivered to such agent when he shall appear; but if such agent do not appear within six months, the prisoner shall be discharged. It further provides that if any person shall by force set at liberty or rescue the fugitive from such agent while transporting the fugitive to the state or territory from which he fled, the person so offending shall, on conviction, be fined not exceeding five hundred dollars and be imprisoned not exceeding one year, and that all costs or expenses incurred in the apprehending, securing, and transmitting such fugitive shall be paid by the state or territory making the demand. U. S. Rev. Stat. § 5278–9.

In the execution of the obligation imposed by the constitution, the following points deserve attention:—

The crime, other than treason or felony, for which a person may be surrendered.

Some difference of opinion has prevailed on this subject, owing to some diversity of the criminal laws of the several states; but the better opinion appears to be that the terms of the constitution extend to all acts which by the laws of the state where committed are made criminal; 1 Kent 42; Johnston v. Riley, 13 Ga. 97; In re Fetter, 23 N. J. L. 311, 57 Am. Dec. 382; Kentucky v. Dennison, 24 How. (U. S.) 107, 16 L. Ed. 717; People v. Brady, 56 N. Y. 187. The word "crime" embraces every species of indictable offence; Kentucky v. Dennison, 24 How. (U. S.) 99, 16 L. Ed. 717; including an act not criminal at the time the constitution was adopted but made so afterwards; Howe v. Treasurer, 37 N. J. L. 147; People v. Brady, 56 N. Y. 182; and an act which is criminal under the law of the state from which the accused has fled, but is not so under the law of the state into which he has fled; Kentucky v. Dennison, 24 How. (U. S.) 103, 16 L. Ed. 1717.

That the courts of the asylum state have jurisdiction to pass upon the sufficiency of the requisition papers has been held; Jones v. Leonard, 50 Ia. 110, 32 Am. Rep. 116; People v. Hyatt, 172 N. Y. 176, 64 N. E. 825, 60 L. R. A. 774, 92 Am. St. Rep. 706, affirmed Hyatt v. New York, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657; In re Waterman, 29 Nev. 288, 89 Pac. 291, 11 L. R. A. (N. S.) 424, 13 Ann. Cas. 926; that the accused should be permitted to show that the indictment or affidavit accompanying the requisition charged no crime under the laws of the demanding state, see Barriere v. State, 142 Ala. 72, 39 South. 55; Ex parte Slauson, 73 Fed. 666.

In Hyatt v. New York, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657, it is said: Upon the executive of the state in which the accused is found rests the responsibility of determining whether he is a fugitive from the demanding state. He does not fail in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him by competent proof that the accused is in fact a fugitive from the justice of the demanding state; and in People v. Brady, 56 N. Y. 182, that the courts have jurisdiction to interfere by *habeas corpus*, and to examine the grounds upon which an executive warrant for the apprehension of an alleged fugitive from justice from another state is issued, and in case the papers are defective and insufficient, to discharge the prisoner.

It must appear to the governor of the asylum state, before he can lawfully comply with it: First, that the person demanded is substantially charged with a crime against the laws of the demanding state, by an indictment or an affidavit certified as authentic by the governor of the demanding state; and, second, that the person demanded is a fugitive from the justice of the demanding state; Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544. The first of these prerequisites is a question of law and is always open on the face of the papers to judicial inquiry under an application for a discharge under a writ of *habeas corpus*. The second is a question of fact, which the governor of the asylum state must decide. How far his decision may be reviewed judicially by *habeas corpus*, or whether it is not conclusive, are said to be questions not settled by harmonious judicial decisions, nor by any authoritative judgment by the Supreme Court; Appleyard v. Massachusetts, 203 U. S. 222, 27 Sup. Ct. 122, 51 L. Ed 161; but it is conceded that the determination of the fact by the executive of the state in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal, until the presumption in its favor is overthrown; In re Reggel, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250; Appleyard v. Massachusetts, 203 U. S. 222, 27 Sup. Ct. 122, 51 L. Ed. 161.

The motives which prompt the governor to issue his warrant are held not proper subjects of judicial inquiry; In re Moyer, 12 Idaho 250, 85 Pac. 897, 12 L. R. A. (N. S.) 227, 118 Am. St. Rep. 214; Com. v. Superintendent of Philadelphia County Prison, 220 Pa. 401, 69 Atl. 916, 21 L. R. A. (N. S.) 939. Jurisdiction to take the action complained of is the test; *id.* The governor need not demand independent proof, apart from the requisition papers, that accused was a fugitive from justice; Pettibone v. Nichols, 203 U. S. 192, 27 Sup. Ct. 111, 51 L. Ed. 148. When the person for whom a requisition is made is in prison in the asylum state under conviction of crime, the governor cannot deliver him up; Opinion of Justices, 201 Mass. 609, 89 N. E. 174, 24 L. R. A. (N. S.) 799, and note.

An indictment is not a prerequisite to extradition; Pierce v. Creecy, 210 U. S. 387, 28 Sup. Ct. 714, 52 L. Ed. 1113. Extradition is a mere proceeding in securing arrest and attention; a complaint before a committing magistrate is a charge of crime; In re Strauss, 197 U. S. 324, 25 Sup. Ct. 535, 49 L. Ed. 774.

The indictment, in order to constitute a sufficient charge of crime to warrant interstate rendition, need show no more than that the accused was substantially charged with crime; Pierce v. Creecy, 210 U. S. 387, 28 Sup. Ct. 714, 52 L. Ed. 1113. If more were required, it would impose upon courts at the trial under writs of *habeas corpus* the duty of a critical examination of the laws of the states with whose jurisprudence and criminal procedure they can have but a general acquaintance.

If the accusation is by affidavit, it should be sufficiently full and explicit to justify arrest and commitment for hearing; Ex parte Smith, 3 McLean 121, Fed. Cas. No. 12,968; In re Heyward, 1 Sandf. (N. Y.) 701; In re

Fetter, 23 N. J. L. 311, 57 Am. Dec. 382; State v. Patterson, 116 Mo. 505, 22 S. W. 696; In re Hooper, 52 Wis. 699, 58 N. W. 741. The demand must be made by the governor of the state; Com. v. Hall, 9 Gray (Mass.) 262, 69 Am. Dec. 285.

The accused must have fled from the state in which the crime was committed; and of this the executive authority of the state upon which the demand is made should be reasonably satisfied. This is sometimes done by affidavit. The governor upon whom the demand is made acts judicially, so far as to see whether the case is a proper one; In re Greenough, 31 Vt. 279; but he cannot look behind the indictment in which the crime is charged; In re Voorhees, 32 N. J. L. 145; Taylor v. Taintor, 16 Wall. (U. S.) 366, 21 L. Ed. 287. The duty to surrender the fugitive is obligatory; Kentucky v. Dennison, 24 How. (U. S.) 103, 16 L. Ed. 717; Taylor v. Taintor, 16 Wall. (U. S.) 370, 21 L. Ed. 287. But in the case of a conflict of jurisdiction between the two states the surrender may be postponed; Taylor v. Taintor, 16 Wall. (U. S.) 366, 21 L. Ed. 287; In re Briscoe, 51 How. Pr. (N. Y.) 422; Com. v. Wright, 158 Mass. 149, 33 N. E. 82, 19 L. R. A. 206, 35 Am. St. Rep. 475.

It is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found or for the purpose of escaping a prosecution anticipated or begun; Ex parte Brown, 28 Fed. 653; but simply that having committed a crime within a state, when he is sought to be subjected to its criminal process, he has left its jurisdiction and is found within another state; In re Reggal, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250; Renaud v. Abbott, 116 U. S. 287, 6 Sup. Ct. 1194, 29 L. Ed. 629; Streep v. U. S., 160 U. S. 128, 16 Sup. Ct. 244, 40 L. Ed. 365; Moyer v. Nichols, 203 U. S. 221, 27 Sup. Ct. 121, 51 L. Ed. 160; Ex parte Brown, 28 Fed. 653; In re Cook, 49 Fed. 833; In re White, 55 Fed. 54, 5 C. C. A. 29; In re Bloch, 87 Fed. 981; Kingsbury's Case, 106 Mass. 223. Whether the motive for leaving was to escape prosecution or not, his return to answer the charges against him is equally within the spirit and purpose of the statute; and the simple fact that he was not within the state to answer its criminal process, when required, renders him a fugitive from justice, regardless of his purpose in leaving; State v. Richter, 37 Minn. 436, 35 N. W. 9. That the accused did not believe he had committed any crime against the demanding state will not prevent his being a fugitive from justice; Appleyard v. Massachusetts, 203 U. S. 222, 27 Sup. Ct. 122, 51 L. Ed. 161, 7 Ann. Cas. 1073; or that he commits a crime within a state and then simply returns to his own home in another state; Ex parte Swearingen, 13 S. C. 74; In re Mohr, 73 Ala. 503, 49 Am. Rep. 63. He is held not to be a fugitive from justice if he has never been in the demanding state, but is alleged to have obtained money by false pretences through the mails; State of Tennessee v. Jackson, 36 Fed. 258, 1 L. R. A. 370. In In re Robinson, 29 Neb. 135, 45 N. W. 267, 8 L. R. A. 398, 26 Am. St. Rep. 378, the court ordered the discharge of a prisoner because he had been forcibly brought into the state without requisition papers; and to the same effect, State v. Simmons, 39 Kan. 262, 18 Pac. 177. Crimes which are not actually, but only constructively, committed within the demanding state do not fall within the class of cases embraced by the constitution or acts of congress. Not that the jurisdiction to try the crime is lacking, but that no one can in any sense be alleged to have fled from a state in which he has never been corporally present since the commission of the crime; In re Mohr, 73 Ala. 503, 49 Am. Rep. 63; In re Reggel, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250; State v. Hall, 115 N. C. 811, 20 S. E. 729, 28 L. R. A. 289, 44 Am. St. Rep. 501, where the constructive presence of a murderer in the state, where the victim was struck by a bullet fired across the state boundary, was held not sufficient to make him a fugitive from that state when found in the state from which the shot was fired.

In criminal cases, a forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such offence, and presents no valid objection to his trial in such court; Ker v. Illinois, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421; Ex parte Scott, 9 Barn. & C. 446; State v. Smith, 1 Bail. (S. C.) 283, 19 Am. Dec. 679; Dows' Case, 18 Pa. 37. Although it has been frequently held that if a defendant *in a civil case* be brought within the presence of the court by a trick or a device, the service will be set aside, and he will be discharged from custody; Wells v. Gurney, 8 Barn. & C. 769; Metcalf v. Clark, 41 Barb. (N. Y.) 45. The law will not permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest; In re Johnson, 167 U. S. 120, 17 Sup. Ct. 735, 42 L. Ed. 103.

As between the states, fugitives from justice have no right of asylum, in the international sense; and a fugitive who has been returned by interstate rendition may be tried for other offences than that for which his return was demanded, without violating any rights secured by the constitution or laws of the United States; Mahon v. Justice, 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. Ed. 283; Lascelles v. Georgia, 148 U. S. 537, 13 Sup. Ct. 687, 37 L. Ed. 549, affirming *id.*, 90 Ga. 347, 16 S. E. 945,

35 Am. St. Rep. 216; State v. Glover, 112 N. C. 896, 17 S. E. 525; People v. Cross, 135 N. Y. 536, 32 N. E. 246, 31 Am. St. Rep. 850; Com. v. Wright, 158 Mass. 149, 33 N. E. 82, 19 L. R. A. 200, 35 Am. St. Rep. 475; State v. Patterson, 116 Mo. 505, 22 S. W. 696; Waterman v. State, 116 Ind. 51, 18 N. E. 63; State v. Kealy, 89 Ia. 94, 56 N. W. 283; Carr v. State, 104 Ala. 4, 16 South. 150; State v. Stewart, 60 Wis. 587, 19 N. W. 429, 50 Am. St. Rep. 388; Ham v. State, 4 Tex. App. 645; Williams v. Weber, 1 Colo. App. 191, 28 Pac. 21; In re Brophy, 2 Ohio N. P. 230; Harland v. Territory, 3 Wash. Ty. 131, 13 Pac. 453; *contra*, In re Baruch, 41 Fed. 472; In re Fitton, 45 Fed. 471; State v. Hall, 40 Kan. 338, 19 Pac. 918, 10 Am. St. Rep. 200; State v. Meade, 56 Kan. 690, 44 Pac. 619; In re Cannon, 47 Mich. 481, 11 N. W. 280. In some states the courts have overruled former decisions, bringing themselves in accord with the United States supreme court; Petry v. Leidigh, 47 Neb. 126, 66 N. W. 308; see In re Robinson, 29 Neb. 135, 45 N. W. 267, 8 L. R. A. 398, 26 Am. St. Rep. 378; In re Brophy, 2 Ohio N. P. 230; Ex parte McKnight, 3 Ohio N. P. 255; *id.*, 48 Ohio St. 588, 28 N. E. 1034, 14 L. R. A. 128. See 12 Harv. L. Rev. 532.

Habeas corpus will not lie to release from custody one who has been forcibly abducted from another state and brought to trial into the jurisdiction of a tribunal having jurisdiction of the offence charged; Ex parte Davis, 51 Tex. Cr. R. 608, 103 S. W. 891, 12 L. R. A. (N. S) 225, 14 Ann. Cas. 522; and to the same effect Ker v. Illinois, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421, where the prisoner was kidnapped in Peru, without any pretence of authority under the treaty or from the United States, and brought to Illinois; his trial in the state courts was held not to involve a violation of the due process clause of the constitution, nor of the treaty with Peru. The principle upon which the judgment rested was that when a criminal is brought into, or is in fact within, the custody of the state, charged with a crime against its laws, the state may, so far as the constitution and laws of the United States are concerned, proceed against him for the crime, and need not inquire as to the particular methods employed to bring him into the state. In meeting the contention that the accused, by virtue of the treaty with Peru, acquired by his residence a right of asylum, it was said: "There is no language in this treaty, or in any other treaty made by this country on the subject of extradition of which we are aware, which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled." The right of a government voluntarily to give an asylum is different from the right to demand security in such asylum. The treaty, so far as it regulates the right of asylum at all, is intended to limit this right in one who is proved to be a criminal fleeing from justice, so that on proper demand and proceedings had therein the government of the country of the asylum shall deliver him up to the country where the crime was committed. To this extent, and to this alone, the treaty does regulate or impose a restriction upon the right of the government of the country of the asylum to protect the criminal from removal therefrom. In Mahon v. Justice, 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. Ed. 283, the governor of Kentucky made a requisition upon the governor of West Virginia for one charged with the crime of murder in Kentucky, alleged to have fled from its jurisdiction and taken refuge in West Virginia. While the two governors were in correspondence on the subject, a body of armed men without warrant or other legal process, arrested the accused in West Virginia and delivered him to the jailor of Pike county, Kentucky, in the courts of which he stood indicted for murder. Thereupon the governor of West Virginia, on behalf of that state, applied to the district court of the United States for the Kentucky district for a writ of *habeas corpus* and his return to the jurisdiction of West Virginia. The supreme court held that no mode is provided by which a person unlawfully abducted from one state to another can be restored to the state from which he was taken, if held upon any process of law for offences against the state to which he has been carried. The decision was by a divided court, but its authority is said to be none the less controlling; Moyer v. Nichols, 203 U. S. 221, 27 Sup. Ct. 121, 51 L. Ed. 160; affirming In re Moyer, 12 Idaho 250, 85 Pac. 897, 12 L. R. A. (N. S.) 227, 118 Am. St. Rep 214. In Cook v. Hart, 146 U. S. 183, 13 Sup. Ct. 40, 36 L. Ed. 934, it was said that the cases of Ker v. Illinois, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421, and Mahon v. Justice, 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. Ed. 283, established two propositions: 1. That that court will not interfere to relieve persons who have been arrested and taken by violence from one state to another, where they are held under process legally issued from the courts of the latter state. 2. That the question of the applicability of this doctrine to a particular case is as much the province of the state courts as a question of common law, or of the law of nations, as it is of the courts of the United States. If a forcible abduction from another state and conveyance within the jurisdiction of the court holding him is no objection to his detention and trial for the offence charged, no more is the objection allowed if the abduction has been accomplished under the forms of law. The act complained of does not relate to the restraint from which the petitioner seeks to be relieved, but to the means by which he was brought

within the jurisdiction of the court under whose process he is held; Pettibone v. Nichols, 203 U. S. 192, 27 Sup. Ct. 111, 51 L. Ed. 148, where conspiracy was charged against the governors of the states of Idaho and Colorado and other officers to secure the presence of Pettibone in the former state. It was held that the fundamental question was whether a United States circuit court, when asked upon *habeas corpus* to discharge a person held in actual custody by a state for trial in one of its courts, under an indictment charging a crime against its laws, can properly take into account the methods whereby the state obtained such custody, and that that question had been determined in the negative in Ker v. Illinois, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421, and Mahon v. Justice, 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. Ed. 283, supra.

See 15 L. R. A. 177 n.; 12 L. R. A. (N. S.) 225 n.

The constitutional provision for interstate rendition warrants a surrender after conviction; In re Hope, 7 N. Y. C. R. R. 406, 10 N. Y. Supp. 28; but after serving his sentence the convict cannot be surrendered under a requisition from another state until he has had reasonable time to return to the state from which he was extradited; *id.*

Extradition proceedings may be made the basis of a suit for malicious prosecution; Castro v. De Uriarte, 16 Fed. 93.

See FUGITIVE FROM JUSTICE.

EXTRA JUDICIUM. Extra-judicial; out of the proper cause. Judgments rendered or acts done by a court which has no jurisdiction of the subject, or where it has no jurisdiction, are said to be *extra-judicial.*

EXTRANEUS. In Old English Law. One foreign born; a foreigner. 7 Rep. 16.

In Roman Law. An heir not born in the family of the testator. Those of a foreign state. The same as *alienus.* Vicat, Voc. Jur.; Du Cange.

EXTRAORDINARY. Beyond or out of the common order or rule; not usual, regular, or of a customary kind; not ordinary; remarkable; uncommon; rare. Ten Eyck v Episcopal Church, 29 Abb. N. C. (N. Y.) 154, 20 N. Y. Supp. 157; The Titania, 19 Fed. 103.

EXTRATERRITORIALITY. A term formerly used to express the exemption from the obligation of the laws of a state granted to foreign diplomatic agents, war-ships, etc. Wheaton, § 224. It has now been generally replaced by the term "Exterritoriality" *(q. v.).* See also FOREIGN JUDGMENT; FOREIGN LAW; EQUITY. The term is used to indicate jurisdiction exercised by a nation in other countries, by treaty, as, by the United States in China or Egypt; or by its own ministers or consuls in foreign lands. Crime is said to be extraterritorial when committed in a country other than that of the forum in which the party is tried. See 2 Moore, Int. L. Dig.

EXTRAVAGANTES. In Canon Law. The name given to the constitutions of the popes posterior to the Clementines.

They are thus called, *quasi vagantes extra corpus juris,* to express that they were out of the canonical law, which at first contained only the decrees of Gratian: afterwards the Decretals of Gregory IX., the Sexte of Boniface VIII., the Clementines, and at last the Extravagantes, were added to it. There are the Extravagantes of John XXII., and the common Extravagantes. The first contain twenty epistles, decretals, or constitutions of that pope, divided under fifteen titles, without any subdivision into books. The others are epistles, decretals, or constitutions of the popes who occupied the holy see either before or after John XXII. They are divided into books, like the decretals.

EXTREMIS (Lat. in extremity). When a person is sick beyond the hope of recovery, and near death, he is said to be *in extremis.*

A will made in this condition, if made without undue influence, by a person of sound mind, is valid. As to the effect of declarations of persons *in extremis,* see DYING DECLARATIONS, DECLARATIONS.

EYE-WITNESS. One who saw the act or fact to which he testifies. When an eye-witness testifies, and is a man of intelligence and integrity, much reliance must be placed on his testimony.

EYOTT. A small island arising in a river Fleta, l. 3, c. 2, s. b; Bracton, l. 2, c. 2. See ISLAND.

EYRE. A journey; a court of itinerant justices. In old English law applied to the judges who traveled on circuit to hold courts in the different counties. See JUSTICES IN EYRE.

EYRER. To go about. See EYRE.

[END OF VOL. 1]